Freedom, Security & Justice: European Legal Studies

Rivista giuridica di classe A

2023, n. 2

EDITORIALE SCIENTIFICA

Rivista quadrimestrale on line "Freedom, Security & Justice: European Legal Studies"
www.fsjeurostudies.eu
Editoriale Scientifica, Via San Biagio dei Librai, 39 - Napoli
CODICE ISSN 2532-2079 - Registrazione presso il Tribunale di Nocera Inferiore n° 3 del 3 marzo 2017

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Commenti e Note

COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE FROM THE ISTANBUL CONVENTION TO THE EU FRAMEWORK: THE PROPOSAL FOR AN EU DIRECTIVE

Elisabetta Bergamini*

1. Introduction

In recent years the need to combat and prevent violence against women (hereinafter VAW) and domestic violence has been considered of utmost importance by International Organizations, leading to the approval of position papers and soft law instruments[1] and in particular to the specification through General Recommendations of existing hard law instruments as in the case of CEDAW (Convention on the Elimination of all Forms of Discrimination against Women) with its General Recommendation No 35 (2017) on gender-based violence against women[2].

Double blind peer reviewed article.

* Full Professor of European Union Law, University of Udine. E-mail: elisabetta.bergamini@uniud.it.

I would like to thank Professor Sara De Vido for involving me a few years ago in the study of the interesting issues of the possible EU legal basis for a directive on VAW and for the opportunity we had to share ideas and exchange views.

[1] See for instance UN General Assembly, *Declaration on the Elimination of Violence against Women*, UN Doc. A/Res/48/104, of 20 December 1993.

[2] General Recommendation No 35 updated the previous General Recommendation No 19 from 1992. On the role of soft law instruments in the field of violence against women see E.Y. KRIVENKO, *The Role and Impact of Soft Law on the Emergence of a Prohibition of Violence against Women within the Context of*

At the same time, new binding international instruments were introduced at regional level such as the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, also known as the Convention of Belém do Pará, whose text was adopted in 1994 by the Organization of American States[3], and which has recently been the subject of detailed and innovative interpretations by the Inter-American Court of Human Rights[4], the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), adopted by the Assembly of the African Union in 2003[5], and the Istanbul Convention, whose text was approved in 2011 by the Council of Europe[6].

The European Union has followed the same path, working for a long time at various levels to prevent and combat violence against women and girls. It has done so by addressing soft law issues with management strategy tools such as the Daphne Programme, launched in 1997 and allocating millions of resources to raise awareness on the need to combat gender-based violence and to create networks that address it – a strategy that has proven to be an effective way for the EU to promote the issue in Member States and candidate countries.

The EU's commitment to combat gender-based violence, supporting and protecting victims and holding perpetrators accountable, has more recently been reinforced by other soft law instruments as the 2020 Gender Equality Strategy[7] and the European Commission 2021 Communication on Hate Speech and Hate Crime[8] that also deals with some specific gender-based offences against women.

CEDAW, in S. LAGOUTTE, T. GAMMELTOFT-HANSEN, J. CERONE (eds.), *Tracing the Roles of Soft Law in Human Rights*, Oxford, 2016, pp. 47-68. On CEDAW see M.A. FREEMAN, C. CHINKIN, B. RUDOLF (eds.), *The UN Convention on the Elimination of all Forms of Discrimination against Women. A Commentary*, Oxford, 2012.

[3] The Convention of Belém do Pará entered into force on 5th March 1995. For a comparison between the different international law instruments regarding gender-based violence see R. CELORIO, *Women and International Human Rights in Modern Times: A Contemporary Casebook*, Northampton, 2022, p. 38 ff.

[4] See R.M. CELORIO, *The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting*, in *University of Miami Law Review*, 2011, p. 819 ff.

[5] For a critical assessment of the effects of this hard law instrument, entered into force on 25th November 2005, see K. DAVIS, *The Emperor Is Still Naked: Why the Protocol on the Rights of Women in Africa Leaves Women Exposed to More Discrimination*, in *Vanderbilt Law Review*, 2021, no. 42, p. 949 ff.

[6] For a general framework on the issue see, among the many publications, S. DE VIDO, *Violence against Women's Health in International Law*, Manchester, 2020 and the contributions in J. NIEMI, L. PERONI, V. STOYANOVA (eds.), *International Law and Violence Against Women: Europe and the Istanbul Convention*, Abingdon-Oxon, 2021. For an evaluation of the relevance of the CEDAW and Istanbul Convention in relationship with Articles 2 and 3 of the ECHR see A. DI STASI, *Il diritto alla vita e all'integrità della persona con particolare riferimento alla violenza domestica (artt. 2 e 3 CEDU)*, in A. DI STASI (ed.), *CEDU e ordinamento italiano. La giurisprudenza della Corte europea dei diritti dell'uomo e l'impatto nell'ordinamento interno (2016-2020)*, II ed., Milano 2020, p. 6 ff.

[7] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Union of Equality: Gender Equality Strategy 2020-2025*, of 5 March 2020, COM(2020) 152 final.

[8] Communication from the Commission to the European Parliament and the Council, , *A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime*, of 9 December 2021, COM(2021) 777 final.

However, it is only recently that the EU has begun to actively address the issue of violence against women using hard law instruments: the starting point being the decision to sign the Istanbul Convention in 2016[9]. This approach proved to be long and complex: in fact, after signature took place on 13th June 2017, the subsequent debate on its ratification slowed down the process, which only recently got back on track[10] as the Council adopted (the) two decisions on the EU accession on the 1st June 2023, after the European Parliament gave its consent on 10th May 2023[11].

All these developments paved the way for the decision to finally create a comprehensive piece of legislation that could substitute or at least integrate the fragmented existing framework[12]: an EU directive on combating violence against women and domestic violence[13], the draft of which was presented by the European Commission on 8 March 2022 and is currently going through the approval process.

[9] For a comment see S. DE VIDO, *The Ratification of the Council of Europe Istanbul Convention by the EU: A Step Forward in the Protection of Women from Violence in the European Legal System*, in *European Journal of Legal Studies*, 2017, no. 2, pp. 69-102 and A. PRECHAL, *The European Union's Accession to the Istanbul Convention*, in K. LENAERTS, J.-C. BONICHOT, H. KANNINEN, C. NAÔMÉ, P. POHJANKOSKI (eds.), *An Ever-changing Union?:Perspectives on the Future of EU Law in Honour of Allan Rosas*, Oxford, 2019, pp. 279-291.

[10] For an update on the European Parliament position see also the LIBE (Committee on Civil Liberties, Justice and Home Affairs) and FEMM (Committee on Women's Rights and Gender Equality) Interim report on the proposal for a Council decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence, of 2 February 2023, COM(2016)0109 – 2016/0062R(NLE), A9-0021/2023.

[11] European Parliament legislative resolutions of 10 May 2023 on the draft Council decisions on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, asylum and non-refoulement (05523/2023 – C9-0038/2023 – 2016/0062B(NLE)) and with regard to institutions and public administration of the Union (05514/2023 – C9-0037/2023 – 2016/0062A(NLE)). The Council decisions were approved on 1st June 2023: Council Decision (EU) 2023/1075 *on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to institutions and public administration of the Union*, OJ L 143I , 2 June 2023, p. 1; Council Decision (EU) 2023/1076 *on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, asylum and non-refoulement*, OJ L 143I , 2 June 2023, p. 4.

[12] For an evaluation of the existing framework of legislative rules at EU Level applicable to VAW and domestic violence cases see V. TEVERE, *Verso una "tutela integrata" delle donne vittime di violenza*, in this *Journal*, 2019, no. 2, pp. 184-207.

[13] Proposal for a directive of the European Parliament and of the Council on combating violence against women and domestic violence, of 8 March 2022, COM(2022)105 final 2022/0066(COD). For the position of the European Parliament on the proposal see N. HAHNKAMPER-VANDENBULCKE, I. BACIAN, *Violence against Women and Domestic Violence: The New Commission Proposal in Light of European Parliament Requests*, Brussels, 2022. On the impact assessment and the need to proceed to harmonize the national rules see also European Commission, Directorate-General for Justice and Consumers, *Study to Support the Impact Assessment on Preventing and Combatting Violence against Women and Domestic Violence*, Publications Office of the European Union, 2023. For a first analysis of the proposal see S. DE VIDO, *A First Insight into the EU Proposal for a Directive on Countering Violence against Women and Domestic Violence*, *EJIL:Talk!*, 7 April 2022, available at ejiltalk.org/a-first-insight-into-the-eu-proposal-for-a-directive-on-countering-violence-against-women-and-domestic-violence/.

If the process of ratification of the Istanbul Convention seemed for a long time to be stalling because of the objections raised by some EU Member States[14], the proposal to have a directive addressing the issue at least from the internal point of view could be an alternative way to a positive development, allowing to achieve a better protection of women against violence and to fill the remaining gaps in national legal frameworks, including at constitutional level[15].

The idea to combat violence against women through EU law instruments may not be regarded as entirely new: in fact according to a study commissioned in 2013 by the European Parliament[16] the existing EU legal framework (and specifically Articles 82 and 83 TFEU) could have led to the approval of three specific directives on rape, genital mutilation, domestic violence, or to the approval of a more general and comprehensive one on VAW (based on Articles 82 and 84, with a possible conjunction with Article 19 TFEU). These possibilities were not further explored until the proposal for a comprehensive directive was presented by the European Commission in 2022.

The proposal that we will evaluate in this paper focuses mainly on the criminal law perspective, although human rights violations and forms of discrimination are also concerned. Indeed, the European Commission recognises that the need to combat VAW is relevant in order "to protect the core EU values and to ensure that the EU Charter on Fundamental Rights is upheld". In particular VAW and domestic violence may affect the right to human dignity (Article 1), the right to life (Article 2), the prohibition of torture and inhuman or degrading treatment (Article 4), the right to freedom from discrimination, including on the grounds of sex (Article 21) and the right to access justice (Article 47)[17]. More in general violence against women endangers the possibility to reach, in all fields, equality between women and men, a principle which is a core value of the European Union and should be realized in all its activities in accordance with Articles 2 and 3.3 of the TEU, Article 8 of the TFEU and Article 23 of the Charter of Fundamental Rights.

[14] At the time of writing (1 June 2023), six EU Member States have not ratified the Istanbul Convention: Bulgaria, Czechia, Hungary, Latvia, Lithuania, Slovakia. The Polish government announced in July 2020 its intention to withdraw from the Convention: however, withdrawal has not yet been enacted. As we will see in Opinion 1/19 (Court of Justice, Grand Chamber, Opinion of 6 October 2021, C-1/19), the Court of Justice explained that the Council of the European Union could decide to wait for the "common accord" of the Member States to be bound by that convention or to go further without waiting for it, as happened in our case.

[15] For an evaluation of violence against women as a Constitutional concern, see R. RUBIO-MARÍN, *Global Gender Constitutionalism and Women's Citizenship: A Struggle for Transformative Inclusion*, Cambridge, 2022, p. 214 ff.

[16] See M. NOGAJ, *European Added Assessment EAVA 3/2013, Combatting Violence against Women*, Brussels, 2013, and S. WALBY, P. OLIVE, *The European Added Value of a Directive on Combatting Violence Against Women: Annex 2 Economic Aspects and Legal Perspectives for Action at the European Level*, Research Paper, Publications Office of the European Union, Brussels, 2013.

[17] For the full list of the rights involved see p. 1 of the proposal. More in general on the role of the Charter in the evolution of EU law see the contributions in S. DE VRIES, E. BERNITZ, S. WEATHERILL (eds.), *The EU Charter of Fundamental Rights as a Binding Instrument*, Abington, 2015 and in S. PEERS, T. HERVEY, S. KENNER, A. WARD (eds.), *The EU Charter of Fundamental Rights. A Commentary on the European Union Charter of Fundamental Rights*, Oxford, 2014.

The aim of the proposed directive is to promote among member States trust in their respective judicial systems in order to improve judicial cooperation in criminal law and, specifically, mutual recognition of judgements and[18] thus ensure effective protection of women's right (and victims' right in general) as set out in international human rights law and standards.

This paper will discuss the proposal for a directive focusing on the issues related to its legal basis and the different options that could have been used by the European Commission; it will also considers the case of cybercrimes as a specific gender-based offences against women and the relationship with the Istanbul Convention in light of its recent conclusion by the EU in order to assess the different point of views existing for member States and the consequences of its approval.

2. The evolution of the EU framework on judicial cooperation in criminal matters and the legal basis for the new directive on VAW

2.1 The proposal for a directive in the framework of EU judicial cooperation in criminal matters

Before evaluating the content of the new proposal for a directive we must first of all recall the existent EU legal framework on criminal law and justice cooperation among member States in which the draft directive is grounded and needs to find its justification and legal basis[19].

Criminal justice has been subject to EU law since the Maastricht version of the Treaty (1992), when the competence to adopt cooperation instruments in that area was included in the newly created third pillar (Title VI TEU)[20]. However it was not until entry into force of the Lisbon Treaty (1 December 2009) under Chapter 4 of Title V TFEU (Judicial cooperation in criminal matters in the area of freedom, security and justice[21]), that the EU Institutions in general were given the competence to adopt the ordinary legislative acts

[18] See K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, in *Il Diritto dell'Unione europea*, 2015, no. 3, p. 525 ff.

[19] On the evolution of EU criminal justice cooperation see F. MUNARI, C. AMALFITANO, *Il "terzo pilastro" dell'Unione europea: problematiche istituzionali, sviluppi giurisprudenziali, prospettive*, in *Il Diritto dell'Unione europea*, 2007, p. 773 ff; H. LABAYLE, *Le traité de Lisbonne et l'entraide répressive dans l'Union européenne*, in *Revue des affaires européennes*, 2007/2008, no. 2, p. 209 ff; E. HERLIN-KARNELL, *EU Competence in Criminal Law after Lisbon*, in A. BIONDI, P. EECKHOUT, S. RIPLEY (eds.), *EU Law after Lisbon*, Oxford, 2012, p. 331 ff.; S. PEERS, *EU Criminal Law and the Treaty of Lisbon*, in *European Law Review*, 2008, p. 507 ff.

[20] See A. TIZZANO, *Brevi note sul «terzo pilastro» del Trattato di Maastricht*, in *Il Diritto dell'Unione europea*, 1996, p. 391 ff.

[21] On the evolution of the area of freedom security and justice see the contributions in A. DI STASI, L.S. ROSSI (eds.), *Lo Spazio di libertà sicurezza e giustizia a vent'anni dal Consiglio europeo di Tampere,* Napoli, 2020. On the protection of fundamental rights in the judical area see A. DI STASI (ed.), *Tutela dei diritti fondamentali e spazio europeo di giustizia. L'applicazione giurisprudenziale del titolo VI della Carta*, Napoli, 2019.

(regulations, directives and decisions) referred to in Article 288 TFEU[22]. While in the matter of mutual recognition of judicial decisions – as with other interventions referred to in Article 82.1 TFEU – it is also allowed to approve regulations (the provision just mentioned using the generic expression "measures"), under Articles 82.2 and 83 TFEU, on the approximation of procedural or substantive national provisions, only directives are allowed.

We also need to stress that the European Union can only operate under the principle of conferral as stated in Article 5 of the TEU,: therefore when the European Commission first decided to present a proposal for a directive on VAW and domestic violence the main issue was related to the existence, or lack thereof, of a legal basis that would allow such an act to be approved. The choice made by the European Commission was to use as a legal basis Articles 82.2 and 83.1 TFEU[23]. As the Court of Justice, in its Opinion 1/19 on access to the Istanbul Convention[24], extensively assessed and criticized the choice of legal basis for the EU decision for that international treaty, we need to evaluate if the proposed legal basis for the new directive, that will deal with a similar topic, may be accepted, and the possible limits, problems and alternatives to the choice made by the European Commission[25].

2.2. Evaluation of Article 82.2 TFEU as a legal basis for the directive

First of all, we need to discuss the relevance of Article 82.2 TFEU, that provides for the approximation of the criminal laws of the Member States at procedural level.

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[22] Instruments that however will not bind Denmark (due to the opt out regime under Protocol 22 annexed to TEU and TFEU) nor Ireland (if not on an elective basis, pursuant to Protocol 21).

[23] See the two proposals – Proposal for a Council decision *on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence*of 4 March 2016, (COM(2016) 111final and Proposal for a Council decision *on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence*, of 4 March 2016, COM(2016)109 final and the two decisions on the signing – Council Decision (EU) 2017/865 *on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters* of 11 May 2017, OJ 2017 L 131, 20 May 2017, p. 11 and Council Decision (EU) 2017/866 *on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement*, of 11 May 2017, OJ 2017 L 131, 20 May 2017, p. 13.

[24] For a comment on Opinion 1/19 see G. KÜBEK, *Facing and Embracing the Consequences of Mixity: Opinion 1/19, Istanbul Convention*, in *Common Market Law Review*, 2022, no. 5, pp. 1465-1500; P. KOUTRAKOS, *Confronting the Complexities of Mixed Agreements: Opinion 1/19 on the Istanbul Convention*, in *European Law Review*, 2022, no. 2, pp. 247-263; C. MORINI, *La questione dell'adesione dell'Unione europea alla Convenzione di Istanbul*, in this *Journal*, 2021, no. 3, pp. 136-162.

[25] The Court of Justice declared in the final part of its Opinion that "the appropriate substantive legal basis for the adoption of the Council act concluding, on behalf of the European Union, the part of the Istanbul Convention covered by the envisaged agreement, within the meaning of Article 218(11) TFEU, is made up of Article 78(2), Article 82(2) and Articles 84 and 336 TFEU". In its request for an O pinion the European Parliament asked if "Articles 82(2) and 84 TFEU constitute the appropriate legal bases for the [Council of the European Union] act concluding the [Council of Europe Convention on preventing and combating violence against women and domestic violence ("the Istanbul Convention")] on behalf of the [European] Union, or should that act be based on Articles 78(2), 82(2) and 83(1) TFEU".

Under its provisions the European Parliament and the Council may, in accordance with the ordinary legislative procedure, adopt directives laying down minimum standards relating to the specific elements of the criminal procedure referred to therein, by a unanimous decision (Ireland and Denmark excluded) and after obtaining the consent of the European Parliament.

Approximation of laws at procedural level is strictly functional to mutual recognition and should not endanger the peculiarities of the national legal traditions and systems[26]: in fact, the very beginning of Article 82.2 TFEU states that it can only take place "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"[27]. Harmonization in the field is therefore considered to have a utilitarian rationale, being justified only in light of the policy goal of judicial cooperation in criminal matters and as long as it is meant to facilitate mutual recognition[28]. The increase of mutual trust always resulting from harmonization of rights may be considered as sufficient evidence of fulfillment of these requirements if we accept a broad interpretation of Article 82.2[29]. At the same time the cross-border dimension requirement should not be considered in a rigorous way as we need to avoid the risk to apply harmonized rules only to cross-border proceedings, on a case by case approach, such leading to the risk of reverse discrimination[30]. This approach is also confirmed by the Court of Justice reasoning in case *Moro* in 2019, when the Court declared that the rules laid down by a directive approved on the basis of Article 82.2 TFEU were "independent of the existence of any cross-border situation in the context of a dispute arising in that Member State"[31].

[26] Article 82.2 states that "(s)uch rules shall take into account the differences between the legal traditions and systems of the Member States". More in general on protection of national identities in the European Union see G. DI FEDERICO, *L'identità nazionale degli Stati membri nel diritto dell'Unione europea. Natura e portata dell'art. 4, par. 2, TUE*, Napoli, 2017.

[27] For an evaluation in detail of the cross-border dimension of VAW and domestic violence see the subsequent paragraph 2.3 on Article 83.1. On the application of the mutual recognition principle in the area of criminal justice see V. MITSILEGAS, *The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU*, in *Common Market Law Review*, 2006, p. 1277 ff.

[28] For the justification of judicial cooperation in criminal matters for deontological or utilitarian reasons see I. WIECZOREK, *The Legitimacy of EU Criminal Law*, Oxford, 2020, p. 106 ff.

[29] A narrow interpretation could, however, lead to different results as can be seen in a specific analysis related to harmonization under Article 82.2 letter b) on the rights of individuals in criminal procedure from I. WIECZOREK, *EU Harmonisation of Norms Regulating Detention: Is EU Competence (Art. 82(2)b TFEU) Fit for Purpose?*, in *European Journal of Criminal Policy and Research*, 2022, no. 28, pp. 465-481.

[30] See *ex multis* A. TRYFONIDOU, *Reverse Discrimination in EC Law*, Alphen aan den Rijn, 2009; V. VERBIST, *Reverse Discrimination in the European Union: A Recurring Balancing Act*, Cambridge, 2017; B. NASCIMBENE, *Le discriminazioni all'inverso: Corte di giustizia e Corte costituzionale a confronto*, in *Il Diritto dell'Unione europea*, 2007, pp. 717-733; F. SPITALERI, *Le discriminazioni alla rovescia nella recente giurisprudenza comunitaria: rimedi insufficienti o esorbitanti*, *ibidem*, 2007, pp. 917-939.

[31] Court of Justice, judgment of 13 June 2019, *Moro*, Case C-646/17, para 36. As stated in para 35 the provisions of that directive (2012/13/EC) were "based on the idea that the principle of mutual recognition implies that the decisions of the judicial authorities, even in a purely internal situation, should be based on common minimum rules. In that context, as the Advocate General emphasized in essence in point 41 of his Opinion, when the need for a specific instance of cross-border cooperation arises, the police and judicial authorities of a Member State can then regard the decisions of the judicial authorities of the other Member States as equivalent to their own".

Furthermore, the directives thus adopted constitute only a minimum standard of protection that must be guaranteed in the Member States to the various parties involved in the criminal procedure, but do not prevent national legislators from maintaining or increasing the level of protection offered. From the European Commission point of view, the use of Article 82.2 TFEU as a legal basis will enable the directive to cover measures concerning the rights of victims of the crimes (being such rights included in the list under letter (c)) of VAW and domestic violence[32]. This will allow protection, access to justice, victim support before, during and after criminal proceedings and preventive action: *i.e.* a specific individual assessment to identify victims' protection needs and support needs (Articles 18-19), protection of victim's private life (Article 22), prompt removal of online material used to commit cybercrimes (Article 25), specialist support to victims, specifically linked to the type of offence they were subject to (Articles 27-30). The provisions on protection of victims are partly in line with the Istanbul Convention, because they fail to appreciate the gendered dimension of violence. For example, women's support services are not mentioned in the draft directive, even though they are playing a fundamental role in supporting women that have been victims of violence.

This legal basis was used in the last few years to approve directives related in general to the protection of victims of crimes, as it was the case with the 2012/29 Directive establishing minimum standards for victim protection[33]. The new VAW Directive, however, will undoubtedly have a broader approach as it will not only focus on victim's protection but also on criminalization of behaviors, for which Article 82.2 alone does not represent a sufficient legal basis.

2.3 Evaluation of Article 83.1 TFEU as a legal basis for the directive: the problem of cross border dimension. The case of domestic violence triggering cross-border movement of women and the international child abduction

The second legal basis for the proposal is Article 83.1 TFEU that allows the approval of minimum harmonised rules on the definition of what is to be considered a criminal

[32] On the role of fundamental rights protection in judicial cooperation in criminal matters see N. PARISI, *I diritti fondamentali nell'Unione europea fra mutuo riconoscimento in materia penale e principio di legalità*, in U. DRAETTA, N. PARISI, D. RINOLDI (eds.), *Lo spazio di libertà, sicurezza e giustizia dell'Unione europea. Principi fondamentali e tutela dei diritti*, Napoli, 2007, p. 113 ff. On the rights of vulnerables victims see C. AMALFITANO, *La vittima vulnerabile nel diritto internazionale e dell'Unione europea*, in *Rivista italiana di medicina legale*, 2018, pp. 523-551. More in general on Article 82 TFEU as a legal basis see C. AMALFITANO, *Article 82*, in A. TIZZANO (ed.), *Trattati dell'Unione europea*, Milano, 2014, p. 866 ff.

[33] The victims' rights directive will remain in force as a general framework, to which the draft directive will add specific measures. See Directive 2012/29/EU of the European Parliament and of the Council *establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, of 25 October 2012, OJ L 315, 14 November 2012, p. 57. The same will happen, with some changes proposed in order to ensure coherence with the new framework, to the Child Sexual Abuse Directive (see Directive 2011/93 of the European Parliament and of the Council of 13 December 2011 on *combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA*, OJ L 335, 17 December 2011, p. 1).

offense and the sanctions to apply "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". Even if the transnational element does not always exist for VAW and domestic violence, as the situation may lack the cross-border dimension, this apparent obstacle is easy to overcome. The sentence is written using 'or' so the need for harmonisation concerns the crimes having cross-border dimension, *or* a situation in which there is a special need to combat them on a 'common basis' and there clearly is such a special need in the situation evaluated in this paper. According to scholars[34], the reference to the transnational dimension should be read in a flexible way, in the sense that national provisions in compliance with the directives elaborated under Article 83.1 can be applied also in case the crime they have harmonised has a pure internal character. It is relevant also to stress that the wording of Article 83.1 TFEU refer to a "cross border dimension" and not to a "cross border element"; a choice of wording that, as confirmed by the reasoning of Advocate General Pikamae in Joined Cases C-845/19 and C-863/19, "shows that fulfilment of that condition is not dependent on any assessment of the factual circumstances of a given case, but merely on the fact that the criminal offence under consideration comes within one of the areas of crime amenable to harmonisation under the second subparagraph of Article 83.1 TFEU, and that it comes within the scope of the secondary legislation adopted on the basis of Article 83.1 TFEU and governing such an area"[35].

Although domestic violence does not always have a cross-border dimension, in some cases it can be cross-border: a clear example of this are cases where women move (or better, flee) to another country as a result of domestic violence, a situation that is further

[34] See, for example, C. AMALFITANO, *Article 83*, in A. TIZZANO (ed.), *Trattati dell'Unione europea*, Milano, 2014, p. 900. On the harmonisation principle in Article 83.1 TFEU see also L.A. ZAPATERO, M. MUÑOZ DE MORALES ROMERO, *Droit pénal européen et traité de Lisbonne: le cas de l'harmonisation autonome (article 83.1 TFUE)*, in G. GIUDICELLI-DELAGE, C. LAZERGES (eds.), *Le droit pénal de l'Union européenne au lendemain du Traité de Lisbonne*, Paris, 2012, p. 116 ff. On the relationship between Article 83.1 and Article 82.2 with reference to the cross border dimension it is relevant to see the Advocate General Pikamae Opinion on Joined Cases C-845/19 and C-863/19 (24 March 2021) who stated that "in contrast to Article 82(2) TFEU, the establishment of harmonised substantive provisions is not conditional on their being necessary in order to facilitate the mutual recognition of judicial decisions and cross-border police and judicial cooperation. On the contrary, the first subparagraph of Article 83(1) TFEU expressly provides that, in addition to the particularly serious nature of the areas of crimes considered, such harmonisation is strictly conditional on the crimes in question having a cross-border dimension resulting from the nature or impact they have or from a special need to combat them on a common basis. These areas of crime are, according to the second subparagraph of Article 83(1) TFEU, 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. As is clear from the wording of Article 3 of Directive 2014/42, the latter applies solely to criminal offences covered by secondary legislation harmonising substantive criminal law in the areas I have just mentioned or, better put, in areas having a cross-border dimension" (paras 35-36).

[35] Advocate General Pikamae Opinion on Joined Cases C-845/19 and C-863/19, cit., para 40 where he adds that "(w)here that is the case, the criminal offence under consideration is ipso facto regarded as fulfilling the condition of having a cross-border dimension, as well as the condition of being particularly serious. It follows that the question of whether one or other of the elements inherent in the commission of the offence in question, such as the nationality of the perpetrator, the place where the offence was committed or the location of the proceeds of the crime, is of a cross-border nature, is entirely irrelevant".

complicated when children are part of the family, creating the risk of a breach of the rules on custody and visitation rights. The situation clearly becomes more common when domestic violence takes place in cross-border families, as migrant women exposed to violence may be more vulnerable in similar cases and the decision (or in some cases the need) to flee from the perpetrator may also lead to international child abductions.

If the EU grants a certain level of protection in similar circumstances to the woman victim of domestic violence by extending at least their residence right as family member of an EU citizen even if the marriage ended, thanks to Article 13.2 of Directive 2004/38[36], no general provision exists in Directive 2003/86 for family members of non-EU citizens, nor did the Court of Justice considered to extend a similar protection to situations involving only third Country citizens[37]. Regarding this, we should note that Article 59.3 (b) of the Istanbul Convention stipulates that victims shall be granted a residence permits 'where the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings': however the content of the directive proposal confirms that its Article 16 does not introduce a right to a residence status for persons reporting violence, even if recital 56 defines them (women with dependent residence status or permit or undocumented migrant women) as victims with specific needs that should receive specific protection and support. Even if some authors[38] considered that the need to issue a residence permit to victims of domestic violence should be protected using Article 82.2 as a legal basis, as it is related to facilitation of mutual recognition of judicial decisions and police and judicial cooperation in criminal matter, the idea that it should be

[36] Directive 2004/38/EC of 29 April 2004 *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, OJ L 158, 30 April 2004. Article 13.2 deals with "Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership" and provides that divorce, annulment of marriage or termination of the registered partnership shall not entail loss of the right of residence of a third Country national family member where"(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting" .

[37] Directive 2003/86/EC of 22 September 2003 *on the right to family*, OJ L 251, 3 October 2003, such determining a discriminatory treatment for migrants who are not linked to a EU national. Unfortunately the ECJ gave a restrictive interpretation of that by stating that "a third-country national, who is divorced from a Union citizen at whose hands she has been the victim of domestic violence during the marriage, cannot rely on the retention of her right of residence in the host Member State, on the basis of that provision, where the commencement of divorce proceedings post-dates the departure of the Union citizen spouse from that Member State" (see, Court of Justice, First Chamber, judgement of 30 June 2016, *Secretary of State for the Home Department v NA*, Case C-115/15, para 51). For a comment see L. GYENEY, *Sensitive Issues before the European Court of Justice - The Right of Residence of Third Country Spouses Who Became Victims of Domestic Violence, as Well as Same-Sex Spouses in the Scope of Application of the Free Movement Directive (Legal Analysis of the NA and Coman Cases)*, in *Hungarian Yearbook of International Law and European Law*, 2017, pp. 211-256; H. OOSTEROM-STAPLES, *Residence Rights for Caring Parents who are also Victims of Domestic Violence*, in *European Journal of Migration and Law*, 2017, no. 19, p. 396 ff.; S. PEERS, *Domestic Violence and Free Movement of EU Citizens: A Shameful CJEU Ruling*, in *EU Law Analysis*, 25 July 2016, available at www.eulawanalysis.blogspot.com/2016/07/domestic-violence-and-free-movement-of.html.

[38] For this interpretation see V. STOYANOVA, *On the Bride's Side? Victims of Domestic Violence and their Residence Rights under EU and Council of Europe Law*, in *Netherlands Quarterly of Human Rights*, 2019, no. 4, pp. 311-335.

considered as an immigration law measure prevailed, as already happened in all previous directives adopted under Article 82.2 that always failed to introduce immigration law measures.

The EU framework also lacks specific harmonized rules on custody and visitation rights for parents, a situation that is only considered from the perspective of private international law, which is now subject to the recast Regulation 2019/1111 (also known as Brussels II recast Regulation) that applies from 1 March 2021[39]. This regulation is meant to apply in the international law framework created by the Hague Convention on the Civil Aspects of Child Abduction of 1980[40] and more generally by the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement, and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children[41]. The Brussels II recast Regulation, having been approved after the entry into force of the Istanbul Convention albeit at a time when) that

[39] Regulation 2019/1111/EU of the Council *on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)*, of 25 June 2019, OJ L 178, 2 July 2019, p. 1. The recast Regulation applies from 1 March 2021 substituting the previous Regulation 2201/2003/EC *concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000*, of 27 November 2003, OJ L 338, 23 December 2003, p. 1. On the new Regulation see *ex multis* G. BIAGIONI, *Il nuovo regolamento (UE) 2019/1111 relativo alla competenza, al riconoscimento e all'esecuzione delle decisioni in materia matrimoniale e di responsabilità genitoriale, e alla sottrazione internazionale*, in *Rivista di diritto internazionale*, 2019, pp. 1169-1178; T. KRUGER, L. CARPANETO, F. MAOLI, S. LEMBRECHTS, T. VAN HOF, G. SCIACCALUGA, *Current-day International Child Abduction: Does Brussels IIb Live up to the Challenges?*, in *Journal of Private International Law*, 2022, pp. 159-185. On the relationship between the provisions of the Istanbul Convention and the EU PIL framework see E. BERGAMINI, *Article 31*, in S. DE VIDO, M. FRULLI (eds.), *Preventing and Combating Violence against Women and Domestic Violence. A Commentary on the Istanbul Convention* (forthcoming) and, for a critical evaluation of the poor results of Regulation 2019/1111 in combating VAW, see C. RUIZ SUTIL, *La violence de genre/conjugale à l'égard des ressortissantes étrangères et leurs enfants face à la dimension transfrontalière dans l'Union européenne*, in C. CORSO, P. WAUTELET (dir.), *L'accès aux droits de la personne et de la famille en Europe*, Bruxelles, 2022, in particular pp. 164-165.

[40] On the problematic balance between the need to apply the Hague 1980 Convention and the need to protect women against violence see also R. LAMONT, *Mainstreaming Gender into European Family Law? The Case of International Child Abduction and Brussels II Revised*, in *European Law Journal*, 2011, no. 3, pp. 366-384, and, more recently, C. RUIZ SUTIL, *Implementación del Convenio de Estambul en la refundición del Reglamento Bruselas II Bis y su repercusión en la sustracción internacional de menores*, in *Cuadernos de derecho transnacional*, 2018, no. 2, pp. 615-641; M. FREEMAN, N. TAYLOR, *Domestic Violence and Child Participation: Contemporary Challenges for the 1980 Hague Child Abduction Convention*, in *Journal of Social Welfare and Family Law*, 2020, no. 2, pp. 154-175. On the case of women subjected to a Hague return order after fleeing family and domestic violence perpetrated by their previous partner, because they fled with their children across international borders see G. MASTERTON, Z. RATHUS, J. FLOOD, K. TRANTER, *Dislocated Lives: The Experience of Women Survivors of Family and Domestic Violence after being 'Hagued'*, in *Journal of Social Welfare and Family Law*, 2022, no. 3, pp. 369-390. More in general on the 1980 Hague Convention see also M.C. BARUFFI, *Uno spazio di libertà, sicurezza e giustizia a misura di minori: la sfida (in)compiuta dell'Unione europea nei casi di sottrazione internazionale*, in *Freedom, Security & Justice: European Legal Studies*, 2017, pp. 2-25.

[41] For a general presentation of the 1996 Hague Convention see M.C. BARUFFI, *The 1996 Hague Convention on the Protection of Children*, in I. VIARENGO, F.C. VILLATA (eds.), *Planning the Future of Cross Border Families: A Path Through Coordination (Studies in Private International Law)*, Oxford, 2020, p. 259 ff. See also H. BAKER, M. GROFF, *The Impact of the Hague Conventions on European Family Law*, in J.M. SCHERPE (ed.), *European Family Law*, Volume I, *The Impact of Institutions and Organisations on European Family Law*, Cheltenham/ Northampton, 2016, pp. 143-208.

Convention was not yet ratified by many Member States and by the EU itself), contains a reference to the need to use a specific approach in cases of domestic violence by (?) imposing to Central Authorities the obligation not to disclose information on the whereabouts of the child to the parent which the child was wrongfully removed from by the victim of violence[42]. In fact Article 89 created a new procedure allowing Central Authorities to limit access to information in case they could endanger the safety of a child or of another person, for example the mother fleeing violence, thus trying to find the difficult balance between the need to avoid wrongful removals and to grant access to justice for the parent victim of this crime (but culprit of domestic violence) and the need to protect the best interests of the child and of the other family members who must be protected from violence. However, the new Brussels recast Regulation has been criticised for missing the opportunity to fully implement the Istanbul Convention, as private international law in general seems still to be anchored to a gender-neutral perspective[43].

2.4 Evaluation of Article 83.1 TFEU as a legal basis for the directive: the definition of "Eurocrimes"

If we therefore accept that Article 83.1 may represent a correct legal basis from the point of view of domestic violence having a cross border or a "special need" relevance, we can go further in our reasoning by examining the second paragraph that includes a list of offences commonly known as "Eurocrimes" in order to combat which it is possible to establish common rules at EU level: we need therefore to argue if VAW and domestic violence may be qualified as such, even if no specific reference to them is included in the list.

The doubt stems from the fact that the list of crimes that is included in the second sentence of Article 83.1 was meant to be an exhaustive list to which no modification is admitted unless the mechanism provided for in the third sentence which requires a unanimous decision in the Council and a consent of the European Parliament to extend the list of Eurocrimes) is triggered. Harmonization of crimes and penalties leads to "the development of a common EU legal culture in relation to fighting crime, which adds up to but does not substitute national legal traditions and has a positive impact on mutual

[42] See recital 88 and Article 89 of the recast Regulation. See also recital 43 in which whilst advocating mediation as instrument to solve cases of international child abduction, it is made clear that mediation might not be appropriate in cases of domestic violence. For a comment see A. GAUDIERI, *Il principio dei "best interests of the child" e la tutela della vittima minorenne nello spazio giuridico e giudiziario europeo*, in this *Journal*, 2019, no. 3, p. 106 -137.

[43] On the need to add a gender perspective to private international law see C. VAQUERO LÓPEZ, *Woman, Marriage and Motherhood: Issues of Private International Law from a Gender Perspective*, in *Cuadernos de Derecho Transnacional*, 2018, no. 1, pp. 439-465; R. ESPINOSA CALABUIG, *La (olvidada) perspectiva de género en el Derecho internacional privado*, in this *Journal*, 2019, no. 3, pp. 36-57; M.D. ORTÍZ VIDAL, *Derecho de visita y violencia de género el principio de mutuo reconocimiento y el interés superior del menor*, in M.P. DIAGO DIAGO, P. JIMÉNEZ BLANCO, C. ESPLUGUES MOTA (eds.), *50 años de derecho internacional privado de la Unión Europea en el Diván*, Valencia, 2019, pp. 327-337.

trust amongst the legal systems of the Member States"[44]. Without a unanimous decision of the Council to expand it, the list of Eurocrimes, is therefore fixed and unmodifiable.

The list of Eurocrimes in Article 83.1 TFEU lacks any explicit reference to violence against women and to domestic violence but contains the notion of "trafficking in human beings and sexual exploitation of women and children", together with that of "computer crime". If there is no doubt about the existence of cybercrimes as an autonomous and self-sufficient Eurocrime in Article 83.1 – the expression 'computer crimes' not defined at EU level, can be interpreted in the light of the CoE legal framework and precisely of the Additional Protocol to the Convention on Cybercrime of 2001[45], concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems of 2003 – we need to evaluate whether sexual exploitation may be considered as a crime only if it is connected to trafficking in human beings[46] or whether sexual exploitation of women may be considered as a crime on its own.

In order to find an answer, it may be helpful to consider the existing legal framework and specifically the 2011/93 Directive on the fight against sexual exploitation of children and child pornography, which replaced the Framework Decision 2004/68[47], that introduced a minimum of approximation of the EU Member States' legislations in order to criminalize the most serious forms of child sexual abuse and exploitation, to extend domestic jurisdiction, and to provide assistance to victims. The previous framework decision was transformed into a directive after the entry into force of the Lisbon Treaty, using as a legal basis the same Articles 82.2 and 83.1 that we are currently analyzing and, in its elaboration, the European Commission mainly referred to the Lanzarote Convention

[44] Resolution 2010/2310(INI) of the European Parliament *on an EU approach to criminal law*, of 22 May 2012, OJ C 264, 13 September 2013, letter G.

[45] The 2001 Council of Europe (CoE) Convention on Cybercrime (known as the 'Budapest Convention') does not envisage accession by the European Union that is however recognized as an Observer Organization to the Cybercrime Convention Committee.

[46] The main legal text on trafficking in EU law is Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 *on preventing and combating trafficking in human beings and protecting its victims*, and replacing Council Framework Decision 2002/629/JHA, in OJ L 101, 15 April 2011, pp. 1-11. This directive is currently subject to a reform procedure thanks to the amendments proposed by the European Commission in the Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/36/EU *on preventing and combating trafficking in human beings and protecting its victims*, 19 December 2022, COM(2022) 732 final, 2022/0426(COD). For a first comment on the text of directive in force see C. GABRIELLI, *La direttiva sulla tratta di esseri umani tra cooperazione giudiziaria, penale, contrasto all'immigrazione illegale e tutela dei diritti*, in *Studi sull'integrazione europea*, 2011, no. 3, pp. 609-631. More in general on trafficking in international law see J. ALLAIN, *Slavery in International Law. Of Human Exploitation and Trafficking*, Leiden, 2012; S. FORLATI (ed.), *La lotta alla tratta di esseri umani, fra dimensione internazionale e ordinamento interno*, Napoli, 2013; G. VAZ CABRAL, *La traite des êtres humains: Réalités de l'esclavage contemporain*, Paris, 2013. For an analysis on trafficking in human beings specifically focused on women and a comment on the new proposal see S. DE VIDO, *A Legal Analysis of the Contributing Factors to Trafficking in Women*, in this *Journal*, 2023, no. 1, p. 41 ff.

[47] Directive 2011/93/EU of the European Parliament and of the Council *on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA*, of 13 December 2011, in OJ L 335, 17 December 2011.

on the Protection of Children against Sexual Exploitation and Sexual Abuse[48], as it is clear from the legislative proposal[49].

Hence, the definition of sexual exploitation has been interpreted in light of international legal instruments in force, in particular the Lanzarote Convention, that includes criminalization of several behaviors, including sexual abuse and offences concerning child prostitution, child pornography, corruption of children, and solicitation of children for sexual purposes (not necessarily related to human trafficking). This can be considered as evidence that the Commission – and the Parliament and the Council in the approval of the Directive – have already interpreted in a broad way, using existing international legal instruments, the wording "sexual exploitation of women and children" in Article 83.1 TFEU: therefore it seems that using it as a legal basis for the approval of the new directive should not constitute a problem, without any need to extend the list of Eurocrimes.

More into details, the European Commission considers as covered by Article 83.1 the provisions on rape for lack of consent, female genital mutilation and online violence all of them being covered by the expression "sexual exploitation of women and children" that can be interpreted in a broader way, as including both exploitation and abuse, in light of the existing legal instruments in force.

It should be mentioned that Advocate General Hogan, in his Opinion on Case 1/19, had considered the provisions contained in the Istanbul Convention as not falling in the competence of the EU under Article 83.1 TFEUstating that "the mere fact that, in some cases, the violence covered by that convention may come under the umbrella of trafficking in human beings or of the sexual exploitation of women and children is not in itself sufficient to permit the conclusion that certain provisions of the Istanbul Convention are likely to fall within the competence that the Union derives from Article 83.1 TFEU"[50].

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[48] The 2007 Council of Europe (CoE) Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (known as the 'Lanzarote Convention' and not ratified by the EU) is expressly mentioned in recital 5 of the directive. For an evaluation of the relationship between the Lanzarote Convention, Directive 2011/93/EU and Article 34 of the New York Convention on the Rights of the Child of 1989 see W. VADENHOLE, G.E. TÜRKELLI, S. LEMBRECHTS, *Article 34: Protection From Sexual Exploitation and Abuse*, in W. VADENHOLE, G.E TÜRKELLI, S. LEMBRECHTS, *Children's Rights. A Commentary on the Convention on the Rights of the Child and its Protocols*, Cheltenham, 2019, pp. 334-342. The directive (recital 7) mentions that "*some* (emphasis added) victims of human trafficking have also been child victims of sexual abuse or sexual exploitation" therefore de-linking sexual exploitation of children from trafficking.

[49] Proposal for a Directive of the European Parliament and of the Council *on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA*, 29 March 2010, COM(2010)94 final, 2010/0064 (COD). No reference instead is made to the 2005 Convention against trafficking that could have linked sexual exploitation to human trafficking.

[50] Opinion of Advocate General G. HOGAN, delivered on 11 March 2021, in the Opinion procedure 1/19, para 155. See also S. PRECHAL, *The European Union's Accession to the Istanbul Convention*, cit., p. 290. It is interesting to note that the Advocate general suggested the Council to avail itself of the possibility offered by Article 83.2 TFEU in case of lack of ratification of the Istanbul Convention by a Member State in order "to reduce the Union's exposure to the risk of it being held liable for unjustified non-compliance with the Istanbul Convention by a Member State". In fact, a future situation in which a Member States would not ratify or implement the Convention might be considered as a case falling into Article 83.2 TFEU that requires that "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 the subject of

However, his position is relevant only for the conclusion of the Istanbul Convention, that has a content and a scope not exactly overlapping with the draft directive we are examining and cannot be considered as legally binding. Even if the extension of the list of Eurocrimes would allow the possibility to better tackle gender-based violence, it seems that such an extension is not needed in order for the directive to be approved.

3. The qualification of certain forms of violence against women and the need of protection: the case of cyberviolence

The aim of the directive is, therefore, to qualify as crimes certain violent actions afflicting women under Article 83.1 and to enhance access to justice for victims of such crimes, thus granting women an adequate protection and support under Article 82.2 letter c. This objective can be reached by preventing violence against women and creating an efficient system of recognition of judgements through coordination and cooperation at national and EU level.

Going into details of its content the European Commission considers different activities as in need to be criminally sanctioned at EU level, establishing common rules on offences such as rape for lack of consent and sexual violence, for which lack of consent is an essential element[51], female genital mutilation and cyber-related crimes.

Cyberviolence is one of the most relevant and innovative fields in which the new directive will be able to harmonize States' intervention, an intervention that is becoming more and more relevant after the European Court of Human Rights recently condemned States for failing to discharge their positive obligations to prevent, protect from and punish acts of cyber violence against women, thus violating Article 8 of the ECHR[52].

harmonisation measures". Therefore, the Union could avail itself of that provision in order to obtain "exclusive jurisdiction over all the provisions of that convention aimed at criminalising certain conduct and, consequently, under the theory of State succession, assume alone the obligations arising from that convention".

[51] On the qualification of rape in the directive proposal see C. RIGOTTI, *A Long Way to End Rape in the European Union: Assessing the Commission's Proposal to Harmonise Rape Law, through a Feminist Lens*, in *New Journal of European Criminal Law*, 2022, no. 2, pp. 153-179. For an introduction to the content of the draft directive see also S. DE VIDO, *A First Insight into the EU Proposal*, cit., and M. PICCHI, *Violence against Women and Domestic Violence: The European Commission's Directive Proposal*, in *Athens Journal of Law*, 2022, no. 4, p. 400 ff.

[52] For a comment on the first judgements of the European Court of Human rights on cyberviolence, one of them (European Court of Human Rights, Chamber, judgment of 11 February 2020, application n. 56867/15, *Buturugă v Romania*) related to a EU Member State, see A. SINCLAIR-BLAKEMORE, *Cyberviolence Against Women Under International Human Rights Law:* Buturuga v Romania *and* Volodina v Russia (No 2), in *Human Rights Law Review*, 2022, no. 23, pp. 1-27, (especially p. 22 where it advocates the need to treat cyberviolence as a violation of Article 3 rather than Article 8 of the ECHR in order to have a "substantial impact on allocation of resources and the seriousness with which the issue is treated by national authorities"). On cyberviolence see also Council of Europe, *Protecting Women and Girls from Violence in the Digital Age: The Relevance of the Istanbul Convention and the Budapest Convention on Cybercrime in Addressing Online and Technology-Facilitated Violence against Women*, December 2021, p. 9 ff.

At international level the periodic Reports of the UN Special Rapporteur on Violence against Women, Its Causes and Consequences and in particular the 2018 one on "online violence against women and girls from a human rights perspective" recommend States to enact new laws and measures to combat the new forms of online gender-based violence[53]. At regional European level the GREVIO (Group of Experts on Action against Violence against Women and Domestic Violence)[54], working as the monitoring body of the Istanbul Convention, adopted in 2020 its first General Recommendation focusing on the Digital dimension of VAW, a document meant to fill in the gap of the Istanbul Convention that, quite astonishingly, considering its recent elaboration, does not specifically mention cyber-related offences against women.

At EU level the European Parliament in its Resolution of 14 December 2021[55] stresses that "existing Union legal acts do not provide the mechanisms needed to address gender-based cyberviolence adequately"; at the same time Member States seldom treat it as a serious crime, therefore the draft directive we are examining is much needed to fill in the gaps in the existing legal framework, even at international level due to the silence of the Istanbul Convention on the matter, by detailing the computer related crimes connected to gender-based violence and in particular by creating, in its Articles 8-10, different specific categories: cyber-stalking; cyber-harassment; cyber-incitement to violence or hatred; incitement, aiding and abetting and attempt to commit any of these afore mentioned offences (that includes hate speech on the basis of sex or gender)[56].

Moreover Article 7 too is linked to the use of information and communication technologies, if not limited to it, as it is meant to qualify as criminal offences the non-consensual sharing of intimate or manipulated material, also known as "image-based sexual abuse"[57]. However, we need to stress that this criminal offence will qualify as such

[53] See the Special Report of the Special Rapporteur S. DUBRAVKA, 18 June 2018 (A/HRC/38/47, p. 19), transmitted to the UN Human Rights Council.

[54] For a comment on this general Recommendation focusing on the relationship between soft law and hard law instruments in the field of cyber violence against women see G. GUNEY, *The Istanbul Convention: A Missed Opportunity in Mainstreaming Cyberviolence against Women in Human Rights Law?*, in *EJIL Talk!*, 2022, available at www.ejiltalk.org/the-istanbul-convention-a-missed-opportunity-in-mainstreaming-cyberviolence-against-women-in-human-rights-law/. On the GREVIO's practice to date concerning reservation to the Istanbul convention see W. BUREK, *Reservations to the Istanbul Convention and the Role of GREVIO: A Call for New Approach*, in *Human Rights Law Review*, 2022, no. 4, pp. 1-18.

[55] Resolution of the European Parliament with recommendations to the Commission *on combating gender-based violence: cyberviolence*, of 14 December 2021, 2020/2035(INL), OJ C 251, 30 June 2022, p. 2.

[56] See S. DE VIDO, *A First Insight into the EU Proposal*, cit., for the need to coordinate this part of the draft proposal with the ongoing EU actions on hate crimes and the Digital Service Act (Regulation (EU) 2022/2065 of the European Parliament and of the Council *on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act)*, of 19 October 2022, OJ L 277, 27 October 2022, pp. 1-102.

[57] On the development of this term as an alternative to the more used (and criticized) "revenge porn", see C. MCGLYNN, E. RACKLEY, *Image-Based Sexual Abuse*, in *Oxford Journal of Legal Studies*, 2017, no. 37, p. 534. On its application in the context of the proposal for a directive, for critical evaluation of the compromise solution reached see C. RIGOTTI, C. MCGLYNN, *Towards an EU Criminal Law on Violence Against Women: The Ambitions and Limitations of the Commission's Proposal to Criminalise Image-Based Sexual Abuse*, in *New Journal of European Criminal Law*, 2022, no. 4, pp. 452-477. On the use of ICT tools to proceed to non-consensual dissemination of private images see S. DE VIDO, L. SOSA,

only if the material is made accessible (or if there is a threat to make it accessible) to a significant number ("a multitude") of end users: therefore, there is a risk that it does not qualify as a relevant computer crime and thus it may lack protection under the future directive. This problem could find a solution by introducing gender-based violence as a new Eurocrime using the possibility offered by Article 83.1 to create new categories of Eurocrimes: in this way the level of protection for similar abuses will be extended.

4. The relationship between the proposal for a directive and the approval of the Istanbul Convention by the European Union

We have seen in Advocate general Hogan's Opinion on the access to the Istanbul Convention that "the Council and the Parliament could possibly infer from the existence of difficulties in some Member States in concluding this convention the existence of a special need to combat certain behavior, within the meaning of Article 83.1 TFEU, which would authorise them, by virtue of the third subparagraph thereof, to extend areas of shared jurisdiction in areas relating to criminal law"[58]. It stems from this reasoning that the existence of difficulties and obstacles in the ratification process by Member States should be considered as a drive to react and accelerate the harmonisation process and not as a justification for abandoning it. Within this meaning the idea to approve and implement the directive before and independently from the entry into force of the Convention in all the national legal orders should work as a driving force to lead EU Member States to accept the content of the Istanbul Convention and to respect it at national level.

In fact, we need to reiterate that the European Union had the possibility to accede to the Istanbul Convention also without having the agreement of all Member States as it was up to the Council to decide whether to wait for the "'common accord' of the Member States to be bound by that convention in the fields falling within their competences" or to conclude the ratification process without waiting for it[59]. The Treaties prohibited the Council from adding a further step to the conclusion procedure by making the adoption of the decision concluding that convention contingent on the prior establishment of such a 'common accord'". Therefore, it has been possible for the EU to proceed to accession with the decisions approved on the 1 June 2023, even if some Member States have not ratified it yet.

At the same time the EU's accession to the Istanbul Convention does not exempt Member States from ratifying it themselves, as confirmed by the European Parliament with its Resolution of 15 February 2023 on the proposal for a Council decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing

Criminalisation of Gender-Based Violence against Women in European States, Including ICT Facilitated Violence. A Special Report, Publications Office of the European Union, 2021, p. 135.

[58] Opinion of Advocate General G. Hogan, cit., para 219.

[59] Court of Justice, Grand Chamber, Opinion of 6 October 2021, cit., para 249.

and combating violence against women and domestic violence, in which the EP urges the remaining six countries – Bulgaria, Czechia, Hungary, Latvia, Lithuania and Slovakia – to ratify the Convention without delay[60]. In fact, ratification by the EU could compel these Member States to respect the obligations stemming from the EU accession while at the same time enhance pressure on them to proceed to ratification at national level. We need also to remember that the approval process by the EU needed to consider the many different consequences of the entry into force of the Istanbul Convention, not all of them relevant for this research paper.

In fact the first decision on ratification was specifically approved with regard to institutions and public administration of the Union, and is based on Article 336, in conjunction with Article 218.6, second subparagraph, point (a)(v) TFEU, and the second one was approved with regard to matters related to judicial cooperation in criminal matters, asylum and non-refoulement and is based on Article 82.2 and Article 84 (for the part related to criminal matters) but also on Article 78.2, in conjunction with Article 218.6, second subparagraph, point (a)(v) (for the part related to asylum and non-refoulement). The EU's accession to the Istanbul Convention will cover only matters falling within its exclusive competence and Member States will remain accountable to implement the provisions of the Convention falling within their national competence.

Accession by the EU, therefore, does not exclude the need for a specific directive on VAW and domestic violence as the future directive will harmonize national legislation and therefore reinforce the role of the EU as a member of the Convention rendering it responsible for its implementation in the areas of competence: the exercise of rights and obligations of EU Institutions and Member States who are party to the Convention will be subject to a Code of Conduct drawn up[61]. At the same time the directive was drafted as complementary to the Convention rather than a substitute for it; in fact, it will only partly overlap with its content, the Convention remaining "an essential tool for the EU strategy to address gender-based violence"[62].

It will remain to be seen how the Opinion of the ECJ on the legal basis for the part of the Istanbul Convention related to criminalization of behaviors (excluding the use of

[60] On the evolution of the European Court's case law on the substantive and procedural aspects of violence against women and the current problems of the Istanbul Convention ratification process for certain States and the EU see N. MOLE, *The Council of Europe and Violence against Women - Past, Present and Future*, in *European Human Rights Law Review*, 2023, no. 2, pp. 163-171. For a reply to the fears expressed by some of these countries that the Istanbul Convention could threat traditional family values and impose a gender ideology see Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No 210) - scope of obligations (11 January 2018), Council of Europe Directorate of Legal Advice and Public International Law, stating that "the Istanbul Convention does not imply the obligation to legally recognise a third sex or to provide legal recognition of same-sex marriages".

[61] See recital 12 of the decision, declaring that it will cover "the Commission's role as coordinating body within the meaning of Article 10 of the Convention for matters falling under Union's exclusive competence"; the monitoring mechanism, including reporting to the GREVIO; participation in meetings of the bodies created by the Convention and the possible establishment of Union, common or coordinated positions for such meetings.

[62] European Parliament Resolution of 15 February 2023 on the proposal for a Council decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence (COM(2016)0109 - 2016/0062R(NLE)), point 29.

Article 83.1 TFEU)[63] and the subsequent choice to make reference only to Articles 82.2. and 84 TFEU in the Council decision on its conclusion, will influence the prospected selection of a different legal basis for the provisions on criminal offences included in the directive.

If Article 84 TFEU may not represent a correct legal basis for the proposal of directive as it excludes any harmonization of laws and regulations of the Member States and cannot therefore authorize a directive whose main aim is to harmonize national laws[64], Article 82.2 alone does not seem to be sufficient considering the prospected content of the directive and therefore the choice of Article 83.1 seems to be the only alternative to justify such a complex and comprehensive text that will surely go much further in the level of protection granted in cases of VAW and domestic violence.

5. Final remarks

It is quite difficult at this stage to assess the chances of a rapid adoption of the directive on VAW and domestic violence and the risk for it to remain unapproved is still high, even though the recent adoption of the two decisions on accession of the Istanbul Convention may be regarded as good news for the future of this directive too. It would certainly be important to have a similar system at EU level as it would ensure at least a minimum level of harmonization of Member States' legislations, which is quite justified, as the existing legal framework at EU level is fragmented and insufficient to cover all the different aspects of VAW, as clearly emerging from the text of the proposal and from the subsequent debate[65].

[63] Court of Justice, Grand Chamber, Opinion 1/19, cit., par. 301 declared that "the scope of action open to the European Union under Article 83(1) TFEU is so narrow that it must be concluded that the obligations set out in that part of the convention which fall within that scope of action are 'extremely limited' in scope for the European Union and that, accordingly, that provision should not be one of the legal bases of the act concluding the envisaged agreement".

[64] Article 84 only allows to "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". This new choice of legal basis for the decision on the conclusion of the Convention may be found in the text of the final draft Decision 5523/1/23 REV 1 of the Council *on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, asylum and non-refoulement* , 13 February 2023.

[65] See Article 47 that contains a reference to the existing tools that will continue to be applied such as the already mentioned Directives 2011/29 and 2011/93, the gender equality Directives (2004/113, 2006 /54 and 2010/41) and other instruments such as: Directive 2011/99/EU of the European Parliament and of the Council *on the European protection order*, of 13 December 2011, in OJ L 338, 21 December 2011, pp. 2-18; Regulation 606/2013/EU of the European Parliament and of the Council *on mutual recognition of protection measures in civil matters*, of 12 June 2013, in OJ L 181, 29 June 2013, pp. 4-12; Directive 2011/36/EU of the European Parliament and of the Council *on preventing and combating trafficking in human beings and protecting its victims*, of 5 April 2011, in OJ L 101, 15 April 2011, pp. 1-11, and, more recently, the Digital Service Act (the above mentioned Regulation (EU) 2022/2065). On the existing fragmented framework see V. TEVERE, *Verso una "tutela integrata*", cit., p. 193 ff.

Another way would have been to approve a directive fully (or partly) based on Article 19 TFEU on the prohibition of discrimination as theorized also by the European Parliament Assessment of 2013 that we mentioned earlier. This could have ensured a broader definition of gender-based violence and a more comprehensive approach. Article 19 allows the Council, acting unanimously and with the consent of the European Parliament, to take appropriate action to combat discrimination based, inter alia, on sex and could be the basis for the creation of a more general legal framework on VAW not limited to the criminal justice part. Unfortunately, Article 19 has not been used as a legal basis for a long time[66] and it seems that some Member States may find it difficult to accept the approval of a similar directive, even if other legal bases are shared: therefore, unanimity will be difficult to reach and the choice from the European Commission to avoid any reference to Article 19 in the proposal for a directive is welcomed.

As far as subsidiarity is concerned, it is clear that EU action can be justified under Article 5.3 and Protocol No. 2 on the application of the principles of subsidiarity and proportionality as it is more effective than the current situation. Intervention at EU level is necessary as national legislators will have difficulties in implementing the Istanbul Convention in a coordinated manner. Even though this Convention has not yet been ratified by all Member States, we have a relevant number of them that are legally obliged to respect it, and the recent ratification by the European Union makes it even more relevant to implement it in a coordinated, harmonized, way at EU level. In particular we must remember that the problems related to online gender-based violence have an inherent cross-border dimension that cannot be sufficiently addressed at national level.

Moreover, as we have seen in the previous sections, the cross-border dimension is also found in the situation of women, EU citizens but also migrants and in particular asylum seekers, who are a sub-category of vulnerable persons in special need of protection, fleeing from domestic or gender-based violence to another country[67] whose situation needs to be addressed with a comprehensive EU approach.

It is therefore of the utmost importance that this proposal for a directive continues on its path to approval and we therefore hope that, in light of the general principle of non-discrimination and the standards for the protection of human rights now enshrined in the

[66] The only two directives approved using Article 19 (at the time Article 13) as a legal basis are Directive 2000/43/EC of the Council, *implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, of 29 June 2000, OJ L 180, 19 July 2000, and Directive 2000/78/EC of the Council, *establishing a general framework for equal treatment in employment and occupation*, of 27 November 2000, in OJ L 303, 2 December 2000, pp. 16-22.

[67] On protection of asylum seekers fleeing from gender based violence see J.J. SARKIN, T. MORAIS, *Why States Need to View Their Responsibility to Protect Refugee and Asylum-Seeking Women through the Lens of Intersectionality, Vulnerability, and the Matrix of Domination to Address Sexual and Gender-Based Violence*, in *European Human Rights Law Review*, 2022, no. 6, p. 554. More in general on protection of migrant women victims of domestic violence see C. RUIZ SUTIL, *La violence de genre/conjugale*, cit., p. 145 ff. A request for a preliminary ruling on the possibility to obtain international protection on the basis of gender discrimination is at the moment pending in front of the Court of Justice, lodged on 22 September 2022, Case C- 609/22.

founding treaties, Member States will find a difficult but much-needed agreement for its adoption, notwithstanding the differences in their national approaches to the issue[68].

Pending an urgent decision on the extension of the list of Eurocrimes in Article 83.1 TFEU in order to include gender-based violence, an extension that the European Parliament proposed in its Resolution of 16 September 2021 but that went unheeded, the draft directive now seems to be the first important step to improve a minimum standard of protection such complementing the process that led the European Union to enter the Istanbul Convention[69].

ABSTRACT: The main focus of this paper is on the path that is leading the EU legislator to combat violence against women and domestic violence using different approaches. Starting with the recent development that led the EU to ratify the Istanbul Convention with the decisions approved on 1st June 2023, the author examines the recent proposal for a directive on the topic, evaluating in particular its legal basis as proposed by the European Commission (Article 82.2 and Article 83.1 TFEU), taking into account Opinion 1/19 of the EU Court of Justice, and all the decisions that authorised signature and ratification of the Istanbul Convention and the possible alternatives. In this context, reference will be made to the provisions of the directive dealing with the qualification of certain forms of violence against women (in particular the ones connected to cybercrime) and to the risk of challenges by States that have not ratified or are raising problems about the implementation of the Istanbul Convention, seeking to assess the prospects for the future adoption of the proposed directive.

KEYWORDS: Violence against Women – Istanbul Convention – Opinion 1/19 – Eurocrimes – Victims' Protection.

[68] Using the legal basis we have evaluated, as proposed by the European Commission, the future directive could be approved by the Council and the European Parliament under the ordinary legislative procedure, and therefore even without the agreement of all Member States. Once harmonization will be reached in the field, it will become possible to use as a future legal basis Article 83.2 that requires a previous harmonization of the area in order to allow the adoption of directives establishing minimum rules with regard to the definition of criminal offences and sanctions.

[69] For a qualification of gender/based violence as a serious crime that endangers the EU more relevant interests pursuant to Article 2 TFEU see C. RIGOTTI *A Long Way to End Rape in the European Union*, cit., p. 168 ff. For the position of the European Parliament see C. NAVARRA, M. FERNANDES, N. LOMBA, *Gender-based Violence as a New Area of Crime Listed in Article 83(1) TFEU. European Added Value Assessment*, Brussels, 2021, p. 34.