



**The protection of children from violence in the context of intimate partner  
violence/domestic violence and custody and visitation  
In light of the international normative framework, with special attention to  
the Council of Europe's Istanbul Convention**

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## Foreword and methodology

The interrelation of violence against children and violence against women in the context of domestic violence, the effects of intimate partner violence on children, and in custody and visitation rights and proceedings is a critical issue that has received more and more attention in recent years at national, European, as well as at a wider international level.

The thematic scope of this paper is the protection of children from violence, in the context of violence against women and domestic violence, focusing specifically on the issues related to custody and visitation rights and related proceedings.

The basis of the paper is the international normative framework. The present paper provides a basic overview of the regulation of key relevant international norms and standards when it comes to domestic violence/intimate partner violence and custody and visitation rights of children, among others the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the UN Convention on the Rights of the Child.

Furthermore the document will have a closer look at the content and implementation of the respective regulations and provisions of the Council of Europe's Convention on Preventing and Combating Violence Against Women and Domestic Violence (hereinafter referred to as the Istanbul Convention), and their implementation in the states that have ratified the Convention.

The evaluation report of the GREVIO Committee provides the basis of the present paper. More precisely, the Mid-term Horizontal Review of GREVIO baseline evaluation reports (hereinafter referred as the Mid-term Review) provides the starting point for analysing and summarising the key issues.<sup>1</sup> The Mid-term Review covered 20 countries for which GREVIO has published baseline evaluation reports by December 2020.<sup>2</sup> Since the publication of the Mid-term Report, three other national baseline reports have been published.<sup>3</sup> The present paper also looks at these reports, and has taken their content into consideration for this analysis. The paper focuses on Article 31 of the Istanbul Convention that explicitly regulates the issues of custody and visitation rights. It also takes a look - although not in such a depth - at other provisions of the Convention that especially mention children, or have special importance for children's protection from violence, in light of custody and visitation rights.

Based on the overview and analysis of the above resources, a conclusion and summary of key or emerging issues will be determined, together with related suggestions for WAVE's future priorities, and for the directions and themes of WAVE's advocacy and other actions in the field.

There are numerous related issues that are relevant to either the protection of children from violence in general or to the regulation of custody and visitation rights in particular. However, those issues are beyond the scope of this paper, and can be addressed in a future analysis.

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<sup>1</sup> Mid-term Horizontal Review of GREVIO baseline evaluation reports. Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). 10 May 2021. Council of Europe, France. Available at <https://rm.coe.int/horizontal-review-study-2021/1680a26325>

<sup>2</sup> These countries are: Albania, Andorra, Austria, Belgium, Denmark, Finland, France, Italy, Monaco, Malta, Montenegro, the Netherlands, Portugal, Serbia, Spain, Sweden, and Turkey.

<sup>3</sup> These are, in the order of publication date: Poland, San Marino and Slovenia.

## I. BASIC OVERVIEW OF KEY INTERNATIONAL LEGAL INSTRUMENTS

Significant international literature (including research findings) and the practical experience of organisations and services working in the field of violence against women and children already showcase how children are and can be negatively affected by the phenomenon of domestic violence, whether they are directly targeted by violence or witnessing violence. The phenomenon of violence against women and violence against children in this regard is strongly interlinked.<sup>4</sup>

The interlinks between violence against women and violence against children in the context of domestic violence/intimate partner violence has started to gain (more) attention and recognition in the international normative framework in recent times, particularly in the last decades. However, there is significant room for improvement and a necessity to recognize and address this interlink, even on paper, but also in practice - as it is shown below.

Before the Council of Europe's Istanbul Convention was adopted, the two basic international norms addressing violence against women and/or violence against children have been the UN Convention on the Elimination of all Forms of Discrimination Against Women<sup>5</sup> (hereinafter referred as the CEDAW Convention), and the UN Convention on the Rights of the Child<sup>6</sup> (hereinafter referred to as the CRC Convention).

When it comes to children as the main beneficiary group and for cases with crossborder, international elements, the Convention on the Civil Aspects of International Child Abductions<sup>7</sup> (hereinafter referred to as the Hague Convention) has special importance in the thematic focus of this paper.

Moreover, the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the European Convention on Human Rights)<sup>8</sup> also presents importance in the field of violence against women, violence against children and domestic violence.<sup>9</sup>

### UN CEDAW Convention

The UN CEDAW Convention on elimination of discrimination against women does not address explicitly the phenomenon of violence against women or girls, nor intimate partner violence/domestic violence, and the protection of children in this context. However, General Recommendations of the CEDAW Committee (Committee on the Elimination of Discrimination against Women) do so. Although the General Recommendations are not legally and formally part of the Convention, and therefore are not legally binding, they have crucial importance on the interpretation of the Convention. Consequently, they provide guidance on state obligations for the implementation of the Convention, as well as for related state reporting obligations.

**General recommendation No. 35 on gender-based violence against women updating general recommendation No. 19<sup>10</sup>** has primary importance in the field. This is the core document for addressing violence against women under the CEDAW framework.

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<sup>4</sup> See for example the WAVE's paper on children's rights 2015

<sup>5</sup> Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>

<sup>6</sup> Available at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

<sup>7</sup> Available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>

<sup>8</sup> Available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>

<sup>9</sup> There are also other international human rights legal instruments that address certain forms of either violence against women, or violence against children, mostly in the field of trafficking and sexual exploitation, but their analysis is beyond the scope of this paper. Similarly, the international norms that address custody and visitation issues in general are also beyond the scope of this paper.

<sup>10</sup> Available at

<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsldCrOIUTvLRFD>

Important to note is that the updated recommendation also makes references to the needs and rights of children, in the context of violence against women. It underlines that state parties shall “*Ensure that all legal proceedings, protective and support measures and services concerning victims/survivors respect and strengthen their autonomy (...), take into account any specific needs of their children and other dependants...*”<sup>11</sup>

For the context of **domestic violence**, and protection of victims, the Recommendation sets as a principle that when it comes to the rights and claims of (alleged) perpetrators in relation to legal proceedings, such rights and claims should be determined in light of women’s and children’s human rights to life and integrity, and the best interests of the child. It states precisely: “*The rights or claims of perpetrators or alleged perpetrators during and after judicial proceedings, including with respect to property, privacy, child custody, access, contact and visitation, should be determined in the light of women’s and children’s human rights to life and physical, sexual and psychological integrity and guided by the principle of the best interests of the child.*”<sup>12</sup>

With regard to **prosecution and punishment of gender-based violence against women** the CEDAW Committee recommends that States parties should “*Ensure that gender-based violence against women is not mandatorily referred to alternative dispute resolution procedures, including mediation and conciliation. The use of those procedures should be strictly regulated and allowed only when a previous evaluation by a specialized team ensures the free and informed consent of victims/survivors and that there are no indicators of further risks to the victims/survivors or their family members. Procedures should empower the victims/survivors and be provided by professionals specially trained to understand and adequately intervene in cases of gender-based violence against women, ensuring adequate protection of the rights of women and children (...).*”<sup>13</sup>

A separate **General recommendation** of CEDAW addresses **women’s access to justice**.<sup>14</sup> It does not mention the needs and rights of children. Counteracting gender stereotypes, prejudices and bias, and application of gender-sensitivity are repeatedly reiterated in the Recommendation. They might have relevance especially for girls/girl victims, as well as on intimate partner violence that has an effect on children. It is notable to state here that in this Recommendation the Committee is more strict regarding the application of alternative dispute resolutions, recommending member states to “*Ensure that cases of violence against women, including domestic violence, are under no circumstances referred to any alternative dispute resolution procedure.*”<sup>15</sup>

The Convention furthermore gives the opportunity for individual complaints to be submitted in relation to the violation of the Convention to the CEDAW Committee. The jurisprudence of the CEDAW Committee has important decisions in the field of domestic violence/intimate partner violence and child protection, including custody and visitation issues.<sup>16</sup>

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<https://www.ohchr.org/Docstore/ohchr/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhslDcrOIUTvLRFDjh6%2fx1pWCd9kc8NuhsZOT1QuzhrDy1rIpOgSyxJmK%2fSo2p3MpTI9diLSL02wtX8JPse1mlicqCgIo0em30unjIY%2fnkmn3g>

<sup>11</sup> GR. No. 35, para 31 (b)

<sup>12</sup> GR. No. 35, para 31 a) ii.

<sup>13</sup> GR. No. 35, para 32 b)

<sup>14</sup> Committee on the Elimination of Discrimination against Women: General recommendation No. 33 on women’s access to justice. Available at

<https://www.ohchr.org/Docstore/ohchr/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhslDcrOIUTvLRFDjh6%2fx1pWCd9kc8NuhsZOT1QuzhrDy1rIpOgSyxJmK%2fSo2p3MpTI9diLSL02wtX8JPse1mlicqCgIo0em30unjIY%2fnkmn3g>

<sup>15</sup> GR. No. 33, para 58. c)

<sup>16</sup> See for example the cases of Yildirim v. Austria, Goekce v. Austria, González Carreño v. Spain, M.W. v. Denmark, and Jallow v. Bulgaria.

## UN Convention on the Rights of the Child

The UN Convention on the Rights of the Child is the basic and core international legal instrument in the field of the protection of children.

There is no mention of the girls in the Convention. However, based on Article 2 States Parties shall respect and ensure the rights set forth in the Convention to each child **without discrimination** of any kind, irrespective of - among others - the sex of the child or his or her parent or legal guardian.

The Convention mentions the word woman/women only once: in the Preamble, in the context of the protection of women and children in emergency and armed conflict, when referring to the title of a related Declaration.<sup>17</sup> The Convention does not recall the CEDAW Convention - although it is ten years younger than CEDAW.

The overall guiding principle laid down in the Convention is **the best interest of the child**, that shall be applied by all relevant institutions, authorities and bodies in actions concerning children. More precisely, Article 3 of the Convention states that *“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.”*

In addition to this general requirement, the Convention refers to the best interest of the child in several specific situations and issues. For the focus of the present paper, the following two Articles have specific relevance.

Article 9 allows **the separation of the child from the parents**, against their will only when the competent authorities determine that such separation is necessary for the best interest of the child. The Article says that “Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents....”<sup>18</sup> When the child is separated from the parents, the state shall respect his/her right “to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.”

The other relevant provision is Article 18 that calls for the recognition of the principle that **parents** (or legal guardians as relevant) **have common and primary responsibilities for the upbringing and development of the child**, while “the best interests of the child will be their basic concern.”

When it comes to **protection of children from all forms of violence**, Article 19 is a relevant provision. According to this Article *“States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”* This provision, and consequently the whole Convention shall be applied furthermore to domestic violence, among others.

No specific provision of the Convention addresses the **intersection between violence against women and violence against children**. Similarly, there is no specific provision requiring in general to take (previous history of) violence into consideration both in custody and visitation proceedings or decisions, that would explicitly address both cases when violence is directed towards the child or witnessed by the child (directed towards the other parent or other family members). Such a wider scope and conception can only be derived from when reading and interpreting together the applicable provisions.

Regarding the separation of the child from the parent - i.e. cases of custody -, the Convention mentions abuse and neglect by the parent as a justified case for that. However, there is no reference here to the cases when the child is not targeted but has witnessed violence (against the other parent, or family member). For maintaining personal and direct contact on a regular basis with the separated parent - i.e. visitation -, neither violence towards the child or witnessing violence is not mentioned by the

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<sup>17</sup> “Declaration on the Protection of Women and Children in Emergency and Armed Conflict”. (UN General Assembly, 14 December 1974, A/RES/3318(XXIX))

<sup>18</sup> Article 9, para 1

Convention as a ground for limiting/excluding such rights. The only exception that the Convention recalls for the right of maintaining such contact (visitation) is the case when “it is contrary to the child’s best interest”. Therefore, ensuring the protection and safety of the victims is dependent on the adequate interpretation of the “best interests of the child”.

The Convention itself does not contain an explicit provision on the priority of the rights to life and physical, sexual and psychological integrity of children over personal and regular contact with the parent.

It is important to mention that Article 12 guarantees the right of the child to be heard. Based on this, the child - who’s capable of forming views - has a right to express his or her views in all matters affecting him/her. A due weight shall be given for such views in accordance with the age and maturity of the child. In this respect the child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or a body. (Article 12, para 1-2.) This provision shall be applied for the cases of violence as well.

In addition to the Convention, the General Comments of the Committee on the Rights of the Child have a special importance on interpreting and further elaborating the Convention’s provisions. Two of the general comments have special relevance for the focus of the present paper.

The **General comment No. 13** addresses the **right of the child to freedom from all forms of violence**.<sup>19</sup>

First of all, the document makes reference to Article 3 on the best interests of the child. As described above, the interpretation of the best interest principle has significant importance for times - including the effect of intimate partner violence on children - when the Convention lacks clear and well detailed provisions. The Committee emphasised in this document that *“the interpretation of a child’s best interests must be consistent with the whole Convention, including the obligation to protect children from all forms of violence. It cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child’s human dignity and right to physical integrity. Importantly, the Committee highlights that “An adult’s judgement of a child’s best interests cannot override the obligation to respect all the child’s rights under the Convention.”*

As for the separation of the child from the parent(s), or family environment, the document highlights that the decision *“must be made only when it is in the child’s best interests (art. 9 and art. 20, para. 1). However, in cases of violence where perpetrators are primary caregivers, within the child rights safeguards listed above, and depending on the severity and other factors, intervention measures focusing on social and educational treatment and a restorative approach are often preferable to a purely punitive judicial involvement. Effective remedies should be available, including compensation to victims and access to redress mechanisms and appeal or independent complaint mechanisms.”*

For maintaining contact with the parents the General comments only repeats the Convention’s Article 9 (cited above), including the best interest principle. No further explanation is provided. The links and interrelations of intimate partner violence and violence against children and/or the effects of such violence on children is not discussed, neither for separation (custody), nor for contact (visitation) issues.

Importantly though, the General comments document recognizes the gender dimensions of violence against children.<sup>20</sup>

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<sup>19</sup> Committee on the Rights of the Child - General comment No. 13 (2011): The right of the child to freedom from all forms of violence. Available at <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2f5F0vFKtnY3RFBX0eVOrGEVYuIm9CsHNwhlHrjED9fVmGn%2baZ1TGy6vH1Iek6kukGyB%2fFCGBbSOP0uwpKf24vcxkEnv>

<sup>20</sup> See VI. b)

The **General comment No. 14** discusses the **best interests of the child** as a primary consideration.<sup>21</sup> The document underlines that the assessment of the best interest shall include the consideration of the child's safety and right to protection against violence and exploitation. As it says precisely: *"Assessment of the child's best interests must also include consideration of the child's safety, that is, the right of the child to protection against all forms of physical or mental violence, injury or abuse (art. 19), sexual harassment, peer pressure, bullying, degrading treatment, etc., as well as protection against sexual, economic and other exploitation, drugs, labour, armed conflict, etc.(arts. 32-39)."*

The document recalls conflicting issues for the best-interest assessment. *"For example, preservation of the family environment may conflict with the need to protect the child from the risk of violence or abuse by parents. In such situations, the elements will have to be weighted against each other in order to find the solution that is in the best interests of the child or children.* The document also states in relation to weighting, but also as a general considerations, that *"the purpose of assessing and determining the best interests of the child is to ensure the full and effective enjoyment of the rights recognized in the Convention and its Optional Protocols, and the holistic development of the child."*

In terms of the practice of the Committee on the Rights of the Child, an analysis showed that of the 87 state parties examined between 2014-2017, no connection is made between domestic violence and child custody.<sup>22</sup>

### **Convention on the Civil Aspects of International Child Abductions (the Hague Convention)**

When a child is affected by domestic violence and the case has international/cross-border dimensions and custody considerations, the Convention on the Civil Aspects of International Child Abductions (the Hague Convention) has a key relevance.

The aim of the Convention is *"a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."*

The Convention underlines and refers to **"the interests of children"** that *"are of paramount importance in matters relating to their custody."*

To secure the prompt return of children, the protection for rights to access - as well as the duty of the state to do so - shall be considered as a main rule. At the same time, Article 13 sets the **exceptions** to the main rule. It says that the state authorities are *"not bound to order the return of the child if the person, institution or other body which opposes its return establishes that ...there is a **grave risk** that his or her return would expose the child to physical or psychological **harm** or otherwise place the child in an **intolerable situation**".*

The **Explanatory report to the Convention**<sup>23</sup> interprets and further elaborates on the Convention's provisions, including Article 13 b). It says that the exceptions ruled in paragraphs 1b and 2 of Article 13 clearly *"derive from a consideration of the interests of the child."* The report also says that *"the interest of the child in not being removed from its habitual residence without sufficient guarantees of its*

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<sup>21</sup> Committee on the Rights of the Children - General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration ( art . 3 , para . 1 ) \*Available at <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2f5F0vEAXPu5AtSWvliDPBvwUDNUfn%2fyTqF7YxZy%2bkauw1IKClJiE%2buI1sW0TSbyFK1MxqSP2oMIMyVrOBPKcB3Y1%2fMB>

<sup>22</sup> See: International human rights mechanisms, child custody and domestic violence: Do they walk the talk? A presentation by Prof. Ruth Halperin-Kaddari. Available at <https://rm.coe.int/rhk-presentation-strasbourg/168094b6e7>

<sup>23</sup> Explanatory report Convention on the Civil Aspects of International Child Abduction by Elisa Pérez-Vera. Available at <https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf>



*stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation.*<sup>24</sup>

In addition to the Explanatory report, there is a **Guide to Good Practice** publication, regarding Article 13 1 b).<sup>25</sup> The document elaborates on the gravity of such an exception, both from theoretical and a practical point of view. For the latter, it discusses - among others - examples for assertion that can be raised under Article 1(b). In this part domestic violence against the child and/or the taking parent is elaborated separately. The document underlines that “Assertions of a grave risk resulting from domestic violence may take various forms.” It can be a grave risk of direct harm because of abuse of the child, or “grave risk results from the child's exposure to domestic violence by the left-behind parent directed to the taking parent.” The document reiterates here that the specific focus of the grave risk analysis here is the effect of domestic violence on the child; and “whether such effect meets the high threshold of the grave risk exception”. Consequently, it states that “Evidence of the existence of a situation of domestic violence, in and of itself, is therefore not sufficient to establish the existence of a grave risk to the child.” That conclusion and interpretation raises great concerns about the human rights of children not to be protected from any form of violence. It gives the problematic message that “some” violence is acceptable for children to bear. Such interpretation needs to be discussed and changed in order to avoid that children are harmed and suffered from violence in the Hague Convention procedures.

The document contains a part on good practice for courts (including early identification, evidence), as well as on good practice for central authorities of the states concerned.

### **Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights)**

The European Convention on Human Rights also has a relevance for addressing and responding to violence against women, violence against children, and domestic violence.

The Convention itself does not contain provisions on the issues mentioned above, consequently nor on the further specification of the themes. The key relevant Articles for such cases are Article 2 (right to life), Article 3 (prohibition of torture), Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination).

Consequently, the European Court of Human Rights has a central role in the interpretation of the Convention's Articles to cases addressing child abuse, intimate partner violence, domestic violence and custody and visitation issues linked to them. The **jurisprudence of the Court** has a record on addressing violence against women, domestic violence, child abuse and the protection of minors.

In the field of domestic violence, the European Court of Human Rights has consistently stressed in its jurisprudence the state's positive obligation to protect victims from domestic violence.<sup>26</sup> Since the groundbreaking *Opuz*<sup>27</sup> case, the Court has also observed in several times the violation of Article 14 on discrimination, read in conjunction with Article 2 and/or 3, if state authorities did not acknowledge the gravity of the problem of domestic violence and its discriminatory effect on women, and did not take appropriate actions against it. The related jurisprudence included cases where both women and children were affected by domestic violence.<sup>28</sup>

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<sup>24</sup> Explanatory report, para. 29.

<sup>25</sup> Guide to Good Practice under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part VI Article 13(1)(b). The Hague Conference on Private International Law, 2020. Available at <https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf>

<sup>26</sup> See for example the case of *Kontrová v. Slovakia* (application no. 7510/04).

<sup>27</sup> See *Opuz v. Turkey* (application no. 33401/02), Final judgment, STRASBOURG, 9 June 2009. Available at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-92945%22%7D>

<sup>28</sup> See for example *Eremia and Others v. the Republic of Moldova* (application no. 3564/11), and *Talpis v. Italy* (application no. 41237/14).

The Bevacqua and S. case addressed child custody matters. The applicants were a mother and her son (the first and second applicant, respectively). The mother claimed she was regularly battered by her husband (Mr. N.), and that her requests for interim custody measures were not treated as priority. The Court established a violation of Article 8 of the Convention, and the state's positive obligation, given "the cumulative effects of the District Court's failure to adopt interim custody measures without delay in a situation which affected adversely the applicants and, above all, the well-being of the second applicant and the lack of sufficient measures by the authorities during the same period in reaction to Mr N.'s behaviour amounted to a failure to assist the applicants".<sup>29</sup>

The M. and M. focused on custody case, including allegations of child abuse committed by the father. The applicants were a mother and her daughter; they complained that the authorities had failed to remove the child from the father's care and to thus prevent further domestic abuse. The Court established a violation of Article 3 of the Convention based on the State's "failure to investigate promptly the allegations of ill-treatment brought by the mother and child". In addition, the Court also declared violation of Article 8 "on account of the excessive length of the custody proceedings in respect of both mother and daughter and on account of the daughter's lack of involvement in the custody decision-making process". On the other hand, the Court found no violation of Article 3 or Article 8 of the Convention as concerned the State's duty to protect the child from further ill-treatment.<sup>30</sup>

The case of O.C.I. and Others focused on a cross-border custody matter, and especially the interpretation/application of the "grave risk" exemption that prevents the returning the child according to the Hague Convention on child abduction. The applicants were a mother and her children. The mother took the children from their habitual residence to another country. While the father requested the return of the children under the Hague Convention, the mother opposed it, alleging that her husband was violent towards the children. The Court concluded the violation of Article 8 of the Convention, based on the fact that when the national courts ordered the children's return to their father, they failed to give enough consideration to the grave risk of children being subjected to domestic violence. The Court also concluded that a mutual trust between the two countries' child-protection authorities under EU law did not mean that one county had been obliged to send the children back to an environment - solely on the basis of their habitual residence - where they were at risk of domestic violence.<sup>31</sup>

M. and M. v. Croatia<sup>32</sup> can also be highlighted.

The above list is not exhaustive, it provides only examples from the Court's jurisprudence. Careful analysis and assessment of related jurisprudence of the European Court of Human Rights - on the human rights of women and children, in the context of domestic violence - would certainly be useful, but goes beyond the scope of this paper.

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<sup>29</sup> See: Bevacqua and S. v. Bulgaria (Application no. 71127/01), Final Judgment, Strasbourg, 12 June 2008, 12/09/2008 Available at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-86875%22%7D> }

<sup>30</sup> See the case of M. and M. v. Croatia (application no. 10161/13), and the related press release of the Chamber's judgment at <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-5160387-6379484&filename=Judgment%20M.%20and%20M.%20v.%20Croatia%20-%20custody%20dispute%20and%20allegations%20of%20child%20abuse.pdf>

<sup>31</sup> See the case of O.C.I. and Others v. Romania (application No. 49450/17), and the related press release on the final judgement at <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-6410420-8419877&filename=Judgment%20O.C.I.%20and%20Others%20v.%20Romania%20-%20interpretation%20of%20grave%20risk%20rule%20in%20international%20child%20custody%20case.pdf>

<sup>32</sup> Available at <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22003-5160387-6379484%22%7D> }

**DIRECTIVE 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (The Victim's Rights Directive)<sup>33</sup>**

Looking at the legislative framework of the EU, the Victim's Rights Directive has a special relevance in the focus of this paper.

The Directive contains several provisions targeting children as victims or witnesses, as well as victims of gender-based violence and of violence in close relationship.

As for children, the Directive settles as primary considerations the best interest of the child principle and child-sensitive approach *"taking due account of the child's age, maturity, views, needs and concerns"*.<sup>34</sup>

The Directive highlights that victims of violence in close relationships, gender-based violence, and child victims (among others) *"tend to experience a high rate of secondary and repeat victimisation, of intimidation and of retaliation"* and *"there should be a strong presumption that those victims will benefit from special protection measures"*.<sup>35</sup>

Importantly, the Directive reiterates separately that *"Women victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence."*<sup>36</sup>

The Directives introduces measures for "victims with specific protection needs", and requires a related assessment to identify those victims. According to the Directive, *"child victims shall be presumed to have specific protection needs due to their vulnerability to secondary and repeat victimisation."* In addition, the Directive requires that in the context of the individual assessment to identify victims with special protection needs, particular attention shall be paid to certain groups of victims, and such victims shall be duly considered - victims of gender-based violence, and of violence in a close relationship (among others) are listed here.<sup>37</sup>

We are not aware of any publicly available comprehensive, EU-wide research that addresses the implementation or evaluation of the Directive as regard to victims of violence in close relationship, gender-based violence, and child victims and witnesses in the context.<sup>38</sup> The current evaluation of the Directive, conducted by the European Commission, as well as the process of drafting the new Directive addressing violence against women hopefully will strengthen the knowledge base for these specific groups.

**Platform of Independent Expert Mechanisms on the Elimination of Discrimination and Violence against Women (EDVAW Platform)**

As the intersection between and linkages of different international norms and standards, an important statement was issued in 2019, although without any legal effects.

The statement was issued by the Platform of Independent Expert Mechanisms on the Elimination of Discrimination and Violence against Women (EDVAW Platform). The Platform was established in 2018 and gathers seven United Nations and regional independent expert mechanisms on violence against

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<sup>33</sup> 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/JHA (The Victim's Rights Directive). Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0029&from=EN>

<sup>34</sup> Article 1, para. 2

<sup>35</sup> Preamble, 57.

<sup>36</sup> Preamble, 17.

<sup>37</sup> Article 22, para 3

<sup>38</sup> At national level, such analysis exists. See for example: *Az Áldozatvédelmi Irányelv gyakorlati megvalósulása párkapcsolati erőszak áldozatainak tapasztalatai alapján. VICATIS kutatási beszámoló: Magyarország.* (The practical application of the Victim's Rights Directive., based on the experiences of victims of intimate partner violence. VICATIS Research report: Hungary) VICATIS Victim-centered approach to improving support services. Available in Hungarian at

[https://www.patent.org.hu/dokumentumok/kozpolitika\\_kutatas/VICATIS\\_kutatasi\\_beszamolo\\_2019.pdf](https://www.patent.org.hu/dokumentumok/kozpolitika_kutatas/VICATIS_kutatasi_beszamolo_2019.pdf)

women and women's rights operating at international and regional level, including the CEDAW Convention, the Istanbul Convention's monitoring expert body (GREVIO) and five other international mechanisms' expert groups and special rapporteurs.<sup>39</sup> The statement entitled *Intimate partner violence against women is an essential factor in the determination of child custody*.<sup>40</sup>

The Platform highlighted that "*Ignoring intimate partner violence against women in the determination of child custody can result in serious risks to the children and thus must be considered to ensure and grant their effective protection.*" They also called on the States "*to take the necessary measures to ensure implementation of international standards that require that intimate partner violence against women is thoroughly weighed in the determination of child custody.*" The statement also addressed and put into context the issue of parental alienation, saying clearly that "*Accusations of parental alienation by abusive fathers against mothers must be considered as a continuation of power and control by state agencies and actors, including those deciding on child custody.*"

As a conclusion, the Platform reiterated its call that "*in determination of custody and visitation rights of children, violence against women is taken into account in all custody cases*", The statement then exactly repeats the provisions from the CEDAW General recommendation No. 35, saying that perpetrators' rights or claims during and after proceedings should be determined in light of women's and children's rights to life and integrity, and guided by the principle of the best interests of the child. (See above)

### **European Parliament resolution on the impact of intimate partner violence and custody rights on women and children<sup>41</sup>**

One resource at the European level that is undoubtedly worth mentioning, since it specifically focuses on the theme of the present paper is the European Parliament Resolution adopted in October 2021 on the impact of intimate partner violence and custody rights on women and children.

The document covers different related issues, in a number of fields,<sup>42</sup> and formulates a number of recommendations both for the European Commission and Member States.

The Resolution highlights that in separations and custody arrangements it is essential to pay due attention if the child has witnessed violence in the home or family environment.<sup>43</sup> It is also essential to fully take into account intimate partner violence against women when deciding about separation and custody, and to address allegation of violence before that.<sup>44</sup>

The Resolution points out that criminal proceedings on domestic violence often dealt separately from separation and custody proceedings, this can lead to a shared custody and/or visitation imposed that

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<sup>39</sup> See more information on the Platform at <https://www.coe.int/en/web/istanbul-convention/edvaw-platform>

<sup>40</sup> *Intimate partner violence against women is an essential factor in the determination of child custody, say women's rights experts*. 31 May 2019. Platform of Independent Expert Mechanisms on the Elimination of Discrimination and Violence against Women (EDVAW Platform). The signatories were Dubravka Šimonovic, Special Rapporteur on Violence against Women, its causes and consequences Hilary Gbedemah, Chairperson of the CEDAW, Ivana Radačić, Chair of the United Nations Working Group on Discrimination against Women in Law and Practice, Feride Acar, President of the GREVIO, Margarete May Macaulay, Rapporteur on the Rights of Women at the InterAmerican Commission on Human Rights, Lucy Asuagbor, Special Rapporteur on the rights of women in Africa, and Sylvia Mesa, President of the MESECVI

Available at [https://www.ohchr.org/Documents/Issues/Women/SR/StatementVAW\\_Custody.pdf](https://www.ohchr.org/Documents/Issues/Women/SR/StatementVAW_Custody.pdf)

<sup>41</sup> European Parliament resolution of 6 October 2021 on the impact of intimate partner violence and custody rights on women and children (2019/2166(INI)). Available at [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0406\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0406_EN.html)

<sup>42</sup> These include protection and support for victims (addressing intimate partner violence in custody rights and visitation decisions; access to legal protection, emergency accommodation and to victim's fund; protection and support for children); prevention (training of professional; education and awareness raising addressing gender stereotypes and biases); and cooperation between Member states, including in cross-border cases.

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endanger the rights and safety of the victim and the children.<sup>45</sup> Shared custody in intimate partner violence cases exposes women to the continuum of violence, and it can have an impact on children. The right of women and children to be protected from violence should take precedence over the preference of shared custody.<sup>46</sup> In addition, *“the child and the request for shared custody are often manipulated by the violent parent to continue reaching the mother after the separation”*.<sup>47</sup> It is contrary to the best interests of the child “if the law automatically gives parental responsibilities to either or both parents”, and “intimate partner violence is clearly incompatible with the best interests of the child and with shared custody and care”.<sup>48</sup> “(W)hen establishing the arrangements for custody allocation, access and visitation rights, the protection of women and children from violence and the best interests of the child must be paramount and should take precedence over other criteria”. “The withdrawal of the custody and visitation rights of the violent partner and the awarding of exclusive custody to the mother, if she is a victim of violence, can represent the only way to prevent further violence and the secondary victimisation of the victims”; and “awarding all parental responsibilities to the one parent must be accompanied by relevant compensation mechanisms”.<sup>49</sup>

“(F)ailing to address intimate partner violence in custody rights and visitation decisions is a violation by neglect of the human rights to life, to a life without violence, and to the healthy development of women and children”; and “any form of violence, including witnessing violence against a parent or close person, to be considered in law and in practice as a violation of human rights and as an act against the best interests of the child”<sup>50</sup>. “(T)he parental authority of the accused parent should be systematically suspended in cases of femicide for the entire duration of the proceedings”.<sup>51</sup>

The Resolution further highlights “the key role of economic support for victims in helping them to achieve financial independence from their violent partner; stresses that the majority of women become poorer during separation and divorce procedures, and that some women give up asking for their fair share and what they are entitled to for fear of losing custody”.<sup>52</sup>

The Resolution calls on the Member States, among others to:

- pay particular attention to the risk of (...) victims of domestic violence becoming more precarious during the separation and divorce process”<sup>53</sup>
- “promote and guarantee full access to adequate legal protection, effective hearings and restraining orders, shelters and counselling, as well as victim funds and financial empowerment programmes for women victims of intimate partner violence;”<sup>54</sup>
- “to guarantee support for mothers and their children who are victims of domestic violence by means of community, educational and financial support (...) to ensure these mothers have the necessary means to care for their children and to prevent them from losing custody”;<sup>55</sup>
- “to apply particular procedures based on common minimum standards and to give support to victims of domestic violence, in order to prevent them from becoming victims again as a result of shared custody or from completely losing custody of their children”;<sup>56</sup>
- “to ensure that the legal costs of victims of domestic violence are covered when they do not have sufficient resources and to guarantee them proper defence by lawyers specialised in situations of domestic violence”;<sup>57</sup>

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<sup>47</sup> 3

<sup>48</sup> 9

<sup>49</sup> 9

<sup>50</sup> 10

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<sup>52</sup> 15

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<sup>56</sup> 16

<sup>57</sup> 16

- “to ensure that victims of intimate partner violence have access to psychological support and counselling at every stage of their legal procedures”.<sup>58</sup>

In case of decisions on shared custody, the Resolution urges to postpone such decisions, “until intimate partner violence has been adequately investigated and a risk assessment conducted”.<sup>59</sup>

The Resolution emphasises “that the child must in particular be provided with the opportunity to be heard, which is essential for establishing what is in the best interests of the child when examining custody... cases, according to the age and maturity of the child; points out that in every case, but crucially in cases where intimate partner violence is suspected, such hearings must be conducted in a child-friendly environment by trained professionals.”<sup>60</sup>

The Resolution also calls on the national authorities to improve coordination between courts, and “to ensure that family courts are able to consider all issues relating to gender-based violence against women when determining custody and visitation rights”;<sup>61</sup> The document also calls on the Member States “to set up a platform for the regular exchange of best practices between civil and criminal courts, legal practitioners dealing with cases of domestic and gender-based violence, child abuse and separation and custody cases, and all other relevant stakeholders”.<sup>62</sup> The document recommends national authorities “to draft and circulate a set of guidelines for professionals involved in cases relating to intimate partner violence and custody rights, taking risk factors... into consideration to enable intimate partner violence to be assessed, in support of children’s and women’s rights<sup>63</sup>;

The Resolution “condemns the use, assertion and acceptance of non-scientific theories and concepts in custody cases which punish mothers who attempt to report cases of child abuse or gender-based violence by preventing them from obtaining custody or by restricting their parental rights; stresses that so-called parental alienation syndrome and similar concepts and terms, which are generally based on gender stereotypes, can work to the detriment of women victims of intimate partner violence by blaming mothers for their children’s ‘alienation’ from their father, calling into question victims’ parental skills, disregarding the children’s testimony and the risks of violence to which their children are exposed, and jeopardising the rights and safety of the mother and children; calls on the Member States not to recognise parental alienation syndrome in their judicial practice and law and to discourage or even to prohibit its use in court proceedings, particularly during investigations to determine the existence of violence,<sup>64</sup>

The document also stresses the importance of collecting EU-wide accurate, reliable, comparable, high-quality, gender-segregated data, in the field of intimate partner violence and custody rights.<sup>65</sup>

By nature, the Resolution is a political and not a legally binding instrument, but undoubtedly is an important source for the present paper and for suggesting future directions and activities in the field, both at national and EU level, thus also being valuable for related advocacy efforts.

The two last documents prove that the protection of children and women in the context of intimate partner violence/domestic violence, including in relation to custody and visitation issues are now - especially in the last years - getting increased international attention. The reason for this might be twofold: on one hand the scale and severity of the problem and reality of the victims has been given more visibility - also thanks to the work of NGOs, women’s specialist services working in the field. On

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<sup>58</sup> 16

<sup>59</sup> 32

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<sup>61</sup> 33

<sup>62</sup> 34

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<sup>65</sup> 50

the other hand this issue has been affected by the so-called backlash on women's rights, in some cases translated to or promoting of harmful, even dangerous legislative and other measures, while so-called father's rights organisations and groups also have a more active role, place and visibility.

## II. THE PROVISIONS OF THE ISTANBUL CONVENTION ON THE PROTECTION OF CHILDREN

### Introduction

Evidence from the field shows - as WAVE Network members providing support services to survivors and witnesses report - that fundamental rights of women and children to live free from any form of violence, is far often not implemented in practice, despite public rhetoric about the importance of children's rights, their protection and best interests.<sup>66</sup> Children are not or not well protected from violence. Attrition rates in cases of violence against children are high and conviction rates low. Children are often not believed as witnesses and they are forced to have contact with the violent father, even while they seek refuge or are staying in a women's shelter.

In addition to the existing fundamental and structural problems, the COVID-19 pandemic aggravated the situation. As the WAVE Country report 2021 concluded - on the impact of the COVID-19 pandemic on women's specialist support services: *"Perpetrators have utilised the enabling environment of social distancing, quarantine and other requirements to consolidate their isolation, control, and entrapment of partners and children at home.... Closure or restrictions to specialist support, police and justice services have raised additional barriers for women and children."*<sup>67</sup>

### Children as a beneficiary/protected group of the Istanbul Convention

The Istanbul Convention contains several provisions that focus on or at least mention children and/or their protection.

Among the definitions in Article 3, the Convention states that "women" includes girls under the age of 18 (Article 3f). It means that all provisions and measures in the Convention shall be applied to girls as well (where relevant).

The Convention also underlines and recognizes in its Preamble that "children are victims of domestic violence, including as witnesses of violence in the family". Furthermore, the Convention encourages parties "to apply this Convention to all victims of domestic violence" (Article 2. 2).

Based on the above, the Istanbul Convention shall be applied to girls (where relevant) and children as victims of domestic violence, in all of its provisions. For domestic violence the Convention shall be applied within a wider scope to children, irrespective of whether they are targeted by violence or witnessing violence. Witnessing violence shall also be understood in a wide sense, it does not only mean the physical presence of the child in incidents of violence (see below).

In the field of **prevention**, when it comes to awareness raising the Conventions prescribes that such activities (campaigns and programmes) shall also address the consequences of violence on children.<sup>68</sup> In addition, the Convention calls for the states to *"develop and promote, in co-operation with private sector actors, skills among children, parents and educators on how to deal with the information and communications environment that provides access to degrading content of a sexual or violent nature which might be harmful."*<sup>69</sup>

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<sup>66</sup> See for example the WAVE Network's paper on children's rights, 2015

<sup>67</sup> WAVE Country Report 2021 - Women's Specialist Support Services in Europe and the impact of COVID-19 on their provision. WAVE – Women Against Violence Europe, Vienna, Austria, December 2021. p. 10. Available at <https://wave-network.org/wp-content/uploads/2021/12/WAVE-Country-Report-2021.pdf>

<sup>68</sup> Article 13

<sup>69</sup> Article 17, para. 2.



Regarding the measures for **protection and support**, the Conventions sets as a general rule that they shall be *“based on an integrated approach which takes into account the relationship between victims, perpetrators, children and their wider social environment”*, as well as *“address the specific needs of vulnerable persons, including child victims, and be made available to them.”*<sup>70</sup>

As for the **services**, children are specifically mentioned as a beneficiary group together with women victims in case of access to women’s specialist support services and shelters: the Convention requires state parties to provide or arrange for specialist women’s support services to all women victims of violence and their children,<sup>71</sup> and Parties shall provide for shelters to safe accommodation for and to reach out to victims, especially women and their children.<sup>72</sup>

In the case of **sanctions**, according to the Convention, states may adopt measures in relation to perpetrators, such as *“withdrawal of parental rights, if the best interests of the child, which may include the safety of the victim, cannot be guaranteed in any other way”*.<sup>73</sup>

As for **aggravating circumstances**, such a factor can be if the offence was committed against or in the presence of a child.<sup>74</sup>

In the field of **investigations and judicial proceedings**, the Convention prescribes that *“A child victim and child witness of violence against women and domestic violence shall be afforded, where appropriate, special protection measures taking into account the best interests of the child.”*<sup>75</sup>

In addition to the general obligation stated above and the specific provisions, there are two stand-alone Articles of the Convention that focus on the rights, protection and support for children, namely Article 26 on protection and support for child witnesses, and Article 31 on custody, visitation rights and safety. The exact provisions are cited below, and the content of Article 31 are further elaborated/explained. The implementation of these Articles in practice, based on the findings of the GREVIO reports - also together with the implementation of other provisions/Articles of the Convention that are particularly relevant for the focus of this paper - will be presented in the following section.

It is important to note in advance, however, that in practice the focus on children in the implementation of the Convention seems to be weak, as will be shown in the paper later. While all Articles should be implemented by taking into account the rights of the girls, as well as child victims/witnesses (particularly in domestic violence), in practice the attention to children is rather limited to those Articles that exactly mention them.

#### **Article 26 – Protection and support for child witnesses**

*“1. Parties shall take the necessary legislative or other measures to ensure that in the provision of protection and support services to victims, due account is taken of the rights and needs of child witnesses of all forms of violence covered by the scope of this Convention.  
2 Measures taken pursuant to this article shall include age-appropriate psychosocial counselling for child witnesses of all forms of violence covered by the scope of this Convention and shall give due regard to the best interests of the child.”*

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<sup>70</sup> Article 18, para. 3.

<sup>71</sup> Article 22

<sup>72</sup> Article 23

<sup>73</sup> Article 45

<sup>74</sup> Article 46, d

<sup>75</sup> Article 56, para. 2

## Article 31 – Custody, visitation rights and safety

*“1. Parties shall take the necessary legislative or other measures to ensure that, in the determination of custody and visitation rights of children, incidents of violence covered by the scope of this Convention are taken into account.*

*2. Parties shall take the necessary legislative or other measures to ensure that the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim or children.”*

The first paragraph of Article 31 prescribes that authorities have to take into consideration the incidents of all forms of violence covered by the scope of the Convention when they make decisions on custody and visitation rights. Based on Article 31 not only incidents of violence against the child itself, but also “incidents of violence against the non-abusive carer” must be regarded “when decisions on custody and the extent of visitation rights or contact are taken”.<sup>76</sup> Therefore, based on this Article a violent husband can not be granted visitation or custody rights on the ground that “he never did anything to the child, he ‘only’ beat up his wife”. Witnessing violence and the impact of such violence against a parent or close person taking care of the child, constitutes violence against the child and a threat to the child’s well-being.

The article further implies that the authorities have to take an active role in taking incidents of violence into account. They have to take all signs and indications seriously and conduct or initiate further investigations, and have to work together with other authorities to collect evidence and reports about violence.

The danger in cases of violence against women and domestic violence is that professionals bias and own preconceived beliefs around myths of violence, stereotyping, prejudices which lead to victim blaming attitudes, can furthermore influence a legal decision when incidents of violence will be “re-framed” into “no-violence”. For instance, incidents of violence in the family might be dismissed by legal and social professionals responsible for the well-being of children and their protection from violence. Another danger is that violence will not be taken into account because different legal systems applicable in the case are not interlinked (do not even share information and cooperate with each other): this often happens between criminal and civil law procedures. Therefore, information-sharing between the different legal systems is necessary.

The second paragraph of Article 31 further requires authorities to “ensure that the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim or children”. This requirement implies that judges responsible for the well-being of children have to take an active role if there is any sign that the rights and safety of a child are in danger. They have to check *ex officio* if there is any danger for the child and take preventive steps by e.g. temporarily or finally suspending custody and/or visitation rights of perpetrators. This is immensely important to prevent further harm and victimisation of the children. If a perpetrator keeps the custody rights, he has easy access to the child which jeopardises the rights and safety of the child. The safety of the mother also has to be taken into account by the courts, as the mothers shall not be put in danger by parental regulations. As the Explanatory report of the Istanbul Convention concludes: “*In particular in cases of domestic violence, issues regarding common children are often the only ties that remain between victim and perpetrator. For many victims and their children, complying with contact orders can present a serious safety risk because it often means meeting the perpetrator face-to-face. Hence, this paragraph lays out the obligation to ensure that victims and their children remain safe from any further harm.*”<sup>77</sup>

The implementation of Article 31 and Article 26 will be further analysed in the next part of this paper, in light of the GREVIO Baseline evaluation reports.

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<sup>76</sup> Explanatory report, para. 175

<sup>77</sup> Explanatory report, para 176.

Article 26 and Article 31 have a special role and relevance for the safety and protection of children in the context of custody and visitation, and beyond. The other provisions that explicitly mention children (as referred above) also have significant importance. However, for effective, efficient and holistic implementation of the Convention it is not enough to look at and analyse these provisions only and alone. One shall keep in mind that the Convention's different provisions as well as their implementation have an effect on one another - they work better together in practice, based on a holistic and comprehensive interpretation and implementation of the Convention.

In general terms, the Convention requires that incidents of violence are identified, prosecuted and sanctioned, and that victims are protected from violence and further victimisation is prevented. This is crucial when applying and implementing Article 31, among others: if violence against children is not recognized, thoroughly investigated and prosecuted, if cases are dropped quickly, if evidence not collected carefully, if child victims and witnesses are not believed, mothers are accused of "false accusations", if no support services are available for children and women before and during the proceedings, it is not very likely that incidence of violence will be taken into account in custody and visitation procedures.

In conclusion, Article 31 cannot be properly implemented and evaluated, if protection, prosecution and prevention measures do not work for children. In addition, the specific support and protection for child witnesses based on Article 26 shall include the support of children in custody and visitation proceedings.

When looking at the implementation as well as the evaluation of the Convention, one shall also keep in mind the girls and child victims of domestic violence as specific beneficiary groups: their rights and needs have to be mainstreamed across the Convention's content, beyond the specific provisions.

### **III. THE CONVENTION IN PRACTICE, WITH A SPECIFIC FOCUS ON ARTICLE 31 - BASED ON THE FINDINGS FROM THE MID-TERM HORIZONTAL REVIEW OF GREVIO BASELINE EVALUATION REPORTS**

#### **Introduction**

The following section is focusing on the implementation of Article 31 of the Istanbul Convention. It draws upon the findings of the Mid-term Horizontal review of GREVIO baseline reports covering findings from 17 countries<sup>78</sup> and three additional baseline reports<sup>79</sup> by GREVIO that have been published since the publication of the Mid-term Horizontal review.

The aim of this section is to summarise common gaps and challenges in protecting children and their mothers from domestic violence that have been identified by GREVIO. This can be a basis for recommending and/or developing minimum standards and/or criterias for good practice from the perspective of specialist support services for survivors of violence against women and domestic violence. This also provides a basis for identifying issues that need to be further researched or explored. It also provides a basis and potential for strategic planning: identifying aims, priority issues, as well as different activities and actions for the WAVE Network, as well as its members.

The Mid-term Review Report reveals a worrisome picture, fundamental problems and challenges regarding the implementation of measures outlined in Article 31, namely the obligation of state parties to take incidents of violence into account in custody and visitation procedures and to ensure that any visitation or custody rights do not jeopardise the rights and safety of the victim or the children.

#### **Shortcomings in the legal framework and implementation in all evaluation reports**

GREVIO has observed shortcomings both in the legal framework and in the implementation of laws regarding the obligation to ensure the safety of victims and their children in custody and visitation procedures in all the state parties to the Convention covered by the Mid-term Review.<sup>80</sup> In addition, the three other GREVIO evaluation reports that were published after the Mid-term Review revealed the same shortcomings. This is a very alarming situation regarding the safeguarding of rights of victims and their children to live free from violence.

GREVIO noted that in several countries laws regarding custody and visitation do not mention domestic violence as an explicit legal criterion that has to be taken into account in taking custody and visitation rights decisions.<sup>81</sup> In many countries where there is a legal basis to prevent granting parental rights to a violent parent, such provisions are hardly applied.<sup>82</sup> This means that violent men (who are the perpetrators in the majority of domestic violence cases) almost always keep their custody and/or visitation rights over children - which is an alarming finding of the GREVIO evaluation.

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<sup>78</sup> The Mid-term Review Report 17 parties for which the baseline report had been published by GREVIO, namely: Albania, Andorra, Austria, Belgium, Denmark, Finland, France, Italy, Monaco, Malta, Montenegro, the Netherlands, Portugal, Serbia, Spain, Sweden, and Turkey.

<sup>79</sup> Namely Poland, San Marino and Slovenia

<sup>80</sup> Para. 326

<sup>81</sup> Para. 327

<sup>82</sup> Para. 327

## Use of mediation instead of protection

The Mid-term Review Report shows and concludes - also referring to the findings in relation to Article 48 of the Convention - that the use of mediation is very common in family law/separation procedures in many countries. In a number of countries, mediation can even be a mandatory first step required by the authorities in the separation procedure; and has a significant role in custody and visitation arrangements. Even victims of domestic violence may be required to undergo mediation. GREVIO underlines in this context that *“in these cases victims are particularly vulnerable due to the power imbalance that is typical in cases of domestic violence and that this power imbalance is likely to impair the ability of the victim to negotiate and reach acceptable agreement that ensures, inter alia, the children’s and the mother’s safety”*.<sup>83</sup>

Gaining and maintaining power and control over victims is a central dynamic of violence that results in a power imbalance on the side of the perpetrator. Violence instils fear in victims and affects their ability to openly say what they think and what their needs are. This inevitably has an effect on the mediation process, and its outcomes. Importantly, mediation procedures per se may also traumatise the victims, and pose a further harm and risk for their safety.

The use of mandatory mediation in cases of violence runs contrary to the principles of and obligations stemming from the Convention; the rights, safety and needs of victims must be at the centre of all procedures and interventions.

## Bias in defining the best interest of the child

As the Mid-term Review points out, GREVIO has noticed in several countries an alarming bias in the determination of the best interest of children. More precisely: *“state parties tend to give priority to the presumed best interest of the child, which is deemed to be to maintain contact with both parents at all costs, regardless of the violence children have witnessed.”*<sup>84</sup> GREVIO observed in several countries a lack of understanding among judges and other professionals of the harm on children in witnessing domestic violence.<sup>85</sup> Also in several countries the joint exercise of parental authority was maintained, even if the parent was sentenced for violence against the other parent, or where a protection order was issued.<sup>86</sup>

Contrary to such beliefs of the primacy of maintaining contact “at all costs”, the UN Convention on the Rights of the Child (CRC) sets the right of the child to maintain personal relations and direct contact “except if it is contrary to the child’s best interests.”<sup>87</sup> (See also the previous section on the international normative framework, and respectively on the CRC Convention.) Therefore, maintaining contact is not an absolute right, but rather a relative one being conditioned to/depending on the best interest of the child.

Moreover, the right of the child not to be subjected to any form of violence is a fundamental right and national authorities have a positive obligation to take all appropriate measures to protect every child from all forms of violence and neglect - as it is laid down in the CRC Convention.<sup>88</sup> Therefore the right

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<sup>83</sup> Para. 328

<sup>84</sup> Para. 329

<sup>85</sup> Para. 329

<sup>86</sup> Para 329

<sup>87</sup> UN Convention on the Rights of the Child, Article 9, para. 3. “States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”

<sup>88</sup> UN Convention on the Rights of the Child, Article 19, para 1. “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or

to live free from violence has to be given priority by the authorities, over maintaining contact with the perpetrator parent.

The views and will of the child must also be respected, and it shall be kept in mind that based on the CRC Convention, the right of the child to have contact does not entail an obligation to have contact: children should not be “ordered or forced” to do so against their will.

### **Common bias, misconceptions and prejudices: Violence “defined away” as “disputes”**

The Mid-term Review Report reveals that in several countries judicial authorities seem to have a **tendency to define domestic violence as “mere dispute”**. GREVIO has criticised this tendency.<sup>89</sup>

Violence is in itself harmful, it instils fear in victims and the children witnessing it. Therefore, it should never be underestimated, minimised or down-played. To treat violence as a “dispute” also bears the danger to overlook risk factors and to fail in taking an active role in providing safety measures and protection orders to victims.

Another phenomenon leading to the non-recognition of violence and secondary victimisation of victims, comes from a problematic concept in practice, the so-called “**parental alienation syndrome**” (PAS).

In relation to this issue, GREVIO Mid-term Review also noticed the use of the concept of PAS in a number of countries. In terms of the concept, the Mid-term Review refers to a study requested by the European Parliament’s FEMM Committee. The study outlines that “*parental alienation syndrome*” *lacks universal clinical or scientific definition, but “it is generally referred to the presumption that a child’s fear or rejection of one parent (typically the non-custodial parent) stems from the malevolent influence of the preferred (typically custodial) parent.”*<sup>90</sup>

In terms of PAS, as the Mid-Term Review also outlines, GREVIO consistently refers to the related **statement of the European Association for Psychotherapy (EAP)** in the baseline evaluation reports, recalling that PAS and PA (parental alienation) are unsuitable for use in psychotherapeutic practice.<sup>91</sup> EAP comprises of 128 organisations from 41 countries. The organisation issued a related statement in 2017. The document concludes and considers that “the terms and concepts of ‘PAS’ and ‘PA’ are unsuitable for use in any psychotherapeutic practice”.<sup>92</sup>

The EAP in its statement “*recognizes that there is a high risk and potential of PAS/PA concepts to be used in a manner allowing for violence against children and their mothers to remain undetected, and/or contested, since it ignores essential aspects of child welfare and the gender-based nature of domestic violence.*”<sup>93</sup> The statement also underlines that “*neither PAS nor PA are included in any international classifications of mental disorders (DSM and ICD) and psychotherapists should therefore not use these terms as diagnostic categories.*” Importantly, the document addresses the need of taking domestic violence reports seriously, as well as of distinguishing between conflicts and violence in divorce/separation and custody cases. “*The EAP believes that all European psychotherapists must also take, very seriously any report of domestic violence in divorce and child custody cases. Psychotherapists need to distinguish between a contentious divorce/separation and a divorce/separation in which there is domestic violence in order to be able to adjust psychotherapeutic interventions accordingly.*”<sup>94</sup> This

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mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”

<sup>89</sup> Para. 329

<sup>90</sup> Footnote 541

<sup>91</sup> Para. 338, footnote 541

<sup>92</sup> See the statement here: [Statement on Parent Alienation Syndrome \(PAS\) - EAP \(europsyche.org\)](https://www.europsyche.org/statement-on-parent-alienation-syndrome-pas/)

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

statement acts as a guiding principle for European psychotherapists. Similar other statements or positions exist by professionals at a national level as well.<sup>95</sup>

In line with EAP's statements, the Mid-term Review underlined that "*GREVIO consistently called for the relevant professionals to be informed of the absence of scientific grounds for the "parental alienation syndrome", and, in the case of Italy, for banning its use.*"<sup>96</sup>

Concerns in relation to parental alienation have also been addressed by other actors. In 2019, a Collective memo of concern was addressed to the World Health Organization (WHO), regarding the inclusion of the parental alienation of the revised version of International Classification of Diseases (ICD-11). More than one thousand signatories, including organisations, institutions and individual experts requested the removal of the term from ICD-11.<sup>97</sup> As a result, WHO removed parental alienation from ICD - although an official public communication of that can't be found.

According to the evaluation reports by GREVIO, another worrying tendency is the "bias against women who raise issues of domestic violence in proceedings related to custody and visitation".<sup>98</sup> It has manifested in different forms, for example as identified by GREVIO: **to label parents** who experienced violence by the partner as "**un-cooperative**", or "**unfit for parenting**" when due to domestic violence they refused joint meetings with perpetrators, or not agreed with custody or visitation.<sup>99</sup>

It is important to mention here that women who experience domestic violence by their husbands or cohabiting partners, are often confronted by contradicting expectations by child welfare authorities, which are practically impossible to comply with: despite being victims themselves, they are expected to protect the children, to separate from the violent partner, or to sufficiently prepare the child for a visitation. Since some expectations are contradictory, meeting one, means that women often end up being punished for failing to meet the contradictory expectation.

The Mid-term Review also points out that there are countries where professionals who have an important role in custody and visitation proceedings/decisions - such as court appointed experts or other professionals - lack the proper knowledge and competence to deal with such cases.<sup>100</sup>

### **Systematic screening for violence and risk assessment**

The Istanbul Convention requires that authorities take incidents of violence covered by the Convention when determining custody and visitation rights of children. This includes all forms of violence, such as psychological violence, threats and coercion, physical, sexual and economic violence. In order to ensure that all incidents are taken into account, courts and other authorities involved in determining custody and visitation rights of children, must carry out systematic and comprehensive screening.

According to the Mid-term Review, GREVIO observed in many countries that **judges do not screen cases of custody and visitation for domestic violence**.<sup>101</sup> This bears a great danger that incidents of violence will not be detected or will be overlooked, and victims and children do not receive adequate protection and assistance and are likely to be exposed to violence and victimisation again.

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<sup>95</sup> See for example "*The Declaration on so called "Parental Alienation Syndrome"*" from Slovakia, available at <https://www.justice.gov.sk/SiteAssets/Lists/Aktuality/EditForm/Common%20Declaration.pdf>

<sup>96</sup> Para. 338

<sup>97</sup> Collective Memo of Concern to: World Health Organization RE: Inclusion of "Parental Alienation" as a "Caregiver-child relationship problem" Code QE52.0 in the International Classification of Diseases 11th Revision (ICD-11) From: 352 Concerned Family Law Academics, Family Violence Experts, Family Violence Research Institutes, Child Development and Child Abuse Experts, Children's Rights Networks and Associations and 764 concerned individuals. Available at <https://www.learningtoendabuse.ca/docs/WHO-September-24-2019.pdf>

<sup>98</sup> Para. 338

<sup>99</sup> Para. 331

<sup>100</sup> Para. 330

<sup>101</sup> Para. 333

Conducting risk assessment is also relevant when it comes to custody and visitation issues and procedures. According to Article 51 of the Convention, risk assessment entails effectively assessing the risk of lethality, the seriousness of the situation and the risk of repeat violence. Risk assessment must further be carried out by all relevant authorities in order to manage the risk and if necessary to provide co-ordinated safety and support. We have to note here that risk assessment is not an end in itself, it must be followed by risk management procedures, such as: measures of protection and support for victims, also in family law proceedings regarding custody and visitation questions.

Experiences in the field - including GREVIO's practice - are concerning: they show that risk assessment is not always carried out by the respective authorities. GREVIO observed that "*judges do not conduct risk assessments or ask for the disclosure of the risk assessment and safety plans drawn up by law-enforcement agencies and/or other competent stakeholders, with a view to taking them into account and determining the best interest of the child.*"<sup>102</sup> Specialist women's support services accompanying victims and advocating for their rights during proceedings, are core agencies to be consulted and to provide expert statements on the situation of violence and associated risk.

It is also important to underline that separation and post-separation is a very dangerous period for victims that requires special attention: separation is a risk factor for repeated violence and for escalating violence. Violence often continues during visitation, and children are therefore harmed by being direct victims or witnessing violence. Femicides and also the killing of children take place in such a context. On the other hand, abusive fathers are granted visitation rights quickly, even immediately after a violent act, during and after separation.

### **Supervised visitation**

Deciding about and granting visitation without an adequate screening of violence and without providing protective measures and safety planning in case of violence is a dangerous intervention for victims and children.

In the context of domestic violence the practice to grant supervised visitation for violent parents is often not a safe method. As the Mid-term Review of GREVIO reports reveals, numerous shortcomings were observed regarding the facilities, as well as the personnel responsible for supervised visitation.<sup>103</sup> GREVIO noted that several countries lacked the necessary resources/infrastructure to ensure safety. For example spaces were rather equipped to deal with conflictual relationships than violence cases. GREVIO drew attention to the "high risks to victims and children posed by maintaining contact between the victim and the perpetrator, without protection and appropriate measures."<sup>104</sup>

The Mid-term Review also revealed substantial shortcomings in sufficiently trained personnel for supervised visitation in a number of countries, while bias by staff towards women victims of domestic violence was also noted.<sup>105</sup>

### **Consultation and cooperation between and within agencies**

The Istanbul Convention requires that policies to protect victims shall be comprehensive and co-ordinated, encompassing all relevant measures and offering a holistic approach.<sup>106</sup> Another important policy principle is that the rights and needs of the victims must be placed at the centre of all measures.<sup>107</sup>

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<sup>102</sup> Para. 333

<sup>103</sup> Paras 334-335.

<sup>104</sup> Para. 334

<sup>105</sup> Para. 335

<sup>106</sup> Article 7, para. 1

<sup>107</sup> Article 7, para. 2



This approach is not always implemented, also not in the area of the protection of victims and their children in family law procedures such as divorce, custody and visitation proceedings. Different legal and policy fields are often fragmented and work in parallel, and in isolation, rather than in a coordinated way. Research in the field - by Marianne Hester - speaks of structural fragmentations as a “three planet model”, dividing the three areas of work between domestic violence, child protection and safeguarding, and child contacts.<sup>108</sup>

The Mid-term Review of GREVIO reports discovered similar problems of fragmentation, especially a lack of consultation between family courts and criminal courts in custody and visitation decisions - that includes questions such as whether there are and have been criminal proceedings against the father.<sup>109</sup> In addition to the concerns raised by GREVIO for the legal system, consultations with other relevant agencies including with specialist women’s support services seem to be missing as well.

### **Other problematic mechanisms and practices in custody and visitation matters**

Social services or specialist mechanisms in state administration often play an important role in the field, sometimes even when making decisions about custody and visitation matters. If these bodies are authorised to make decisions, victims and children can’t even seek justice before court, because the matter has to be settled in out-of-court proceedings. Such structures place the mandatory “co-operation between the parents” at the centre and pose a danger to overlook incidents of violence. Victims are even discouraged to report violence, because they need to “look at the future” and focus on reaching agreements regarding parenting. WAVE experts report with concern that victims are even put under pressure to accept visitation and custody arrangements that they and specialist victims support services see as unsafe.

The Mid-term Review of GREVIO notices with great concern these country specific problems as structures which hinder victims to address the family courts and to report about violence. The review also points out that practises such as joined sessions of victims and perpetrators are not appropriate in cases of domestic violence.<sup>110</sup> Victims always shall be entitled to exercise their rights to appeal against decisions by authorities.

The review is also very concerned about a practice of imprisonment of mothers, who, in order to protect the children, do not comply with visitation decisions.<sup>111</sup> Such practice jeopardises the safety of children and is contrary to the obligation of the Istanbul Convention to take all incidents of violence into account and to focus on the protection of children.

The review also points out that GREVIO strongly criticises alarming practices to remove children from their mothers care, particularly in the Roma communities.<sup>112</sup>

### **Access to justice and legal aid for victims and their children**

The results of the Mid-term Review indicate that victims and especially children are having enormous difficulties in vindicating and realising their rights, including in custody and visitation matters. As it was presented in the previous part of the paper, the priority and focus rather seems to be on granting parental rights over the safety and protection of women and children, and violent fathers seem to often keep custody or visitation rights, despite their violent behaviour. It raises basic concerns and

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<sup>108</sup> Hester, M. (2011). The three planet model - towards an understanding of contradictions in approaches to women and children's safety in contexts of domestic violence. *British Journal of Social Work*, 41, 837 - 853.

<sup>109</sup> Para. 332

<sup>110</sup> Para. 336

<sup>111</sup> Para. 336

<sup>112</sup> Para. 337

questions about how the rights of victims and their children are represented and upheld in (family) court procedures.

Access to justice is a key factor in the realisation of human rights. Access to proper legal aid and assistance is a central element in and for victim's access to justice. The experience of WAVE experts indicate that victims and their children are often not or not well represented legally. Gender inequalities such as low incomes or precarious, low paid jobs, often do not allow women victims of violence to hire lawyers to represent them in court. Perpetrators on the contrary, on average do have more financial means and are able to afford legal representation. The lack of legal representation also hits children claiming their rights in custody and visitation procedures, because their mothers cannot afford lawyers to represent them and free legal aid is often not available.

It seems that legal aid systems are underdeveloped, and mainly focused on criminal law in the field. As the GREVIO Mid-term Review highlighted, different types of barriers exist across countries in terms of providing legal aid, including accessibility, eligibility, and scope/type of legal aid (legal advice and referral and/or specialised legal support)<sup>113</sup>, although practice varies.<sup>114</sup>

It still remains unclear how much free legal aid, representation and assistance of victims and children is a mere right and how much victims are actually supported to claim and enforce their rights, in both criminal and in civil proceedings.

Legal aid and assistance shall not only be accessible, but also be adequate. The Mid-term Review revealed that in a number of countries legal aid lawyers lacks expertise in the area of violence against women.<sup>115</sup>

Another phenomenon that raises concern is that women victims of violence are more and more confronted by strategic malevolent lawsuits of perpetrators. If cases are dropped in the course of proceedings (e.g. by the prosecutors), which often happens for cases of violence against women and domestic violence, perpetrators turn the tables and accuse victims of having lied (depending on the legal system false accusation, defamation, and libel might also be invoked in such cases). This puts enormous pressures on victims and also prevents further reporting. Furthermore, the duty to cover the cost of legal representation (even with taking a loan for this purpose) often ruins the victim's financial situation.

The phenomenon of strategic lawsuits against women victims of violence is very harmful since it restricts the freedom of women victims to report violence, silences them, and while preventing them from seeking assistance increases the risk of further harm on them and their children.

### **Gaps in the right to be supported by a specialist support service for women and their children**

According to the Istanbul Convention all victims have the right to specialist support services. Article 22 explicitly states that parties shall provide **“specialist women's support services to all women victims of violence and their children.”**

Such specialist support services often play an important role in providing psycho-social support to victims and children in legal proceedings and in accompanying them to the police and to courts. Some also offer legal advice and even representation, in order to ensure provision of services in a holistic manner, so that victims are not overburdened by having to see and coordinate among many different services.

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<sup>113</sup> The recent reviews have differentiated between “primary legal aid” which consist of legal advice and referrals and “secondary legal aid”, which is defined as specialised legal support (para 506)

<sup>114</sup> Paras. 500-506.

<sup>115</sup> Para. 502

According to the recommendations referred to in the Explanatory report of the Istanbul Convention, one family place per 10,000 of population have to be provided for victims and children in specialist women's shelters, and one specialist center should be available per every 200,000 inhabitants, in all regions.<sup>116</sup> According to the review of GREVIO reports and also according to the WAVE Country Report 2021,<sup>117</sup> specialist services do not exist in all countries and regions yet. While there is a general overall shortcoming in the number of shelter places and the number of women's centres and the geographical coverage of these services at a national level, there are significant differences between the countries.

In addition to the obligation of states for providing or arranging specialist women's support services to the children of all women victims of violence, the Convention also requires that "in the provision of protection and support services to victims, due account is taken of the rights and needs of child witnesses of all forms of violence covered by the Convention".<sup>118</sup> Such measures shall include "age-appropriate psychosocial counselling... and shall give due regard to the best interests of the child."<sup>119</sup> The Explanatory report further specifies the features of such service as "age and developmentally appropriate best evidence-based psychosocial interventions that are specifically tailored to children to cope with their traumatic experiences where necessary."<sup>120</sup>

Based on the Explanatory report of the Convention, the term "child witnesses" shall be interpreted broadly. It "*refers not only to children who are present during the violence and actively witness it, but to those who are exposed to screams and other sounds of violence while hiding close by or who are exposed to the long term consequences of such violence.*"<sup>121</sup>

As the Mid-term Review of GREVIO reports shows, despite the recognition of the harmful effects of witnessing domestic violence in many countries, the required services are often not available: countries "*mostly fail to provide appropriate and sufficient access to specialised and age-appropriate services for children.*"<sup>122</sup> As the review shows, different related problems and challenges are in place. On one hand, in several countries such services are provided in shelters, that means that they are limited time-wise, being only available when the children are staying in the shelters. Another problem is that in several countries the services in shelters are not specialised and tailored to the needs of children.<sup>123</sup>

As for the counselling services outside shelters, GREVIO concluded that access to such services "is even more limited." In addition, while specialised counselling services for children victims/witnesses are mostly offered by women's specialist support organisations, either insufficient funding or insufficient geographical coverage are hindering the promptness and sustainability of the assistance.<sup>124</sup>

Another point of concern raised by GREVIO is that although general support services, such as social services and child protection services may provide support and protection to children witnesses of domestic violence, "staff from general support services may not have the required training or expertise to support and protect children victims of domestic violence."<sup>125</sup>

GREVIO also pointed out that "*barriers for child witnesses/victims with regards to support and protection are linked to the judicial practice of granting joint parental custody in cases of domestic violence, which result in the perpetrator impeding the counselling of their children in some cases.*"<sup>126</sup>

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<sup>116</sup> Explanatory report, para.135 and 142, respectively.

<sup>117</sup> See the WAVE Country Report 2021 at <https://wave-network.org/wp-content/uploads/2021/12/WAVE-Country-Report-2021.pdf>

<sup>118</sup> Article 26., para. 1

<sup>119</sup> Article 26., para. 2

<sup>120</sup> Explanatory report, para. 144

<sup>121</sup> Explanatory report, para. 144

<sup>122</sup> Para. 294

<sup>123</sup> Para. 294

<sup>124</sup> Para. 294

<sup>125</sup> Para. 294

<sup>126</sup> Para. 294

In women's counselling services, services to child witnesses can often not be provided at all. This is of great concern and also a missed opportunity to break the cycle of intergenerational violence. To safeguard the rights and needs of children experiencing and witnessing violence (which often goes hand in hand) is a precondition for the healing and empowerment of children and young people.

In the Mid-term Review, GREVIO highlighted the strong link of the safety of non-abusive parent and their children. It underlined that by helping women victims of domestic violence, children are also helped, and protection for the abused parent shall be a primary measure of safety. *"GREVIO has observed that rather than ensuring the protection of the woman victim of gender-based violence as the primary measure to ensure the safety for children, many parties interpret the best interest of the child in a very narrow manner. GREVIO has emphasised in this respect that the safety of children is strongly linked to the safety of adults and that by helping women victims of domestic violence secure protection, children are also helped. The healing process is greatly enhanced if children are permitted to stay within their own home and with their attachment figures. GREVIO consistently has advocated for the focus to be placed onto securing protection for the abused parent as a primary measure of safety before exploring other avenues of protection for the child."*<sup>127</sup>

### **Lack of legal measures to protect children. Lack of applying aggravating circumstances**

As mentioned in previous sections, children have the right to be protected from violence, that constitutes an overall and comprehensive obligation of the states and its authorities. It is not enough, therefore, that authorities take incidents of violence into account in custody and visitation proceedings, they also have to provide concrete measures to protect children, such as suspending or removing parental rights.

Protective measures in the Istanbul Convention, such as emergency barring orders<sup>128</sup> and restraining or protection orders<sup>129</sup> shall also protect child victims and children witnessing violence. As pointed out earlier, the Convention also applies to girls and to children victims of domestic violence (understanding the term victim in a wider sense). Due to a lack of focus on children and a lack of data on the application of emergency orders/protective measures for the protection of children, it remains unclear to what degree children can be protected and are actually protected through such measures.

GREVIO developed a standard questionnaire for its evaluation - the countries under review are requested to use this questionnaire as a basis for preparing their state report.<sup>130</sup> The GREVIO questionnaire for the baseline report asks for the application of emergency barring orders and protection orders when women are at risk of violence. There are no specific questions, however, on the protection of children with such emergency and protection measures. The questions should be expanded to the children, including children witnessing violence.<sup>131</sup>

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<sup>127</sup> Para. 297

<sup>128</sup> Article 52

<sup>129</sup> Article 53

<sup>130</sup> See: Questionnaire on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention). Adopted by GREVIO on 11 March 2016. GREVIO/Inf(2016)1. Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). Council of Europe. Available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805c95b0>

<sup>131</sup> Regarding emergency barring orders or restraining and protection orders (Article 52 and 53) the following questions might be added to the questions about the implementation of the Istanbul Convention: Are children eligible for protection by such measures? How many emergency barring orders are issued to protect children? Of what age? What protective measures are applied? Have they been successful to prevent further violence? In the area of criminal law such questions can be for instance: How many cases of physical, psychological and sexual

A lack of recognition for the impact of domestic violence on children can also fall under the implementation of the Article 46 on **aggravating circumstances** that have to be taken into account in sentencing violence against women. If the offence was committed against or in the presence of a child, that constitutes one of the aggravating factors in the Convention. As the review of GREVIO reports shows, many countries do not recognize this as an aggravating circumstance in their law, and judges are not aware of the list of aggravating circumstances in the Istanbul Convention.<sup>132</sup>

### Summary

**Messages and recommendations in relation to Article 31 that WAVE is suggested to use in its professional work, including strategic planning and advocacy activities; proposed future activities, actions that WAVE can take**

#### **Introducing legal measures and strengthening their implementation**

- GREVIO has observed severe shortcomings in the legal framework and/or in the implementation of laws regarding the obligation to ensure the safety of victims and their children in custody and visitation procedures in ALL examined countries.
- In several countries, GREVIO found that there was no explicit reference to domestic violence as a legal criterion to be taken into account when deciding on custody and/or visitation rights.
- GREVIO strongly encouraged/urged these states to explicitly recognise the need to take into account incidents of violence covered by the Convention in the determination of custody and visitation rights of children.
- In many countries where there is a legal basis to prevent granting of parental rights to a violent parent, such provisions are hardly applied. (This means that perpetrators almost always keep their custody and/or visitation rights over children.)

#### *Suggested future actions*

- WAVE is advised to alert the network members as well as governments and intergovernmental bodies to the finding that in terms of Article 31 of the Convention shortcomings exist in the laws and their implementation in the field of custody and visitation rights in all the countries GREVIO has evaluated. The findings call for a strong and comprehensive response, for stepping up measures to protect victims and their children from violence. It must be addressed by all legislators, policy makers and other stakeholders on the national and European level.
- WAVE Network must demand that the safety of victims and their children have to be a top priority in family laws and policies.
- Possible related thematic message/demand for advocacy/minimum standards: explicit legislative provisions in the field; introduction of systematic review mechanisms of the application of related laws and regulations.

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abuse of children are reported? How many are prosecuted and how many convicted? What are the sanctions? How are children protected from further violence and abuse? How do authorities ensure that children are protected from further abuse?

<sup>132</sup> Paras. 402 and 403.

### **Offering protection (orders) instead of mediation**

- Mediation is a common method used in family law/separation procedures in many countries; alarmingly it is also used - even ordered - in cases of domestic violence, as the GREVIO evaluations show.
- Victims of domestic violence are disadvantaged in mediation procedures, this likely has a negative effect on the outcome of the procedures, including the safety of women and children.
- If there are signs of incidents of violence, it should be prohibited to use mediation; instead of mediation measures to protect victims and children, such as protection and restraining orders, must be issued, ex officio and swiftly.
- Mandatory case assessment/screening/filtering mechanism - and related proper training for all relevant professionals, including the justice and child protection personnel - shall be introduced in order to identify cases when mediation is prohibited.

### **Eradication of bias in defining the best interest of the child**

- GREVIO detected in several countries that maintaining contact with both parents at all costs, regardless of violence children have witnessed, seemed to be considered as the best interest of the child.
- Based on GREVIO's evaluation in several countries there is a lack of understanding among professionals of the harm on children by witnessing domestic violence. In several countries the parental authority is jointly exercised, even if the parent was sentenced for violence against the other parent, or with a protection order in place.
- According to the UN Children's Rights Convention, exercising the right to maintain contact stands "except if it is contrary to the child's best interests". The best interest of the child does NOT mean maintaining contact with parents at all costs.
- The will of the child must be respected. "Ordering/forcing" the child to see a parent would turn the right to have contact into an obligation which runs contrary to the Children's Rights Convention as well as the Istanbul Convention.

### *Suggested future actions*

- Exploring/assessing the possibilities and initiating strategic conciliation, cooperation and joint actions or communications with organizations, human rights bodies and other stakeholders focussing on the rights and protection of children.
- Planning and organizing activities and actions regarding the interpretation of the "best interest of the child" - e.g. initiating/issuing related guidance and publications - focusing on intimate partner violence and its effect on children and guided by the principle of women's and children's right to life and integrity.
- Putting a special emphasis on the theme of children witnessing violence.

### **Eradication of biases and prejudices of professionals in relation to violence**

- GREVIO has criticised the biases professionals have, such as the tendency to define violence as a “dispute”. GREVIO has regularly stressed the need to provide appropriate training, and professional guidelines (including on the level of violence required, and/or what tests should be applied by judges in custody and visitation decisions).
- GREVIO urged the authorities that “only those professionals, particularly psychologists and child psychiatrists, who are attuned to the issue of violence against women and the requirements of the Istanbul Convention, can be appointed by courts to provide advice on issues of custody and visitation in situations of violence against women”.
- GREVIO warned state parties/authorities that parental alienation is not a scientific concept.
- Violence and its effects should never be underestimated, minimised or down-played. To treat violence as “dispute” bears the danger to overlook risk factors and to fail in taking an active role in providing safety measures and issuing protection orders for victims of violence.
- Problematic concepts leading to a non-recognition of violence such as “parental alienation” should not be used because they bear the danger of ignoring and overlooking violence, which helps the perpetrator to continue the abuse.
- Children need to be carefully listened to and believed, as well as watched/assessed to identify and recognize possible harm done to them.
- It is discriminatory and unprofessional to label victims, protecting themselves and their children, as “un-cooperative” and “unfit for parenting”; they should actively be supported in safety planning.
- Only professions with clear protocols, guidelines and standards, on how to address violence against women and domestic violence and how to relate to victims to further avoid victims’ secondary traumatisation, should be appointed as experts; they need to undergo proper training on violence against women, domestic violence and its impact on children.

### **Applying and strengthening mandatory and systematic screening and risk assessment regarding violence**

- Based on the Mid-term Review of GREVIO evaluations, it is not a standard practice yet that countries are carrying out systematic screenings and risk assessment on incidents of violence - it is rather missing in many countries.
- GREVIO strongly encouraged, called or urged the authorities in many cases to conduct screening of family court applications and include a mandatory question regarding violence, and/or to undertake or to disclose risk assessments originating from other authorities.<sup>133</sup>
- Given WAVE’s expertise on specialised support services it is important to underline that all victims and children shall be guaranteed to exercise their right to be supported by specialised services of their choice, and that all measures have to focus on the human rights and the safety of the victims.<sup>134</sup> Specialist services must be involved and their expertise must be duly taken into account in the screening process as well as in risk assessment and risk management at the side of the victims to ensure that their rights and needs are met.
- Methods such as a common questionnaire should be used by all relevant authorities to ensure that all forms of violence are included in the screening and that a systematic approach is taken.
- Risk assessment shall be carried out systematically in all cases of violence, by all relevant authorities, institutions, involving the lethality of risk, the seriousness of the situation and the risk of repeat violence.

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<sup>133</sup> Para. 333

<sup>134</sup> Article 18, para. 3

- Courts and authorities engaged in family law matters, including divorce, custody and visitation issues, must also carry out risk assessment or take risk assessments carried out by other agencies into account.
- Both screening of violence and risk assessment must be followed by protective measures for the victims, including issuing protection and restraining orders and other measures.

#### *Suggested future actions*

- Collecting and evaluating existing practices and developing related model questionnaires, proceedings, or blueprints for screening risk assessment and risk management for relevant authorities, to ensure that all forms of violence are included in the screening and that a systematic approach is taken.

#### **Acting with caution in (supervised) visitation**

- GREVIO was strongly encouraged to build in safeguards in the procedures (e.g. offering separate appointments for parents, separate court waiting areas, monitoring court practice).
- Visitation rights should be suspended *ex officio* in and after acute situations of violence.
- Perpetrators should be monitored for a certain period of time (e.g. at least three month), and obliged to visit and cooperate with child protection authorities regularly.

#### **Strengthening consultation and cooperation between and within agencies**

- GREVIO has urged authorities to ensure that family courts take into account any episodes of violence, including by consulting with all relevant professionals and/or to conduct its own investigations.
- GREVIO evaluation reports have stressed the importance of consulting and co-ordinating with relevant bodies and/or professionals - including for example law-enforcement agencies, health and education authorities, and specialist women's support services.
- WAVE and its members are advised to disseminate the message that according to the Istanbul Convention, in all measures, including multi-agency interventions, the rights, the needs and the safety of victims and children must be at the center. Therefore victims and children's rights must be guaranteed and represented in all legal procedures, by the involvement of support services specialised on violence against women and domestic violence and victim's rights.

#### **Addressing other problematic practices in relation to custody and visitation**

- Structures for the arrangement of custody and visitation which force victims to "cooperate" with the violent partner, and which hinder them to claim their rights and bring in reports of violence, are not appropriate.
- Victims should not be forced or pressured to participate in unsafe procedures and should not have to face pressure or disadvantages if they do not agree to mediation and to such agreements that they do not feel safe for the children.
- If victims don't "cooperate" this should never be a reason for authorities to take away the children; children shall be protected from all forms of violence and not punished for having been victimised; authorities have to use measures such as protection orders to guarantee for children to remain in their homes, instead of having to leave the family.
- Children should never be forced to visitation against their will.



- Victims should always have the right to turn to an independent family court and to access their rights at all levels, including the right to remedy.

### **Guaranteeing and promoting access to justice and legal aid**

- In a number of countries, GREVIO has urged the authorities to ensure that legal aid lawyers are trained in the area of violence against women.
- The principle that the rights and needs of victims, including children, must be at the centre of all measures, has to be applied and implemented in all legal procedures. Authorities must step up their efforts to realise that.
- Effective measures for the protection against violence and for access to justice, must be available to all victims and children, including children who face multiple forms of discrimination.
- Women victims and children must have guaranteed the right to free legal aid, including free legal representation of their choice, in all legal proceedings, including in family law, custody and visitation proceedings, with specially trained lawyers.
- Victims must be protected from strategic malevolent lawsuits of perpetrators and must be provided with free legal representation to defend themselves. Society as a whole must develop effective measures against such strategic litigation including legislative and other measures.
- All victims of violence, including children, shall be entitled to realise their right to be supported and accompanied by specialist women’s support services (see the next section).

#### *Suggested future actions*

- The phenomenon of strategic lawsuits and other malevolent proceedings against women victims of violence should be researched as a matter of urgency and actions and measures to counter it must be developed both at a national and European level. Existing related concepts and phenomena, as “paper abuse”<sup>135</sup>, or “custody stalking”<sup>136</sup> have to be discussed and recognized.

### **Guaranteeing access to specialist support services**

- Many victims and children witnessing violence do not have access to specialist support available. It means that they are left alone in facing complicated and often overburdening procedures, as well as being at risk of secondary traumatising and further abuse. This situation has to be changed urgently and countries shall step up efforts to provide specialist services to all women victims of violence and their children, in sufficient number, and adequate geographical coverage. The operation of the services must be based on the approach and principle of human rights: women’s and children’s rights to life and physical, sexual and psychological integrity.
- Women’s shelters and other specialist support services for women and children, including women’s centres, should provide protection and support to all children of the victims. Support should be provided considering the actual age of the children.

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<sup>135</sup> Paper abuse includes “frivolous lawsuits, false reports of child abuse, and other system-related manipulations” by the batterers that “exerts power, forces contact, and financially burdens their ex-partners”. See Susan L. Miller, Nicole L. Smolter: “Paper Abuse”: When All Else Fails, Batterers Use Procedural Stalking. *Volume: 17 issue: 5*, page(s): 637-650. Article first published online: April 28, 2011; Issue published: May 1, 2011

<sup>136</sup> Custody stalking is defined as “a malevolent course of conduct involving fathers’ use of custody and/or child protection proceedings to overturn historic patterns of care for children.” See Vivienne Elizabeth, Custody Stalking: A Mechanism of Coercively Controlling Mothers Following Separation. *Feminist Legal Studies* volume 25, pages 185–201 (2017)

- The support of children, as the support of all victims, should be gender-sensitive and apply an intersectional approach, taking the different needs of children (coming from their different abilities, minority ethnic background, residence or refugee status or any other status), into account.
- Children should be accompanied and supported by specialist services in claiming their rights and in receiving effective protection.
- The specialist women's support services also operates as children's support services and needs to be recognized in funding schemes as women's and children's rights facilities.

### **Applying and utilising legal measures to protect children, as well as aggravating circumstances**

- Authorities must not only take incidents of violence into account in custody and visitation procedures, they must also ensure that children receive proper protection, for instance by suspending or removing parental rights and/or by issuing or initiating protective orders for the protection of children and ensuring legal representation of children in such proceedings.
- GREVIO should expand its questionnaire regarding protective orders to children and ask how often children, including children witnessing violence, are protected by such measures and what possible obstacles there are to apply those measures to children.
- The aggravating circumstances in the Convention, including if the offence was committed against or in the presence of a child, shall be recognized in the criminal legislation, and applied in practice.
- The screenings of incidents of violence should include the question whether violence has been committed against a child or in the presence of a child.

#### IV. SUMMARY, CONCLUSIONS AND WAYS FORWARD

In the field of protection of women and children in the context of domestic violence, with special regard to custody and visitation issues, there has been important development in the last decades, both positive and negative.

When looking at the international normative framework - with the exception of the Istanbul Convention, and to some extent the CEDAW Conventions -, it can be seen that there is a room for improvement in clearly and adequately addressing and guaranteeing the rights and protection of women and children in the context of intimate partner violence/domestic violence, including in the field of custody and visitation issues. In this context, awareness raising on the linkages between violence against women and violence against children, and on the effects of intimate partner violence on children shall be increased and adequate responses strengthened. Strategic cooperation between and joint actions among different stakeholders working for women's rights and children's rights would advance such an approach, both at a national and international level.

In the international normative framework the Istanbul Convention provides the clearest approach, wording and spirit in this sense. At the same time, there are numerous gaps and shortcomings in the implementation and practical application of the Convention, some of them being common or similar across countries, as has been revealed by the GREVIO baseline reports and the Mid-term Review report. As an overall problem, in practice, there seems to be a weak focus on girls and children: the applicability of the Convention to this group seems to be sometimes overlooked, undervalued or underdeveloped in the implementation and evaluation of the Istanbul Convention.<sup>137</sup> Based on the above, the focus and application of all relevant measures of the Convention on children needs to be strengthened where relevant.<sup>138</sup>

For the specific theme on custody and visitation, fundamental problems and issues of concerns exist. An alarming finding is that GREVIO has observed severe shortcomings in the legal framework and/or in the implementation of laws regarding the obligation to ensure the safety of victims and their children in custody and visitation procedures in ALL of the examined countries. Another fundamental problem that exists in several countries is the bias in the determination/interpretation of "the best interest of the child" principle, namely to maintain contact with both parents at all costs, regardless of the violence children have witnessed. The existing bias among professionals to underestimate and downgrade the seriousness of violence, and lack of understanding among professionals of the harm on children in witnessing domestic violence are also significant problems. (The practical consequences of such an approach is that in several countries the joint exercise of parental authority was maintained, even if the parent was sentenced for violence against the other parent, or where a protection order was issued.)

In the framework of the structural problems, there are certain issues that have been emerging or given more attention in recent years. They include, among others: granting shared/joint custody, and application of mediation in violence cases; using the controversial concept of parental alienation; or malevolent use of the legal and child protection system against the victims by the perpetrators (such as through paper abuse and custody stalking).

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<sup>137</sup> In the area of protection and prosecution, for example, state reports hardly provide information on the application of legal measures in cases in which children are victimized.

<sup>138</sup> It is the case, for example, to guarantee the protection of children by emergency and protection orders.

Those fundamental and emerging problems are being present now both at national, European and international level, and require strong and coordinated responses on each levels.

**Suggestions for possible future policy, advocacy, communication and other directions and activities, including for the WAVE Network, but also to other stakeholders**

- As an overall goal: strengthening the interrelation and linkages between the protection of women and protection of children from violence, in the context of intimate partner violence/domestic violence. Using as a reference, and utilising the international norms with explicit content and clarity in the field - e.g. the Istanbul Convention.
- Increasing efforts for ensuring proper interpretation and further elaboration on the respective international norms and standards, including advocacy activities for this purpose
  - Issuing specific targeted documentations/publications, such as explanatory comments, commentaries, elaboration of related minimum standards and/or criterias of good/promising practice for the safety and protection of victims.
  - Addressing the adequate interpretation and application of the best interest of the child principle.
  - Discussing the problematic interpretation of the Hague Convention concept of “grave risk”.
- Organising strategic discussions, exchanges, cooperation and joint actions among and between the women’s rights and children’s rights NGOs, individual experts, interest representation organisations, and international human rights platforms and stakeholders
  - Planning and organising specific programmes and actions - including exchanges and strategic meetings - to address key (emerging) issues and themes that are connected to the protection of children and women, in the context of custody and visitation rights, but also beyond - e.g. addressing issues of parental alienation, shared/joint custody, alternative dispute resolution/mediation
- Making greater visibility for the issues concerned, by organising campaigns and other communication activities in the field.
- Coordinating and strengthening advocacy efforts in related international legislative and policy processes, at the EU and other levels as well
  - Incorporating key and emerging issues where relevant to the current legislative and policy processes, such as the adoption of the upcoming EU Directive against violence against women, or the evaluation and review of the EU Victims’ Rights Directive.

## ANNEX I

### ***Suggestions for basic criterias/indicators of minimum standards or practice for the protection of children, with special regard to Article 31 of the Istanbul Convention***

- Existence of a **legislative framework** that explicitly sets the obligations stemming from Article 31.
- Recognition in all **relevant laws, by-laws and regulations/guidelines** that **witnessing violence** against a parent or close person taking care of the child constitutes violence and a threat to the wellbeing and best interest of the child.
- **A proactive and professional approach** - avoiding myths, stereotyping, prejudices or victim blaming - is guaranteed in detecting, documenting and responding to all forms of violence; existence of adequate **training** of all relevant professionals for this purpose.
- Regulated **consultation, information sharing and cooperation** on exploring potential history/incidents of violence, among relevant authorities, especially between different legal systems (criminal justice, civil and family law system). Victims are included in such processes. Women's specialist support services (or NGOs providing such services) are involved in such schemes.
- Existence of adequate and careful **screening mechanisms** of history and/or incidents of violence by all relevant actors on the whole system of prevention, protection and prosecution.
- Existence of systematic **risk assessment** mechanism - that assess lethality risks as well - for all relevant professions, with special attention to the separation and post separation, including custody and visitation proceedings. Existence of adequate **risk management processes**.
- Arrangement and issuing **protection measures** (including emergency barring orders, protection and restraining orders) that are available for children victims and witnesses of domestic violence, adopted in a multi-agency manner, with an obligation to obtain relevant information from other professionals.
- **Prohibition of methods** and practices being **harmful and dangerous** to victims.
  - Exclusions or prohibition of alternative dispute resolution/mediation in cases of domestic violence, including where children are directly targeted by or witnessing violence. Existence of an assessment/filtering system - or utilisation of violence screening mechanism for this purpose.
  - Prohibition of the reference to “parental alienation syndrome”.
- Existence of accessible and comprehensive legal aid and assistance to victims, with lawyers having specific expertise in the field of violence against women and domestic violence.
- Acting **ex officio** is guaranteed in violence cases, with a principle of suspending custody and visitation rights of the perpetrator if there is any danger to the rights and safety of the victim or the child/children.
- Effective and dissuasive **sanctions** are available in cases where children are direct victims and/or witnesses of domestic violence. Aggravating circumstances are in place when the offences are committed against or in the presence of a child.

## ANNEX II

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