

Intimate partner violence against women is an essential factor in the determination of child custody, say women's rights experts

(31 May 2019) The Platform of undersigned United Nations and regional independent mechanisms on violence against women and women's rights¹ voiced its concern over patterns across various jurisdictions of the world that ignore intimate partner violence against women in determining child custody cases. These patterns reveal underlying discriminatory gender bias and harmful gender stereotypes against women. 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.

The Platform members addressed this issue during the conference on "Women's rights at the Crossroads: strengthening international cooperation to close the gap between legal frameworks and their implementation" hosted by the Council of Europe on May 24th 2019 in Strasbourg (France). In its follow up evaluation of the results, the Platform calls on States to pay particular attention to these patterns and 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 Platform members hold the view that abusive relationships between parents predominantly affect women and have direct impacts on the children's life, yet violence against women is rarely considered as relevant factor by national authorities in child custody decisions. There is also no doubt that intimate partner violence predominantly affects women, and yet the correlation between domestic violence against women and child abuse is most often underestimated by practitioners and courts. Gender bias against women in such contexts is prevalent as women subjected to intimate partner violence are at higher risk of negative custody-visitation outcomes. Moreover, discriminatory gender bias often leads to mistrust women, in particular concerning presumed false allegations of child abuse and domestic violence. In this regard, the experts stressed that a holistic and coordinated approach based on the existing international and regional standards must be applied at the national level in such cases, not only to uphold the principle of the best interest of the child but also the principle of equality between women and men. This approach is confirmed by jurisprudence of various international courts, UN treaty bodies and other relevant mechanisms.

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In the case *Jessica Lenahan (Gonzales) v. the United States*, the Inter-American Commission of Human Rights (IACHR) addressed the duties of the State to respond to situations of domestic violence with diligent protection measures and analyzed the correlation between intimate partner violence against women and child abuse, in particular when the parties within a marriage separate.² The IACHR concluded on the international responsibility of the State, since its agents failed to ensure compliance with the protection measure granted to Ms. Lenahan; failed to comply with their obligation of due diligence; and failed to protect the rights of the children who were abducted and murdered by their father.

In the Gonzalez case³, where an abusive father, during an unsupervised visit, murdered his daughter and then took his own life, the CEDAW Committee found that, by ruling to allow unsupervised visits without giving sufficient consideration to the background of domestic violence, the Spanish authorities had failed to fulfil their due diligence obligations under the Convention (para. 9.7) The Committee recommended, among others, that any history of domestic violence be considered when determining visitation schedules in order to ensure that these do not endanger women or children.

These, and other similar cases, could have been prevented if the authorities had exercised their international obligation to adhere to a standard of due diligence to prevent, investigate, prosecute and punish the perpetrators of violence against women, including intimate and domestic violence.

In addition to this, the experts reiterated that the CEDAW General Recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19, affirms that “perpetrators or alleged perpetrators’ rights or claims 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”.

The Inter-American Model Law on the Prevention, Punishment and Eradication of the Gender-Related Killing of Women and Girls at article 10 affirms that “any father subject to criminal proceedings for the crimes of femicide/feminicide, induction to suicide, consummated or attempted, will be suspended the exercise of custody of children, whether or not children of the victim, until a final decision is determined in the criminal process. The custodial rights will be

² The Inter-American Commission on Human Rights (IACHR) Case No. 12.626 Lenahan et Al. v. the United States: www.oas.org/en/iachr/decisions/2011/USPU12626EN.doc

Jessica Lenahan, a victim of domestic violence along with her daughters Leslie, Katheryn and Rebecca Gonzales had obtained a restraining order against Ms. Lenahan’s former husband and father of the children. In 1999, Ms. Lenahan’s daughters were abducted by her estranged husband and killed in front of the police station of Castle Rock (Colorado), after police authorities repeatedly refused to enforce her domestic violence restraining order against him.

³ CEDAW Communication n. 47/2012, available here:

<https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/JurisprudenceSession58.aspx>

temporarily exercised by the appropriate person according to the best interests of the children”.

The Maputo Protocol, at its article 7, explicitly affirms that “in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance”.

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) is the only legally binding instrument on violence against women that has an explicit provision on child custody in such situations. Its article 31 requires States to “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” and that “the exercise of any visitation or custody rights does not jeopardize the rights and safety of the victim or children”. The expert body monitoring the implementation of the Convention’s standards (GREVIO), has found evidence of gender bias towards women in custody decisions and lack of attention paid by courts to patterns of abuse by fathers in all 10 States parties monitored so far.

The experts further discouraged the abuse of the “Parental Alienation”⁴ and of similar concepts and terms invoked to deny child custody to the mother and grant it to a father accused of domestic violence in a manner that totally disregards the possible risks for the child. In this regard, the Committee of Experts of the Follow-up Mechanism to the Belem do Para Convention (MESECVI), in the 2014 Declaration on Violence against Women, Girls and Adolescents and their Sexual and Reproductive Rights, recommends to explicitly prohibit, during the investigations to determine the existence of violence, “evidence based on the discrediting testimony on the basis of alleged Parental Alienation Syndrome”. The experts also expressed concern for the recent inclusion of “parental alienation” as an index term in the new WHO International Classification of Diseases (ICD-11) as a “Caregiver-child relationship problem” that could be misused if applied without taking into consideration above-mentioned international standards that require that incidents of violence against women are taken into account and that the exercise of any visitation or custody rights does not jeopardize the rights and safety of the victim or children. 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.

In conclusion, the Platform reiterates its call that, in determination of custody and visitation rights of children, violence against women is taken into account in all custody cases and that perpetrators’ rights or claims during and after judicial proceedings, including with respect to property, privacy, child custody,

⁴ Parental alienation, while lacking a universal clinical or scientific definition, generally refers to the presumption that a child’s fear or rejection of one parent (typically the noncustodial parent), stems from the malevolent influence of the preferred (typically custodial) parent.

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.

SIGNED

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