

Council on General Affairs and Policy of the Conference – March 2018

Document	Preliminary Document <input checked="" type="checkbox"/> Information Document <input type="checkbox"/>	No 5 of January 2018
Title	Note on the recognition and enforcement of foreign civil protection orders	
Author	The Permanent Bureau	
Agenda item	[To be determined]	
Mandate(s)	C&R No 6 of the 2015 Council on General Affairs and Policy C&R No 15 of the 2017 Council on General Affairs and Policy	
Objective	To facilitate discussions on the next steps in relation to the recognition and enforcement of foreign civil protection orders project	
Action to be taken	For Approval <input type="checkbox"/> For Decision <input checked="" type="checkbox"/> For Information <input type="checkbox"/>	
Annexes	Annex I – Summary of work carried out since 2011 Annex II – Report on the Experts' Meeting on Issues of Domestic / Family Violence and the 1980 Hague Child Abduction Convention Annex III – Types of Protection Orders and Sanctions - Analysis of 2014 Country Profiles and 2012 Questionnaire Responses Annex IV - Extracts from national and regional instruments dealing with recognition and enforcement of protection orders Annex V – Conclusions and Recommendations of the 12-13 February 2014 Experts' Group	
Related documents	See Annexes	

A. Introduction

1. In March 2015, “[t]he Council welcomed the additional statistical and comparative information on national law collected by the Permanent Bureau. The Council invited the Permanent Bureau, subject to available resources, to continue exploratory work on [the recognition and enforcement of foreign civil protection orders], including in relation to addressing the diversity of types of legal regimes (*e.g.*, orders issued under civil, administrative or criminal law) in the field of protection orders”.¹

2. Regrettably, as additional resources were not available until 2017, the Permanent Bureau was not able to prepare a note addressing the diversity of types of legal regimes in the field of protection orders before this time. At the meetings of the Council on General Affairs and Policy which took place in 2016 and 2017, the Permanent Bureau limited its oral reports to providing information on the latest developments in the area.²

3. The objective of this note is to address the diversity of types of legal regimes in the field of protection orders. It draws on information obtained from the Questionnaire circulated to the Members of Hague Conference of Private International Law (HCCH) in November 2012³ (hereinafter “2012 Questionnaire”) and the Draft Country Profiles completed by Members in 2014⁴ (hereinafter “2014 Draft Country Profile”).

4. This note presents the different approaches to the classification of protection orders in existing literature (*e.g.*, as civil, criminal, administrative or “hybrid” protection orders), and the factors determining their classification as such. Thereafter, it provides an overview of the diversity of orders found in the legal systems of Members of HCCH, based on their responses to the 2012 Questionnaire and the 2014 Draft Country Profile. Before examining possible solutions at the international level as to how diverse types of protection orders (*i.e.*, civil, administrative or criminal orders) can be recognised and enforced, the note presents different domestic schemes for the recognition and enforcement of protection orders made in a third jurisdiction.

5. Readers who are unfamiliar with this project are invited to consult Annex I, which provides a concise summary of the work that has been carried since this project was added to the agenda of HCCH in 2011.⁵ Annex II contains the findings of a meeting of experts on issues of domestic / family violence and the 1980 Hague Child Abduction Convention held in London in June 2017, which specifically address the development of a potential new international instrument on protection orders.⁶

¹ See “Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (24-26 March 2015)”, C&R No 6, available on the HCCH website < www.hcch.net > under “Governance” then “Council on General Affairs and Policy”.

² In March 2016, “[t]he Council welcomed the oral update provided by the Permanent Bureau. The Council invited the Permanent Bureau, subject to available resources, to continue exploratory work on this topic and to prepare a short note to the Council in 2017” and in March 2017, “[t]he Council welcomed the oral update provided by the Permanent Bureau and noted that the topic will be discussed during the upcoming Special Commission on the 1980 Child Abduction and 1996 Child Protection Conventions. The Council directed a short note to allow for a discussion of the future of this work item at its 2018 meeting”. See respectively, “Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (15-17 March 2016)”, C&R No 21 and “Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (14-16 March 2017)”, C&R No 15, both available on the HCCH website (see path indicated in note 1).

³ See “Questionnaire on the Recognition and Enforcement of Foreign Civil Protection Orders”, Prel. Doc. No 4 A of November 2012 for the attention of the Council of April 2013 on General Affairs and Policy of the Conference, available on the HCCH website < www.hcch.net > (see path indicated in note 1). The individual responses to the Questionnaire are available on the HCCH website at < www.hcch.net > under “Legislative Projects”, then “Protection Orders” as “Responses to the Questionnaire on the Recognition and Enforcement of Foreign Civil Protection Orders (Prel. Doc. No 4 A of November 2012)”.

⁴ See “Draft Country Profile – Meeting of the Expert’s Group on the Recognition and Enforcement of Foreign Civil Protection Orders”, Prel. Doc. No 4 B of March 2014 for the attention of the Council of March 2014 on General Affairs and Policy of the Conference, available on the HCCH website < www.hcch.net > (see path indicated in note 1). The individual responses to the 2014 Draft Country Profile are available on the HCCH website (see path indicated in note 3).

⁵ All information relating to this project is available on the HCCH website (see path indicated in note 3).

⁶ See “Report on the Experts’ Meeting on Issues of Domestic / Family Violence and the 1980 Hague Child Abduction Convention, 12 June 2017, The University of Westminster, London”, Info. Doc. No 6 of August 2017, to the attention of the Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction and the 1996 Hague Child Protection Convention, 10-17 October 2017,

B. Diversity of Protection Orders

1. Approaches to classification of protection orders in existing literature

6. According to common approaches, various factors may be used to classify protection orders, including the following:

- the subject-matter jurisdiction of **the authority** that can establish the protection order;
- the area of law in which the protection order has been **legislated**, *e.g.*, civil code versus criminal code;⁷
- if the protection order is available within other **legal proceedings**, the nature of those legal proceedings, *e.g.*, divorce proceedings;⁸
- the **applicants**, *e.g.*, private individuals versus public authorities;⁹
- the **standard of proof** employed;¹⁰
- the **rules of procedure and discovery** applied;¹¹ and / or,
- the **terms used** in the protection order legislation, *e.g.*, 'respondent' and 'applicants' versus 'victim' and 'defendant'.¹²

7. Another factor that has at times been employed to determine the "type" of protection order is the nature of the sanction that is imposed upon breach of the order. This is a logical determining factor, as civil and criminal law are often distinguished based on differences in the types of legal sanctions that may be imposed under each.¹³ However, in this particular area of law, it is generally accepted that the type of sanction that is applied upon breach of a protection order does not alter the legal nature of the protection order.¹⁴ In fact, most jurisdictions with civil protection orders allow criminal sanctions for breaches thereof,¹⁵ and the *United Nations Handbook for Legislation on Violence against Women* recommends the criminalisation of breaches of all protection orders (as evidenced by the responses to the 2012 Questionnaire and the 2014 Draft Country Profile, such protection orders can be of a civil, administrative or criminal nature).¹⁶ In some cases, the word "hybrid" has been used to refer to civil protection orders with criminal sanctions, with protection orders themselves referred to as a "unique hybrid".¹⁷

available on the HCCH website < www.hcch.net > under "Child Abduction Section", "Special Commission meetings" then "Seventh Special Commission meeting (October 2017)".

⁷ See, *e.g.*, M.M. Cheh, "Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction", *Hastings Law Journal*, Vol. 42, 1991, p. 1330.

⁸ See, for example, Sweden where temporary protective measures are available in divorce proceedings and therefore categorized as civil protection orders.

⁹ See, *e.g.*, R.E. Barnett, "Foreword: Four Senses of the Public Law-Private Law Distinction", *Harvard Journal of Law & Public Policy*, Vol. 9, 1986, p. 269.

¹⁰ See, E. Boxill, "Jamaica: Family Property Division and Domestic Violence", *International Survey of Family Law*, 2001, p. 231; K. Wilcox, "Recent Innovations in Australian Protection Order Law – A Comparative Discussion", *Australian Domestic & Family Violence Clearinghouse Topic Paper 19*, 2010, p. 3; M. Burton, "Emergency barring orders in domestic violence cases: what can England and Wales learn from other European countries", *Child and Family Law Quarterly*, Vol. 27, No. 1, 2015, p. 26; and M.M. Cheh, *op. cit.* note 7, p. 1325.

¹¹ See, *e.g.*, M.M. Cheh, *op. cit.* note 7, p. 1325; and P.H. Robinson, "The Criminal-Civil Distinction and the Utility of Desert", *Boston University Law Review*, Vol. 76, 1996, p. 203.

¹² See, K. Wilcox, *op. cit.* note 10, p. 3.

¹³ See, *e.g.*, R.E. Barnett, *op. cit.* note 9, pp. 271-272; M.M. Cheh, *op. cit.* note 7, pp. 1349-1350; and P.H. Robinson, *op. cit.* note 11, p. 202.

¹⁴ See, for example, W. Chan, "A Review of Civil Protection Orders in Six Jurisdictions", *Statute Law Review*, Vol. 38, No 1, 2017, 15: "...breach of a protection order is considered a criminal matter even though the protection order itself is considered a civil order".

¹⁵ See, E. Boxill, *op. cit.* note 10; W. Chan, *op. cit.* note 14; F. Banda, "Zimbabwe: Developments in Zimbabwe", *International Survey of Family Law*, 2007; and E. Quansak, "Ghana: Progress and Retrogression on Domestic Violence Legislation in Ghana", *International Survey of Family Law*, 2006.

¹⁶ United Nations, *Handbook for Legislation on Violence against Women*, ST/ESA/329, 2010, p. 50.

¹⁷ S.F. Goldfarb, "Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?", *Cardozo Law Review* 2008. This term was also used in S. Goel, B.A. Sims & R. Sodhi, *Domestic Violence Laws in the United States and Malay: A Systematic Comparison of Backgrounds and Implications*, New York, Palgrave Macmillan, 2014, p. 23, and in C. Connelly & K. Cavanagh, "Domestic Abuse, Civil Protection Orders and the 'New Criminologies': Is there any value in engaging with the law?", *Feminist Legal Studies*, 2007, p. 263.

8. It has been noted more broadly that the conceptual distinction between civil and criminal matters is contributing to an unfortunate deficiency in international co-operation, compromising the ability to address pressing needs for international legal co-operation.¹⁸ Within national jurisdictions, the blurring of the line dividing civil and criminal law¹⁹ is in part attributed to the lack of legal justification for the divide.²⁰ The focus on the utility of measures, rather than doctrinal distinctions, has also led to some blurring of these lines, which have traditionally been fairly rigid. Civil protection orders, with criminal sanctions, are a clear example thereof.²¹ In fact, the distinction between civil and criminal protection orders may not be so clear, as the sanctions are not generally more extreme nor are the procedural safeguards always more stringent in the case of criminal protection orders.²²

9. Truly “hybrid” types of protection orders have been described in other contexts. Recent research on Protection Order in the European Member States (the “POEMS” research) identified four types of protection orders: civil, criminal, quasi-criminal, and emergency barring orders, with “quasi-criminal orders” considered to be true “hybrid” orders.²³ Such orders are “quasi-criminal” because they can be imposed by the public prosecutor or a criminal court, but the procedure applied is different than a typical criminal prosecution.²⁴ For example, in Sweden, a separate administrative procedure is directed by a public prosecutor.²⁵ Another “quasi-criminal” form in the POEMS research is the Spanish regime, in which a judge of a Special Court on Gender Based Violence can impose criminal and civil protection orders, with the rules of criminal procedure applying.²⁶ The emergency barring orders identified in the POEMS research were classified as administrative (or police) protection orders, because these are imposed by administrative authorities, including law enforcement officers.²⁷

2. Overview of the diversity of protection orders found in the legal systems of Members of HCCH

10. Annex III to this document presents preliminary information on the diversity of protection order regimes based on the responses of 40 Members of HCCH to the 2012 Questionnaire and / or the 2014 Draft Country Profile. Civil protection order regimes are undoubtedly the most common, with 75% of States having civil protection orders. On the other hand, 60% of States have criminal protection orders (with 12.5% of States found to have *only* criminal protection orders (*i.e.*, 5 States out of 40)), 15% have administrative protection orders and 62.5% have “hybrid” regimes; usually these types of protection order regimes exist in addition to other types of protection order regimes. While there is diversity in the types of orders, in particular within a given jurisdiction, a high proportion of the surveyed States (75%) have protection order regimes which may be qualified as “civil” according to conventional classification approaches.

11. Even though enforcement measures *per se* would not be part of the scope of a future instrument,²⁸ an analysis of the diversity of sanctions is useful as they sometimes play a role in the characterisation of the type of protection order. It is worth noting that the sanctions applied to breaches of protection orders are less diverse than the range of available protection orders. This analysis is based on the responses of 24 Member States of HCCH to the 2014 Draft Country Profile.²⁹ The majority, 62.5% of States, apply both criminal and civil sanctions, 20% apply only criminal sanctions, and 12.5% of States apply only civil sanctions. The information available was insufficient to determine the precise connection between the States’ types of protection orders and the applied sanctions. However, it is evident that a large number of

¹⁸ As evidenced, for example, by the different Treaties and Conventions discussed in D. McClean, *International Co-operation in Civil and Criminal Matters*, Oxford, Oxford University Press, 2012, at p. 149.

¹⁹ J.H. Merryman, “The Public Law-Private Law Distinction in European and American Law”, *Journal of Public Law*, Vol. 17, 1968, p. 14.

²⁰ See, e.g., M.M. Cheh, *op. cit.* note 7; and P.H. Robinson, *op. cit.* note 11.

²¹ Another example is contempt, see M.M. Cheh, *op. cit.* note 7.

²² *Ibid.*

²³ See S. van der Aa *et al*, *Mapping the legislation and assessing the impact of Protection Orders in the European Member States*, Oisterwijk, Wolf Legal Publishers, 2015.

²⁴ *Ibid.* These are available in Finland, Denmark and Sweden.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ It is interesting to note that the Belgian expert in the POEMS research classified this type of order as a *sui generis* type of order.

²⁸ The HCCH does not have the mandate to unify enforcement rules.

²⁹ The 2012 Questionnaire did not address the issue of sanctions.

States with civil protection order regimes apply criminal sanctions. In addition, the five States found to apply administrative sanctions all do so in relation to breaches of the administrative protection orders available in their State.

3. Summary of findings concerning the classification of protection orders

12. In summary, it appears that the classification of protection orders depends mainly on the subject-matter jurisdiction of the authority that can establish the protection order, the area of law in which the protection order has been legislated and the nature of the sanctions for breaching the order. Furthermore, an analysis of the 2014 Draft Country Profiles completed by Members of HCCH shows that, regardless of their classification (*i.e.*, as civil, criminal or administrative), protection orders that can be ordered and recognised and enforced will, in most cases, address the following types of conduct:

- Contacting or communicating with the protected person (*e.g.*, in person, by way of a third party, by mail, by e-mail, by phone);
- Approaching or being in physical proximity to the protected person;
- General harassment of the protected person;
- Molestation / annoyance of the protected person;
- A requirement to stay away from certain places;
- Forwarding or disseminating personal data or photos of the protected person; and
- Possession of weapons

13. Furthermore, an analysis of the 2014 Draft Country Profile responses shows that in the majority of States, protection orders are put in place in response, in particular, to the following actions or potential actions: domestic and family violence, sexual assault, dating violence, stalking, forced marriage, so-called "honour crimes", and human trafficking.

14. Based on the information contained in Part B, consideration should be given to developing an instrument that would not distinguish between civil, criminal and administrative protection orders, but that would rather cover protection orders that address particular types of dangerous conduct.

C. Recognition and Enforcement of Foreign Protection Orders

15. A review of existing domestic schemes for the recognition and enforcement of national protection orders in a federal context as well as foreign protection orders may provide guidance for the possible development of an international solution.

1. Existing national schemes for the recognition and enforcement of national protection orders in a federal context

*a. Violence Against Women Act (VAWA) of the United States of America*³⁰

16. The Act requires states to grant "full faith and credit" to the protection orders of other states.³¹ All 50 states and the District of Columbia have enacted legislation allowing victims of domestic violence to petition for a civil protection order against an alleged abuser. A valid protection order may be recognised and enforced in another state. A valid protection order is one in which:

- i) the issuing state, tribal or territorial court had both personal and subject matter jurisdiction according to their law; and
- ii) the respondent against whom the order has been granted has had reasonable notice and opportunity to be heard.³²

17. Pursuant to the "full faith and credit" provision, courts must enforce a valid protection order of another state as if it were originally issued in the enforcing state. That is, it should not be treated any differently because it originated from another state jurisdiction.

³⁰ See Annex IV for an extract of the provisions of the Act dealing with recognition and enforcement of protection orders.

³¹ 18 U.S.C § 2265.

³² 18 U.S.C. Section 2265(b).

18. The *Violence Against Women Act* includes within its scope all protection orders intended to protect victims of domestic violence, irrespective of how the issuing court or relevant legislation is characterised (*i.e.*, as civil or criminal). This is despite legal challenges founded on the “penal exclusion” to the “full faith and credit” obligations among states upon which VAWA relies. This is because a protection order is characterised by reference to its purpose, which is to protect a victim of domestic violence and not to punish the respondent offender.³³

*b. United States Uniform Interstate Enforcement of Domestic Violence Protection Orders Act*³⁴

19. The *Uniform Interstate Enforcement of Domestic Violence Protection Orders Act*³⁵ establishes uniform procedures for the effective interstate enforcement of domestic violence protection orders within the United States.³⁶

20. Pursuant to the Act, a protection order is defined as an order issued by a tribunal of another state (meaning a court, agency, or other entity authorised by law to issue or modify a protection order) which prohibits an individual from engaging in violent or threatening acts against, harassment of, contact or communication with, or physical proximity to, another individual. Only protection orders which are issued under domestic violence, family violence or anti-stalking laws are within the scope of the Act. This means that the Act effectively excludes orders against non-family and non-intimate persons, and may also exclude many domestic and family violence orders issued under laws other than those mentioned above.

21. The Act was constitutionally authorised to only provide a mechanism for the enforcement of civil protection orders. However, the Act does provide for the enforcement of orders in states which allow the equivalent of civil protection orders to be issued by a criminal court.³⁷ These “equivalent” orders are understood as orders issued by a criminal court which operate as civil orders. According to the *Comments*, the distinction between civil and criminal orders is the aim of the law. In other words, if an order “provides a remedy to an individual fearing harm from another individual”, it is civil in nature. When it “provides a remedy to the public as a whole”, it is a criminal protection order.³⁸

*c. Australian model law – Domestic Violence Orders (National Recognition) Model Provisions*³⁹

22. The Australian model law has been drafted to provide for the immediate recognition and enforcement of domestic violence-related protection orders among all Australian states and territories.⁴⁰ The model law covers a diverse range of protection orders that can be issued under the respective laws of each state and territory. This includes both final and interim orders related to domestic violence matters issued by courts, whether exercising civil or criminal jurisdiction, or police agents.⁴¹

³³ See E. Stack, “Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders”, *Northwestern University Law Review*, Vol. 98, p. 827, 2004 available at < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=838884 > (last consulted on 12 January 2018).

³⁴ See Annex IV for an extract of the provisions of the Act dealing with recognition and enforcement of protection orders.

³⁵ The Act was completed by the Uniform Law Commissioners in 2000 and subsequently amended in 2002.

³⁶ 22 states have implemented uniform interstate enforcement of domestic violence protection orders into law, namely: Alabama, California, Delaware, District of Columbia, Idaho, Indiana, Kansas, Mississippi, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, U.S. Virgin Islands, Utah, West Virginia and Wisconsin.

³⁷ Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, S. 3(b).

³⁸ Uniform Interstate Enforcement of Domestic Violence Protection Orders Act with Prefatory Note and Comments, *National Conference of Commissioners on Uniform State Laws*, 2002, available online at < <http://www.uniformlaws.org> > (last consulted on 21 June 2017), p. 7.

³⁹ See Annex IV for an extract of the provisions of the Model Law dealing with recognition and enforcement of protection orders.

⁴⁰ All jurisdictions in Australia have signaled commitment to implementing the *Domestic Violence Orders (National Recognition) Model Provisions* and establishing a national recognition and enforcement scheme. The A.C.T., New South Wales and Victoria have enacted legislation to implement the model law. Queensland, Tasmania, South Australia, and the Northern Territory have introduced bills.

⁴¹ *Ibid.*

23. Domestic violence related protection orders become recognised at the time of issuance and remain in force for as long as they would be in effect in the originating jurisdiction. They become enforceable when the person against whom the order is made is properly notified of the protection order having been made or amended. The Model Provisions also provide for the exchange of information between issuing authorities and law enforcement agencies of different jurisdictions.

d. Uniform Law Conference of Canada model law⁴²

24. The *Uniform Enforcement of Canadian Judgments and Decrees Amendment Act 2011* amends The *Uniform Enforcement of Canadian Judgments and Decrees Act* of the Uniform Law Conference of Canada in order to provide for the recognition and enforcement of civil protection orders in Canada.

25. A foreign civil protection order is defined as a foreign judgment (or part thereof) made by a court of a foreign State that prohibits a person from:

- i) being in physical proximity to a specified person or following a specified person from place to place;
- ii) contacting or communicating with, either directly or indirectly, a specified person;
- iii) attending at or within a certain distance of a specified place or location; or
- iv) engaging in molesting, annoying, harassing or threatening conduct directed at a specified person.

26. The foreign protection order can only be issued by those courts or tribunals which exercise a judicial function and only in the context of civil proceedings.⁴³

2. Existing national and regional schemes for the recognition and enforcement of foreign protection orders

a. United States Uniform Recognition and Enforcement of Canadian Domestic-Violence Protection Orders Act⁴⁴

27. The *Uniform Recognition and Enforcement of Canadian Domestic-Violence Protection Orders Act⁴⁵* provides for the enforcement of domestic violence protection orders issued by Canadian courts (not tribunals or other entities or agencies authorised by law to issue or modify a protection order) regardless of the statute or legislation that provides for the order. Because of the limits on enforcing the criminal orders of another country, the Act enforces only Canadian *civil* domestic violence orders. Neither the Act nor the *Comments* attached clarify what is understood as "civil" orders. The limited scope is acknowledged, with reference to the more expansive scope of the *Uniform Interstate Enforcement of Domestic Violence Protection Orders Act* (see above), but explained as necessary to avoid international problems in enforcing the criminal law of another State.⁴⁶

28. The Act addresses instances of apprehended or threatened violence. Therefore, only the relevant parts of the Canadian domestic-violence protection order requiring no contact directly or indirectly with a protected individual may be recognised and enforced. There is no limitation as to the legislative source of a protection order (*e.g.*, limited to orders issued under domestic violence or family violence legislation). Therefore, domestic violence protection orders found under more general statutes are within the scope of the Act.

⁴² See Annex IV for an extract of the provisions of the Uniform Law dealing with recognition and enforcement of protection orders.

⁴³ *Uniform Enforcement of Canadian Judgements and Decrees Act*, Section 1.

⁴⁴ See Annex IV for an extract of the provisions of the Act dealing with recognition and enforcement of protection orders.

⁴⁵ North Dakota and Delaware have enacted State legislation to implement the Uniform Law. Rhode Island, Nevada and California have introduced bills.

⁴⁶ *Uniform Interstate Enforcement of Domestic Violence Protection Orders Act* with Prefatory Note and Comments (*op. cit.* note 31), p. 2.

b. *European Union Directive and Regulation*

29. In the European Union Protection Orders Directive (2011/99/EU)⁴⁷ and Protection Measures Regulation (606/2013),⁴⁸ the diversity of protection orders and the “different legal traditions” of the Member States are recognised. The original aim of the legislative initiative in the European Union was to cover the entire diversity of protection orders available in the Member States, regardless of the type of protection orders and the issuing authorities.⁴⁹ The Rapporteurs wrote that “the fact that the judicial systems of Member States are different and that the proceedings may be criminal, civil or administrative needs to be overcome,”⁵⁰ and it was argued that these orders all have the same purpose of preventing crimes from being committed or repeated.⁵¹ However, several Member States were critical in the negotiations with regards to the legal basis chosen for the European Protection Order Directive and with regards to the varying standards of mutual recognition between civil and criminal measures.⁵² The Protection Order Directive was adopted on the basis of Article 82 of the Treaty on the Functioning of the European Union (hereinafter “TFEU”),⁵³ which provides for judicial co-operation in criminal matters, while the Protection Measures Regulation was adopted on the basis of Article 81 of the TFEU, which provides for judicial co-operation in civil matters. The EU legislator, therefore, opted to divide the recognition and enforcement of protection orders between two instruments:⁵⁴ the European Protection Order Directive for criminal matters and the European Protection Measures Regulation for civil matters. Some have noted that there is a “very thin demarcation line” between the scope of both instruments, making the borderline at times unclear.⁵⁵

i) *European Protection Order Directive*⁵⁶

30. The scope of the European Protection Order Directive covers protection orders issued in “criminal matters” (Art. 2(2)). The determination of whether a protection measure is a “criminal matter” is left to the national law and procedures of the issuing Member State. According to the Recitals, the Directive applies to protection orders aimed to protect a person against a new or previous criminal act of another person.⁵⁷ However, it is not necessary for a criminal offence to have been established by a final decision for the protection order to be executed under the Directive. Nor is the nature of the issuing authority, whether criminal, administrative, or civil, relevant.⁵⁸ The characterisation of the protection order as “criminal”, is dependent on the type of procedure by which it was issued; specifically, through “a decision in criminal matters”.⁵⁹ The Directive is silent on whether or not police issued (administrative) protection orders are included in the scope of “criminal matters”. Under Article 9(1) of the Directive, the competent authority of the executing State is required to recognise a European protection order and take

⁴⁷ Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order (hereinafter, ‘European Protection Order Directive’), Recital 8.

⁴⁸ Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters (hereinafter, ‘European Protection Measures Regulation’), Recital 12.

⁴⁹ L. Klimek, *Mutual Recognition of Judicial Decisions in European Criminal Law*, Cham, Springer International Publishing, 2017, p. 464.

⁵⁰ Draft report of 20 May 2010 on the initiative for a directive of the European Parliament and of the Council on the European Protection Order, 2010/0802 (COD), p. 52. See also, S. van der Aa & J. Ouwerkerk, “The European Protection Order: No Time to Waste or a Waste of Time?”, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 19, 2011, pp. 279-280.

⁵¹ Report on the proposal for regulation of the European Parliament and of the Council on mutual recognition of protection measures in civil matters COM(2011) 276.

⁵² Explanatory Memorandum of the Proposal for a regulation of the European Parliament and of the Council on mutual recognition of protection measures in civil matter COM(2011) 276 Final.

⁵³ Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012 P. 0001-0390 (hereinafter ‘TFEU’).

⁵⁴ A. Dutta, “Cross-border protection measures in the European Union”, *Journal of Private International Law*, Vol. 12, No. 1, 2016, p. 171.

⁵⁵ G. Vermeulen *et al.*, *The disqualification triad: Approximating legislation, Executing requests, Ensuring equivalence*, Antwerpen/Apeldoorn/Portland, Maklu, 2012, p. 45. D. van Iterson, “Recognition and Enforcement of Foreign Civil Protection Orders – A Topic for the Hague Conference?”, in: *A Commitment to Private International Law: Essays in honour of Hans van Loon*, Cambridge/Antwerp/Portland, Intersentia, 2013, p. 616.

⁵⁶ See Annex IV for an extract of the provisions of the Directive dealing with recognition and enforcement of protection orders.

⁵⁷ Recital 9 of the European Protection Order Directive.

⁵⁸ Recital 10 of the European Protection Order Directive.

⁵⁹ L. Klimek, *op. cit.* note 49, p. 477.

a decision adopting any measure available under its national law in similar cases, in order to ensure the necessary protection. Crucially, in so doing, “[t]he executing State may apply, in accordance with its national law, criminal, administrative or civil measures”. Thus, foreign protection measures established by “decisions in criminal matters” under the Directive may, once recognised, result in the application of a civil protection order regime in the State where the measure is to be enforced, if necessary.⁶⁰

ii) *European Protection Measures Regulation*⁶¹

31. The scope of the European Protection Measures Regulation covers protection measures in “civil matters” (Art. 2(1)). The Regulation defines these civil protection measures as “any decision, whatever it may be called, ordered by the issuing authority of the Member State of origin in accordance with its national law” which imposes certain prohibitions or regulations on a person causing a risk to another person’s physical or psychological integrity (Art. 3(1)).

32. According to the Recitals, “civil matters” should be interpreted autonomously according to the principles of the European Union, not according to Member States’ national laws.⁶² The term should also be interpreted independently from the phrase “civil and commercial matters” as used within the Brussels I regime, taking into account the case law of the Court of Justice of the European Union with regards to the delineation between civil and non-civil matters in the specific area of family law.⁶³ It is emphasized that the nature of the authority issuing the measure is not decisive for the characterisation of the measure as civil.⁶⁴ The measures covered by the Regulation can be issued by judicial authorities or administrative authorities (if the latter offer sufficient guarantees of impartiality and judicial review), but measures issued by police authorities can “in no event” be covered by the Regulation.⁶⁵ The Regulation complements the Directive discussed above,⁶⁶ and therefore it has been argued that “civil” protection orders should be understood to mean any protection orders which do not fall within the scope of the “criminal” protection orders included in the Directive.⁶⁷ An additional argument is that the main difference between the definitions included in the two instruments is the phrase “a decision in criminal matters” in the Directive versus “any decision” in the Regulation.⁶⁸

33. The method for characterising the *ratione materiae* scope of the Regulation is set out in Articles 3(4) and 18(1)(a)(i): Member States are to designate the judicial or other authorities whose issued protection measures fall within the scope of the Regulation.⁶⁹ It follows that protection measures issued by any of these designated authorities are to be regarded as civil measures of protection for the purposes of applying the Regulation.

⁶⁰ The underlying policy considerations for the creation of this flexibility is set out in Recital 20 of the European Protection Order Directive: “[s]ince, in the Member States, different kinds of authorities (civil, criminal or administrative) are competent to adopt and enforce protection measures, it is appropriate to provide a high degree of flexibility in the cooperation mechanism between the Member States under this Directive.” See also A. Dutta, *op. cit.* note 54, at p. 183: “[t]he conversion can even overstep the border between criminal and private law if in the executing Member State protection measures are implemented by private law.”

⁶¹ See Annex IV for an extract of the provisions of the Regulation dealing with recognition and enforcement of protection orders.

⁶² Recital 10 of the European Protection Measures Regulation.

⁶³ A. Dutta, *op. cit.* note 54, p. 173. L. Vaigé, “Recognition and Enforcement of Foreign Orders Aimed to Protect Women against Domestic Violence”, in: M. Jänträ-Jareborg & H. Tigroudja (eds.), *Women’s Human Rights and the Elimination of Discrimination*, Leiden/Boston, Brill Nijhoff, 2016, p. 522.

⁶⁴ Recital 10 of the European Protection Measures Regulation.

⁶⁵ Recital 13 of the European Protection Measures Regulation. See also, E. de Götzen, “Protection Orders Across Europe: First Remarks on Regulation No. 606/2013”, in: K. Boele-Woelki, N. Dethloff & W. Gephart (eds.), *Family Law and Culture in Europe: Developments, Challenges and Opportunities*, Antwerpen, Intersentia, 2011, p. 281; and L. Vaigé, *op. cit.* note 63, p. 524. Neither in the Explanatory Memorandum nor in the Rapporteur’s Report of the European Protection Measures Regulation is an explanation given with regards to why protection measures issued by police do not fall under the scope of “civil” protection measures in this Regulation. It is also not mentioned whether this means that police protection measures do fall under the “criminal” scope of the Directive.

⁶⁶ Recital 8 of the European Protection Measures Regulation.

⁶⁷ A. Dutta, *op. cit.* note 54, p. 173.

⁶⁸ G. Vermeulen *et al.*, *op. cit.* note 55, p. 45-46.

⁶⁹ A. Dutta, *op. cit.* note 54, p. 173-174.

3. International co-operation for the recognition of foreign civil and criminal protection orders

34. Brief mention of the Council of Europe *Istanbul Convention of 11 May 2011 on preventing and combating violence against women and domestic violence*⁷⁰ is warranted here (see para. 38 below for further detail). While it does not establish a system of private international law, the Istanbul Convention imposes a duty of co-operation with respect to the recognition of foreign civil and criminal protection orders among States Parties, when issued by judicial authorities. The instrument is thus a relevant component of the international human rights law backdrop to any potential international instrument for the cross-border enforcement of protection orders.

4. Practical relevance of the recognition and enforcement of foreign protection orders

35. In 2014, the Permanent Bureau circulated a document entitled "Recognition and Enforcement of Foreign Civil Protection Orders: Questionnaire of June 2014 for Non-Governmental Organisations and Other Experts"⁷¹ to 85 organisations and experts from 27 countries⁷² in various regions of the world.

36. The total number of international, cross-border cases reported by those organisations and experts handling such cases varied from 1 to 2000 cases per year, depending on, among others things, the geographic area covered, size of the organisation, organisational practices or mandate, and available resources. The average number of international cases reported was 130 cases per year per organisation or expert (*i.e.*, a total of 11,050 cases connected to 27 countries).

5. Solutions put forward by the Experts' Group at its 12-13 February 2014 Meeting for the recognition and enforcement of foreign protection orders

37. The development of a solution for the recognition and enforcement of protection orders addressing the diversity of such orders should take into consideration the following three solutions recommended by the Experts' Group at its 12-13 February 2014 Meeting:⁷³

"On-the-spot" / immediate enforcement

No 20: The experts discussed with great interest the feasibility of an instrument that would provide for "on-the-spot" / immediate enforcement of foreign protection orders. The experts discussed both the possibility to enforce: i) on the simple presentation of the order; and ii) on the simple presentation of the order accompanied by a multilingual enforcement certificate and / or e-certificate. It was felt that additional work and discussion among experts should take place to weigh further the benefits and drawbacks of these two solutions.

⁷⁰ 44 States have signed the Istanbul Convention, with 23 of those States having proceeded to ratify the Convention.

⁷¹ See "Recognition and enforcement of foreign civil protection orders: Additional statistical and comparative information on national law", Prel. Doc. No 4 of February 2015 for the attention of the Council of March 2015 on General Affairs and Policy of the Conference, available on the HCCH website (see path indicated in note 1).

⁷² Questionnaires were submitted from organisations / experts based in Australia, Austria, Belgium, Brazil (2), Burkina Faso, Cambodia, Canada, Colombia, Croatia, Democratic Republic of Congo (3), Estonia, Germany (3), Guatemala (6), India, Ireland (2), Luxembourg, Mexico, New Zealand (3), Netherlands, Nigeria, Norway, Papua New Guinea, Romania, Serbia, Slovenia, South Africa, United States of America (including Navajo Nation and Puerto Rico) (45), and / or "global / international" (3). The majority of respondents to the Questionnaire were civil society organisations, with, however, at least five individual legal practitioners / academics and at least 11 governmental agencies / bodies which provide victim services or work in the justice sector with exposure to victims providing responses.

⁷³ See Annex IV for the complete Conclusions and Recommendations of the 12-13 February 2014 Experts' Group.

Advance establishment of protection orders

No 21: The experts agreed that advance establishment of a protection order in another jurisdiction should be available, in accordance with the conditions set out under the law of the jurisdiction where establishment is sought.

Advance recognition of foreign protection orders

No 22: The experts agreed that application for advance recognition of foreign protection orders should be available. Such advance recognition would not preclude protected individuals from availing themselves of additional mechanisms under national law, as appropriate.

No 23: The experts agreed that traditional private international law methods for the recognition and enforcement of a foreign decision were not usually appropriate in this area."

38. Furthermore, the solution put forward should respect the following principles highlighted by the Experts' Group:

No 13: The experts at the meeting noted that in their jurisdictions the protection of the police and other enforcement officers from liability for good faith enforcement of protection orders is an important and established principle.⁷⁴

No 14: The experts agreed and underlined that appropriate due process rights of the person causing the risk should be respected.⁷⁵

No 15: The experts agreed that an undue burden should not be placed on the victim / protected person when seeking to have a protection order recognised and enforced abroad.⁷⁶

6. Possible international solutions for the recognition and enforcement of protection orders

39. An international solution developed under the auspices of HCCH could provide a response to Article 62(1)(d) of the Istanbul Convention, which imposes a duty of international co-operation between Contracting Parties with respect to "enforcing relevant civil and criminal judgments issued by the judicial authorities of Parties, including protection orders". It should be noted that the Istanbul Convention does not establish a framework for the recognition and enforcement of protection orders. Below are three possible solutions for the establishment of such a framework, which draw on the recommendations of the Experts' Group presented above (see para. 36).

a. An international instrument covering only "civil protection orders"

40. A first option could be to develop an international instrument that would only cover protection orders deemed to be "civil protection orders". The challenge under this option would be to agree on the "criteria" (e.g., the type of authority, procedure and / or sanction) that would be used in the instrument to identify those protection orders that qualify as "civil" orders. However, as observed earlier (see paras 12-14 above), there are a number of orders characterised as "criminal" (due to the corresponding nature of the issuing authority or the procedure under which they were issued) that in fact address the same types of conduct as protection orders issued by "civil" authorities and / or under "civil" procedure. Many such orders would be unlikely to fall under the scope of the proposed potential instrument, which would regrettably fail to provide cross-border protection for a significant number of victims.

⁷⁴ This is necessary where enforcement officers would not properly enforce a protection order.

⁷⁵ This is necessary for the person causing the risk if, for example, enforcement officers were to abuse their enforcement powers.

⁷⁶ From the victim / protected person perspective, the enforcement should be as simple and effective as possible.

41. Other problems may arise from this solution. The characterisation of the protection order may result in delays at the enforcement stage, or enforcement officers may simply find it impossible to do so “on-the-spot”. Furthermore, should a victim wish to establish a protection order prior to moving to another Contracting State where only criminal protection orders are available, it would be impossible for such a State to issue the necessary protection orders under the envisaged international instrument, as the available measures would not qualify as “civil protection orders”.

b. An international instrument with an autonomous definition of “civil protection orders”

42. A second option could be to develop an international instrument that would cover all orders which have as their object the protection of an individual by placing restrictions on another person posing a danger, with the aim of preventing further violence (e.g., no-contact, proximity and stay away orders (see para. 12 above)). This could be done on the basis of either an “open” list of autonomous definitions⁷⁷ or a “closed” list of autonomous definitions⁷⁸, regardless of the type of issuing authority or procedure used to issue such orders. The protection orders that would meet those definitions would be autonomously defined as “civil protection orders” for the purpose of the instrument.

43. This second option would have the advantage of creating a level playing field among different types of protection orders. As a result, it would cover the vast majority of protection orders aiming to protect an individual. Furthermore, it may reduce delays at the enforcement stage and simplify the work of enforcement officers. Finally, the problem with regards to the advance establishment of protection orders identified above would be resolved if the criminal orders issued in the State where a protection order is sought were to meet the Convention’s autonomous definition.

c. An international instrument covering all protection orders

44. A third option would be to develop an international instrument that would cover all types of protection orders without defining such orders. This option may be rather ambitious in view of the difficulty of identifying the entire range of types of protection orders that may be subject to such an instrument, let alone the impossibility of foreseeing every such protection order that could emerge in the future. Where this approach might be effective for federal States in which protection orders are to a great extent harmonised, such as the United States of America, it would entail significant challenges for negotiation and implementation at the international level.

D. Conclusions and possible future work

45. If the Council decides that further work on this topic is desired, the Permanent Bureau suggests reconvening the Experts’ Group in the course of 2018-2019, subject to available resources, to explore the above options and the issues listed below, in particular. The Experts’ Group could make concrete recommendations to the Council as to the best approaches that could feature in a new international instrument in this area, drawing on relevant existing models and practice. The work of the Experts’ Group could also include the elaboration of specific recommendations as to the substance of a possible new international instrument. This work could be undertaken in co-operation with the United Nations Office on Drugs and Crime (UNODC), drawing on its expertise in the area of victim protection and criminal law.⁷⁹

⁷⁷ See the autonomous definition of “rights of custody” under Art. 5(a) of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. For example, an autonomous definition in the context of an international instrument concerning protection orders could read as follows: “Without regard to the issuing authority and the nature of the law under which the order is issued, an order is deemed to be a “civil order” for the purpose of this Convention if it is meant to obligate an individual from refraining[, in particular,] from the following conducts: [...] with regard to[, in particular,] the following actions or potential actions: [...]”.

⁷⁸ The choice between an “open” list or a “closed” list would depend on whether States would wish to maintain some flexibility to accommodate protection orders they would not have contemplated during the negotiations that would be similar to those listed in the instrument.

⁷⁹ See Annex I, para. 9.

46. During its 2014 meeting, the Experts' Group suggested a number of potential features of an international protection orders instrument (see para. 36 above) and set out a range of policy orientations (see para. 37 above).⁸⁰ Exploration could continue, inter alia, on issues such as:

- 1) Possible mechanisms for "on-the-spot" / immediate enforcement of foreign protection orders;
- 2) Any challenges posed by differential enforcement schemes for protection orders in various jurisdictions;
- 3) Due process / notification requirements for the person causing risk, drawing on existing models;
- 4) Whether it would be necessary or desirable to include rules on jurisdiction and applicable law in an international instrument;
- 5) Possible mechanisms for "advance establishment" and "advance recognition" of protection orders in a foreign jurisdiction;
- 6) Inter-relationship with other relevant instruments, including the 1996 Child Protection Convention and the 1980 Child Abduction Convention, and how a new instrument on protection orders could be designed to support the operation of the latter, in particular;
- 7) The use of an international certificate and / or model forms, to ensure the genuine "portability" of protection orders; and
- 8) The particular types of conduct currently addressed by protection order regimes in different legal systems that a new instrument would need to cover (see para. 13 above).

⁸⁰ See Annex IV for the complete list of policy orientations and possible instrument features suggested by the Experts' Group at its 12-13 February 2014 Meeting.

A N N E X E S

Summary of work carried out since 2011

1. In April 2011 the Council on General Affairs and Policy of HCCH on Private International Law (the "Council") added to the agenda of the Conference "the topic of the recognition of foreign civil protection orders made, for example, in the context of domestic violence cases".¹
2. The Sixth Meeting of the Special Commission on the practical operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention (Part I, 1-10 June 2011) welcomed the addition of this topic to the HCCH agenda and recommended that "account should be taken of the possible use of such orders in the context of the 1980 Convention".²
3. The Permanent Bureau presented to the Council in April 2012 Preliminary Document No 7, "Recognition and Enforcement of Foreign Civil Protection Orders: A Preliminary Note"³ in fulfilment of the previous year's mandate.⁴
4. Upon request of the 2012 Council, a Questionnaire was circulated to Members of HCCH in November of 2012.⁵ Preliminary Document No 4 B of March 2013, "Questionnaire on the recognition and enforcement of foreign civil protection orders: Summary of Member responses and possible ways forward,"⁶ was subsequently presented to the 2013 Council.⁷
5. In April 2013 the Council "welcomed the work carried out by the Permanent Bureau and invited it to continue exploratory work, including further comparative research (such as a country profile) and investigation on the feasibility of a future instrument. The Permanent Bureau may, resources allowing, convene an Experts' Group to assist in carrying out this work."
6. In furtherance of this 2013 mandate, the Permanent Bureau developed a Draft Country Profile for this area of law,⁸ and convened an Experts' Group on the Recognition and Enforcement of Foreign Civil Protection Orders, which took place from 12 to 13 February 2014. A very positive report showing substantial progress was presented to the Council at its March 2014 meeting.⁹ The Conclusions and Recommendations of the Experts' Group clearly called for the development of an instrument in this area. Council discussions revealed a desire from Members to obtain more statistics with a view to better assess the need to develop an instrument in this area.
7. Additional statistics collected from 28 responses to the 2014 Draft Country Profile and 85 responses to a Questionnaire distributed to NGOs located in 27 countries were shared with the Council at its 2015 meeting. A notable number of reported cases related to child abduction matters. The cases dealt with a variety of issues, ranging from domestic violence and harassment to stalking and forced marriage, as well as others. The statistics that were collected to assess the prevalence of relevant cases and the need for an instrument showed that a great

¹ See "Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (5-7 April 2011)", C&R No 23, available on the HCCH website (see path indicated in note 1 of this Note).

² "Conclusions and Recommendations of the Sixth Meeting of the Special Commission (Part I, 1-10 June 2011)", No 43 available on the HCCH website at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings".

³ Prel. Doc. No 7 of March 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference available on the HCCH website at < www.hcch.net > (see path indicated in note 1 of this Note).

⁴ The document noted significant national and regional policy attention to this area of law based on, among other things, a growing awareness of "[t]he ease of international cross-border travel combined with the severe risk to an individual who cannot obtain immediate recognition and enforcement of a foreign protection order" (*ibid.*, at p. 5).

⁵ *Op. cit.*, note 3 of this Note.

⁶ Prel. Doc. No 4 B of March 2013 for the attention of the Council of April 2013 on General Affairs and Policy of the Conference available on the HCCH website at < www.hcch.net > (see path indicated in note 1 of this Note).

⁷ This document included information from the 24 Members (including the European Union) from which the Permanent Bureau received individual responses before 28 February 2013, and supported the findings of the previous year's Preliminary Note. Individual Member responses to the Questionnaire, including responses received after 28 February 2013, are available on the HCCH website.

⁸ *Op. cit.*, note 4 of this Note.

⁹ "Report of the Meeting of the Experts' Group on the Recognition and Enforcement of Foreign Civil Protection Orders", Prel. Doc. No 4 A of March 2014 for the attention of the Council of April 2014 on General Affairs and Policy of the Conference, available on the HCCH website < www.hcch.net > (see path indicated in note 1 of this Note).

majority of the practitioners and victim-services groups canvassed were handling cross-border cases on a regular basis.

8. In March 2016, the Permanent Bureau reported to Council that an analysis of the responses to the Questionnaire and 2014 Country Profile evidenced the existence of enough core commonalities between national protection order regimes for international work to be considered feasible.

9. In March 2017, the Permanent Bureau informed the Council that there had been a productive meeting with UNODC, which had agreed to co-operate with HCCH on the recognition and enforcement of protection orders.

10. On 12 June 2017, at a Meeting of Experts on Issues of Domestic / Family Violence and the 1980 Hague Child Abduction Convention co-organised by the University of Westminster and the HCCH, “[p]articipants welcomed continuing international work on protection orders, and recognised a need in practice, both in the operation of the 1980 Convention, and in a variety of other cross-border circumstances (*e.g.*, domestic and family violence, stalking, general harassment, human trafficking, forced marriage, female genital mutilation (FGM), etc.), for an international instrument addressing the recognition and enforcement of protection orders”.¹⁰

11. At its Seventh Meeting (10-17 October 2017), the Special Commission on the practical operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention, recalling its Conclusion and Recommendation on this topic at the Sixth Meeting (No 43), welcomed “the report on preliminary work already undertaken as well as the continued exploration of further work on the recognition and enforcement of foreign protection orders at the international level”.¹¹

¹⁰ See para. 19 of the “Report on the Experts’ Meeting on Issues of Domestic / Family Violence and the 1980 Hague Child Abduction Convention, 12 June 2017, The University of Westminster, London”, *op. cit.*, note 6 of this Note. Other Conclusions and Recommendations of the 12 June 2017 London Meeting of Experts can be found in Annex II to this document.

¹¹ See “Conclusion and Recommendation of the Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention (10-17 October 2017), C&R No 55, available on the HCCH website (see path indicated in note 6 of this Note).

Report on the Experts' Meeting on Issues of Domestic / Family Violence and the 1980 Hague Child Abduction Convention

The University of Westminster, London (12 June 2017)

On 12 June 2017, 57 experts attended a meeting, at the invitation of the conference organisers, Professor Marilyn Freeman of the University of Westminster and the Hague Conference on Private International Law (HCCH), on the topic of Domestic / Family Violence and the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (1980 Child Abduction Convention). Participating experts included judges, government officials, Central Authority officials under the 1980 Convention, lawyers, mediators, psychologists, academics, researchers and members of non-governmental organisations from the following 19 jurisdictions: Australia, Belgium, Brazil, Canada, Finland, France, Germany, India, Italy, Japan, New Zealand, Norway, South Africa, Switzerland, the Netherlands, the United Kingdom (England and Wales, Northern Ireland, Scotland) and the United States of America, as well as European Union officials and members of the Permanent Bureau of the HCCH.

The meeting was opened with remarks by Mr. Justice A. K. Sikri, Supreme Court of India, and Ms. Salla Saastamoinen, Director, Directorate A Civil and Commercial Justice, Directorate General Justice and Consumers, European Commission, followed by four hour-long presentations and facilitated sessions on particular topics, engaging participants in discussion and debate. A questionnaire was circulated in advance of the meeting in order to provide background information on the topic from various jurisdictions in order to inform conference discussion.

[...]

4th Thematic Session

Discussion of a potential new international instrument on protection orders

Chair: Anne-Marie Hutchinson, QC (Hon) OBE, Dawson Cornwell & Co., Solicitors

19. Participants welcomed continuing international work on protection orders, and recognised a need in practice, both in the operation of the 1980 Convention, and in a variety of other cross-border circumstances (*e.g.*, domestic and family violence, stalking, general harassment, human trafficking, forced marriage, female genital mutilation (FGM), etc.), for an international instrument addressing the recognition and enforcement of protection orders.
20. It was noted that the protective measures that could be obtained under the 1996 Convention are related to the child concerned / the dispute concerning the child and not necessarily the child's carer. Further, 1980 Convention proceedings are restricted to the parties, usually the parents. There are many situations where protection orders are required in respect of other actors and in particular extended family members, thus, only a separate new international instrument could provide for those areas of protection, even if accompanied by orders under the 1996 Convention.
21. Any new instrument should likely be multi-layered with an option for "full" protection orders that are transportable across international borders, as well as provision for urgent measures that are intended to be time-limited (*e.g.*, in the context of return proceedings under the 1980 Convention). In all cases, the due process rights of a respondent should be safeguarded.
22. In the context of the operation of the 1980 Convention, potential in this area could be realised in particular through co-operation and liaison within judicial networks, among lawyers and Central Authorities.
23. The need to learn from operational experience with the 1996 Convention was highlighted, including the need to ensure that recognition and enforcement of measures would be truly "automatic." The great importance of attention to the issue of effective enforcement of

orders generally, and training of relevant actors (*e.g.*, enforcement officers) on the same, was underlined.

24. Participants suggested the need for an effective database or other registration system for “transportable” international orders so they could be accessed and verified swiftly, *e.g.*, by law enforcement. Learning could also be drawn from the Passport system of the United States of America, or that of a transnational model form / certificate used within the European Union.

Types of Protection Orders and Sanctions

Analysis of 2014 Country Profiles and 2012 Questionnaire Responses

1 - Overview of types of protection orders - Analysis of 2014 Country Profiles and 2012 Questionnaire Responses

1. The purpose of this Annex is to provide a preliminary classification of types of protection order regimes for 40 Members of HCCH¹ through the combined analysis of two main sources of information: responses to the Questionnaire circulated to Members of HCCH in November 2012² and the 2014 Draft Country Profiles completed by Members in 2014³. The 2012 Questionnaire and 2014 Draft Country Profiles responses are considered authoritative, as they emanate from State officials.

2. Of the 40 States analysed, 27 have a protection order regime that could be characterised as civil.⁴ Seven of these States do not have protection order regimes of a different nature that exist in addition to the civil protection order regime.⁵ This leaves 20 States in which there are civil protection regimes as well as other types of protection order regimes.⁶

3. 25 States have a criminal protection order regime,⁷ three of which have it as the *only* protection order regime in their jurisdiction,⁸ and 22 of which have other types of protection order regimes that exist alongside the criminal one.⁹

4. Six States have an administrative protection order regime; all of them exist in addition to other types of protection order regimes.¹⁰

5. 24 States have what may be deemed a “hybrid” protection order regime.¹¹ In 16 of these States the “hybrid” regime is one of a civil and criminal nature¹², in three of these States the “hybrid” system is one of a civil, criminal and administrative nature.¹³ Sweden and the Netherlands are the only States where the “hybrid” system is of criminal and administrative

¹ Argentina, Australia (Australian Capital Territory (ACT), federal government (Fed.), New South Wales (NSW), the Northern Territory (NT), Queensland (Qld.), South Australia (SA), Tasmania (Tas.), Victoria (Vic.), Western Australia (WA)), Austria, Belarus, Brazil, Bulgaria, Canada (Alberta (AB), British Columbia (BC), Manitoba (MB), Newfoundland and Labrador (NL), Northwest Territories (NWT), Nova Scotia (NS), Ontario (ON), Prince Edward Island (PEI), Quebec (QC), Saskatchewan (SK), Yukon Territory (YT)), China (SAR of Hong Kong and SAR of Macao (not mainland China)), Croatia, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Germany, Greece, Hungary, Israel, Italy, Japan, Latvia, Lithuania, Mexico, Monaco, the Netherlands, New Zealand, Paraguay, Poland, Portugal, Republic of Korea, Romania, Serbia, Slovakia, Spain, Sweden, Switzerland, Turkey, Ukraine, and United States of America.

² The individual responses to the Questionnaire are available on the HCCH website (see path indicated in note 3 of this Note).

³ The 2014 Draft Country Profiles are available on the HCCH website (see path indicated in note 3 of this Note).

⁴ Argentina, Austria, Bulgaria, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Israel, Italy, Japan, Latvia, Lithuania, Mexico, Monaco, New Zealand, Paraguay, Poland, Romania, Serbia, Slovakia, Spain, Switzerland, Turkey and the United States of America.

⁵ Austria, Bulgaria, France, Japan, Hungary, Switzerland and Turkey.

⁶ Argentina, Czech Republic, Estonia, Finland, Germany, Greece, Israel, Italy, Latvia, Lithuania, Mexico, Monaco, New Zealand, Paraguay, Poland, Romania, Serbia, Slovakia, Spain and Switzerland.

⁷ Argentina, Belgium, Brazil, Czech Republic, Denmark, Ecuador, Estonia, Germany, Greece, Israel, Italy, Latvia, Lithuania, Mexico, Monaco, the Netherlands, New Zealand, Paraguay, Poland, Portugal, Republic of Korea, Romania, Slovakia, Spain and Sweden.

⁸ Denmark, Portugal and Republic of Korea.

⁹ Argentina, Brazil, Czech Republic, Ecuador, Estonia, Germany, Greece, Israel, Italy, Latvia, Lithuania, Mexico, Monaco, the Netherlands, New Zealand, Paraguay, Poland, Romania, Serbia, Slovakia, Spain and Sweden.

¹⁰ Czech Republic, Germany, Latvia, the Netherlands, Paraguay and Slovakia.

¹¹ Argentina, Australia (ACT, Fed., NSW, NT, Qld., SA, Tas., Vic., WA), Canada (AB, BC, MB, NL, NWT, NS, ON, PEI, QC, SK, YT), China (SAR of Honk Kong, SAR of Macao), Czech republic, Ecuador, Estonia, Germany, Greece, Israel, Italy, Latvia, Lithuania, Mexico, Monaco, the Netherlands, New Zealand, Paraguay, Poland, Romania, Serbia, Slovakia, Spain and Sweden.

¹² Argentina, Czech Republic, Ecuador, Estonia, Germany, Greece, Israel, Italy, Lithuania, Mexico, Monaco, New Zealand, Poland, Romania, Serbia and Spain.

¹³ Latvia, Paraguay and Slovakia.

nature. Lastly, three States are considered to have “hybrid” regimes owing to their federal nature and the differences of regimes that exist between the different jurisdictions.¹⁴

2 - Overview of types of sanctions imposed for the breach of protection orders as presented in the 2014 Draft Country Profiles

6. The sanctions for the breach of protection orders have been classified for 24 States’ protection order regimes¹⁵ using one main source of information, namely the Draft Country Profiles completed by Members in 2014.¹⁶

7. Of these 24 States, 15 States impose both criminal and civil sanctions for the breach of a protection order.¹⁷ Three States have only civil sanctions for the breach of a protection order.¹⁸ Five States have only criminal sanctions for the breach of a protection order.¹⁹ The answer of one State is unclear.²⁰

¹⁴ Australia (Civil: ACT, NSW, NT, Qld., SA, Tas., Vic., WA, Criminal: NSW, NT), Canada (Civil: AB, BC, MB, NL, NWT, NS, ON, PEI, YT, Criminal: SK, Civil and Criminal: QC) and China (Civil: SAR of Honk Kong, Criminal: SAR of Macao).

¹⁵ Argentina, Austria, Bulgaria, Canada (Alberta (AB), British Columbia (BC), Prince Edward Island (PEI), Quebec (QC), Saskatchewan (SK)), China (SAR of Hong Kong), Ecuador, Estonia, France, Greece, Hungary, Italy, Latvia, Lithuania, Monaco, New Zealand, Paraguay, Poland, Republic of Korea, Serbia, Slovakia, Spain, Sweden, Switzerland and Ukraine.

¹⁶ The 2014 Draft Country Profiles are available on the HCCH website (see path indicated in note 3 of this Note).

¹⁷ Argentina, Canada (AB, BC, PEI, QC, SK), China (SAR of Honk Kong), Estonia, France, Greece, Hungary, Latvia, Lithuania, Monaco, New Zealand, Poland, Republic of Korea, Serbia and Spain.

¹⁸ Austria, Slovakia and Switzerland.

¹⁹ Bulgaria, Ecuador, Paraguay, Sweden and Ukraine.

²⁰ Italy.

Extracts from national and regional instruments dealing with recognition and enforcement of protection orders

1. Existing national schemes for the recognition and enforcement of national protection orders in a federal context

a. Violence Against Women Act (VAWA) of the United States of America

Violence Against Women Act (VAWA) of the United States of America U.S. Code, Title 18, Part I, Chapter 110A¹

Paragraph 2265:

(a) Full Faith and Credit.—

Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory [1] as if it were the order of the enforcing State or tribe.

(b) Protection Order.—A protection order issued by a State, tribal, or territorial court is consistent with this subsection if—

(1) such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and

(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

(c) Cross or Counter Petition.—A protection order issued by a State, tribal, or territorial court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a spouse or intimate partner is not entitled to full faith and credit if—

(1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or

(2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order.

(e) Tribal Court Jurisdiction.—

For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

¹ The full text of the Act is available at <https://www.law.cornell.edu/uscode/text/18/2265> (last consulted on 12 January 2018).

b. United States Uniform Interstate Enforcement of Domestic Violence Protection Orders Act

Uniform Interstate Enforcement of Domestic-Violence Protection orders Act (last amended or revised in 2012)²

SECTION 3. JUDICIAL ENFORCEMENT OF ORDER.

(a) A person authorized by the law of this State to seek enforcement of a protection order may seek enforcement of a valid foreign protection order in a tribunal of this State. The tribunal shall enforce the terms of the order, including terms that provide relief that a tribunal of this State would lack power to provide but for this section. The tribunal shall enforce the order, whether the order was obtained by independent action or in another proceeding, if it is an order issued in response to a complaint, petition, or motion filed by or on behalf of an individual seeking protection. In a proceeding to enforce a foreign protection order, the tribunal shall follow the procedures of this State for the enforcement of protection orders.

(b) A tribunal of this State may not enforce a foreign protection order issued by a tribunal of a State that does not recognize the standing of a protected individual to seek enforcement of the order.

(c) A tribunal of this State shall enforce the provisions of a valid foreign protection order which govern custody and visitation, if the order was issued in accordance with the jurisdictional requirements governing the issuance of custody and visitation orders in the issuing State.

(d) A foreign protection order is valid if it:

(1) identifies the protected individual and the respondent;

(2) is currently in effect;

(3) was issued by a tribunal that had jurisdiction over the parties and subject matter under the law of the issuing State; and

(4) was issued after the respondent was given reasonable notice and had an opportunity to be heard before the tribunal issued the order or, in the case of an order ex parte, the respondent was given notice and has had or will have an opportunity to be heard within a reasonable time after the order was issued, in a manner consistent with the rights of the respondent to due process.

(e) A foreign protection order valid on its face is prima facie evidence of its validity.

(f) Absence of any of the criteria for validity of a foreign protection order is an affirmative defense in an action seeking enforcement of the order.

(g) A tribunal of this State may enforce provisions of a mutual foreign protection order which favor a respondent only if:

(1) the respondent filed a written pleading seeking a protection order from the tribunal of the issuing State; and

(2) the tribunal of the issuing State made specific findings in favor of the respondent

SECTION 4. NONJUDICIAL ENFORCEMENT OF ORDER.

(a) A law enforcement officer of this State, upon determining that there is probable cause to believe that a valid foreign protection order exists and that the order has been violated, shall enforce the order as if it were the order of a tribunal of this State. Presentation of a protection order that identifies both the protected individual and the respondent and, on its face, is

² The full text of the Act is available at http://www.uniformlaws.org/shared/docs/interstate%20enforcement%20of%20domestic%20violence%20protection%20orders/uiedvpoa_final_02.pdf (last consulted on 12 January 2018).

currently in effect constitutes probable cause to believe that a valid foreign protection order exists. For the purposes of this section, the protection order may be inscribed on a tangible medium or may have been stored in an electronic or other medium if it is retrievable in perceivable form. Presentation of a certified copy of a protection order is not required for enforcement.

(b) If a foreign protection order is not presented, a law enforcement officer of this State may consider other information in determining whether there is probable cause to believe that a valid foreign protection order exists.

(c) If a law enforcement officer of this State determines that an otherwise valid foreign protection order cannot be enforced because the respondent has not been notified or served with the order, the officer shall inform the respondent of the order, make a reasonable effort to serve the order upon the respondent, and allow the respondent a reasonable opportunity to comply with the order before enforcing the order.

(d) Registration or filing of an order in this State is not required for the enforcement of a valid foreign protection order pursuant to this [Act]

c. Australian model law – Domestic Violence Orders (National Recognition) Model Provisions

Domestic Violence Orders (National Recognition) Model Provisions approved by COAG on 1 December 2015³

Part 2 National recognition of DVOs

Division 1 General principles

9 Recognition of DVOs

(1) Each of the following DVOs is a recognised DVO in this jurisdiction:

- (a) a local DVO,
- (b) an interstate DVO made in a participating jurisdiction,
- (c) a foreign order that is a registered foreign order in any participating jurisdiction.

(2) A DVO becomes a recognised DVO when it is made. *Note. A foreign order is taken to be made when it is registered as a registered foreign order.*

(3) A DVO is a recognised DVO, subject to these Model Provisions, for the period for which it remains in force in the jurisdiction in which it is made.

10 Variations to DVO

(1) A variation to a recognised DVO that is done in this or another jurisdiction is a recognised variation in this jurisdiction in the circumstances provided for by this section.

(2) A variation to a local DVO is a recognised variation in this jurisdiction if the variation is done:

- (a) in this jurisdiction by a court or any other person authorised to do so under this Act,
- or
- (b) in another participating jurisdiction by a court under a corresponding law.

³ The full text of the model law is available at <https://www.pcc.gov.au/uniform/Domestic-Violence-Orders-Model-Provisions-11December2015.pdf>

(3) A variation to an interstate DVO or foreign order is a recognised variation in this jurisdiction if the variation is done:

(a) in the issuing jurisdiction by a court or any other person authorised to do so under the law of the issuing jurisdiction, or

(b) in any participating jurisdiction by a court under these Model Provisions or a corresponding law.

(4) A variation is recognised from the time that it is made.

12 Recognised DVO prevails over earlier comparable DVOs

(1) A recognised DVO that is enforceable against a defendant in this jurisdiction (a new DVO) supersedes:

(a) any comparable recognised DVO made earlier than the new DVO, and

(b) any comparable local DVO made earlier than the new DVO (whether or not the local DVO is a recognised DVO).

(2) The earlier comparable DVO is superseded from the time the recognised DVO becomes enforceable against the defendant.

(3) A recognised DVO that is superseded ceases to be a recognised DVO.

(4) A local DVO that is superseded is revoked.

(5) A DVO is not superseded to the extent that it relates to a protected person who is not a protected person under the new DVO.

(6) Accordingly, a DVO continues to be a recognised DVO, and to have effect, to the extent that it relates to a person who is not a protected person under the new DVO.

(7) A DVO made by a police officer does not supersede a comparable DVO made by a court (of any jurisdiction).

(8) A DVO is comparable with another DVO if:

(a) the DVOs are made against the same defendant, and

(b) the DVOs are made for the protection of one or more of the same protected persons.

Division 2 Enforcement of recognised DVOs

14 Recognised DVOs and variations are enforceable against defendant

(1) A recognised DVO, or a recognised variation to a recognised DVO, is enforceable against the defendant in this jurisdiction.

(2) A recognised DVO that is a local DVO becomes enforceable against the defendant in this jurisdiction when the defendant is properly notified of the making of the DVO under the law of this jurisdiction.

(3) A recognised DVO that is a non-local DVO (other than a foreign order) becomes enforceable against a defendant in this jurisdiction when the defendant is properly notified of the making of the DVO under the law of the jurisdiction in which the DVO was made.

(4) A recognised DVO that is a foreign order becomes enforceable against a defendant in this jurisdiction from the time it becomes a recognised DVO.

(5) A recognised variation to a recognised DVO becomes enforceable against the defendant in this jurisdiction when the defendant is properly notified of the variation under the law of the jurisdiction in which the variation is done

Division 3 Enforcement of non-local DVOs

18 Non-local DVO to be treated as local DVO

(1) A recognised DVO that is a non-local DVO has the same effect in this jurisdiction as a local DVO.

(2) A prohibition, restriction or condition imposed by a non-local DVO has the same meaning as it would have in the jurisdiction in which the DVO was made, but may be enforced in this jurisdiction as if it were a prohibition, restriction or condition of a local DVO.

*PART 3 Variation and revocation of recognised non-local DVOs***24 Power of court to vary or revoke recognised non-local DVOs**

(1) A court may vary or revoke a recognised DVO that is a non-local DVO in accordance with this Part as if the DVO were a local DVO.

(2) A court cannot vary or revoke a non-local DVO if it is a kind of DVO that cannot be varied or revoked by a court in the jurisdiction in which the DVO was made.

(3) A variation to or revocation of a recognised DVO that is done under this Part is not limited in its operation to this jurisdiction.

(4) This Part does not apply to the variation or revocation of a foreign order that is registered as a registered foreign order in this jurisdiction.

(5) To avoid doubt, if a court varies a recognised DVO that was made in another jurisdiction, the other jurisdiction continues to be treated, for the purpose of these Model Provisions, as the jurisdiction in which the DVO was made.

25 Application for variation or revocation of recognised non-local DVO

(1) An application for the variation or revocation of a recognised DVO that is a non-local DVO may be made to a court as if it were an application for variation or revocation of a local DVO by any person who would be able to make the application if the DVO were a local DVO.

(2) An application:

(a) is to be made to a court that would have power to hear the application if the DVO were a local DVO, and

(b) is to be made in accordance with any requirements that would apply if the DVO were a local DVO, and

(c) may be dealt with (subject to this Part) as if the DVO were a local DVO

d. Uniform Law Conference of Canada model law

Uniform Enforcement of Canadian Judgments and Decrees Act 1997 (Last amended in 2011)⁴

Section 1

Right to register Canadian judgment

(1) Subject to subsection (2) a Canadian judgment, whether or not the judgment is final, may be registered under this Act for the purpose of enforcement

(2) A Canadian judgment that requires a person to pay money may not be registered under this Act for the purpose of enforcement unless it is a final judgment.

⁴ The full text of the Act is available at <https://www.ulcc.ca/en/annual-meetings/377-1997-whitehorse-yk/civil-section-documents/1760-enforcement-of-canadian-judgments-and-decrees-act>

(3) A Canadian judgment that also contains provisions for relief that may not be enforced under this Act may be registered under this Act except in respect of those provisions.

Effect of registration

(1) Subject to sections 5 and 6, a registered Canadian judgment may be enforced in [enacting province or territory] as if it were an order or judgment of, and entered in, the [superior court of unlimited trial jurisdiction in the enacting province or territory].

Time limit for registration and enforcement

(1) A Canadian judgment that requires a person to pay money must not be registered or enforced under this Act

(a) after the time for enforcement has expired in the province or territory where the judgment was made; or

(b) later than [xxx] years after the day on which the judgment became enforceable in the province or territory where it was made

Application for directions

(1) A party to the proceeding in which a registered Canadian judgment was made may apply to the [superior court of unlimited trial jurisdiction in the enacting province or territory] for directions respecting its enforcement.

(2) On an application under subsection (1), the court may

(a) make an order that the judgment be modified as may be required to make it enforceable in conformity with local practice,

(b) make an order stipulating the procedure to be used in enforcing the judgment,

(c) make an order staying or limiting the enforcement of the judgment, subject to any terms and for any period the court considers appropriate in the circumstances, if

(i) such an order could be made in respect of an order or judgment of the [superior court of unlimited trial jurisdiction in the enacting province or territory] under [the statutes and the rules of court] [any enactment of the enacting province or territory] relating to legal remedies and the enforcement of orders and judgments,

(ii) the party against whom enforcement is sought has brought, or intends to bring, in the province or territory where the Canadian judgment was made, a proceeding to set aside, vary or obtain other relief in respect of the judgment,

(iii) an order staying or limiting enforcement is in effect in the province or territory where the Canadian judgment was made, or

(iv) is contrary to public policy in [the enacting province or territory].

(3) Notwithstanding subsection (2), the [superior court of unlimited trial jurisdiction in the enacting province or territory] shall not make an order staying or limiting the enforcement of a registered Canadian judgment solely on the grounds that

(a) the judge, court or tribunal that made the judgment lacked jurisdiction over the subject matter of the proceeding that led to the judgment, or over the party against whom enforcement is sought, under

(i) principles of private international law, or

(ii) the domestic law of the province or territory where the judgment was made,

(b) the [superior court of unlimited trial jurisdiction in the enacting province or territory] would have come to a different decision on a finding of fact or law or on an exercise of discretion from the decision of the judge or court that made the judgment, or

(c) a defect existed in the process or proceeding leading to the judgment.

(4) An application for directions must be made under subsection (1) before any measures are taken to enforce a registered Canadian judgment where

(a) the enforceability of the judgment is, by its terms, subject to the satisfaction of a condition, or

(b) the judgment was obtained ex parte without notice to the persons bound by it

2. Existing national and regional schemes for the recognition and enforcement of foreign protection orders

a. United States Uniform Recognition and Enforcement of Canadian Domestic-Violence Protection Orders Act

Uniform Recognition and Enforcement of Canadian Domestic Violence Protection Orders Act⁵

SECTION 3. ENFORCEMENT OF CANADIAN DOMESTIC VIOLENCE 27 PROTECTION ORDER BY LAW-ENFORCEMENT OFFICER.

(a) If a law-enforcement officer determines under subsection (b) or (c) that there is probable cause to believe a valid Canadian domestic violence protection order exists and the order has been violated, the officer shall enforce the order as if it were an order of a tribunal.

(b) Presentation of a record of a Canadian domestic violence protection order that identifies both a protected individual and a respondent and on its face is in effect, constitutes probable cause to believe that a valid order exists.

(c) Presentation of a record of a Canadian domestic violence protection order is not required for enforcement. If the order is not presented as provided in subsection (b), a law enforcement officer may consider other information in determining whether there is probable cause to believe that a valid Canadian domestic violence protection order exists.

(d) If a law-enforcement officer determines that an otherwise valid Canadian domestic violence protection order cannot be enforced because the respondent has not been notified or served with the order, the officer shall notify the protected individual that the officer will make reasonable efforts to contact the respondent, consistent with the safety of the individual. After notice to the individual and consistent with the safety of the individual, the law-enforcement officer shall make reasonable efforts to inform the respondent of the order, serve a copy of the order on the respondent, and allow the respondent a reasonable opportunity to comply with the order before the officer enforces the order.

(e) If a law-enforcement officer determines that the individual is a protected individual, the officer shall inform the individual of available local victim services.

SECTION 4. OTHER ENFORCEMENT OF CANADIAN DOMESTIC 30 VIOLENCE PROTECTION ORDER.

⁵ The full text of the Act is available at http://www.uniformlaws.org/shared/docs/Recognition%20and%20Enforcement%20of%20Canadian%20Domestic%20Violence%20Protection%20Orders/URECDVPOA_Final%20Act.pdf

- (a) A tribunal may issue an order enforcing a Canadian domestic violence protection order on application of a person authorized by law of this state other than this [act] to seek enforcement of a domestic protection order.
- (b) In a proceeding to enforce a Canadian domestic violence protection order under subsection (a), the tribunal shall follow the procedures of this state for the enforcement of a domestic protection order.
- (c) A Canadian domestic violence protection order for which enforcement is sought under subsection (a) is enforceable if:
- (1) it identifies a protected individual and a respondent;
 - (2) it is in effect;
 - (3) the issuing court had jurisdiction over the parties and the subject matter under law of the issuing court's jurisdiction; and
 - (4) it was issued after:
 - (A) the respondent was given reasonable notice and had an opportunity to be heard before the court issued the order; or
 - (B) in the case of an *ex parte* order, the respondent was given notice and had or will have an opportunity to be heard within a reasonable time after the order was issued, in a manner consistent with the right of the respondent to due process.
- (d) A Canadian domestic violence protection order valid on its face is *prima facie* evidence of its enforceability under subsection (a).
- (e) A claim that a Canadian domestic violence protection order does not comply with subsection (c) is an affirmative defense in an action seeking enforcement of the order.

b. European Union Directive and Regulation

1) DIRECTIVE 2011/99/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order⁶

Article 9

Measures in the executing State

1. Upon receipt of a European protection order transmitted in accordance with Article 8, the competent authority of the executing State shall, without undue delay, recognise that order and take a decision adopting any measure that would be available under its national law in a similar case in order to ensure the protection of the protected person, unless it decides to invoke one of the grounds for non-recognition referred to in Article 10. The executing State may apply, in accordance with its national law, criminal, administrative or civil measures.
2. The measure adopted by the competent authority of the executing State in accordance with paragraph 1, as well as any other measure taken on the basis of a subsequent decision as referred to in Article 11, shall, to the highest degree possible, correspond to the protection measure adopted in the issuing State.
3. The competent authority of the executing State shall inform the person causing danger, the competent authority of the issuing State and the protected person of any measures adopted in accordance with paragraph 1, as well as of the possible legal consequence of a breach of such measure provided for under national law and in accordance with Article 11(2). The address

⁶ The full text of the Directive is available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0099&from=EN>

or other contact details of the protected person shall not be disclosed to the person causing danger unless such details are necessary in view of the enforcement of the measure adopted in accordance with paragraph 1.

4. If the competent authority in the executing State considers that the information transmitted with the European protection order in accordance with Article 7 is incomplete, it shall without delay inform the competent authority of the issuing State by any means which leaves a written record, assigning a reasonable period for it to provide the missing information.

Article 10

Grounds for non-recognition of a European protection order

1. The competent authority of the executing State may refuse to recognise a European protection order in the following circumstances:
 - (a) the European protection order is not complete or has not been completed within the time limit set by the competent authority of the executing State;
 - (b) the requirements set out in Article 5 have not been met;
 - (c) the protection measure relates to an act that does not constitute a criminal offence under the law of the executing State;
 - (d) the protection derives from the execution of a penalty or measure that, according to the law of the executing State, is covered by an amnesty and relates to an act or conduct which falls within its competence according to that law;
 - (e) there is immunity conferred under the law of the executing State on the person causing danger, which makes it impossible to adopt measures on the basis of a European protection order;
 - (f) criminal prosecution, against the person causing danger, for the act or the conduct in relation to which the protection measure has been adopted is statute-barred under the law of the executing State, when the act or the conduct falls within its competence under its national law;
 - (g) recognition of the European protection order would contravene the *ne bis in idem* principle;
 - (h) under the law of the executing State, the person causing danger cannot, because of that person's age, be held criminally responsible for the act or the conduct in relation to which the protection measure has been adopted;
 - (i) the protection measure relates to a criminal offence which, under the law of the executing State, is regarded as having been committed, wholly or for a major or essential part, within its territory.
2. Where the competent authority of the executing State refuses to recognise a European protection order in application of one of the grounds referred to in paragraph 1, it shall:
 - (a) without undue delay, inform the issuing State and the protected person of this refusal and of the grounds relating thereto;
 - (b) where appropriate, inform the protected person about the possibility of requesting the adoption of a protection measure in accordance with its national law;
 - (c) inform the protected person of any applicable legal remedies that are available under its national law against such a decision.

Article 11

Governing law and competence in the executing State

1. The executing State shall be competent to adopt and to enforce measures in that State following the recognition of a European protection order. The law of the executing State shall apply to the adoption and enforcement of the decision provided for in Article 9(1), including rules on legal remedies against decisions adopted in the executing State relating to the European protection order.
2. In the event of a breach of one or more of the measures taken by the executing State following the recognition of a European protection order, the competent authority of the executing State shall, in accordance with paragraph 1, be competent to:

- (a) impose criminal penalties and take any other measure as a consequence of the breach, if that breach amounts to a criminal offence under the law of the executing State;
- (b) take any non-criminal decisions related to the breach;
- (c) take any urgent and provisional measure in order to put an end to the breach, pending, where appropriate, a subsequent decision by the issuing State.

3. If there is no available measure at national level in a similar case that could be taken in the executing State, the competent authority of the executing State shall report to the competent authority of the issuing State any breach of the protection measure described in the European protection order of which it is aware

2) REGULATION (EU) No 606/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters⁷

CHAPTER II RECOGNITION AND ENFORCEMENT OF PROTECTION MEASURES

Article 4

Recognition and enforcement

1. A protection measure ordered in a Member State shall be recognised in the other Member States without any special procedure being required and shall be enforceable without a declaration of enforceability being required.
2. A protected person who wishes to invoke in the Member State addressed a protection measure ordered in the Member State of origin shall provide the competent authority of the Member State addressed with:
 - (a) a copy of the protection measure which satisfies the conditions necessary to establish its authenticity;
 - (b) the certificate issued in the Member State of origin pursuant to Article 5; and
 - (c) where necessary, a transliteration and/or a translation of the certificate in accordance with Article 16
3. The certificate shall take effect only within the limits of the enforceability of the protection measure.
4. Irrespective of whether the protection measure has a longer duration, the effects of recognition pursuant to paragraph 1 shall be limited to a period of 12 months, starting from the date of the issuing of the certificate.
5. The procedure for the enforcement of protection measures shall be governed by the law of the Member State addressed.

Article 12

No review as to substance

Under no circumstances may a protection measure ordered in the Member State of origin be reviewed as to its substance in the Member State addressed.

Article 13

Refusal of recognition or enforcement

⁷ The full text of the Regulation is available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0606&from=EN>

1. The recognition and, where applicable, the enforcement of the protection measure shall be refused, upon application by the person causing the risk, to the extent such recognition is:
 - (a) manifestly contrary to public policy in the Member State addressed; or
 - (b) irreconcilable with a judgment given or recognised in the Member State addressed.
2. The application for refusal of recognition or enforcement shall be submitted to the court of the Member State addressed as communicated by that Member State to the Commission in accordance with point (a)(iv) of Article 18(1).
3. The recognition of the protection measure may not be refused on the ground that the law of the Member State addressed does not allow for such a measure based on the same facts.

Conclusions and Recommendations of the 12-13 February 2014 Experts' Group

"The Experts' Group reached the following Conclusions and Recommendations:

Background to the discussion

No 1: The protection orders, in the cross-border context, that were the subject of discussion of the experts are usually restricted to the enforcement of personal no-contact or proximity orders. These types of protection orders do not have final financial or property ownership consequences resulting from their enforcement and do not deal with the determination of final parental rights and responsibilities.

No 2: The experts discussed protection orders, in the cross-border context, that are used to prevent harmful behaviours where an individual's life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk. These behaviours include, *inter alia*: a) domestic and family violence; b) stalking; c) sexual assault and sexual violence; d) dating violence; e) interpersonal harassment and intimidation; f) forced marriage; g) so-called "honour crimes"; h) human trafficking; and, i) female genital mutilation (FGM).

No 3: The experts discussed protection orders regardless of the nature of the issuing authority, for example, authorities of a civil, administrative or other nature.

Policy rationale for potential future work

No 4: The experts recognised the importance of the human rights framework, and the high priority—at national, regional and international levels—accorded to the protection of women and children in particular from violence, as well as to the protection of victims of crime.

No 5: The experts noted that the recognition and enforcement of foreign protection orders is the subject of regional work within the European Union and within or among a number of individual States, but as of yet there is no global instrument in this area.

No 6: The experts noted that States and Regional Economic Integration Organisations (REIOs) which have legislated in this area have done so on the basis of inferences drawn from increasing cross-border mobility rates and national, regional and international statistics showing high levels of domestic violence and other harmful behaviours that are addressed by protection orders. Specific statistics as to the number of cases which would benefit from cross-border mechanisms with respect to protection orders at the international level are not available due to difficulties in collecting such statistics, lack of a centralised authority that would be tasked with collecting such statistics and the scale of the populations affected.

No 7: With the current lack of global mechanisms in this field, the experts highlighted the undue burdens and barriers currently faced by those seeking immediate protection through a national protection order when they move or travel abroad, including:

- a) delays which are often inherent in establishing a new protection order or to have an existing order recognised in the foreign jurisdiction(s), thereby defeating the purpose of a protection order to address situations of imminent harm;
- b) the substantial financial resources that may be required to establish a new protection order or to have an existing order recognised in the foreign jurisdiction(s);
- c) common problems with a foreign authority assuming jurisdiction to establish a new protection order (*e.g.*, a weak evidentiary basis to establish subject matter or personal jurisdiction), or indirect jurisdictional rules applicable to the recognition of a foreign order;
- d) challenges in accessing information, appropriate legal expertise and in gathering and presenting adequate evidence in the foreign jurisdiction(s);
- e) language and legal-cultural barriers when establishing a new protection order or having an existing order recognised in the foreign jurisdiction(s); and,
- f) other legal and practical problems.

No 8: The experts observed, in the case of the safe return of the child to the State of habitual residence under the Hague *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, that the development of a future instrument in this field would assist in addressing the safe return of the taking parent in particular, which is not covered by the 1980 Child Abduction Convention or the Hague *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*. Further work in this area would also provide enhanced protection of children from violence. Some experts noted that current measures sometimes employed in this context, such as mirror orders, undertakings and similar mechanisms, are often not effective.

No 9: The experts discussed the expansion of definitions of violence globally, for example, to include such phenomena as stalking, intimidation, and the effects of children being exposed to violence between their parents, among others.

No 10: The experts took note of national policy work that has underlined the economic impact and consequences when protection orders are not recognised and enforced in cross-border circumstances, as health, labour market and other costs are accrued.

No 11: On the above bases, the experts concluded that there is a need for further work in this area, given the high international priority to prevent and mitigate violence.

Policy orientations of future work

No 12: The experts underlined the importance of victim protection and harm prevention principles:

- a) *Victim protection and security*: victims or potential victims should be provided with assurances of security in advance of and during travel or a move abroad, in order to protect the victims' or potential victims' mobility rights;
- b) *General deterrence*: a successful global solution should result in raising awareness and ensuring that persons causing a risk understand that protection orders will be effective in foreign jurisdictions and that there will be consequences when violating the terms of such orders abroad; and,
- c) *Specific deterrence*: a successful global solution should include immediate / "on-the-spot" enforcement of a foreign order to allow for harm prevention in circumstances of imminent risk or threat.

No 13: The experts at the meeting noted that in their jurisdictions the protection of the police and other enforcement officers from liability for good faith enforcement of protection orders is an important and established principle.

No 14: The experts agreed and underlined that appropriate due process rights of the person causing the risk should be respected.

No 15: The experts agreed that an undue burden should not be placed on the victim / protected person when seeking to have a protection order recognised and enforced abroad.

No 16: The experts referred to the internationally accepted standard that, with regard to violence against women, States are required to abide by the due diligence standard, requiring proactive measures to combat all forms of violence.

No 17: The experts' discussions highlighted the need to address issues of language barriers.

No 18: The experts noted that the existence of an instrument in this field would assist in highlighting principles for dealing with victims of domestic violence and other victims of violence in cross-border circumstances; for example, requirements for speedy resolution, confidentiality and referrals to support services. Such principles could form a basis for subsequent judicial education, Guides to Good Practice or other initiatives.

No 19: The experts underlined the importance of securing protection of personal data in particular in relation to the registration of orders either at the national or international level.

Discussion of possible solutions

"On-the-spot" / immediate enforcement

No 20: The experts discussed with great interest the feasibility of an instrument that would provide for "on-the-spot" / immediate enforcement of foreign protection orders. The experts discussed both the possibility to enforce: i) on the simple presentation of the order; and ii) on the simple presentation of the order accompanied by a multilingual enforcement certificate and / or e-certificate. It was felt that additional work and discussion among experts should take place to weigh further the benefits and drawbacks of these two solutions.

Advance establishment of protection orders

No 21: The experts agreed that advance establishment of a protection order in another jurisdiction should be available, in accordance with the conditions set out under the law of the jurisdiction where establishment is sought.

Advance recognition of foreign protection orders

No 22: The experts agreed that application for advance recognition of foreign protection orders should be available. Such advance recognition would not preclude protected individuals from availing themselves of additional mechanisms under national law, as appropriate.

No 23: The experts agreed that traditional private international law methods for the recognition and enforcement of a foreign decision were not usually appropriate in this area.

Central Authorities

No 24: The experts discussed the potential value of establishing a Central Authority or another system under a possible future instrument. Possible specific functions of Central Authorities were identified by the experts. In no order of priority, Central Authorities could take appropriate measures to:

- a) transmit and receive applications for:
 - i) advance establishment of protection orders, and
 - ii) advance recognition of foreign protection orders;
- b) initiate or facilitate the institution of proceedings in respect of such applications;
- c) serve as a channel to provide assistance for the subsequent review / challenge of the enforcement of a foreign protection order;
- d) where circumstances require, provide or facilitate the provision of legal assistance;
- e) where circumstances require, provide or facilitate the provision of assistance to victims;
- f) provide assistance with the training of enforcement officers with regard to the enforcement of foreign protection orders; and
- g) provide information of a general character as to the relevant law of their State in connection with the recognition and enforcement of foreign protection orders.

Country Profile

No 25: The experts underlined the importance of victims' access to information in this area. The Draft Country Profile prepared by the Permanent Bureau was well-received by the meeting, and it was recognised that it could, in a more final form, be used as one tool that could play a role in this respect.

Other tools and mechanisms

No 26: The experts discussed a number of other tools and mechanisms that could be used to assist with the recognition and enforcement of protection orders, such as:

- a) a standardised international enforcement certificate;
- b) other standardised forms (*e.g.*, for advance establishment, advance recognition);
and
- c) an international electronic database for registration of orders and real-time access to established orders.

Future work / next steps

No 27: The experts recommended that the feasibility of a binding instrument be explored further with the assistance of the Experts' Group. Such instrument could include the three types of mechanisms for which there was interest: a) "on-the-spot" enforcement; b) advance establishment; and c) advance recognition. The experts were of the view that these mechanisms are not mutually exclusive.

No 28: The experts recognised the value of international co-operation in this area but noted that it would be difficult to achieve without an international framework creating obligations to co-operate. Designated authorities responsible for such co-operation would require a legal basis for the delineation of functions.

No 29: In addition, the experts agreed that other tools should be explored further that could be used in combination with a binding instrument. The Country Profile was identified as one such tool.

No 30: In carrying the feasibility study forward, the experts recommended that practical experience be drawn from the operation of existing national and regional instruments in this area, as well as from the 1996 Child Protection Convention, insofar as such experience could benefit the individuals protected by a protection order in cross-border circumstances."