***Expert Group Meeting, 20 May 2020***

*UN Special Rapporteur on violence against women: Report on rape as a grave and systematic human rights violation and gender-based violence against women*

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*Speaking notes*

European Women’s Lobby is the largest European umbrella network of [women’s associations](https://womenlobby.org/-Our-membership-) representing a total of more than 2000 organisations in 26 EU Member States, three Candidate Countries, one former EU Member State and one European Free Trade Association country, as well as 17 European-wide organisations. Combatting and preventing VAWG is one of the key area’s of EWL’s programmatic work, in order to achieve Europe free from male violence against women. This includes achieving a Europe free from prostitution.

**The European Women’s Lobby calls for:**

·      The EU’s accession to the Istanbul Convention, **in order to facilitate the full implementation of its provisions across the EU**

·      All EU Member States should also ratify and implement the Convention.

·      The addition of violence against women to the list of EU crimes in the EU treaties.

·      The design of a comprehensive legal framework, including the adoption of a Directive on violence against women applying to all forms of violence against women in all spheres of life, including sexual violence and sexual exploitation.

These demands are informed, among others, by European Women’s Lobby (EWL) unique structure - Observatory on Violence against Women - which brings together group of 39 women from 32 countries in Europe and European wide members, with outstanding experience and expertise in different forms of male violence against women.

The EWL Observatory plays a key role in identifying burning issues and monitoring progress towards a Europe free from male violence against women and feed into the policy work of the EWL to advocate for improved policies and service provision for prevention and support of women victims of male violence. Currently EWL Observatory is carrying out a mapping on the gaps in the implementation of the provisions of the Istanbul Convention in Europe. For example, one of the factor hindering the protection of women against violence the experts have identified is the gender-neutral character of laws and policies, meaning the lack of gender sensitive approach and a women focus approach.

As the Observatory experts report, despite the comprehensive provisions of the Istanbul Convention regarding prevention, protection and prosecution, national legislations and policies on violence against women vary greatly from one country to the other as the level of implementation of the Convention varies. To address this situation, in 2017 the European Union signed the Istanbul Convention sending a strong political message on its commitment to end violence against women and girls at all levels. But signing the convention is not enough - to be effective, the EU must access the Convention and implement it broadly. All EU Member states have signed the Istanbul Convention but there are still 7 countries that have to ratify it. Even if the EU manages to ratifies, the MS states will need to do it too, as they are responsible of implementing the majority of the provisions of the Convention.

**After the EU elections in May 2019,** more women entered in the European Parliament and Ursula Von der Leyen, the President of the new European Commission stated that ending violence against women will be a top priority and that the EU’s accession to the Istanbul Convention is a must.

**European region:**

Europe as a region can be considered as having some of the most progressive legislation on VAWG including rape. However, it is also the region where, in France every 7 minutes a man rapes a woman, that is 205 rapes each day, and, 1 in 10 women in the Netherlands has been raped at some point in her life.

These crimes do not happen in isolation. Not only they lie on a continuum of men’s violence against women ultimately connected with other, “milder” or “more grave”, forms of violence . They must be viewed within a larger context of the sex role stereotypes, the system of gender, objectification of women and girls, and sexual and reproductive exploitation of women.

Gendered myths and stereotypes about male and female sexuality and sexual behaviour are still prevalent in the European society**.** For example, a recent Eurobarometer showed that almost 1 in 2 (47%) Maltese think that women often make up or exaggerate claims of abuse or rape. More than 1 in 2 persons (55%) in Romania believe that having sexual intercourse without sexual consent can be justified in certain situations such as being drunk or wearing revealing clothing.

All these attitudes expose a rape culture, which, coupled with the global consumerism, fosters sexual violence as well as prostitution. In a context where everything can be bought and sold, women and girls are being considered as objects, both virtually and physically. The sexualisation of women, sexist advertising and the pornification of the public sphere convey the message that women’s bodies and sexuality are available for men’s fantasies.

All these factors not only facilitate and reinforce subordination of women to men / by men, thus significantly **impairing the rights of women**, but, as the CEDAW Art 1 reminds us, they also **nullify** our rights.

They nullify them by facilitating **dehumanisation** of women, continuously **recreating women and girls as objects**.

The rights of objects cannot be violated. Because objects have no rights.

This reading of the contextual links between harmful attitudes, objectification of women and sexual violence is, of course, not something new. The CEDAW GR 19 (on VAW) says very clearly that “***Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles….contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender-based violence.***” Similarly, the Beijing Declaration and Platform for Action, reinforced the same message making the connections between the stereotypes, harmful attitudes and objectification of women and girls through pornography, leading to VAWG of which rape is one concrete manifestation. At the same time the Council of Europe Istanbul Convention, considered as one of the most comprehensive international legal instrument in the area of violence against women, recognises that “**violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared to men**”. The Art 36 of the Convention asks to **adapt criminal legislation** to ensure that the definition of the criminal offence of sexual violence, including rape is based on the **lack of consent** as a constituent element of crime. The IC states that "**consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances**”.

“The surrounding circumstances” is a particularly important element here, as our understanding of consent in the domain of sexuality, and the sexual and reproductive rights of women, must be informed by our feminist analysis of *the asymmetry of power between women and men* and the **subordination of women by men** - precisely the structure that the IC is set to dismantle in a holistic way.

However, usually, as Catherine MacKinnon puts it, “**inequality on the basis of sex is ignored so that the word consent can act as a stand in for freedom and mutuality of desire when in fact the activity under discussion is anything but what a woman involved actually wants**" .

Another important point that MacKinnon makes is that ( I am summarising her thought), ***Consent is never enough to describe positive sexual experience, but it is always enough to prove that the negative one did not take place***.

These are two important points and it is at their backdrop I am going to briefly bring your attention to the four cases in Europe, from “weakest” to “strongest”, in the context of ratification of the IC and the role it played in each of these countries.

**Rape and Consent in the European Context:**

**Germany: “No means No”**

I’d like to start with the case of Germany. In 2016 Germany, in order to be able to ratify the Istanbul convention, had to change its criminal law (section 177 that covered rape). The original law hadn't absolutely demanded force, the way it was interpreted by the highest court of *applied* law meant that in practice there had to be force, it had to be immediate in the sense that the force had to be applied to achieve rape, and the force had to be considerable enough to be deemed dangerous to "body and life". So a man was acquitted of rape who had beaten up his wife, then ripped off her clothes and raped her, because that everything that preceded rape was not life threatening and she could have screamed and run away.

The new law of 2016 replaced the use of “force” with "against the clearly stated will” ( or “against discernible contrary will”). The proof of rape no longer rested on the active resistance of the victim but rather on her expressed disagreement - as opposed to her agreement, i.e. consent - to engage in a sexual act. This is a principle known as “**No means No**”. And it is, of course, a very bare minimum that anyone, woman or man, has the right to expect of any sexual interaction, and which is simply not enough for a satisfactory sexual encounter. This is particularly important from the perspective of the recognition of inherent to patriarchal power structures and pervasive sex inequality, elaborated through CEDAW or IC jurisprudence.

**From ‘No Means No’ to ‘Only Yes Means Yes’**

**SPAIN:** The law that had been in force until recently was widely condemned after a group of five men who called themselves "La manada" (wolf pack) were initially cleared of gang-raping a young woman and convicted instead of sexual abuse because the court decided that the woman had not faced violence or intimidation, as intimidation was considered key to establishing the crime of rape. [That was eventually struck down](https://www.bbc.com/news/world-europe-48716940) in June 2019 when the Supreme Court endorsed the principle of "**only yes means yes**", using the Istanbul Convention definition that "consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances”. Currently a new law (the so called Law on Sexual Liberties) has been proposed but still remains a project. And while this law removes the notion of force, replaces it with what is called affirmative or expressive consent, according to the experts in the Observatory on VAW in EWL, the law is not as comprehensive enough as it could be in order to truly tackle the problem of rape in a holistic way. For example, even though the law arguably goes one step further than the German version of it “No means No”, as is the case with Germany it has no potential to legally address rape in all contexts, for example, in the context of prostitution or pornography.

**IRELAND:** Ireland ratified the Istanbul Convention in March 2018. In order to ensure compliance with its provisions in 2017 Ireland adopted the law on “sexual offences”. The law defined sexual consent for the first time, and, thanks to the advocacy work of women’s organisations, including the coalition Turn Off the Red Light, the new legislation also included child pornography, incest, child sexual grooming *and* **criminalised the purchase of sexual acts**.

It can be argued that the **criminalisation of the purchase of sex** embedded in the Sexual Offences Act 2017, taken together with the **criminalisation of coercive control** embedded in the Domestic Violence Act 2018, reflect a broadened understanding about the bounds of consent. Additionally, the Sexual Offences Act 2017 not only criminalises the purchase of sexual acts but also for the first time it provided a legislative definition of consent. Even though the consent itself is still based on the notion of “agreement”[[1]](#footnote-1) it offers a greater recognition of the importance of contextualising consent including by taking into account thepsychological and background conditions that inform it. It is with this understanding of consent that the law treats prostitution is a situation not as of equal sexual relationship between two equally positioned people. For that reason it is the buying of sexual acts that is criminalised and not the selling.

In doing so the Sexual offence Act of Ireland answered an important question: If sexual consent is understood, in legal terms, as a *proxy for mutuality, freedom and choice* (MacKinnon), if we are teaching young people that this is what is required of sexual consent, then how is it possible that this is completely disregarded in the context of prostitution ? Do women in prostitution operate under a different sexual consent understanding to the rest of the population ?

**SWEDEN:** Sweden introduced the notion of expressive or affirmative consent in its rape law in 2018. It is important to note that the law does not use the term “consent” or “agreement” but referes to “clearly expressed free will”. There are other strong elements in this bill, such as that passivity cannot be considered a sign of voluntary participation or that it is not necessary for a victim to be in the position of “vulnerability”. The new law increased the penalties and introduced new offences, such as “negligent rape”. All of these elements made the law of Sweden, aligned with the IC’s definition of consent.

What is worth noting about Sweden is that this understanding bounds of sexual consent and the contextual factors within which consent is possible, based on our obligation to view rape, or sexual violence against women at large, in the context of stereotyped roles, harmful attitudes and objectification of women as was elaborated in CEDAW jurisprudence, was already integrated in the law of 1999 that prohibited the purchase of sexual acts in Sweden .

This law was preceded by a long political debate that finally culminated in the proposal to criminalise the purchase of sex as part of the Women’s Peace Bill. The aim of the Act was not only to eradicate or reduce prostitution but to change the social attitudes, primarily of men towards women (even though the law itself is worded in a gender neutral way). In this law there was already an understanding that in the context as inherently unequal as prostitution is (as was described earlier in the Irish case) consent is simply not possible. And if it is for a very small minority of women, this alone cannot form the basis for a legislation. And while this understanding of existing asymmetry of power between women and men clearly informed the law on prostitution, there seemed to be a considerable delay in extending the same understanding to the sphere of sexuality and sexual relationships outside of the system of prostitution. A delay of almost 20 years. It seems that in 2018 Sweden has come to terms with a broader understanding of consent not as “agreement” but as “free will” and, as always contextual, always viewed at the backdrop of power relationship, and always insufficient on its own unless clearly defined in law and clearly and affirmatively expressed, by a woman, in the context of sexual encounter.

In doing so it connected two important legal areas, one specifically protecting the women in prostitution (sex purchase prohibition) AND the other protecting all women, including the women in prostitution. This is significant, as for the women exploited in the sex trade who are far more likely to be subjected to rape compared to any other group of women, there now exists a double protection. The new law on rape has already proved beneficial: in 2019 a Romanian woman, victim of trafficking, successfully persecuted a buyer, 70 y o Swedish man, under both sex purchase ban AND the clause on “negligent rape” under the rape law.

1. Ireland’s Sexual Offences Act 2017, Art 48 (9) 1. “A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act” [↑](#footnote-ref-1)