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TYPOLOGY OF DOMESTIC VIOLENCE LAWS IN COUNCIL OF EUROPE MEMBER STATES - A PRELIMINARY OVERVIEW

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I. INTRODUCTION

1. Legislation explicitly addressing domestic violence can be found in criminal law, civil law, administrative law (e.g. police law, procedural law), family law and social welfare law. These domains of the law are connected in different ways in different legal systems. Furthermore, many states elaborate on existing laws (for example, with interpretation, regulations, protocols, guidelines or ordinances) to make their application to domestic violence clear. In this paper, I will describe the most important types of legal frameworks in use with examples. Currently, a project on mapping legislation has just begun[1] and will gather information systematically; the present overview is doubtless incomplete.

2. The main sources for this overview were:

- The compendium of legislation in the member States compiled by the Council of Europe updated and published in January 2007;
- Information sent directly by members of the Council of Europe Steering Committee on Equality between women and men during the process of monitoring implementation of Council of Europe Recommendation (2002)5 on the protection of women from violence as well as other information from internet sources gathered in 2007;
- The country reports on actions taken during the Council of Europe Campaign against violence against women including domestic violence, including answers to the Task Force questionnaire specifically related to penalisation of domestic violence, compiled in June 2008;
- The database launched by the UN Department for the Advancement of Women on March 9, 2009; at the time of writing, 37 Council of Europe member states had supplied information on their laws in this area, although many of the entries died not include a description of the laws.

3. Although none of these sources include all member states, no member state is missing from all of them. Time did not permit studying further sources such as CEDAW reports for this overview.

4. It is perhaps useful to recollect that policies towards violence by individuals derive from different historical paradigms.

- The first is the emergence of the modern state with its monopoly of legitimate violence and of retribution and punishment. In this regard, the legitimacy of the state hangs upon its predictable and law-based execution of redress of wrongs, and thus, individuals who use illegitimate violence must be effectively prosecuted and punished. Policy towards illegitimate violence centers on policing.
- The second paradigm derives from the interest of the state in children as future citizens and in the functional family. From this came the first laws for the safety and welfare of children, and we find different types of family law across Europe. Well into the 20th century, the state monopoly of violence did not enter the sphere of the

[1] "REALIZING RIGHTS? Mapping content and assessing impact of EU legislation on violence against women and children": Project funded in the EU Daphne III program 2009-2011, coordinated by the Child & Woman Abuse Study Unit (CWASU, London Metropolitan University, United Kingdom), in cooperation with the International Victimology Institute Tilburg (INTERVICT, the Netherlands) and the University of Osnabrück (Germany).

family; fathers and husbands had the power to use violence with impunity. Family and child welfare law gradually established legitimate state intervention from a welfare perspective. Policy centers on the common good.

- The third paradigm is the most recent: the human rights framework. It is neither concerned with securing the legitimacy of the state, nor does it pursue the interests of the state in family outcomes. Rather, it begins from the rights of the – potential – victim to a life free of violence. Theoretically, a human rights framework ought to assess what measures best serve the safety of victims and best secures their rights. Today there is a variety of opinions on when and how criminal justice prosecution on the one hand, family protection and welfare laws on the other, are fit-for-purpose in a human rights framework.

5. In the different legal frameworks currently being developed to address domestic violence, we can see elements of all three traditions, and depending on the legal and cultural traditions of the country, they can be stronger or weaker. This can lead to confusion when discussing legal frameworks, as there may be different understandings of what "criminalisation" of domestic violence means, and also of what it means to address violence against women as a human rights violation.

6. The Nordic countries, on the whole, can be said to give priority to social protection legislation. Neoclassic criminal law policy is sceptical both of the usefulness of incarceration and the possibility of treatment of offenders; the criminal justice system is understood to aim at general prevention (as opposed to deterrence and individual prevention) by articulating social values through legislation that declares certain acts punishable. Convictions, sentencing and punishment are not considered to have the effect of prevention.[2] It is consistent with this basic philosophy of the role of law when Sweden responds to the Task Force questionnaire by writing: "in the Swedish standpoint, a human rights violation is a violation committed by the state and therefore the only time domestic violence becomes a human rights violation is when the state neglects to enact laws to prevent it". Denmark, Estonia, Finland and Iceland reply that they do not consider domestic violence a human rights violation, as well as Azerbaijan, Hungary, Luxembourg and Malta.

7. The majority of member states regard domestic violence as in itself a human rights violation. A number of states also emphasize the imperative to ensure that these offences are effectively penalized. For example, the first comprehensive law on Family Violence in Europe, in Cyprus (1994, revised 2000) aimed at initiating prosecution ex officio by a specialized team of prosecutors, obligatory reporting to the police was introduced and, when there are children present, the wife is a compellable witness against her husband. In 2008 the UK reports investing heavily in improving the conditions for victims to testify in criminal court in order to secure more convictions, and writes: "We also recognised the need for tougher sentences. In December 2006, the Sentencing Guidelines Council published its definitive guidelines on deciding sentences in domestic violence cases. Called: *Overarching Principles: Domestic Violence and Breach of a Protective Order*, the guidelines were introduced to help make sentencing more consistent, and ensure that the punishment better fits the crime." Both the UK and Spain have introduced specialized courts to handle cases of domestic violence rapidly and to impose punishments and protective measures such as bans on contacting the victim in as many cases as possible, given evidence of violence. Prosecution in all three countries is independent of the wishes of the abused woman, and this is expected to have, in time, a deterrent effect on potential perpetrators.

[2] Niemi-Kiesläinen, Johanna: Criminal law or social policy as protection against violence. In: Nousiainen, Kevät et al. (eds.): Responsible Selves. Women in the Nordic Legal Culture. Aldershot: Ashgate, 2001, pp. 289-309

8. Thus, while all member states reporting to the Council of Europe monitoring framework on Recommendation (2002)5 confirm that both physical and sexual violence to spouses or partners are penalized, and most also confirm penalisation of psychological violence as well[3], the meaning of "penalisation" is not always the same. This is not just a question of how well the laws are implemented, but may also reflect deeper differences in understandings of the role and purposes of criminal justice. Similar issues are present when surveying the existence of different types of protection orders. Such orders may be imposed by the police, the mayor's office, the prosecutor or by judges at one of several different types of court, they may be issued at the request of the victim or on another 's judgement, they may be established as measures of civil law, family law, policing, or as measures anchored in criminal procedural law. Behind the many technical issues of who, when and how there are differences in the underlying legal philosophy: Is protection from the threat of private violence a concern of the state in its obligation to secure social welfare and security, is it an obligation of the police ensuring order and compliance with norms, or is it a service that the state should offer, but not impose unless requested? Measures that sound similar in cross-national surveys may actually have different functions in the legal system. These points should be kept in mind when comparing legal frameworks across Europe.

II. LEGAL MEASURES ON DOMESTIC VIOLENCE

1) Criminalisation

9. A first major domain of legislation is penalization and definition of the acts of violence against partners or ex-partners as offences. There are several approaches to this.

A) Use of existing general criminal laws

10. A number of member states declare that domestic violence is covered by existing criminal law, and that their legal systems do not differentiate crimes against the person by sex or relationship. This "systematic" approach may be defended with the view that there is no need for specific laws on domestic violence: Assault against a person is punishable; women are persons in the law. It could even be seen as a step backward to define a specific offence just to protect women.

11. Denmark reports for example: "Domestic violence against women is a criminal offence in accordance with Section 244 of the Danish Criminal Code, which is the general provision regarding violence. Section 244 states, that any person who commits an act of violence against, or otherwise attacks the person of others, shall be liable to a fine or to imprisonment for any term not exceeding three years." Finland writes: "It is characteristic of the Finnish criminal legislation that penal provisions are very general in nature, and, for example, the sex of a victim is not relevant as regards determination of punishment. In addition, including the repetition of offences as essential elements of an offence could also lead to problems of interpretation of the

[3] See Hagemann-White, Carol : Protecting women against violence. Analytical study of the results of the second round of monitoring the implementation of Rec (2002) 5 on the protection of women against violence in Council of Europe member states, Strasbourg 2008

principle of *ne bis in idem*. Offences against a person's life or health are punishable under the Penal Code, chapter 21, which includes e.g. penal provisions on assault (section 5) and aggravated assault (section 6)."

12. Statements that domestic violence is punished in the same way as all other violent acts were made by Andorra, Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Denmark, Estonia, Georgia, Germany, and Lithuania. A few of these member states are considering introducing a specific offence, but most are not.

B) Domestic violence as an aggravating circumstance

13. Some member states use existing criminal law with the addition of a provision that violence is an aggravated offence when used against a family member, a spouse or ex-partner, or a close person, and should thus receive a higher sentence. There seem to be two types of such provisions. While some countries have legislated specifically to define such cases, others have general provisions on circumstances that could be reason for a higher sentence, and explain that these general provisions can also be used for domestic violence.

14. Specific legislative provisions are more frequently (but not exclusively) found in French speaking countries and countries that have some historical links with the French legal tradition. **France** reports for example: The Law of 4 April 2006 has introduced in the French Criminal Code article 132-80 which contains a general definition of aggravating circumstances in relation to offences committed among intimate partners: "In the cases envisaged by the law, the penalties incurred by a crime or a misdemeanour are aggravated if the crime is committed by a spouse, a common-law spouse or an intimate partner. The aggravated circumstance envisaged in the first paragraph is equally applicable to offences committed by a former spouse, former common-law spouse or former intimate partner. The provisions of the present paragraph are applicable if the crime is committed because a relationship between the victim and perpetrator has existed."

15. Similar provisions are to be found in Belgium, France, Greece, Iceland, Luxembourg, the Netherlands and Turkey. In Cyprus, the Violence in the Family Law 2000 is even more specific, listing the offences that, when committed within the family, are to be treated as particularly aggravated, with guidelines on how the penalty in the penal code may be increased to reflect this.

16. By contrast, **Finland** cites general provisions and indicates that these can be applicable to a woman abused by her partner: "At present the mode of committing an offence and its harmful effects as well as circumstances related to the victim can be paid attention to according to the provisions on imposing a punishment in chapter 6 of the Penal Code. According to the said provisions a punishment more severe than the normal punishment can be imposed in cases where the assault is aimed at a person that is in a weaker position than the perpetrator or where the person has otherwise limited capacity to defend herself or himself, i.e. at a woman or child and/or in which the assault is repeated." Sweden introduced the new offence of "gross violation of a woman's integrity" in 1998, which mainly functions to raise the penalty when violence is repeated, and also cites general provisions for higher sentences when the perpetrator is especially ruthless or exploits another person's vulnerability. Such general provision with applicability to domestic violence cases are also reported by Albania and Andorra, and doubtless exist in a number of other member states.

17. The **UK** has taken a third path between the general and the specific definition of aggravated cases. With explicit reference to the area of domestic violence, elaborated sentencing guidelines have been issued listing circumstances that should be considered to define the offence as more serious. In these guidelines, the fact of acts being committed within a relationship is not itself an aggravating circumstance. Instead, the guidelines essay to make clear what it is about domestic violence that can make this form of violence against women particularly harmful. Abuse of trust, exploiting vulnerability, or forcing the victim to leave the home, for example, can be aggravating circumstances. This approach avoids treating any and all hurtful or aggressive actions as equal, and thus seems adapted to a human rights framework. The guidelines do not have the status of legislation and do not change the definition of punishment accruing to offences.

C) Specific offence in the Penal Code

18. Relatively few member states have introduced a specific offence in their Penal Codes to criminalize **domestic violence**. Most of these paragraphs are also framed to apply to child abuse and other forms of family conflict as well. They include:

19. **Croatia:** “family violence” is a misdemeanour defined as: "Any application of physical force or physical coercion against the integrity of a person, any other practice of one family member that can cause or give rise to the threat of causing physical and psychological pain, feeling of fear or personal endangerment or violation of dignity, physical assault regardless of whether physical injury was inflicted, verbal attacks, insults, cursing, and calling names and other forms of rough molestation, sexual harassment, stalking and all other forms of molestation, wrongful isolation or limitation of freedom of movement or communication with third persons, or destruction of property or an attempt to do so."

20. **Czech Republic** introduced “battering a person living in a common flat or house” into the penal code in 2004.

21. **Italy:** “Maltreatment within the family” carries a penalty of imprisonment from 1 to 5 years. The article specifies that in order to proceed for a crime of “maltreatment”, the violence committed must include a set of violent acts (psychological as well as physical or sexual) repeatedly committed over an extended period of time, even if no violence takes places between one event and the next. Maltreatment can apply both to married couples and de-facto relationships. It is further noted that the Criminal code contains few provisions specifically referring to domestic violence (understood to refer to violence between intimate partners) and that most cases would fall under general provisions.

22. **Montenegro:** “Violence in the family”: “Anyone who by use of violence or by an impudent or arrogant behaviour endangers peace, physical integrity or mental condition of a member of his family or family community shall be sentenced to a fine or imprisonment not exceeding one year.”

23. **Norway:** “Domestic violence”:

“Any person who by threats, duress, deprivation of liberty, violence or any other wrong grossly or repeatedly maltreats

a) his or her former or present spouse,
b) his or her former or present spouse’s kin in direct line of descent,

c) his or her kin in direct line of ascent,
d) any person in his or her household, or
e) any person in his or her care

shall be liable to imprisonment for a term not exceeding three years. If the maltreatment is gross or the aggrieved person dies or sustains considerable harm to body or health as a result of the treatment, the penalty shall be imprisonment for a term not exceeding six years. In deciding whether the maltreatment is gross, particular importance shall be attached to whether it has endured for a long time and whether such circumstances as are referred to in section 232 are present. Any person who aids and abets such an offence shall be liable to the same penalty."

24. **Poland:** Family violence: Art. 207 penal code (1997): Whoever mentally or physically mistreats a person close to him, or another person being in a permanent or temporary state of dependence to the perpetrator, a minor or a person who is vulnerable because of his mental or physical condition shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.

25. **Serbia:** "Domestic violence" The 2002 Amendments to the Criminal Code classified domestic violence as a separate criminal offence. Revision in 2005 brought changes in the description of the criminal offences of domestic violence, milder sanctions for any form of execution of the criminal offence of domestic violence, and, particularly, violation and infringement of family law measures protection from domestic violence are classified as a separate criminal offence and as such sanctioned.

26. Specific offences that apply only to violence within an existing or former couple relationship, and not to any form of aggression within the family, have a clearer focus on violence against women, but laws specifically penalizing **intimate partner violence** are rare in Europe. The databases searched for this overview yielded only the cases of Spain and Portugal; the concept of a "close person" in Slovakia also seems intended to apply primarily to adults.

27. **Portugal:** "Domestic violence": Domestic violence is for the first time a typified crime (Article 152), punishable by 1 to 5 years of imprisonment. This crime consists in the infliction, whether repeatedly or not, of physical or psychological mistreatment, including corporal punishment, restriction of freedom and sexual offences to a partner, ex-partner, person of the same sex or different sex that have maintained or have a relationship analogous to that of partners, or to a person who is vulnerable due to age, deficiency, sickness, pregnancy or economic dependence living with the perpetrator.

28. **Slovakia** has established the concept of "Maltreatment of a close person" in the penal code to address intimate partner violence, but since the amendment in 2005 the concept also functions to define aggravated cases of offences penalized in general. "A close person for the purposes of criminal acts of blackmail pursuant to Section 189, rape pursuant to Section 199 (2), sexual violence pursuant to Section 200 (2), sexual abuse pursuant to Section 201 (2), maltreatment of a close person or ward pursuant to Section 208 or dangerous threats pursuant to Section 360 (2) shall also be understood to be a former spouse, cohabitant, former cohabitant, parent of a joint child or a person who is a close person in relation to them pursuant to paragraph 4 (see above), as well as a person, who lives or lived with the offender in a common household."

29. In **Spain**, "gender violence" was both criminalized as a specific offence and addressed in the comprehensive Organic Law 1/2004 of 28 December on

Comprehensive Protective Measures against Gender Violence. It defines the offence as "violence inflicted on women by their present or former spouses or men with whom they maintain or have maintained an emotional relationship, whether or not in a common dwelling". The law is interpreted to call for a more severe penalty when men exercise violence against women in close relationships, since gender violence is located in the context of structural gender inequality. A woman who commits an analogous act against her male partner would be penalized under the general criminal code and thus receive a lower penalty.

30. In **Sweden**, the new offence, gross violation of a woman's integrity, was introduced into the Penal Code in 1998. It deals with repeated punishable acts directed by men against women who have or have had a close relationship with the perpetrator. "Gross violation of a woman's integrity" means that if a man commits certain criminal acts (assault, unlawful threat or coercion, sexual or other molestation, sexual exploitation, et cetera) against a woman to whom he is or has been married or with whom he is or has been cohabiting, he shall be sentenced for gross violation of the woman's integrity, instead of for each single offence he has committed. Since the acts concerned must in themselves already be criminal, this offence can also be seen as a variation on the approach of defining aggravated cases. It combines the two approaches.

D) General remarks on penalisation through specific offences

31. Only Spain and Sweden have introduced any gender-based definitions of domestic violence into their criminal codes. The concept of an aggravating circumstance calling for a higher penalty seems more likely to be introduced with a focus specifically on violence by an intimate partner, while specific offences in the penal code tend to comprise violence in the family in very general terms and often take special care to include child abuse, abuse of elders, as well as violence between siblings or even other relations. This lack of focus may lead to problems since criminalisation has very different functions and uses in relation to preventing child abuse, for example, than in dealing with adults. Paragraphs such as those in Croatia, Montenegro or Norway could even be used to criminalize children who act out aggressively against their parents. In fact, most such acts would probably not be criminalized, but this suggests some lack of legal clarity about what is or is not an offence.

32. A number of member states are presently considering introducing a specific offence or report that legislation is being drafted.

2) Protection measures

33. By far the largest proportion of specific legislation addressing domestic violence is focussed on measures for protection of victims from further abuse after violence has been committed. Many laws entitled "Law on Domestic Violence" or "Family Violence Act" or "Protection against Violence Act" do not address criminalisation or punishment, but introduce tools and procedures aimed at the safety of victims. In some cases, the member state has passed two separate laws at different points in time, one defining a criminal offence and another introducing protective measures.

34. In order to gain an overview of what measures exist, in the second round of monitoring implementation of Council of Europe Recommendation (2002)5 on the protection of women against violence judicial protection orders were differentiated into eviction orders (removing the perpetrator from the residence for a specified

period, or permanently), restraining orders (placing other limits on the actions of a perpetrator such as requiring him to stay away from specific areas, or forbidding use of violence) and non-molestation orders (specifically ordering the man not to contact or harass the woman). A closer look at the various laws that have been passed show that these terms are not uniformly defined, and the data are thus of limited validity.

35. The databases for the present study often do not include enough information for a clear picture of just what kinds of orders can be issued, by whom, under what conditions, and how they are enforced. Indeed, the powers of the judiciary, the prosecutors and the police to act to protect citizens from danger are not something that can be easily described with any accuracy in a summary of 400 words. Thus, a comparative analysis of just what protection different countries offer to safeguard women's human rights is a question for the research now beginning. For this overview, three types of legal frameworks can be described. The accuracy of placement of each member state in one of these categories is uncertain, when the available information was not extensive.

36. It should be noted that many (but not all) European legal systems have a general institution of court injunctions to prevent a possible criminal act. The applicant for an injunction must show probable cause, and the need to prevent irreparable infringement of rights. For example, in disputes over property one party can be temporarily prohibited from selling or destroying the property until the court has examined the applicant's claim to ownership. Such institutions of temporary injunctions can, of course, be applied to any threat of violence without specific legislation. The need for specific laws arises with domestic violence because the potential victim has voluntarily shared her residence, property and family with the potential perpetrator, and legal tradition has been to avoid intervention in this sphere. Nonetheless, there is no absolute necessity to introduce specific restraining orders to prohibit violence or harassment if the legal system is able and willing to use general measures. At present count, about two thirds of Council of Europe member states seem to be introducing specific legislation. This is particularly needed if the aim is to deny a perpetrator the right to visit or live in the common residence, which usually requires an explicit legal foundation.

37. **Note on terminology:** The measures discussed in this section do not presuppose a criminal conviction, and there is thus no legal finding of guilt or innocence, the terms "victim" and "perpetrator" are used throughout. It should be understood that in civil law protection measures, the assessment is based on the balance of probabilities. For this reason, various safeguards against possible injustice are employed, such as imposing measures for a limited time only, requiring a hearing of both parties, or submitting an emergency measure to a second instance for examination. There is no space to discuss such details here. The general assumption is that the risk to women's fundamental rights to life, liberty and personal integrity justifies restrictions on the sphere of action of a potential or alleged perpetrator, if redress is available in case these measures should be unjustly imposed.

A) Combining police law and civil law: immediate intervention ex officio and optional court injunctions

38. This strategy was pioneered by Austria in 1997 and has become the standard for a larger region of German-speaking countries and neighbouring member states. It is intended to establish immediate physical distance between the perpetrator and the

victim, to prevent any further intimidation, and to give the victim both time and access to information and advice, so that she can reflect on her situation and prepare steps towards her future safety. It comprises the following elements:

- The police have the power and the duty to expel a person who poses a threat of further violence immediately from the residence for a period of 7, 10 or 14 days. This is an ex officio intervention with no regard to a complaint or request by the victim, based on the police duty to protect citizens from danger.
- The state ensures services that offer competent advice and information without delay; the most usual form is to establish "intervention centres" authorized to receive information directly from the police and to contact the victim.
- The victim is encouraged to apply to the court for medium-term injunctions. These can transfer the sole right to the residence, regulate custody or prohibit the perpetrator from contacting or harassing the victim or from entering the surrounding areas of the home, workplace or children's schools.

39. There is no direct connection to criminal law, since the police eviction is based on the assessment of probable future violence or possible escalation of violence. This does not, of course, eliminate the duty of police to investigate when there are signs that a criminal offence has been committed.

40. Following this temporary measure, court injunctions are civil law measures available to the applicant on request; advice centres may be able to support the request, but such measures are not imposed unless the person needing protection asks for them.

41. While there is variation in the details, this combination of strong and direct, but temporary police intervention with empowerment of victims to seek injunctions and other civil law remedies (such as divorce) has been implemented in Austria, the Czech Republic, Germany, Liechtenstein, Luxembourg, the Netherlands, Switzerland, Slovenia, and in modified form in Norway and in Georgia.

42. **Austria** reports on this legal framework as follows: Under the Protection against Violence Act, all persons living in a flat or house (e.g. wife, de-facto wife, children, relatives, but also subtenants, fellow occupants, etc.), regardless of their proprietary situation, may request that police expel and ban a violent cohabitant from the flat or house. The ban from the home is applicable to the flat or house and its immediate neighbourhood such as entrance or access road to the home.

43. Police may impose an expulsion/ban from the home on the spot, as well as in cases when victims have turned to the police after abuse or for fear of further violence. Once an expulsion/ban on the offender has been imposed, the victim has no say in whether she wants this measure or not.

44. If the violent offender contravenes the ban on the home, he commits an administrative infraction (§ 84 CCP) which entails the imposing of a fine. Even if the endangered person lets the violent offender in of her own accord, the offender makes himself liable to prosecution. The ban on the home is upheld for a maximum of 10 days. If within these 10 days a temporary injunction is sought from the local court, the ban will be prolonged to a maximum of 20 days. If the victim deems long-term protection necessary, within the 10 days of the ban from the home exercised by the police a temporary injunction can be sought from the local court. As a consequence, the ban from the home exercised by the police will automatically be prolonged until the court's decision, however, to a maximum of 20 days. Therefore, it is important to

seek an injunction as quickly as possible.

45. Intervention Centres established under the Protection against Violence Act provide assistance in the process of seeking the injunction. With the temporary injunction the protection granted may be prolonged to up to three months. However, if proceedings under family law (e.g. divorce proceedings) have been initiated, the protection is extended until the end of the proceedings. By means of the temporary injunction staying at certain locations such as the work place or school of the endangered person as well as making contact can be prohibited. A temporary injunction can also be sought irrespective of an expulsion or ban from the home exercised by the police.

46. Legislation introducing this approach is sometimes introduced only as an amendment to police law, while the intervention centres do not appear as legislation but as services. **Lichtenstein** for example summarizes the 2001 Violence Protection Act: "This Act contains a provision providing for protection against domestic violence, which includes the right to expel potential perpetrators from the home as a precautionary measure. Where a grievous attack on the life, health or liberty of a person is anticipated, the police may, as a precautionary measure, expel the potential perpetrator and issue a temporary restraining order, thereby providing adequate protection for the potential victim of domestic violence. This provision is meant to counter previous practice, whereby the victims of domestic violence (mainly women and children) were forced to abandon the home."

47. In the Netherlands and Norway, the prosecuting attorney is involved in, or has the authority to issue an eviction order, however, this apparently does not imply that criminal prosecution has been initiated, but rather expresses a preference not to delegate the decision to the police alone. Thus, the ban on visits (including expulsion from the residence) in **Norway** can be imposed "if there is reason to believe that a person will otherwise

a) commit a criminal act against another person,
b) pursue another person, or
c) in any other way disturb another person's peace. "

48. This is a preventive measure to ensure safety, and may be imposed by request of the person to be protected or if it is required in the public interest. It is limited to three months, and must be submitted to the court within five days.

49. Luxembourg also requires the police to ask authorisation from the state prosecutor, and also emphasises the interlocking functions of different measures. It reports: The Law on Domestic Violence of 8 September 2003 allows for the immediate expulsion from the home of a perpetrator of domestic violence. The provision promulgates :

" In the framework of its preventive and protective measures, the police, authorised by the Office of the Public Prosecutor, may expel from the home any person suspected, in light of existing evidence, to commit or re-commit an offence against life or limb of a person with whom he or she is cohabitating."

The duration of the expulsion order shall end on the 10th day following the day of its entry into force, subject to the provisions contained in Article 1017-1 of the new Code of Civil Procedure. Article 1017-1 of the new Code of Civil Procedure envisages:

In the event of an expulsion order issued pursuant to Article 1 of the Law on Domestic Violence in favour of any person listed in the following paragraph, this person may request the President of the Court (tribunal d'arrondissement) to issue against the expelled person, for a maximum period of three months following the expiry of the initial expulsion order, a ban on returning to the home, irrespective of his or her rights to the home.

50. Expelling a perpetrator of domestic violence is a measure which aims at

- immediate prevention of imminent acts of domestic violence;
- making perpetrators assume responsibility for their acts, in particular with a view to long-term prevention;
- raising awareness of the general public of the serious and specific nature of domestic violence.

51. As the expulsion by itself is insufficient to achieve these objectives, the law devises a comprehensive strategy, composed of five essential elements inextricably linked to one another: aggravating circumstances, expulsion of a perpetrator from the home by the police, summary proceedings, strengthening the role of victims' rights organisations and data collection.

B) Protection orders issued directly by the civil courts

52. With legislation of the next type, direct police intervention is not included or is limited to situations calling for arrest, while the power to issue restraining orders of any kind is reserved to the courts. Protection orders are, as in the previous model, independent of criminal prosecution, but there is considerable variation in the conditions that may lead up to the order. While some member states hold with a strict rule that only the person who seeks protection can apply for injunctions, a number of specific laws introducing restraining orders allow third parties to apply for an order in on behalf of the victim.

53. For example, the Bulgarian Protection against Domestic Violence Act of 2005 entitles the victim to turn to the court for protection. Court orders may require the perpetrator to refrain from committing domestic violence; remove him from the joint residence for a specified period; prohibit his visiting the home, place of work or other places; give provisional custody of a child to the parent who did not perpetrate violence, oblige the perpetrator to attend specialized programs; or direct the victims into rehabilitation programs. The Law created a **special urgent civil procedure** that is a *sui generis* procedure, although similar to the quick civil procedure. The law contains also elements of criminal procedure (the perpetrator is to be fined) but remains within the framework of civil law, which provides for a burden of proof that is more favourable to the victim of domestic violence. Proceedings to have such an order issued may be initiated on petition of the victim; by request of the Director of Social Assistance Directorate; by petition of a brother or sister or of an individual who is direct kin to the victim.

54. The Bulgarian Law applies to "any person, who has become victim of domestic violence, perpetrated by spouse or former spouse; person, with whom he/she is or has been in a de-facto conjugal co-habitation; person, who has fathered her child; ascendant; descendant; brother or sister; relative by marriage up to the second degree; guardian, custodian or foster parent."

55. Albania added eviction orders to the Family Code in 2003; in 2007 the law

"On Measures against Domestic Violence" came into force. It is similar to the Bulgarian law in covering all family relationships and in providing for a quick procedure in civil courts. In addition to the regular protection order, there is an *emergency protection order* that can be issued within 48 hours, when the abuser poses a direct and immediate threat to the safety, health or well-being of the victim or other family members.

Here, too, the petition for emergency protection orders may be presented by:

a. The victim him/herself;
b. The victim's legal representative or attorney;
c. The police/the prosecutor;
ç. A family member of the victim;
d. Representatives of the social services.

56. Similar frameworks for protection orders are legislated in Cyprus, in Bosnia and Herzegovina (in the two entities) and (with less detail) in Romania.

57. In **Turkey** as well, protection orders can be granted on application by the victim "or upon the application of any other person who is aware of such domestic violence". The *Family Protection Law* No 4320 entered into force in January 1998. The scope of the Law was widened and the revised law entered into force on 1 March 2008. Under the law, family court judges may decide all precautionary measures to be taken against the perpetrator, including sending the perpetrator away from the spouse's house. When and if the Family Court Judge deems appropriate, he/she can, under the law, order the perpetrator to "apply to a healthcare institution for examination or treatment".

58. Among the member states that have introduced protection orders by specific laws, there seem to be few that follow the traditional civil law principle that application for a protection order requires the initiative or the consent of the victim. The available information suggests that this is the case in Finland, Italy, and Switzerland.

59. **Finland:** The Act on Restraining Orders (1998) was introduced as a measure that would prohibit any attempt to contact the protected person. It was supplemented in the beginning of 2005 so that it would also be applied when the person protected by the order and the person on whom the restraining order has been imposed live in the same household. Previously, a restraining order could not be ordered if the parties concerned were living together. The new provisions on the inside-the-family restraining order may also be applied in case the persons live together for reasons other than forming a partner relationship. A person imposed an inside-the-family restraining order should leave the residence and not return. He is not allowed, either, to meet or contact in any way the person protected by the order. It is also prohibited to stalk the person protected. Such an order may also be extended to cover staying in some other given place, the vicinity of the shared home, for instance. This seems to be a measure that the court may impose on request of the person seeking protection, and not by third parties.

60. Similarly, **Italy** introduced "barring orders" in response to the demand of victims to be able to stay in their homes. The 2001 Law established that the judge can order the immediate separation of the violent relative from the places frequented by the family (for example the work place, the school of the children), if his behaviour causes serious prejudice to the physical or moral integrity or to the personal freedom of the

family, when the fact is not liable of persecution.

61. The Civil Code of **Switzerland** was amended in 2006 and the provisions concerning the protection of individuals (Art. 28 Civil Code) were supplemented by general measures against violence, threats or harassment as well as specific measures concerning domestic violence. The legislation concerns not only domestic violence but also other forms of violence such as stalking. The measures that may be ordered by the courts are, in particular, prohibiting the person accused of such acts from coming within a certain distance of the victim's home or banning them from certain places or from getting in touch with the victim. If the victim and the perpetrator of the violence share the same dwelling, the court may also order the latter's removal from the dwelling for a specific period of time.

62. Overall, it seems that member states either use policing measures as in group (A) to ensure immediate separation of perpetrator and victim; in this case they generally regard requests for court injunctions as a citizen's right not to be taken over by any third party, or they rely on direct court actions as in group (B), and then see a need for third parties take the initiative, since it can be both difficult and dangerous for a woman living in a situation of domestic violence to turn to public authorities for help.

C) Protection orders issued in the course of criminal proceedings

63. Although many of the specific laws relating to domestic violence focus solely on civil and family law and social protection measures, there are some that have introduced court injunctions and restraining orders in the context of criminal law only, or in both civil and criminal law.

64. Some of these laws are procedural and may take effect to the exclusion of civil injunctions, but be intended to deal with the more severe cases. For example, in France the Act of 12 Dec. 2005 "relates to recidivism and has made it easier to ban the perpetrator from the victim's home at all stages in proceedings before the criminal courts, as well as providing the possibility of medical, social or psychological treatment where necessary". Iceland also amended the criminal procedure law in 2000 to allow for protection orders.

65. **Hungary amended** the criminal code in 2005 to introduce a restraining order as a rule of conduct under the supervision of the probation officer. This can be applied when the court suspends the sentence on probation, or releases the person sentenced to imprisonment on parole. In the criminal procedure code, restraining can be ordered in cases where there is suspicion beyond reasonable doubt of a crime to be punished with imprisonment. This is the case when it may be assumed that if the perpetrator remains in the residence, he will influence or threaten the witness of the crime, thereby defeating or making the evidentiary procedure more difficult, or would commit the previously attempted or another crime against the victim; the restraining order is imposed instead of pre-trial detention, and aims to protect the victim so that she will testify, in order to attain a conviction. Within this framework, evidence for criminal prosecution must be secured before any protection for the victim can be ordered.

66. **Estonia** has a dual model, having introduced new paragraphs in the Code of Civil Procedure in 2006 that can be used in cases of domestic violence, but are framed generally: "In order to protect the personal life of a person or other personality rights, the court may apply a restriction order or other measures based on § 1055 of the Law of Obligations Act. Such measures may be applied with a term of up to three years."

The law further states: "Before applying a restriction order or another measure for protection of personality rights, the court shall hear the person with respect to whom application of such measure is requested and the person in the interests of whom proceedings are conducted for application of such measure. Where necessary, the court shall also hear the persons close to the persons specified above, and the rural municipality or city government or police authority of the residence of the persons." The requirement to hear both parties suggests that such measures will not provide immediate protection. When a criminal case is being prosecuted there is also provision for urgent temporary restraining orders prohibiting any contact in order to protect the personal life of a person or other personality rights. Such a temporary restriction order can be applied only with the consent from the victim. By the request from the victim or the prosecuting authority the conditions of the temporary restriction order can be changed or it can be annulled.

67. **Slovakia** in its Law on Violence against Close Persons empowers the court to issue temporary restraining orders including eviction from the residence, on petition by the victim, but requires that criminal prosecution should follow. "Upon issuing an emergency ruling, the court lays the obligation upon the plaintiff to file a petition for the commencement of proceedings in a court or arbitration tribunal within a specified period; if concerning proceedings that can commence without petition, the court shall issue a decision on the commencement of proceedings." This is particularly significant because prosecution for domestic violence requires the consent of the victim: "criminal proceedings cannot start and, in the case that it has already started, cannot continue, if the victim did not give his/her consent or withdrew consent to the criminal proceedings. This right to withdraw the consent to criminal proceedings pertains to specific crimes, such as violence against the person, damage of health, limitation of personal freedom and rape."

68. Member states that pursue an aggressive prosecution policy, giving the victim no right to withdraw consent, such as Portugal, Spain and the UK, link the protection measures to the criminal procedure and may impose them not only on request of the victim, but also when they are deemed in the public interest, and then possibly even against the explicit wish of the victim.

69. Finally, there are a few member states, notably Greece and Monaco, which have introduced a mediation procedure in the criminal law on domestic violence. There is no mention in the databases of measures to ensure the safety of women in case of mediation proceedings.

D) Specific Laws on Protection of Women against violence: description not available in detail

70. In the databases, a number of recent laws are reported that aim at protection from domestic violence, but either descriptions in English are not yet available or the descriptions do not give a clear picture of the conditions under which protection are issued.

71. For example, **Georgia** reports to the UN database: "The *Law on the Elimination of Domestic Violence, Protection and Assistance of the Victims of Violence* was prepared and adopted on May 25, 2006. Its aim is to create a foundation for the protection of the rights and freedoms of family members recognizing the equality of their rights, physical and psychological security, legal guarantees for the protection of family values, as well as protection and rehabilitation of the victims of violence. The law outlines the main characteristics of domestic violence, specifies legal and

organizational issues for the identification and elimination of domestic violence, as well as guarantees for social and legal protection and assistance of the victims of domestic violence." This summary does not explain what guarantees of protection can be given and who is authorized to give them.

72. Countries with specific laws on domestic violence that include protection orders, or in which the court is mandated to "impose necessary measures" either directly or by way of confirming the actions of another authority such as the police, include Greece (2006) Ireland (2002), Romania (2003) San Marino (2008), the former Yugoslav Republic of Macedonia (2004), the Ukraine (2001). For these member states, the present level of information is insufficient to assign them clearly to the above categories.

73. There are also a number of procedural laws intended to ensure that protection is given effectively and quickly, for example in Croatia and in Malta; these would need to be studied in the context of the legal system concerned.

E) Remarks

74. A number of questions are raised that cannot be answered in the present cross-national overview.

- If protection orders depend on criminal prosecution, and without some protection women are prevented from testifying by realistic fear of reprisals or intimidation, it seems likely that neither protection orders nor penalisation will occur. Do some member states have legal provisions to resolve this dilemma?
- Under what circumstances should restraining or protection orders be imposed by authorities or initiated by third parties without the agreement of the victim or against her wishes?
- The police duty to protect citizens from imminent danger justifies temporary measures against the wishes of the endangered persons, as in the case of fire or flood. For domestic violence, there is no defined point when danger is past. At what point in time does protective intervention cross the line into infringement of fundamental rights of women?
- When measures of protection require court decisions, how can legal frameworks ensure that the measures are rapid and effective (including enforcement) and thus provide real safety?

3) Laws obliging the state to provide services to support victims

75. The decisions of the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) on the cases against Austria and Hungary made it clear that states party to the convention are obliged to provide women effective protection against violence in every individual case. While the lack of adequate police response was a main aspect of these cases, provision of services such as places of safety, competent information and advice can be understood in the context as part of the human rights obligations of the state.

76. The data bases provide relatively little information on legislative guarantees for services and support (note that this is different from mapping the actual provision of services!), and there does not seem to be a widespread understanding that this kind of legislation, interwoven as it is with the system of social services that states generally offer, is needed. Monitoring surveys have generally not asked about such legislation.

77. **Denmark** does, however, report to the UN database laws intended to give women who suffer domestic violence the right to services:

78. "In 2004, the Danish Government introduced a new article into the Act of Social Service containing the duty for municipalities to provide temporary accommodation facilities for women who have been exposed to violence, threats of violence or a corresponding crisis in relation to family or cohabitation relationship. The woman may be accompanied by children and will receive care and support during their stay.

79. Shelters or temporary accommodation facilities are not free of charge for the woman and her children. The municipality council shall stipulate a tariff for each individual municipality service. The state shall reimburse 50% of the costs incurred by municipal authorities in respect of accommodation facilities under article 109. In certain cases a dispensation for the payment is possible, or the municipality will cover the costs.

80. In 2008 the Danish Government introduced new paragraphs in the Act of Social Service requiring municipalities to appoint advisors to victims of violence (women with children). After the women and children's stay at a Shelter for battered women, the advisors assist them into a new life in relation to housing, work, schools, day-care for the children etc."

81. Norway is also planning to introduce shelters as a statutory service.

82. Legislation in Slovenia and the UK has made women who have to leave a violent partner eligible for publicly subsidized housing.

III. SUMMARY

83. Legislation in Council of Europe member states most frequently introduces or regulates protection orders. These focus on imposing restrictions of the apparent perpetrator of violence to ensure that he does not enter the dwelling, harass, attempt to meet or intercept, or to contact the woman who is to be protected. These restrictions may be imposed by an authority ex officio, and the possible duration varies.

84. Specific provisions for penalisation of domestic violence as such are less frequent. Relatively few member states set up legal frameworks so as to pursue a course of prosecution and punishment regardless of the wishes of the victim, seeing this as both an obligation of the state and a potential way of actually eliminating violence against women. The reports to the various databases suggest that, with notable exceptions, relatively little faith is placed in the probability or the utility of obtaining a significant proportion of convictions.

85. Legal definitions of domestic violence are rarely gender-based and tend to define harmful acts between family members in a very general way, in particular using a framing that includes child abuse and elder abuse as well. These definitions are often to be found in laws that only lay out civil law or procedural remedies, and thus do not have a clear application to criminal law. With the broader definitions it may be questioned how far they could actually be implemented into criminal law. As a result, the protective measures are legally not well articulated with the penal codes.

86. Across a wide variety of approaches, there seem to be some "spheres of affinity" within Europe; thus, the definition of violence against a spouse or ex-partner as an aggravated offence seems widespread in French-speaking countries and countries with affinities to the French legal tradition, while the model based on coordinating policing with civil-law options has spread across the German-speaking countries and their neighbours. Member states that joined the Council of Europe after 1990 are more likely to institute a legal definition of domestic violence, which seems to be found useful in lending private violence the status of a matter of public interest.

87. The possibility of establishing the victim's right to safety, protection, services and justice in a legal framework seems to have received less attention than more conventional frameworks.