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

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1 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 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.

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

A directive on combating 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

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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 law\(^7\) 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 change\(^8\). “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 identity\(^9\).

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 combating 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 time\(^10\), “aims to contribute towards ensuring a

\(^7\) See infra Part II, A. 2. and B.


\(^9\) 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).

high level of protection of physical and mental health by the protection of children, young persons and women against violence”\textsuperscript{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”\textsuperscript{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.

\textsuperscript{11} Ibid., Article 1, § 2.

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) 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, biotechnology has in fact constituted a significant contribution to the affirmation of the EU as a polity (a political –as opposed to merely economic- community).

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

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this State had been found fully cooperative with the International Criminal Tribunal for the former Yugoslavia (ICTY)\textsuperscript{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 violence\textsuperscript{17}. 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 unlawful\textsuperscript{18}.

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

\textsuperscript{16} See Council Conclusion 12514/05 (Presse 241).

\textsuperscript{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.

\textsuperscript{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 theory 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

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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
Parliament. 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”. The EU Council adopted the EU Guidelines on Violence against Women and Girls and Combating all Forms of Discrimination against them to highlight the importance of this topic for the EU. The Commission also stresses that specific action is needed to eliminate impunity, 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 2008. 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”. Strengthening EU support to partner countries in combating 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. Where there are no specific agreements with the State concerned, the EU instrument for Democracy and Human Rights may enable the EU to act in favour of diminishing VAW. Project combatting family-based violence against...

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22 See: EU Guidelines… (op.cit. note 1).
27 For an example of a specific agreement, see infra, Cotonou Agreement, 2005.

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.

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30 See e.g.: Ministerial Conclusions on Strengthening the Role of Women in Society, 14-15 November 2006, Istanbul, § 10 f), and 12, § c).
33 EU/Egypt Action Plan, in 2008/688/CE.
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 policy\(^{39}\) while Iceland was asked to ratify the Council of Europe Convention on preventing and combatting violence against women and domestic violence\(^{40}\). The EU is also requiring from Turkey that it make efforts to significantly reduce the widespread phenomenon of VAW\(^{41}\). 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 2012\(^{44}\). 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,


\(^{39}\) 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.


\(^{43}\) 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.
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 Mutilation.

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 security, 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 Resolution 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; on 21 June 2011, after a series of dialogues organised with Civil Society Organisations, it stressed the necessity of reducing sexual violence during conflicts: 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.
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 representatives\textsuperscript{51}. 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 policy\textsuperscript{52}. By 2015 80% of EU delegations will have specific measures on the role of external assistance and development cooperation introduced in their local strategies\textsuperscript{53}. Such policies take ground on the EU Guidelines and the EU Plan of Action on Gender Equality in Development Cooperation\textsuperscript{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 Security\textsuperscript{55}, and considers its objectives as binding\textsuperscript{56}.

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

\textsuperscript{51} Guidelines… op. cit., § 3.2.1.
\textsuperscript{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.
\textsuperscript{53} EU Plan of Action… op. cit., p.16.
\textsuperscript{54} See Objective 8.
\textsuperscript{55} See supra.
\textsuperscript{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 381 (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 combating 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 Community. 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 right.

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 2010-2015.

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

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60 ECJ, 8 April 1976, Defrenne v/ SABENA, 43/75, §§ 9-10.
61 ECJ, 10 February 2000, Schroder, C-50/96, § 57.
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 gender\textsuperscript{63}.

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 because\textsuperscript{64}:

- It disproportionately affects women\textsuperscript{65}
- It is a consequence of implicit albeit socially accepted hierarchies that place women in inferior positions
  - 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
  - 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.
  - 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


\textsuperscript{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.

\textsuperscript{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 costs\textsuperscript{66}.

International human rights law, both universal and regional\textsuperscript{67} 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 step\textsuperscript{68}. 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”\textsuperscript{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”\textsuperscript{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

\textsuperscript{66} World Health Organization, Violence Against Women: Intimate Partner and Sexual Violence Against Women, 2011, Fact Sheet n°239.
\textsuperscript{67} See infra, Part I, A. 2.
\textsuperscript{68} B. Meyersfeld, Domestic Violence and International Law, Hart, 2012.
\textsuperscript{69} Article 3, § 2, TEU.
\textsuperscript{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.”

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 excessive. 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”.

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 judgment, 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

72 ECtHR, 26 March 2013, Valiuliene v. Lithuania, n°33234/07.
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 that 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 discourse\textsuperscript{79}; in fact, any discourse in 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 2009\textsuperscript{80} 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 Rights\textsuperscript{81} (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 procedures\textsuperscript{82} 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 condoning\textsuperscript{83}; this clarifies States’ accountability for inaction.


\textsuperscript{80} ECtHR, 9 June 2009, Opuz v. Turkey, Application n°33401/02.

\textsuperscript{81} 1950, ETS 5.

\textsuperscript{82} See e.g.: ECtHR, 24 April 2012, Kaluncza v. Hungary, Application n°57693/10.

\textsuperscript{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 retribution. 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].

86 See in particular: European Commission, DAPHNE, Feasibility study „op. cit.
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 coherence. 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 injunctions). 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.
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 behaviors 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.
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.

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/autonomy. Moreover, there are indications that at least in Latvia marital rape is not criminalized as a separate offence.

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/autonomy. Moreover, there are indications that at least in Latvia marital rape is not criminalized as a separate offence.

**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 legislation.

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,

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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 consensual. The case was soon overturned 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 women.

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 violence.

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 harm. 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.
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.
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 accusation\textsuperscript{107}. 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 equality\textsuperscript{108}.

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 clear\textsuperscript{109}.

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 women\textsuperscript{110}. 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

\textsuperscript{107} Conseil constitutionnel, 4 May 2012, Déc. 2012-240 QPC.
\textsuperscript{109} See e.g.: Cassazione penale, 24 November 2011, sentenza no. 24575, and Cassazione penale, 27 April 2012, sentenza no. 23626.
\textsuperscript{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 imprisonment\textsuperscript{111}. In Austria the penalty for stalking (\textit{beharrliche Verfolgung}) is imprisonment of up to one year\textsuperscript{112} whereas in the UK the maximum imprisonment is 6 months and/or a fine not exceeding 5000£\textsuperscript{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 expenses\textsuperscript{114}. 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€\textsuperscript{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 parole\textsuperscript{116}.

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 \textit{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

\textsuperscript{111} Article 612bis Codice penale.
\textsuperscript{112} § 107a Strafgesetzbuch.
\textsuperscript{113} Protection from Harassment Act 1997.
\textsuperscript{114} Tribunale Salerno, 16/10/2012.
\textsuperscript{115} Tribunale Torino, sez. V penale, 13/01/2012
\textsuperscript{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 below\(^\text{117}\), 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 measures\(^\text{118}\) 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)\(^\text{119}\). 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 randomly.120

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

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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


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.

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)\textsuperscript{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)\textsuperscript{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 Beings\textsuperscript{129} 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 ‘Belem do Pará Convention’ adopted within the framework of the Organization of American States\textsuperscript{130} 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 21\textsuperscript{st} 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

\begin{itemize}
  \item \textsuperscript{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).
  \item \textsuperscript{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).
  \item \textsuperscript{129} OAS, Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, 9 June 1994, 33 ILM 1049.
\end{itemize}
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

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132 ECJ/CJEU case-law on VAW is rare (see CJEU, 15 September 2011, Magatte Guèye and Valentin Salmerín 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 Members 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 requirements. 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 directive. 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

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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 § 1\(^{136}\)), and into adopting further rules on the topic\(^{137}\). 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 combating 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 mechanisms\(^{138}\). 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 Convention\(^{139}\) provides some interesting elements on the possible coordination of the two mechanisms, and, more specifically, of the potential shortcomings of the Convention which the

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\(^{135}\) 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 ar. 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.).


The important point here is that the modifications of French law, as formulated by the French Parliament in 25 July, have been provoked by the CoE Conventions’ requirements, the ECtHR’s decisions finding that France had violated certain provisions of the ECHR, 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 law. 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.

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
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 equality. 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. In addition, the few existing hard-law EU instruments lack the global perspective that is needed when dealing with this particular issue.

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 field, 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 action. These priorities were defined by the Women’s Charter, adopted by the European Commission in 2010 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

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146 Supra, Part I, B. 2. a).
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 combating 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 combating 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.
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
155 Article 1, § 2, of the Decision n°293/2000/EC.
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 mentioned\(^{157}\), 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.
161 Recital (17) of the Directive.
This Directive defines harassment and sexual harassment as discriminations on the
grounds of sex\textsuperscript{163} 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”\textsuperscript{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 services\textsuperscript{165}. 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 trafficking\textsuperscript{166}, 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 order\textsuperscript{167} 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 crime\textsuperscript{168} 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,

\textsuperscript{163} Article 2, 2, a, of the Directive 2006/54.
\textsuperscript{164} Article 26 of the Directive 2006/54.
\textsuperscript{165} OJ L 373, 21 December 2004, p. 37.
\textsuperscript{166} Infra, Part II, 2. c).
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 significantly\(^{170}\). In some Member States such services are limited and provided almost entirely by NGOs with little or no state support\(^{171}\).

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.


\(^{172}\) 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/JHA\textsuperscript{174}. 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”\textsuperscript{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”\textsuperscript{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 Crime\textsuperscript{177}.

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”\textsuperscript{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

\textsuperscript{175} Recital (7) of the Directive, OJ, p. 2.
\textsuperscript{176} Recital (3) of the Directive, OJ, p. 1.
\textsuperscript{177} Recital (9) of the Directive.
\textsuperscript{178} Article 11, 7, of the Directive.
reducing the risk of people, especially children, becoming victims of trafficking in human beings”\textsuperscript{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”\textsuperscript{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 competence\textsuperscript{181}, 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.

\textsuperscript{179} Article 18, 2, of the Directive.
\textsuperscript{180} Recital (9) of the Directive 2011/99/EU.
\textsuperscript{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. In these conditions, basing a global instrument on VAW on Articles 82 and 83 TFEU seems a feasible but difficult option.

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 law, 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 States. 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 mobilized\textsuperscript{184}, 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 level\textsuperscript{185}. 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”\textsuperscript{186}. Hence, a global hard-law instrument on VAW should lay down minimum standards of definition, prosecution, prevention or protection\textsuperscript{187}, 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 regulations\textsuperscript{188}.

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.

\textsuperscript{184} See supra.
\textsuperscript{185} See the wording of Article 5, § 3, TFEU.
\textsuperscript{186} Article 5, § 4, TFEU.
\textsuperscript{187} See supra, Part II, A. 1. and 2.
\textsuperscript{188} Article 2, § 5, TFEU.
The Directive which was eventually adopted\textsuperscript{189} 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”\textsuperscript{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”\textsuperscript{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”\textsuperscript{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”\textsuperscript{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 Parliament\textsuperscript{194}.

\textsuperscript{190} Recital 20 of the Directive.
\textsuperscript{191} Article 82, § 2.
\textsuperscript{192} Ibid.
\textsuperscript{193} Article 82, § 3.
\textsuperscript{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 conduct 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 authority. 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 victims could be usefully achieved, as we have already stressed its main gap, the absence of a gender-specific approach to this type of VAW. 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”. 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/EU 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.

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197 See supra, Part II, B. 2. c).
198 Article 18, § 4, of the Directive 2011/36/EU.
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 women. 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 basis”. 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”. 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 phenomenon.

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

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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

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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.
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 women\textsuperscript{208}, 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”\textsuperscript{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”.

\textsuperscript{208} See supra, Part I, B. 2, a).

\textsuperscript{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 no. 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 principal 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 combating trafficking in human beings and protecting its victims\(^{211}\) 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/EU\(^{212}\), 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).


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 harassment.

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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