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FEASIBILITY STUDY FOR A CONVENTION AGAINST DOMESTIC VIOLENCE

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CONTENTS

Introduction

- 1. The phenomenon of domestic violence: background information**
 - 1.1 Aspects of victim-perpetrator relationships and the scope of the problem**
 - 1.2 Types of violence**
 - 1.3 Prevalence of domestic violence**
 - 1.4 Repetitive victimisation and psychological impact**
 - 1.5 Social attitudes: on silence and ambivalence towards domestic violence**
 - 1.6 Help-seeking behaviour**

- 2. Initiatives and activities to tackle domestic violence, including existing international legal instruments**
 - 2.1 International and regional instruments relating to domestic violence**
 - 2.2 Current legislation within Council of Europe member states**

- 3. A legally binding international instrument on domestic violence: preliminary conclusions**
 - 3.1 Analysis of the need for a legally binding instrument**
 - 3.2 The potential of the Council of Europe**

- 4. Points to consider in a Council of Europe convention on domestic violence**
 - 4.1 Basic requirements: the need for coherent and evidence-based instruments**
 - 4.2 Purpose and scope**
 - 4.3 Prevention: awareness raising, education and information distribution**
 - 4.4 Substantive criminal law**
 - 4.5 Civil law: intervention and prevention**
 - 4.6 Protection of victims**
 - 4.7 Investigation, prosecution and procedural law**
 - 4.8 Monitoring mechanism**

Introduction

Domestic violence constitutes a profound attack on individual victims, but also on society. It violates a central value which is of great concern to the Council of Europe: promoting safety and security in the community at large. If the well-being and physical integrity of a large number of fellow citizens is chronically and structurally endangered in their home and family – the very place where they should be able to expect safety and security – then society has a serious problem. Violence in intimate relations is severely disruptive and exacts a high price, both in a material sense and in a non-material and moral sense. It is therefore crucial that measures be taken to curb domestic violence and to address its consequences when it occurs. This report assesses whether a Council of Europe convention on domestic violence would be a viable measure at the current point in time.

The first chapter deals with several aspects of the phenomenon of domestic violence which are central to its understanding. The focus is on the specific characteristics of *domestic* violence, as distinguished from other, more general forms of violent victimisation as well as from violence against women in general.

A number of initiatives and instruments have been developed both nationally and internationally to tackle violence against women, some of which touch on domestic violence either directly or indirectly. In our second chapter, we briefly address the most significant and relevant accomplishments so far, both international ones (2.1) and national ones within Council of Europe member states (2.2).

In the third chapter, we reflect on two issues: the *need* for an international legal instrument to combat domestic violence (3.1) and the *potential* of the Council of Europe for creating such an instrument (3.2).

The final chapter highlights the major issues that must be considered in drafting a future, legally binding instrument. After identifying some important basic requirements (4.1), we focus on the purpose and scope of a convention on domestic violence (4.2), prevention measures (4.3), substantive criminal law (4.4), civil law (4.5), the protection of victims (4.6), investigation, prosecution and procedural law (4.7) and a monitoring mechanism (4.8).

Our study weighs the available information to determine whether an international legal instrument is necessary and feasible, and whether its implementation will help to combat domestic violence through national and international means. We conclude that the effort to curb domestic violence would benefit from a comprehensive form of international legislation encompassing both criminal and non-criminal dimensions and solutions. It would serve as a general framework and reference point for the Council of Europe member states.

1. The phenomenon of domestic violence: background information

1.1 Aspects of victim-perpetrator relationships and the scope of the problem

Child abuse, elderly abuse, interpersonal or partner abuse

In a literal sense, domestic violence refers conceptually to violence taking place in the home. It thus includes various forms of violent behaviour as perpetrated against different categories of victims. It can involve violence by parents or caretakers against children (child abuse and neglect, sexual abuse and exploitation), violence by children against parents or grandparents (elder abuse) and violence between partners (interpersonal violence or IPV). This means we have to clearly determine the definition and scope of the domestic violence concept as employed in this feasibility report before we examine the scope of any legal instrument such as a convention.

The social and psychological dynamics underlying the various forms of violence are very different, especially in terms of the psychological and material dependencies between victims and perpetrators. The power differentials that prevail in abusive relationships between parents and children, between partners, and between ex-partners are profoundly dissimilar, and so are the ways these relate to wider forms of socially embedded power, abuse and exploitation of women, children or elderly people. This severely complicates any commonalities in private family settings that can be identified with respect to child abuse, elder abuse, and abuse between partners or ex-partners.

Most importantly, the violence differs in relation to gender. Physical and psychological violence against *children* or against *parents* or *grandparents* in the home has no clear correlation with gender. In other words, domestic violence directed at victims of a different generation – against children, parents or grandparents – victimises both genders, and it is perpetrated more or less to an equal degree by fathers and mothers, by sons and daughters, or by stepparents or stepchildren of either gender.

Domestic violence between *adults*, in contrast, is distinctly gendered. It disproportionately victimises women more than men, whilst men are overrepresented as perpetrators. It is also strongly related to socially determined power differentials between men and women. Although the debate resurfaces now and then about the reliability of prevalence data on women's physical abuse of male partners, the leading researchers and policymakers increasingly agree that such violence, however prevalent, is far *less serious* on average than partner violence against women.¹ Equally if not more important, violent abuse of men by a female partner is not known to continue *systematically* after separation, in contrast to partner violence against women. A substantial proportion of the latter (stalking or outright physical violence by the ex-partner) is perpetrated during separation and continues thereafter, particularly when the break was initiated by the victim. That period also carries the highest risk of *lethal* violence for the (female) victim, and to a lesser extent for the male perpetrator as well.² It is the *gendered nature* of partner-related violence that distinguishes domestic violence from violent crime in general as well as from other types of violence in the home.

The defining *relational* characteristic of domestic violence lies in the *intimacy and/or dependency between the victim and the perpetrator in the private domain*. Clearly there are essential characteristics shared between child abuse, elder abuse and intimate personal violence. However, the distinctions in the nature of the violence and the relational and gender dynamics that underlie it have far-reaching implications for the types of interventions, both penal and non-penal, that are needed to effectively protect victims, punish perpetrators and carry out preventative measures. If a broad definition of domestic violence is used, the

¹ For an overview of data from recent international surveys, see the following reports: Schrötle, M., Martinez, M. et al. (2006), *Comparative reanalysis of prevalence of violence against women and health impact data in Europe - obstacles and possible solutions. Testing a comparative approach on selected studies*. [http://www.cahrv.uni-osnabrueck.de/reddot/CAHRVreportPrevalence\(1\).pdf](http://www.cahrv.uni-osnabrueck.de/reddot/CAHRVreportPrevalence(1).pdf) Also, Römkens, R, J. van Poppel et al. (2006), *Preliminary study on domestic violence in the Netherlands. Literature review of research methods and findings on prevalence, determinants, consequences and help-seeking behaviour*. http://www.emancipatieweb.nl/uploads/2221/Translation_total_small.pdf. Sundaram V., Curtis T., Helweg-Larsen K., Bjerregaard P. (2003), Can we compare violence data across countries? *Circumpolar Health*, pp. 389-396. http://ijch.oulu.fi/issues/63suppl2/ICCH12_Sundaram.pdf. The World Health Organization estimates that about 30% of the female population is victimised by domestic violence. See Garcia-Moreno, C., Henrica A.F.M. Jansen, Mary Ellsberg, Lori Heise, Charlotte Watts (2005), *WHO multi-country study on women's health and domestic violence against women: Initial results on prevalence, health outcomes and women's responses*. Geneva: World Health Organization.

² Walby, S., Allen, J., (2004). *Domestic violence, sexual assault and stalking: Findings from the British Crime Survey. Home Office Research Study 276*. London: Home Office Research, Development and Statistics Directorate.

coherence of the necessary measures comes under pressure. The Council of Europe has already decided to separately address the sexual abuse and exploitation of children.³ The relevant documents leading up to the present feasibility study⁴ have focused on domestic violence defined as the abuse of partners and ex-partners. Yet it is also important to underline that children who grow up in a violent environment obviously suffer from harmful effects on their emotional, cognitive and social development. Curbing domestic violence will therefore have a preventative impact on the next generation.

Domestic interpersonal violence cannot be considered to be predominantly a problem of heterosexual or married couples. The extent to which intimate violence is reported by teenagers and young women shows that marital status, or even cohabitation, are not essential conditions for violence between partners.⁵

To date there are no reliable (i.e. population-based and generalisable) statistics available on the prevalence of domestic violence – in terms of interpersonal violence between partners or ex-partners – among same-sex couples. Qualitative data indicate that violence in gay or lesbian relationships is not exceptional.⁶ The question is whether this can be labelled as gender-based violence which is related to wider, socially based power differentials between the partners involved. The issue of domestic violence in homosexual relationships raises the interesting question of how closely gender and gender dynamics are indeed related to sex differences. Further research is needed on this form of domestic violence to find out what kinds of measures are necessary and feasible.

For all these reasons, the focus in the present study is on domestic violence defined as interpersonal partner- or ex-partner-related violence in male-female relationships. Since a comprehensive approach is needed that includes measures directed at perpetrators as well as at victims, it is important to include both men and women, as both can be victims and perpetrators of domestic violence.

1.2 Types of violence

With regard to the violent behaviour *per se*, a distinction is commonly made between three types of violence:

1. *Physical violence*: violations of a person's bodily integrity (or threat to do so) against that person's will, resulting in pain or injury; this implies assault, aggravated assault and, most severely, homicide. Particularly during a process of separation from a partner, abused women run the risk of being killed. Domestic violence usually involves repeated violent acts.
2. *Sexual violence*: sexual acts perpetrated against a person's will and/or under coercion, regardless of the marital status of the victim and perpetrator. This implies rape (defined as oral, vaginal or anal penetration of the body) and other forms of sexual coercion by a partner or ex-partner.

³ Committee of Experts on the Protection of Children against Sexual Exploitation and Sexual Abuse (PC-ES). *Draft convention on the protection of children against sexual exploitation and sexual abuse*. Strasbourg: 10 April 2007. PC-ES (2007) 6 E FIN.

⁴ Those documents include the following: *Information document concerning combating domestic violence against women*. CDPC-BU (2007) 20. Strasbourg, 5 April 2007; *Summary meeting report*. CDPC-BU (2007) 23 fin, 26 April 2007, notably para.19-23; *Recommendation Rec (2002)5 of the Committee of Ministers to member states on the protection of women against violence and explanatory memorandum; Implementation of and follow-up to Recommendation Rec (2002)5 on the protection women against violence*. (EG-S-MV (2004) RAP FIN rev. *Combating violence against women. Stocktaking study on the measures and actions taken in Council of Europe member states*. 2006, prepared by Carol Hagemann-White with the assistance of Judith Katenbrink and Heike Rabe. Directorate General of Human Rights, Strasbourg, 2006. Task Force to Combat Violence against Women (TFV), *Selection of international instruments and declarations relevant to combating violence against women* (EG-TFV (2006)4; and *Information document on the Council of Europe's action to combat violence against women* (EG-TFV (2006) 2 rev. *Legislation in the member states of the Council of Europe in the field of violence against women. Volumes I and II* (EG (2007). Directorate General of Human Rights, Strasbourg, January 2007.

⁵ Römken, R., S. Mastenbroek (1998), Budding happiness. The relational dynamics of the abuse of girls and young women by their boyfriends. In R. Klein (Ed), *Multidisciplinary perspectives on family violence*. London: Routledge, 58-75. See also Schröttle, M., Martinez, M. et al. (2006), Comparative reanalysis of prevalence of violence against women and health impact data in Europe - obstacles and possible solutions. Testing a comparative approach on selected studies. [http://www.cahrv.uni-osnabrueck.de/reddot/CAHRVreportPrevalence\(1\).pdf](http://www.cahrv.uni-osnabrueck.de/reddot/CAHRVreportPrevalence(1).pdf).

⁶ Ristock, J. (2002), *No more secrets. Violence in lesbian relationships*. New York: Routledge. See also 'Domestic violence in gay and lesbian couples'. http://www.psychpage.com/gay/library/gay_lesbian_violence/dv_gay_couples_intro.html.

3. *Psychological violence*: forms of systematic intimidation, harassment or other conduct that limits a victim's behavioural freedom against her/his will. This implies coercion of a victim to endure behaviours that constitute an infringement of her/his freedom or safety.

These types of violence often occur in conjunction with one another.

Forced marriages and *honour-based killings* are two particular forms of domestic violence that need to be mentioned explicitly. They are directly related to the growing migration in Council of Europe member states, and they may therefore increase in the future. They embody a mixture of the forms of violence distinguished above. In some migrant communities, some families prefer that their children marry a person of the same community. Young women from the country of origin are forced to migrate to Europe to marry a man from the corresponding community in the host country. So-called honour killings may occur in such communities if young women resist submitting to this tradition or prefer a romantic relationship of their own choice. The woman, and sometimes the partner, are at risk of being murdered by her relatives.

1.3 Prevalence of domestic violence

The complexity of the domestic violence concept, in combination with the personal and social sensitivities that the subject evokes, poses major challenges to the collection of reliable research data on the scale of domestic violence in societies. Definitions of domestic violence vary widely in research. Cultural and social differences between countries inevitably also affect data collection. Currently we do not yet have a validated and tested international instrument for measuring domestic violence, although promising initiatives have been taken and results are expected by late 2007.⁷ Comparison of data from different countries has proven difficult time and again.⁸ Bearing this in mind, we can present a general picture of data that inevitably allows for a wide margin in the statistics to do justice to the underlying differences in definitions.

Across countries, one-fifth to one-quarter of all women have experienced physical violence at least once during their adult lives. Transnational comparison indicates that 12% to 15% of all women over 16 have ever experienced *repeated* physical, emotional and sexual abuse.⁹ Figures on sexual violence differ more widely, due to varied definitions of sexual violence and rape. The narrowest definitions of rape as a 'forced' sexual act elicit prevalence figures indicating that from 5% to 7% of all women have been raped by a partner or ex-partner at some point in their lives. Broader definitions produce prevalence rates of sexual violence around 10%.¹⁰ We do not have data reliable enough to present transnational statistics on psychological violence. Reported rates of stalking by an ex-partner vary widely. Based on international and North American research, we can conservatively estimate that the prevalence data will be in a range from 5% to 10% of all adult women.¹¹

1.4 Repetitive victimisation and psychological impact

A substantial proportion of the domestic violence is not limited to single incidents, but develops into patterns of repeated violations. Many victims of domestic violence suffer from symptoms of chronic traumatisation. This often develops into posttraumatic psychosomatic and depressive symptoms that diminish only gradually after the separation. The specific psychological and physical health impact of domestic violence is an important factor to bear in mind in planning legal measures, since it negatively affects the willingness and the psychological capacity of victims to engage with the criminal justice system (as by lodging complaints or testifying). Fear of retaliation is one common consequence of chronic victimisation which can persist for many years after the actual threat has subsided.¹²

⁷ The International Violence Against Women Survey (IVAWS), which contains a subsection on domestic violence, so far includes Australia, Switzerland, Denmark, Greece, Mozambique, Poland, Costa Rica, Hong Kong and the Czech Republic. Australia presented its results in 2004. A comparative report on all collected data is forthcoming (late 2007).

⁸ See Römken, R., J. van Poppel et al. (2006), Preliminary study on domestic violence in the Netherlands. Literature review of research methods and findings on prevalence, determinants, consequences and help-seeking behaviour, http://www.emancipatieweb.nl/uploads/2221/Translation_total_small.pdf; Schröttle et al., (note 4 above) and Sundaram V., Curtis T., Helweg-Larsen K., Bjerregaard P. (2003), Can we compare violence data across countries? *Circumpolar Health*, pp. 389-396. http://ijch.oulu.fi/issues/63suppl2/ICCH12_Sundaram.pdf.

⁹ Schröttle et al. (2006), note 5 above; Römken et al. (2006), note 8 above.

¹⁰ Schröttle et al., note 5 above; Römken et al., note 8 above. See also Römken, R. (1997) Prevalence of wife abuse in the Netherlands. Combining quantitative and qualitative methods. *Journal of Interpersonal Violence*. 12, 1997, 1, 99-125.

¹¹ Römken, R. (2006), Protecting prosecution. The powers of criminal law to protect victims of stalking. *Violence against Women* 2, (2006), 160-187.

¹² Jones, L. M. Hughes, Unterstaller, (2001), Post-traumatic stress disorder (PTSD) in victims of domestic violence. A review of the research, *Trauma, Violence, & Abuse*. Vol. 2, No. 2, 99-119.

1.5 Social attitudes: on silence and ambivalence towards domestic violence

Domestic violence is a phenomenon that evokes strong moral responses. In this section we highlight several aspects of this that should be taken into account in preparing regulatory measures, as they will affect the level of consensus and social support for any kind of regulation.

Social attitudes towards the moral and/or legal unacceptability of domestic violence

It is only rather recently that violence against women and children has met with growing and unequivocal condemnation on a social level and in the domain of policy and legislation. This is a significant yet fragile historical shift. Although Recommendation (2002)⁵ on Violence against Women reveals tremendous progress towards publicly denouncing violence against women, substantial parts of the recommendation still await implementation in the member states.¹³ The fact that domestic violence takes place within intimate relationships where individuals expect non-interference in what they consider to be their private lives makes it even harder for domestic violence to be accepted as a target of public regulation. A clear and strong positioning of governments is therefore vital to fostering a public understanding that ‘private violence’ – which constitutes a large-scale violation of the fundamental human rights of many individuals, notably women – is not only rightfully the object of public regulation but should also be a matter of serious public concern. This awareness raising is an essential step towards successfully combating practices that condone domestic violence.

Silencing and susceptibility to intimidation

The intimacy of the victim’s relationship to the perpetrator often implies that loyalty ties and ambivalences vis-à-vis the perpetrator will continue for some time, even after a separation. Notably in the case of children who have had to witness the abuse, their emotional and material dependency hampers their ability to distance themselves from the abuser(s). For both adult and child victims, this translates into susceptibility to intimidation and pressure exerted by perpetrators. Knowledge about the psychological dynamics that operate in contexts of intimacy and dependency is crucial in order to adequately approach victims in criminal and other legal contexts and to support them in ways that can facilitate successful investigation and prosecution.

Limited visibility of injuries and the collection of evidence

Most of the victimisation takes place in ways that are literally invisible to others and without any witnesses. At the social and psychological levels, this adds to the victims’ isolation. Their isolation is a serious obstacle for them to overcome before they can stand up against the perpetrator and search for help. From a criminal law perspective, this aspect of domestic violence obviously complicates the collection of evidence. The psychological impact, and even the physical severity of the abuse, is not always immediately visible, because hiding the injuries and pain is a common coping mechanism in repeatedly abused victims.

1.6 Help-seeking behaviour

Initially, the majority of domestic violence victims are reluctant to seek any help at all while the relationship with their partner is ongoing. To the extent that we have internationally comparable data available, we can conclude that the professionals to whom victims eventually most often turn are general practitioners (for medical injuries and psychosomatic complaints), social workers and police. A minority of victims seek refuge in shelters (an estimated 5% of all victims). A substantial proportion of victims do not seek any professional help, even when they sustain serious injuries. Telephone help lines that can be called anonymously and 24/7 are a crucial provision for helping victims to break their isolation, overcome the shame, and start a process of empowerment by speaking out against the victimisation by their partner.¹⁴

2. Initiatives and activities to tackle domestic violence, including existing international legal instruments

2.1 International and regional instruments relating to domestic violence¹⁵

¹³ See *Stocktaking study* (2006), note 4 above.

¹⁴ Plichta, S.B., (2004). Intimate partner violence and physical health consequences, *Journal of Interpersonal Violence*, 19, 11, 1296-1323. Campbell, J.C. (2002), Health consequences of intimate partner violence, *Lancet* 359, 1331-1336; World Health Organization (2005).

¹⁵ For a thorough overview, see *Selection of international instruments and declarations relevant to combating violence against women*, Task Force to Combat Violence against Women, including Domestic Violence, EG-TFV (2006) 4, 1st meeting of the Task Force, (Strasbourg, 21-23 February 2006).

At both international and regional levels, activities have been undertaken to fight violence against women, and instruments are being adopted to regulate this complex field. The launch in 2006 of the Task Force to Combat Violence against Women, including Domestic Violence, highlights the growing commitment of the Council of Europe. This group is charged with evaluating progress at national levels and creating instruments to quantify developments at the pan-European level.¹⁶ Domestic violence – usually defined as repeated abuse and violations of the physical, sexual and psychological integrity of the subject – is often not the object of *specific* regulation or instruments. This section gives a brief overview of the main activities and instruments that now exist. It will aid us in assessing whether a specific convention in the field of domestic violence is needed (3.1).

The Council of Europe has adopted two recommendations that address domestic violence specifically: Recommendation (85)4 on Violence in the Family; and Recommendation (90)2 on Social Measures concerning Violence within the Family. It has also agreed a more general recommendation, (2002)5, on the Protection of Women against Violence,¹⁷ which includes provisions aimed at all forms of violence against women, as well as additional measures on violence within families (paras. 55-59). This recommendation in particular, with its extensive explanatory memorandum, could serve as an example for a European convention on domestic violence. Beyond these thematic documents, the Council has published several recommendations aiming to ensure specific rights for crime victims within criminal justice systems. One of these is Recommendation (85)11 on the Position of the Victim within the Framework of Criminal Law and Procedure, passed in 1985. The most recent and comprehensive document is Recommendation (2006)8 on Assistance to Crime Victims, adopted 14 June 2006. The Parliamentary Assembly of the Council of Europe has also passed several resolutions and recommendations pertaining to violence against women. Recommendations 1582 (2002) and 1681 (2004) specifically address domestic violence against women. Finally, the European Convention for the Protection of Human Rights and Fundamental Freedoms is also relevant here, notably its provisions on non-discrimination, the right to respect for private and family life, the right to liberty and security, the prohibition of torture and inhuman or degrading treatment, and the right to life.

On an international or global level, the United Nations has undertaken various activities and has adopted declarations and resolutions that deal with violence against women. The most important ones are the Declaration on the Elimination of Violence against Women,¹⁸ the Beijing Declaration and Platform for Action,¹⁹ the outcome of the 23rd special session of the General Assembly entitled 'Women 2000: Gender Equality, Development and Peace for the 21st Century',²⁰ and the Declaration adopted at the 49th session of the Commission on the Status of Women.²¹ In addition, the UN General Assembly recently adopted Resolution 61/143 entitled 'Intensification of Efforts to Eliminate All Forms of Violence against Women'.²² It urges states, *inter alia*, 'to take action to eliminate all forms of violence against women by means of a more *systematic, comprehensive, multisectoral and sustained approach*, adequately supported and facilitated by strong institutional mechanisms and financing, through national action plans, including those supported by international cooperation and, where appropriate, national development plans, including poverty eradication strategies and programme-based and sector-wide approaches'.²³

At earlier stages, the UN has created several international instruments that are relevant here. The three most important UN legal instruments to reflect on are the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the UN Protocol to Prevent, Suppress and Punish Trafficking in

¹⁶ See *Information document*, note 4 above.

¹⁷ The 3rd Ministerial Conference on Equality between Women and Men (Rome, October 1993) is viewed as the starting point of intensified action to curb violence against women. One of the results was a Plan of Action comprising political, judicial, administrative, educational, cultural and other means to combat violence against women. See *Information document concerning combating domestic violence against women, Secretariat memorandum* prepared by the Directorate General of Legal Affairs, 5 April 2007. For more detailed information regarding the Council of Europe activities in the field of domestic violence, see *Information document on the Council of Europe's action to combat violence against women*, EG-TFV (2006) 2 rev, Task Force to Combat Violence against Women, including Domestic Violence, 2nd meeting of the Task Force, (Strasbourg, 25-27 April 2006).

¹⁸ Resolution 48/104.

¹⁹ *Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995* (United Nations publication, Sales No. E.96.IV.13), chap. I, resolution 1, annexes I and II.

²⁰ Resolution S-23/2, annex, and Resolution S-23/3, annex.

²¹ See *Official records of the Economic and Social Council, 2005, Supplement No. 7* and corrigendum (E/2005/27 and Corr.1), chap. I, sect. A.

²² Adopted on 19 December 2006.

²³ GA Res. 61/143, para. 8, italics added by authors.

Persons, Especially Women and Children (supplementing the UN Convention against Transnational Organized Crime) and the Rome Statute of the International Criminal Court (ICC), which criminalises gender-related crimes and crimes of sexual violence.

None of those instruments addresses domestic violence specifically.²⁴ Nevertheless, they deserve mention here by virtue of their extensive victims' rights provisions that could serve as examples of how the specific needs of a specified victim group can be taken into account (ICC Statute and UN Protocol), or because authoritative bodies have addressed violence against women in their recommendations (CEDAW).

To start with the ICC Statute, it has been hailed as 'a milestone in victimology'.²⁵ Compared to the procedural rules governing previous international tribunals (such as those on the former Yugoslavia and Rwanda), the main improvements involve extending victim protection, increasing victim participation, and better provisions on reparation.²⁶ The greatest significance of this Rome Statute, though, lies in its provision of a more universal model for how legal systems can respect legitimate victim rights without prejudicing a fair trial for the accused. As to CEDAW, the committee that monitors its implementation has published two recommendations affirming that violence against women also falls within the Convention's scope: General Recommendation 12 (8th session, 1989) and most notably General Recommendation 19 (11th session, 1992) on violence against women.²⁷ Recommendation 12 notes that 'articles 2, 5, 11, 12 and 16 of the Convention require the States parties to act to protect women against violence of any kind occurring within the family, at the work place or in any other area of social life.' Recommendation 19, para. 24(r) provides that 'measures that are necessary to overcome family violence should include: (i) criminal penalties where necessary and civil remedies in cases of domestic violence; (ii) legislation to remove the defence of honour in regard to the assault or murder of a female family member; (iii) services to ensure the safety and security of victims of family violence, including refuges, counselling and rehabilitation programmes; (iv) rehabilitation programmes for perpetrators of domestic violence; (v) support services for families where incest or sexual abuse has occurred.' The UN Protocol on Victims of Trafficking could also serve as an example, in that it takes into account the specific needs of those victims, thereby also addressing immigration issues. The difficulty of maintaining a balance between law enforcement and prosecution on the one hand and the protection of victims on the other was one concern that came to the foreground while the UN protocol was being negotiated.

2.2 Current legislation within Council of Europe member states

The Council of Europe's *Stocktaking Study* (2006)²⁸ concluded that the legal measures to prevent domestic violence, protect victims and punish perpetrators are rather scattered and differ substantially among the member states. Most member states do not have specific legislation in place on physical domestic violence. In the majority of countries, it falls under general legislation (on assault, aggravated assault or murder). In some countries it is addressed under general provisions pertaining to family-related offences. Very few countries have implemented specific domestic violence laws or specific laws on violence against women that also cover domestic violence against women.

Legislation on sexual violence against adult ex-partners differs widely as well. Rape within marriage is not yet a crime in every member state. Only twelve countries have removed the rape-in-marriage exemption.

Psychological violence as such is not a concept that is penalised *per se*. In some states, specific stalking laws have criminalised harassment – recognising that repeated infringements of personal integrity through phone calls, letters and shadowing in the public domain constitute serious intimidation and threat. The recent Council of Europe reports on legislation on violence against women²⁹ confirm this picture of wide

²⁴ Note that the Vienna Declaration and Programme of Action adopted at the 1993 United Nations World Conference on Human Rights explicitly recognised domestic violence and other forms of violence against women as human rights violations.

²⁵ Marc Groenhuijsen, International protocols on victims' rights and some reflections on significant recent developments in victimology, in R. Snyman & L. Davis (eds.), *Victimology in South Africa*, Pretoria: Van Schaik Publishers 2005, pp. 333-351.

²⁶ Sam Garkawe, Victims and the International Criminal Court: Three major issues, *International Criminal Law Review*, 3, pp. 345-365, 2003.

²⁷ The CEDAW Committee, in General Recommendation No. 19, declared in Article 6 that 'the definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately.'

²⁸ See *Stocktaking study* 2006, note 4 above.

²⁹ *Legislation in the member states of the Council of Europe in the field of violence against women*. Volume I (Albania to Ireland) and Volume II (Italy to United Kingdom). January 2007. www.coe.int/equality

divergencies and lack of comprehensiveness in the legislation on psychological violence. Differences are attributable to two factors in particular: whether the legal system is adversarial or inquisitorial (this usually affects procedure more than content), and whether there is a constitution that safeguards human rights. The existence of a convention would aid in determining whether acts of violence against women are a violation of human rights and fundamental freedoms. Of the 40 countries that submitted information on their legislation for the reports on violence against women, most are clearly aiming to address domestic violence by law in one way or another. Some have introduced specific legislation and/or legal procedures, thus sending a clear message that domestic violence is unacceptable. There is also a growing willingness on the part of some states to introduce innovative measures such as restraining orders that prohibit the perpetrator from entering the victim's home and/or other premises. This trend could have a significant incentive effect on other member states. We conclude that, despite differences between the member states, there is a sufficiently strong legal and political basis to start from in order to harmonise law through a convention on domestic violence.

3. A legally binding international instrument on domestic violence: preliminary conclusions

3.1 Analysis of the need for a legally binding instrument

Among the Council of Europe member states, there is a growing sense of social and political urgency to develop an effective policy on domestic violence. This heightened awareness can provide the needed impetus for Council initiatives to induce the member states to better harmonise their approaches. The *Stocktaking Study* underlined the need 'to link different legal frameworks (such as criminal law and protective measures, penalisation of domestic violence and child contact regulation, domestic violence measures with immigration law) in order to provide a coherent and effective response to violence against women.' It also urged stricter regulation. Although Recommendation (2002) 5 states that countries should develop national action plans on violence against women, only 19 have done so to date.³⁰ The Council's Deputy Secretary General recently emphasised the profound importance of a new, binding legal instrument for the Council with respect to domestic violence.³¹

A preliminary issue to consider when reflecting on the need for a convention on domestic violence is how such a convention would operate in relation to the existing international instruments in this domain. On the one hand, it is important not to underestimate the value of the existing international recommendations and resolutions which address domestic violence indirectly and sometimes directly. Recommendations often have a powerful moral force, as well as giving practical guidance to member states in their conduct. Such instruments are valuable because they are recognised and accepted by a large number of states and, even without legally binding effect, they may be seen as declaratory of broadly accepted goals and principles within the international community. As such, they are often used as benchmarks to assess progress in the areas they apply to. Hence, even though soft law norms may lack formal legal consequences, states still often aspire to comply with them.

On the other hand, if soft law can be more rigorous than one might think at first sight, the opposite also holds – hard law is not always the most adequate instrument to influence policy and practice. Adopting legally binding documents does not automatically induce countries to adapt their national legislation, create the necessary infrastructures to effectuate those rights, or enforce compliance. More is needed, as we will argue below in more detail when discussing the importance of an adequate monitoring mechanism.

Notwithstanding these two considerations, we want to put forward four important arguments in favour of a legally binding international instrument such as a convention. First, no international legally binding document exists today that would deal with penal and non-penal aspects of interpersonal violence in a comprehensive, sufficiently detailed and specific way. Given the scale and urgency of the problem, a concerted approach is necessary and timely. We currently face rather fragmented, widely differing approaches in the Council of Europe member states. The European Committee on Crime Problems recently concluded that 'from the responses of member states it is clear that domestic violence is not specifically defined in the legislations of all of them. In some cases it is not mentioned in the legislation at all, and is considered to be part of a general body of offences against personal liberty or against the human dignity. Some other member states

³⁰ *Information document concerning combating domestic violence against women. Secretariat memorandum prepared by the Directorate General of Legal Affairs, 5 April 2007, para. 18; Stocktaking study (2006), note 4 above.*

³¹ *Speech of the Deputy SG of the Council of Europe. Seminar on Men's Active Participation in Combating Domestic Violence. Zagreb (Croatia), 9 May 2007, italics added by authors.*

however do have separate laws devoted to prohibition of domestic violence.³² A Council of Europe convention could therefore enhance uniformity among member states – a value that is important in and of itself in the Council of Europe context, and even more acute since the recent expansion of the EU.

Second, the increasing migration in member states brings specific vulnerabilities into the foreground which involve the violent victimisation of women. Not only are we witnessing a rapid growth of trafficking in women, who are usually forced into prostitution and sexual slavery, but we also see an increase in two forms of domestic violence in some ethnic minority communities: forced marriages and the killing of women in the name of preserving so-called family honour. This connection between migration and domestic violence against women underlines the urgent need for an active Council of Europe stance on the issue of domestic violence. That would signal the moral importance of the fight against domestic victimisation, which mostly affects women, as a fundamental human rights concern of the Council. In the context of the ongoing debate on cultural diversity in relation to political unity, it is crucial to establish regulation which allows for cultural differences without jeopardising the protection of victims of domestic violence.

Third, adopting a convention would imply an unequivocal recognition of the rights of domestic violence victims. The social and psychological empowerment that could emanate from such a measure must not be underestimated, given the scope of the problem. In view of the specific characteristics of the violence and the special types of legal and social measures that are necessary to effectively address this specifically *domestic* form of victimisation, a specific instrument to support victims of domestic violence would be of added benefit above and beyond general instruments in support of victims and victim rights.³³ At the same time, it is important to articulate a new specific convention with existing victims' rights instruments and those now in the drafting process.³⁴

Finally, a convention would enable creation of a monitoring mechanism (like that proposed in the Draft Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse³⁵) which could play a critical role in promoting implementation and compliance. A supervisory body of independent experts will be needed which can employ a set of robust monitoring methods (including a requirement for states to periodically report on their practices and the right to conduct on-site visits if need be).

3.2 The potential of the Council of Europe

One of the key reasons for founding the Council of Europe was to secure democracy based on the freedom of the individual and to prevent the resurgence of gross human rights violations as took place in the Second World War. The Council covers all major issues facing European society, other than military defence, and aims to promote democracy, human rights and the rule of law, and to develop common responses to political, social, cultural and legal challenges in its member states. The task of actively promoting adherence to the rule of law becomes particularly urgent when human rights violations are involved, as is the case in domestic violence. By virtue of the work it has already done in this area, the Council of Europe is now the leading intergovernmental organisation in combating violence against women, including domestic violence. In particular, its integrated, multifaceted approach allows it to address issues from criminal, civil, administrative and human rights law perspectives, and this is especially needed in the fight against domestic violence.

In view of the broad membership of the Council (to date 46 member states), a Council of Europe instrument would potentially have a powerful impact. The Council of Europe is also capable of planning and adopting conventions in relatively short periods of time. In accordance with its human rights-based approach, a Council of Europe convention on domestic violence would provide a link to the European Convention on Human Rights by placing a positive obligation on each party to protect its citizens against these particular

³² *Information document concerning combating domestic violence against women*, European Committee on Crime Problems, 5 April 2007, para. 28.

³³ For an overview of international victims' rights instruments and an analysis of their legal status, see Marc Groenhuijsen & Rianne Letschert, *Compilation of international victims' rights instruments*, Tilburg: Wolf Legal Publishers, 2006.

³⁴ The World Society of Victimology and the International Victimology Institute of Tilburg University, INTERVICT, convened an informal meeting with experts from different regions to discuss the need for and content of a UN convention on victims' rights. The meeting took place at Tilburg University in December 2005, and led to the Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power. For more information, see <http://www.tilburguniversity.nl/intervict/undeclaration/>.

³⁵ The explanatory report to the Draft Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse notes that 'the monitoring system foreseen by the Convention, is based essentially on a body, the Committee of the Parties, composed of representatives of the Parties to the Convention.' See para. 262.

human rights violations (notably, of the right to respect for private and family life, the right to liberty and security, and the torture prohibition).

The adoption of a Council of Europe convention of domestic violence could also prompt further action by the European Union, as already witnessed with respect to standards for the treatment of crime victims – Council of Europe Recommendation 1985(11) is seen as a forerunner to the 2001 EU Framework Decision on the Standing of Victims in Criminal Proceedings.³⁶ In an international legal perspective, a Council of Europe convention could provide a basis for other international instruments. This is not to say that Council of Europe initiatives are unidirectional. A Council of Europe convention could also benefit by drawing on the *acquis* of the UN, the World Health Organization and EU. Nonetheless, given the ongoing developments in the UN as well as the WHO, a Council of Europe convention could also provide a ready-made model that could inspire developments globally. As noted above, the UN itself has firmly underlined the importance of a *systematic, comprehensive, multisectoral and sustained approach* in combating violence against women.

4. Points to consider in a Council of Europe convention on domestic violence

4.1 Basic requirements: the need for coherent and evidence-based instruments

This final chapter addresses several aspects that merit further consideration in the context of a Council of Europe convention. Before addressing them separately, we wish to underline some general requirements for developing a coherent approach that would link together a range of measures. Many legal, social, medical and psychological issues intersect in domestic violence. For a convention to be efficient and effective in its implementation, it is crucial that it provide a framework that encourages member states to develop coherency in the measures they develop and implement.

From the 2004 report on the implementation of Recommendation (2002)5 on the Protection of Women against Violence, we can conclude that a minority of Council of Europe member states have started to systematically develop action plans on violence against women, or on domestic violence in particular. Much still needs to be done. The nature and content of the measures taken so far still vary widely. In its monitoring report, the Group of Specialists on Recommendation (2002)5 provided an excellent overview of points to be addressed – most of which would also apply to a Council of Europe convention. In the context of our limited feasibility study, this chapter confines itself to the primary points that deserve attention in a convention. As the Group of Specialists focused its report on violence in the family and on sexual violence (mainly against adult women), the report contains excellent analyses of the problem of domestic violence and valuable insights to draw and build upon in preparing a future convention.

Coordinated and multisectoral interventions

A multisectoral approach that engages professionals from all the fields involved will be crucial if it is to be effective for both victims and perpetrators. This has been emphasised repeatedly in various international documents and instruments discussed in chapter 2. Drawing up a *national action plan* that provides for a national coordinating body for implementation and evaluation is an indispensable step to that end. A convention would form a unique opportunity to provide overall guidelines for such action plans.

The Spanish Organic Act 1/2004 is exemplary for the development of integrated protection measures relating to domestic violence.³⁷ It addresses not only the victims' rights to protection and to a range of social, legal and medical services. It also deals with the impact that violence can have on employment for victims. In criminal law, special violence against women courts have been established, headed by specialised investigating judges. In the health care sector, early detection and intervention measures have been established. Most importantly, the law's implementation is monitored in the various domains in order to collect data that promote an effective, long-term implementation.

Related to the need for a multisectoral approach is the need to link different *legal* domains that deal with victim support and with preventing revictimisation through sanctions and/or treatment for perpetrators. It is important to fully explore the options that civil and criminal law can offer here.

³⁶ 2001/220/JHA, 15 March 2001.

³⁷ See *Stocktaking study* 2006, 25-26 (note 4 above).

Data collection and research

Monitoring and evaluation are indispensable to developing solid, evidence-based policies. Systematic data collection is necessary for all the legal or policy measures proposed here. It is particularly important to keep accurate data on police records of the handling of domestic violence cases, on prosecutions and convictions, and on medical and mental health care provided to victims. More generally, nationally representative survey data on prevalence and help-seeking behaviour is also vital to coherent policy development.

4.2 Purpose and scope

The purpose of a convention would be (1) to prevent and combat domestic violence in all its forms, (2) to protect the rights of domestic violence victims, (3) to sanction perpetrators and bring about behavioural change to prevent recidivism and revictimisation, and (4) to promote international cooperation in combating transnational aspects of domestic violence, in particular forced marriages and killings in the name of honour.

In establishing the scope of a convention, the starting point is that it should be *comprehensive*, providing for a *complete* set of policies to prevent violence, restrain and punish perpetrators, and help the victims by providing both legal assistance and immediate and long-term psychological and social support. In sections 4.3 to 4.8 below, we address in general terms the most important dimensions that a future convention ought to address.

In the light of the arguments presented in chapter 1, the nature of ongoing policy developments within the Council of Europe, and the need for coherence of measures, it seems most feasible to focus on domestic violence as *interpersonal violence between adult partners or ex-partners*. Children should be covered in the regulations only to the extent that they are affected by violence against an abused parent. This is consistent with the current trend globally (as in UN and WHO contexts), whereby domestic violence is usually defined in relevant international instruments as violence between partners or ex-partners. Even though the majority of victims are women, a convention would preferably use gender-neutral terminology. That would not preclude a gender-based analysis of the underlying problem, nor a gender-sensitive implementation of the convention. Furthermore, it would provide the tools to address male victimisation in domestic violence when necessary.

Domestic violence can be understood as any act of violence between partners or ex-partners which results in (or is likely to result in) physical, sexual or psychological harm or suffering, including threats of such acts, coercion, or arbitrary deprivation of liberty. It includes physical and mental aggression, emotional and psychological abuse and sexual violence. The violence may take place in a range of relationships, including marriage-based family units, registered or unregistered partnerships, and whether or not the partners are cohabiting.

Inclusion of the term *gender-based* in a *legal definition* could open a fundamental debate on the legal interpretation of the meanings of *gender* and *gender-based*. In drafting a convention, it is important to be explicit about the meaning of the gender concept. It is crucial to emphasise that gender is not a synonym or an alternative for the term *biological sex*. The essence and added value of the concept of *gender* over *sex* is that it extends beyond biological male or female bodies. It refers to masculinity and femininity as sets of behavioural repertoires that are the results of intersecting layers of cultural, historical, social and psychological practices and mechanisms which have become normatively associated with men and women.³⁸

4.3 Prevention: awareness raising, education and information distribution

Considering the long time it has taken for domestic violence to become a focus in national action plans on violence against women, and given the persisting attitudes that minimise or even deny the severity of the violations involved, it is crucial that awareness-raising campaigns about domestic violence continue to be implemented to educate the wider social community. This is also necessary with an eye to disseminating information to victims and to society at large on the available support provisions. At this writing, a minority of 14 member states conduct any campaign at all on violence against women in general. The recently established Council of Europe Task Force on Violence against Women, which also covers domestic violence, has launched a Council of Europe publicity campaign in 2007.

³⁸ Scott, J. (1986), Gender: A useful category of historical analysis, *The American Historical Review*, Vol. 91, No. 5, 1053-1075.

Information on the subject of domestic violence should become part and parcel of the curriculum in primary and secondary schools, combined with provisions in schools that make it clear whom children can turn to *while at school* (specified teachers, social workers) for help or support. This can have an important preventative effect by helping to empower the victims. Systematic training and education of professionals in the medical, legal and social service domains is another activity crucial to the prevention of secondary victimisation of children through early detection and adequate intervention.

4.4 Substantive criminal law

In accordance with Recommendation (2002)5 on the Protection of Women against Violence, the following measures are needed in specific relation to domestic violence:

- Ensure that criminal law provides that any act of physical or sexual violence against spouses, ex-spouses, regular or occasional partners or cohabitants constitutes a violation of that person's *physical, psychological and/or sexual freedom and integrity*, and not solely a violation of morality, honour or decency. Given the range of definitional issues that then arise, it seems crucial to present a clear definition of the behaviours that are subject to regulation. To that end, the definition of domestic violence set out above may serve as a starting point.
- Penalise sexual violence, including rape and any bodily sexual act or penetration against the will and/or without consent of the victim, between spouses, regular or occasional partners and cohabitants.
- Penalise psychological violence. This needs to be behaviourally defined and circumscribed in detail in any legislation to enable effective criminal investigation and prosecution. Particular attention is required for the *systematic* nature of behaviours which, if viewed as mere incidents, would seldom constitute infringements of freedom or safety (such as phone calls, e-mails, letters). Special attention is also needed for the different ways in which children can be misused in exercising psychological violence (intimidation, threats) against a partner or ex-partner.
- Ensure that cultural and/or religious traditions justifying violence against or the killing of a family member, particularly women, cannot be accepted as mitigating circumstances or so-called cultural defences.
- Ensure that criminal law provides options for the treatment of perpetrators as part of a legally based sanctioning regime.

4.5 Civil law – intervention and prevention

In general, judicial protection orders for domestic violence victims need to be available in national legal systems. This entails:

- Provisions that allow victims to have the perpetrator of domestic violence temporarily barred from the premises shared by the victim and perpetrator (barring orders).
- Provisions that allow protection of a victim's privacy (orders of protection, non-contact orders).
- Provisions that take the victim's and the children's safety into full consideration in deciding on custody and visiting arrangements after divorce or separation.

4.6 Protection of victims

Criminal justice system

In general terms, it is essential that an eventual convention on domestic violence call for appropriate measures and sanctions in national legislation, thus enabling swift, effective action to restrain perpetrators and to redress the wrongs done to victims. There appears to be an international consensus on the nature and the extent of victims' rights in the criminal justice system. Essentially, this involves the following principles:

- The right to respect and recognition at all stages of the criminal proceedings.

- The right to receive information about the progress of the case. This right is particularly relevant for victims of domestic violence, in view of the social isolation that many of them have suffered.
- The right to provide information to officials responsible for decisions relating to the offender.
- The right to have legal counsel available, regardless of the victims' means.
- The right to protection of victims' privacy and their physical safety. In the case of domestic violence victims, specific needs may be present. They could be enabled to use a different entrance and exit than the suspect if they fear retaliation after testifying. If there is a serious structural risk of retaliation beyond the courtroom, the victim should receive support in finding adequate protection and safety, even in the form of alternative housing. Another crucial option is that of providing testimony via video link to avoid a potentially traumatising encounter between the victim and the offender.
- The right to compensation from the offender and the state for any pecuniary, physical, psychological, moral and social damage suffered, corresponding to the degree of gravity and including legal costs incurred.
- The right to receive victim support. In providing support to domestic violence victims, it is essential that both the legal and the social and psychological needs be taken into account, in order to balance the interests of prosecuting the perpetrator and protecting the victim. With the growing involvement of the criminal legal system in addressing domestic violence, it is important to acknowledge that prosecutorial interests might not necessarily concur with a victim's needs for safety and peace of mind. Providing support to victims should never depend on their willingness to testify.

Social and clinical support of victims

As to the rights of domestic violence victims outside the criminal justice system, it is important that governments more specifically ensure the following provisions in the social and clinical fields:

- *Shelters* providing safety against revictimisation. Shelters that are available 24/7 are an indispensable provision.
- *Telephone help lines* available 24/7.
- Supportive provisions for children who have been traumatised by witnessing the violence against (usually) the mother.

Perpetrators

- *Treatment programmes*. In addition to criminal justice-based treatment programmes, it is essential with respect to preventing revictimisation that perpetrators be offered treatment programmes that they can attend on a voluntary basis.

4.7 Investigation, prosecution and procedural law

Profound problems still exist in the implementation of existing laws that penalise domestic violence. The problems are revealed most clearly in the low victim reporting rates and high case attrition rates in the criminal justice system. Without proper enforcement, any effort to harmonise substantive criminal law will be ineffectual. The following points deserve particular attention:

- *Training*: In general, adequate training is a prerequisite for any improvement in the performance of police and the judiciary. This should be part of the basic training of any professional in the criminal justice domain (police, prosecutors and judges) and should continue through on-the-job training. Once awareness-raising campaigns are intensified, the lowered threshold for victims to seek help is likely to translate into increased demand for police assistance. This calls for more focused professional training of police, prosecutors and judges. Developing adequate advocacy support for victims is equally important.

- *Data collection and monitoring:* The systematic recording of domestic violence cases by police forces is fundamental to any monitoring of police performance in handling domestic violence cases. It could also provide evidence for why the case attrition rate is so high and what can be done to counteract that tendency.
- *Special expert teams:* It is worthwhile to consider setting up specialised domestic violence units, or violence against women units, within police and prosecutors' offices to ensure that the required level of training and expertise is available.
- *International cooperation* in investigation is particularly important in cases of so-called honour killings and forced marriages. This is in line with the debate on victim rights which calls on states to foster, develop and improve cooperation with other states in cases of cross-border victimisation, in order to more effectively protect victims' interests in criminal proceedings.
- *Prosecution ex officio:* Domestic violence is an offence against the public order. It is essential to have legal provisions that enable public prosecutors to start criminal proceedings in cases of domestic violence.³⁹

4.8 Monitoring mechanism

A final point to consider is the issue of monitoring the implementation of a future Council of Europe convention. The convention would clearly benefit from a monitoring mechanism. The Task Force on Violence against Women, including Domestic Violence, could play a vital role in monitoring and encouraging national initiatives in this area, in order to keep the implementation of the convention on national political agendas. It deserves consideration to include the Task Force as a structural part of the monitoring mechanism to be planned as part of the convention.

Representatives of non-governmental organisations and other bodies actively involved in preventing and combating domestic violence should also have a role in the monitoring procedure.⁴⁰ An example is the Group of Specialists on the Implementation of and Follow-up to Recommendation (2002)5 of the Committee of Ministers to Member States on the Protection of Women against Violence (EG-S-MV). Another good example within the Council of Europe lies in the Framework Convention for the Protection of National Minorities, which has installed an Advisory Committee composed of independent experts as well as assigning a decision-making role to a political body (in this case, the Committee of Ministers of the Council of Europe). Even though most monitoring committees can produce only non-binding opinions (in contrast to the European Court of Human Rights), they nonetheless play a critical role in producing a collection of best practices that subsequently could serve as models for other states parties. Such high-level opinions could also be utilised by other Council of Europe bodies, such as the European Court of Human Rights, in future case law.⁴¹

³⁹ See also Rec. 2002/5, paras 38, 39 and 40.

⁴⁰ See also para. 269 of the explanatory note to the Draft Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which provides for a similar construction.

⁴¹ The value of such opinions is demonstrated by the fact that the European Court of Human Rights has turned to the opinions of the Advisory Committee on the Protection of Minorities for guidance. See ECtHR, *Gorzelik and others v. Poland*, No. 44158/98, 17 February 2004.