



European Added Value Assessment

Combatting violence against women

An assessment accompanying the
European Parliament's Legislative own-Initiative Report
(Rapporteur Antonia Parvanova, MEP)

European Added Value Assessment

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Combatting violence against women

AUTHOR

Monika Nogaj, European Added Value Unit, European Parliament

ABOUT THE EDITOR

This paper has been undertaken by the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament.

To contact the Unit, please e-mail eava-secretariat@europarl.europa.eu

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On 9 November 2012, the **Committee for Women's Rights and Gender Equality** (FEMM) requested a European Added Value Assessment (EAVA) to prepare the legislative initiative report of Ms Antonia Parvanova with recommendations to the Commission on combatting violence against women (2013/2004(INI)).

This paper has been drafted by the **European Added Value Unit** of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament.

This assessment draws on previous work and documents provided by the Library of the European Parliament and by Policy Department C for Citizens' Rights and Constitutional affairs. Additional expertise, commissioned specifically for the purpose of this Assessment, has been provided by:

- Myriam Benlolo-Carabot, Clémentine Bories, Stéphanie Hennette-Vauchez and Mathias Möschel, of the Université Paris Ouest Nanterre La Défense (REGINE research programme on Gender);
- Professor Sylvia Walby and Philippa Olive, Lancaster University.

Abstract

Violence against women is a complex, omnipresent problem in the EU, affecting, in one way or the other, around one fifth of the female population. It directly affects women victims and has a short and longer term impact on society as a whole, in terms of general well-being, health and safety, productivity and public expenditure. The economic cost of violence against women in the EU has been estimated at EU 228 billion annually.

Despite undeniable progress, the current legal EU framework for combatting violence against women presents important lacunae. Swift action at EU level is hence necessary to fill the gaps in the existing national, international and EU legislation, to ensure better protection for women, enhance legal certainty and coherence of EU action.

Complementing the current framework requires a global approach, including the adoption of a legal act with measures to promote and support Member States' action in the field of prevention.

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by Myriam Benlolo-Carabot, Clémentine Bories, Stéphanie Hennette-Vauchez and Mathias Möschel, REGINE research programme on Gender (Université Paris Ouest Nanterre La Défense)

- II - **Economic aspects and legal perspectives for actions at EU level**
by Professor Sylvia Walby and Philippa Olive (Lancaster University)

Executive summary

The EU is a champion of human rights, and is therefore duty-bound to fight violence against women both as an expression of (gender-based) discrimination and as one of the most pervasive violations of human rights within its territory. Around one fifth to one quarter of women in Europe have experienced acts of physical violence at least once during their adult lives and over one tenth have suffered sexual violence involving the use of force.

Over and above the adverse and onerous consequences for female victims, violence against women brings with it significant costs for communities, societies and nations, affecting public well-being, health and safety, productivity, law enforcement and public budgets.

It is estimated that the annual cost to the EU-28 of gender-based violence against women amounted to **EUR 228 billion in 2011**, or **1.8% of EU GDP**, of which EUR 45 billion a year in costs to public and state services and EUR 24 billion in terms of lost economic output, or **0.5% of EU GDP**. The remaining **EUR 159 billion** represent the value the public places on avoiding pain and suffering.

Although this problem, and the urgent need to address it, has been acknowledged, the current EU framework for fighting violence against women presents important shortcomings at different levels: national legislations of the 28 EU Member States offer unequal protection of women against all forms of violence; several international and regional instruments on combatting violence against women have been adopted but lack effectiveness in national legal orders; and despite undeniable progress, the measures adopted at EU level present important lacunae, notably in terms of prevention.

Complementing the current framework on violence against women would provide better and more uniform protection to women, and ensure legal certainty throughout the EU. As such, it would contribute to the deepening of the Area of Freedom, Security and Justice. It would also enhance the coherence of EU action. It would represent a significant step in the on-going process of transforming the EU into a genuine community based on shared values and respect of human rights. It would also contribute to eliminating the considerable financial burden that affects women and puts an economic burden on Member State economies.

A holistic approach on combatting violence against women is needed to complement and include current instruments. An analysis of regulatory options reveals that improving the existing EU legal framework is challenging but feasible. It could encompass a combination of legislative and non-legislative measures, including:

- the adoption of a legal act supporting the action of Member States in the field of prevention of violence;
- the establishment of a coherent system for collecting statistics on gender-based violence in Member States;
- the activation by the EU Council of the *passerelle clause*, by adopting a unanimous decision to include gender based violence as an area of crime listed under Article 83(1) TFEU;
- the launching of the procedure for the accession of the EU to the Istanbul Convention
- the adoption of an EU-wide Strategy and Action Plan to combat violence against women.

1. Violence against women: a persistent and burning problem in the EU

Violence against women is an omnipresent scourge. It is not only a serious violation of human rights and a form of gender-based discrimination but is also the main structural expression of inequality between women and men. At the same time it is the root cause of gender inequality, as it is an obstacle to women's full participation in economic, social, political and cultural life.

Box 1 - Definitions

Gender based-violence: Violence that is directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately. It may result in physical, sexual, emotional or psychological harm, or economic loss, to the victim. Gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking in human beings, slavery, and different forms of harmful practices, such as forced marriages, female genital mutilation and so-called 'honour crimes'.

Source: Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime

Gender-based violence against women is violence that is directed against a woman because she is a woman or that affects women disproportionately, and includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty'.

Domestic violence: 'all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim'.

Source: Convention on preventing and combatting violence against women and domestic violence, Council of Europe, 2011.

Cutting across socio-economic, educational, cultural and religious differences, violence against women takes many different forms - including physical and sexual violence, psychological violence, harassment, female genital mutilation (FGM), forced marriages - even at childhood age, forced abortion and sterilisation, honour crimes, etc. At the individual level, it leads often to a troubling number of fatalities. Women, who are subject of violence, face long term severe psychological and physical traumas.

Violence against women has also a short and longer term impact on society as a whole. Besides the significant economic burden it imposes in the form of healthcare costs, policing and legal costs, lost productivity and wages, violence against women has serious repercussions on future generations. Apart from the pain and suffering it causes for the children who witness it, it also perpetuates the cycle of violence: a child's exposure to the father abusing the mother is the strongest risk factor in transmitting violent behaviour from one generation to the next. The persistence of male violence against women in our societies puts into question our vision of human security and peace: are we really living in peace when half of the population is experiencing or might experience some form of male violence just because they are female?

It is increasingly recognised that violence against women is a widespread as well as an underestimated phenomenon in the European Union. While the current lack of comparable data on different types of violence against women makes it difficult to ascertain the real extent of the problem - partly due to the lack of common legal definitions at European level, partly because many acts of violence against women are simply not reported - the available estimates are alarming. Around 20 to 25 per cent of women in Europe have experienced acts of physical violence at least once during their adult lives and over 10 per cent have suffered sexual violence involving the use of force. As many as 45 per cent of women have endured some form of violence¹; 12 to 15 per cent of women in Europe are victims of domestic violence and seven women die every day in the European Union from it².

There is now sufficient evidence that the economic crisis literally hits women hardest: it aggravates the unequal power relations between men and women and leads to an increase of harassment, domestic violence, trafficking in women and a rise in prostitution³. Moreover, the recession seriously undermines social policies in many Member States resulting in shelters for women victims of violence being shut down, prevention projects being discontinued and national equality budgets being slashed⁴.

¹ Council of Europe Convention on preventing and combating violence against women and domestic violence

² Figures for 2006. See: *Estimated mortality related to domestic violence in Europe, summary of scientific report*, Psytel, June 2010, p. 5. The scientific report and summary are available at: <http://www.psytel.eu/en/>.

³ European Parliament resolution of 12 March 2013 on the *Impact of the economic crisis on gender equality and women's rights*, P7_TA-PROV(2013)0073

⁴ Opinion of the European Economic and Social Committee on *Eradicating domestic violence against women*, 18 September 2012, SOC/465

In recent years, the issue of violence against women has gained increased attention among citizens and politicians. According to a recent Eurobarometer survey⁵, violence against women is cited as the second most important issue (after the gender pay gap) for candidates in the next European elections in 2014 to tackle.

The European Union has repeatedly expressed “its political will to treat the subject of women’s rights as a priority and to take long-term action in that field”⁶. Various EU documents - such as the European Commission's Stockholm Programme, the Women's Charter, the Strategy for equality between women and men, as well as a number of Council Conclusions - recognise gender-based violence as a priority issue in order to achieve genuine gender equality and strengthen the EU's commitment to put in place a comprehensive and effective policy framework to combat it more effectively.

However, despite the recognition of the pertinence of the matter and the numerous calls of the European Parliament on the need for urgent action, the current EU framework for fighting violence against women leaves much to be desired.

Most recently, in the frame of the legislative initiative report with recommendations to the Commission on Combating violence against women (rapporteur Antonyia Parvanova), the European Parliament reiterates its call on the Commission to submit a proposal for a legislative act establishing measures to promote and support action of Member States in the field of prevention of violence against women.

This European Added Value Assessment provides arguments in favour of this approach.

⁵ European Parliament Eurobarometer Flash survey (EB flash 371) on *Women and gender Inequalities in the context of the Crisis*, 26 February 2013

⁶ See e.g.: *EU Guidelines on violence against women and girls and combating all forms of discrimination against them*, General Affairs Council of 8 December 2008.

2. Added Value of action at EU level- remedying the legal gaps

The EU has achieved a high level of awareness of the scale and seriousness of violence against women within its territory, the severe socio-economic consequences and has recognised this issue as a priority.

The challenge therefore is not to establish the need for action, but rather the way the problem should be tackled and how extensive and comprehensive the EU's contribution should be.

Unequal protection at national level

Depending on the specific national history, the power relations between men and women, the role of religion in the public sphere, the structure of the legal system, and the role of women's movements, Member States have adopted different approaches to the problem of violence against women. There are mainly three broad ways Member states have attempted to regulate this predicament ranging from a unitary and comprehensive approach, through piecemeal legislation with some recognition of the gender dimension of violence against women to absent or gender-blind provisions.

Box 2 - Ways of regulating violence against women at national level

Unitary, comprehensive and gender-specific regulation of violence against women

Spain's 2004 Act on Violence Against Women⁷ best corresponds to such a definition with the introduction of broad protection and preventive measures that encompass education and awareness-raising in schools, media and hospitals as well as the creation of specialised courts and specialised public prosecutors that will deal with such legislation.

Piecemeal legislation with the explicit recognition of the gender dimension of violence

This model concerns the majority of EU Member States. For example, Germany introduced a statute protecting women against domestic violence in 2001⁸, followed by legislation protecting against stalking in 2006⁹. Sexual harassment was introduced in the same year but through a different enactment on equal treatment¹⁰ thanks to

⁷ Ley Orgánica 1/2004 de Medidas de Protección Integral contra la Violencia de Género, 28 December 2004.

⁸ Gesetz zum zivilrechtlichen Schutz vor Gewalttaten und Nachstellungen, 11 December 2001 (BGBl. I, p. 3513).

⁹ Gesetz zur Strafbarkeit beharrlicher Nachstellungen vom 30. November 2006, introducing a new Article 238 into the existing Criminal Code.

¹⁰ Allgemeines Gleichbehandlungsgesetz (AGG), 14 August 2006 (BGBl. I, p. 1897).

which Germany adapted its national legislation to various European non-discrimination directives. One can observe a similar trend in Italy. In 1996 sexual violence was re-characterised as 'crime against the person' instead of as 'crime against morality'. This theoretical shift permitted the introduction of successive enactments, in particular statutes protecting women against domestic violence and stalking¹¹.

Absence of specific legislation on gender violence, gender-blind provisions

Examples of this model include the Netherlands where domestic violence is protected 'only' by the general provisions of criminal law (such as rape, sexual assault, abuse, manslaughter or murder), or the UK, where the Protection from Harassment Act 1997 or the Domestic Violence, Crime and Victims Act of 2004 do not specifically envisage women as victims, even though they were initiated by victims of stalkers.

As a consequence, the outcome and level of protection of the female population against all forms of violence differ widely from one EU Member State to the other.

Box 3 - Concrete examples of differing levels of protection against violence against women

Domestic violence

Today a woman who becomes a victim of domestic violence in Spain can count on a whole system that has been specifically sensitised to the issue of violence against women: hospitals where she might have needed to get treatment and the police personnel which may have been called in are all alerted and educated to the specific issues of domestic violence. If the facts of a case give rise to a lawsuit, a special jurisdiction (*juzgados de violencia contra la mujer*) with broad civil and criminal powers and a special prosecutor (*fiscal contra la violencia sobre la mujer*) will intervene. If the same domestic violence had happened in the Netherlands, it would be punished by regular criminal law provisions and principles (causing bodily harm, abuse, manslaughter...) and referred in ordinary courts. Hence, the specific aspects of violence against women risk getting lost and, in case the wife and the husband are legally separated, prosecution is only possible following a complaint by the victim.

Stalking

In Italy the statutory penalty for stalking (*atti persecutori*) ranges from 6 months to 4 years of imprisonment¹². In Austria the penalty for stalking (*beharrliche Verfolgung*) is imprisonment of up to one year¹³ whereas in the UK the maximum imprisonment is 6 months and/or a fine not exceeding 5000£¹⁴. Comparability of penalties given in concrete cases is extremely difficult given that the interplay of other factors such as mitigating or aggravating circumstances, repeat offences and/or concurring crimes or

¹¹ Decreto legge 23 febbraio 2009, n. 11, introducing a new Article 612 *bis* into the existing Criminal Code.

¹² Article 612 *bis* Codice penale.

¹³ § 107a Strafgesetzbuch.

¹⁴ Protection from Harassment Act 1997.

misdemeanours sensibly change the picture. For example, in Italy, sentences below two years imprisonment benefit from automatic parole if the judge believes that the convicted will not commit other crimes.

A comprehensive unified approach including *inter alia* prevention, gender-specific formulation of the laws fighting crimes or misdemeanours, dedicated institutions and procedural adaptations is arguably the most effective model in terms of protecting women from violence. Violence against women needs to be seen through a single lens not only in order to obtain enhanced protection for its victims but also to achieve harmonisation and legal certainty. A legislative instrument would bring about minimum standard characteristics of such a unitary model, without necessarily demanding harmonisation of national legislation in criminal matters.

The international framework- lack of effectiveness in national legal orders

The added value of an EU instrument on violence against women has also to be assessed with respect to other instruments that have been adopted at international (United Nations) and regional (Council of Europe) level.

There is an extensive body of instruments at international level which deal with issues related to violence against women and which EU Member States have signed up to.

Box 4 - International instruments on violence against women

At the UN level, instruments such as the UN Convention for the Elimination of Discrimination against Women (CEDAW), the Rome Statute of the International Criminal Court, and practice in international legal tribunals (International Criminal Tribunals for former Yugoslavia and Rwanda and the Special Court for Sierra Leone) have recognised different forms of violence against women as a specific humanitarian and human rights violation. The instruments of the Council of Europe, relevant to violence against women, include the European Convention of Human Rights, the rulings of the European Court of Human Rights that interpret the Convention, the Convention on Action Against Trafficking in Human Beings (which deals with one specific, sectorial aspect of violence against women) and the 2011 Istanbul Convention on preventing and combatting violence against women and domestic violence.

While most of these instruments represent partial approaches to establishing a prohibition of violence against women, the Istanbul Convention represents the first attempt to regulate and combat the phenomenon of violence against women in the broadest possible way and from an all-encompassing perspective. This

constitutes important progress, recognised as such by the EU as a whole and underlined by the European Parliament, which has called on EU Member States to ratify the Convention¹⁵. To date, the Convention has not come into force as only six States, including Portugal and Italy, the only EU Member States, have ratified it. However, even when all Member States become parties to this Treaty, an EU instrument would remain necessary. Such an instrument would become the regulatory addition that would complement and reinforce the existing international conventions (in particular the Istanbul Convention) and national laws.

Indeed, instruments at the international level present a number of weaknesses, in terms of impact on national legal orders, compared to binding EU legislation. First and foremost, those instruments do not have direct effect as EU laws do, nor do they propose the same type of measures. Thus, in cases of violation or non-implementation of an EU directive there would be, under certain circumstances, access to the Court of Justice of the EU through the preliminary reference procedure¹⁶. This is clearly not the case for international conventions. For example, the UN Convention for the Elimination of Discrimination against Women (CEDAW) and the Istanbul Convention monitoring mechanisms result in state reports on violence against women, which lack means of implementation. When an individual recourse against States which have a record of violence against women are referred to the European Court of Human Rights or (under certain circumstances) to the CEDAW Optional Protocol, those instruments' judgments often lack legal enforceability. Therefore in most instances their judgements are more of a persuasive character than judgments by the CJEU which are immediately enforceable. The jurisprudence of these international instruments shows that judges often tend to deny direct effect to provisions of international human rights conventions, which is not normally the case when applying the EU law. Even EU directives (alongside EU regulations) constrain national judicial authorities as a minimum judicial enforcement must be guaranteed.

Secondly and closely related to the above point, the monitoring procedures of international instruments are not at all the same as the EU ones. Usually, international human rights treaties dealing with issues related to violence against women only contain state reporting obligations. For instance, the Istanbul

¹⁵ See for instance EP plenary debate of 8 October 2013 on the Convention on preventing and combating violence against women (Istanbul convention).

¹⁶ ECJ/CJEU case-law on violence against women is rare (see CJEU, 15 September 2011, *Magatte Gueye and Valentin Salmerón Sánchez*, C-483/09 and 1/10), but it should grow in the next years, given that recent directives which have not been implemented yet at the national level deal with certain aspects of violence against women (see *infra*, Part II.B.2).

Convention establishes a reporting mechanism to a Committee of experts who can order or perform country visits. However, no individual recourse is envisaged. And even where such individual recourse is envisaged, as is the case under the ECHR, the judgements usually consist of financial compensation only but are powerless when it comes to obliging states to change their existing legislations.

Adopting a binding EU instrument on violence against women would thus be a powerful way to implement the EU's international commitments, and in particular the Istanbul Convention. Indeed, there are major lingering gaps between the latter's provisions and legal actions that are planned within the EU (both at EU-level and Member States-level). Among the many steps the signatories to the Convention need to take for compliance with the Convention, an important one is to actually change domestic laws so that they include specific criminal offences for all forms of violence against women (stalking, psychological violence, sexual violence, forced marriage, etc). Given its nature and impact, a binding EU instrument would therefore be a perfect regulatory addition to complement existing international conventions and their shortcomings and to enforce them in the EU.

Box 5 - The role of an EU legislative act in compensating for the shortcomings of international Conventions

French law was modified as a result of the requirements of the Council of Europe Convention on Action against Trafficking in Human beings, the European Court of Human Rights' decisions finding that France had violated certain provisions of the European Convention on Human Rights, and the need to comply with and to transpose EU Directive 2011/36 on preventing and combatting trafficking in human beings and protecting its victims. In its function of monitoring the Council of Europe Convention, the Group of experts on action against trafficking in human beings (GRETA) expressed concern, and formulated recommendations. However, it could not compel French authorities to adopt a new definition of trafficking. Interestingly enough, it asked to be informed of the new definition French authorities would be likely to adopt in order to transpose Directive 2011/36 into national law. The implementation of a hard-law EU instrument, subject to Court of Justice of the European Union scrutiny, combined with French international obligations, proved to be efficient incentives to improve French legislative framework.

Hence, because of the impact it generally has in national legal frameworks, an EU legal instrument on violence against women would have considerable added value by complementing the existing international instruments, addressing their shortcomings and thus considerably enhancing the effectiveness of women's protection against violence.

EU law: a fragmented and often non-binding approach

The EU has adopted in the last few years a number of important measures to combat and eradicate violence against women. Besides a string of non-binding communications, strategies, guidelines and important programmes (Daphne) - which have positioned gender-based violence as one of the priorities for EU action but which do not create new rights for women that are enforceable before European and national tribunals-, the EU has taken a number of initiatives by dealing with violence against women through decisions and directives.

These binding EU law instruments lack however certain characteristics to be fully effective in the combat against violence against women. First of all, the EU law remains fragmented and fails to tackle the issue of violence against women in a global and coherent manner, both in terms of the forms of violence addressed and the types of remedies provided.

Harassment and sexual harassment have been addressed in the context of equal treatment directives, such as the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, Directive 2002/73/EC and Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. This last Directive defines harassment and sexual harassment as discrimination on the grounds of sex¹⁷ and stipulates that harassment should be prohibited not only in the workplace, but also in access to employment, vocational training and training. It also acknowledges the importance of preventive actions in order to tackle the sources of sexual harassment. The same approach was adopted in Council Directive 2004/113/EC of 13 December 2004, implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

The so-called "victims' package" was adopted in order to implement a comprehensive set of measures on victim's rights. The Directive on the European protection order¹⁸ establishes rules allowing a judicial authority in a Member State, in which a protection measure has been adopted so as to protect a person against a criminal act by another person which may endanger his life or physical, psychological or sexual integrity, to issue a European protection order enabling the authority in another Member State to continue the protection of the person in the territory of that other Member State. The directive marks a significant step for the deepening of an Area of Freedom, Security and Justice. However, it is based on the principle of mutual recognition of judgments and does not interfere at all

¹⁷ Article 2, (2), a, of the Directive 2006/54.

¹⁸ Directive 2011/99/EU of 13 December 2011, OJ L 338, 21 December 2011, p. 2.

with the definition of the crimes which are prosecuted or punished in national laws. It does not deal with the prevention of violence either.

The Directive establishing minimum standards on the rights, support and protection of victims of crime¹⁹ takes a more ambitious approach. It strengthens the rights of victims, especially information rights and access to victim support. These provisions could be very important for women, as this directive encourages Member States to pay particular attention to the specific needs of victims: in addition to general support services, Member States shall take measures to establish specialist support services that are free of charge and confidential "for victims with specific needs, such as victims of sexual violence, victims of gender-based violence and victims of violence in close relationships". These provisions could fill an important gap in current EU and national legislation: indeed, specialised services are insufficient and unequally distributed in and among the Member States. According to a report of the European Institute for Gender Equality (EIGE), only 12 out of the 27 EU Member States have developed state-funded specialised services for women victims of violence. Provisions across the EU vary significantly.

Despite being tailored for victims with special needs, this instrument does not adopt a general approach on gender-based violence. It deals with the *protection* of victims, not with the prevention of violence or prosecution of crime and does not set out core elements of definitions of violence against women. Once recognised as a "victim" a woman would be entitled to a uniform treatment in procedural proceedings throughout the EU. However, as the definitions of violence against women and the sanctions vary considerably from one Member State to the other, this gives rise to potential inequalities of treatment: if the violence a woman suffers is not prosecuted in her State (i.e. stalking is still not punishable in many EU legal systems, she may then not be recognised as "a victim" and would not be able to invoke the Directives.

Secondly, the existing instruments often fail to specifically address the issue through a gender-based approach. The Directive on preventing and combatting trafficking in human beings and protecting its victims, replacing the Council Framework Decision 2002/629/JHA²⁰ is a case in point. The ambit and the scope of the Directive are particularly wide compared to the previous Council Framework Decision. The Directive "adopts an integrated, holistic, and human rights approach to the fight against trafficking in human beings"²¹. In particular,

¹⁹ Directive 2012/29/EU of 25 October 2012, OJ L 315, 14 November 2012, p. 57.

²⁰ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011, OJ L 101, 15 April 2011, p. 1.

²¹ Recital (7) of the Directive, OJ, p. 2.

it “recognizes the gender-specific phenomenon of trafficking and that women and men are often trafficked for different purposes”. For this reason, “assistance and support measures should also be gender-specific where appropriate”²². It sets ambitious objectives, such as more rigorous prevention, prosecution and protection of victims’ rights, which seem to fully take into account gender-based violence. Pursuant to Article 1, the Directive establishes “minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking of human beings. It also introduces common provisions, taking into account the gender perspective, to strengthen the prevention of this crime and the protection of the victims thereof”.

However, in spite of these general assertions, the detailed provisions of the Directive fail to ensure gender-specific protection for women. When the Directive mentions certain human rights it seeks to ensure and respect, it mentions neither gender equality and non-discrimination, nor the rights of women, while (rightly) insisting on the rights of the child. Moreover, the Directive does not take into account the specific case of gender-based violence in the prevention and victims’ protection measures it aims to implement. Article 11, dealing with assistance and support for victims of trafficking in human beings, provides that “Member States shall attend to victims with special needs when those needs derive, in particular, from whether they are pregnant, their health, a disability, a mental or psychological disorder they have, or a serious form of psychological, physical or sexual violence they have suffered”²³. The Directive contains general provisions, support and protection measures for child victims of trafficking in human beings, but none for women.

Despite undeniable progress, the current EU framework for combatting violence against women presents important lacunae. Swift action at EU level is hence necessary to fill the gaps in the existing national, international and EU legislation.

²² Recital (3) of the Directive, *OJ*, p. 1.

²³ Article 11, (7), of the Directive.

3. Benefits from EU action on combatting violence against women

Protecting women from exposure to abuse, violence and harassment is not only a moral duty for the EU but also a decisive step towards a more equitable society. A radical improvement of the current state of play would bring undeniable ethical, social and economic benefits and enhance the EU's image as a champion of human rights in the world.

Enhancing legal certainty for women

A specific EU instrument on violence against women would present enormous added value in effectively completing the existing framework and offering improved, more effective and more complete legal protection to women.

It would allow listing all forms of harm to women that to this day remain essentially beyond the ambit of the EU's legal framework and thus affirm at EU level that violence against women is unacceptable. The existence of a legal category, corresponding to the prejudices a woman is confronted with is crucial for those women who want to take legal action to protect their rights.

Box 6 - Importance of recognising forms of violence against women as legal categories

The issue of marital rape is a classic example in the field of violence against women and illustrates the importance of the mere existence of legal categories that name forms of harm. Until well into the last decades of the 20th century, in many countries marital rape was not conceivable in the sense that it could not be articulated (formulated) in legal terms. Consequently, judges kept failing to offer any kind of protection to women who, because they were married, were thought to be ever-consenting to all forms of sexual intercourse with their husbands. A harm that has no name cannot be punished or sanctioned in any way.

A specific EU legal instrument aimed at combatting all forms of violence against women would thus give voice to the victims, ensure that they are no longer excluded from the consideration of the law, nor stuck in legal blind spots. It will provide all women with the tools for speaking up and acting upon their rights.

Deepening the area of Freedom, Security and Justice

As we have seen, the significant discrepancies between Member States' regimes constitute unequal and uneven protection for women at the European level since

violence against them is sanctioned and addressed in many different ways. This, as a consequence, impairs the construction of a European Area of Freedom, Security and Justice (AFSJ).

First, it limits the freedom of movement of women within the EU, because of the uncertainty that their dignity, physical, psychological and sexual integrity would be equally protected in other Member States. In this respect, an EU instrument on violence against women would favor free movement of women throughout the EU territory, because of the confidence that they will be treated according to minimum legal standards of protection and in a non-discriminatory manner wherever they are in the EU.

The fact that potentially 50 per cent of the EU's female population is exposed to some kind of violence while this is dealt with differently in the Member States fragments that European Area of Security and Justice. In Article 3 paragraph 2 TEU, the Lisbon Treaty provides that "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combatting of crime". Article 67 paragraph 4, TFEU also provides that "The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters".

Legal action at EU level on combatting violence against women would serve these core objectives, by deepening the link between prevention of violence, freedom of movement, and access to justice. Free movement of women could be enhanced throughout the territory of the EU, because of the confidence women would have that they will be treated according to minimum legal standards of protection and in a non-discriminatory manner wherever they are in the EU.

Such an initiative would also be consistent with central policy priorities expressed by EU institutions, such as in the Stockholm Programme. In that fundamental roadmap for EU tasks in the Area of Freedom, Security and Justice for the period 2010-2014, the European Council states that promoting citizenship and fundamental rights are the EU's main priorities. It admits that "vulnerable groups in particularly exposed situations, such as women who are the victims of violence or of genital mutilation or persons who are harmed in a Member State of which they are not nationals or residents, are in need of greater protection, including legal protection"²⁴.

²⁴ European Council, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, OJ C 115, 4 May 2010, p. 10.

Thus, legal action on combatting violence against women is a significant and coherent step for the EU in view of the deepening of the Area of Freedom, Security and Justice.

Enhancing the internal/external coherence of EU action

On the international scene the EU clearly acts as an advocate of women's rights, with a special focus on violence against women. Its behaviour in this field is part of the EU general policy towards the international protection of human rights and has given birth to a large spectrum of actions and affects its relationships with the all the countries around the world, regional groups and international organisations. Be it for political or legal purposes, as part of a preventive approach or with actually binding effect, the EU already defends women internationally against gender violence when perpetrated by and/or in third countries. This mainstream EU external action regarding violence against women plays out at different levels.

Firstly, reducing gender violence has become a priority of the EU's development and humanitarian policy as well as of its relations with the European Neighbourhood' countries. The European Consensus on Humanitarian Aid thus recognises that a focus on violence against women is necessary in all humanitarian assistance policies and strengthening EU support to partner countries in combatting gender-based violence and all forms of discriminations against women and girls has become one of the Specific Objectives mentioned in the Operational Framework of the *EU Plan of Action on Gender Equality and Women's Empowerment in Development* for the 2010-2015 period. The Strategic Partnership with Africa and the cooperation with African, Caribbean and Pacific countries also deal with violence against women issues. In its relationship with the EuroMed countries, the EU has continuously stressed the importance of the status of women and of the elimination of violence against them and has given rise to manifold national policies from part of both EU Member States and Mediterranean countries. Moreover, where there is no specific agreement with a state, the EU acts in favour of combatting violence against women via the EU instrument for Democracy and Human Rights. Violence against women is a permanent point of discussion in the Human Rights Dialogues that the EU pursues with many third countries.

The EU often also takes part, and even leads, international broader initiatives to reduce violence against women in international fora. The EU regularly affirms

the importance it grants the topic throughout various statements²⁵, it is involved in programs and actions within the UN system and in particular behaves like a central actor of the Security Council policy and fight against violence against women in war and peace-building contexts.

Finally, the EU requires that candidates for EU membership effectively prevent and sanction gender violence within their national legal orders. The community *acquis* supposes for candidates to address and reduce violence against women throughout both national and international efforts and the EU has systematically used this leverage, most recently towards Turkey, Serbia, Albania as well as Iceland.

In the diplomatic sphere, the EU thus appears to draw much attention to the respect of international law of human rights requirements regarding violence against women. Not only does the EU promote women's rights and try to prevent violence but it also requires from third countries that they themselves fight against that grim reality.

If the EU continues to impose such standards on third States but not on its own institutions and Member States, it places itself at risk of being accused of abiding by "double standards". In that context, a specific instrument on violence against women would strengthen and legitimise EU's actions on violence against women, as it would reinforce the EU's position as an independent political entity meeting its own ends and defining its own priorities using proper means.

Furthermore, while acknowledging the fact that EU actions inside and outside the EU are of a different legal nature and that the EU external actions dealing with violence against women do obviously not generate a domestic legal competence, they do however create a favourable context for the adoption of a binding instrument on the topic. According to Article 21 of the Treaty on European Union, EU foreign policy must be guided by the same principles and objectives that gave birth to the EU and were used to make of the EU a real political entity. Moreover, Article 21, § 3, TEU provides that "The Union shall ensure consistency between the different areas of its external action and between these and its other policies". Therefore, the adoption of such a legal text is not only politically desirable. It can also be considered a legal necessity as it would contribute to a better consistency between the external action of the EU and its other policies.

²⁵ See for example EU Statement on the International Day for the Elimination of Violence against Women, OSCE Permanent Council Nr 933, Vienna, 29 November 2012.

Affirming the EU's identity as a human rights based polity

A legal action on violence against women would certainly affirm EU identity as a firmly human rights-grounded polity. The incorporation of human rights both at the foundation and the horizon of EU action (be it internal or external) has been a crucial step in the evolution of the EU over the past decades and has contributed immensely to the affirmation of the EU as an actual polity. It is now well accepted that the EU is not solely an economic organisation striving for market integration. The EU Charter of Fundamental Rights has constituted a decisive moment in this respect. As recognised in article 6 TFEU, the rights, freedoms and principles set out in the Charter have the same legal values as the Treaties. In light of the gaps identified earlier, the adoption of a comprehensive legal tool to combat violence against women would significantly contribute to making the core human rights values proclaimed in the Charter, and namely human dignity, equality and solidarity more concrete.

It would also contribute to reinforcing the general values and principles that the EU is based upon, as referred to by the preamble or Articles 2 and 3 of the TEU, such as: "economic and social progress", "democracy", "cohesion", "equality", "human dignity" and "justice". Indeed, the available social data establish the breadth of the long-term effects of public policies aimed at combatting violence, in terms of those principles. Combatting violence is also a way of enhancing public health, economic growth, inclusion and participation and the elevation of general quality of life standards. As a matter of fact, the EU has acknowledged this virtuous circle effect for a long time: the Daphne Programme for instance considers "important to recognise the serious immediate and long-term implications for health, psychological and social development, and for the equal opportunities of those concerned, that violence has for individuals, families and communities and the high social and economic costs to society as a whole".

Finally, remaining inactive in the field of violence against women is a cost for the EU in terms of its image and credibility as a human rights based polity. Indeed, for an entity such as the EU, the decision not to legislate in an area that cries for improvement is just as important as that to do so and risks tarnishing its internal and external image. And eventually, the EU will not be able to eternally escape political accountability for not addressing violence against women at a time where it is both undisputed and well-documented as a severe social issue and technically explored in terms of regulatory options²⁶.

²⁶ See part 4 The choice of instrument: rationale for EU action.

Reducing the economic costs of violence

Very few thorough evaluations on the economic costs to Europe of violence against women have been made. This is no doubt due to the fact that comparable data on different types of violence against women in Member States across the European Union are not collected on a regular basis, which makes it difficult to estimate the real extent of the problem at EU level.

A number of studies conducted at Member State level have provided estimates of the total cost of violence against women for a particular city, region or country. Most of these studies have focussed on domestic violence and, while methodological approaches vary, in general three different kinds of information are used: incidence or prevalence rates of violence, rates of how many women sought help at particular services as a consequence of domestic violence, and the costs of these particular services and activities. Violence against women generates many different types of costs in a very broad range of areas and sectors that ought to be taken into account: health care, social services, economic output, police, criminal justice and civil legal sector and housing, as well as more indirect, intangible or long-term costs such as lost wages, disruption in the lives of victims, psychological or psychosomatic illnesses.

In the near future there is likely to be a more accurate overall estimate, when the EU-wide survey on violence against women, currently being conducted by the Fundamental Rights Agency (FRA), is published in the course of 2014. Until that happens, obtaining precise figures from the existing fragmented studies is difficult due to the considerable differences in their methodology and scope.

A 2006 study of the Council of Europe²⁷ provides a rough comparative analysis of the various cost estimates conducted in the Council of Europe area. The study concludes that the cost of domestic violence alone is estimated to lie in a range of about EUR 20 to EUR 60 (2006 prices) for every person in the population per year. These figures should however be considered underestimates as they do not fully take into account many of the direct as well as indirect costs.

Among attempts to quantify the costs of violence against women at EU level, two studies are worth mentioning. A study²⁸ funded by the European Commission under the Daphne programme, focusing on domestic violence, estimated the economic cost of the latter at EUR 16 billion annually for EU Member States (calculated in 2006 financial year). The numbers, include medical, justice and

²⁷ *Combating violence against women, Stocktaking study on the measures and actions taken in Council of Europe Member States*, Carol Hagemann-White, 2006

²⁸ *Estimated cost of domestic violence in Europe* » (IPV EU_cost - 2006), Psytel, Ingénierie de l'information

police, social and economic costs. The study also suggests that every additional euro spent on prevention work, protection and assistance to victims would create savings of EUR 87 million on the total cost of domestic violence.

A more recent evaluation was conducted specifically at the request of the European Parliament for the purpose of this paper. This research presents the best estimates of the annual costs of gender based violence against women in the EU. Based on an extrapolation of an estimation of annual national costs of domestic violence for England and Wales in 2001, the study relies on statistics from administrative organs as its main sources of data rather than relying on expert or speculative judgements to calculate the prevalence of violence and the costs of related services and on in-depth studies of the impact of injuries over four years on lost employment to quantify the cost of lost economic output. It also includes a more comprehensive range of items than any other studies, both in terms of forms of violence as well as types of impacts analysed, including a cost for the pain and suffering of the victims²⁹.

The cost to the EU of gender-based violence against women is estimated at EUR 228 billion in 2011, i.e. 1,8% of EU GDP.

Annual costs of gender based violence against women in the EU in 2011

Type of cost	EUR million
State/public services	45 056
Economic output	23 980
Pain and suffering of victim	158 988
Total	228 024

This figure includes EUR 45 billion a year in public and state services and EUR 24 billion of lost economic output. It further includes EUR 159 billion as the value the public places on avoiding pain and suffering for equivalent injuries. If this component were to be left aside and only the cost of public services and the lost economic input alone were retained, the estimate is EUR 69 billion annually, i.e. 0.5% of EU GDP.

This figure is almost certainly an underestimate: the study examines numerous forms of violence (domestic violence, sexual assault and stalking), but it is not exhaustive (female genital mutilations (FGM), forced marriage, and trafficking).

²⁹ For the full methodology and findings, see Annex II, Part I Economic aspects of the added value of measures to combat violence against women

It estimates the cost of the use of major public services, including legal, health, housing but not the much smaller costs of specialised services. It calculates the cost of lost economic output insofar as this is captured by time lost from employment due to physical injuries, but fails to include the impact of mental injuries on capacity to sustain employment, second generation costs borne by children whose capacity is diminished by the violence, because data limitations do not enable these costs to be captured robustly. Therefore, the calculations presented by the research do not describe the full scope of the problem.

In any event, the precise measurement of the costs of violence against women is less important than the fact that it adds an argument to the list of moral, legal, sociological arguments for the prevention and eradication of violence against women. While the economic angle is only one way among many to consider the implications of violence against women for policy, it is nonetheless an important one with significant implications for EU-level policy.

It is important to highlight the order of magnitude of the problem and compare it to the cost of implementing measures to combat violence against women. An economic lens shows that violence against women is a detriment to the economy through increasing social exclusion and reducing economic output. Actions to reduce violence against women are of benefit to the economy by increasing output and productivity, and thereby increasing the likelihood of greater economic growth. An EU instrument to combat violence against women would contribute to eliminating the considerable financial burden that impacts both the abused European women and the national economies.

4. The choice of instrument: rationale for EU legislation

There is a variety of ways to rectify the deficiencies of instruments at EU level for combatting violence against women. They range from improvements to the existing mechanisms and conventions to the introduction of new and all-embracing instrument. However the immensity of the task and the urgent need to significantly reduce the harmful direct and side effects of violence against women plead for the latter.

The need for a comprehensive approach

A global action tackling all forms of violence against women in a comprehensive manner, i.e. including a criminal component, would have the greatest impact. Indeed, to be effective, instruments on violence against women must adopt an all-inclusive approach, ranging from prevention, support measures, definition of main offences to prosecution, sanctions, to the assistance of victims of gender-based violence.

This comprehensive approach, including an EU specific binding instrument on violence against women has been consistently promoted by the European Parliament, throughout its various reports and resolutions.

Box 7 - The European Parliament and violence against women

Resolution of 26 November 2009 on the elimination of violence against women, the EP called on the Commission to "establish a clear legal basis for combatting all forms of violence against women, including trafficking and to start work on drafting a proposal for a comprehensive directive on action to prevent and combat all forms of violence against women".

Resolution of 25 November 2009 on the Stockholm Programme: the EP calls "for issuing of a directive and a European action plan on violence against women".

Resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women (Svensson report): the EP calls for "a new comprehensive policy approach against gender-based violence, including a criminal-law instrument in the form of a directive against gender-based violence".

Resolution of 6 February 2013 on the 57th session on UN CSW: Elimination and prevention of all forms of violence against women and girls: EP calls on the Commission to devise a strategy for tackling violence against women, which would include the drafting of a directive laying down minimum standards.

Overcoming the legal obstacles

It must however be recognised that a global directive on violence against women would necessarily touch upon many areas of law where the competence of the EU is limited. According to Article 5, § 2 TEU, “Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaty remain with the Member States”. The regulation on violence against women cuts across multiple domains of law, such as criminal, family, civil, social welfare, asylum, immigration, administrative, police, labour and equality law, which are not equally dealt within the EU law. Whereas the EU competence appears to be very well established in some areas, such as labour law, the EU cannot nevertheless claim exclusive competence in most of the aforementioned areas.

This patchwork of competences prevents EU Institutions from any overly one-dimensional approach, but leaves scope for important progress in combatting violence against women.

In particular, the possibility to act in the area of criminal violence is of great importance in view of the gaps in the EU framework identified in previous sections and the necessity to improve women's protection against gender-based violence in the EU. Article 83 TFEU provides tools that enable to harmonise substantively the criminal law, albeit in a limited number of areas.

**Box 8 - Article 83 paragraph 1,
Treaty on the Functioning of the European Union (TFEU)**

The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

In the second part of the paragraph 1, article 83 refers to crime areas of sexual exploitation of women and organised crime. This means that violence against women occurring in the context of sexual exploitation (i.e. violence to prepare, facilitate, accompany, cover up sexual exploitation of women) could be subject to minimum rules in criminal law definitions and sanctions by means of an EU directive as long as this is done simultaneously with criminal law rules on sexual exploitation of women as such. The same stands for organised crime. From this perspective, existing instruments, such as for instance Directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims could be revised in order to fully take into account the gender dimension. These initiatives, however, could not be considered as global instruments on violence against women.

Article 83 paragraph 1 covers some aspects of violence against women, but leaves aside the majority of them, such as domestic violence, rape, stalking, female genital mutilation, etc. The fact that gender-based violence is not, as such, listed in this article is the main obstacle for the recourse to this legal basis for a directive on combatting violence against women. But the last part of the paragraph opens the possibility to create a new legal basis in criminal matters through a "*passerelle clause*". The Council might take a decision, by unanimity and after consent of the European Parliament, to extend the list of offences contained in this provision. EU institutions could then propose minimum standards of definition and legal penalties in order to combat violence against women at a larger scale.

The requirement of unanimity is certainly an obstacle hard to overcome but the other conditions of application of article 83 do not raise major obstacles. Not all cases of violence raise cross-border issues, however, as was demonstrated above, the unequal treatment of women victims of violence contradicts the principle of freedom of movement, which is at the very foundation of the EU project.

Defining new offences regarding violence against women on a larger scale would result "from a special need to combat them on a common basis" as required in Article 83 paragraph 1: this special need results first from the gaps and divergences of national approaches in this field, which could only be overcome by a legislative instrument defining minimum standards in full respect with the principles of subsidiarity and proportionality. Furthermore, this need comes from the special kind of threat to society violence against women constitutes. As it has already been highlighted, statistics are eloquent about the devastating effects of violence against women – well beyond the violent acts themselves. Because violence generates violence, all kind of offences to women impact not only physical and psychological health-related aspects, but also generate much broader social costs in the longer term. For these reasons, there is a pressing need

for the EU Council to activate without delay the "*passerelle clause*", in order to add gender based violence to the list of crimes covered by article 83 TFEU.

Establishing rules on prevention

Criminal law definitions and legal penalties in the area of violence against women require the creation of a legal basis in criminal matters. Article 84 TFEU already offers an appropriate legal basis for establishing measures to promote and support the action of Member States in the field of prevention of violence. This provision could serve as a useful legal basis for a directive which would not seek to harmonise national legislations, but to efficiently supplement the existing EU law on victims.

Box 9 - Article 84 Treaty on the Functioning of the European Union (TFEU)

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.

As stated earlier, taking into account the dimension of prevention when combatting violence against women is indeed a crucial part of the comprehensive approach which is necessary in that field. On the basis of this article, the EU should therefore promote measures for gathering and exchanging information, education and training for the officials involved, exchange of experiences and good practices, information and awareness-raising, and other relevant activities of this kind..

Establishing a system for collecting statistics on violence against women

Experience has shown that reliable and comparable data on the prevalence of violence against women in the EU Member States is an important element of any strategy designed to combat this phenomenon at EU level.

The European Parliament has in several resolutions urged Member States to provide data on violence against women. Moreover, the Council in its conclusions of December 2012 has called to improve the collection and dissemination of comparable, reliable and regularly updated data concerning all forms of violence against women at both national and EU level. The on-going Europe-wide survey on violence against women will provide valuable indications on the extent of problem, but will be a snapshot of the situation. Today there are few indicators that can measure violence against women since no

principles of crime classification systems for statistical purposes has been established in the EU and there is no agreed common methodology for obtaining comparable administrative data. This was one of the main reasons why the Gender Equality Index by EIGE could not take violence against women properly into account.

In June 2011 the Commission submitted a Proposal for a Regulation on European statistics on safety from crime (COM(2011)335 final), based on article 338 TFEU, aiming at establishing a common framework for producing European statistics, based upon a household/personal survey in the respective Member States. The Commission's proposal has been questioned by Parliament, among other, as regards to the suggested budget (considered to be high and unjustified), the statistical methodology (considered to be too subjective) and the scope of the proposal (allowing namely for some exceptions for certain Member States). As a consequence, the EP rejected the proposal in plenary and called for a new one to be submitted by the Commission. There is therefore still a need for a new proposal for EU legislation which establishes a coherent system for collecting statistics on violence against women in the Member States.

Launching the procedure for EU accession to the Istanbul Convention

The possibility of the EU accession to the Istanbul Convention also needs to be pursued, as called for by the European Parliament. This prospect is already being examined by the Commission, which is indeed preparing an internal study on the feasibility of the accession to the Convention by the EU, its legal implications and added value³⁰.

While awaiting the results of the internal study, it is evident that the EU's accession would project a capital political message. Above all, it would be a way for the EU to affirm itself as a world leader and promoter of human rights. Secondly, it would provide a guarantee against risks of incoherencies or even double standards in the field of violence against women. Greater integration of the EU with relevant international mechanisms is manifestly the most plausible and serious perspective in order to be effective in this the area. In this respect, the accession of the EU to the Istanbul Convention, despite the internal legal and political difficulties it may entail, will give the world a robust message about the EU's commitment to fight this scourge.

³⁰ In its Follow-up to the European Parliament resolution on equality between women and men in the European Union (2010), adopted on 22 June 2011, the European Commission states that "it will carefully review the adopted text (the Istanbul Convention) and consider the possibility to propose the Council that the EU accedes to the Convention. The Convention will then become legally binding for the EU where it has competence under the Treaty.

**Box 10 - The example of the UN Convention
on the Rights of Persons with Disabilities**

The Convention has been ratified by the EU given the strong convergences that existed with previous the EU actions. The European Disability Strategy 2010-2020 has consequently been based on the UN Convention's requirements.

It is however noteworthy, that the situation was different from that of violence against women today: the fact that every Member State had already signed the Convention on the Rights of Persons with Disabilities had a real impact on the decision of the EU to ratify the Convention. To this date, the Istanbul Convention has been signed by 20 and ratified by three EU Member States.

If the EU does ratify this treaty, the Convention would probably remain without direct effect within the EU legal order, even if all 28 Member States had ratified it as well. A proper EU instrument will thus still be necessary and the question of coherence between the two mechanisms would naturally arise. For the two legal instruments to be more coherent and complementary and without having to reproduce the international treaty's provisions, the EU instrument should mention the Istanbul Convention as a source for its rules and principles, just as the ECJ and the Treaties refer to the ECHR when speaking about general principles of Union's law in connection to human rights. There are indeed many similar examples of legislative action by the EU, aligning itself to Council of Europe conventions (see box 11 below).

**Box 11 - The fight against trafficking- example of coordination
between a Council of Europe convention and EU directive**

Directive 2011/36/EU of the European Parliament preventing and combatting trafficking in human beings and protecting its victims explicitly mentions the UN³¹ and Council of Europe³² instruments, takes due notice of the existence of an evaluation mechanism monitored by the Group of experts on action against trafficking in human beings (GRETA) and a Committee of the Parties, and mentions the need for coordination so as to avoid duplication of efforts due to the coexistence of the two mechanisms.

Given the importance that EU's accession to the Istanbul Convention will have on the fight against violence against women, the European Commission should

³¹ United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organised Crime, 2000.

³² Council of Europe Convention on Action against Trafficking in Human Beings, 2005

immediately launch the procedure for such accession once it has finalised its impact assessment on EU existing policies.

Complementing the existing framework with other measures

While legally binding EU action is necessary in order to prevent violence and punish the perpetrators, a comprehensive approach to the problem entails the adoption of a number of measures to enhance protection of women against violence. These measures include addressing specific forms of violence, improving policy making coordination, exchanging of best practices to raising awareness.

For instance, building on the public consultation launched this year the results of which are expected to be published around the international day against violence against women (25 November), further action should be proposed on Female Genital Mutilation. An EU action plan on FGM should be adopted, addressing several issues like prevention and protection, and covering both internal and external aspects of the problem.

In addition, the EIGE's competences should progressively be extended in order to evolve into a European observatory on violence against women. She thinks that it will be more appropriate to frame it inside EIGE's competences. Placed in the context of gender equality and fundamental rights, the new mandate would allow better coordination and coherence among EU institutions, EU agencies, Member States and international actors, as well as to further develop existing and propose new EU policies to combat violence against women.

Finally, an EU Year to End Violence against women should be established in the next three years in order to raise awareness among EU citizens about this pressing problem.

The above list of actions is indicative and certainly non-exhaustive. But it sets nonetheless clearly the priorities that the European Parliament believes should be an integral part of an EU-wide Strategy to combat violence against women, which the European Commission needs still to present. In its Action Plan implementing the Stockholm Programme, the Commission had pledged to present, in the course of 2011-2012, a 'Communication on a strategy to combat violence against women, domestic violence and female genital mutilation, to be followed up by an EU action plan'. Given the importance of this issue, such a Strategy is long overdue.

RECOMMENDATION

The EU should adopt, on the basis of Article 84 TFEU, a legal act establishing measures to promote and support the action of Member States in the field of prevention of violence and all other necessary steps, outlined in this European Added Value Assessment, to address the problem of violence against women.

European Added Value

of a Directive on combatting violence against women

ANNEX I

Assessing the necessity and effects of intervention at EU level

Research paper
**by Myriam Benlolo-Carabot, Clémentine Bories,
Stéphanie Hennette-Vauchez and Mathias Möschel**

Abstract

This research paper assesses the necessity for the EU to adopt a binding legal instrument on combatting violence against women (VAW). In particular, it argues that a broadly framed instrument which harmonizes national legislation and complements and integrates existing international instruments on VAW would reinforce a European identity, provide better protection to women, guarantee legal certainty and enhance the coherence of EU action.

AUTHOR

This research paper has been written by **Myriam Benlolo-Carabot, Clémentine Bories, Stéphanie Hennette-Vauchez** and **Mathias Möschel** of the Université Paris Ouest Nanterre La Défense (REGINE [Recherches et études sur le genre et les inégalités dans les normes en Europe] research programme on Gender and the Law and TEE Trans Europe Experts, European Network of Legal Experts), at the request of the European Added Value Unit, of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary research Services (DG EPRS) of the General Secretariat of the European Parliament.

RESPONSIBLE ADMINISTRATOR

Monika Nogaj, European Added Value Unit

To contact the Unit, please e-mail eava-secretariat@europarl.europa.eu

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List of abbreviations and acronyms

AFSJ	Area of Freedom, Security and Justice
Az	Aktenzeichen
BGBI	Bundesgesetzblatt
CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination Against Women
CJEU	Court of Justice of the European Union
CoE	Council of Europe
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GC	Grand Chamber
GRETA	Group of experts on action against trafficking in human beings
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
OAS	Organization of American States
OJ	Official Journal
OSCE	Organization for Security and Co-operation in Europe
QPC	Question prioritaire de constitutionnalité
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
VAW	Violence Against Women

Executive summary

The purpose of this research paper is **to assess the added-value of adopting a comprehensive, legally binding European Union (EU) instrument (in the form of a directive) on combatting all forms of violence against women.** It assesses both the necessity of such a legislative action, its complementarity with the existing framework, and the spill-over effects of an intervention at EU level. It also analyses the feasibility of such an action, as well as possible other options to reinforce the EU framework on this matter.

The research paper first analyses the added-value of a global directive on violence against women **in terms of enhancing the identity and the coherence of EU.** A legal action on violence against women would certainly affirm EU identity as **a human rights-grounded polity:** core values proclaimed in the EU Charter of Fundamental rights, such as human dignity, equality, and solidarity, would be enhanced by a global directive on violence against women. This instrument would then increase credibility of the EU as a community with shared values, as it would also be **a major step in order to reinforce principles and objectives of EU legal order, such as public health, a high level of education, or economic growth.**

Besides these empirical reasons, there are also more **theoretical arguments** that should be underlined when assessing the added-value of a directive on violence against women. They have to do with what can be called **the expressive force of law** –a crucial function of law as a tool throughout which an entity such as the EU self-defines itself. An instrument on violence against women would frame such violence in the language of law. From that perspective, the adoption of an EU directive on violence against women, imposing new/dynamic understandings of the concepts of equality and non-discrimination, would have great added-value in that it would allow **overcoming the specific obstacles that the existing (national) legal provisions on violence against women encounter.**

A legal action on violence against women would also enhance **the consistency of EU action, both in the context of EU's external action and in the one of core internal objectives or policies of EU.** On the international scene, the mainstream EU action regarding violence against women plays out at different levels, such as humanitarian action, requirements of the EU towards candidates to membership, or active involvement in international broader initiatives. In this perspective, a directive on violence against women would not only strengthen, **but also legitimize EU external action in the field, by tackling the accusation of having "double standards".**

The same can be argued with regard to core objectives or policies of the EU. Because the concept of gender allows framing violence against women as a form of gender discrimination, the adoption of a global instrument in the field by the EU can only be viewed **as a logical corollary to its action in both the field of gender equality and anti-discrimination** over the years. As far as the Area of Freedom, Security and Justice (AFSJ) is concerned, the added-value of a directive on violence against women appears obvious,

because it would favour free movement of women throughout the EU territory and it would facilitate access to justice for women, by ensuring them support, protection, and ability to participate in criminal proceedings when they are victims of violence. An instrument on this subject **would be in line with the very philosophy and principles of the AFSJ**, which implies the development of common means to reduce and prevent violence. Moreover, if the EU were to remain inactive or silent in the field of violence against women (and leave it to States or other levels of regulation to deal with the issue), it would need to prepare for justification – **for the decision not to legislate is just as important as that not to do so.**

The second part of the research paper identifies the real added-value of a directive on violence against women **compared with the existing national, international and EU legal frameworks.** On a national level, the outcomes and levels of protection of women and girls against all forms of violence within the 27 EU Member States differ widely. The presence of three broad models at the national level (unitary and gender-specific regulation on violence against women; piecemeal legislation with the explicit recognition of gender forms of violence; absence of legislation or genderblind provisions) determines quite differing levels of protection for women from one Member State to the other. A directive would ensure **that certain minimum standards would be spelt out**, without necessarily demanding complete harmonization of national legislations. It would then be a major step to enhance **legal certainty and effectiveness of law.** Of course, a binding EU law instrument would not be the first one tackling this issue, as international (mainly CEDAW) or regional (the Istanbul Convention) instruments have already been adopted. However, a EU directive would considerably enhance women’s protection effectiveness, because of the peculiar nature of this legal act and **the far greater impact it could have in national legal orders.** A global directive on violence against women would also complete other recent EU measures, such as the European Protection Order or the “Victims package”: if these instruments constitute important steps for the protection of crime victims, they fail to provide a specific response to a specific and central problem. From this perspective, a directive on violence against women **would not only complete existing EU law, but also deepen the very philosophy of these measures, founded on the core principle of mutual trust.**

The third part of the paper **provides options** for the adoption of such a binding EU instrument. Because of the EU’s limited competence in several areas related to violence against women, such as criminal law, EU institutions do not have a large margin of action: if some aspects of violence against women are covered by article 83, § 1, **it is not the case for most of them, such as domestic violence, rape or stalking.** This article could be modified and other offences added to it, but to meet that end **a unanimous decision of the EU Council is needed.** Other options should be explored, **such as an action founded on article 19, § 2:** the EU could initiate a strong action based on the fact that violence against women is **undoubtedly gender discrimination.** EU institutions could also promote this core principle while pushing **for an improvement of the existing legal EU framework.**

Introduction

The EU has repeatedly expressed “its political will to treat the subject of women’s rights as a priority and to take long-term action in that field”¹. It has also clearly acknowledged that VAW is “one of the major human rights violations of today’s world”². However, despite numerous calls by the European Parliament and its Women’s Rights Committee for a comprehensive legal instrument aimed at combatting all forms of VAW, the Commission has so far rejected the idea of binding EU legislation in that field.

The purpose of this research paper is to assess the added-value of adopting a comprehensive, legally binding European Union instrument (in the form of a directive) on combatting all forms of violence against women. It assesses both the necessity of such a legislative action, its complementarity with the existing framework, and the spill-over effects of an intervention at EU level. It also analyses the feasibility of such an action, as well as other possible options to reinforce the EU framework on this matter.

In order to deliver clear and comprehensible results, the research team made two important methodological choices. The first one is to provide an in-depth analysis of the current EU legal framework, intended in a broad sense (existing Conventions, legislation or actions, both at national, international, and European levels; existing and relevant case-law on VAW; soft-law instruments, such as Guidelines, international or European recommendations, actions or information programs, etc...). The analysis of this broad body of law is twofold. On the one hand, the study contends that the EU’s main principles, core values and policies would only be confirmed and deepened by a global hard-law instrument on VAW: the adoption of a directive on VAW would enhance the existence of the EU as a true community and polity based on shared values and human rights. On the other hand, a directive on VAW would be necessary because it would fill existing gaps and lacunas as well as overcome obstacles at the national, international and European levels in the field of VAW.

The second methodological choice is more theoretical and has to do with the way VAW ought to be considered in order to be combated more effectively. Using international approaches and theoretical tools, the research paper provides arguments in order to clearly frame VAW as a form of gender discrimination and as an obvious violation of human rights. The research then identifies lacunas of the existing legal framework and explores options so as to fill them. Whereas a global directive setting up minimum standards of definition and prosecution on VAW seems to be the best option in terms of efficiency and legal certainty, other solutions should be explored in order to reframe the existing EU law on VAW from a broader antidiscrimination policy point of view.

These methodological options have led the research team to answer the question of the added-value and necessity of a directive on VAW in three parts. In the first part, the

¹ See e.g.: *EU Guidelines on violence against women and girls and combatting all forms of discrimination against them*, General Affairs Council of 8 December 2008.

² *Ibid.*

paper analyses the added-value of a global directive on violence against women **in terms of enhancing the identity and the coherence of the EU**. The second part identifies the added-value of a directive on violence against women **compared to the existing national, international and EU legal frameworks**. The third part of the paper **provides options** for the improvement of the existing EU framework, such as the adoption of a global directive, other binding EU instruments or amendments to existing ones.

The research team consists of four persons, all based at the University of Paris Ouest Nanterre La Défense (France) and members of the academic research project REGINE (Recherche et Etudes sur le Genre et les Inégalités dans les Normes en Europe) which in turn is a correspondent for the TEE (Trans Europe Experts) network of legal experts. As a three-year research program funded by the French Agence Nationale pour la Recherche (ANR), the REGINE project aims at introducing and mainstreaming feminist legal theory into French legal research. By analyzing entire areas of French law from a gender perspective, it tends to demonstrate whether and how law produces gender (in)equality.

Myriam Benlolo Carabot is the head of the research team. She is a professor of Public Law. She teaches mainly International and European (both institutional and substantial) Law. Her research focuses mostly on the protection of human rights in the EU, the construction of a European citizenship, and the development of the Area of Freedom, Security and Justice.

Clémentine Borjes Fontana Giusti is an Assistant Professor of Public Law. She teaches International Human Rights Law and Global Administrative law. Her main research focuses on international protection of human rights, and explores the development of administrative rules at the international and European level.

Stéphanie Hennette-Vauchez is a professor of Public Law. She teaches Constitutional Law and Administrative Law, as well as Biomedical Law, European Human Rights Law and Feminist Legal Theory. She is the scientific coordinator of the REGINE project. Her research focuses mostly on biomedical law and the theory and sociology of human rights law.

Mathias Möschel is a Post-doctoral researcher. His research focuses on non-discrimination law and equality, human rights law and constitutional law, from a comparative, critical race theory and gendered perspective.

Part I. A directive on combatting violence against women in order to enhance the identity and the coherence of EU action

A directive on combatting VAW would affirm the identity of the EU, which is now founded on fundamental human values and principles and which claims to be a human rights-grounded polity (A). Such a legal action would also enhance the coherence of EU action, both from an external and an internal perspective (B).

A. A legal action on violence against women would affirm European Union identity as a human rights-grounded polity

There is a variety of reasons for which the very identity of the EU is at stake when it envisages possible courses of legal and political action on the topic of violence against women (VAW). Some of them have to do with the particular history of values and human rights protection within the European legal order (1) and others have to do with more abstract elements (2).

1. Empirical reasons: the particular history of values and human rights protection within the EU

Some reasons tightly related to the specific history of the affirmation of the role and place of “values” within the EU legal order allow to consider a potential action of the EU against violence against women as a very relevant means of affirming and consolidating Europe as a firmly human rights grounded polity.

The incorporation of human rights both at the foundation and at the horizon of EU action (be it internal or external) has been a crucial step in the evolutions of the EU over the past decades. In fact, human rights have contributed immensely to the affirmation of the EU as an actual polity –and not solely as an economic organization. It is now well accepted that the EU no longer strives solely for economic/market integration. This occurs because, on the one hand, “internal market legislation is always also about something else”³ and, on the other hand, “fundamental rights form an integral part of the general principles of law whose observance the Court ensures (...). Respect for human rights is therefore a condition of the lawfulness of Community acts, and measures incompatible with respect for human rights are not acceptable in the Community”⁴.

The EU now is thus seriously committed to protecting and promoting human rights. The Court of Justice certainly has been one of the main actors of the affirmation of fundamental rights’ role as cement of the EU as a legal and political order⁵ but they are

³ B. De Witte, “Non market values in internal market legislation”, in N. N. Shuibhne, *Regulating the Internal Market*, Elgar, 2006, p. 76.

⁴ ECJ [GC], 3 September 2008, *Kadi v. Commission and Council*, C-415/05, §283-84.

⁵ “Judicial review of the internal lawfulness of a contested regulation in the light of fundamental freedoms is a constitutional guarantee forming part of the very foundations of the Community”, ECJ [GC], 3 September 2008, *Kadi v. Commission and Council*, C-415/05, §290.

now explicitly mentioned and confirmed in a variety of EU legal acts from the Treaty of Maastricht onwards. It is now expressly recognized that “the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000 (...) have the same legal value as the Treaties”⁶. The EU Charter of Fundamental Rights has constituted an important moment in the solemn acknowledgement that core values of human rights both rest at the foundation and guide the horizon of EU action –both internal and external. More generally, it is worth noting that the EU has considerably enriched much of its actions with non-market values. Article 6 of the TFEU mentions the protection of health, tourism, culture or sports as areas in which the EU has competence “to carry out actions to support, coordinate or supplement the actions of the Member States”.

This entire process is widely understood to have had an impact well beyond the sole technical/legal dimension of turning a body of fundamental rights into binding provisions for Member States and European institutions. Much more decisively, it is understood to have contributed to the transformation of the very identity of the EU – from one economic in nature into one political. It is because it can claim to rest on values such as the principle of human dignity, solidarity, equality and liberty that the EU can claim its identity as a political community.

It thus is very important to take human rights seriously within the EU. The EU Charter of Fundamental Rights serves as a useful guide: dignity, freedoms, equality, solidarity, citizen’s rights and Justice form its six main chapters. The first four chapters express rights and values that a directive on violence against women could help enforce. To be sure, the centrality of the human dignity principle is a founding rock for measures of protection. As expressed by the Praesidium’s explanatory report, human dignity is not only a human right in itself, but also the foundation of all the other rights expressed in the Charter. Human dignity is a multi-faceted principle: it may ground positive rights that the individual may claim against society as well as negative rights to be protected against violence, discrimination or rights’ restrictions. It includes the right to physical integrity, the prohibition on torture and degrading treatments. The right to liberty is also a founding principle here, all the more so when read and understood as complemented by Equality rights: when the Charter proclaims that “Everyone is equal before the law”, this must be understood as calling for rules specifically designed to redress or address structural wrongs. Indeed, it is well understood that formally equal rules may in fact produce or cultivate inequality when applied to persons or groups of persons who are placed in different situations. This explains the failure or shortcomings of existing national criminal laws in the field: they do not redress the structural over exposure of women to violence –physical and sexual. Again, since there is a dynamic understanding of Equality in EU law, it appears to be the appropriate level for concretising the notion that violence against women as it prevails in society may actually be perceived as a form of sex discrimination that EU human rights’ provisions combat. In fact, Article 23 of the Charter makes it clear that equality between men and women should be achieved in *all areas*. Finally, solidarity should not be forgotten among the important values that EU

⁶ Article 6 TEU.

legislation should strive to translate into concrete action (legislation and public policy). A directive specifically aimed at this particular form of violence could thus significantly contribute to making the EU Charter of Fundamental Rights' values more concrete. This is all the more true in that the developments of international and European law⁷ have led to the emergence of domestic violence as an autonomous human rights violation consisting in the commission of physical, sexual or psychological harm, or the threat or attempt thereof, in private or public life, by an intimate partner, an ex-partner, a member of the household, or an ex-member of the household.

A firm stance by the EU on VAW would also underline the important role of the EU Charter of Fundamental Rights in the strengthening of the Area of Freedom, Security and Justice (AFSJ). As the Commission has clearly acknowledged, the achievement of an AFSJ is first and foremost a way for the EU to affirm, protect and project human values. In an important communication named "Delivering an area of freedom, security and justice for Europe's citizen", the Commission recalled the "everlasting values" of the EU - respect for the human person and human dignity, freedom, equality and solidarity - at a time of unrelenting societal and technological change⁸. "Ensuring the protection of fundamental rights", and, in particular providing "a robust European response to violence against women and children" are mentioned as key actions for the EU in order to achieve the AFSJ, seen here as a common space of values, and a way of affirming an EU strong identity⁹.

Last but not least, a directive on VAW would also contribute to reinforcing the general values and principles that the EU is based upon (see for instance the ones referred to by the preamble or Articles 2 and 3 of the TEU, such as: "economic and social progress", "democracy", "cohesion", "equality", "human dignity" and "justice"). The available social data establish the breadth of the long-term effects of public policies aimed at combatting violence, in terms of enhancing those principles. Combatting violence is also a way of enhancing public health, economic growth, inclusion and participation and the elevation of general quality of life standards. As a matter of fact, EU institutions have acknowledged this virtuous spill-over effect for a long time: the Daphne Programme, which was launched in 2000 for the first time¹⁰, "aims to contribute towards ensuring a

⁷ See *infra* Part II, A. 2. and B.

⁸ "Delivering an area of freedom, security and justice for Europe's citizens Action Plan Implementing the Stockholm Programme", COM (2010) 171 final, 20 April 2010.

⁹ An action on VAW would also enhance the coherence of EU action, in line with main objectives of the Area of Freedom, Security and Justice, *see infra*, Part I, B. 2, b).

¹⁰ Decision n°293/2000/EC of the European Parliament and of the Council of 24 January 2000 adopting a programme of Community action (the Daphne programme) (2000 to 2003) on preventive measures to fight violence against children, young persons and women, *OJ L* 34, 9 February 2000, p. 1. See also: Decision n°803/2004/EC of the European Parliament and of the Council of 21 April 2004 adopting a programme of Community action (2004 to 2008) to prevent and combat violence against children, young people and women and to protect victims and groups at risk (the Daphne II programme), *OJ L* 143, 30 April 2004, p. 1, and Decision n°779/2007/EC of the European Parliament and of the Council of 20 June 2007 establishing for the period 2007-2013 a specific programme to prevent and combat violence against children, young people and women and to protect victims and groups at risk (the Daphne III programme) as part of the General Programme Fundamental Rights and Justice, *OJ L* 173, 3 July 2007, p. 19.

high level of protection of physical and mental health by the protection of children, young persons and women against violence”¹¹. It considers “important to recognise the serious immediate and long-term implications for health, psychological and social development, and for the equal opportunities of those concerned, that violence has for individuals, families and communities and the high social and economic costs to society as a whole”.

Interestingly enough, the formulation has been modified and further developed in the Decision adopting the Daphne III Programme. This Decision not only recognises the effects of violence against women and children so widespread as to constitute “a major health scourge”, but also “as a genuine violation of fundamental rights, (...) and an obstacle to the enjoyment of safe, free and just citizenship”¹².

For all these reasons, adopting a directive on VAW would contribute to the affirmation of the EU as a polity and a Community founded on human values, the one it claims to be besides its Member States and in its external relations with third countries and international organisations.

2. Theoretical reasons: the expressive force of law

There are also reasons external to the specific history and context in which the EU has evolved over time that ground the notion that the adoption of a global and hard law instrument of European law on combatting violence against women would significantly affect (and in fact, strengthen) the EU’s identity: such a directive would confirm and stress the EU’s full acceptance of its now much wider than economic scope and objectives. These reasons are more theoretical and have to do with what can be called the expressive force of law –a crucial function of law as a tool throughout which an entity such as the EU self-defines itself.

This notion of an expressive force of law stems in part from a resolutely contemporary and contextualized understanding of “the law”. Certainly, law is first and foremost a system of rules and mechanisms designed at achieving a number of social and political goals. To that aim, law is a very important tool and technique. Nevertheless, law is also a discourse that a given entity produces about itself. Its policy-making capacity is very well exemplified by the unlikely development of a body of law aiming at the regulation of science and technology. Whether in the field of food security, GMOs, biotechnologies, patents, scientific research or even health law, the current and important role of the EU is one that was largely unpredictable, if one looked at the wording of the founding treaties. The same could be said about the existing EU body of human rights law, whose existence also came as an unpredictable (and indeed, unpredicted) development of European integration.

¹¹ *Ibid.*, Article 1, § 2.

¹² Decision n°779/2007/EC of the European Parliament and of the Council of 20 June 2007 establishing for the period 2007-2013 a specific programme to prevent and combat violence against children, young people and women and to protect victims and groups at risk (the Daphne III programme) as part of the General Programme Fundamental Rights and Justice, *OJ L 173*, 3 July 2007, p. 19.

Indeed, the founding treaties did not envisage those fields as possible areas of EU action. However, the EU has undoubtedly affirmed itself as a relevant level of regulation for a variety of topics and subjects in the field of science and technology. This occurred progressively from the 1990s onwards: health, food, biotechnology became fields of action throughout a variety of unlikely vectors: legislation (GMOs, patent directives), research policy (limitation and invitations to research), or even ethical opinions (see the institutionalization of the European Group of Ethics). Regardless of the initial unlikelihood of such measures, they are now understood to have played an important role in the transformation of the EU's identity from a mainly economic organization to an actual polity. They have proved to be terrains on which the intervention of the EU has been not only important for the questions at stake, but also – through something like a boomerang effect- on the EU itself.

Scholars in the field of Science and Technology studies (STS) have developed in-depth studies demonstrating that the contemporary imbrication of “science” and “society” (cf. our knowledge-based economies)¹³ accounts for the policy-making capacity of regulatory fields such as, for instance, food safety. They argue that the increased attention (and eventual normative action) of the EU in fields in which the regulation of science was at stake –such as, for instance, biotechnology¹⁴- has in fact constituted a significant contribution to the affirmation of the EU as a polity (a political –as opposed to merely economic- community)¹⁵.

What we would like to stress here is that a similar argument can be made about the role of human rights law at the EU level. Similarities indeed are great between “human rights” and “science and technology” as fields of EU law and policy. Human rights were equally absent from the founding treaties and scope of the EU; however, as recalled here above, the progressive incorporation of fundamental rights within the EU legal order played a major role in the transformation of the EU. It can thus be said that nowadays, when the EU speaks the language of human rights, it produces both a discourse about human rights and about itself. Throughout its multi-faceted commitments and actions in various fields of human rights, the EU continuously defines and redefines itself as a polity – one that is cautious not only to protect and sanction, but also to promote and enhance the worth and self-determination of all human beings.

The external action of the EU in general, and its involvement to promote human rights beyond its boundaries in particular, are good examples of the way the EU uses law as a tool to construct itself. When cooperating with the International Criminal Court and promoting ACP countries and candidates' access to that judicial institution, the EU works for a worldwide international justice and the development of international criminal law. It behaves like a political entity defending the human rights cause. In order to appear as a polity promoting human rights, the EU opened the negotiations with Croatia only when

¹³ S. Jasanoff, ed., *States of Knowledge. The Co-Production of Science and Social Order*, Routledge 2004.

¹⁴ S. Hennette Vauchez, “Biomedicine and EU law: Unlikely Encounters?”, *Legal Issues of European Integration*, 2011, no. 1, p. 6.

¹⁵ S. Jasanoff, *Designs on nature. Science and Democracy in Europe and in the United States*, Princeton University Press, 2005.

this State had been found fully cooperative with the International Criminal Tribunal for the former Yugoslavia (ICTY)¹⁶. Another example of this normative discourse of the EU can be found in the EU's involvement in UN policies in the field of VAW. Thus, the EU appears like an authentic representative of the cause of human rights and of gender equality all over the world. Through these policies, the EU requires other States or international organisations to respect international law standards regarding the situation of women who face violence¹⁷. The EU thus creates international normative commitments that bind other actors in the field, in order to fulfil its own goals as a political entity promoting human rights and gender equality. The EU policy is thus consistent with international human rights' law.

From that perspective, one can certainly speak about an expressive force of law. How does it play out specifically in the field of VAW?

It has long been established in political theory that the way in which a given political community treats its most fragile groups (both in action and in discourse) is revealing as to the authenticity and strength of its commitment to effective rules of justice and equality. Along those lines, it appears quite clearly that a specific place should be made, in the axiological discourse and action of the EU, to marginalized groups and, among those, to women who suffer from violence. In that sense, there are at least two crucial ideas that would be expressed by a global instrument of EU in the field of violence against women:

- a) It would allow to name forms of harm that to this day remain essentially beyond the ambit of EU legal rules and principles
- b) It would transform the nature of VAW, from acceptable to unlawful¹⁸.

One crucial aspect of an instrument on VAW is that it frames such violence in the language of law. Not only does this allow moving forward towards the second idea (and allow for effective sanctioning of corresponding practices) but it also provides a voice to the victims and helps those who were silenced to speak up. The existence of a legal category corresponding to the harm one experiences is of considerable help to those who wish to take action and affirm their self-determination and their capacity to fight back. Giving voice to those who are victims ensures that they are included –and no longer excluded– from the community. It makes it possible for them to exercise their citizenship and reaffirms that they fully belong to the polity. In that respect, one can really consider that the existence of legal categories that give names to various forms of social harms is crucial for the affirmation and preservation of the citizenship of those who are victims. They are no longer excluded from the consideration of the law, nor stuck in legal blind spots; on the contrary, they are provided the tools for speaking up and acting upon their rights. The issue of marital rape is a classic example in the field of VAW and illustrates the importance of the mere existence of legal categories that *name* forms of harm. Until

¹⁶ See Council Conclusion 12514/05 (Presse 241).

¹⁷ For other examples of the role the EU plays in order to combat VAW outside its territory and the necessary quest for consistency in EU action, see *infra*, Part I, B. 1.

¹⁸ B. Meyersfeld, *Domestic Violence and International Law*, Hart, 2012.

well into the last decades of the 20th century in many countries, marital rape was not conceivable in the sense that it could not be articulated (formulated) in legal terms. Consequently, judges kept failing to offer any kind of protection to women who, because they were married, were thought to be ever-consenting to all forms of sexual intercourse with their husbands. A harm that has no name cannot be punished or sanctioned in any way.

Moreover, it is an important step for a political community to use legal provisions in order to shift social structural and endemic practices from 'social reality' to 'illegality': once VAW is defined as legally reprehensible, it can no longer be accepted as a negative, albeit unavoidable ('it has always been that way'...), social reality. By outlawing such practices, political communities affirm their control over reality by taking action. They place themselves in a position of effectively fighting what can be perceived as structural forms of social harms.

For all those reasons, as an accountable community, the EU would considerably strengthen its political identity by the adoption of a global hard law instrument in the field of VAW because such an instrument would allow the EU to define itself not only as an economically oriented entity and as not only theoretically and in principle attached to the respect for human rights and equality for all, but also actively and effectively committed to those goals. It would name and legally characterize such forms of violence as unlawful, it would give voice to victims of violence and it would enable actual and effective legal actions to be taken in order to protect victims of violence.

From that perspective, the adoption of a EU directive on VAW would have great added-value in that it would allow overcoming the specific obstacles that the existing (national) legal provisions on VAW encounter. Indeed, as it has been proven in other fields of EU action (such as labour or social security law), the EU level of legal action is one propitious to the dissemination of new/dynamic understandings of the concepts of equality and non-discrimination. In many EU Member States the legal principle of equality has traditionally received a primarily formal meaning –one that plainly required that the law be the same for all. This formal understanding of equality has however been seriously challenged during the past decades, both in the field of legal theory¹⁹ and in that of positive law. Significantly though, international and European law have proved to be more welcoming to “new approaches” to equality. International and European law have been arenas in which equality has been understood to be not only a matter of legal provisions, but also of social reality. Hence the development of legal categories aiming at linking law and social reality, such as that of indirect discrimination (and the correlative use of statistics to establish indirect discrimination), temporary special measures (justified when targeted at redressing structural disadvantage) or discrimination (understood to be the relevant legal way of expressing some forms of structural over exposition to social harms –such as violence). Because international and European law have developed more recently than national legal orders, they have proved to favour such new and dynamic understandings of the concept of equality. This is a strong reason

¹⁹ Among the many references, see: S. Fredman, *Discrimination Law*, Oxford University Press, 2011.

for considering that a EU directive on VAW would necessarily have tremendous added-value in that it would (thanks to EU's law authoritativeness vis-à-vis national legal orders) necessarily succeed in imposing a renewed (more substantive) understanding of equality. One could make a parallel with the use of indirect discrimination in French law. Not only was the concept of indirect discrimination ignored by French law, it was actually opposed by a number of legal and political actors. However, its centrality in EU law eventually imposed its inclusion in French law (see for instance Law 2008-496 of May 2008); and since then, it has been used by a variety of courts. This exemplifies the ways in which EU law is a relevant level of regulation for initiating change in the very understanding of legal concepts in national legal orders. Correlatively, a EU directive on VAW would help reluctant or oblivious national legal orders to frame violence against women as an issue of equality and non-discrimination.

B. A legal action on violence against women would enhance the consistency of EU action

Besides the added-value in terms of asserting of a positive identity for the EU as a polity that is truly committed to rules and values of human liberty and equality, the adoption of a global and hard law instrument on combatting violence against women would also enhance the consistency of EU action.

EU action towards VAW has both external (1) and internal (2) developments. Taken together, these two aspects reveal the EU's identity as a polity that aims at defending human rights –and particularly women's rights. The comparison of these two aspects suggests that, in order to be a consistent political entity and to meet its own standards and objectives, the EU should strengthen its current actions.

1. Coherence between internal and external action of the EU

As a political entity, the EU must show it has an identity and priorities of its own. This implies that EU action in the diplomatic scene must be coherent with the Organization's internal action. In this regard, it is striking that on the international scene the EU clearly acts as an advocate of women's rights, with a special focus on VAW. Its behaviour in this field is part of the EU general policy towards the international protection of human rights. It has already given birth to a large spectrum of actions and affects its relationship with the major States, regions and international organisations. The EU thus acts like a strong supporter of women victims of violence on a worldwide scale. Be it for political or legal purposes, as part of a preventive approach or with actually binding effect, the EU already defends women internationally against gender violence when perpetrated by and/or in third States.

VAW has been mentioned as a priority in the EU's external policy towards third States by its main organs. Reducing and prohibiting gender violence is part of the EU's gender external policy. Violence in all its manifestations is a political concern for the European

Parliament²⁰. The Council of the European Union also stressed “the importance of tackling gender-based violence in all of its manifestations, including harmful traditional and customary practices such as female genital mutilation”²¹. The EU Council adopted the *EU Guidelines on Violence against Women and Girls and Combatting all Forms of Discrimination against them* to highlight the importance of this topic for the EU²². The Commission also stresses that specific action is needed to eliminate impunity²³, and largely address foreign policy issues.

This mainstream EU external action regarding VAW has become an important aspect of the EU identity as it plays out at different levels. It forms part of the economic, development and humanitarian policies of the EU, of what is required from candidates to EU membership, and of EU foreign policy within broader organizations and universal initiatives.

Firstly, reducing gender violence has become a priority of the EU’s development policy and humanitarian action. After gender issues have become part of the EU humanitarian policies priorities, a special focus has been made on the question of violence. The VAW issue has been presented as one of the objectives of humanitarian action in the EU Plan of Action published in 2008²⁴. Moreover, the European Consensus on Humanitarian Aid thus recognises that a focus on VAW is necessary in all humanitarian assistance policies: “protection strategies against sexual and gender based violence must be incorporated in all aspects of humanitarian assistance”²⁵. Strengthening EU support to partner countries in combatting gender-based violence and all forms of discriminations against women and girls has become one of the Specific Objectives mentioned in the Operational Framework of the *EU Plan of Action on Gender Equality and Women’s Empowerment in Development* for the 2010-2015 period²⁶. Where there are no specific agreements with the State concerned²⁷, the EU instrument for Democracy and Human Rights may enable the EU to act in favour of diminishing VAW²⁸. Project combatting family-based violence against

²⁰ See the Parliament debates, and for instance: P7_TA(2011)0340 and 2003/C 33 E/23.

²¹ *Gender Equality and Women’s Empowerment in Development Cooperation*, Conclusions of the Council and of the Representatives of the Governments of the Member States meeting with the Council, 15 May 2007, para. 8.

²² See: *EU Guidelines...* (*op.cit.* note 1).

²³ Communication from the Commission to the European Parliament and the Council, *Gender Equality and Women Empowerment in Development Cooperation*, 15 December 2008.

²⁴ Commission Staff Working Paper, *European Consensus on Humanitarian Aid – Action Plan*, SEC (2008) 1991.

²⁵ Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission (2008/C 25/01), §39.

²⁶ *EU Plan of Action on Gender Equality and Women’s Empowerment in Development 2010-2015*, SEC(2010) 265 final: see Operational Framework, Point No. 8.

²⁷ For an example of a specific agreement, see *infra*, Cotonou Agreement, 2005.

²⁸ Combatting VAW is one of the objectives of the financing instrument: Regulation (EC) n°1889/2006 of the European Parliament and of the Council on Establishing a Financing Instrument for the Promotion of Democracy and Human Rights Worldwide, 20 December 2006, article 1.

women have already been financed, for instance in Vietnam (2008-2010), Philippines (2009-2011), Kyrgyzstan (2007-2010), and in Tajikistan (2008-2009)²⁹.

As far as economic cooperation is concerned, a special focus on VAW is part of the attention paid to gender issues. In its relationship with the EuroMed countries, the EU has continuously stressed the importance of the status of women and of the elimination of violence against them. The Euro-Mediterranean partnership aims at combatting all forms of VAW. Such an objective needs “adequate policies, legislation and infrastructure”, along with consciousness-raising programs³⁰. The elimination of VAW has turned into a priority for the UE and the other States involved in the EuroMed³¹. It has given rise to manifold national policies from part of both EU Member States and Mediterranean countries³². In that context, gender-based violence and genital mutilations have then been mentioned as needing further efforts to reinforce the already existing Egyptian policy³³.

The Strategic Partnership with Africa³⁴ and the cooperation with African, Caribbean and Pacific countries also deal with the VAW issue. In 2003, VAW has been mentioned as a worrying situation needing particular attention in the future of this partnership³⁵. The fight against gender-based violence has then been mentioned in the ACP-EU Treaties as a means of reducing the HIV problem³⁶ and a necessary part of peace-building policies, conflict prevention and resolution, and of the responses to situations of fragility³⁷.

²⁹ See Compendium 2007-2009, Promoting Democracy and Human Rights in Asia, *The European Instrument for Democracy and Human Rights (EIDHR)*, http://ec.europa.eu/europeaid/what/human-rights/documents/compendium_asia_2007-2009_en.pdf.

³⁰ See e.g.: Ministerial Conclusions on Strengthening the Role of Women in Society, 14-15 November 2006, Istanbul, § 10 f), and 12, § c).

³¹ Conclusions, Union for the Mediterranean, Second Ministerial Conference on Strengthening the Role of Women in Society, Marrakesh, 11th and 12th of November 2009, §13; Ministerial Conclusions on Strengthening the Role of Women in Society... (2006-2007), *op. cit.*, p.11; Euromed Partnership: *Strengthening the Role of Women in Society*, Multi-Annual Report 2006-2009, p.39; Ministerial Conclusions on Strengthening the Role of Women in Society, Implementation Review, Annual Report 2008-2009.

³² See e.g.: Ministerial Conclusions on Strengthening the Role of Women in Society, Implementation Review, Final report 2006-2007, § 1.2, p.24; Ministerial Conclusions on Strengthening the Role of Women in Society, Implementation Review, Final Report 2007-2008, § 2.4, p.35.

³³ EU/Egypt Action Plan, in 2008/688/CE.

³⁴ Council of the EU, Lisbon, *The Africa-EU Strategic Partnership. A Joint Africa-EU Strategy*, 16344/07,9 December 2007, §63.

³⁵ Opinion of the European Economic and Social Committee on the ‘Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards a Renewed EU-Pacific Development Partnership*’ JOINT (2012), 2013/C 76/12, §1.5.

³⁶ Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, as first amended in Luxembourg in 25 June 2005, § 23d.

³⁷ Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, ... 2005 (*op. cit.*), Article 11.

Secondly, the EU requires that candidates to membership effectively prevent and sanction gender violence within their national legal orders. The community *acquis* supposes for candidates to address and reduce VAW throughout both national and international efforts. For instance, the EU has thus taken due note of the progress Albania accomplished regarding VAW, “including some significant steps, notably an increase of seizures of criminal assets, the adoption of a comprehensive strategy on property reform, and amendments to the criminal code strengthening sanctions for domestic violence”³⁸. It also requires additional actions from some States: Serbia has been asked for further measures to develop its internal policy³⁹ while Iceland was asked to ratify the Council of Europe Convention on preventing and combatting violence against women and domestic violence⁴⁰. The EU is also requiring from Turkey that it make efforts to significantly reduce the widespread phenomenon of VAW⁴¹. Besides the explicit requirements and demands in connection with accession and the community *acquis*, the EU’s influence can also be observed in the case of both the Romanian Act 217 of 2003 on Preventing and Combatting Violence within the Family and the Bulgarian Protection against Domestic Violence Act of 2005. National politicians were able to instrumentally portray the reforms as necessary in view of EU accession, even though this was not strictly speaking in the community *acquis* (yet)⁴².

Thirdly, the EU often takes part in international broader initiatives to reduce VAW. According to the *Guidelines*, EU action can be based on “the relevant articles of the Conventions on human rights and international humanitarian law and the Rome Statute establishing the International Criminal Court”⁴³. The EU has affirmed the importance it grants the topic throughout various statements; for instance, one should mention the EU Statement on the International Day for the Elimination of Violence against Women of 29 November 2012⁴⁴. EU’s action in favour of protecting women against violence also takes place within universal intergovernmental organizations. To be more precise, the Union action is closely linked to the UN policies and organs.

It is involved in programs and actions within the UN system. For instance, a joint EU-UNICEF Project was centred on genital mutilations in Egypt, Eritrea, Ethiopia, Senegal,

³⁸ Communication from the Commission to the European Parliament and the Council, *Enlargement Strategy and Main Challenges 2012-2013*, COM(2012) 600 final.

³⁹ Communication from the Commission to the European Parliament and the Council..., *op. cit.*, p. 44.

⁴⁰ Communication from the Commission to the European Parliament and the Council..., *op. cit.*, p. 73.

⁴¹ See e.g.: Olli Rehn, EU Commissioner for Enlargement, Women’s rights in Turkey’s EU Accession, SPEECH/09/128, Seminar on Gender equality in Turkey and the EU, Brussels, 18 March 2009.

⁴² See C. Chiva, ‘The Limits of Europeanisation. EU Accession and Gender Equality in Bulgaria and Romania’, *Perspectives on European Politics and Society* (2009), vol. 10, no. 2, p. 204.

⁴³ *Guidelines...* *op. cit.*, §1.

⁴⁴ EU Statement on the International Day for the Elimination of Violence against Women, OSCE Permanent Council Nr 933, Vienna, 29 November 2012.

Sudan and India⁴⁵. The EU also participates in the UN Commission on the Status of Women in which it supports the adoption of a resolution on the elimination of VAW. Together with the UN, the EU also co-organized a conference on women's leadership in the Sahel which dealt with the issue of VAW. It is also worth mentioning that the adoption of a United Nations' Resolution to help tackle female genital mutilation received strong support from the EU in the Joint Statement on the International Day against Female Genital Mutilation⁴⁶.

Further, the EU also participates in the United Nations' normative policy regarding VAW. It helps the UN developing its law and conforms to its rules. It frequently refers to the UN Development Goals and to the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in its actions, with a special focus on the Beijing Platform of Action. The EU has also decided to support the COMMIT initiative the UN Women are directing to have States and other actors committing to reduce VAW by internal and external actions. The "solid multilateral *acquis*" on which the EU policy is based on, is mostly founded on UN rules and actions, as recognized in the *Guidelines* which refer to the UN Secretary-General's in-depth study on all forms of violence against women (2006), the work on indicators on violence carried out by the UN Special Rapporteur on Violence against Women (2008), Ms Yakin Ertük, and Security Council Resolution 61/143 on intensification of efforts to eliminate all forms of violence against women (2006).

The EU is also particularly involved into UN security policy based on Security Council resolutions 1325 (2000) and 1820 (2008) on women, peace and security⁴⁷, the latter of which particularly emphasizes the need to eliminate sexual violence during armed conflicts and in peace-building contexts. To support UN efforts to involve women in peace and security policies, the EU organised various meetings that present the fight against VAW as a priority. It celebrates the 10th anniversary of the Resolution⁴⁸ preparing three events together with Belgium Government; on 25-26 May 2011, it organised a Meeting on Cross-Regional Program regarding South Caucasus and Central Asia;⁴⁹ on 21 June 2011, after a series of dialogues organised with Civil Society Organisations, it stressed the necessity of reducing sexual violence during conflicts⁵⁰: The EU thus behaves like a central actor of the Security Council policy and fight against VAW in war and peace-building contexts.

⁴⁵ The EU provided financial support for a total of 3,991,000 € to a UNICEF policy over the period 2008-2012.

⁴⁶ Joint Statement on the International Day against Female Genital Mutilation, 6 February 2013, MEMO/13/67.

⁴⁷ UN Security Council, S/RES/1325 (2000), 31 October 2000; UN Security Council, S/RES/1820 (2008), 19 June 2008.

⁴⁸ http://www.peacewomen.org/news_article.php?id=153&type=event.

⁴⁹ *Strengthening women's peace movement and networking to advocate for enforcement of UN Security Council's Resolutions*, Meeting report, 25-26 May, 2011, Tbilisi, http://eeas.europa.eu/human_rights/women/docs/2011_may_25-26_meeting_report.pdf.

⁵⁰ Civil Society Dialogue Network (CSDN) Policy Meeting: Women, Peace and Security in EU Common Security and Defence Policy Missions, 21 June 2011, Brussels.

As VAW is considered to be a priority for the EU, its foreign policy has to take this fight into account on every moment and in every place. In 2008 the Commission decided that VAW must now be part of the mandate of all its representatives⁵¹. In 2011, at least 50% of the EU Delegations had already introduced specific measures on the role of external assistance and development co-operation in their policy⁵². By 2015 80% of EU delegations will have specific measures on the role of external assistance and development cooperation introduced in their local strategies⁵³. Such policies take ground on the *EU Guidelines* and the *EU Plan of Action on Gender Equality in Development Cooperation*⁵⁴. For instance, the Delegation in the US issues press releases and other kind of information about EU action to protect women from violence. More particularly, on the International Day against Female Genital Mutilation, the Delegation website features information and statements from EU leaders on EU action. Many of the mandates of the EU Special Representatives abroad also mention the Security Council Resolution 1325 (2000) on Women, Peace and Security⁵⁵, and considers its objectives as binding⁵⁶.

In the diplomatic scene, the EU thus appears to draw much attention to the respect of international law of human rights requirements regarding VAW. As such, it acts like a strong supporter of women against violence. Not only does the EU promote women's rights and try to prevent violence but it also requires from third countries that they themselves fight against that grim reality. In that context, a strong coherence is needed from the EU to truly act as the political entity defending women's rights it seeks to be. If the EU continues to impose such standards on third States but not on its own institutions and Member States, it places itself at risk of being accused of abiding by "double standards". It thus appears necessary to prepare a new instrument in order to be exemplary and tackle such an accusation.

Internal and external aspects of a policy are closely linked. According to Article 21 of the Treaty on European Union, EU foreign policy must be guided by the same principles and objectives that gave birth to the EU and were used to make of the EU a real political entity. As far as VAW is concerned, it is striking that EU external and internal actions regarding gender violence are already presented together as two aspects of the same action. By explicitly incorporating certain international obligations concerning VAW into the EU *acquis* the *Guidelines* not only broaden the internal EU framework but also

⁵¹ *Guidelines... op. cit.*, § 3.2.1.

⁵² *EU Plan of Action on Gender Equality and Women's Empowerment in Development 2010-2015*, SEC (2010) 265 final, see Operational Framework, Specific objective No.8, p. 16.

⁵³ *EU Plan of Action... op. cit.*, p.16.

⁵⁴ See Objective 8.

⁵⁵ See *supra*.

⁵⁶ See for instance: Council Decision 2013/133/CFSP of 18 March 2013 appointing the European Union Special Representative for the Sahel, Article 3; Council Decision 2012/325/CFSP of 25 June 2012 extending the mandate of the European Union Special Representative for Sudan and South Sudan, article 3(j); Council Decision 2012/329/CFSP of 25 June 2012 extending the mandate of the European Union Special Representative for the Horn of Africa, article 3§1 (k); Council Decision 2012/327/CFSP of 25 June 2012 extending the mandate of the European Union Special Representative for the Southern Mediterranean region, article 3(e); Council Decision 2012/33/CFSP of 23 January 2012 appointing the European Union Special Representative for the Middle East Peace Process, Article 3(k).

“underpin European action to protect women’s rights and promote gender equality in external relations [...]”⁵⁷. Such close links between these internal and external interventions of the EU have also been made clear in a Joint Statement by Catherine Ashton made recently together with Viviane Reding, Andris Piebalgs, Cecilia Malmström and Tonio Borg at the occasion of the International Day against Female Genital Mutilation: “the European Union is taking action both abroad and at home”⁵⁸. The need for a broad domestic action of the EU regarding VAW is thus obvious. As the EU action regarding VAW is already presented as two-sided, the need for a real domestic policy and a broad normative instrument within EU law has to become priority for the EU.

As a matter of principle, every EU political action towards third States has to be based on the Union’s own priorities and goals: Article 21, § 1, TEU, provides that “The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law”⁵⁹. Moreover, and it is of course very important in terms of consistency and coherence of EU action on VAW, Article 21, § 3, TEU provides that “The Union shall ensure consistency between the different areas of its external action and between these and its other policies”.

The EU external actions dealing with VAW thus create a favourable context for a domestic competence of the EU to be cleared up so that the Union can adopt a binding instrument on the topic. Had it a general binding instrument of its own, the EU would appear as a better actor in the fight against VAW. It would strengthen its position as an international actor protecting women from VAW as it would turn the EU into an independent polity meeting its own ends and defining its own priorities using proper means. A general binding text would reinforce the already undertaken external action of the EU and help the Union resemble the human rights model it aspires to be.

In a nutshell, for the EU action to be fully coherent, its current policy strongly needs to be echoed in EU law. In the name of the necessary internal/external coherence of EU action, the adoption of a European binding instrument seems unavoidable. Such an external policy from the EU needs an internal counterpart, or to be more accurate an internal exemplary binding instrument with a broad purview, that would deal with all types of violence women have to face. The adoption of such a legal text is not only politically desirable. It can also be considered a legal necessity as it would contribute to a better consistency between the external action of the EU and its other policies.

2. Coherence, core values and European integration

⁵⁷ *Guidelines... op. cit.*, p. 19.

⁵⁸ Joint Statement on the International Day against Female Genital Mutilation, 6 February 2013, MEMO/13/67.

⁵⁹ See also Article 8 TEU.

Indeed, the double commitment of the EU in the field of the fight against various forms of discrimination on the one hand, and towards gender equality on the other hand, would only be further confirmed and entrenched by a global instrument combatting VAW (a). A strong action on this subject would also be consistent with core objectives of EU integration process, such as the deepening of the Area of Freedom, Security and Justice (b). Last but not least, the added-value of a directive on the subject has also to be assessed in view of the consequences it would entail for the EU to remain inactive in this field (c).

a) The double commitment of the EU in the field of gender equality and non-discrimination

The EU has strong credentials in the field of gender equality. In fact, at the global level, it may well claim to be one of the very few international/regional organizations that have taken gender seriously. Undoubtedly, progress can still be made. Some applications of EU law on gender equality can be criticized for relative short-sightedness in that they tend to equate the concepts of 'gender' and 'sex' – thus at times they fail to protect 'gender' in a broader sense that would encompass gender identity, or to understand it as challenging a heterosexual model of polity. But globally speaking, gender equality is indisputably protected under EU law.

The 1957 Founding Treaty already proved quite progressive at the time by prescribing equal pay between men and women. On that basis, a strong body of equal treatment legislation has consolidated; all public policies within the EU were later subjected to gender mainstreaming – so that no policy in Europe can avoid being thought over and questioned from a gendered perspective. At first, the principle of equal pay was conceived both as an economic tool aiming at the elimination of distortions of competition between undertakings established in different Member States, and as a part of the social aims of the Community⁶⁰. Thanks to the interpretation and strong action of the ECJ, the economic aim is now secondary to the social aim pursued by the principle of equal pay, which has been re-characterized as the expression of a fundamental human right⁶¹.

Moreover, the EU has favoured specific measures for the advancement of women. All in all, these commitments and interventions are very important and mutually self-reinforcing. It is therefore only logical that ending gender violence counts as one of the 6 main objectives of the European Commission's Strategy for equality between women and men for 2010-2015⁶².

The EU also has strong credentials in the field of anti-discrimination law and policies, especially since 1999, when former Article 13 of the EC Treaty (today Article 19 TFEU) provided the European Community with the competence and the legal basis to take appropriate action to fight discrimination based on sex, race or ethnic origin, religion or

⁶⁰ ECJ, 8 April 1976, *Defrenne v/ SABENA*, 43/75, §§ 9-10.

⁶¹ ECJ, 10 February 2000, *Schroder*, C-50/96, § 57.

⁶² *Strategy for equality between women and men for 2010-2015*, COM (2010) 491, 21 September 2010.

belief, disability, and age or sexual orientation. This has led to the adoption of a number of non-discrimination directives, including on the grounds of gender⁶³.

Both these commitments of the EU (in the field of gender equality and in that of anti-discrimination law) would find their coherence enhanced by legislative action to combat VAW. Indeed, the concept of gender allows framing VAW as a form of gender discrimination; subsequently, the adoption of a global instrument in the field by the EU can only be viewed as a logical corollary to its much welcomed action in both the field of gender equality and anti-discrimination over the years.

Violence against women is a form of gender discrimination because⁶⁴:

- It disproportionately affects women⁶⁵
- It is a consequence of implicit albeit socially accepted hierarchies that place women in inferior positions
 - o This is true of sexual forms of violence: rape, domestic violence, sexual harassment... all can be related to structural inequality between the sexes that posits men's need for sexual liberation whatever its shape and form and (simultaneously) women's availability to sexual intercourse as a global social function
 - o This is also true of 'traditional' (cultural, religious...) practices such as honour crimes or female genital mutilation that construct the body of girls and women as a legitimate locus for social practices and simultaneously define their right to bodily integrity as less valuable than that of boys' and men's.
 - o This is also true of trafficking, slavery and other contemporary forms of exploitation. These are practices that commodify women –and even more so migrant women and women from foreign ethnic backgrounds.

Moreover, many studies and statistics show the devastating effects of VAW –well beyond the violent acts themselves. Along with physical and psychological health-related aspects, one should also take into account the overall quality of life that is impacted. This includes participation and engagement in various aspects of life and society: loss of

⁶³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ L 180*, 19 July 2000, p. 22; Council Directive 2000/78/EC of 27 November 2000 establishing a legal framework for equal treatment in employment and occupation, *OJ L 303*, 2 December 2000, p. 16; and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between women and men in the access to and supply of goods and services, *OJ L 204*, 26 July 2006, p. 23.

⁶⁴ For a thorough and powerful intervention in support of this notion, see the dissenting opinion of Judge Pinto de Albuquerque in ECtHR, 26 March 2013, *Valiuliene v. Lithuania*, Application n°33234/07.

⁶⁵ Ever since CEDAW Recommendation n°19, it has been widely acknowledged that violence between intimates affects women disproportionately, demarcating women as a group in need of proactive State protection. The same conclusion was reached, for instance, in the *UN Secretary-General's In-depth Study on All Forms of Violence Against Women*, 2006, and the *UNICEF Report on Domestic Violence Against Women and Girls*, Innocenti Digest, volume 6, 2000.

productivity and output of the women affected as well as of their support networks, broader social costs⁶⁶.

International human rights law, both universal and regional⁶⁷ have made significant contributions to such forms of reasoning that construct violence against women as gender discrimination. This is an element of context that is important because action by the EU at the legislative (hard law) level would be a great signal and echo to the tremendous efforts that have taken place at the international level. As international human rights law is progressively moving forward and taking decisive steps in terms of asserting (i) freedom from systemic violence as a human rights and (ii) corresponding State obligations, experts of the field consider that the translation/incorporation of these renewed perspectives within domestic legal orders is both the necessary next and trickiest step⁶⁸. To that extent, the intervention of the EU legal order would be of the utmost importance. Indeed, the EU legal order may well be described as posited somewhere in between the international legal order and that of Member States. In addition, the high and binding level of integration of the EU and national legal orders makes any move taken by the EU a very significant one in terms of actual effects in domestic law. These elements combined indicate that if the EU were to take legislative action in the field of violence against women, it would both take over from and give voice to international law's contribution in the field, in a way that international law cannot because of its relatively greater remoteness and disconnect with national legal orders.

b) The necessary deepening of the Area of Freedom, Security and Justice

The Lisbon Treaty provides that "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combatting of crime"⁶⁹. It also provides that "The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters"⁷⁰. Obviously enough, a directive on VAW would perfectly serve these core objectives, by deepening the link between prevention of violence, freedom of movement, and access to justice. Such an initiative would be consistent with central priorities expressed by EU institutions, such as in the Stockholm Programme. In that fundamental roadmap for EU tasks in the Area of Freedom, Security and Justice for the period 2010-2014, the European Council states that promoting citizenship and fundamental rights are the EU's main priorities. It admits that "vulnerable groups in particularly exposed situations, such as women who are the victims of violence or of genital mutilation or persons who are

⁶⁶ World Health Organization, *Violence Against Women: Intimate Partner and Sexual Violence Against Women*, 2011, Fact Sheet n°239.

⁶⁷ See *infra*, Part I, A. 2.

⁶⁸ B. Meyersfeld, *Domestic Violence and International Law*, Hart, 2012.

⁶⁹ Article 3, § 2, TEU.

⁷⁰ Article 67, § 4, TFEU.

harmed in a Member State of which they are not nationals or residents, are in need of greater protection, including legal protection”⁷¹.

First, a directive on VAW would favour free movement of women throughout the EU territory, because of the confidence they would have, thanks to a global and hard-law instrument on VAW, to be treated according to minimum legal standards of protection and in a non-discriminatory manner wherever they are in the EU. For example, take the facts of a recent case on domestic violence by the European Court of Human Rights involving Lithuania in which the plaintiff, Ms. Valiuliene, complained that the authorities had failed to investigate her allegations of repeated domestic violence (repeated beatings) by her Belgian partner and to hold him accountable and that the length of the criminal proceedings had been excessive⁷². One can turn things around and imagine a Belgian woman who moves to Lithuania to start working at the European Institute for Gender Equality in Lithuania’s capital, Vilnius, meets someone there and eventually finds herself in a similar situation as Ms. Valiuliene unprotected by national laws and institutions against the violence of her partner in ways she may not have been exposed if she had remained in Belgium (or any other EU country protecting women better against domestic violence). On the basis of such facts, the freedom of movement formally enjoyed through European rules and even within EU institutions becomes *de facto* undermined and less attractive for women who might have second thoughts on moving to places where their bodily and psychological integrity and dignity are potentially less protected and respected. Second, it would also facilitate access to justice for women, by ensuring them support, protection, and ability to participate in criminal proceedings when they are victims of violence. Of course, EU institutions have already acknowledged the positive impact of an action in this field, as the adoption of the “victim’s package” clearly shows: it is today undisputed that “a specific action in order to establish a common minimum standard of protection of victims of crime and their rights in criminal proceedings throughout the Union (...) will enhance citizen’s confidence that the European Union and its Member States will protect and guarantee their rights”⁷³. It is also undisputed that any action aiming at improving access to justice for citizens when they are victims of crimes throughout the Union is founded on the mutual recognition of judicial decisions in civil and criminal matters, which is the cornerstone of the Area of Freedom, Security and Justice (AFSJ).

Turning now to the very philosophy of the AFSJ, the added-value of a directive on VAW on the creation of a common space for living and moving should be stressed out. Recently, in a very important judgment⁷⁴, the CJEU stressed the link between the AFSJ and the legislative body of EU law related to European Citizenship and free movement and residence for EU citizens. For the first time, and thanks to the entry into force of the Lisbon Treaty, the CJEU accepted to interpret the notion of “imperative grounds of public

⁷¹ European Council, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, OJ C 115, 4 May 2010, p. 10.

⁷² ECtHR, 26 March 2013, *Valiuliene v. Lithuania*, n°33234/07.

⁷³ Resolution of the Council of 10 June 2011 on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings, OJ C/187, 28 June 2011, p. 1.

⁷⁴ CJEU [GC], 22 May 2012, *P.I.*, C-348/09.

security”, which can allow a State to expel a long-term resident EU citizen, in the light of Article 83, § 1, of the TFEU, which provides that the sexual exploitation of children is one of the areas of particularly serious crime with a cross-border dimension in which the European union legislature may intervene. It is thus “open to the Member States to regard criminal offences such as those referred to in the second subparagraph of article 83(1) TFEU as constituting a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population and thus be covered by the concept of ‘imperative grounds of public security’, capable of justifying an expulsion measure under article 28(3) of Directive 2004/38”⁷⁵. But that should not necessarily lead to the expulsion of the person concerned: the host Member State must take into account various elements, for example how long the individual has resided on the territory, social and cultural integration into that State and the extent of his/her links with the country of origin⁷⁶.

Why is such a conclusion important with regard to the adoption of a hard-law instrument on VAW? First of all, the ECJ clearly links the achievement of an AFSJ to the EU legislation on citizenship and free movement (here, Directive 2004/38). This connection could potentially be decisive for the development, both of the EU citizenship and of the AFSJ. Women could, and should be protected, not only as women in their fundamental rights, but also as citizens of the EU considered as the main actors and beneficiaries of the Area progressively built on. Secondly, and this point should be particularly highlighted, this type of reasoning underlines a new conception of EU objectives, far more ambitious than the first economic ones. This conception was clearly exposed by Yves Bot, the Advocate General who delivered his opinion on *P.I.* According to him, “the creation of a common space for living and moving also requires account to be taken, in the overall interest of that communal space, that is to say the social cohesion of the Union, of the phenomenon of delinquency, *even if it means developing common means of preventing and combatting it. (...) That is the task and ambition of the space of freedom, security and justice*”⁷⁷. If Mr I. can be expelled from the host State, it is because the integration of a EU citizen “is not based only on territorial and time factors, but also on qualitative elements. To acknowledge that Mr. I. may derive from his criminal conduct the right to the enhanced protection provided for in article 28(2) and (3) of Directive 2004/38 would (...) conflict with the values on which citizenship of the Union is based”⁷⁸.

The achievement of an Area of Freedom, Security and Justice then implies the development of common means to prevent violence, which is why a directive on VAW seems a necessary and coherent step for the EU.

c) What silence and inaction mean

Another element that should be decisive in the deliberation within EU institutions over whether or not to take action in the field of combatting violence against women has to do

⁷⁵ *Ibid.*, § 28.

⁷⁶ *Ibid.*, § 32.

⁷⁷ Opinion of Advocate General Yves Bot, *P.I.*, 6 March 2012, § 46.

⁷⁸ *Ibid.*, §§ 60 and 62.

with the fact that non-legislating is a decision exactly as important as the decision to legislate; in fact, it may even be a decision more difficult to justify and accommodate in the larger framework of EU actions than its opposite. This holds true both from a conceptual/political point of view and from a technical point of view.

Conceptually, it is very important to acknowledge the fact that the decision, for an entity such as the EU, *not* to act in a given field or *not* to address a given topic is a decision exactly in the same way as the decision to do so. Linguistic scholars have made a great contribution to speech acts theory and its political utility by establishing that silence and speech should not be viewed or thought of as mutually exclusive. Silence, they claim, is not the opposite of discourse⁷⁹; in fact, any discourse is constituted in part by its positive dimension (what is said) but also by its negative dimension (what is not said).

Arguably, the same goes with action. Action can be understood to cover what is done but also what is not. To that extent, when faced with such a large, significant and endemic problem as violence against women, there is no way for a polity such as the EU to escape; it necessarily addresses it. The reasoning of the European Court of Human Rights (hereinafter ECtHR) in the *Opuz v. Turkey* case of 2009⁸⁰ is worth mentioning here: in this case of extreme domestic violence, the ECtHR declares that there has been a violation of Article 3 of the European Convention of Human Rights⁸¹ (hereinafter ECHR) “in respect of the authorities' failure to protect the applicant against domestic violence”. More precisely, one reads at paragraph 198 that the “judicial passivity” of the Turkish authorities is key to the finding of a violation of ECHR obligations, for the judicial authorities failed to take the victim’s complaints seriously, and did not take any preventive or punitive measures. Along the same lines, the current case-law of the ECtHR is a good exemplification of the fact that States are accountable to more than negative obligations in the realms of Articles 2, 3 and 8 (which are the main legal provisions of the ECHR that instances of violence against women threatens). Not only should States thus refrain from actively infringing upon the right to life and physical integrity or the right to private life, they should also take positive action in order to ensure that these rights are not threatened by others –including third private parties. Judicial passivity or unjustifiably lengthy procedures⁸² can thus lead to ECHR violation rulings. These examples show that inaction is a choice –and can thus lead to instances of legal accountability. In fact, in another landmark VAW case, the ECHR has ruled that inaction can be interpreted as condoning⁸³; this clarifies States’ accountability for inaction.

⁷⁹ G. Bhambra, R. Shilliam, eds., *Silencing Human Rights. Critical Engagements with a Contested Project*, Palgrave MacMillan, 2008.

⁸⁰ ECtHR, 9 June 2009, *Opuz v. Turkey*, Application n°33401/02.

⁸¹ 1950, ETS 5.

⁸² See e.g.: ECtHR, 24 April 2012, *Kalucza v. Hungary*, Application n°57693/10.

⁸³ ECtHR, 28 May 2013, *Eremia v. Republic of Moldova*, Application n°3564/11, §89: “In the Court’s opinion, the combination of the above factors clearly demonstrates that the authorities’ actions *were not a simple failure or delay in dealing with violence against the first applicant, but amounted to repeatedly condoning such violence* and reflected a discriminatory attitude towards the first applicant as a woman. The findings of the United Nations Special rapporteur on violence against women, its causes and consequences only support the impression that the authorities do not fully appreciate

In any case, if the EU were to remain inactive or silent in the field of VAW (and leave it to States or other levels of regulation to deal with the issue), it would need to prepare for justification – for remaining silent on a given topic will not erase the problem. And eventually, the EU will not be able to eternally escape political accountability for not addressing the issue at a time where it is both undisputed and well-documented as a social issue, and technically explored in terms of regulatory options⁸⁴. The prevalence of VAW makes it difficult indeed to claim good reasons for setting the topic aside; it has been established that one in two women across Europe experience one form of VAW during the course of their lifetime⁸⁵. Regulatory options have been explored – here and in several other studies⁸⁶. In this context, inaction and action are equally involving and potential sources of accountability for the EU.

Here, the analogy with the manner in which the legal order of the Council of Europe has faced difficulties after years of denying instances of racial discrimination in Europe is instructive. British scholar Marie-Bénédicte Dembour has made a compelling point that serves as a useful analogy here. In her study of the ECtHR's case law on racial discrimination, Dembour demonstrates that the ECtHR's case law "bypasses racism. In support of this point, suffice it to say that it took the ECtHR four and a half decades for it to find for the first time a state in violation of the prohibition of racial discrimination". Furthermore, she analyses that "silencing of racism" as the simultaneous act of constitution of "Europe as a place where the liberal state, democracy and the rule of law flourish". In other words "it is only because racism is being silenced that the idea of democratic Europe emerges". She also cites the vocal dissenting opinion of ECtHR judge Vanni Bonello under the *Anguelova* judgment of 2002⁸⁷.

"I consider it particularly disturbing that the Court, in over fifty years of pertinacious judicial scrutiny, has not, to date, found one single instance of violation of the right to life (Article 2) or the right not to be subjected to torture or to other degrading or inhuman treatment or punishment (Article 3) induced by the race, colour or place of origin of the victim (...). Leafing through the annals of the Court, an uninformed observer would be justified to conclude that, for over fifty years democratic Europe has been exempted from any suspicion of racism, intolerance or xenophobia. The Europe projected by the Court's case-law is that of an exemplary haven of ethnic fraternity, in which peoples of the most diverse origin coalesce without distress, prejudice or recrimination. The present case energises that delusion (...). Kurds, coloureds, Muslims, Roma and others are again and again killed, tortured or maimed, but the Court is not persuaded that their race, colour, nationality or place of origin has anything to do with it (...). This inability to establish a

the seriousness and extent of the problem of domestic violence in Moldova and its discriminatory effect on women" [emphasis added and internal citations omitted].

⁸⁴ See European Commission, DAPHNE, *Feasibility study to assess the possibilities, opportunities and needs to standardise national legislation on violence against women, violence against children and sexual orientation violence*, Luxembourg: Publications Office of the European Union, 2010.

⁸⁵ H. Johnson, N. Ollus, S. Nevala, *Violence against women: an international perspective*, Springer, 2008; see also WAVE, *Country report 2008: A Right for Protection and Support?*, 2008 (<http://www.wave-network.org/start.asp?ID=23087&b=15>).

⁸⁶ See in particular: European Commission, DAPHNE, *Feasibility study ...op. cit.*

⁸⁷ ECtHR, 13 June 2002, *Anguelova v. Bulgaria*, Application no. 38361/97.

link between physical abuse and ethnicity comes notwithstanding that the red light about the special treatment of Roma by the Bulgarian police in breach of Articles 2 and 3 has been flashing insistently and alarmingly: this is the third case of death or brutality of Roma at the hands of Bulgarian police officers decided by the Court (see *Assenov and Others* and *Velikova*) (...). Amnesty International, in a chillingly detailed account, focused on the predilection displayed by police officers for savaging Roma (...)."

This analogy serves as a useful reminder of the fact that for a legal order to remain silent with respect to a given issue in fact amounts to its active choice to *silence* the issue – instead of dealing with it. However, neither racism within Council of Europe High Contracting Parties nor violence against women in EU Member States are absent – even if or when the COE or the EU as legal orders do not name them and take action against them. This, we contend, is something EU institutions and actors should keep in mind: active intervention against the endemic and largely structural problem of violence against women is not only an opportunity to affirm one's existence as an actively value-grounded polity but also as a bravely protective one that avoids the invisibilizing trap and faces its responsibilities towards the vulnerable.

From a more technical point of view, inaction also amounts to allowing situations in which victims of violence are trapped in the gaps and interstices of the various legal orders that they could resort to. As it has been established here as well as in the specialized literature more generally, international law has been a privileged forum for the emergence and consolidation of the notion that violence against women was a form of gender discrimination. Nationally, the history of the salience of VAW as a political and legally addressable issue is very diverse and often is the tortuous result of various initiatives that mix civil and criminal law approaches, preventive and punitive measures. In fact, national responses to VAW have often been adopted 'as things came' and sometimes lack coherence⁸⁸. The combination of these two factors (uncertainties as to civil, criminal, social or equality law to be the best way to address VAW on the one hand, a relative lack of integrated approach of the issue on the other hand) sometimes results in national approaches being somewhat stuck in blind spots and failing to improve the protection they offer (see emblematically the critique of the latest development of French law, that seemingly fails to meet its goal of overcoming the civil/criminal divide by allowing the *juge aux affaires familiales* to order protection injunctions⁸⁹). It thus can be hypothesized that there is a form of path dependency of national responses to VAW to their specific political and legal contexts of adoption that explains many of their shortcomings. This is another strong element in favour of choosing the EU as an appropriate regulatory level of action.

⁸⁸ See more details on this in Part II. A. 1.

⁸⁹ See Assemblée nationale, Rapport n°4169 de la Commission des lois constitutionnelles sur l'application de la loi 2010-769 du 9 juillet 2010: <http://www.assemblee-nationale.fr/13/rap-info/i4169.asp>

Part II. A directive on combatting violence against women in order to remedy to the inconsistencies and gaps of current existing legislations and actions

The added-value of a directive on VAW must also be assessed in the context of national, international and European regulations in this field. Obviously, national legislations on VAW differ widely, while international conventions Member states might have ratified lack the effectiveness of a directive (A). As far as EU law is concerned, it certainly has tackled the issue of VAW, but not from a global and gender-based perspective: lacunas and gaps of existing legislations remain quite obvious (B).

A. National legislations on violence against women: the case for harmonization through EU law

Because of specific national histories as well as the many various conceptions of the role of women in European societies or even the stark differences among European legal systems, a common understanding, definition and regime of VAW does not exist in national laws (1). VAW might be more globally tackled at the supranational level; but as far as international and regional instruments are concerned, they lack the effectiveness a EU directive could have, given its force of penetration in Member States legal orders (2).

1. The absence of a common understanding, definition and regime on the question of violence against women in national laws

VAW is physical, sexual, psychological or economic violence that is directed against women because of their sex/gender or which affects women disproportionately. As a consequence, this definition of VAW includes phenomena as different as rape, sexual assault, domestic violence, sexual harassment (at work and/or in general), stalking, forced sterilizations and abortions, slavery, human trafficking, prostitution, pornography, female genital mutilations, forced marriages, honour based crimes and sexist insults.

Over the past years, within most EU Member States, one can observe some broad common trends concerning these different forms of VAW. There is a general sense today that VAW is increasingly unacceptable in our contemporary societies because it represents a manifestation of historically unequal power relations between men and women which have led to domination over and discrimination against women by men. However, the path towards this consensus has been - and remains - a long one. The first form of VAW against women that is generally recognized and punished is rape, followed by sexual harassment at work (mainly due to harmonization through Directive 2002/73/EC) and domestic violence. The gendered aspects and disparate impact of slavery, forced sterilizations and abortions, human trafficking, prostitution, pornography and sexist insults are also increasingly recognized in national and international law. The latest developments in terms of regulation of VAW are stalking, female genital mutilations, forced marriages and the prohibition of honour-based crimes.

What looks like a linear evolution here is rather the result of long and on-going contestation and controversy both inside and outside national courts and parliaments but also at the broader European level. Depending on the specific national history, the power relations between men and women, the role of religion in the public sphere, the structure of the legal system, and the role of women's movements, this evolution has been faster or slower. Moreover, with regards to some Eastern European Member States there are indications that accession to the EU has also played a role at least favouring, if not outright requiring, the adoption of legislation on VAW and more specifically on domestic violence. Thus, the outcomes and levels of protection of women and girls against all forms of violence within the 27 EU Member States differ widely.

Moreover, the legal regulation of these issues spans areas as different as criminal law, constitutional law, administrative law, labour law, family law, tort law, civil and criminal procedure, international law. This makes a common understanding of VAW even more difficult and again determines different levels of protection of women and girls from country to country. Harmonization, even only in terms of a common and overarching understanding of the phenomenon, is necessary.

A comparative analysis of VAW in the 27 EU Member States shows that there are three broad ways of understanding and legally regulating this phenomenon that can be summarised as unitary and comprehensive (a), piecemeal with some recognition of the gendered dimension of VAW (b), or absent or genderblind provisions (c)⁹⁰.

a) Unitary, comprehensive and gender-specific regulation of VAW

The first one is to regulate VAW from a unitary and all-encompassing perspective. This model consists in an overarching (re-)conceptualization of VAW and a coherent regulation of *all* phenomena that constitute VAW. Thus, rape, sexual assault, domestic violence, sexual harassment, stalking, forced sterilizations and abortions, slavery, human trafficking, prostitution, pornography, female genital mutilations, forced marriages, honour based crimes and sexist insults are not seen any more as distinct and independent phenomena but rather as the manifestations of one and the same problem. Such regulation not only covers the criminalization or prohibition of the substantive behaviours but more importantly includes preventive measures (e.g. education, training of law enforcement personnel), procedural and evidentiary adaptations and innovations (e.g. shifting or sharing the burden of proof or temporary restraining orders) and the creation of new/specialized institutions (e.g. courts, public or private bodies) that supervise or implement the policies developed in order to organically address VAW.

At the national level undoubtedly Spain's 2004 Act on Violence Against Women⁹¹ best corresponds to such a definition. Some of the most innovative aspects of this piece of

⁹⁰ The information on national legislation on VAW is mainly based on two studies: Council of Europe, *Legislation in the Member States of the Council of Europe in the Field of Violence Against Women*, Strasbourg, December 2009, EG (2009) 3 and European Commission, DAPHNE, *Feasibility study ...op. cit.*

⁹¹ Ley Orgánica 1/2004 de Medidas de Protección Integral contra la Violencia de Género, 28 December 2004.

legislation are the introduction of broad preventive measures that encompass education and awareness-raising for example in schools, media and hospitals but also the introduction of specialized courts and specialized public prosecutors that will deal with such legislation.

To a lesser extent one might also include Sweden in this model. While there has not been the adoption of one single piece of legislation dealing in general with violence against women, the laws adopted starting from the late 1990s are the result of an in-depth investigation and report by a Commission on Violence Against Women. The ensuing reform package not only strengthened existing punishments but also insisted on prevention and coordination by public authorities on the issue.

b) Piecemeal legislation with the explicit recognition of gendered forms of violence

This is probably where the majority of EU Member States are situated and which corresponds to the evolution(s) described earlier. As the sensitivity on the issue concerning gendered violence increases, laws and procedures are amended to reflect this. As opposed to the first model, however, this adaptation and development lacks coherence, a more general conceptualization of VAW, generalized preventive measures, and the introduction of new specialized and specific institutions. The focus remains mainly on criminal law with an acknowledgement or at least understanding, nevertheless, that such legislation is specifically tailored to protect women.

For example, Germany introduced a statute protecting women against domestic violence in 2001⁹², followed by legislation protecting against stalking in 2006⁹³. Sexual harassment was introduced in the same year but through a different enactment on equal treatment⁹⁴ thanks to which Germany adapted its national legislation to various European non-discrimination directives. One can observe a similar trend in Italy. In 1996 sexual violence was re-characterized as ‘crime against a person’ instead of as ‘crime against morality’. This theoretical shift allowed introducing successive enactments, in particular statutes protecting women against domestic violence and stalking⁹⁵. France also follows a similar model as exemplified by the latest pieces of legislation on domestic violence⁹⁶, violence against women⁹⁷ as well as on sexual harassment⁹⁸.

⁹² Gesetz zum zivilrechtlichen Schutz vor Gewalttaten und Nachstellungen, 11 December 2001 (BGBl. I, p. 3513).

⁹³ Gesetz zur Strafbarkeit beharrlicher Nachstellungen vom 30. November 2006, introducing a new Article 238 into the existing Criminal Code.

⁹⁴ Allgemeines Gleichbehandlungsgesetz (AGG), 14 August 2006 (BGBl. I, p. 1897).

⁹⁵ Decreto legge 23 febbraio 2009, n. 11, introducing a new Article 612 *bis* into the existing Criminal Code.

⁹⁶ Loi n°2006-399 renforçant la prévention et la répression des violences au sein du couple ou commises contre les mineurs, 4 April 2006.

⁹⁷ Loi n° 2010-769 relative aux violences faites spécifiquement aux femmes, aux violences au sein des couples et aux incidences de ces dernières sur les enfants, 9 July 2010.

⁹⁸ Loi n° 2012-954 relative au harcèlement sexuel, 6 August 2012.

Many Eastern European Member States such as Bulgaria or Romania also fall into this category where accession to the EU has shown some spill-over effects in terms of spawning the adoption of specific legislation on domestic violence respectively in 2003 and in 2005. However, how far these are only formalistic adaptations that are not an indication of a conceptual shift in the understanding of VAW, remains an open question. In fact, one can see that especially in some Eastern European Member States (Bulgaria, Hungary, Lithuania, Latvia but also in Denmark and Malta) sexual violence is still framed as a crime against morality rather than as a crime against a person's (sexual) integrity/self-determination/autonomy⁹⁹. Moreover, there are indications that at least in Latvia marital rape is not criminalized as a separate offence¹⁰⁰.

c) Absence of legislation or merely piecemeal legislation which subsumes gendered violence under more general, genderblind (criminal law) provisions

This last model of regulation is different from the second one, either because no specific legislation has been adopted, meaning that generic criminal law provisions are used to protect women/girls against violence (e.g. stalking would be punished under harassment) or because the adopted legislation/amendment consists in a genderblind adaptation of criminal law where the specificity of VAW is not explicitly acknowledged. Needless to say, preventive measures, or specific institutions are completely absent in this model of regulation.

This approach can be understood as trying to include male victims of violence and same sex couples. However, it erases the gendered predominance of VAW and risks leaving women/girls unprotected from certain forms of violence. Female genital mutilation, where criminalized, is always gender-specific.

Examples of this model are the Netherlands where domestic violence is protected 'only' by the general provisions of criminal law (such as rape, sexual assault, abuse, manslaughter or murder). Moreover, the liberal regulation of pornography and prostitution risks exposing certain groups of women to violence and exploitation.

But also the United Kingdom would fall into this model. For example, the Protection from Harassment Act 1997 or the Domestic Violence, Crime and Victims Act of 2004 do not specifically envisage women as victims, even though they were initiated by victims of stalkers. As a consequence of this omission and the very broad framing of the legal provisions, companies have been able to use the 1997 Act to prevent any sort of protest against them by applying for the very broad injunctions which can be granted under such legislation¹⁰¹.

As is the case with most classifications, there are no pure examples. Especially between the second and the third regulatory model the overlaps are at times significant. However,

⁹⁹ See European Commission, DAPHNE, *Feasibility study op. cit.*, p. 54.

¹⁰⁰ *Id.* p. 51.

¹⁰¹ See e.g.: *R. v. Director of Public Prosecutions, ex parte Moseley and others* [1999], All ER (D) 587.

what we want to highlight here is that from a comparative perspective each of these constitute qualitatively different approaches in how to regulate and acknowledge VAW.

To some extent each of these different models has presented various obstacles/issues in terms of protecting women from violence. A general common feature and risk for all three models are judicial interpretations by (often male-dominated) courts which fail to comprehend the female perspective of the victims of (sexual) violence. The long battle over defining what is deemed to be consent in rape cases is a typical example. For instance, in an infamous decision of 1999 the Italian Supreme Court had held that a woman wearing jeans could not be deemed a rape victim because taking off someone's jeans can only happen with that person's consent and therefore the sexual intercourse had to be consensual¹⁰². The case was soon overturned¹⁰³ but the issue of when and whether a woman's consent to sexual intercourse is or can be presumed as well as the related requirement of showing that some force and resistance have occurred during the rape demonstrates the difficulties male-dominated courts have in acknowledging, recognizing and understanding sexual violence against women¹⁰⁴.

Another example of such difficulties comes from Bulgaria. The 2005 Domestic Violence Act provides the possibility of emergency protection orders. The courts granted a husband such an order as well as custody over the child he had with his wife even though it turns out that, as in most cases, it was the wife who had been the victim of such violence. Not only was she never heard by the judges but what was criticized was the absence of recognition of gender-based violence¹⁰⁵.

However, the difficulties extend also to other domains such as damage awards. For instance, in Germany the Supreme Labour Court (*Bundessozialgericht*) has interpreted the protection of victim legislation restrictively by not extending the damage awards for victims to cases of psychological harm, thus only including physical harm¹⁰⁶. However, in many cases of VAW, such as those of stalking, the harm is psychological and not physical.

In terms of more specific interpretative issues, the first two models have often been subject to scrutiny from a criminal and a constitutional law perspective. For instance in France, the Constitutional Council has struck down the entire legislation on sexual harassment because deemed to be too imprecise, which *de facto* and *de iure* left women

¹⁰² Cassazione penale, 10 February 1999, sentenza no. 1636.

¹⁰³ Cassazione penale, 15 November 1999, sentenza no. 13070, and Cassazione penale, 21 July 2008, sentenza no. 30403.

¹⁰⁴ The ECtHR has established that narrow force-based definitions and interpretations of rape violate women's human rights (ECtHR, 4 December 2003, *M.C. v. Bulgaria*, Application no. 39272/98). Nevertheless, a number of states keep a definition limited to use of force or threat with some resistance requirements. See European Commission, DAPHNE, *Feasibility study op. cit.*, p. 52.

¹⁰⁵ For more details on this case, see: CEDAW Committee, *Isatou Jallow v. Bulgaria*, Communication no. 32/2011, UN Doc. CEDAW/C/52/D/32/2011.

¹⁰⁶ Bundessozialgericht, 7 April 2011, Az. B9VG2/10R.

unprotected by law against sexual harassment and automatically ended all criminal trials underway on that type of accusation¹⁰⁷. Another type of problem has arisen in Spain. Here the question was whether the fact that under the new legislation on VAW domestic violence committed against women was considered a different crime which is punished more heavily than other cases of VAW was compatible with the constitutional principle of equality, because only women could be victims – and by consequence only men could be the perpetrators. The Constitutional Court upheld the article as non-discriminatory and compatible with the principle of equality¹⁰⁸.

Another obstacle concerns mainly the second model with its piecemeal, gender-specific adaption(s). The issues courts are dealing with here are distinguishing the different conducts from a criminal law perspective. Thus, for example in Italy courts are struggling to distinguish the newly introduced crime of stalking from other criminal law provisions, especially when the stalker is a former partner (i.e. a separated husband) and the distinction from and/or overlap with domestic violence is not always clear¹⁰⁹.

We have already mentioned the problem with the third model which, while presenting the advantage of not leading to similar issues as the first two, erases or at least conceals the gender-specific harms inherent in VAW.

The presence of these three broad models at the national level determines quite differing levels of protection for women from one Member State to the other. The first one tends to offer the best protection to women whereas the last one usually the least. In concrete terms, today a woman who becomes victim of domestic violence in Spain can count on a whole system that has been specifically sensitized to the issue of VAW: hospitals where she might have needed to get treatment and the police personnel which may have been called in are all alerted and educated to the specific issues of domestic violence. If the facts of a case give rise to a lawsuit, a special jurisdiction (*juzgados de violencia contra la mujer*) with broad civil and criminal powers and a special prosecutor (*fiscal contra la violencia sobre la mujer*) will intervene. If the same domestic violence had happened in the Netherlands, it would be punished by regular criminal law provisions and principles (causing bodily harm, abuse, manslaughter...) and in ordinary courts. Hence, the specific aspects of VAW risk getting lost and in case the wife and the husband are legally separated, prosecution is only possible with a complaint by the victim.

Stalking provides another example of how differences in legislation and absence of harmonization can create concrete damages for women¹¹⁰. For those countries that have introduced criminal sanctions, already at the statutory level certain differences emerge. For example, in Italy the statutory penalty for stalking (*atti persecutori*) ranges from 6

¹⁰⁷ Conseil constitutionnel, 4 May 2012, Déc. 2012-240 QPC.

¹⁰⁸ Tribunal Constitucional, 14 May 2008, STC 59/2008.

¹⁰⁹ See e.g.: Cassazione penale, 24 November 2011, sentenza no. 24575, and Cassazione penale, 27 April 2012, sentenza no. 23626.

¹¹⁰ See for more details on stalking and the differences at national level: CoE Draft resolution on Stalking, adopted by the Committee on Equality and Non-discrimination on 24 June 2013, AS EGA(2013)23.

months to 4 years of imprisonment¹¹¹. In Austria the penalty for stalking (*beharrliche Verfolgung*) is imprisonment of up to one year¹¹² whereas in the UK the maximum imprisonment is 6 months and/or a fine not exceeding 5000£¹¹³. Comparability of penalties given in concrete cases is extremely difficult given that the interplay of other factors such as mitigating or aggravating circumstances, repeat offences and/or concurring crimes or misdemeanours sensibly change the picture. A typical example is that of a recent Italian case. The female victim had a relationship with her stalker which ended. When she entered a new relationship her ex started pestering her with phone calls, sending her threatening and offensive text messages, waited below her home, followed her by car, spat on her and battered her for more than a year. As a consequence she was forced to change her daily routines and even her home. The stalker was sentenced to nine months of prison and to reimburse the procedural expenses¹¹⁴. In another very similar case, a former partner also made insisting phone calls and sms to the mobile phone and work phone of the victim, waited in front of her home and work, threatened and harassed her in spite of an existing restraining order prohibiting him to approach her, which forced the victim to change her daily routines, her mobile phone number and her address. The sentence was a total of one year and eight months of which seven months for stalking and a reimbursement of all economic and moral damages calculated at 18.000€¹¹⁵. In Italy, prison sentences below two years imprisonment benefit from automatic parole if the judge believes that the convicted will not commit other crimes. A German case shows similar fact patterns: the victim had met her stalker shortly after he had finished an alcohol rehabilitation therapy. She cared for him and occasionally accompanied him to walks and/or his shopping. However, once he started drinking again she told him clearly that she did not want to have anything to do with him anymore. For three months he called her eight hours per day, waited below her home, followed her in the streets, and tried to forcefully enter her home. Eventually he was convicted to 6 months imprisonment partly because a repeat offender but was nevertheless granted parole¹¹⁶.

The important point here is possibly not so much that there are huge differences between each country or the other issue of whether such sentences actually do justice to the psychological and physical harm of the victims. The point is that in many European countries such behaviours would still not be sanctioned as such, because stalking is not penalized and therefore women cannot obtain restraining orders in the first place and in the worst case basically have to wait until physical violence actually happens to them.

As a consequence of these observations, we hold that a comprehensive approach to VAW corresponding to the first model described here above and which includes *inter alia* prevention, gender-specific formulation of crimes and/or misdemeanours, specific institutions and procedural adaptations seems to be the best in terms of protecting

¹¹¹ Article 612*bis* Codice penale.

¹¹² § 107a Strafgesetzbuch.

¹¹³ Protection from Harassment Act 1997.

¹¹⁴ Tribunale Salerno, 16/10/2012.

¹¹⁵ Tribunale Torino, sez. V penale, 13/01/2012

¹¹⁶ Landesgericht Arnsberg, 27/02/2012, II-6 KLS-294 Js 32/11-17/11.

women from such forms of violence. VAW needs to be seen through a single lens not only in order to obtain enhanced protection for its victims but also in order to achieve harmonization and legal certainty in the domain which could be achieved precisely through a directive. A directive would ensure that certain minimum standards of such a unitary model will be spelt out, without necessarily demanding complete harmonization of national legislations.

Furthermore, we contend that looking at VAW through a single lens would have another strong advantage, namely that of allowing to overcome obstacles which criminal harmonization would most certainly face, were it to be undertaken at the European level. As will be demonstrated below¹¹⁷, the EU's competence in criminal matters is limited. The EU thus lacks the competence to set minimum standards of definition, sanction and prosecution on all forms of VAW. Nevertheless, by framing the whole issue of VAW as an instance of gender discrimination, it could claim a broader competence to take support measures¹¹⁸ and disciplinary sanctions, which could integrate substantive or procedural national criminal law, in order to effectively combat VAW.

In terms of minimum standards, the European Parliament Resolution of 5 April 2011 undoubtedly provides an excellent starting point in as much as it proposes a comprehensive policy approach which extends to criminal matters and to highlighting the necessity of focusing on working with civil society and on the need to provide adequate financial resources (appropriate means)¹¹⁹. This resolution could or should be combined with some minimum standards that can be derived from the Istanbul Convention and its focus on better substantive definitions of the involved behaviours such as eliminating marital rape exemption; characterizing rape along consent and not force-based definitions (as required by human rights standards); and including stalking and forced marriage prohibitions in the future provisions. However, almost more importantly, the future directive also needs to establish minimum standards in terms of integrated policies, statistics, preventive measures like education and mandatory training programmes (of law enforcement personnel and judges), protection through (emergency) restraining orders, specific or specialized institutions or court sections dealing with VAW, indications that not only physical but also psychological factors will be taken into account when assessing the victim's damage awards. Human rights standards on VAW, that have evolved during the last years on VAW and that are described more in detail below may certainly help understanding and outlining what the minimum standards for VAW are and/or should be.

In terms of proportionality, such minimum standards would still leave states sufficient leeway in determining how to implement them. For instance, it may not be necessary to create a specific public prosecutor or specific courts for VAW as Spain did but specialized sections such as the labour law sections or commercial law sections in certain courts

¹¹⁷ See Part III. A.

¹¹⁸ See Part III. B.

¹¹⁹ Resolution of 5 April 2011 on priorities on outline of a new EU policy framework to fight violence against women (A7-065/2011).

might be understood as a correct implementation. The establishment of training programmes for police forces on VAW could also be identified in terms of necessitating the attendance of initial and advanced training courses leaving it to Member States how to structure them and how often they want to have them. In terms of substantive/criminal law and criminal procedure provisions, the directive could identify the prohibited behaviours that would overlap with those provided for in the Istanbul Convention (see below) leaving it to the Member States to identify more specifically how they define and sanction them. However, it should also be clear that certain aspects such as marital rape definitions or consent-based definitions of rape as well as the fact that certain types of VAW will need to become independent from a victim's denunciation need to be a minimum which cannot be derogated from.

Instead, today the lack of a common definition and regulatory framework on the question of VAW in the national laws of EU Member States determines significant discrepancies and legal uncertainty that have far-reaching consequences. First, they constitute an unequal and uneven protection for women at the European level because the violence against them is sanctioned and fought against in quite different ways. Second, and as a consequence, this limits freedom of movement of women within the EU. European women might think twice about moving to a Member State where their dignity, physical, psychological and sexual health are not protected and/or less protected thus determining a discrimination as opposed to European men who do not face a similar conundrum. Last but not least, it impairs the construction of a European Area of Freedom, Security and Justice. Indeed, potentially 50% of the EU's population is exposed to VAW but the way this is dealt with differently in the Member States leads to a break-up of that European area where *women's* basic freedom, security and justice are protected very unequally and randomly¹²⁰.

2. International and regional instruments on violence against women: piecemeal approach and a lack of effectiveness in the national orders

The international level reflects a similar picture as the national one. The evolution of recognizing VAW as specific humanitarian and human rights' violation is a slow and piecemeal one. On the one hand, as far as international humanitarian law and international criminal law are concerned, mass rapes or forced sterilizations have only (recently) been added to the list of prohibited behaviours¹²¹. This approach is confirmed both by case law (by the International Criminal Tribunals for the former Yugoslavia and

¹²⁰ See Part I, B. 2. b) for more details on the way a Directive on VAW furthers the construction of a European Area of Freedom, Security and Justice.

¹²¹ E.g. Article 6 of the Rome Statute of the International Criminal Court which contains the most recent codification of genocide as an international crime defines this crime as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: [...] (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity [...]".

for Rwanda, and the Special Court for Sierra Leone) and by the International Criminal Court Statute itself¹²².

On the other hand, as far as international human rights are concerned one can observe a similar trend when dealing with VAW. For instance, CEDAW, also known as the Women's Bill of Rights, does not mention VAW at all in its text. It is only in 1989¹²³ that the CEDAW Committee brought VAW within the purview of the CEDAW's and consequently its own reach, by requiring from States that their periodic report deal with the topic. A number of individual petitions brought before it now are also violence-oriented. In those cases where the CEDAW Committee has found a violation of the CEDAW, it did so because the legislation failed to protect the victim, because there were not sufficient shelters available and because the judges, prosecutors and law enforcement personnel had interpreted the violence in a stereotyped manner. But upon declaring a violation, all the Committee can do is to adopt a (non-binding) view and make some recommendations. It is not a criminal court neither a judiciary organ entitled to sentencing individuals. As a treaty-based body, the Committee is only a conventional actor that supervises States' international commitments. Amongst other measures, the CEDAW Committee insists on mandatory training for such professions which will help them interpret VAW in a gender-sensitive manner¹²⁴.

Always at the United Nations level, the relevance of VAW as a human right came at first through various more limited resolutions on domestic violence by various U.N. bodies¹²⁵. It is the U.N. General Assembly Declaration on the Elimination on Violence Against Women which for the first time referred to violence against women as a human rights violation¹²⁶.

At the regional level, the ECHR also shows only slow and piecemeal recognition of VAW as a human rights violation under its various provisions. The case law on VAW under

¹²² Rapes can be qualified as war crimes, crimes against humanity or genocide, depending on the circumstances. See e.g., for the ICTY: ICTY, *Tadic case*, IT-94-1-T, Judgment, 7 May 1997; ICTY, 'Celibici Camp case': *Prosecutor v. Ejnil Delalic, Zdravko Mucic alias 'Pavo', Hzim Delic et Esad Landzo alias 'Zenga'*, IT-96-21-T, Judgment, 16 November 1998; ICTY, *Prosecutor v. Anto Furundžija*, IT-95-17/1-T, Judgment, 10 December 1998; ICTY, *Prosecutor v. Dragoljub Kunarac, Radomic Kovac and Zoran Vukovic*, IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001. See also the ICTR Jurisprudence, e.g.: ICTR, *Prosecutor v. Jean-Paul Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998. Following this general tendency, the Rome Statute of the ICC also mentions sexual violence from a gender perspective.

¹²³ General Recommendation No. 12 of the United Nations' Committee on the Elimination of Discrimination Against Women (8th session, 1989). Later, it also adopted the General Recommendation No. 19 (11th session, 1992).

¹²⁴ See e.g. CEDAW Committee, *Goekce v. Austria*, Communication no. 5/2005, UN Doc. CEDAW/C/39/D/5/2005 (domestic violence); CEDAW Committee, *Vertido v. The Philippines*, Communication no. 18/2008, UN Doc. CEDAW/C/46/D/18/2008 (rape and judicial stereotypes); and CEDAW Committee, *V.K. v. Bulgaria*, Communication no. 20/2008, UN Doc. CEDAW/C/49/D/20/2008 (domestic violence).

¹²⁵ See e.g. U.N. Economic and Social Council, Resolution no. 1984/14 and U.N. General Assembly, Resolutions no. 40/36 and 45/114.

¹²⁶ U.N. General Assembly Declaration, Res. 48/104, A/48/49.

various forms ranging from domestic violence to forced sterilizations has literally exploded over the past twenty years or so. Nevertheless, whereas the ECtHR has often recognized and framed VAW and especially domestic violence in terms of an Article 8 violation (right to respect of private life)¹²⁷, it is only recently it has started to doctrinally and jurisprudentially frame VAW as a broader issue of equality and gender discrimination (in terms of an Article 14 or of a Protocol No. 12 violation) and of inhuman or degrading treatment or punishment by itself that requires positive obligations on the part of the state (as an Article 3 violation)¹²⁸. This means that the ECtHR finally starts analysing and framing VAW as a broader societal and structural issue and problem rather than as a private, domestic one.

At the same regional level, the Convention on Action Against Trafficking in Human Beings¹²⁹ deals with one specific, sectorial aspect of VAW by acknowledging that women and children are particularly at risk of being trafficked. However, this convention is far from comprehensive on VAW. Moreover, it is not gender-specific.

The international law developments on VAW do not only concern Europe but can be said to play out in other regional contexts as well, thus highlighting the “glocal” awareness it has by now reached. First and foremost, one needs to mention the 1994 ‘Belém do Pará Convention’ adopted within the framework of the Organization of American States¹³⁰ which certainly is the first specific international (human rights) convention dealing with this phenomenon. In spite of its symbolic and real impact and of framing VAW in terms of human rights, dignity and equality, this instrument spells out VAW in broad human rights language rather than in terms of criminal law definitions that identify the different situations which VAW encompasses. It also does not refer to the related preliminary or procedural issues. All this then is reflected in the limited number of 25 articles in total of the Belém do Pará Convention which for these reasons remains a more limited model in addressing VAW. Also of importance is the 2003 Maputo Protocol to the African Charter of Human and Peoples’ Rights. The very existence of such a Protocol in that regional legal order is very important and constitutes an emblematic example of the symbolic and political significance of gender-based approaches to human rights in modern 21st century regimes. As far as VAW is concerned, the protection of women against violence is very present throughout the Protocol –although again, in a broad human rights parlance and without precise procedural safeguards and recommendations. However, there is no

¹²⁷ See e.g. ECtHR, 12 June 2008, *Bevacqua and S. v. Bulgaria*, Application no. 71127/01 (domestic violence); ECtHR, 8 November 2011, *V.C. v. Slovakia*, Application no. 18968/07 (forced sterilizations on Romani women, finding an Article 3 and Article 8 violation but unable to find an Article 14 violation); and ECtHR, 24 April 2012, *Kaluckza v. Hungary*, Application no. 57693/10 (rape and domestic violence).

¹²⁸ ECtHR, *Opuz v. Turkey*, Application no. 33401/02, 9 June 2009 (recognizing an Article 3 and Article 14 violation in a domestic violence case), ECtHR, 26 March 2013, *Valiuliene v. Lithuania*, Application no. 33234/07, (analyzing a domestic violence case under Article 3 instead of under Article 8) and ECtHR, 28 May 2013, *Eremia v. Republic of Moldova*, Application n°3564/11 (finding an Article 3 and Article 14 violation in a domestic violence case).

¹²⁹ CoE, Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS no. 197.

¹³⁰ OAS, Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, 9 June 1994, 33 ILM 1049.

judicial enforcement of the Protocol at this stage, for reasons intrinsic to the African human rights protection system.

The first attempt at dealing in a comprehensive way with VAW at the international law level, thus corresponding to the first model, comes with the Istanbul Convention¹³¹. Here we can observe an overarching understanding, definition and regime of VAW that is reflected in the architecture and structure of the Istanbul Convention. It starts with some general purposes and definitions that locate the fight against VAW in the domain of equality and non-discrimination (Chapter I, Articles 1-6), then moves on to the preliminary practical issues dealing with integrated policies, statistics and data collection and financial resources (Chapter II, Articles 2-11) before describing the obligations in terms of preventive measures that include *inter alia* education, training of professionals and media involvement (Chapter III, Articles 12-16) and of various protection and support measures for the victims such as shelters, telephone helplines and specialist support systems (Chapter IV, Articles 17-28). It is 'only' in Chapter V (Articles 29-48) that the Istanbul Convention actually touches upon the substantive law with the broadest possible range of phenomena related to VAW from psychological violence and stalking to female genital mutilation (with the exception of somewhat controversial topics such as prostitution and pornography) and also extends to criminal law principles such as jurisdiction, aiding/abetting, justifications and aggravating circumstances. The text then provides for the procedural mechanisms (such as emergency barring orders and/or protection orders but also the determination of when proceedings can only be initiated by the victims and when a proceeding can be started by the prosecutor without the victim's initiative) which are equally important in an effective fight against VAW (Chapter VI, Articles 49-58). The international aspects of VAW including migration and asylum (Chapter VII, Articles 59-61) and of international cooperation (Chapter VIII, Articles 62-65) are also taken into account before concluding with the monitoring mechanisms (Chapter IX, Articles 66-70) and broader international law related provisions (e.g. ratification, reservations etc.). The Istanbul Convention thus attempts to regulate and combat the phenomenon of VAW in the broadest possible way and from an all-encompassing perspective.

Nevertheless, all the instruments described here at the international level of protection against VAW present some additional problems which do not arise at the national level. First and foremost, they are all international law instruments which do not have the same type of sanctions and direct effect as EU law. Thus, in case of violation or non-implementation of a directive there is, under certain circumstances, access to the CJEU through the preliminary reference procedure¹³². This is not the case for the other international conventions. Most of the times, as for example for CEDAW and for the Istanbul Convention, the monitoring mechanism is one of state reporting. And when

¹³¹ CoE, Convention on preventing and combatting violence against women and domestic violence, 12 April 2011, CETS no. 210.

¹³² ECJ/CJEU case-law on VAW is rare (*see* CJEU, 15 September 2011, *Magatte Gueye and Valentin Salmerón Sánchez*, C-483/09 and 1/10), but it should grow in the next years, given that recent directives which have not been implemented yet at the national level deal with certain aspects of VAW (*see infra*, Part II.B.2).

there is individual recourse against states such as in the case of the ECHR or under certain circumstances under the CEDAW Optional Protocol, these decisions or judgments either lack the legal enforceability and/or visibility which gives some of them at best persuasive precedent compared to a judgment by the CJEU. Last but not least, it must be recalled that national judges often tend to deny direct effect to provisions of international human rights conventions; they may not do so *vis-à-vis* EU law: even directives constrain national judicial authorities as a minimum judicial enforcement must be guaranteed.

Second and closely related to the first point, the monitoring procedures are not at all the same. Usually, international human rights treaties dealing with issues related to VAW 'only' contain state reporting obligations. For instance, the Istanbul Convention establishes a reporting mechanism to a Committee of experts who can order or perform country visits. However, no individual recourse is envisaged. And even where such individual recourse is envisaged, as is the case under the ECHR, the remedy is usually only monetary and does not necessarily force states to change their legislation.

Last but not least, EU directives are more visible than most international law conventions. This may be particularly true of conventions dealing with women's rights more generally. In fact, even though CEDAW entered into force in the early 1980s and was prepared under the auspices of the United Nations, it has little visibility within many European states.

For these reasons we believe that a broadly framed EU Directive on VAW would represent a perfect regulatory addition which complements existing international conventions and their shortcomings. It would enhance Member States' international commitments to fight against VAW and, more particularly, those that are based on the Istanbul Convention.

Nowadays, a new directive appears extremely useful given that most EU Member States have not ratified this Convention. In fact, the Convention has not come into force and as of end of July 2013 only 6 States, including Portugal and Italy as the only 2 EU Member States, have ratified the Convention. The preparation of a EU directive could thus well constitute an interesting move in the direction of a stronger involvement of all the States in the fight against VAW. Moreover, even if (or when) all Member States were parties to this treaty, a EU directive would remain necessary.

The directive would, if correctly implemented, give victims of VAW the opportunity to have a State condemned by the Court of Justice of the EU for non-compliance of its obligations. One could even say that supporting the elaboration of a EU directive can be seen as a way for States to actually apply the Istanbul Convention. Indeed, among the many steps that signatories to the Convention need to take for compliance with the Convention, an important one is to actually "change the law" so that it includes specific criminal offenses for all forms of VAW (stalking, psychological violence, sexual violence, forced marriage etc.)... Adopting a directive would certainly be a fine way to "change the law" and thus comply with the obligations arising from the Convention.

The hypothesis of the accession by the EU itself to the Istanbul Convention also needs to be envisaged. We contend that this is an interesting opportunity. First, it would be a way for the EU of affirming itself as a leader and promoter of human rights. Second, it would be a guarantee and a protection against risks of double standards in the field of VAW. The example of the UN Convention on the Rights of Persons with Disabilities proves useful. The Convention has been ratified by the EU given the strong convergences that existed with the EU action. The European Disability Strategy 2010-2020 has consequently been based on its requirements¹³³. But it is worth mentioning that in that case, the circumstance that every Member State had already signed the Convention could have had a real impact on that decision. Moreover, the situation was different from that of VAW today, since EU action on the topic has proved less developed than the one dealing with disabilities, and that the Istanbul Convention has proven less successful until now within the Member States.

As far as VAW is concerned, greater integration of EU and CoE human rights protection mechanisms clearly appears to be the most plausible and serious horizon in many fields. There are other examples of fields in which EU action strengthens the main principles of a given international treaty while dealing with the same topic. In the field of environmental law for instance, the same principles and rules appear both in an international commitment and in a EU directive¹³⁴. In the field of bioethics as well: the adoption of important EU directives on Blood (2003), Organs (2010), or Clinical Trials (2001) is posterior to the important Oviedo Convention on Human Rights and Biomedicine of 1997. In many ways, the EU directives strengthen the principles that the Oviedo Convention lays down; it makes them more precise and, to a certain extent, transforms them into harder law.

Second, even if the EU does ratify this treaty, the Istanbul Convention would not by itself suffice to comply with all the EU ambitions and with all possible actions in the field of VAW. Once ratified, the Istanbul Convention would push the Union into strengthening

¹³³ http://ec.europa.eu/justice/discrimination/disabilities/disability-strategy/index_en.htm

¹³⁴ *E.g.*: Convention on Long-range Transboundary Air Pollution, Geneva, 13 November 1979 and Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on Ambient Air Quality and Cleaner Air for Europe; Convention on the Law of Non-Navigational Uses of International Watercourses, 21 May 1997 and the Water Framework Directive (Directive establishing a Framework for Community Action in the Field of Water Policy, 23 October 2000; Helsinki Convention on the Transboundary Effects of Industrial Accidents, 17 March 1992, and Directive on Industrial Emissions (Integrated Pollution Prevention and Control), 24 November 2010; Basel Convention on the Control of Transboundary Movements, 22 March 1989 and Directive on Waste and Repealing Certain Directives; ILO Convention No.148 concerning the Protection of Workers against Occupational Hazards in the Working Environment Due to Air Pollution, Noise and Vibration, 29 June 1977 and Directive 2003/10/EC on the Minimum Health and Safety Requirements regarding the exposure of workers to the risks arising from physical agents (noise), 6 February 2003; CITES Convention (on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973 and Directive 92/43/EC on the Conservation of Natural Habitats and of Wild Fauna and Flora, 21 May 1992; UNEP Regional Seas Conventions and Directive 2008/56/EC establishing a Framework for Community Action in the Field of Marine Environmental Policy, 17 June 2008.

already existing EU actions regarding prevention of VAW (art. 12)¹³⁵ ; it would also push the Union into fighting against VAW in its direct relations with European citizens and agents (art. 5 § 1¹³⁶), and into adopting further rules on the topic¹³⁷. But the Istanbul Convention would probably remain without direct effect within the EU legal order. Therefore, a proper EU instrument would remain necessary.

For the two legal instruments to be more coherent and complementary, the directive could mention the Istanbul Convention as a source for its rules and principles, just as the ECJ and the Treaties refer to the ECHR when speaking about general principles of Union's law in connection with human rights. Such a method has also been followed, for instance, to fight against human trafficking (see the 2005 CoE Convention and the Directive 2011/36/EU of 5 April 2011). A new directive regarding VAW could thus easily be based on similar rules and principles as the Istanbul Convention.

This does not mean that it would have to reproduce these international treaty's provisions. It is up to the EU to write its own rules and manage the coordination of the two texts. There are many examples of legislative action by the EU in the same field as an international treaty ratified by the Union, some of which have been adopted within the Council of Europe. This means that the two instruments can easily be coordinated. Again, Directive 2011/36/EU of the European Parliament preventing and combatting trafficking in human beings and protecting its victims explicitly mentions the UN and CoE instruments, takes due note of the existence of an evaluation mechanism monitored by the Group of experts on action against trafficking in human beings (GRETA) and a Committee of the Parties, and mentions the need for coordination so as to avoid duplication of efforts due to the coexistence of the two mechanisms¹³⁸. Such provisions would be worth including in a directive dealing with VAW. The recent evaluation Report which the GRETA published about French implementation of the 2005 CoE Convention¹³⁹ provides some interesting elements on the possible coordination of the two mechanisms, and, more specifically, of the potential shortcomings of the Convention which the

¹³⁵ For instance, § 2 states that : "Parties shall take the necessary legislative and other measures to prevent all forms of violence covered by the scope of this Convention by any natural or legal person".

¹³⁶ "Parties shall refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation".

¹³⁷ See art. 5 § 2: "Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors ". The Convention also requires States to adopt further legislation in criminal matters, which would at the moment not be possible for the EU due to art. 83 TFUE (*see infra*, Part III, A.).

¹³⁸ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combatting trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, §(9).

¹³⁹ *Report concerning the implementation of the Council of Europe Convention on Action Against Trafficking in Human beings by France*, GRETA (2012) 16, 28 January 2013.

directive could overcome if and when transposed into national law¹⁴⁰. For the GRETA, France does not fully comply with the Convention's requirements because, for instance, it has not introduced new crimes and an enlarged definition of "human trafficking". Moreover, the French definition of "trafficking" does not comply with the international standards of the Convention, as confirmed by ECtHR case law. As a matter of fact, national implementation of the EU Directive will solve this problem, as the definition of "trafficking" contained in that instrument lies on the notion of "exploitation", which is larger than the one currently existing in articles 225-4-1, 225-13 and 225-14 of the French Criminal Code.

The important point here is that the modifications of French law, as formulated by the French Parliament in 25 July¹⁴¹, have been provoked by the CoE Conventions' requirements, the ECtHR's decisions finding that France had violated certain provisions of the ECHR¹⁴², and the need to comply with and to transpose EU Directive 2011/36. In its monitoring function of the CoE Convention, the GRETA certainly expressed its concern, and formulated some recommendations. However, it could not compel French authorities to adopt a new definition of trafficking. Interestingly enough, it asked to be informed of the new definition French authorities would be likely to adopt in order to transpose 2011/36 Directive into national law¹⁴³. The implementation of a hard-law EU instrument, subject to CJEU scrutiny, combined with French international obligations, proved to be efficient incentives to improve French legislative framework.

The provision of audio-visual media services is another example of coordination between a Council of Europe convention and a directive, which confirms that such coexistence is manageable. The European Convention on Transfrontier Television is taken into account by the 2010/13/EU Directive of 10 March 2010 as the definition of "European works" includes "works originating in European third States party to the European Convention (...)"¹⁴⁴. Furthermore, it is mentioned that in fields it does not coordinate, the directive "shall not affect the rights and obligations of Member States resulting from existing conventions"¹⁴⁵. Put differently, there is no risk of a double standard that could not be prevented if the directive takes the situation into account.

Moreover, a new VAW-centred directive would also impact all Member States and give birth to more efficient obligations, whose breach could be judicially controlled. It would

¹⁴⁰ EU Member States had to transpose Directive 2011/36/EU before April 2013, but many of them have not done so yet. The French National Assembly and Senate have only just found an agreement on 25 July 2013.

¹⁴¹ The French "Commission Mixte Paritaire" has agreed on a new and enlarged definition of "trafficking" on 25 July 2013. The new provisions of the Code Pénal should enter into force shortly.

¹⁴² ECtHR, 11 October 2012, *C. N and V v. France*, Application n°67724/09; ECtHR, 26 July 2005, *Siliadin v. France*, Application n°73316/01.

¹⁴³ *Report on the implementation...*, § 55.

¹⁴⁴ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), Article 1, § 1 (n).

¹⁴⁵ *Ibid.*, Article 31.

thus have various advantages. First, it would create new possibilities of recourse for the victims, who could bring their case either directly before a domestic court – if there were a breach of legality or any violation of their rights as recognised by the European text, either to the ECJ – indirectly, through the preliminary reference procedure. Second, it will create enforcement and monitoring mechanisms as well as visibility common to EU law instruments, when the Istanbul Convention would offer additional guarantees of the possibility of country visits and a specific Committee which supervises states' performances specifically on such issues. We also stress the important improvement that the Lisbon treaty has provided in terms of judicial control of former third pillar acts. Because of the extinction of the “pillar” structure, these instruments (which are no longer “decisions” but “directives”) are submitted to full judicial control from the ECJ, either through the preliminary reference procedure or through proceedings for failure to fulfil States' obligations.

Taken together, these two instruments (the Directive on VAW and the Istanbul Convention) would guarantee a true European Area of Freedom, Security and Justice where VAW becomes not only rhetorically but also legally outlawed.

B. EU law: a fragmented and often non-binding approach on violence against women

As highlighted above, the EU has strong credentials in the field of gender equality¹⁴⁶. However, whereas VAW is often presented as a key objective of EU action, measures promoted by the EU to combat and eradicate VAW have mostly been soft-law ones (1). In addition, the few existing hard-law EU instruments lack the global perspective that is needed when dealing with this particular issue (2).

1. The importance of soft law on violence against women

Besides the crucial role of the European Parliament, which adopted several resolutions on the subject and repeatedly urged the European Commission and the Council to act in this field¹⁴⁷, a number of programmes and strategies have dealt with VAW. Indeed, they have recently positioned gender-based violence as one of the priorities for EU action¹⁴⁸. These priorities were defined by the Women's Charter, adopted by the European Commission in 2010¹⁴⁹ and aiming to build a gender perspective into all policies over the next five years. In this document, the Commission calls for “a comprehensive and effective policy framework to combat gender-based violence” and asks to strengthen EU action “to

¹⁴⁶ *Supra*, Part I, B. 2. a).

¹⁴⁷ Resolution on the current situation in combatting VAW and any future action (P6_TA(2006)0038); Resolution of 26 November 2009 on the elimination of violence against women (P7_TA(2009)0098); Resolution of 24 March 2009 on combatting female mutilation in the EU (P6_TA(2009)0161); Resolution of 15 April 2011 on priorities on outline of a new EU policy framework to fight violence against women (A7-065/2011).

¹⁴⁸ See for example the *Roadmap for equality between women and men* (2006-10), COM (2006) 92, p. 7; Strategy for equality between women and men for 2010-2015, COM (2010) 491, 21 September 2010, p. 8.

¹⁴⁹ COM (2010) 78.

eradicate female genital mutilation and other acts of violence, including by means of criminal law, within the limits of – its – powers”¹⁵⁰.

The EU Council also expressed its concerns regarding VAW, in important *Guidelines on violence against women and girls* issued on December 2008¹⁵¹. Of course, one should not underestimate the political importance of such a position, the Council marking “the EU’s clear political will to treat the subject of women’s rights as a priority and to take long-term action in that field”, and acknowledging that the issue of VAW is “one of the major human rights violations of today’s world”. However, as important as they may be, these guidelines are not legally binding. They are intended to encourage the implementation of a greater number of specific projects aimed at women and girls, financed by the EU. They are also and primarily a tool in the EU’s external relations, as if VAW were not to be combated within the EU’s boundaries. With the aim of preventing such violence, “the strategies of the Member States and of the EU in its external action must in particular focus on legislation and public policies which discriminate against women and girls, and the lack of diligence in combatting discrimination practiced in the private sphere and gender-stereotyping”¹⁵². The EU Council also expressed its concern about VAW and included the fight against such violence amongst its priorities¹⁵³.

EU programmes support actions taken by the Commission, specific transnational projects or activities of NGO’s or other organisations, thus contributing to preventing and fighting all forms of violence occurring in the public or the private domain against children, young people and women. On 24 January 2000, the European Parliament and the Council adopted the Daphne Programme¹⁵⁴, whose goal is “to contribute towards ensuring a high level of protection of physical and mental health by the protection of children, young persons and women against violence (including violence in the form of sexual exploitation and abuse), by the prevention of violence and by the provision of support for the victims of violence, in order, in particular, to prevent future exposure to violence”¹⁵⁵. Established for three years, the Daphne Programme has been renewed in 2004 and in 2007. The Daphne III Programme¹⁵⁶ ensures continuity for the projects supported by the Daphne I and Daphne II programmes, and is now part of the General

¹⁵⁰ Section 4, Women’s Charter.

¹⁵¹ *EU Guidelines on violence against women and girls and combatting all forms of discrimination against them....op. cit.*

¹⁵² *Ibid.*, p. 2, point 3.1.1.

¹⁵³ See the *Stockholm Programme* (2010-2014) adopted under the Swedish Presidency, and the March 2010 Council Conclusions on the Eradication of Violence Against Women in the European Union, adopted under the Spanish Presidency.

¹⁵⁴ Decision n°293/2000/EC of the European Parliament and of the Council of 24 January 2000 adopting a programme of Community action (the Daphne programme) (2000 to 2003) on preventive measures to fight violence against children, young persons and women, *OJ L 34*, 9 February 2000, p. 1.

¹⁵⁵ Article 1, § 2, of the Decision n°293/2000/EC.

¹⁵⁶ Decision n°779/2007/EC of the European Parliament and of the Council of 20 June 2007 establishing for the period 2007-2013 a specific programme to prevent and combat violence against children, young people and women and to protect victims and groups at risk (Daphne III programme) as part of the General Programme Fundamental Rights and Justice, *OJ L 173*, 3 July 2007, p. 19.

Programme on “Fundamental Rights and Justice”, in order to contribute to the strengthening of the area of Freedom, Security and Justice over the period 2007-2013.

Of course, these programmes cannot be compared to binding legislation or instruments. As opposed to a directive, they do not provide new rights for women, enforceable before national or European courts or tribunals. They contribute to the dissemination and exchange of information, experience and good practices, the development of networking as appropriate, and, more generally, Europe-wide awareness on these issues. In a very interesting way, and as already mentioned¹⁵⁷, they always link the combat against VAW to the achievement and development of European policies, such as those related to public health, human rights and gender equality. As stated earlier, in the Daphne Programme EU institutions have acknowledged the virtuous spill-over effect of combatting violence, which is also a way of enhancing public health, economic growth, inclusion and participation and the elevation of general quality of life standards. This can be a strong argument for legislative action and further harmonization based on the current provisions of the Lisbon Treaty.

2. The absence of a global strategy on violence against women: the gaps in the current binding EU legislation

Besides the non-binding guidelines and programmes referred to above, the EU has taken some punctual and limited initiatives dealing with VAW through decisions and directives. Despite its binding character, this *acquis* lacks the coherence and the global treatment needed for a fully effective combat against VAW. As a matter of fact, while definitions of VAW already exist in EU law or could easily be transposed from international standards and instruments (a), existing binding EU instruments fail to tackle the issue of VAW in a global and coherent manner (b), or do not specifically address this issue through the prism of gender discrimination and human rights (c).

a) An existing definition of violence against women in EU law

EU institutions have already taken into account the established definition of VAW as set in international instruments. In the *EU guidelines on violence against women and girls and containing all forms of discrimination against them*, the EU Council refers to the definition of VAW based on the United Nations Declaration on the Elimination of Violence against Women of 1993. The term “Violence against women” means “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”. A similar definition is included in the Istanbul Convention, which also insists on VAW as “as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or

¹⁵⁷ *Supra*, Part I, A. 1.

economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”¹⁵⁸.

In the *EU Guidelines*, the EU Council also makes an attempt of listing VAW, in a non-exhaustive way. VAW includes forms of physical, sexual and psychological violence occurring within the family (such as prenatal selection based on the sex of the foetus, forced marriage, rape by habitual or cohabiting partners, female genital mutilations) and occurring within the general community (including, for example, rape, sexual harassment, trafficking in women and forced prostitution, modern forms of slavery), whether or not perpetrated or condoned by the State.

This definition, which is contained in a non-binding instrument¹⁵⁹, has recently been confirmed in 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, and replacing Council Framework Decision 2001/220/JHA¹⁶⁰. It explicitly states that “violence that is directed against a person because of that person’s gender, gender identity or gender expression or that affects persons of a particular gender disproportionately, is understood as gender-based violence. It may result in physical, sexual, emotional or psychological harm, or economic loss, to the victim. Gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking in human beings, slavery, and different forms of harmful practices, such as forced marriages, female genital mutilation and so-called “honour crimes”¹⁶¹.

This step is extremely important: by adopting this definition of VAW in a binding provision, EU institutions recognize both the international consensus on this subject, and the consistency of a human rights and anti-discrimination approach on VAW. Yet, EU law remains inconsistent with such a view. Of course, some aspects of VAW have been addressed in EU legislation, albeit in a very fragmented way. From this point of view, a directive combatting all forms of VAW, based on the existing and well-established definition of VAW, could be of a real added-value.

b) A fragmented approach on violence against women

Harassment and sexual harassment have been dealt with in the context of equal treatment directives, such as the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, Directive 2002/73/EC and Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation¹⁶².

¹⁵⁸ Article 3, «Definitions», a, of the Istanbul Convention.

¹⁵⁹ As said earlier, the *EU Guidelines* certainly have great political importance, but they are not legally binding.

¹⁶⁰ OJ L 315, 14 November 2012, p. 57.

¹⁶¹ Recital (17) of the Directive.

¹⁶² OJ L 204, 26 July 2006, p. 23.

This Directive defines harassment and sexual harassment as discriminations on the grounds of sex¹⁶³ and admits that they should be prohibited not only in the workplace, but also in the context of access to employment, vocational training and formation. It also acknowledges the importance of preventive actions in order to tackle the sources of sexual harassment, by encouraging States “to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion”¹⁶⁴.

The same approach has been adopted in Council Directive 2004/113/EC of 13 December 2004, implementing the principle of equal treatment between men and women in the access to and supply of goods and services¹⁶⁵. The prohibition of sexual harassment and the necessity of effective sanctions of this type of discrimination are therefore widely admitted in EU law, in the workplace, but also in areas outside of the labour market. This is a strong indicator of the evolution of EU’s objectives, and its successful attempts to define itself as a political entity promoting human and fundamental values.

Recent directives deal with important aspects of VAW. Besides legal instruments combatting human trafficking¹⁶⁶, directives have been adopted in order to implement a comprehensive set of measures on victim’s rights. Of course, these measures could be of a real added-value for the protection of women who are victims of violence: the Directive on the European protection order¹⁶⁷ establishes rules allowing a judicial authority in a Member State, in which a protection measure has been adopted so as to protect a person against a criminal act by another person which may endanger his life or physical, psychological or sexual integrity, to issue a European protection order enabling the authority in another Member State to continue the protection of the person in the territory of that other Member State. The directive marks a significant step for the deepening of an Area of Freedom, Security and Justice. However, it is based on the principle of mutual recognition of judgments and does not interfere at all with the definition of the crimes which are prosecuted or punished in national laws. It does not deal with the prevention of violence either. The scope of the directive seems very narrow compared to the one of a directive specifically dealing with VAW.

The Directive establishing minimum standards on the rights, support and protection of victims of crime¹⁶⁸ has a more ambitious scope and approach. It strengthens rights of victims, especially information rights and access to victim support. These provisions could be very important for women, as this directive encourages Member States to pay particular attention to the specific needs of victims: in addition to general support services, Member States shall take measures to establish specialist support services that are free of charge and confidential. These services shall develop and provide “targeted and integrated support for victims with specific needs, such as victims of sexual violence,

¹⁶³ Article 2, 2, a, of the Directive 2006/54.

¹⁶⁴ Article 26 of the Directive 2006/54.

¹⁶⁵ OJ L 373, 21 December 2004, p. 37.

¹⁶⁶ *Infra*, Part II, 2. c).

¹⁶⁷ Directive 2011/99/EU of 13 December 2011, OJ L 338, 21 December 2011, p. 2.

¹⁶⁸ Directive 2012/29/EU of 25 October 2012, OJ L 315, 14 November 2012, p. 57.

victims of gender-based violence and victims of violence in close relationships”¹⁶⁹. These provisions could fill an important gap in current EU and national legislation: indeed, specialised services are insufficient and unequally distributed in and among the Member States. According to a report of the European Institute for Gender Equality (EIGE), only 12 out of the 27 EU Member States have developed state funded specialised services for women victims of violence. Provisions across the EU vary significantly¹⁷⁰. In some Member States such services are limited and provided almost entirely by NGOs with little or no state support¹⁷¹.

Once again, despite being tailored for victims with special needs, this instrument does not adopt a general approach on gender-based violence. It deals with the *protection* of victims, not with the prevention of violence or prosecution of crime. It does not set core elements of definitions of VAW: a victim could have a uniform treatment in procedural proceedings. However, since the definitions of VAW and the sanctions vary considerably from one State to the other, victims could be treated very differently throughout the European Union territory. She could not be considered as “a victim” if the violence she suffered is not prosecuted in her State (i.e. stalking is still not punished in many EU legal systems), and then, not be able to invoke the Directives setting measures for victims.

Given that this Directive has not entered into force yet, the CJEU has not yet had to consider its added-value compared to the previous Council Framework Decision 2002/220/JHA. However, given the Directive’s wording and objectives, the CJEU should reason as it did with regard to the Framework decision 2002/220/JHA where it stated very clearly that “there is no provision in the Framework Decision relating to the forms of penalties and the level of penalties which Member States must enact in their legislation in order that criminal offences should be subject to punishment”¹⁷². Moreover, “the Framework Decision contains no indication that the EU legislature, within the limits of the powers conferred on it by the EU Treaty, intended to harmonize or, at the least, approximate the legislation of Member States in respect of the forms and levels of criminal penalties”¹⁷³.

Thus, EU law is fragmented and limited. It also lacks a general and necessary human rights and gender-based approach. Important bindings instruments have not been conceived through the prism of gender discrimination and human rights, which is a major flaw of existing EU legislation.

c) The absence of a gender-based approach on violence against women in important binding instruments of EU law

Some major aspects of VAW, such as trafficking of women, have recently garnered attention. On 5 April 2011, the European Parliament and the Council adopted a Directive

¹⁶⁹ Article 9, 3, b), of the Directive.

¹⁷⁰ See also *supra* Part II, A. 1.

¹⁷¹ EIGE, “Review of the Implementation of the Beijing Platform for Action in the EU Member States: Violence against Women, Victim Support”, 7 December 2012.

¹⁷² CJEU, 15 September 2011, *Magatte Gueye and Valentin Salmerón Sánchez*, C-483/09 and 1/10, §50.

¹⁷³ *Ibid.*, § 51.

on preventing and combatting trafficking in human beings and protecting its victims, replacing the Council Framework Decision 2002/629/JHA¹⁷⁴. The ambit and the scope of the Directive seem particularly large compared to the previous Council Framework Decision. The Directive “adopts an integrated, holistic, and human rights approach to the fight against trafficking in human beings”¹⁷⁵. In particular, it “recognizes the gender-specific phenomenon of trafficking and that women and men are often trafficked for different purposes”. For this reason, “assistance and support measures should also be gender-specific where appropriate”¹⁷⁶. It sets ambitious objectives, such as more rigorous prevention, prosecution and protection of victims’ rights, which seem to fully take into account gender-based violence. Pursuant to Article 1, the Directive establishes “minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings. It also introduces common provisions, taking into account the gender perspective, to strengthen the prevention of this crime and the protection of the victims thereof”.

However, in spite of these promising assertions, the detailed provisions of the Directive fail to assure a gender-specific protection for women. Most surprisingly, when the Directive mentions certain human rights it seeks to ensure and respect, it neither mentions gender equality and non-discrimination, nor the rights of women, while (rightly) insisting on the rights of the child. Whereas it acknowledges that “children are more vulnerable than adults” and that the child’s best interests must be a primary consideration”, referring notably to the 1989 United Nations Convention on the Rights of the Child, it does not once mention CEDAW which has been ratified by all EU Member States. The only reference to an international instrument related to gender-based protection is to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime¹⁷⁷.

Moreover, the Directive does not take into account the specific case of gender-based violence in the prevention and victims’ protection measures it aims to implement. Article 11, dealing with assistance and support for victims of trafficking in human beings, disposes that “Member States shall attend to victims with special needs when those needs derive, in particular, from whether they are pregnant, their health, a disability, a mental or psychological disorder they have, or a serious form of psychological, physical or sexual violence they have suffered”¹⁷⁸. The Directive contains general provisions, support and protection measures for child victims of trafficking in human beings, but none for women. As for the prevention aspect of the Directive, Member States shall take appropriate measures, such as education and training, “aimed at raising awareness and

¹⁷⁴ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011, *OJ L 101*, 15 April 2011, p. 1.

¹⁷⁵ Recital (7) of the Directive, *OJ*, p. 2.

¹⁷⁶ Recital (3) of the Directive, *OJ*, p. 1.

¹⁷⁷ Recital (9) of the Directive.

¹⁷⁸ Article 11, 7, of the Directive.

reducing the risk of people, especially children, becoming victims of trafficking in human beings”¹⁷⁹.

The same conclusion could be drawn from the analysis of the Directive on the European protection order: it specifically underlines that it “applies to protection measures which aim to protect all victims and not only the victims of gender violence, taking into account the specificity of each type of crime concerned”¹⁸⁰.

To conclude, the existing binding (“hard”) EU law instruments dealing with VAW lack two fundamental characteristics. First, recent directives do not appear to be sufficiently gender-based; consequently, they fail to frame various forms of VAW (such as trafficking) as forms of gender discrimination and gross violations of human rights. Second, as a consequence they also lack the global approach which is needed for effectively combatting VAW. To be effective, instruments on VAW must indeed adopt a comprehensive approach, ranging from prevention, support measures, definition of main offences to prosecution, sanctions, to the assistance to victims of gender-based violence. Given the obstacles the EU might face in terms of competence¹⁸¹, adopting a human-rights perspective centred on the core objective of substantial equality and antidiscrimination would be a major shift and a provide a way either to improve existing legislation or to frame new binding instrument(s). This comprehensive approach would also be an interesting way to bypass limitations of the EU competence in some areas dealing with VAW: from such a perspective, prevention measures should be reinforced in all directives dealing with victims’ protection.

¹⁷⁹ Article 18, 2, of the Directive.

¹⁸⁰ Recital (9) of the Directive 2011/99/EU.

¹⁸¹ See *infra*, Part III.

Part III. Ascertaining the feasibility of a global EU instrument on violence against women

A directive on VAW seems necessary and consistent with core objectives of the EU. It is also legally feasible within the current framework of the EU treaties. Of course, legal and political obstacles to such an action can be raised. Nevertheless, it seems that some legal actions remain viable, based either on Articles 82 and 83 TFEU (A) or Article 19 TFEU (B).

A. First option: a directive based on Articles 82 and 83 TFEU

A global directive on VAW touches upon many different areas of law, in which the competence of the EU is not always well established. That is particularly the case for harmonization of procedural and substantive criminal law (1). In these conditions, basing a global instrument on VAW on Articles 82 and 83 TFEU seems a feasible but difficult option (2).

1. A global directive on violence against women touches upon many areas of law, in which the competence of the EU is subject to serious limitations

Combatting VAW implies a multidimensional action to be effective. This is obviously one of the major difficulties any initiative on the subject must deal with. As a matter of fact, regulation on VAW crosses multiple domains of law, such as criminal, family, civil, social welfare, asylum, immigration, administrative, police, labour and equality law¹⁸², which are not equally dealt with in EU law. According to Article 5, § 2 TEU, “Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaty remain with the Member States”. Not only does this mean that the EU’s competence must clearly be established by the Treaties, but also that this competence, when it exists, will be exercised in order to attain precise objectives inscribed in them. It also means that in most cases, the EU competence will be exercised along with the competences left to the Member States. As a matter of fact, whereas the EU’s competences have considerably expanded thanks to the various revisions of the founding treaties and the constant deepening of the EU integration process, the EU cannot claim any exclusive competence in any of the areas just mentioned as significant for VAW. In some of them, such as in labour law, the EU competence appears to be very well established, thanks to the economic goal of the Rome Treaty and the core objective of the internal market. However, it is not an exclusive one since Article 4, § 2, a) TFEU lists the area of the internal market as one of those where competences are shared. In other important fields for VAW, such as education, protection and improvement of human health, administrative cooperation, the EU has competence to carry out actions to support, coordinate or supplement the actions of the Member States¹⁸³. Last but not least, since the Amsterdam Treaty, the EU affirmed its competence

¹⁸² See on this issue: European Commission, DAPHNE, *Feasibility Study.... op. cit.*

¹⁸³ Article 6, a), e), g), TFEU.

to adopt legally binding acts in criminal and immigration areas. This has been further confirmed with the Lisbon Treaty. As stunning as this evolution can be, it did not lead to any exclusive competence in these fields, and logically enough, the Area of Freedom, Security and Justice appears to be an area of shared competence between the EU and the Member States in Article 4, § 2, j), TFEU.

This patchwork of competences prevents EU institutions from any overly simplistic approach when dealing with a matter such as VAW. Because the EU's competence is shared with Member States, or because it can only support Member States actions, the EU must draw particular attention to the respect of the principles of subsidiarity and proportionality: it has to demonstrate, and strong arguments could easily be mobilized¹⁸⁴, that its action could be of a real added-value compared to the one of the Member States, and that the objectives of the proposed action could not be sufficiently achieved by them, either at central level or at regional and local level¹⁸⁵. It must also demonstrate that the content and the form of Union action "shall not exceed what is necessary to achieve the objectives of the Treaties"¹⁸⁶. Hence, a global hard-law instrument on VAW should lay down minimum standards of definition, prosecution, prevention or protection¹⁸⁷, leaving it to Member States to adapt the EU law to national specificities or constraints. Lastly, one must bear in mind that when the EU has competence to carry out actions to support or supplement the actions of the Member States, legally binding acts of the Union shall not entail harmonization of Member States' laws or regulations¹⁸⁸.

Whereas many of these conditions and limitations apply to almost all EU actions, some of them produce specific and quite negative effects when EU institutions tackle some issues linked to VAW. Among many examples of the difficulties which may occur, one should mention the debates around some recent proposals of the Commission on certain aspects of VAW, the so-called "victims package". For example, serious conflicts arose on the scope of the EU competence and on the legal basis of the Directive on the European Protection Order. The European Commission strongly supported the view of some Member States who had argued that the initial legal basis of the proposal first submitted by other Member States was invalid. As a matter of fact, the initial proposal had been based solely on Article 82, § 1, d), which authorizes the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, to adopt measures to "facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings *in criminal matters* and the enforcement of decisions". According to the European Commission, the fact that the measures could also be adopted pursuant to civil proceedings or to an administrative decision was seen as an issue and therefore the proposal could not solely be made in relation to criminal law.

¹⁸⁴ See *supra*.

¹⁸⁵ See the wording of Article 5, § 3, TFEU.

¹⁸⁶ Article 5, § 4, TFEU.

¹⁸⁷ See *supra*, Part II, A. 1. and 2.

¹⁸⁸ Article 2, § 5, TFEU.

The Directive which was eventually adopted¹⁸⁹ is based on Article 82, § 1, d), and Article 82, § 1, a), which allows the European Parliament and the Council to adopt measures “to lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions”. It is thus solely related to criminal law, which is not wholly satisfactory. Because of the different legal traditions and systems, preservation of which is central in criminal matters, the Directive confers a large margin of appreciation to Member States. Since “in the Member States, different kinds of authorities (civil, criminal or administrative) are competent to adopt and enforce protection measures, it is appropriate to provide a high degree of flexibility in the cooperation mechanism between the Member States under the Directive. Therefore, the competent authority in the executing State is not always required to take the same protection measure as those which were adopted in the issuing State, and has a degree of discretion to adopt any measure which it deems adequate and appropriate under its national law in a similar case”¹⁹⁰.

Undoubtedly, the EU now has a broader competence in European criminal procedure. Since the entry into force of the Lisbon Treaty, Articles 82 and 83 allow the EU institutions to establish minimum rules on both procedural (for Article 82) and substantive (for Article 83) law. However, these provisions also contain important limitations, which could represent serious legal obstacles to the adoption of a directive on VAW. As far as criminal procedural law is concerned, the legal measures the EU can adopt (minimum rules to facilitate mutual recognition of judgments and judicial decisions, police and judicial cooperation in criminal matters) shall only concern some aspects, such as mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure and the rights of victims of crime. These measures are subject to procedural limitations, since they can only be adopted if the EU action is “necessary to facilitate mutual recognition of judgments (...) and police and judicial cooperation”¹⁹¹, and if there is a cross-border dimension. The rules must be “minimum”, and “take into account the differences between the legal traditions and systems of the Member States”¹⁹². Moreover, if “a member of the Council considers that a draft directive as referred to in paragraph 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure”¹⁹³. Last but not least, the Council may decide to extend the list to other aspects of criminal procedure. But in that case, it must act unanimously after having obtained the consent of the European Parliament¹⁹⁴.

¹⁸⁹ Directive 2011/99/EU of 13 December 2011, OJ L 338, 21 December 2011, p. 2.

¹⁹⁰ Recital 20 of the Directive.

¹⁹¹ Article 82, § 2.

¹⁹² *Ibid.*

¹⁹³ Article 82, § 3.

¹⁹⁴ Article 82, § 2, d).

Of course, steps which could be important for protecting women against certain forms of violence have been taken based on this Article 82, such as the European Protection Order or the Directive establishing minimum standards on the rights, support and protection of victims of crime. But, as previously shown, these cannot be assimilated to a global instrument on VAW, which will necessarily contain both procedural and substantive criminal law. As the Directive on the European Protection Order clearly states, a European protection order may only be issued when a protection measure has been previously adopted in the issuing State. That means that the Directive does not interfere with the definition of conducts which could lead a State to issue such an order. A protection measure which relates to an act that does not constitute a criminal offence under the law of the executing State may not be recognized by the competent authority¹⁹⁵. All these restrictions are crystal-clear examples of procedural and substantive limitations contained in Article 82 TFEU.

Article 83 TFEU provides new tools to harmonize substantive criminal law. In its first paragraph, it provides that “The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis”. In the second part of the paragraph, it then exhaustively lists the areas of crime concerned: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money-laundering, corruption, counterfeiting of means of payment, computer crime and organized crime.

The fact that gender-based violence is not, as such, listed in Article 83, § 1, is obviously the main obstacle for the use of this legal basis. It could nevertheless be used alone or in combination with Article 82, § 2.

2. Articles 82 and 83, a feasible but difficult option for a global instrument on VAW

Since Article 83, § 1, does not include gender-based violence in the list of crimes which can be subject to EU measures of harmonization, it is not possible, in the current state of the EU law, to use this legal basis for the adoption of a general directive combatting VAW. One should note however that Article 83, § 1, does refer to crimes of sexual exploitation of women and to organised crime. Moreover, it is worth noticing that Article 83, § 1, refers to “areas” of crime, and not “crimes”. This may allow a flexible interpretation of the offences potentially contained in this provision. VAW occurring in the context of sexual exploitation of women, or VAW occurring in the context of organised crime, could be subject to minimum rules of harmonization.

¹⁹⁵ Article 10, c), of the Directive 2011/99/EU. For the gaps in the victims’ package, *see supra*, Part II, B. 2. b).

From this perspective, a directive on that subject could be proposed, or existing instruments could be revised in order to fully take into account the gender dimension. A reflection on amendments to Directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims¹⁹⁶ could be usefully achieved, as we have already stressed its main gap, the absence of a gender-specific approach to this type of VAW¹⁹⁷. References to CEDAW should be added, assistance and support of women suffering from sexual violence should be strengthened, particularly in Article 11 of the Directive, prevention should and could be aimed more specifically towards women. One could argue of course that the EU lacks competence in this field, given that it does not seem to have a general competence for the harmonization of wide prevention measures. But the inclusion in this Directive of prevention measures, even if they leave a certain margin of appreciation to Member States, proves that EU institutions can bypass certain obstacles or limitations related to EU competences in order to achieve important goals such as the deepening of the Area of Freedom, Security and Justice. Indeed, while the legal basis of the Directive on preventing and combatting trafficking in human beings (Articles 82, § 2, and 83, § 1) do not refer to the prevention of crimes, the instrument finally adopted includes adoption of measures to discourage demand, raise awareness and reduce the risk of people becoming victims of trafficking. It even provides that “in order to make the preventing and combatting of trafficking in human beings more effective by discouraging demand, Member States shall consider taking measures to establish as a criminal offence the use of services which are the objects of exploitation as referred to in article 2, with the knowledge that the person is a victim of an offence referred to in article 2”¹⁹⁸. The same argument could be made for support measures, for which the primary competence is a national one. It did not prevent EU institutions to adopt comprehensive provisions when they reframed the Council Decision establishing minimum standards on the rights of victims of crime: Article 9, § 3, b), of the Directive 2012/29/EU¹⁹⁹ is of a real added-value for women, for it says that support services shall as minimum develop and provide “targeted and integrated support for victims with specific needs, such as victims of sexual violence, victims of gender-based violence and victims of violence in close relationships, including trauma support and counselling”.

Of course, these initiatives cannot be considered as global instruments on VAW. In order to adopt such a directive, there is one, albeit difficult way: Article 83, § 1, also provides that “On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament ». Of course the unanimity requirement raises potentially tremendous political difficulties. But the Council might take a decision to extend the list of offences contained in this provision. EU institutions could then propose minimum standards of definition and sanctions in order to combat VAW at a larger scale.

¹⁹⁶ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011, *OJ L* 101, 15 April 2011, p. 1.

¹⁹⁷ *See supra*, Part II, B. 2. c).

¹⁹⁸ Article 18, § 4, of the Directive 2011/36/EU.

¹⁹⁹ Directive 2012/29/EU of 25 October 2012, *OJ L* 315, 14 November 2012, p. 57.

If the requirement of unanimity is a real concern, the other conditions of application of the article should not raise major obstacles. Not all cases of domestic violence raise cross-border issues. However, the freedom of movement which is at the very foundation of the EU project could indeed increasingly endanger women²⁰⁰. Undoubtedly, and regardless of the cross-border dimension, defining new offences regarding VAW on a larger scale would result “from a special need to combat them on a common basis²⁰¹. The requirements of Article 83, § 1 are met : this special need results first from the gaps and divergences of national approaches in this field, which could be overcome only by a legislative instrument defining minimum standards in full respect with the principles of subsidiarity and proportionality. Second, this need comes from the special kind of threat to society VAW constitutes. As has already been highlighted, statistics show the devastating effects of VAW – well beyond the violent acts themselves. Because violence generates violence, all kind of offences to women impact not only physical and psychological health-related aspects, but also much broader social costs, in a long term perspective.

Article 84 TFEU could also serve as a legal basis for establishing rules of prevention. In fact, Article 84 allows for the adoption of rules that “promote and support the action of Member States in the field of crime prevention, excluding any harmonization of the laws and regulations of the Member States”²⁰². Thus, this provision could serve as a useful legal basis for a directive which would not seek to harmonize national legislations, but to efficiently supplement existing EU law on victims. As stated earlier, taking into account the dimension of prevention when combatting VAW is indeed part of the comprehensive approach which is necessary in that field. An action based on Article 84 TFEU would then be fully consistent with existing EU measures. The EU could promote national training plans for competent authorities on a European basis, or the publication of relevant statistics on certain forms of VAW which could be very useful in order to combat a transnational phenomenon²⁰³.

We should also mention Article 83, § 2, which provides that “[i]f the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned”. This article allows EU institutions to complement non-criminal law measures already adopted and harmonizing certain fields related to women by criminal law measures in order to ensure

²⁰⁰ See for example ECtHR, 26 March 2013, *Valiulienė v. Lithuania*, n°33234/07, or CEDAW Committee, *Isatou Jallow v. Bulgaria*, Communication no. 32/2011, UN Doc. CEDAW/C/52/D/32/2011.

²⁰¹ Art. 83, § 1: “in the areas of particularly serious crime with a cross-border dimension resulting from the nature of impact of such offences or from a special need to combat them on a common basis”.

²⁰² Article 84 TFEU.

²⁰³ In its Report on the implementation of the 2005 CoE Convention by France, the GRETA insists on the shortcomings and gaps in French framework on this aspect, *Report on the implementation...*, § 10.

the “effective implementation” of the Union policy at stake. Because it leads us to analyze EU provisions outside the ones regarding criminal matters, we will discuss the possibility of using Article 83, § 2 in the next section. As a matter of fact, given the obstacles and limitations of criminal provisions as they are in the Lisbon Treaty, it appears that some actions could be led outside this chapter: they should rely on the major objective which would be pursued by legislation on VAW, which is the struggle against discrimination.

B. Second option: an instrument based on Article 19, § 2 TFEU

It might be a good option to bypass procedural and substantive limitations of EU criminal law provisions by using other much more efficient tools in the TEU. This possibility is uneasy, given the strict rules set by the CJEU with regard to the choice of a legal basis (1). Nevertheless, it should be explored. Indeed, conceived from a gender-equality perspective, an instrument on VAW could also be linked to the achievement of other important EU policies, such as general health education or, most of all, non-discrimination (2).

1. The rules governing the choice of a legal basis of an act adopted by the EU

In settled case-law, the Court has consistently emphasized that the choice of the appropriate legal basis had constitutional significance. Since the EU only has conferred powers, it must tie its decisions to appropriate Treaty provisions empowering it to adopt this kind of measure²⁰⁴. The Court also clearly established that the choice of the legal basis for a EU measure “must be based on objective factors which are amenable to judicial review and include in particular the aim and content of the measure”²⁰⁵.

Most importantly for the determination of a legal basis for a directive on VAW, the Court also stated that “if examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component²⁰⁶. “Exceptionally”, the Court also stated, “if on the other hand it is established that the act simultaneously pursues a number of objectives or has several components that are inextricably linked, without one being secondary and indirect in relation to the other, such an act will have to be founded on the various corresponding legal bases”²⁰⁷.

When framing an action on VAW, EU institutions should thus consider the possibility of legally basing a binding act not just on criminal law provisions of the Lisbon Treaty, but

²⁰⁴ ECJ, 1 October 2009, *Commission v. Council*, C-370/07, § 47.

²⁰⁵ See e.g.: ECJ, 10 January 2006, *Commission v. European Parliament and Council*, C-178/03, § 41; 11 June 1991, *Commission v. Council (Titanium Dioxide)*, C-300/89, § 10.

²⁰⁶ ECJ, 10 January 2006, *Commission v. European Parliament and Council*, C-178/03, § 42. See also Judgment of 11 September 2003, *Commission v. Council*, C-211/01, § 39; 29 April 2004, *Commission v. Council*, C-338/01, § 55.

²⁰⁷ *Ibid.*, § 43; 19 September 2002, *Huber*, C-336/00, § 31; 11 September 2003, *Commission v Council*, C-211/01, § 40.

also on others which would appear to pursue objectives that are deemed inseparable from the former. One solution could be explored from that perspective: an action on VAW would not only, or not mainly, aim at harmonizing national criminal laws in the field. It would also be a strong and central instrument in EU law in order to combat discrimination, and more specifically, gender discrimination, which is now a core objective of the EU project and polity.

2. A possible action under Article 19 § 2 TFEU?

These rules relating to the choice of a legal basis do not leave a large margin of appreciation to EU institutions. A global instrument on VAW, which aims at providing minimum standards in terms of definition of infractions, sanctions, prosecution of VAW, prevention and protection of victims, should be based on criminal law provisions laid down in the Lisbon Treaty, mainly in Articles 82 and 83.

However, if combatting VAW were viewed from a gendered perspective and thus conceptually framed as discrimination against women²⁰⁸, it would allow EU institutions to propose another legal basis, namely Article 19 TFEU, in complement of Articles 82 and 83, or alone, in the case of an instrument not dealing with criminal matters. According to Article 19, § 1, « Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”. The second paragraph provides, “by way of derogation from paragraph 1”, that “the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonization of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1”.

EU institutions would have to stress the core objective of non-discrimination, in order to justify an EU competence in that field, and then respect the requirement of the conferral principle, which only confers competence to the EU “to attain the objectives set out”²⁰⁹ in the treaties. This would be an easy task: as mentioned earlier, Article 2 TEU establishes core values of the EU, amongst which human dignity, equality, non-discrimination, tolerance, solidarity and equality between men and women. The EU Charter of Fundamental Rights has now the same legal value as the Treaties. Article 8 TFEU provides that “in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women”. Article 10 TFEU provides that “in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

²⁰⁸ See *supra*, Part I, B. 2, a).

²⁰⁹ Article 5, § 2, TEU.

All these provisions make it quite clear that non-discrimination is a central and fundamental objective of the EU. This impression is confirmed by the Declaration n° 19 to Article 8 TFEU, annexed to the Treaties, which says that “in its general efforts to eliminate inequalities between women and men, the Union will aim in its different policies to combat all kinds of domestic violence”. Obviously, this declaration is not legally binding, and as such, could not confer any competences to the EU to adopt binding acts on this issue. But it is of the utmost importance for two reasons: first, it explicitly acknowledges that domestic violence can be seen as discrimination towards women, since this combat must be inscribed in a general effort to “eliminate inequalities between women and men”. Second, it urges the Union to found all its policies under this fundamental banner: VAW is conceived as an obstacle to the achievement of other policies of the EU. Hence, combatting it as such must be considered as a central objective of the EU in the Lisbon Treaty.

Hence, the principle of conferral is respected when the EU acts in this field. So are the main requirements identified by the ECJ as far as the choice of a legal basis is concerned. Obviously, the fight against gender-based discrimination is not a secondary objective when VAW is at play: that is why an act could lawfully be based on several provisions of the EU treaties or solely on Article 19 if the EU’s binding act does not intend to proceed to a harmonization in criminal matters.

Article 19, § 2, could be a feasible legal basis, as long as the EU act does not aim at harmonizing the laws and regulations of the Member States. It would allow the EU to take support measures in order to supplement Member States action, such as training on VAW for law enforcement personnel, effective civil remedies that also extend to psychological harm, publication of full statistical data on VAW. The European Parliament Resolution of 5 April 2011 proposes such a comprehensive policy approach, and highlights the necessity of focusing on working with civil society and on the need to provide adequate financial resources (appropriate means)²¹⁰. Existing EU Directives should also be taken as good examples of the feasibility of such an approach. As stated earlier, Directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims²¹¹ has included prevention measures, while the legal basis of the Directive (Articles 82, § 2, and 83, § 1) does not refer to the prevention of crimes. The instrument which was eventually adopted includes the adoption of measures which discourage demand of trafficked human beings, raise awareness, and reduce the risk of people becoming victims of trafficking. EU institutions have also adopted comprehensive prevention provisions when they have reframed the Council Decision establishing minimum standards on the rights of victims of crime and adopted Directive 2012/29/EU²¹², which is, as we have seen, of a real added-value for women.

²¹⁰ Resolution of 5 April 2011 on priorities on outline of a new EU policy framework to fight violence against women (A7-065/2011).

²¹¹ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011, *OJ L* 101, 15 April 2011, p. 1.

²¹² Directive 2012/29/EU of 25 October 2012, *OJ L* 315, 14 November 2012, p. 57.

The main point is that choosing a global approach at the EU level, mainly through the equality and the non-discrimination principles, would allow EU institutions to adopt broad preventive measures, which are, as we have seen in the Spanish model, decisive for the effective protection of women.

It would also be possible to use Article 19, § 2, besides other provisions of the EU treaties, such as Article 83, § 2, TFEU, which allows EU institutions to complement non-criminal law measures already adopted and harmonizing certain fields related to women, by criminal law measures in order to ensure the “effective implementation” of the Union policy at stake. This could be the case in the areas of employment and working conditions, in which EU directives include a prohibition of discrimination based on sex, including harassment²¹³.

In any case, if a global hard-law instrument has the main goal of setting up minimum standards of definitions of offences to women and minimum rules to prosecute and sanction them, it would fall under the criminal provisions of the Lisbon Treaty, and as such, would be subject to the various limitations mentioned earlier. Undoubtedly, such an option should not be ignored: it is feasible and, albeit not in a global and complete way, it should be taken into serious consideration when defining and pursuing some major forms of VAW at the EU level which are not legally defined in the same way in national systems.

Conclusion

Adopting a global hard-law instrument on VAW, such as a directive, would represent a significant step in the on-going process of transforming the EU into a real community based on shared values and on the respect of human rights, and thus contribute to giving the EU in the position it strives to have. It would enable the EU legal order to provide adequate solutions to deal with gross violations of human rights – and in fact, better solutions than the ones that can be offered by Member States, given the importance and the transnational dimension of the issue that affect thousands of human beings across Europe (and beyond). Because the EU is now more than ever strongly committed to the defence of substantial equality and the fight against all forms of discriminations, a directive on VAW framed in that perspective would only be consistent with and deepen the main EU objectives and policies.

This should be the guideline of the EU action in any case. Indeed, even if a global directive on VAW should face too much political resistance and legal limitations, EU institutions should improve the existing EU legislation in order to frame recent directives from a gender-based perspective. They should also consider complementing existing EU legislation with measures based upon antidiscrimination provisions of the EU treaties.

²¹³ See *supra*, Part II, B. 2.

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European Added Value
of a Directive on combatting violence against women

ANNEX II

**Economic aspects and
legal perspectives for action at EU level**

**Research paper
by Prof. Sylvia Walby
and Philippa Olive**

AUTHOR

This research paper has been written by **Prof. Sylvia Walby** (s.walby@lancaster.ac.uk), UNESCO Chair in Gender Research and Distinguished Professor of Sociology at Lancaster University (Parts I and II), and **Philippa Olive** (p.olive@lancaster.ac.uk), researcher at the Department of Sociology, Lancaster University (Part I), at the request of the European Added Value Unit, of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament.

RESPONSIBLE ADMINISTRATOR

Monika Nogaj, European Added Value Unit
To contact the Unit, please e-mail eava-secretariat@europarl.europa.eu

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Part I

Economic aspects of the added value of measures to combat violence against women

**Research paper
by Sylvia Walby and Philippa Olive**

Abstract

The paper investigates the economic cost of violence against women for the EU and compares the costs of action and inaction. Violence against women is estimated to cost the EU EUR 226 billion each year, including EUR 45 billion for services and EUR 24 billion in lost economic output. The costs of preventive measures are substantially less than the cost of the violence.

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Executive Summary

Violence against women costs the EU EUR 226 billion each year.

The cost is estimated using methods that are found from a review of the relevant literature.

There are three major components of the cost: services, lost economic output, and the pain and suffering of the victims. Services include criminal and civil legal systems, health services, and specialised support services. The cost of services is largely borne by the state, or by the public through the pooling of costs through insurance. Lost economic output is a consequence of injuries leading to lost days of work. The public's willingness to pay to avoid pain and injury is included since it is a part of cost-benefit exercises in adjacent policy fields, such as, road building and other forms of crime.

The cost of services is EUR 45 billion; the value of lost economic output is EUR 24 billion; the value placed on pain and suffering is EUR 158 billion.

The estimates were developed using existing studies on the cost of domestic violence and other forms of violence against women in EU member States. Costs were extrapolated to the EU, based on population size.

The costs of inaction are high.

1 Introduction

The purpose of this paper is to contribute to an assessment of the added-value of adopting a comprehensive, legally binding EU instrument (in the form of a Directive) on combatting all forms of violence against women, by contrasting the effects and costs of action with those of inaction. The specific aim of the paper is the comparison of the costs of action with the costs of inaction. This is achieved by the identification of the components of the economic costs of violence against women in the EU, in its different forms, for the various stakeholders; the estimation of the costs of violence against women in the EU; and the comparison of the costs of violence against women with the costs of inaction.

Gender-based violence against women is a major harm and detriment to the quality of life causing pain and suffering. In legal terms it is both a form of gender discrimination, since it is violence that is disproportionately against women, and it is a violation of women's human rights. In terms of health, it is a major detriment to public health. In terms of the economy it is a significant detriment to economic productivity and output and to the potential for economic growth. Violence against women is a detriment to social inclusion.

The focus on the cost of violence against women is thus one among several possible foci when investigating its harms and the case for action. Cost is not the only or major reason for action, but it is nonetheless important. The purpose of comparing the cost of action and inaction is that it contributes to the assessment of the impact of proposed legislation. Costing violence against women enables this impact assessment to use the same tool, the same unit of assessment, as that for other policies, that is, money. It thus allows for the comparison of policies to combat violence against women with other policy priorities. In particular, it contributes to the assessment as to whether action at the EU-level is proportionate to the harm. Proportionality is a core aspect of the principle of subsidiarity in which decision-making should take place at the level of the Member State unless there is sufficient reason for EU-level action.

The methodology to measure the cost of gender-based violence against women is relatively new, developing over the last 20 years or so. It draws on the widespread use of cost-benefit analysis in adjacent policy fields. Data to support the analysis are developing, but remain uneven and with significant gaps. This means that current estimates are under-estimates of the impact of the harms.

In addition to this introduction, the paper has five further sections:

- methodology and literature review
- identification of the types of impact of violence against women;
- estimation of the cost of violence against women;
- comparison of the costs of the violence with the cost of measures to combat the violence; and
- concluding points.

2 Methodology

2.1 Review of literature

The method and data for this paper are drawn from many sources, following a review of relevant academic, policy and statistical literature. This review identified the categories into which violence can be divided, where data are to be found, and the analytic procedures to estimate the costs.

The literature reviewed includes: Chan and Cho (2010); Council of Europe (2012); Day, McKenna and Bowlus (2005); Heise et al (1994); Laing and Bobic (2002); Morrison and Orlando (2004); Walby (2004); and Willman (2009); and of studies of the costs of violence against women in selected countries, focused on the EU, Denmark: Helweg-Larson et al (2010); EU: Nectoux (2006); Finland: (Piispa and Heiskanen 2001); France: Nectoux et al (2010); the Netherlands (Korf, Meulenbeck, Mot and van den Brandt, 1997); Spain (Andalusia) Villagómez (2003; 2010); Sweden: Envall et al (2006); and UK (Walby 2004, 2009); with some extension to OECD and beyond: Australia (Roberts 1988; Access Economics, 2004; NCRVAW&C, 2009); Canada: Zhang et al (2013); Switzerland (Godenzi and Yodanis 1999); US (Miller et al 1996; National Center for Injury Prevention and Control 2003).

This paper especially draws on Walby's (2004) *The Cost of Domestic Violence* published by the UK Department for Trade and Industry, and quality assured by the UK Office for National Statistics.

The procedure is to identify the impacts of violence against women; estimate their size; estimate their cost; attribute these costs to different stakeholders; and then to scale up from Member State to EU-level. These costs are attributed to different stakeholders, in particular: state and public; business and economy; the victims. The methodology is dependent on sources of data as to the extent of violence against women; the use of services by victims; the cost of these services; the size of the impact on the employment of victims; and an estimation of a value of the pain and suffering.

The data to support the analysis are of uneven quality with gaps so that some costs cannot be measured. This means that the costs are an under-estimate. If it is not possible to robustly measure the size of the effect and the cost, then the paper errs on the side of caution and offers a conservative estimate. The impacts for individuals and wider society for which the precise scale of effects are not known robustly and thus not included in the costs are reported in Section 3. This may be regarded as an agenda for further research.

2.2 Defining violence against women

The subject of this paper is gender-based violence against women. The UN defines 'violence against women' as 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including

threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life' (UN 1993).

There have been a variety of alternative approaches to the subject including: domestic violence against men and women; domestic violence against women; gender-based violence against men and women; and all forms of violence against women. Many of the issues of methodology needed for this study apply to each one of these various formulations so they are included in the review of literature and approaches. The calculation of the costs will make appropriate revisions to return to 'gender-based violence against women'.

2.3 Identifying the components of the cost

The components of the cost of violence against women are derived from the literature. The variations between studies are sometimes related to limitations of data sources and at other times to conceptual disagreements as to what should be included. There are different ways of identifying the categories into which costs fall, including for example, distinctions between: tangible/intangible. In this paper, the costs of violence against women identified in the literature are initially grouped into five types (following Walby 2004): legal; health; specialised support services; business/economy; and pain and suffering.

- Legal costs can be divided into the criminal justice and civil justice systems; the criminal justice system includes police, courts, prisons; civil legal costs includes specialised legal devices such as non-molestation or protection orders.
- Health costs can be divided into physical and mental. Aspects include: doctors, prescriptions for drugs, hospital care, ambulances.
- Specialised support services. These include: places of refuge and shelter, emergency housing, advice.
- Business/economy. This includes time lost from employment due to injuries.
- Pain and suffering. Accounts vary as to whether to include a sum to represent pain and suffering. Some include this as 'willingness to pay' to avoid this harm. Health-facing systems of analysis sometimes include DALYS, the loss of 'disability adjusted life years' (Heise et al 1994; Dolan et al 2005; WHO 2013), though not in EU studies.

In the latter parts of this paper, these five categories are reduced to three for ease of presentation: state and public services (primarily legal, health, specialised support services); lost economic output; pain and suffering of the victim.

2.4 Attributing the costs to different stakeholders

For the purposes of this report, which addresses the costs and benefits of action by the EU and Member States, the focus is on the costs to the wider society. The categories selected for attributing costs to different stakeholders are: the cost to the state/public; the cost to the economy/business; and the cost to victims. Categorised in this way, the costs to the wider society, those who are not direct victims of the violence, but who nonetheless pay a price for the existence of the violence are differentiated from the cost to the victim.

2.5 Methods used to identify size of impacts and attribute a monetary value

There are several approaches to the identification of the size of the impacts and to the attribution of a monetary value to these. These include: expert judgement; victim recall studies; surveys; administrative data; statistical correlations; parallel studies of similar harms. It is common for any given study to use different approaches to the measurement of different kinds of costs.

Expert judgement: asking experts what they think are the services used and how much (e.g. Nectaux 2006). This approach was used in early studies and has the advantage of simplicity and ease. But it is not reliable, since it is little more than well-informed speculation. It is not used in this paper.

Victim recall studies: using in depth interviews with a relatively small number of victims to recall which services they used and how much (Roberts 1988). This approach may appear to be useful in its utilisation of the experiences of survivors, but it is severely limited by the absence of information as to the representativeness of these experiences. It is not used in this paper.

Surveys: asking a representative sample of the population whether they have been victims of violence; nature of the impact; and what services they used and how often. This approach is useful and important in ascertaining the extent to which the major forms of violence against women exist in the general population and the nature of their impact. It is much less reliable for discovering less common forms of violence (e.g. FGM, forced marriage since sample sizes of victims of these forms of violence are usually too small to be representative) and also for discovering the extent of service use partly because most victims do not use services so the sample size can be smaller than is needed to determine whether the findings are representative and partly because most surveys ask only about service use immediately after an incident, but service use that is repeated or prolonged is poorly captured. Survey methodology is recommended for discovering the extent and nature of the major forms of violence, but not for less common forms of violence against women, and only to be used with caution for the extent of service use where there is no

other method. In this paper, surveys are used to discover the extent of the major forms of violence against women and the nature of the injuries caused.

Administrative data from services: investigating the extent of use of services by victims using data from administrative data from services. This approach is useful for estimating the use and cost of services, but only if it is possible to identify the proportion of service use that is by victims of violence against women. It is often necessary to patch together data from several different sources in order to make the calculations needed. In this paper, administrative data are used in the estimates of the size and cost of use of legal, health and specialised services.

Statistical analysis of correlations: investigation of the correlation between violence against women and harmful consequences using statistical analysis of large data sets (see Willman 2009). This approach has been used in an attempt to measure the impact of violence against women on their employment. While this is a potentially powerful methodology, in practice it is weak partly because there are few if any data sets containing the relevant information at a sufficiently high level of quality, and partly because the causal pathways may not be direct and are unlikely to take a simple linear form. For example, it is difficult if not impossible to ascertain whether violence causes unemployment or unemployment causes violence in a cross-sectional data set. In this paper, this approach is not used since there are not the data to support it.

Parallel studies of similar harms: Extrapolation from the costing of similar harms that have been studied for other purposes. This approach is useful in linking the costs of violence against women to costs of other harms that have been authoritatively established and benchmarked elsewhere. In particular, 'injury' is a form of harm that is included in cost-benefit analysis in other, longer established, policy fields. Injury is of interest to authorities engaged in cost-benefit analyses of policies to reduce and prevent their causes, including in: road traffic accidents, other forms of crime, and public health. This includes the cost of treating injuries, in health care. It also includes the value placed on the willingness to pay to avoid a given level of injury. In this paper, the cost of 'injury' established by governmental authorities is used in relation to health care and in relation to the willingness to pay to avoid it.

This paper therefore uses the following three approaches (following Walby 2004):

- **Surveys:** to determine the extent and nature of the major forms of violence against women.
- **Administrative data:** to determine the extent of use of services by victims of violence against women; and also to determine the cost of units of service.
- **Parallel studies of injury:** use of authoritative studies of the impact of physical injury on: lost working time; use of health care services; and the public's willingness to pay to avoid such injuries.

The base-line study for the discussion in the remainder of the report is Walby's (2004) *Cost of Domestic Violence*. This remains the most comprehensive study of the costs of

violence against women in a Member State of the EU. This study for the UK Department of Trade and Industry Women and Equality Unit reached the quality standards of the UK Office for National Statistics.

There are several points of comparison of similarities and differences between Walby (2004) and earlier and later studies: it has a more comprehensive range of items than most other studies, generating typically higher estimates of costs; it uses findings from administrative sources of the estimated as its main sources of data of service use rather than relying on expert or speculative judgements; it includes a cost for the pain and suffering of the victims, which many other studies exclude; it includes the cost of lost economic output based on in-depth studies of the impact of injuries over four years on lost employment which generates more reliable and higher estimates of days lost than other methods such as victim recall over the past year. Hence, while this study produces higher estimates of costs than other studies, it achieves this using only data that is robust.

3 Identifying the costs

There are three main types of costs of violence against women: services, lost economic output, the pain and suffering of the victims. There are three main types of stakeholders: the public/state, economy/employers, and individual victims. The section below draws on Walby (2004) which in turn drew on many earlier studies.

3.1 Services

There are three main types of services that address violence against women:

- legal system: criminal and civil;
- health services: physical and mental;
- specialised services.

Legal system: There are two main parts to the legal system that are relevant: the criminal justice system and the civil legal system. The criminal justice system is engaged in the deterrence and punishment of perpetrators of violence against women, while the civil legal system is involved in the complex processes of disentangling relationships broken by violence especially in relation to children and property. The criminal justice system is the larger part of this and includes: the police; prosecution; courts; prisons and probation services, involving several kinds of legal professionals. The civil legal system is involved in processes of divorce, separation and child custody as well as offering specialised legal instruments variously known as protection orders, non-molestation orders, go-orders. Their work includes solicitors, courts and other legal professionals. Most of the costs of the legal system are borne by the state, though some smaller parts especially in the civil legal system are paid for by victims and defendants.

Health services: Health care services are used to treat the physical and mental injuries caused by the violence. The impact of violence on health may be immediate, but it can also be longer term. Health care involves costs in relation to doctors, nurses, ambulances, hospitals, and drugs. In some countries, such as the UK, most health care costs are borne by the state; in others countries, the costs are borne by the public through the pooling of health care costs through the device of insurance (as the use of health care services increases, so too do the costs of insurance for the public).

Specialised services: There are several specialised services that respond to particular needs, including refuges/shelters, emergency housing, specialised advice and social services. An extensive range of services has developed across the EU (EIGE 2013). Refuges/shelters are specialised residential locations where victims can find immediate safety. There can be special access to various forms of emergency housing. Specialised advice and counselling to victim-survivors as they seek help and rebuild their lives are important. The mainstream social services sometimes offer support to children in situations where there is abuse of both children and women. While some of these services

were started by non-governmental organisations, more recently most are funded in some way by the state.

Other interventions: There are a range of further interventions, including education/media campaigns, increasing women's economic independence, gender-balance in decision-making in relevant policy arenas, research to inform public policy improvement. However, reliable estimates of their costs were not available, so they are not included in this paper.

3.2 Economy

Violence against women reduces economic output (Lloyd 1997). The most direct effect is through injuries from the violence that leads to time off from work. This loss of working time reduces economic output. In addition to the direct effect of injuries on working time, there can be reduced productivity through reduced concentration at work. The losses are to the economy as a whole, with ramifications for the society as a whole. In a more immediate sense the losses are borne by both the worker and the employer, since in some circumstances there are losses in wages, while in others the employer absorbs the occasional days of absence.

3.3 The value/cost of pain and suffering

Gender based violence against women generates pain and suffering. There are human and emotional costs to the violence. Should a price be placed on this? In parallel policy fields, including transport and other crime (Brand and Price 2000), a value has been included. In cost-benefit analyses of the building of new roads, there is an estimate included of the public's 'willingness to pay' to avoid the pain and suffering of the injuries that would be sustained in road traffic accidents if the new road was not built (Department of the Environment Transport and the Regions 1999; Department for Transport, Local Government and the Regions 2001; Mayou and Bryant 2002; McMahon 1995; Murray et al 1993). There are sophisticated analytic systems that link, or chain together, comparisons of what people would pay to avoid certain harms. If it is reasonable to include estimates of the public's willingness to pay to avoid injuries in road traffic accidents as a factor contributing to a decision as to whether to spend money on a new road, then it would seem reasonable to include such estimates in contributing to decisions as to whether to spend money on policies to reduce violence against women.

3.4 Additional impacts not included in the costs

There are some costs where the amounts are hard to estimate, even though the fact of harm is beyond doubt. For example, while the long-term negative effects of domestic violence on children are widely noted, the quantitative data are not sufficiently robust to allow for an estimate of its costs to be included. Further, the cost of injuries to mental health is likely to be considerable, but this is hard to estimate with existing data. In addition, there are forms of gender-based violence against women that are not included,

such as FGM, forced marriage, trafficking for purposes of sexual exploitation, because of insufficient data. In these cases and others, this paper errs on the side of caution and reports on costs conservatively. The total figure is thus very likely to be an underestimate.

3.5 Attributing costs to stakeholders

The costs are apportioned between different stakeholders: the public/state, economy/employers, and individual victims.

State/public: Most of the cost of services is paid by the state/public, though there are a few exceptions where victims pay small costs themselves. In relation to health this can be variously paid by the state or by the public. In the UK, most of the costs are borne by the state from general revenue; in many EU MS the costs are paid through an insurance scheme - these are effectively 'public' since they are pooled across the population; in all MS there are some private costs, these are small (as in the UK, where most costs are borne by the National Health Service that is free at the point of use, and private payments are either small co-payments for prescription-based medicines or voluntary spending on additional services), or moderate (e.g. some insurance-based schemes match payouts by the insurer with a moderate level of co-payments by the individual using the health service), rather than large as in countries such as the US.

Economy: lost economic output. Reductions in economic output are a loss to the economy as a whole and thus to the society as a whole. This is reflected in reductions to the Gross Domestic Product (GDP) of the MS and to GDP per capita (per person). There is a further way of attributing lost economic output, which is to divide it between the employer and the employee (as the proximate bearers of these costs).

Victims: The pain and suffering is borne by the victims.

4 Estimating the size of the costs

4.1 Introduction

While there are some variations in the cost of violence against women in different EU Member States, there are many similarities in its components. The method to estimate the costs of violence against women in the EU (EU-27) is to: identify the costs in the most comprehensive study currently available in the EU, up-dated and revised where possible and reasonable; and to extrapolate to EU-27 using data on variations where available and appropriate.

4.2 Baseline study

The costs estimated in the baseline study (Walby 2004) report are shown in Table 1a, below. There are three major types of costs:

- Costs to the state/public, including: a criminal and civil legal system; health services provided by the state or by insurance; specialised service provision; and further interventions to combat VAW.
- Cost to business/economy of lost working-time.
- Cost of pain and suffering to the victims.

Table 1: Summary of costs in *Cost of Domestic Violence* (GBP million)

Type of cost	State	Individual victim	Employers	Total Cost
Criminal Justice System	1,017			1,017
Health care (Physical)	1,206	15		1,220
Mental health	176			176
Social services	228			228
Housing and refuges	130	28		158
Civil legal costs	159	152		312
All services	2,916	195		3,111
Employment		1,336	1,336	2,672
<i>Sub-total</i>	2,916	1,531	1,336	5,783
Human costs		17,086		17,086
Total	2,916	18,613	1,336	22,869

Note: Costs estimated for one year for England and Wales, centred on 2001.
Walby (2004) Table S.2, page 13.

The first transformation of the data is to translate from GBP pounds to EUR. (£1=€1.1532695 using EU convertor at 6/2011, Europa 2011). This is shown in Table 2.

Table 2: Summary of costs in *Cost of Domestic Violence* (EUR million)

Type of cost	State	Individual victim	Employers	Total Cost
Criminal Justice System	1173			1173
Health care (Physical)	1391	17		1407
Mental health	203			203
Social services	263			263
Housing and refuges	150	32		182
Civil legal costs	183	175		360
All services	3363	225		3588
Employment		1541	1541	3082
<i>Sub-total</i>	3363	1766	1541	6669
Human costs		19 705		19 705
Total	3363	21 466	1541	26 374

Note: Table 2 translated from GBP to EUR: £1=€1.1532695 using EU convertor at 6/2011, Europa 2011

For purposes of simplicity, in the following analyses, some of the costs are grouped into a smaller set of categories: the costs of criminal legal and civil legal are grouped together as legal; the costs of health care physical and mental health are grouped together as health; the costs of social services, housing and refuges are grouped together as specialised services; employment re-named economic output; and human costs re-named as pain and suffering. See Table 3 below.

Table 3: Baseline study re-grouping costs by type and who bears it (EUR million)

Type of cost	State/public	Victim	Employer	Total
<i>Legal</i>	1356	175		1532
<i>Health</i>	1594	17		1611
<i>Special services</i>	413	32		445
All services				3588
Economic output		1541	1541	3082
Pain and suffering		19 705		19 705
Total	3363	21 466	1541	26 374

Table 3 is a condensed version of Table 2 above.

The cost of domestic violence in England and Wales in 2001 was EUR 26374 million. The cost of domestic violence per person in the population was EUR 507 in 2001 in England and Wales, based on estimates of the population in England and Wales as 52 million (National Statistics 2002).

4.3 Revisions in order to calculate costs for gender-based violence against women in the EU in 2011

Introduction

This paper estimates the cost of gender-based violence against women in the EU in 2011. This requires the following revisions from the base-line study:

- a) Revising 'domestic violence against women and men' to 'gender-based violence against women', by deleting violence against men and adding sexual violence by non-partners;
- b) Up-dating the costs for inflation between 2001 and 2011;
- c) Extrapolating from 'England and Wales' to 'UK'
- d) Up-dating the rate of violence against women from that found in 2001 to that in 2011.
- e) Extrapolating from UK to EU27.

From 'domestic violence against men and women' to 'gender based violence against women'

In order to move from the costs of domestic violence against women and men to the costs of gender based violence against women, it is necessary to: delete the costs of domestic violence against men; add the cost of sexual violence and stalking against women by non-partners.

The costs of domestic violence against men are identified in the original report since costs had been disaggregated by sex, so the following costs are removed: Legal (criminal justice system) EUR 153 million; health (hospital/ambulance: GPs, prescriptions for drugs) EUR 346 million; economic output: EUR 638 million; human and emotional costs: EUR 3700 million. (No separate costs for men were identified in other fields, e.g. social service costs were only for children of abused women). Table 4 shows the reduced costs after removing the costs for men.

Table 4: Removing cost of domestic violence against men (EUR million)

Type of cost	State/ public	Victim	Employer	Total	Costs for men	Costs for women
<i>Legal</i>	1356	175		1532	153	1378
<i>Health</i>	1594	17		1611	346	1265
<i>Special services</i>	413	32		445		445
All services				3588	499	3088
Economic output		1541	1541	3082	638	2444
Pain and suffering		19705		19705	3700	16005
Total	3363	21466	1541	26374	4837	21537

It is necessary to add the costs of sexual assault against women from non-partners. These are in two categories: serious sexual assault which is defined as rape and other forms of penetrative sexual assault; and less serious sexual assault, defined as 'unwanted sexual touching that led to fear, alarm or distress'. Around half of serious sexual violence (54% of rape; 47% of other penetrative sexual assault), is committed by a current or former intimate partner, according to the CSEW, so extending from domestic to all serious sexual assaults doubles these numbers from 37,000 to 74,000. Of the other forms of sexual assault, 11% was by current or former intimates, so including all such cases would increase the number of instances nine-fold, from 26,000 to 234,000. These multipliers – times two for rape, times nine for lesser sexual assault are applied to the costs. In criminal justice, the crime code is used to assist the adjustment. The additional costs of sexual violence against women from non-partners are shown in Table 5 below. As was shown in Table 4, most of the costs of services are borne by the state or public; lost employment time is lost economic output; while the cost of pain and suffering is borne by the victim; Table 5 offers a simplified presentation on this basis.

Table 5: Adding sexual violence against women by non-partners (EUR million)

Type of cost	Costs for violence from partners to women	Additional costs of sexual violence from non-partners to women	New total
<i>Legal</i>	1378	541	1919
<i>Health</i>	1265	35	1300
<i>Special services</i>	445		445
All services	3088	575	3664
Economic output	2444	652	3095
Pain and suffering	16 005	4515	20 520
Total	21 537	5742	27 279

Table 6 offers a further simplified presentation, grouping together the costs of different forms of services. It presents the costs in three categories: services paid for by the state/public; lost economic output; and the pain and suffering of the victim.

Table 6: Summary costs for gender-based violence against women: state/public services, lost economic output, victim, England and Wales 2001

Type of cost	EUR million
State/public services	3664
Economic output	3095
Pain and suffering of victim	20 520
Total	27 279

Up-dating the costs for inflation between 2001 and 2011

Inflation means that the meaning of 2001 prices has changed by 2011. The Bank of England (2013) offers an on-line calculator to allow for the expression of prices in 2001 in 2011 prices. Table 7 expresses the costs for 2001 in 2011 prices, allowing for the average of 3.1% inflation.

Table 7: Summary costs for gender-based violence against women: state/public services, lost economic output, suffering of victim, England and Wales, in 2011 prices

Type of cost	EUR million 2001 prices	EUR million 2011 prices
State/public services	3664	4972
Economic output	3095	4200
Pain and suffering of victim	20520	27846
Total	27279	37018

Extrapolating from 'England and Wales' to 'UK'

The estimates were based on England and Wales. In order to scale up to the level of the UK it is necessary to make some assumptions about the rate and costs of violence in England and Wales as compared with the rest of the UK (Scotland and Northern Ireland). There is insufficient robust evidence to support a claim that the rate and costs are different, so the assumption will be made these are the same.

The population of England and Wales (52,041,916) was 88.5% of the UK (58,789,194), in 2001. The UK population was 13% greater. Assuming the same rate of violence and proportionate costs, the cost of gender-based violence against women in 2001 was EUR 41830 million (in 2011 prices), as shown in Table 8 below.

Table 8: Costs in England and Wales and in UK, 2001 (2011 prices) in EUR million

Type of cost	England and Wales	UK
State/public services	4972	5618
Economic output	4200	4746
Pain and suffering of victim	27846	31466
Total	37018	41830

The cost of 'gender based violence against women in the UK in 2001' was EUR 41 828 million (2011 prices). The cost per person was EUR 712 (2011 prices).

Up-dating for changes in the rate of violence between 2001 and 2011

There was a fall of 37% in the rate of domestic violence between 2001 and 2011 in England and Wales. Between 2001 and 2011 domestic violence reported to the main questionnaire of the Crime Survey for England and Wales fell from 626,000 incidents in 2001/2 to 391,000 incidents in 2010/11. This is a fall of 235,000 incidents; a decline in the

number of incidents of 37%. This is assumed to be similar across all forms of violence against women, since there is no evidence to provide a basis for estimates to the contrary. What does a 37% fall in incidents mean for costs?

Do services cost more or less? There is evidence suggesting that use of services has not declined. Indeed, there is evidence that victims are more likely to seek assistance than before. The CSEW shows that while in 2001/2 only 35% of domestic violence incidents reported to the survey were reported to the police, by 2009 this had risen to 47% (Walker et al 2009). Data from Women’s Aid suggest that there has been no decline in their provision of refuges (Towers and Walby 2012). The assumption is that service provision is equivalent in 2001 and 2011.

Does lost economic output decline? If there is less domestic violence, it is likely that days taken off work for injuries sustained as a result of domestic violence will decline proportionately. The assumption is a decline of 37% in the cost of lost output.

Does pain and suffering decline? If there is less domestic violence, it is likely that pain and suffering resulting from domestic violence will decline proportionately. The assumption is a decline of 37% in the cost of pain and suffering.

On the assumption that the cost of services is static, that the cost of economic output declines by 37%, and that the cost of pain and suffering declines by 37%, there is a decline in the cost of gender-based violence against women from EUR 41830 million to EUR 28432 million for UK between 2001 and 2011 (see Table 9).

Table 9: Costs of gender based violence against women UK, 2001 and 2011 (2011 prices), in EUR million

Type of cost	UK 2001	UK 2011
State/public services	5618	5618
Economic output	4746	2990
Pain and suffering of victim	31 466	19 824
Total	41 830	28 432

Extrapolating from ‘UK’ to ‘EU 27’

There is more than one way to calculate the costs in the EU27 from estimates for the UK. One method is to assume that the cost per person/woman is the same in each member state. The calculation would then be a scaling up to the population size of EU27 from the UK. A second would be to revise the figure using available and appropriate data on differences between the UK and other parts of the EU. This requires a discussion as to the differences that are relevant and for which there is available data.

Are there differences in the rate of VAW between Member States? While there may be some variations between Member States, there is no robust evidence source as to the nature and extent of any such variation. While there have been several surveys of the extent of VAW in Member States, the methodology used is so divergent that no

conclusions can be drawn as to the differences in rates between countries in Europe (Hageman-White et al 2008). In the future, there is likely to be such an estimate, when the EU-wide survey on VAW currently being conducted by the EU Fundamental Rights Agency (FRA) reports, probably in 2014 (FRA 2013). Until this survey reports, there is no reliable evidence base on whether the rate is higher or lower in any country. Hence, the best assumption is that the rate of VAW in EU MS is the same everywhere. The use of administrative records of the extent of VAW, for example, those kept by the police, are serious under-estimates of the extent of VAW since many victims do not report to the authorities, in addition to it not being collected in comparable ways by Member States.

The best way forward is to take a figure from the survey that is the most robust, and use this as the basis for estimates in the EU. The most robust survey is the Crime Survey of England and Wales (formerly the British Crime Survey), in particular its specialised self-completion module. There is no data that would allow for a better estimate.

Are there differences in services and in service use between Member States? There has been a study documenting the nature of specialised services in each MS, but it is not available in quantitative form (EIGE 2013). It may be that future studies may gather information in a comparative quantitative form, but this does not yet exist. The administrative data on public services (legal, health, housing, social work) that address violence against women is not available in comparative quantitative form. Many services are used as a consequence of violence, such as hospitals, without reliable records of the reason that the services are used. In many countries there is little knowledge as to the extent to which mainline public services are used as a consequence of VAW. So, there is insufficient robust quantitative data on the extent of the differences between Member States to include this in the calculations. Hence there is no adjustment for any differences in the cost of providing services between countries.

Are there differences in economic value based on GDP? GDP is Gross Domestic Product, and is usually measured at either the level of the country, e.g. GDP for UK, or GDP per person, i.e. GDP per capita (loosely, income per person). There are differences in GDP per capita between EU Member States. But is it appropriate to use them to put a different value on VAW in each Member State? There is a parallel discussion in the literature that investigates the value of a statistical life. This is the implicit or explicit value placed on the life of an unknown person in cost-benefit analyses. The OECD (2012) has reviewed the practical and ethical issues concerning this estimation focused on the policy fields of environment, health and transport for the OECD, which includes many EU Member States. The OECD estimated that the value of a statistical life in the EU-27 in 2005 was centred on \$US3.6m, with a range from \$US1.8m to \$US5.4m. OECD (2012: 15) recommends that variations in income should not be used in analyses that involve the 'value of a statistical life' due to a concern for equity: 'Income: No adjustment within a country or group of countries the policy analysis is conducted for (due to equity concerns).' Put simply, the recommendation is that the lives of rich people should not be treated as if they are more valuable to society than the lives of poor people. The few adjustments recommended by the OECD concern changes over time (in inflation and GDP per capita). The arguments of the OECD that no adjustment is made for differences in average GDP per capita in Member States are convincing.

However, if the OECD recommendation were rejected, for example, as a result of an argument that the price of services varies between countries, then further calculations are necessary. In some countries the cost of the same set of services may be higher or lower than in others, and the cost of the same number of days of lost employment may be higher or lower if that employment generates higher or lower valued production. If variations in GDP were to be taken into account, it would mean that the cost of VAW (services, lost economic output, pain and suffering) in the UK should be adjusted in proportion that the GDP per capita were higher or lower in the rest of the EU. In 2011, the GDP per capita in the UK was slightly higher than that in EU 27 - Eurostat (2012) finds that if the GDP per capita of the EU 27 is taken to be 100, then that of the UK is 108. Thus if costs were to be adjusted by GDP, then the overall cost to the EU should be reduced by around 8%. The UK is sufficiently close to the EU average GDP per capita that this is not a large adjustment.

This paper accepts the OECD recommendations hence no adjustment is made for differences in average GDP per capita in Member States. It benchmarks the extrapolation from UK to EU27 on a population basis, treating each person in the EU as of equal value, rather than on GDP per capita basis.

The cost of gender-based violence in the UK in 2001 was EUR 28432 million. The size of the UK population in 2011 is 63,182,000 (ONS 2012). The cost per person for gender based violence against women is EUR 450 in the UK in 2011. The population of the EU 27 in 2011 is: 502,369,211 (Eurostat 2013a). This is 7.95 times larger. As Table 10 shows, the cost of VAW in the EU is EUR 226,035 million, or EUR 226 billion. This is EUR 450 per person in the EU.

Table 10: Annual Costs of gender based violence against women EU 2011 (EUR million)

Type of cost	UK	EU
State/public services	5618	44 663
Economic output	2990	23 771
Pain and suffering of victim	19 824	157 601
Total	28 432	226 035

Table 10 presents the best estimates of the annual costs of gender based violence against women in the EU, centred on 2011. The forms of violence included are those that are most numerous: domestic violence, sexual assault and stalking. It does not include other forms of violence, such as, FGM, forced marriage, and trafficking, hence is an under-estimate of the costs. It includes the cost of the use of major public services, including legal, health, housing as well as the much smaller cost of specialised services. It includes the cost of lost economic output insofar as this is captured by time lost from employment due to physical injuries, but does not include the impact of mental injuries on capacity to sustain employment, not second generation costs borne by children whose capacity is diminished by the violence, because data limitations do not enable these costs to be captured robustly.

5 Comparing costs of violence and the costs of measures to combat the violence

The cost of inaction is EUR 226 billion a year.

The cost of gender-based violence against women to the EU has been established in the preceding section as EUR 226 billion a year. This includes EUR 24 billion of lost economic output. It further includes EUR 158 billion as the value the public places on avoiding pain and suffering for equivalent injuries and EUR 45 billion a year in services. The value of GDP of the EU as a whole is EUR 12,638 billion (Eurostat 2013b).

The cost of existing measures to combat violence against women is EUR 45 billion a year, on the assumption that the concept of 'combat violence against women' is treated as equivalent to 'services provided by the state/public to address violence against women'. These services are the criminal justice system, civil justice system, health care, emergency housing, social services, and specialised services. They contribute to combatting violence against women in diverse ways, by reducing the likelihood of repetition of acts of domestic violence (e.g. police), by mitigating the harmfulness of the effects of the violence on victims (e.g. health care), by preventing damage to children (e.g. social services).

Further interventions have been recommended, for example, by the European Parliament in calling for a Directive on Violence against Women and by the Council of Europe (2012) in its Istanbul Convention. Many of the interventions called for involve the redirection of existing resources to where they are more useful, e.g. in changing criminal justice priorities, rather than resourcing entirely new services. The cost of innovative specialised services is small as compared with the cost of mainline services in which VAW is one part of their work.

Increasing measures to combat violence against women would reduce some of the costs to society of the violence. For example, it would reduce the lost economic output. This is a minimum estimation of the economic output that is lost as a result of gender-based violence against women, since it includes only time off work because of physical injuries. The estimate would have been higher if some of the more indirect adverse effects on productivity had been included.

6 Concluding points

Violence against women is a major cost to European society and economy. The cost to the EU of gender-based violence against women in 2011 was estimated at EUR 226 billion.

This figure includes the cost of public and state services, of lost economic output and a value attached to pain and suffering.

This figure is likely to be an under-estimate since some of the harmful effects that were identified were excluded from the costs where the quantitative data were not strong. The costs for mental injuries are underestimated, while the long term effects on children and the implications of further forms of gender-based violence against women such as FGM and trafficking are not included.

While the economic perspective is only one way among others to consider the implications of violence against women for policy, it is nonetheless an important one with significant implications for EU-level policy. Actions to reduce violence against women additionally help to reduce social exclusion. The concept of cost is best understood as closely related to the concept of harm: harm to people, harm to the economy, and harm to the society. The cost enables us to see the wider ramifications of violence to individual women for everyone.

An economic lens shows that VAW is a detriment to the economy, through reducing economic output. Actions to reduce VAW are of benefit to the economy by increasing output and productivity, and thereby increasing the likelihood of greater economic growth.

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[RSION.pdf](http://www.coe.int/t/dghl/standardsetting/convention-violence/Background%20info/Overview%20of%20studies%20on%20the%20costs%20of%20violence%20against%20women%20and%20domestic%20violence_INTERNET%20VE)

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Part II

Legal perspectives for action at EU level

Research paper
by Sylvia Walby

Abstract

The research paper assesses the European added-value of a directive to combat violence against women. It considers the extent to which the Treaties confer on the European Union the legal competence to develop a Directive on Violence against Women, reviewing the Treaties and the implications of the principle of subsidiarity. The paper concludes that there is scope for a directive and for other legal actions to combat violence against women.

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Executive summary

This research paper assesses legal aspects of the European added-value of a directive to combat violence against women.

The paper investigates whether there are gaps between international standards and EU measures to combat violence against women. It identifies international standards on violence against women, both legally binding and those that are advisory, especially those developed by the UN and Council of Europe. It summarises existing EU measures to combat violence against women, including the recent wave of directives on specific aspects of violence, and identifies the legal bases under which these measures are legally justified. The paper concludes that, despite recent advances, there are significant gaps between international standards and existing EU measures.

The paper identifies the nature of EU legal competence, identifying the manner in which the division between Member State and Union-level action is drawn in relation to the conferral of powers by Member States under the principles of subsidiarity and proportionality.

The paper identifies two high level aims of the EU that justify action to combat violence against women: equality between men and women, including non-discrimination; and human and fundamental rights. Violence against women is both a form of gender discrimination and a violation of women's human rights, according to both international standards and those of the EU. This provides a necessary but not sufficient condition for action at EU level, which depends also on the conferral of powers.

The paper investigates fields, or policy areas, where there are several potential legal bases for a directive or other actions to combat violence against women: freedom, security and justice; employment and social inclusion; public health; external relations; and research and statistics. It investigates existing practice in the exercise of competence in these areas. It considers both the intersection of combatting violence against women and the policy area and the conferral of powers on the EU level in that area. In each field it draws conclusions as to the potential scope for a directive or other action.

Within the field of freedom, security and justice, a series of directives have identified specific aspects of violence against women as contrary to the proper functioning of the EU which requires the mutual recognition of and minimum standards for judicial judgements in criminal matters. Directives on trafficking, child sex abuse, protection orders and victims' rights have been developed using the legal basis of Article 82 of the TFEU (and for trafficking additionally Article 83). This field of EU action is underpinned by the EU commitment in the Treaty on the European Union to fundamental freedoms, human rights and human dignity. Specific competence for directives in criminal matters is limited to actions to support mutual recognition and judicial cooperation, with a focus on minimum standards to achieve this. There is scope for directives setting minimum standards to laws on rape (consent not force as the threshold; no marital exemption), and

on FGM (common definition), using the authority of TFEU Articles 82 and 83. There is scope for a directive on aspects of domestic violence through removing any marital exemption to the crime of assault, based on TFEU Article 82. Such directives would assist mutual recognition of judicial judgements, providing clarity and certainty, and would be proportionate since otherwise significant harms would be left unsanctioned.

Within the field of employment, a series of directives have defined harassment, both on the basis of sex and on the basis of sexuality, as constituting discrimination. Harassment and all forms of gender-based violence against women are forms of gender discrimination, and thus contrary to equal treatment and are illegal in the sphere of employment, as defined under EU law. The area within which this definition of harassment as illegal discrimination applies was initially limited to employment and was then extended to access to goods and services, with a parallel extension in the range of mechanisms to implement the law from individual complaints to tribunals and courts to national equality bodies to gender mainstreaming. Since harassment is a form of discrimination against women and so are other forms of gender based violence against women, there is scope for a directive that names all forms of violence against women to be forms of gender discrimination and illegal under EU law, so as to clarify the scope of the law, giving clarity and legal certainty. The legal competence to combat violence against women as a form of discrimination is firmly but narrowly based on TFEU Article 157, within the field of employment. Article 19 extends this competence to combat sex discrimination (which includes harassment and violence against women) to a wider range of fields, including the sale and distribution of goods and services, and potentially to further fields, though requiring the special rather than ordinary legislative procedure. A directive on violence against women could draw on either Article 157 or Article 19 TFEU, with different consequences.

There is further competence for EU-level actions to combat discrimination in Article 19 TFEU. This legal authority has been used to make illegal sex discrimination, including harassment, in the access to and distribution of goods and services. This legal competence to combat sex discrimination is not restricted to the field of employment, though its use does require a special rather than ordinary legislative procedure. Article 19 TFEU provides scope for further directives to make illegal sex discrimination including violence against women in fields beyond employment.

There are further legal bases for directives in other parts of the economic and social field relevant to combatting violence against women. There is scope for a directive to clarify that measures to support the reintegration into the labour market of those who have been excluded as a result of violence against women is within the competence of the EU, provided at TFEU Article 153. There is a scope to clarify that there is authority to use European Structural Funds to combat the social exclusion caused by violence against women, at TFEU Article 162. There is scope to clarify that the broad guidelines on economic and social policies issued by Council could include reference to violence against women, provided by TFEU 5. There is scope to clarify the regulations of the provision of specialised services to prevent violence against women and to support its victims stating that it is possible that such specialised services be designated services of

'general economic interest' rather than only 'economic interest' under authority provided at TFEU Article 14.

Within the field of public health, there is legal competence for actions short of legislation for support measures to combat violence against women. This has been drawn on to justify the Daphne initiative that exchanges best practice in order to reduce the detriment to public health caused by violence against women. In this field there is no legal competence for legislative action.

Within the field of external relations, there is legal competence for EU-level actions in pursuit of its values, provided at TFEU Article 214. This includes equality between women and men and the promotion of human and fundamental rights and hence to combat violence against women. While there are examples of this legal competence in action, legislative action to more clearly state that the framework for humanitarian aid includes combatting violence against women would add clarity and legal certainty.

Within the field of research and statistics, there is legal competence for EU-level actions to create a European research area and to provide statistics to support the pursuit of EU values and goals, provided at TFEU Article 338. This includes equality between women and men and human and fundamental rights and hence to combat violence against women. Since the utilisation of this legal competence has been relatively limited, legislative action could add welcome clarity and legal certainty that violence against women is an appropriate topic of EU-level research and statistics.

The EU has considerable, though far from unlimited, legal competence to combat violence against women. These legal competences are complex and not well understood. A directive on violence against women that clarified EU-level legal competence across these diverse policy fields would bring legal certainty and aid the EU in pursuit of its fundamental values. The primary legal authority for such a directive would be TFEU Article 19 and draw on the identification of harassment as illegal gender discrimination. An alternative, slightly narrower base for a directive would be TFEU Article 157, which is centred on a broad range of mechanisms to achieve equal pay. A further alternative is the use of Article 82 (and in some circumstances Article 83) to establish minimum standards in specified crimes of violence against women, in particular rape. In addition, in diverse other fields there are additional competences to act in ways that are important to combat violence against women, but which do not include legislation.

1. Introduction

1.1 Purpose and scope

The purpose of this research paper is to assess legal aspects of the European added-value of adopting legal measures to combat violence against women, including a directive.

Violence against women is a terrible reduction in the quality of women's lives. It is a form of gender discrimination, a violation of women's human rights, a detriment to the economy, social inclusion and to public health, already illegal within legal regimes including criminal ones, and pertinent to both internal and external relations of the EU.

The research paper addresses: the extent to which a legal measures including a directive are necessary to achieve the objective of combatting violence against women; it analyses gaps between the existing framework and instruments of EU policy and international instruments; it addresses the scope for legal action as provided by the Treaty of Lisbon; it considers a wide range of potential forms of legal action including directions; it draws conclusions on the necessity, consistency and legal basis of such a Directive, including its added value in ensuring better protection and enhanced legal certainty.

1.2 Calls for action

On the basis of the evolving competences attributed to the Union by different modifications to the EU Treaties and, lately, also referring to the Charter of Fundamental Rights, there have been numerous calls for action to combat violence against women by EU institutions especially by the European Parliament and the European Council, including those mentioned below:

European Parliament

The European Parliament has repeatedly called for greater action to be undertaken by the institutions of the European Union to end violence against women, including Resolutions in 2009, 2011 and 2013 that call for a Directive on violence against women. The European Parliament Resolution of 26 November 2009 on the elimination of violence against women included a recommendation that the Council and Commission establish a legal basis for combatting violence against women and called on the Commission to draw up a more coherent plan for the EU to combat all forms of violence against women (European Parliament 2009a). The Resolution of 25 November 2009 on the Stockholm Programme called on the EU to bring forward a Directive and European action plan on violence against women (European Parliament 2009b). The 2011 Resolution called for a new and strengthened EU policy framework to fight violence against women including a Directive on violence against women (European Parliament 2011). Most recently, in its 2013 Resolution (European Parliament 2013) on the UN Commission on the Status of Women called for a Directive on violence against women, the Parliament:

reiterates its call on the Commission to propose an EU strategy against violence against women, including a directive laying down minimum standards.

Council of the European Union

The General Affairs Council of the European Union has issued EU Guidelines on Violence against Women (European Union, 2008) for use in external as well as internal relations. The Council of the European Union (2010) called for further efforts by the Commission to eliminate violence against women, naming a wide range of actions, including devising 'a European Strategy and a general framework of common principles and appropriate instruments' and to consider if 'additional legal instruments' were warranted. In 2011, the Council (2011) adopted the European Pact for Gender Equality (2011-2020), including its commitment to

Combat all forms of violence against women in order to ensure the full enjoyment by women of their human rights and to achieve gender equality, including with a view to inclusive growth.

1.3 Method of analysis

Within the Lisbon Treaty, several Articles offer potential bases for a Directive and for actions short of a Directive on gender-based violence against women. The investigation of this issue requires discussion of the extent of the overlap between aspects of violence against women and legal principles including the legislative competence of the Union. There are four issues to clarify.

The first issue is the identification of aspects of violence against women that fall within with the aims and competences of the EU and which are not yet addressed by EU measures. There is more than one aspect to violence against women: there are multiple forms; there are multiple dimensions that intersect differently with various policy fields and legal competences. This is addressed by: a summary of the extent and nature of violence against women, derived from authoritative studies (e.g. UN Secretary General's 2006 study); the identification of relevant international standards, both legally binding and advisory; a summary of existing EU measures; and an analysis of the gaps between international standards and EU measures. This analysis is provided in Section 2.

The second issue is the identification of the legal competence of the EU and its division between Union level and Member States. There is a question as to whether there is competence for action at the Union level. There may be competence to act at Union only, the Member State level only, or shared competence between the Union and the Member States. The Union has few competences that are solely its own and most of the competences in pursuit of the objectives of the Treaty are shared with the Member States. The powers of the EU are subject to the principle of conferral of power in the context of the principles of subsidiarity and proportionality. The implications and deployment of the concept of 'proportionality' are relevant to legal debates that involve the evaluation of the priority of competing principles. It has been deployed at several junctures: law and judiciary/democratic politics (Everson and Joerges 2012); legal certainty/case by case basis (Harbo 2010); pluralism/universalism (Barber 2006); balance of security with freedom and justice (Gibbs 2011). The concept of proportionality can also be used to

position evidence of the scale of the problem when weighing the balance of the argument on the necessity for intervention. The division of competences between the Union level and Member States vary between different policy fields, so this issue is pursued in relation to these different fields. There is a particular issue about the extent and nature of Union competence in matters that concern criminal law (Lööf 2006; Neagu 2009). Violence against women includes criminal acts, but is not only a crime. It is also gender discrimination, a detriment to the economy and to public health, linked to conflict and humanitarian emergencies, and a subject in need of research and statistics. See Section 3 for a discussion of these matters.

The third issue is the identification of the aims of the EU and their specification at two levels of generality: high principles, largely in the Treaty on European Union; and detailed fields of application of the principles, largely in the Treaty on the Functioning of the European Union. It is argued, drawing on previous studies, that violence against women is a form of inequality between women and men, a form of gender discrimination (MacKinnon 1979; Edwards 2008) and a violation of women's human rights (Bunch 1995; Merry 2006). For the purposes of this discussion as to the basis of a directive on violence against women, there is a further discussion of whether the high principles concerning equality and human rights located in the opening articles of the Treaty on the European Union can be brought into practical application in EU-level action by the identification of fields in which the EU has competence to act that are relevant to violence against women. This concerns the ways in which the EU gives practical expression to its high level commitments to fundamental rights (Fredman 2006), and to equality between women and men (Howard 2008) beyond the workplace (Masselot 2007, ter Haar and Copeland 2010). This discussion starts with the two high level principles of equality and human rights (see Section 4), then divides into detailed discussions of potential fields of legislative action (see Sections 5, 6, 7, 8, and 9).

The fourth issue clarifies the different legal issues in five fields of potential action: freedom, security and justice; economy and social inclusion; public health; external relations; research and statistics. In each field the paper discusses whether the Treaties offer the legal basis required for a directive, or only for EU-level action short of a directive such as the coordination of policies (e.g. Open Method of Coordination in social inclusion and health policies) and other soft law like recommendations to reach the objectives set out in the Treaties. While the focus in this paper is on directives, the significance of other mechanisms for achieving policy development is not to be ignored or underestimated (Blichner and Molander 2008; Sabel and Zeitlin 2008).

1.4 Structure of the paper

Following this introduction, the second section of this paper identifies the nature and scale of violence against women, the international legal and policy standards on violence against women, identifies EU measures to eliminate violence against women, and compares form the gaps between international standards and EU practice.

The third section considers the nature of legal competence in the EU including the limitations to the competence at the EU-level as a consequence of the principle of subsidiarity.

The fourth section identifies two high level legal principles that entail the Union's rejection of violence against women:

- equality between women and men, including non-discrimination; and
- fundamental rights.

Sections five, six, seven, eight and nine identify and discuss legal principles in the Treaty of Lisbon that express the Union's rejection of violence against women and offer scope for a possible directive or other legal measures. These five are:

- freedom, security and justice;
- effective economy, and social inclusion and cohesion;
- public health;
- external relations;
- research and statistics.

The final section offers conclusions on the necessity and legal basis for directives and other legal measures to combat violence against women.

2 Gaps between international standards and existing EU measures

2.1 Introduction

Are there gaps between international standards and existing EU measures, which a directive might address? There are several relevant international legal instruments and also several relevant international advisory standards on violence against women. The former are binding on the States that sign and ratify the relevant Conventions and Treaties. The latter are advisory, but the EU generally seeks to reach internationally agreed standards.

This section of the paper includes:

- The nature and scale of violence against women
- the identification of relevant international standards
 - legally binding; and
 - advisory;
- a summary of existing EU measures; and
- a comparison of existing practices in the EU with relevant international standards.

2.2 The nature and scale of violence against women

The definition of violence against women most often used in international settings is that of the UN Declaration on Elimination of Violence against Women, in Articles 1 and 2 of the 1993 UN General Assembly Resolution A/RES/48/104:

For the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. Violence against women shall be understood to encompass, but not be limited to, the following:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

The scale of the problem of violence against women is immense. The extent and nature of violence against women around the world was documented in the UN Secretary-General's (2006) in-depth study. The World Health Organization produced a study of the specific impact of violence on health (WHO 2002). There have been numerous studies of the extent of violence in Member States of the EU, although the data they have produced is not directly comparable (Hagemann-White et al 2008). The forthcoming EU

Fundamental Rights Agency survey of violence against women in the EU will produce the first statistics on violence against women for the EU as a whole in 2014 (FRA 2011). One example of a Member State study, of gender-based violence in Britain (England and Wales) by Walby and Myhill (2004) found that 45% of women could recall being subject to domestic violence (abuse, threats or force), sexual victimisation or stalking at least once in their lifetimes; while in the year previous to their interview, 13% of women had been subject to one of these forms of violence (6% domestic abuse; 2% sexual abuse; 8% stalking – some multiply abused). The impact of violence against women on the economy and society as a whole is immense, costing the British economy an estimated GBP 23 billion in 2001 (Walby 2004). The estimate for the EU in the adjacent paper is EUR 222 billion.

When assessing the proportionality of actions to combat violence against women, the scale (13% of women abused in one year) and cost (EUR 222 billion) should be borne in mind.

2.3 Relevant legally binding international instruments

Several international legal regimes have declared that violence against women in general and rape in particular is illegal. Violence against women has been addressed by international legal instruments of the United Nations and of the Council of Europe. The legal instruments of the UN include: the UN Convention for the Elimination of Discrimination against Women (CEDAW); and the Rome Statute of the International Criminal Court, and practice in international legal tribunals. The instruments of the Council of Europe include the European Convention of Human Rights and the rulings of the European Court of Human Rights that interpret the Convention; and the 2011 Istanbul Convention on preventing and combatting violence against women and domestic violence.

All EU Member States are party to the above treaties, conventions and resolutions. However, the Istanbul Convention, while adopted by all EU Member States is not, in 2013, yet signed and ratified by them all. The EU is not a party itself to any of these international instruments, although the Treaty of Lisbon means that the EU is bound to accede to the European Convention on Human Rights.

UN Convention on the Elimination of Discrimination Against Women (CEDAW)

Violence against women is a form of gender discrimination in international law. This is explicitly stated in the UN Convention on the Elimination of Discrimination Against Women (CEDAW). The concept ‘discrimination against women’ has meaning within the UN system as a consequence of its definition within the UN (1979) Convention on the Elimination of Discrimination Against Women (CEDAW) at Article 1:

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of

human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The UN CEDAW defines violence against women as a form of gender discrimination. The UN (1992) (CEDAW) General Recommendation 19 states:

Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men. . .

The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention.

International Criminal Tribunals and Courts

Sexual violence is prohibited by several international legal regimes, though its definition varies between them: international humanitarian law, international criminal law, and international law on war. All of these regimes prohibit acts such as rape, although often only indirectly by classifying sexual violence as torture, inhuman or degrading treatment. These legal regimes have established various courts, including the International Criminal Tribunal established for the Former Yugoslavia in 1993, the International Criminal Tribunal for Rwanda (ICTR) established in 1994.

The Rome Statute of the International Criminal Court recognises rape and other forms of sexual violence to be crimes under international criminal law. Article 7(1) g classifies as crimes against humanity

rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity . . . [committed] . . . as part of a widespread or systematic attack directed against any civilian population.

And in Article 8(2)(b)(xxii) classifies these same acts as war crimes.

European Convention for the Protection of Human Rights (ECHR) and Fundamental Freedoms and the European Court of Human Rights (ECtHR)

The European Court of Human Rights (ECtHR), which interprets the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR 2010), has developed case law on violence against women, in particular on domestic violence and rape. It has done so despite the lack of explicit naming of violence against women within the Convention. The ECtHR has developed its jurisprudence for

domestic violence, supporting complaints of victims against the inaction of their own State. The presumption is that the Convention identifies the duties of states as the 'High Contracting Parties' to the Convention to act with 'due diligence' to guarantee these rights. The ECtHR has used Articles 2, 3, 8, 13 and 14 to address cases that pertain to acts of violence against women:

2. Right to life: Everyone's right to life shall be protected by law.
3. Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
8. Respect for private and family life: Everyone has the right to respect for his private and family life, his home and his correspondence.
13. Right to an effective remedy: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.
14. Prohibition of discrimination: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The European Court of Human Rights has made judgements using the Convention in cases of domestic violence, rape and other forms of violence against women. Although there is no explicit mention of these categories in the Convention, the Court has interpreted cases of violence against women as meeting the criteria laid down in the Convention. In the case of domestic violence it has deployed Article 2 (right to life) in the cases of *Kontrovà v. Slovakia* 7510/04, *Branko Tomašić and others v. Croatia* 46598/06, *Opuz v. Turkey* 33401/02; Article 3 (prohibition of torture, inhuman and degrading treatment) in the case of *E.S. and others v. Slovakia* 8227/04; Article 8 (right to respect for private and family life) in the cases of *Bevacqua and S. v. Bulgaria* 71127/01, *E.S. and others v. Slovakia* 8227/04; *A. V. Croatia* 55164/08; *Hajduouva v. Slovakia* 2660/03; *Kaluczka v. Hungary* 57693/10; Article 13 (right to an effective remedy) in the case of *Kontrovà v. Slovakia* 7510/04; and Article 14 (prohibition of discrimination) in the case of *Opuz v. Turkey* 33401/02. In relation to rape it has supported complaints of victims of rape against the inaction of their own State by using Article 3 (prohibition of torture, inhuman and degrading treatment) in the cases of *Aydin v. Turkey* 23178/94, of *Maslova and Nalbandov v. Russia* 839/02, of *M.C. v. Bulgaria* 39272/98 and of *I.G. v. Republic of Moldova* 53519/07; Article 8 (right to respect for private life) in the case of *X and Y v. the Netherlands* 8978/80; and Article 13 (right to an effective remedy) in the case of *Aydin v. Turkey* 23178/94 (European Court of Human Rights, 2013). In its rulings on rape the Court uses the standard of 'lack of consent' rather than that of 'use of force' (see *M.C. v. Bulgaria* 39272/98).

The European Union will accede to the European Convention on Human Rights (ECHR), as noted in Article 6.2 of the Treaty on the European Union (TEU), and at that time its principles will apply to the EU:

The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

Even before the EU accedes to the ECHR, the rulings of the European Court for Human Rights (ECtHR) have been considered a relevant benchmark (or resumé of European human rights) for judgements made by the EU's European Court of Justice (Morijn 2006).

Council of Europe: Convention of the Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence (Istanbul Convention) (Council of Europe, 2011)

The 2011 Istanbul Convention of the Council of Europe on Preventing and Combatting Violence against Women and Domestic Violence is a treaty, adopted (though not yet signed and ratified) by all Member States of the EU. It treats violence against women as both a violation of human rights and also as a form of discrimination against women. Article 3a states:

“violence against women” is understood as a violation of human rights and a form of discrimination against women and shall mean acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.

The Convention creates a comprehensive legal framework that places a duty on states to prevent violence, to protect victims and to end the impunity of perpetrators. The Convention provides a detailed listing of integrated policies that are required to meet its standards. These include: comprehensive and co-ordinated policies, including financial resources to implement the policies, support for the work of civil society organisations in the field, establishment of national coordinating bodies, and the collection of data and research; measures to ensure prevention, including awareness-raising, education, training of professionals, preventive intervention and treatment programmes, participation of the private sector and the media; the protection and support of victims, including actions in the legal system, provision of information, general support services, assistance in complaints, specialist support services, shelters, telephone lines, support for victims of sexual violence, protection and support for child witnesses, encourage reporting including by professionals; the provision of remedies in civil law, compensation, safety in matters of custody of children, address the civil consequences of forced marriages; ensure the criminalisation of psychological violence, stalking, physical violence, sexual violence including rape (defined as lack of consent), forced marriage, female genital mutilation, forced abortion and forced sterilisation, sexual harassment, with effective, proportionate and dissuasive sanctions; take measures that ensure the implementation of these laws through investigation, prosecution, procedural law and protective measures, including, immediate response by law enforcement agencies, risk assessment and management, ensure the availability of emergency barring orders, restraining or protection orders, protect victims during judicial processes, provide legal

aid; ensure that the residence status of victims does not preclude justice, and that gender-based asylum claims can be recognised; states should cooperate with each other in these matters; a group of experts should monitor the implementation of the Convention.

2.4 Relevant international advisory standards in resolutions and codes of practice

There are several resolutions and standards declared and set by UN bodies, agencies and conferences to which EU Member States contributed in their individual capacity that offer significant international advisory standards, although they are not strictly legally binding on the EU and its Member States. While these are not legally binding, international standards set by the UN are routinely adhered to by the EU and its Member States. Hence gaps between the standards set are pertinent when assessing gaps between the EU and international standards, even while it must be recognised that this is not legally essential. These include:

- the UN Universal Declaration of Human Rights (UN 1948);
- the 1993 Resolution of the General Assembly known as the Declaration on Violence against Women (United Nations General Assembly 1993);
- the 1995 UN Beijing Platform for Action (United Nations 1995);
- the 1996 World Health Assembly Resolution of the World Health Organization (WHO 2002);
- UN Security Council Resolutions (United Nations Security Council 2000, 2008);
- the UN Handbook on Legislation on Violence against Women (United Nations 2010); and the UN Handbook for National Action Plans on Violence against Women (UN Women 2012).

UN Universal Declaration of Human Rights

The principle of human rights is embedded in international standards of practice through the UN Universal Declaration of Human Rights. This states in Article 1 that 'All human beings are born free and equal in dignity and rights' and in Article 2 that everyone 'is entitled to the rights and freedoms set forth in [the UDHR], without distinction of any kind' including sex.

UN General Assembly Resolution

Resolution 48/100 of the UN General Assembly passed in 1993 contains several articles condemning 'gender-based' violence, which is defined in Article 1 as violence

'likely to result in...physical, sexual or psychological harm or suffering to women'

which can include

'threats of such acts, coercion or arbitrary deprivation of liberty.'

UN Beijing Platform for Action

Violence against women is one of the twelve critical areas identified in the UN Beijing Platform for Action of 1995 (UN 1995). The definitions used in the Platform are widely used in other Conventions:

112. Violence against women is an obstacle to the achievement of the objectives of equality, development and peace. Violence against women both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms. The long-standing failure to protect and promote those rights and freedoms in the case of violence against women is a matter of concern to all States and should be addressed. Knowledge about its causes and consequences, as well as its incidence and measures to combat it, have been greatly expanded since the Nairobi Conference. In all societies, to a greater or lesser degree, women and girls are subjected to physical, sexual and psychological abuse that cuts across lines of income, class and culture. The low social and economic status of women can be both a cause and a consequence of violence against women.
113. The term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. Accordingly, violence against women encompasses but is not limited to the following:
- a. Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non- spousal violence and violence related to exploitation;
 - b. Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
 - c. Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

The Platform calls upon governments to engage in a series of actions:

- a. Condemn violence against women and refrain from invoking any custom, tradition or religious consideration to avoid their obligations with respect to its elimination as set out in the Declaration on the Elimination of Violence against Women;
- b. Refrain from engaging in violence against women and exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;
- c. Enact and/or reinforce penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs done to women and girls who are subjected to any form of violence, whether in the home, the workplace, the community or society;
- d. Adopt and/or implement and periodically review and analyse legislation to ensure its effectiveness in eliminating violence against women, emphasizing the prevention of violence and the prosecution of offenders; take measures to ensure the protection of women subjected to violence, access to just and effective remedies, including compensation and indemnification and healing of victims, and rehabilitation of perpetrators;
- e. Work actively to ratify and/or implement international human rights norms and instruments as they relate to violence against women, including those contained in the Universal Declaration of Human Rights.

World Health Organization

The World Health Organization (WHO) is the health arm of the UN. WHO treats violence as an important issue of public health. The WHO (2002) has developed its analysis of violence, including violence against women, as an issue of public health, in a substantial study (WHO 2002). This is officially recognised in the World Health Assembly Resolution WHA49.25 in 1996:

declares that violence is a leading worldwide public health problem

All Member States of the EU are members of the WHO and thus individually party to this resolution.

UN Security Council

UN Security Council Resolutions 1325 and 1820 address the high rates of sexual violence in conflict zones by requiring action to increase the representation of women in decision-making in conflict zones (United Nations Security Council 2000, 2008).

UN Handbooks

The UN has issued guidance as to international standards in the development of legislation to combat violence against women (United Nations 2010) and in the development of national action plans on violence against women (UN Women 2012).

2.5 Existing EU Measures

There have been significant developments in European Union law and policy on violence against women. Actions at the EU-level include Directives that refer to: harassment; trafficking; domestic violence protection orders; child sexual abuse; and the rights of victims. In addition, there are statements of intent in the strategy on equality between women and men (European Commission 2010a); the well-regarded Daphne programme that exchanges information and best practice (European Commission 2009); and studies by the European Gender Institute (EIGE 2012a, 2012b, 2013b) and the Fundamental Rights Agency (FRA 2011).

These are detailed below within the following categories: Directives; strategies; support programmes, such as Daphne; studies by the European Institute for Gender Equality; and a survey by the Fundamental Rights Agency.

Directives

A series of Directives have introduced new legal practices on specific aspects of violence against women and girls, including harassment, trafficking, child sexual abuse, protection orders, and victims', but not on violence against women overall. They are listed below, together with the legal authority on which they draw.

Harassment related to both sex and sexual harassment is included within the definition of discrimination in Directive 2002/73/EC on the implementation of equal treatment.

Although the definition of harassment remains constant to this day, the legal base identified as the authority for the illegality of harassment has changed, and the breadth of its field of application has widened in consequence. In 2002, Directive 2002/73/EC took as its basis Article 141(3) of the Treaty Establishing the European Community (today, this is Article 157(3) TFEU), which is focused on equal pay and with a field of application of employment (which includes, occupation and training) and under Article 8a the necessity of a national equality body or similar agency. In 2004, Directive 2004/113/EC, the field within which the harassment was illegal was widened under the legal authority of Article 13(1) of the Treaty of Amsterdam, so that it included processes of access to and supply of goods and services (today this is Article 19 TFEU). In 2006, Directive 2006/54/EC applied the illegality of harassment to 'occupational social security systems' (Article 1(c)) under the legal authority of Article 141(3) of the Treaty of the European Community, which focused on equal pay in the field of employment. In each of these directives, harassment is defined as a form of discrimination, as follows (Article 2, Directive 2002/73/EC):

1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.
2. For the purposes of this Directive, the following definitions shall apply:
 - direct discrimination: where one sex is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation,
 - indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary,
 - harassment: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment,
 - sexual harassment: where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of the person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Article 3. Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited.

Preventing and combatting trafficking in human beings and protecting its victims are the subject of Directive 2011/36/EU, deriving its legal authority from Articles 82(2) and 83(1) TFEU (European Parliament and Council 2011a). Article 1 states:

This Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings. It also introduces common provisions, taking into account the gender perspective, to strengthen the prevention of this crime and the protection of the victims thereof.

Combatting the sexual abuse and sexual exploitation of children and child pornography is addressed in Directive 2011/92/EU, deriving its legal authority from Articles 82(2) and 83(1) TFEU (European Parliament and Council, 2011b). Article 1 states:

The Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes. It also includes provisions to strengthen the prevention of those crimes and the protection of the victims thereof.

The European protection order, established by Directive 2011/99/EU, which has particular relevance to instances of intimate partner violence, derives its legal authority from Article 82(1)(a) and (d) TFEU which concerns judicial cooperation in criminal matters (European Parliament and Council, 2011c). Article 1 states:

This Directive sets out rules allowing a judicial or equivalent authority in a Member State, in which a protection measure has been adopted with a view to protecting a person against a criminal act by another person which may endanger his life, physical or psychological integrity, dignity, personal liberty or sexual integrity, to issue a European protection order enabling a competent authority in another Member State to continue to the protection of the person in the territory of that other Member State, following a criminal conduct, or alleged criminal conduct, in accordance with the national law of the issuing State.

The minimum standards on the rights, support and protection of victims of crime, established by Directive 2012/29/EU, include specific reference to the special needs of victims of gender-based violence; it derives its legal authority from Article 82(2) TFEU (European Parliament and Council, 2012). Article 1(1) of the Directive states:

The purpose of this Directive is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings. Member States shall ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victim support or restorative justice services or a competent authority, operating within the context of criminal proceedings. The rights set out in this Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status.

Strategies

The Commission 'Strategy for equality between women and men' includes 'violence against women' as one of its five priorities (European Commission, 2010a). The Women's Charter reiterates this commitment to action in the field of violence against women (European Commission, 2010b). The Advisory Equal Opportunities Committee of the European Commission (2010c) offered an opinion in favour of developing an EU strategy on violence against women and girls.

Daphne

The Commission has funded a programme to support the development and exchange of best practice by NGOs and other actors, known as Daphne; now in its third phase, 2007-2013 (European Commission 2009; European Parliament and Council, 2007).

EU European Institute for Gender Equality

The European Institute for Gender Equality (EIGE), established by the European Parliament and Council in 2006 as part of the aim to foster equality between women and

men, included gender-based violence in its work programme (EIGE 2013a) and has conducted several studies on aspects of violence against women including: a study to map existing data and resources on sexual violence against women in the EU (EIGE 2012a); a review of the implementation of the Beijing Platform for Action in the EU Member States in relation to support services for victims of violence against women (EIGE, 2012b); and a study on female genital mutilation in the EU (EIGE 2013b).

EU Fundamental Rights Agency

The European Union Fundamental Rights Agency (FRA, 2011) is conducting an EU-wide survey on violence against women.

Summary of developments and their legal basis

There have been very significant developments in EU provision to combat violence against women. A first wave expressed this in directives that defined harassment as a form of discrimination that was illegal in employment and training, and later also in access to goods and services. This action, focused on harassment as discrimination in employment and related civil law, drew on Articles in the Treaties on equal pay (now 157 TFEU) and on non-discrimination (now Article 19 TFEU). A second wave, following the Treaty of Lisbon, expressed this in directives that draw on provisions to assist the development of judicial cooperation in criminal matters (Articles 82 and 83 TFEU) and which embed a gender dimension into relevant fields of criminal law (trafficking, child sex abuse, protection orders, victims' rights).

2.6 Gaps between EU provision and international legal instruments

Despite these advances, there remain significant gaps between existing EU provision and the international legal instruments and advisory standards.

Evidence on the extent and nature of actions at Member State level on violence against women has been collected by a number of studies and official means, including: European Court of Human Rights Factsheet on cases of violence against women before the court that includes instances where Member States of the European Union have fallen short of the legal standards of the European Convention on Human Rights (European Court of Human Rights 2013); European Institute for Gender Equality studies on resources to combat sexual violence in the EU (EIGE 2012a), on the implementation of the Beijing Platform for Action area on violence against women by EU Member States (EIGE 2012b), and on actions to prevent female genital mutilation by EU Member States (EIGE 2013b); and a Commission funded review of legislation on violence against women in EU Member States (Commission 2010d). These reviews have found considerable unevenness in actions, including in legislation, the implementation of the law in the criminal and civil legal systems, the provision of services to victims, and in the gathering of administrative data.

The Member States of the EU do not all reach the legal standards set by international bodies to which they agreed by ratifying the respective Conventions. Notwithstanding

the lack of a harmonised crime code, the ECtHR identifies the category of 'violence against women' (for example in its public statements, ECtHR 2013), as well as setting standards for categories of violations it names as 'rape' and 'domestic violence', despite these not being named as such in its authorising Convention. It is thus apparent that the ECtHR considers that there are concepts and categories of crimes of 'violence against women', 'rape' and 'domestic violence' that are sufficiently robust and widely understood in law and in practice to be relevant for deployment within its legal regime.

The ECtHR finds that some EU Member States do not meet the thresholds for the exercise by states of their responsibility for due diligence to protection individuals from human rights abuses. These instances include the threshold for the definition of rape that the European Court of Human Rights sets at 'absence of consent' rather than force (in the case of Bulgaria).

Further, many Member States of the EU do not reach the advisory standards set by international bodies of which they are members. Other research finds that Malta still retains a marital exception for rape, which is outside the standard set by the UN (European Commission 2010d).

The gaps between the EU Member States and international legal and advisory standards vary between different forms of violence against women. In particular, rape has been subject to legal regulation to a greater extent than the wider and newer category of gender based violence against women. Hence it is on occasion relevant to separate the discussion of gaps in legal and advisory standards on rape from those on gender based violence against women.

There are major gaps between actions in the EU (both EU-level and Member State-level) and those itemised in the Istanbul Convention of the Council of Europe to combat violence against women. The extent of the gaps is varied between Member States, some of which adhere more closely to the Convention than others, though it is beyond the scope of this report to itemise these in detail. It is not uncommon to find gaps in legislation to ensure the availability of criminal and civil legal remedies; the procedures and institutions necessary to implement the laws effectively; the provision of general and specialised support services to victims; and the availability of statistics and data on all forms of violence against women.

3 Legal competence of the European Union

3.1 Introduction

This section discusses the nature of legal competence in the EU, which is necessary to understanding whether there is competence to go further than existing actions and, in particular, to adopt a directive on violence against women. It reviews the nature of EU legal competence in the context of the principles of conferral, subsidiarity and proportionality.

3.2 What is a legal base for an EU action?

Treaties

The legal bases for EU actions are to be found in the Treaties that constitute its legal foundation.

The European Union is based on the rule of law. This means that every action taken by the EU is founded on treaties that have been approved voluntarily and democratically by all EU member countries. For example, if a policy area is not cited in a treaty, the Commission cannot propose a law in that area. A treaty is a binding agreement between EU member countries. It sets out EU objectives, rules for EU institutions, how decisions are made and the relationship between the EU and its member countries (Europa 2013).

The legal foundations of the EU have been established by a series of Treaties that have been revised and consolidated into the Lisbon Treaty (2008/C115/01), which consists of two parts: the Treaty on European Union (TEU) (EU 2010) and the Treaty on the Functioning of the European Union (TFEU) (EU 2012).

These Treaties refer to some other Treaties and Conventions, but these clarify rather than extend the competencies of the Union. They include: international law and the principles of the United Nations Charter, in Article 3 of the Treaty on European Union, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, in Article 6 of the Treaty on European Union:

In its relations with the wider world, the Union shall . . . contribute to . . . the strict observance and the development of international law, including respect for the principles of the United Nations Charter (TEU, Article 3).

The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties (TEU, Article 6.2).

Directives

A Directive is a legal act of the European Union, as defined in Article 288 of the Treaty on the Functioning of the European Union:

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

The European Union institutions may adopt other legal acts: regulations, decisions, recommendations and opinions. Regulations are binding and directly applicable; decisions are binding but only on those to whom they are addressed; recommendations and opinions have no binding force (Article 288 TFEU).

A Directive is usually brought into being by ordinary legislative procedures involving the Commission, Parliament and Council.

The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission (Article 289 TFEU).

Each Directive has a single legal authority, derived from one (or occasionally two) Articles of the current EU Treaty.

Legal competence of the European Union: subsidiarity and proportionality

The Member States confer competence on the European Union for specific purposes. The boundary between the competence of the European Union and of the Member States is identified by the principles of subsidiarity and proportionality in Article 5 of the Treaty on European Union.

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaty (Article 5 TEU).

The implication of these principles regulating the conferral of powers on the EU-level is that the EU can only create Directives if there is significant value added beyond that which individual Member States could achieve themselves. Most areas of competence are shared by the EU and the Member States, so the issue of added value is important, though not the only consideration.

Legal bases cited in existing EU directives on aspects of violence against women

The existing EU directives on aspects of violence against women draw on parts of four articles in the TFEU for their authority. The Directives (identified by their original number) are as follows:

Article 157(3): Directive 2002/73/EC on harassment (in employment)

Article 19: Directive 2004/113/EC on harassment (in access to and distribution of goods and services)

Article 82(1)(a) and (d): Directive 2011/99/EU on protection orders

Article 82(2): Directive 2011/36/EU on trafficking; Directive 2011/92/EU on child sex abuse; Directive 2012/29/EU on victims' rights

Article 83(1): Directive 2011/36/EU on trafficking

Article 157(3):

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

Article 19 TFEU

Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 82(1)(a) and (d):

1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

(a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;

(d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

Article 82(2):

To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

(a) mutual admissibility of evidence between Member States;

(b) the rights of individuals in criminal procedure;

(c) the rights of victims of crime;

(d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

Article 83(1):

The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, this Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

This list of citations from the TEU and TFEU used by existing directives that combat aspects of violence against women does not mean that there are not potentially further articles of the Treaty of Lisbon that might be used for the purposes of directives to combat violence against women.

4 High level aims: equality between women and men; fundamental rights

4.1 Introduction

Violence against women is contrary to two of the EU's highest level aims: equality between women and men, and combatting sex discrimination; and fundamental and human rights. Violence against women is identified as a form of gender discrimination in international law (see discussion of General Recommendation of the UN Convention for the Elimination of Violence Against Women General Recommendation in section 2.4 above). The aim of reducing and eliminating violence against women is a necessary part of achieving the aim of gender equality. Violence against women is identified as a violation of women's human rights in the UN 1993 Declaration. This places a responsibility of due diligence to stop this violation on all parties to the UN Declaration.

The EU adopts equality between women and men, combatting sex discrimination and protecting fundamental and human rights as fundamental values in the Treaty of Lisbon. These are applied to all the activities of the EU. But, because of the division of powers between the Union and the Member State levels, the implication for the development of directives is a complex not straightforward issue. This section addresses the link between violence against women and these high level aims. Subsequent sections address the links between violence against women within smaller fields where the Union has legal capacity to act either alone or with Member States.

All EU Member States have ratified the European Convention on Human Rights so are individually bound to follow the rulings of the European Court of Human Rights. The jurisprudence of this Court, which has included rulings on various forms of gender-based violence against women including rape and domestic violence, thus affects Member States individually (for example the necessity to use the consent standard for the definition of rape if a state is to be considered to exercise due diligence in preventing torture means that several Member States are currently in violation of this Convention). When the EU accedes to the European Convention on Human Rights as required by the Treaty of Lisbon, this will raise issues at the EU-level, but the process of accession is not complete, so this issue is not included in the discussion below.

4.2 Equality between women and men

The Lisbon Treaty includes legal provisions for actions towards equality between women and men, combatting discrimination and respect for human rights. These take a variety of forms, including some at a very high level within the Treaties.

Treaty on the European Union Article 2:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in

which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Treaty on the European Union Article 3:

The Union's aim is to promote peace, its values and the well-being of its peoples. . . .

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

The aim is not only to combat discrimination but to move towards the larger goal of equality between women and men. The aim to eliminate inequalities and promote equality between men and women is further specified in the TFEU Article 8. This article, referring to 'all' the 'activities' of the EU, provides the basis for the strategy of mainstreaming gender equality into all areas of EU activities, including policy formation and implementation:

In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

Violence against women is a violation of women's human rights. This was established beyond doubt in international law by a Resolution of the UN General Assembly in 1993 (as above).

The aim of 'equality between women and men' has a high priority in the Treaty of Lisbon and is applicable to all areas of the competence of the Union. Since discrimination on the grounds of sex is under the current Treaties illegal in all activities of the EU, so gender based violence against women is illegal in all the activities of the EU in which it has competence to act. However, in accordance with Article 7 TFEU, this competence is in accordance with the principle of conferral of powers. Hence it is necessary to investigate the extent to which the Union has relevant powers, in the sections below.

4.3 Human Rights

Human rights are identified as a fundamental value of the EU in the Treaty on the European Union (TEU) in Article 2:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

and in TEU Article 6, as a key aim:

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. . . .

The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

As TEU, article 6 notes, The *Charter of Fundamental Rights of the European Union* was first adopted in 2000 (European Union 2000) and in adapted form in 2007 by the European Parliament, Council and Commission (2007). Several of the fundamental rights articulated in the Charter are relevant to gender based violence against women. This includes:

1. Human dignity is inviolable. It must be respected and protected.
2. 1. Everyone has a right to life.
3. 1. Everyone has a right to respect for this or her physical and mental integrity.
4. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
5. No one shall be held in slavery or servitude.
No one shall be required to perform forced or compulsory labour.
Trafficking in human beings is prohibited.
21. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
23. Equality between women and men must be ensured in all area, including employment, work and pay.
The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

While the TEU (EU 2010) refers to other international treaties and conventions (including the European Convention for the Protection of Human Rights and Fundamental Freedoms), it asserts that these are its own values and aims and hence there is no need to extend the competence of the EU in order to take account of the accession to these Conventions. Indeed all Member States of the EU have individually signed this convention.

4.4 Conclusion

Equality between women and men and respect for human rights are high aims of the Treaty of Lisbon and are of relevance to 'all' of its 'activities'. However, the competence to act in order to realise aims is carefully circumscribed in the procedures for the conferral of powers. It is necessary to investigate these in order to investigate the Union's competence for a directive.

5 Freedom, security and justice

5.1 Introduction

The EU seeks to establish an area of freedom, security and justice. The Treaty of Lisbon developed the description of the field of activities at the EU-level in relation to establishing an area of freedom, security and justice, consolidating the development of this competency from the Treaty of Amsterdam. There is only limited capacity in this field allows for the development of directives in criminal law. The field of freedom, security and justice contains, but is not confined to, criminal law. A significant part of the discussion as to the competence of the EU in relation to violence against women has focused the competence of the EU in relation to criminal law. While the question of EU competence in criminal law is addressed in this section, it does not provide a complete answer to the question of EU competence, since fields of law other than criminal law are also relevant.

5.2 Legal basis

The area of freedom, security and justice is identified in the TFEU at Article 67.1:

The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

There is competence to develop judicial cooperation in civil legal matters based on the principle of mutual recognition of judgements in Article 81 of the Treaty on the Functioning of the European Union:

81.1 The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decision in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

This applies in Article 81.2 to

- (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases
- (b) the cross-border service of judicial and extrajudicial documents;
- (c) the compatibility of the rules in the Member States concerning conflict of laws and of jurisdiction;
- (d) cooperation in the taking of evidence;
- (e) effective access to justice;
- (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
- (g) the development of alternative methods of dispute settlement;
- (h) support for the training of the judiciary and judicial staff.

There is competence for judicial cooperation in criminal law in Article 82, based again on the principle of the mutual recognition of judgements:

82.1 Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

- (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgements and judicial decisions;
- (b) prevent and settle conflicts of jurisdiction between Member States;
- (c) support the training of the judiciary and judicial staff;
- (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

82.2 To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

- (a) mutual admissibility of evidence between Member States;
- (b) the rights of individuals in criminal procedure;
- (c) the rights of victims of crime;
- (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

For a specified set of crimes that are particularly serious and with a cross-border dimension or where there is a particular need to address them on a common basis, further competence is provided in Article 83. This includes aspects of violence against women in its inclusion of 'trafficking in human beings and sexual exploitation of women and children':

The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crimes with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. . . .

If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.

In areas of crime that do not cross these thresholds of cross-border implications or specified forms of seriousness, there are weaker competences for the European Union, in Article 84:

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.

There follow references to the role of Eurojust, Europol and a wide range of measures to establish police cooperation, including data collection and staff training. Article 87.1 states:

The Union shall establish police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.

The EU appears to make a specific commitment to combat domestic violence. The Council of The European Union (2010) considers that Declaration 19 on Article 8 of the TFEU states should be interpreted as including a commitment to combat domestic violence and names it as a crime:

Declaration 19 on Article 8, whereby, in its general efforts to eliminate inequalities between women and men, the Union will aim in its different policies to combat all kinds of domestic violence, and the Member States should take all necessary measures to prevent and punish these criminal acts and to support and protect victims.

The aim to combat discrimination on grounds of sex is additionally specified in the TFEU Article 10:

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Further, Article 19(1) of the TFEU allows for the adoption of directives to combat discrimination based on sex under the special legislative procedure:

Without prejudice to other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation.

5.3 Use in practice

Since 2011, four directives have included aspects of violence against women and have cited parts of Articles 82 or 83 of the TFEU as their source of legal authority. The directive on 'trafficking' cited article 82.2 and 83.1, on 'child sexual abuse' Article 82.2 and 83.1, on the European protection order Article 82.1a and 82.1d, and on 'victims' rights' Article 82.2 (European Parliament and Council, 2011a, 2011b, 2011c, 2012). These directives are examples of the use in practice of the provisions of the TFEU to extend EU-level actions in the area of violence against women. These directives have provided minimum standards some areas of combatting violence against women across the EU at EU-level. This is in addition to the practice of mutual recognition of judicial judgments.

5.4 Gaps

These directives establish minimum standards in criminal law in some aspects of violence against women, but there are gaps in other aspects of violence against women. The competence of the Union to develop a directive on violence against women has been the subject of discussion and study.

A report published by the European Commission (2010d) suggested that there was little or no legal competence for the EU for legislative action in the field of violence against women; and that such legislation as might be pertinent would require a special legislative route that would be unlikely to be successful. However, this report is based on a flawed interpretation of the TFEU: it underestimates the significance of the need for legal clarity in cross-border judicial matters; it underestimates the significance of the cross-border dimension for crimes of violence against women; it underestimates the extent to which parallel legal authorities (the ECtHR) have already created an effectively harmonised field of crimes of violence against women in Europe.

The argument here is that there is legal competence. This argument is supported by the development of directives in several aspects of violence against women. It is further supported in the arguments below. There are two routes within the area of freedom, security and justice: a series of directives specialised on different aspects of violence against women (e.g. rape, FGM, domestic violence); or a single directive on violence against women. A third route is considered in the following section that discusses competence in the field of the economy.

The gaps between existing EU measures and international standards may be addressed one by one; or altogether in a more general initiative. This question will be addressed in relation to 'rape', FGM, 'domestic violence', and 'violence against women'.

Rape

In the case of rape, there is a specific case to be made for minimum standard of the definition rape for purposes of effective judicial cooperation when there is a cross-border issue in bringing an alleged offender to justice. Rape law is an area where there is a tendency towards harmonisation in the EU, but which is not yet complete according to

research (European Commission 2010d). There are established international standards used by the European Court of Human Rights drawing on the European Convention of Human Rights, which are also endorsed by the UN in its guidance on legislation (2010). These standards include the use of the threshold of 'consent' rather than the use of force, and the refusal of any exception by reason of marriage. Despite standards on the definition of rape being internationally recognised, there are still Member States that do not use them. One Member State, Bulgaria, was found in violation of the ECHR by the ECtHR (no. 39272/98) over the consent standard in 2003, while Kelly and Lovett (2009) and also European Commission (2010d) found several further Member States failing to meet this standard several years later. The marital exception is reportedly still in place in Malta (European Commission 2010d).

Legislative action on minimum standards for the definition of rape passes the several tests for the legal competence of the EU. Rape is a form of 'sexual exploitation of women', which is one of the forms of crimes explicitly named as open to this process. Further, rape can meet the criterion of having a cross-border dimension if the accused leaves the country in which the alleged rape had taken place before enquiries and prosecution are complete. Indeed, rape is one of the offences named in the Council Framework Decision as not needing the establishment of dual criminality before its use in the execution of the European Arrest Warrant (EAW) (Council of the European Union 2002). The instance of rape meets the criterion of a need to establish legal clarity. The absence of legal clarity on the legal definition of rape is a problem for judiciaries in the EU which is in need of remedy. This problem of lack of legal clarity on the definition of rape was one of the issues that entailed extensive judicial activity and several appeals on the occasion of the attempt by Sweden to use the European Arrest Warrant to achieve the surrender of Julian Assange to them by the UK judicial authorities (Royal Courts of Justice 2011; UK Supreme Court 2012). In this case, lawyers for Assange argued that there was a significant difference between the definition of rape used in the Swedish issued EAW and that used in the UK. Eventually the appeals all failed. Clarity in the definition of rape through the use of agreed minimum standards would have facilitated speedier judicial cooperation in this case.

There is a question as to whether the procedure to adopt appropriate legislative measures would require the 'ordinary legislative procedure' or whether it would require the 'special legislative procedure'. However, since rape is a form of 'sexual exploitation of women', is a 'serious' crime, and has 'cross-border dimensions' since the accused may well flee from such a serious charge, then it meets the requirements for the use of the 'ordinary' rather than the 'special' procedure.

It is concluded here that there is legal competence for a directive on rape, so as to ensure that there are minimum rules, namely a consent based definition and no marital exemption. It is needed for legal clarity in order to ensure mutual recognition of judicial judgements. The legal authority is TFEU Articles 82 and 83.

FGM

Female genital mutilation is a form of violence against women. It meets the EU criteria for a directive. It is a serious crime in that it has irrevocable deleterious effects on women. It is a form of sexual exploitation of women, since it is intended to control women's sexuality. It can often involve crossing borders, since girl children can be taken abroad for the procedure to be performed. The pattern and extent of the practice in the EU are reported by EIGE (2013b). There is legal scope for a directive to set minimum standards so as to ensure the mutual recognition of judicial judgements. The legal authority is TFEU Articles 82 and 83.

Domestic violence

The EU makes a specific commitment to combatting domestic violence, naming it as a crime that should be punished and victims should be supported (Declaration 19 on Article 8, above), though only within its competence and policies. Does domestic violence cross the various thresholds necessary to activate EU competence in a directive using criminal law? There are arguments in both directions. On the one hand, European Commission (2010d) suggests that the field of law is too disparate for such a venture. On the other hand, the EU has issued a directive in relation to domestic violence that addresses the mutual recognition of civil legal measures, those of protection orders. So it was considered a sufficiently serious crime, with sufficient cross border dimensions to be appropriate for a directive to secure mutual recognition of a legal instrument, the protection order. There is an argument for developing minimum standards in criminal law. The European Court of Human Rights (as noted above) has made rulings in cases that it categorises as domestic violence, even though it does so using the other legal categories that are available, so as to ensure that states exercise their duty of due diligence in protecting such victims. While recognising that domestic violence is not generally used as a legal crime category in EU Member States, action on a legal crime category that is in common use across the EU would achieve a similar remedy. This would be a directive to remove any marital exception to laws on assault and any other crime of violence against the person. This would help to put in a threshold or floor for Member States that is consistent with the rulings of the ECtHR. This speaks to the issue of domestic violence, while cognisant of the variety of legal traditions within which these crimes are located. While acknowledging that domestic violence is currently a legal category with disparate interpretations, such a minimum rule on a widely used crime category that is pertinent to this matter, would be of assistance in the effective prosecution of domestic violence in Member States, and improve the legal clarity that is necessary for effective judicial cooperation. The legal authority is TFEU Article 82.

Violence against women

Is there legal competence for a directive on gender-based violence against women? The category 'violence against women' is relatively new and is not consistently codified in criminal law across EU Member States. There is an argument for the setting of the minimum standards of the criminal law in each of several forms of violence against women named first, before returning to review the category of violence against women

as a whole in criminal law. However, there is a stronger case that law is sufficiently developed for a directive to be appropriate. The European Court of Human Justice has established jurisprudence in this field, as noted above. There are UN handbooks of guidance, as noted above. The EU Daphne programme has for many years defined the field for purposes of funding the exchange of good practices. The EU Fundamental Rights Agency considers the field sufficiently settled to be able to fund an EU-wide survey on violence against women. All EU Member States treat aspects of violence against women as a crime in some way. These developments suggest that the field is sufficiently well defined for European-level minimum standards to succeed. In addition, violence against women is a form of gender discrimination that is relevant to other fields of competence in the EU, and a further case will be made for a directive under the EU's competence on the economy, next.

5.5 Conclusion

The EU is developing an area of freedom, security and justice. While it leaves most of the action in this field to Member States, the Union level does have some competence in defined circumstances. The EU has recently developed four directives on specific aspects of violence against women since 2011 and largely uses TFEU Article 82 as the source of its legal authority to do so, with secondary use of Article 83. There would appear grounds to use these Articles for further specific aspects of violence against women, including: rape (TFEU 82, 83); FGM (TFEU 82, 83); forced marriage (TFEU 82, 83); and removing the marital exception in crimes of assault, thereby extending the protection of victims of domestic violence (TFEU 82). A directive on violence against women might also have a legal authority under TFEU 82, though the case here is more tenuous since the claim that this is an existing field of criminal law is less strong. In addition, it is important to note that criminal law is only one of several forms of law relevant to the elimination of violence against women.

6 Economy, non-discrimination and social inclusion

6.1 Introduction

The European Union intervenes in the economy in order to pursue balanced economic growth, full employment and social progress, among other goals. Aspects of violence against women intersect with aspects of these goals for the economy; and at such points of intersection there is sometimes competence for the EU to act to combat violence against women, either through legislative action leading to directives or through actions involving other measures.

The most important example of EU interventions in violence against women is its treatment of harassment as a form of discrimination against women that has been addressed through directives on equal treatment and non-discrimination, both in the field of employment and in the sale and distribution of goods and services. There is scope to consider the further utilisation of this approach in a directive to combat violence against women.

The goal of full employment is challenged by violence against women that reduces women's capacity for employment, leading to their social exclusion. There are potential EU-level instruments to address this impairment to women's capacity for employment, including: measures to assist the reintegration into the labour market women subjected to such violence; the deployment of the social and structural funds to combat such social exclusion; and the refinement of the broad guidelines that assist the coordination of the economic policies of Member States produced by the Council.

An indirect effect of EU measures to create balanced economic growth has been the restructuring of the commissioning of the specialised services to combat violence against women within the economy; within the competence to regulate services there is scope for action to assist actions to combat violence against women.

The cost of violence against women to the economy through its detriment to women's employment is relevant to the consideration of the proportionality of measures to combat violence against women. Violence against women is a cost to business (time lost due to injuries; lower productivity due to distractions e.g. attending court, moving house) and a further cost to business in the taxes needed to pay for public services (health, criminal justice system); so reducing this cost would improve business performance and the economy (For more details, see Walby 2004 and also Walby and Olive 2013). Violence against women reduces their employment, since injuries and the need to move can make it harder to stay employment; hence it is a form of social exclusion, since those affected are less able to participate in employment and the full range of social life. Reducing violence against women would thus be of benefit to the performance of the economy, to the goals of full employment and economic growth and would increase social inclusion.

6.2 Legal basis

The high level principles that justify intervention into the economy by the Union are found in TEU Article 3.3, which states:

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

There are several further articles in the TFEU that potentially provide the scope for the Union to act to combat violence against women in the broad field of the economy, non-discrimination and social exclusion. These are: TFEU Articles 5, 14, 19, 153, 157, 162. Their potential application is investigated in the sections below on:

- Harassment as discrimination: Articles 19, 157;
- Reintegration into the labour market: Article 153;
- European Social Fund: Article 162;
- Broad economic guidelines: Article 5;
- Specialised services: Article 14.

6.3 Harassment as discrimination

The EU recognises harassment related to the sex of a person and sexual harassment as forms of discrimination in the 2002 Directive on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions which is based on article 157§3 (Council of the European Union 2002). The 2002 Directive identifies four forms of discrimination: direct, indirect, harassment and sexual harassment in Article 2.

For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

For the purposes of this Directive, the following definitions shall apply:

direct discrimination: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation,

indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary,

harassment: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment,

sexual harassment: where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited.

A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.

An instruction to discriminate against persons on grounds of sex shall be deemed to be discrimination under the meaning of this Directive.

Harassment, as defined by this Directive, logically includes all forms of gender-based violence against women, although this phrase was not used in the definition of harassment. Since harassment is defined as 'unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment,' and sexual harassment is different only in specifying the nature of the conduct as any unwanted 'verbal, non-verbal or physical conduct of a sexual nature' it is hard to imagine that any form of gender based violence against women would be considered not to be within one of these definitions.

In so far as discrimination is illegal in the EU, then harassment is illegal in (some fields of activities of) the EU. In so far as harassment is illegal in the EU, then gender based violence against women is illegal in the EU (in specified fields of activity) in the EU.

The field for the application of this ruling on harassment is broader today than in the first directive that made harassment illegal. At the time of initial definition of harassment as illegal discrimination in Directive 2002/73/EC, the field of application was employment, although broadly defined. In 2002 the field of application is the same as that in Article 1 of the 1976 Directive and is limited to access to employment, promotion, vocational training, and working conditions with progressive application to social security:

The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as 'the principle of equal treatment'.

With a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.

In 2004, the field of application of the ruling that harassment was illegal was extended. The Treaty of Amsterdam introduced new powers to combat discrimination in Article 13. Directive 2004/113/EC drew on the former Article 13 of the Treaty of Amsterdam, now Article 19 TFEU (rather than 157§3 as for the 2002 Directive), to extend the field of application of this prohibition of harassment, additionally including access to and supply of goods and services, stating in Article 1:

The purpose of this Directive is to lay a framework for combatting discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment between men and women.

Directive 2006/54/EC clarified the law and the inclusion of occupational social security schemes within its remit. It extended the range of mechanisms to implement the principle of equal treatment to include 'equality bodies' (Article 20), 'social dialogue' (Article 21), 'dialogue with non-governmental organisations' (Article 22) and 'gender mainstreaming' (Article 29).

20.1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex. These bodies may form part of agencies with responsibility at national level for the defence of human rights or the safeguard of individuals' rights.

21.1. Member States shall, in accordance with national traditions and practice, take adequate measures to promote social dialogue between the social partners with a view to fostering equal treatment, including, for example, through the monitoring of practices in the workplace, in access to employment, vocational training and promotion, as well as through the monitoring of collective agreements, codes of conduct, research or exchange of experience and good practice.

22. Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of sex with a view to promoting the principle of equal treatment.

29. Member States shall take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in this Directive.

Directive 2010/41/EU extended the principle of equal treatment to the self-employed.

There is legislative competence to issue directives to secure equality between women and men, which includes harassment and other forms of violence against women, since these are forms of gender discrimination. The legal authority is found in TFEU Article 19 on non-discrimination as well as in TFEU Article 157 on equal pay. Under the authority of Article 19 TFEU, the range of mechanisms that Member States must utilise to combat harassment include: 'equality bodies', 'social dialogue', 'dialogue with non-governmental

organisations' and 'gender mainstreaming'. The field to which the directives that include harassment have been applied under Article 19 TFEU includes: employment, including training; occupational social security, self-employment, access to and supply of goods and services.

6.4 Reintegration into the labour market

The EU has the goal of full employment. For example, TFEU Article 147 states:

The Union shall contribute to a high level of employment by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action. In doing so, the competences of the Member States shall be respected.

The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Union policies and activities.

The goal of full employment is further reiterated in the context of social policy, where it is supplemented by the goal of combatting exclusion, in TFEU Article 151:

The Union and Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed in Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combatting of exclusion.

The competence to pursue the achievement of 'the integration of persons excluded from the labour market' is provided in TFEU Article 153.1 and explicit permission is given for directives in 153.2:

153.1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields

(h) the integration of persons excluded from the labour market, without prejudice to Article 166;

(i) equality between men and women with regard to labour market opportunities and treatment at work;

153.2. To this end, the European Parliament and the Council

(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States.

There is scope for the EU to develop directives and programmes to support the integration into the labour market of women who have been excluded as a consequence of violence against women provided in TFEU Article 153.

6.5 Social exclusion and the European Social Fund

Violence against women is a detriment to their employment and thus is a form of social exclusion. This has been noted in both studies and in the use of the open method of coordination on social inclusion and health. The review of violence against women in relation to gender equality, social inclusion and health strategies for D-G Employment, Social Affairs and Equal Opportunities (European Commission 2010e). There is reference to violence against women in the development of social policy within some National Plans of Action that are subject to the Open Method of Coordination on employment and social inclusion (European Commission 2010e).

There is competence to combat social exclusion in Article 153 TFEU, though this does not extend to a directive:

153.1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields
(j) the combatting of social exclusion. . . .

153.2. To this end, the European Parliament and the Council
(b) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States.

The EU has established a European Social Fund, at TFEU Article 162:

In order to improve employment opportunities for workers in the internal market and to contribute thereby to raising the standard of living, a European Social Fund is hereby established in accordance with the provisions set out below; it shall aim to render the employment of workers easier and to increase their geographical and occupational mobility within the Union, and to facilitate their adaptation to industrial changes and to changes in production systems, in particular through vocational training and retraining.

Since violence against women is a source of social exclusion, the use of the social and structural funds to reintegrate women is justified. An example is the mobilisation of social and structural funds in Greece to support the reintegration into employment of women excluded from full and effective employment by violence against women. While the significance of violence against women for women's exclusion is noted in studies and acted on in some instances, this is not yet systematic. One area of EU competence to combat violence against women is to deploy its structural funds, in particular the European Social Fund, to support women for whom violence has led to social exclusion. This is action but not a directive. There is legal competence to direct the deployment of the European Social Fund to address the social exclusion of women that is a consequence of violence against women provided in TFEU Article 162.

6.6 Broad guidelines for economic policies

Economic and social policies have impacts on aspects of violence against women especially in the field of employment (see discussion above and European Commission 2010e). There is a two-way relationship between violence against women and full employment. Not only does violence against women constitute a detriment to women's full employment but women's employment can be a source of resilience to violence against women.

There is competence at EU-level to offer guidance to Member States on the nature of their economic and social policies provided in Article 5 TFEU, which states:

The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies

The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.

The Union may take initiatives to ensure coordination of Member States' social policies

Guidance can be offered by the Union-level to Member States on economic and social policies that help to combat violence against women in the broad guidelines produced by Council, although Article 5 TFEU does not provide scope for a directive.

6.7 Specialised services for violence against women

The EU permits the regulation of specialised services in different ways in TFEU Article 14:

Without prejudice to Article 4 of Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

There are specialised services to prevent violence against women and to assist victims. In some countries these specialised services have been marketised along with other services. The marketisation of services in general has been an aspect of recent changes in the regulation of the economy in which the EU has been involved (Penna and O'Brien 2006). There has been controversy as to potentially detrimental consequences to the quality of these services if they are subject to the full rigours of the market, rather than protected as a specialised set of services delivered by experts to victims with special needs. There is a need for legal clarity that the EU does not insist on the marketisation of specialised

services to combat violence against women, but rather that any such marketisation is a matter for each Member State, depending on its circumstances. Regulations developed through the ordinary legislative procedure could make it clear that the EU permits specialised services for violence against women to be treated as services of 'general economic interest' not only as services of 'economic interest', through the legal authority provided in TFEU Article 14.

6.8 Conclusion

Violence against women is recognised in international law (UN CEDAW, signed by all Member States) as discrimination against women. Harassment, a form of violence against women, has been recognised as discrimination in EU law since the 2002 Directive on equal treatment in employment. The series of directives on equal treatment in employment and related matters has defined the field of EU-level action very broadly, including pay, pensions, promotion, working conditions, social security, and access to all goods and services across the single European market, and now draw their legal authority from TFEU Articles 19 (non-discrimination) and TFEU 157 (equal pay). TFEU 19, while potentially broadly drawn in relation to the fields on which discrimination is illegal, has only so far been used in relation to access to and distribution of goods and services. Article 19 offers a potential legal basis to extend the field beyond goods and services to other aspects of economy and society.

Violence against women is a form of gender discrimination. Hence Article TFEU 19 provides legal authority that offers scope for a directive to combat violence against women, not only harassment, since all forms of violence against women are forms of gender discrimination. A directive would provide legal clarity that all forms of violence against women, not only harassment are illegal in the fields to which TFEU applies. Hence, Article 19 of the TFEU could be the legal basis of directive on violence against women that legally clarifies that forms of violence against women in addition to harassment are illegal in the workplace, in the sale and distribution of goods and services, and potentially other fields of economy and society.

Violence against women is a form of social exclusion that is a detriment to full employment and thereby to economic growth. Article 153 TFEU offers scope for a directive to support the integration into the labour market of women who have been excluded as a consequence of gender-based violence. Article 162 offers scope for instructions to be issued for the use of the European Social Fund to combat the exclusion of women consequent on gender-based violence. Article 5 TFEU offers scope to include combatting violence against women within the broad guidelines on economic and social policies issued by the Council.

Specialised services for violence against women are recognised as important in preventing repetitions of and mitigating the impact of violence against women. There is a case that they should be treated as services of 'general economic interest' not only as services of 'economic interest', in order to facilitate their development. The legal authority to regulate on this matter is provided in TFEU Article 14.

7 Public health

7.1 Introduction

Violence is a detriment to health, in the injuries that it causes to physical and mental health and to human well-being. Violence against women is recognised by the EU and World Health Organization as a public health issue. There is a legal basis for action on violence against women within the EU Treaties, but it is limited to actions short of legislation.

7.2 Legal basis in EU

Public health is an area of competence of the European Union. This is specified in the Treaty on the Functioning of the European Union, at Article 6(a), Article 9 and Article 168:

6(a) The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: (a) protection and improvement of human health

9. In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fights against social exclusion, and a high level of education, training and protection of human health.

168. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education, and monitoring, early warning of and combatting serious cross-border threats to health.

The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation.

This legal provision extends to a wide range of support actions including incentives, but does not extend to legislative actions, which are expressly excluded in Article 168.5:

168.5 The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges,

measures concerning monitoring, early warning of and combatting serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States.

7.3 Use in practice

Within the EU, the Daphne programme, 2007-2013, to prevent and combat violence against children, young people and women and to protect victims and groups at risk, is funded under the EU Treaty provisions related to public health. The budget allocated is substantial, at EUR 116.85 million for the period 2007-2013 (European Parliament and Council, 2007). There have been three phases to this programme, the first starting in 2000, under which many projects related to violence against women have been funded (European Commission 2009).

The Decision by the European Parliament and Council to establish the Daphne programme in 2007 makes reference to Article 152 of the Treaty establishing the European Community (European Parliament and Council, 2007), which states:

A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities.

Community action, which shall complement national policies, shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to human health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education.

This Article, in slightly revised form, is included in the current Treaty on the Functioning of the European Union, as Article 168, as above.

7.4 Conclusion

Violence against women is recognised as a matter of public health by the EU and the World Health Organization. There is legal competence to engage in actions on violence against women under the public health provisions of the Treaties, specifically the Treaty on the Functioning of the European Union Article 168. This has been the legal basis for funding the Daphne programme of actions against violence against women. However, the legal basis for action is limited and there is no competence for legislative action at EU-level under the public health remit.

8 External relations

8.1 Introduction

Violence against women, especially sexual violence, is known to be higher in conflict zones and in times of disaster. The increased presence of women among decision-makers in conflict zones offers a degree of protection against the rise in this violence. Violence against women is recognised as a violation of women's human rights. The UN Security Council has recognised this issue in its Resolutions, including UNSCR 1325. Humanitarian aid packages have been called upon by the G8 to routinely include specialist assistance in relation to rape. The EU has developed competence in its external relations with other countries, in its own neighbourhood, in conflict zones and in supplying humanitarian aid. It is possible to utilise EU legal competence in its external relations in combination with the recognition of violence against women as a violation of human rights and a form of gender discrimination to support EU interventions to promote and to develop policies reduce violence against women in its external relations.

8.2 Legal basis

The EU establishes aims of its actions in external relations in Articles 3.5 and 21.2 of the Treaty on the European Union that could include combatting violence against women. Article 214 of the TFEU establishes the Union's competence to act.

The general aim is Treaty on the European Union Article 3.5 states:

In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Further, Article 21.2 of the Treaty of European Union states:

The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity; (b) consolidate and support democracy, the rule of law, human rights and the principles of international law; (c) preserve peace prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders . . . (g) assist populations, countries and regions confronting natural or man-made disasters

TFEU Article 214 provides the legal competence for EU humanitarian action that could include actions to combat violence against women:

214.1 The Union's operations in the field of humanitarian aid shall be conducted within the framework of the principles and objectives of the external action of the Union. Such operations shall be intended to provide *ad hoc* assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations. The Union's measures and those of the Member States shall complement and reinforce each other.

214.2. Humanitarian aid operations shall be conducted in compliance with the principles of inter-national law and with the principles of impartiality, neutrality and non-discrimination.

214.3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures defining the framework within which the Union's humanitarian aid operations shall be implemented.

Article 214.3 provides authority for the ordinary legislative procedure to be used to define the framework within which the Union's humanitarian operations are conducted. Potentially, this procedure could be used to give priority to combatting violence against women within EU humanitarian aid operations abroad.

8.3 Use in practice

There are some examples in which the EU has successfully contributed to the promotion of women's human rights and to policies to reduce violence against women in some of its external relations activities in its neighbourhood, conflict zones and in humanitarian crises.

8.4 Conclusions

The EU has the competence to act in its external relations to promote its values which include respect for human rights and thus to support policies that combat violence against women. The Union has competence to act externally, including in its neighbourhood, in the pursuit of peace in conflict zones, and in humanitarian crises. The requirement that the EU acts externally to uphold and promote its values, which include human rights and equality between women and men, means that there is competence to combat violence against women in its external relations. This is not competence to act to combat violence against women within the EU, but rather competence to act to combat violence against women in the EU's external relations. This is not competence for a directive but for the use of the ordinary legislative procedure to define the priorities of the framework. For purposes of clarity and legal certainty, the priority of the EU to combat violence against women in its external relations as part of its humanitarian aid, enabled by TFEU Article 214, could be defined in measures developed in accordance with the ordinary legislative procedure.

9 Research and statistics

9.1 Introduction

The EU has the aim to strengthen science in the European research area and to develop statistics as needed by the Union, in TFEU Articles 179 and the legal competence to act at Union level in TFEU 338. The EU is required to act in its activities in accordance with the principles of human rights and the pursuit of equality between women and men, according to Articles 2 and 3 on the Treaty on the European Union, which means that it should take action to combat violence against women in those areas where it is competent to act. In the fields of research and of statistics, the Union has legal competence to engage in actions to combat violence against women.

9.2 Legal basis

There is legal competence to act at EU-level on matters of scientific research and statistics. Article 179 of the TFEU states:

179.1. The Union shall have the objective of strengthening its scientific and technological bases by achieving a European research area in which researchers, scientific knowledge and technology circulate freely, and encouraging it to become more competitive, including in its industry, while promoting all the research activities deemed necessary by virtue of the other Chapters of the Treaties.

Article 338 in the Treaty on the Functioning of the European Union states:

338.1. Without prejudice to Article 5 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, the European Parliament and the Council, acting in accordance with ordinary legislative procedure, shall adopt measures for the production of statistics where necessary for the activities of the Union.

338.2. The production of Union statistics shall conform to impartiality, reliability, objectivity, scientific independence, cost-effectiveness and statistical confidentiality; it shall not entail excessive burdens on economic operators.

9.3 Use in practice

There are a few examples of actions in line with this competence. The work of the European Institute for Gender Equality (for example, see EIGE 2012a, 2012b, 2013b) and the survey on violence against women by the Fundamental Rights Agency (FRA 2011) could be considered to fall within this competence. In so far as the Daphne programme has delivered scientific research and statistics on violence against women, this has been under the legal authority of the public health competence, rather than research and statistics. There are, however, as yet, only a few examples of work on violence against women within the mainline research and statistics entities and programmes of the EU under these competences.

9.4 Conclusion

There is legal competence to produce research and statistics on violence against women as a result of the application of the legal principles of human rights and equality between women and men to the fields of research and statistics within which there is competence to act at EU-level. Two of the EU specialised agencies for equality and human rights, EIGE and FRA, have exercised these competences to produce research and statistics on violence against women. These legal competences could be exercised more widely in mainstream programmes of research and statistics. The EU needs statistics and research on violence against women in order to achieve its aims. There is legal basis in TFEU 338 for the EU to take measures for the production of statistics and research on violence against women.

10 Conclusion

The European Parliament and Council have been calling for greater action by the EU to combat violence against women, including a directive. The EU has been developing directives to combat specific forms of violence against women and other instruments to combat violence against women in general. There have been significant developments in international legal instruments to combat violence against women, including by the UN and the Council of Europe, in particular, the 2011 Council of Europe Convention to Combat Violence against Women and Domestic Violence. There are now significant gaps between the legal and advisory instruments at the international level and existing measures by the EU.

The EU has a high level aim under Treaty provisions to act to promote equality between women and men, to promote human rights, which may be reasonably interpreted to entail combatting violence against women, since violence against women is a form of discrimination against women and a violation of women's human rights. The Union-level has competence to act in certain fields of activities, but not in others, under the principles of conferral, subsidiarity and proportionality. The fields in which it has competence to act at the EU-level include some aspects of: freedom, security and justice; employment, economy and social exclusion; public health; external relations; research and statistics.

Within the field of freedom, security and justice, a series of directives have identified specific aspects of violence against women as contrary to the proper functioning of the EU which requires the mutual recognition of and minimum standards for judicial judgements in criminal matters. This field of EU action is underpinned by the EU commitment in the Treaty on the European Union to fundamental freedoms, human rights and human dignity. Specific competence for directives in criminal matters is limited to actions to support mutual recognition and judicial cooperation, with a focus on minimum standards to achieve this. There is scope for directives setting minimum standards to laws on rape (consent not force as the threshold; no marital exemption), and on FGM (common definition), using the authority of TFEU Articles 82 and 83. There is scope for a directive on aspects of domestic violence through removing any marital exemption to the crime of assault, based on TFEU Article 82. Such directives would assist mutual recognition of judicial judgements, providing clarity and certainty, and would be proportionate since otherwise significant harms would be left unsanctioned.

Within the field of employment, a series of directives have defined harassment, both on the basis of sex and on the basis of sexuality, as constituting discrimination. Harassment and all forms of gender-based violence against women are forms of gender discrimination, and thus contrary to equal treatment and are illegal in the sphere of employment, as defined under EU law. The area within which this definition of harassment as illegal discrimination applies was initially limited to employment and was then extended to access to goods and services, with a parallel extension in the range of mechanisms to implement the law from individual complaints to tribunals and courts to

national equality bodies to gender mainstreaming. Since harassment is a form of discrimination against women and so are other forms of gender based violence against women, there is scope for a directive that names all forms of violence against women to be forms of gender discrimination and illegal under EU law, so as to clarify the scope of the law, giving clarity and legal certainty. The legal competence to combat violence against women as a form of discrimination is firmly but narrowly based on TFEU Article 157, within the field of employment. Article 19 extends this competence to combat sex discrimination (which includes harassment and violence against women) to a wider range of fields, including the sale and distribution of goods and services, and potentially to further fields, though requiring the special rather than ordinary legislative procedure. A directive on violence against women could draw on either Article 157 or Article 19 TFEU, with different consequences.

The EU has competence to pursue: balanced economic growth; full employment; to combat social exclusion; and to promote social cohesion. Violence against women is a detriment to women's full employment due to the injuries it causes, and therefore reduces economic growth and social cohesion and produces social exclusion. The EU thus has competence to act to combat violence against women where this intersects with economic policy. There is scope for a directive that measures to support the reintegration into the labour market of those who have been excluded as a result of violence against women is within the competence of the EU, provided at TFEU Article 153. There is a scope to clarify that there is authority to use European Structural Funds to combat the social exclusion caused by violence against women, at TFEU Article 162. There is scope to clarify that the broad guidelines on economic and social policies issued by Council could include reference to violence against women, provided by TFEU 5. There is scope to clarify the regulations of the provision of specialised services to prevent violence against women and to support its victims stating that it is possible that such specialised services be designated services of 'general economic interest' rather than only 'economic interest' under authority provided at TFEU Article 14.

Within the field of public health, the Treaty on the Functioning of the European Union identifies the extent and limits of EU-level action, both allowing action but confining it to non-legislative actions. Violence, including violence against women, is recognised internationally, by the WHO, as a public health issue. The EU has used its legal competence in the field of public health to fund the well-regarded Daphne programme that exchanges knowledge and best practice among practitioners in this field. The field of public health offers a limited competence for action to combat violence against women that has been used to good effect. The articulation of this competence in further actions within the field, for example in relation to monitoring and to education, would be a further contribution. There is scope to clarify the range of actions that are available within public health to combat violence against women, but not a directive concerning legislative action.

Within the field of external relations, the Treaties on European Union and on the Functioning of the European Union provide legal competence for EU-level action in

pursuit of its values. These values include equality between women and men and fundamental rights, human dignity and human rights, as stated in the Treaty on the European Union. Violence against women is a form of discrimination and inequality between women and men and a violation of women's human rights. Hence there is legal competence for the EU to combat violence against women in its external relations. There are some examples of actions to this effect. There is scope to clarify the range of actions that may be undertaken by the EU to combat violence against women in its external relations.

Within the fields of research and of statistics, there is competence to act at EU-level in the creation of a European research area and statistics where necessary to support EU-level activities. There is EU competence to pursue the goal of combatting violence against women since it is a form of inequality between women and men and a violation of human rights. There are a few examples of the utilisation of this competence within the fields of research and of statistics. However, this utilisation has so far been quite limited. There is scope to clarify the actions that could be undertaken within the fields of research and of statistics to combat violence against women.

The EU has considerable, though not unlimited, legal competence to combat violence against women. The EU has high level principles that allow for the combatting of violence against women to be pursued since it is part of the goal of realising: equality between women and men; human and fundamental rights. The extent to which the EU has competence to pursue these goals within specific policy fields is complex and not well understood. A directive on violence against women would provide clarity and legal certainty as to the extent and limits of these competences. By provision of clarity and legal certainty, a directive on violence against women would aid the EU in pursuit of its fundamental values.

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