

**RECONNAISSANCE ET EXÉCUTION DES ORDONNANCES DE PROTECTION RENDUES PAR
DES JURIDICTIONS CIVILES ÉTRANGÈRES : NOTE PRÉLIMINAIRE**

établie par le Bureau Permanent

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**RECOGNITION AND ENFORCEMENT OF FOREIGN CIVIL PROTECTION ORDERS:
A PRELIMINARY NOTE**

drawn up by the Permanent Bureau

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Recognition and Enforcement of Foreign Civil Protection Orders¹: A Preliminary Note²

1. Introduction and Background

1. In April of 2011 the Council on General Affairs and Policy of the Hague Conference on Private International Law 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.”³ As indicated in the Work Programme,⁴ the Permanent Bureau was instructed to prepare “a short note on the subject to assist the Council in deciding whether further work on this subject is warranted.”⁵ This Preliminary Note is in response to this mandate.⁶

2. There has been significant recent international, regional and national attention given to the issue of establishing appropriate civil protection order regimes for victims or potential victims of domestic violence and / or other types of harmful interpersonal behaviour. While much legislative attention in this field has been focused on providing protection orders specifically in circumstances of domestic violence, legislators have also addressed other types of behaviour with protection order regimes, and this Note embraces all such regimes.⁷

¹ The terms “protection order,” “protection measure” or similar general terminologies are used in various jurisdictions and under various instruments, have a similar meaning, and will be used interchangeably in this Note. (Additionally under various legal regimes, specific types of protection orders may include such orders known as “restraining orders,” “barring orders,” “occupation orders,” types of civil or criminal injunctions, etc. which in general fall under the encompassing term of “protection order” or “protection measure.”)

² The Permanent Bureau would like to thank Maja Groff, Legal Officer at the Permanent Bureau, for carrying out the principal drafting of this Note. The Permanent Bureau would also like to thank Lauren Katz, former Intern at the Permanent Bureau, for her invaluable research assistance.

³ Conclusion and Recommendation No 23 of the Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (5-7 April 2011) (available on the Hague Conference website at < www.hcch.net > under “Work in Progress” then “General Affairs”).

⁴ “Work Programme of the Permanent Bureau for the Next Financial Year (1 July 2012 – 30 June 2013),” Prel. Doc. No 2 of February 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference, available on the Hague Conference website at < www.hcch.net > under “Work in Progress,” then “General Affairs,” at para. 12.

⁵ *Supra*, note 3.

⁶ The title of this Note also includes the topic of “enforcement,” as this would normally be implied in any mechanisms with respect to the recognition of protection orders. Further, as reflected in commentary on and work in relation to a number of legal regimes or instruments in this field, issues of effective enforcement are of preeminent importance with respect to protection order regimes. See, for instance, *infra*, at paras 53 to 55 and paras 64 to 66. It should also be noted that the issue of cross-border recognition and enforcement of judgments in the general civil and commercial context is currently under consideration and will be discussed by the Council on General Affairs and Policy in reviewing the merits of resuming the Judgments Project (see “Ongoing Work on International Litigation and Possible Continuation of the Judgments Project,” Prel. Doc. No 5 of February 2012 for the attention of the Council of April 2012, available on the Hague Conference website at < www.hcch.net > under “Work in Progress” then “General Affairs”). Additionally, the subject of potential further work on the recognition and enforcement of agreements in the context of international disputes involving children is discussed in the “Report of the Further Work Recommended by the Special Commission on the practical operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention” (see Prel. Doc. No 12 of March 2012 for the attention of the Council of April 2012, available on the Hague Conference website, *ibid.*).

⁷ Harmful or potentially harmful interpersonal behaviour addressed includes for instance “harassment” or “stalking” (which may occur in, but are not limited to, the context of domestic violence), and may also be in the context of non-domestic relationships, for example between strangers who are not in an intimate or marital relationship. Sections 3 and 4 of this Note, as well as Annex II, give examples of the variations in protection order regimes found in national and regional law and the scope of behaviours and relationships covered by these legal regimes.

3. A United Nations' model framework for legislation in this field was promulgated in 2008,⁸ and recent international efforts to promote national legal good practices⁹ have further encouraged the elaboration of national civil protection order regimes to protect at-risk persons in instances of domestic violence as well as in the context of a number of "harmful practices."¹⁰ There are additionally a number of both recent and well-established initiatives at the national and regional levels which deal with the cross-border recognition and enforcement of such protection measures, in which these measures are made "portable" across jurisdictional boundaries. Several of these notable regional and national projects are summarised in Section 4 of this Note.

4. The utility of further international work on this topic has been raised within the context of the operation of *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter the "1980 Hague Convention") in connection with the issuance of return orders for children, who might be accompanied by an at-risk parent.¹¹ At the moment there is no specific international multilateral mechanism to assure that any protection order for the benefit of a returning accompanying parent of a child who is the subject of a Hague 1980 return order will be recognised and enforced in the country of return. The *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* (hereinafter the "1996 Hague Convention") does not necessarily extend measures of protection to an accompanying parent.¹² Experts at Part I of the Sixth Special Commission on the practical operation of the 1980 and 1996 Hague Conventions (1-10 June 2011) welcomed the addition of the topic of the recognition of foreign civil protection orders to the Agenda of the Hague Conference.¹³

⁸ *Good Practices in Legislation on Violence Against Women*, Part III, "Framework for legislation on violence against women," Report of the Expert Group Meeting, Vienna, Austria, 26 to 28 May 2008, United Nations Division for the Advancement of Women, United Nations Office on Drugs and Crime, at pp. 50-57.

⁹ See, for instance, *Handbook for Legislation on Violence Against Women*, Division for the Advancement of Women, Department of Economic and Social Affairs, United Nations, New York, 2010, at pp. 44-50.

¹⁰ See for instance, *Good Practices in Legislation on "Harmful Practices" Against Women*, Report of the Expert Group Meeting, 26-29 May 2009, Addis Ababa, Ethiopia, United Nations Division for the Advancement of Women, Department of Economic and Social Affairs, at pp. 30-31. "Harmful practices" may include so-called "honour crimes," dowry-related violence and harassment, and forced marriage, among others. See also *Supplement to the Handbook for Legislation on Violence Against Women: "Harmful Practices" Against Women*, Division for the Advancement of Women, Department of Economic and Social Affairs, United Nations, New York, 2011, at p. 30.

¹¹ See Conclusions and Recommendations Nos 39-43, adopted by Part I of the Special Commission on the practical operation of the 1980 and 1996 Hague Conventions (1-10 June 2011), under the heading "Facilitating the safe return of the child and the accompanying parent, where relevant (1980 and 1996 Conventions)" (available on the Hague Conference website at < www.hcch.net > under "Specialised Sections" then "Child Abduction Section").

¹² The 1996 Hague Convention, however, may be of some use in these circumstances. Under the 1996 Hague Convention, an authority in a requested State deciding upon a 1980 Convention return application may, "in all cases of urgency," take "any necessary measures of protection" for the benefit of a child (Art. 11(1)), and such necessary measures of protection could be extended to a parent accompanying a child. Commentators have remarked on the possible limitations of the use of Art. 11 in cases involving domestic violence towards a parent (see for instance p. 32, at para. 129, of "Domestic and Family Violence and the Article 13 "Grave Risk" Exception in the Operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*: a Reflection Paper," Prel. Doc. No 9 of May 2011 for the attention of the Special Commission of June 2011 (available on the Hague Conference website at < www.hcch.net > under "Specialised Sections" then "Child Abduction Section" then "Sixth Special Commission Meeting" then "Preliminary Documents").

¹³ Conclusion and Recommendation No 43, *supra*, note 11, states: "The Special Commission welcomes the decision of the 2011 Council on General Affairs and Policy of the Hague Conference "to add 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, and ... [to instruct] the Permanent Bureau to prepare a short note on the subject to assist the Council in deciding whether further work on this subject is warranted." The Special Commission recommends that account should be taken of the possible use of such orders in the context of the 1980 Convention."

5. The Permanent Bureau has done recent scientific research on issues of domestic and family violence,¹⁴ relevant in part to the topic of this Note. Moreover, Part II of the Sixth Special Commission on the practical operation of the 1980 and 1996 Hague Conventions recommended that a Guide to Good Practice should be developed, pending approval by the Council on General Affairs and Policy of the Conference, to address, among other things, the effective handling of cross-border issues of domestic and family violence when alleged as a defence to a return proceeding within the context of the 1980 Hague Convention.¹⁵ While the scope of civil protection orders described in this Note is often wider than that used only in the context of domestic violence, some useful practical synergies could be developed in relation to work done on the various above-described topics.

6. A general policy impetus for attention to this area, as stated in connection with recent Canadian work on the effective recognition and enforcement of foreign civil protection orders, is “[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”.¹⁶

7. This Note provides several examples of practical difficulties and dangers which may be currently faced by at-risk individuals (Section 2). It then summarises some of the key features of and variations in protection orders drawn from national protection order regimes around the world (Section 3). Existing and proposed cross-border recognition and enforcement instruments in the field of civil protection orders are also presented (Section 4), followed by remarks on the applicability of these models to the international sphere (Section 5). Lastly this Note suggests further steps the Hague Conference might wish to undertake in this field (Section 6). Supplementary information on national legislation is set out in Annexes I and II.

2. Case Studies of Affected Persons Given the Current Lack of a Global Cross-Border Regime

8. The following short cross-border case studies, drawn from actual contemporary accounts, illustrate, in a non-exhaustive fashion, a range of situations which have been addressed by national and regional legislators within the scope of their protection order regimes.

¹⁴ See “Domestic and Family Violence and the Article 13 “Grave Risk” Exception in the Operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*: a Reflection Paper,” *supra*, note 12.

¹⁵ See Conclusions and Recommendations of the Sixth Meeting of the Special Commission (Part II – 25-31 January 2012), available on the Hague Conference website at < www.hcch.net > under “Specialised Sections” then “Child Abduction Section”. Conclusion and Recommendation No 82 reads: “The Special Commission recommends that the Council on General Affairs and Policy authorise the establishment of a Working Group composed of judges, Central Authorities and cross-disciplinary experts to develop a Guide to Good Practice on the interpretation and application of Article 13(1) *b*), with a component to provide guidance specifically directed to judicial authorities, taking into account the Conclusions and Recommendations of past Special Commission meetings and Guides to Good Practice.”

¹⁶ *Foreign Protection Orders: Joint ULCC/CCSO Working Group Report With Draft Act and Commentaries*, Uniform Law Conference of Canada, Civil Law Section, August 7-11, 2011 (Winnipeg, Manitoba), effective 30 November 2011, p. 3 (available at < <http://www.ulcc.ca/en/poam2/FOREIGN%20PROTECTION%20ORDERS.doc> >). The Report further notes that: “Civil Protection Orders have become increasingly common in family law and domestic violence legislation in Canada. These orders are based on the recognition of the need to provide a tool for enforcement agencies to separate at risk individuals from potentially violent partners or family members. The gross disparity between the impact of taking cautious preventive action when weighed against the impact of the extreme risk of violence for failing to act has led to the widespread use of these measures in the Civil law.”

Case Study 1: Protection against Domestic / Family Violence in the Context of International Child Abduction¹⁷

9. A bi-national couple from States A and B live in State B and have two young children. Both State A and B are Parties to the 1980 Hague Convention. The relationship is characterised by intermittent harassment or verbal abuse by one of the spouses, and the affected spouse, without consulting a lawyer, returns with the children to her State of nationality, State A, to be with family members. The left-behind parent in State B makes a return application under the 1980 Hague Convention and the taking parent raises an Article 13(1) *b*) defence. The judge in State A, upon the evidence and information given by the taking parent, assesses that the children would likely not be at grave risk of harm were they to be returned to State B. If ordering a return, the judge would like to take precautionary measures to ensure that the returning parent and children are not subject to any further stress pending custody, relocation and / or other proceeding in the State of habitual residence. The judge would like to attach several protection orders for the benefit of the returning parent, such as a "stay-away" and "no contact" order, to any potential return order of the children, but fears that such orders would not be recognised or enforced in State B.

Case Study 2: Protection against Stalking¹⁸

10. An individual residing in State C has successfully applied for a court-issued civil protection order against a stalker who also resides in State C. The order requires that the stalker not contact the protected individual by any means and stay at least 300 metres away from the protected person at all times. The stalker against whom the protection order was issued had threatened extreme physical violence to the protected person, both verbally in person and through instant-messaging. The stalker had also gone so far as to install spyware on the victim's computer in order to intercept emails and to monitor internet usage. The protected person must regularly travel cross-border to foreign countries for work, which necessarily involves public appearances such that the stalker will be able to track his whereabouts. The protected person is concerned that the police or other authorities in various foreign jurisdictions will not recognise or enforce the protection order issued in State C, and fears both further harassment and for his fundamental safety in the case of an encounter with the stalker in a foreign country.

¹⁷ Crisis office staff at the Americans Overseas Domestic Violence Crisis Center (< <http://www.866uswomen.org/> >), an organisation which deals with cases of Americans overseas who are victims of domestic violence, also suggested that "[...]if these American women knew that getting a protection order overseas before they fled back to the U.S.A. would be recognized in the U.S.A., more would be inclined to get a protection order as part of [their] safety plan. This also helps with documentation of the abuse while overseas in the courts here in the U.S.A., especially when the victim is defending a [Hague 1980 Convention return petition] or in non-Hague jurisdictional battles." According to Crisis Center 2010 statistics, slightly less than half of the families they served had children (210 out of 481), and about 20% of the families (94) were affected by the 1980 Hague Convention. (Email correspondence with Paula Lucas, Executive Director / Founder of the Americans Overseas Domestic Violence Crisis Center, November, 2011).

¹⁸ This example drawn from cases reported in M. Huang, "Keeping Stalkers at Bay in Texas," *Texas Journal on Civil Liberties and Civil Rights*, Vol. 15:1, 2009. According to a recent study carried out by the United States of America Department of Justice, an estimated 3.4 million people are stalked annually in the United States. K. Baum *et al*, *Stalking Victimization in the United States*, U.S. Department of Justice, Bureau of Justice, 2009 (Special Report). For comparative European work on the topic see *Protecting Women from the New Crime of Stalking: A Comparison of Legislative Approaches within the European Union*, University of Modena and Reggio Emilia, Modena Group on Stalking *et al*, for the European Commission, April 2007 (available at < http://www.antiviolenzadonna.it/menu_servizio/documenti/studi/id204.pdf >).

Case Study 3: Protection against Domestic / Family Violence in General

11. A couple resides in State D close to the border of State E, of which both spouses are nationals. One spouse has seriously and repeatedly physically abused the other spouse. In State D the public prosecutor is able to apply for a protection order on behalf of the abused spouse, and the latter duly reports the situation to the prosecutor and moves out of the family residence. The abusing spouse learns of the intended application for a protection order and flees to State E, periodically making short trips back across the border to harass the other spouse in State D. The public prosecutor after some time manages to serve the offending spouse with notice of the protection order, and the order is put in place in State D. However, the abused spouse still fears for her life, due to the ease of travel across the border between State D and E. It is too risky for her to travel to State E to visit her relatives or to apply for a protection order there, in order that State E authorities could also assist in preventing the continued violence and harassment. Finally, because of irregular immigration status, the abused spouse is summarily deported back to State E without the benefit of an enforceable protection order and is murdered several days later by her spouse.

Case Study 4: Protection against Violence by an Extended Family or Group¹⁹

12. A young couple in State F decide to be married without their families' permission. They leave their village located in a rural area of State F to go to its capital city, and shortly after they leave, they learn that they have both been sentenced to death, *in absentia*, by a tribal court in their village. The couple successfully applies for a court-issued protection order in the capital city against family and community members who have threatened them with violence. However, they fear for the inadequate enforcement of this order and decide to leave for a foreign country in order to start a new life. Upon arrival in the foreign jurisdiction, they are still very concerned that their extended family and community members in their new country, who are members of the same cultural group, will learn of their presence and they will still be at risk of serious violence or death. They are also concerned that if they go to the police or other authorities in the new jurisdiction, their protection order from State F, written in a foreign script and language and issued under the law of a foreign State, will not be understood, nor recognised or enforced.

3. Summary of National Protection Order Regimes

A. Existence of National Protection Order Regimes

13. At least 86 States worldwide have developed domestic legislation or practices which allow for protection order regimes.²⁰ Annex I to this Note is a table listing these States, along with the titles of relevant legislation. Annex II to this Note sets forth short descriptive summaries of the protection order regimes of a geographically representative sample of eight States.²¹

¹⁹ Example drawn from *Good Practices in Legislation on "Harmful Practices" Against Women*, *supra*, note 10, pp. 30-31.

²⁰ This number is based on research using the United Nations Secretary General's Database on Violence Against Women, and very likely understates the number of States which have civil protection order regimes, as the resources on the Database are drawn primarily from information shared voluntarily by Member States. For the same reason, the legislation listed in Annex I may not reflect the most recent and up-to-date legislation, nor list all relevant legislation for the given jurisdiction. (The database is available at < <http://webapps01.un.org/vawdatabase/advancedResults.action?searchType=viewall> >.) See also E. Schollenberg and B. Gibbons, "Domestic Violence Protection Orders: A Comparative Review," *Canadian Journal of Family Law*, Spring 1992, 191. This research reports that as of 1992, over 50 jurisdictions had protective order legislation in relation to domestic violence in particular (at pp. 192-193).

²¹ These States include Argentina, the People's Republic of China, Finland, India, Japan, South Africa, Turkey and the United Kingdom. Where possible, citations to legislation for these jurisdictions include references to the legislation online, where available, and an effort was made to include the most up-to-date legislation for each country as of the writing of this Note, according to the accessibility and availability of this information through a variety of sources.

14. This area of law is the subject of much recent national policy discussion and legislative activity, with new countries recently implementing or planning to implement such legal tools.²² Countries which already possess such regimes as well as those who do not yet possess them could be expected to continue, at varying paces, to develop new legislation, or to refine existing legislation, as has been the pattern in many jurisdictions.²³

B. Main Features of and Variations in National Protection Order Regimes

15. The overviews provided in Annex II reveal variations between national protection order regimes. An analysis of the salient features of these regimes is set out immediately below, using illustrative examples.²⁴

i. Types of Behaviour and Supplementary Matters Addressed by Protection Orders

16. Generally, there are two main types of protection orders that are prevalent: 1) domestic exclusion orders, removing an alleged abuser from the home; and, 2) “no contact” orders, prohibiting an alleged abuser from contacting, approaching, harassing the victim and other actions. Many jurisdictions provide for exclusion or eviction orders, which require that the alleged abuser be removed and restrained from entering the shared home.²⁵ For instance, in China, the Supreme People’s Court’s Guidance on Cases Involving Domestic Violence in Marriage suggests that orders temporarily restricting the alleged abuser from the home may be imposed if certain specific criteria are met.²⁶

17. No contact or stay-away orders can cover various activities to protect victims from violence or the threat of violence and from unwanted contact. In most jurisdictions, protection orders can also be filed on behalf of a minor and / or prohibit an abuser from contacting or approaching a minor.²⁷ The protection orders of many jurisdictions prohibit the abuser from entering or approaching the victim’s home, place of employment, or school if the victim is a child.²⁸ Protection orders often also prohibit the abuser from engaging in harassing behaviour such as contacting the victim. Japanese protection

²² For instance, Bhutan and Tajikistan have draft laws under consideration in this field, and a large number of States (Albania, Azerbaijan, Botswana, Nepal, Slovenia, Uganda, etc.) have, in the last five to six years, promulgated legislation in this area (see Annex I). The recent *Council of Europe Convention on preventing and combating violence against women and domestic violence* (adopted 7 April 2011), at Art. 53(1), requires that all States Parties “ensure that appropriate restraining orders or protection orders are available to victims of all forms of violence covered by the scope of [the] Convention.”

²³ See, as one example, the evolutions within the law of the United Kingdom, described *infra*, in Annex II, paras 14 *et seq.*

²⁴ Note that the main national legislations referred to in this Section are also cited in Annex II.

²⁵ For example, Argentina, Finland, India, Japan, South Africa, Turkey and the United Kingdom.

²⁶ See “Government Improves Anti-Domestic Violence Efforts; Victim Protection Remains Limited,” Congressional-Executive Commission on China (CECC), highlighting Art. 27 of the Court Guidance which outlines the role of courts in issuing protection orders (available at < <http://www.cecc.gov/pages/virtualAcad/index.php?showsingle=%20115327> > (last consulted 8 January 2012)).

²⁷ For example, Argentina, Finland, Japan, Turkey, South Africa and the United Kingdom.

²⁸ For example, Argentina, Finland, India, Japan, South Africa and the United Kingdom.

orders specifically prohibit certain harassing acts including the sending of offensive materials and the revealing of information that “harms the victim’s dignity.”²⁹

18. In South Africa and Turkey, protection orders can also prohibit possession of weapons.³⁰ Protection orders in Turkey can prohibit the use of intoxicating substances in the home.³¹ Courts in the United Kingdom,³² South Africa and Turkey have the general ability to include additional conditions and prohibitions in the orders, according to what the court determines is appropriate for the protection of the victim.³³ Supplementary provisions to protection orders in a number of jurisdictions may also include orders of temporary child custody, temporary maintenance orders, protection of property, mandatory counselling for offenders, and other provisions.³⁴ Some jurisdictions provide that the victim is entitled to monetary restitution for the offender’s behaviour.³⁵

ii. Relationships Covered (Qualified Applicants and Respondents)

19. Jurisdictions vary widely with respect to which relationships will be recognised for protection order purposes. The United Kingdom provides an example of an expansive legal regime covering married, formerly married and cohabitating couples, both heterosexual and same-sex, as well as petitions on behalf of children.³⁶ Harassment Restraining Orders, which can be used in domestic violence cases, may provide even greater scope, as they also cover non-intimate relationships.³⁷ In China, domestic violence protection orders cover women only in situations where a married couple is divorcing or is about to divorce.³⁸ In Japan, protection orders are limited to married spouses, those in marriage-like cohabitation and those formerly in married or marriage-like relationships.³⁹ Victims of domestic violence in Japan can also apply for the protection order to cover relatives.⁴⁰ India’s law provides protection against domestic

²⁹ *Act on the Prevention of Spousal Violence and the Protection of Victims*, 2001, amended 2004 and 2007, Art. 10(2)(vii) (< available at <http://www.cao.go.jp/en/doc/sv.pdf> > (last consulted 8 January 2012)).

³⁰ *Domestic Violence Act (1998)* (South Africa), Section 7(2)(a) (available at < <http://webapps01.un.org/vawdatabase/uploads/uploads/South%20Africa%20-%20Domestic%20Violence%20Act%201998.pdf> > (last consulted 8 January 2012)); *Law 4320 on the Protection of the Family*, 1998, amended 2007 (Turkey), Clause 1(e) (available in Turkish at < http://www.ksgm.gov.tr/kanun_4320.php >; available in English at < http://www.justice.gov.tr/basiclaws/family_%20protection.pdf > (last consulted 8 January 2012)).

³¹ *Law 4320 on the Protection of the Family*, *ibid.*, Clause 1(f).

³² When the United Kingdom is referred to in this Section, it refers primarily to legislation applicable to England and Wales, although exceptionally may include legislation also applicable in other jurisdictions within the United Kingdom.

³³ *Family Law Act of 1996* (England and Wales), Part IV, as amended by the *Domestic Violence, Crime and Victims Act of 2004* (England and Wales and Northern Ireland) (available at, respectively, < <http://www.legislation.gov.uk/ukpga/1996/27/contents> > and < <http://www.legislation.gov.uk/ukpga/2004/28/contents> > (last consulted 8 January 2012); *Domestic Violence Act (1998)*, *supra* note 30; *Law 4320 on the Protection of the Family*, *supra*, note 30.

³⁴ See for instance *Handbook for Legislation on Violence Against Women*, *supra*, note 9, at pp. 49-50, describing (temporary) child custody orders issued in protection order proceedings in a number of jurisdictions (e.g., Georgia, Bulgaria, and the Philippines). See also K. Wilcox, *Recent Innovations in Australian Protection Order Law—A Comparative Discussion*, Australian Domestic and Family Violence Clearinghouse, 2010, p. 27, for a summary of Australian jurisdictions which provide for counseling and rehabilitation of perpetrators and / or victims under protection order regimes.

³⁵ For example, Argentina, India and South Africa.

³⁶ *Family Law Act of 1996*, *supra*, note 33, Part IV.

³⁷ *Protection from Harassment Act of 1997* (England and Wales), Section 5 (available at < <http://www.legislation.gov.uk/ukpga/1997/40/contents> > (last consulted 8 January 2012)).

³⁸ See R. De Silva De Alwis, “Opportunities and Challenges for Gender-Based Legal Reform in China,” 5 *East Asia Law Review* 197, 271 (2010), at p. 273.

³⁹ *Act on the Prevention of Spousal Violence and the Protection of Victims*, *supra*, note 29. See also T. Ota, “Legal Strategies for the Issue of Domestic Violence in Asia,” in *East and South East Asia Regional Workshop on Domestic Violence Legislation: Moving towards Regional Networking and Strategies* (1-3 December 2003: Bangkok, Thailand), pp. 37-53, at p. 41 (available at < http://www.unifem-eseasia.org/projects/evaw_403/finalreport.pdf > (last consulted 8 January 2012)).

⁴⁰ *Ibid.*

violence only to women in domestic relationships.⁴¹ Turkish legislation provides protection for a “spouse” or “other family member”.⁴²

iii. Civil and Criminal Orders

20. In addition to civil protection orders issued in civil proceedings, jurisdictions may also provide for civil protection orders which arise from criminal proceedings, and / or for protection orders enshrined in criminal codes.⁴³ For example, France and Iceland have amended their criminal laws to allow for protection orders.⁴⁴ In Hungary, restraining orders can be applied against criminal offenders on probation.⁴⁵ In Slovakia the *Law on Violence Against Close Persons*⁴⁶ permits victims to obtain temporary restraining orders, following the issuance of which a criminal prosecution must be undertaken. In Portugal, Spain, and the United Kingdom, if criminal proceedings have been initiated against a perpetrator of domestic violence, the court may issue a restraining order even without the consent of the victim.⁴⁷

iv. Maximum Duration and Renewability of Protection Orders

21. The duration of protection orders varies across jurisdictions, ranging from legislatively set time periods to *ad hoc* court determinations made upon review of the circumstances affecting the parties. For example, in China, Japan, and Finland, the domestic violence legislation provides a maximum duration for protection orders, ranging from two months to two years, depending on the type of order. In Turkey, protection orders may be imposed for up to six months; if violence persists after the protection order terminates, the victim may request another protection order for six additional months.⁴⁸ Courts in Argentina, the United Kingdom and South Africa have discretion to determine the appropriate duration of a protection order.⁴⁹ In India, the protection order is in force until the applicant applies for a discharge of the order.⁵⁰

⁴¹ *Protection of Women Against Domestic Violence Act*, 2005, Section 3 (available at < http://www.liiofindia.org/in/legis/cen/num_act/powfdva2005435/ > (last consulted 8 January 2012)). See also *Kant v. Sharma* [(2008) DMC 1 MP], holding that female relatives cannot be made respondents under the Act.

⁴² *Law 4320 on the Protection of the Family*, *supra*, note 30, at Clause 1.

⁴³ For instance, the “peace bond” of Section 810 of the Criminal Code of Canada. The peace bond is a court order effective for a maximum time period of one year that places specific conditions on an individual’s behavior in an effort to ensure no harm comes to an applicant and / or their families or their property (for instance, by stipulating that a person stay away from another person, not possess weapons, and not approach a person’s property). Anyone who has reason to fear for their or their family’s personal safety or for damage to their property from another person can apply for a peace bond. The peace bond is not and does not replace a criminal conviction.

⁴⁴ “Typology of Domestic Violence Laws in Council of Europe Member States,” *Ad Hoc Committee on Preventing and Combating Violence Against Women and Domestic Violence*, CAHVIO (2009) 13, Council of Europe, Strasbourg, 5 May 2009, providing an overview of domestic violence regimes in Europe, at p. 17 (available at < http://www.coe.int/t/dghl/standardsetting/violence/CAHVIO%20_2009_13%20%20e.pdf >). For additional information on domestic violence legislation across Europe, see *Violence against women and the role of gender equality, social inclusion and health strategies*, EGGSI Coordinating Team, European Commission, (available at < http://www.genderbasedviolence.am/conimages/Social_Europe_VAW_gender_2010.pdf >).

⁴⁵ “Typology of Domestic Violence Laws in Council of Europe Member States,” *ibid.*

⁴⁶ *Ibid.*, p. 18.

⁴⁷ *Ibid.*

⁴⁸ *Law 4320 on the Protection of the Family*, *supra*, note 30, at Clause 1. See also *He Loves You, He Beats You: Family Violence in Turkey and Access to Protection*, Human Rights Watch, May 2011, pp. 15-16 (available at < <http://www.hrw.org/sites/default/files/reports/turkey0511webwcover.pdf> > (last consulted 8 January 2012)).

⁴⁹ *Ley de protección integral para prevenir, sancionar y erradicar la violencia contra las mujeres en los ámbitos en que desarrollen sus relaciones interpersonales*, Ley 26.485, 11 March 2009, Art. 6 and Art. 26 (available at < http://www.cnm.gov.ar/LegNacional/Ley_26485_decreto_1011.pdf > (last consulted 8 January 2012)); *Family Law Act of 1996*, *supra*, note 33; *Domestic Violence Act (1998)*, *supra*, note 30, at Section 4.

⁵⁰ *Protection of Women Against Domestic Violence Act*, *supra*, note 41, at Section 25.

v. Availability of *Ex Parte* / Emergency Orders

22. Some jurisdictions provide for *ex parte* emergency orders or temporary orders to protect against immediate violence or the threat of violence while proceedings for a more permanent order are undertaken. The United Kingdom provides a legal framework where police officers have the power to grant Domestic Violence Protection Notices and arrest the suspected abuser for the immediate protection of victims of domestic violence.⁵¹ The legal regime in Finland provides that both police officers and courts may grant temporary restraining orders in cases of domestic violence and in other situations.⁵² In India, magistrates may grant victims of domestic violence an *ex parte* order upon the submission of an affidavit stating that the victim has suffered from abuse.⁵³ Similarly, in South Africa, courts may grant interim protection orders outside of ordinary court hours, upon the establishment of *prima facie* evidence of domestic violence.⁵⁴

vi. Qualified Applicants for the Protection Order

23. Generally, victims or their advocates may petition the court for a civil protection order.⁵⁵ In some jurisdictions, under specific circumstances, prosecutors may also petition the court for a protection order. For example, in the United Kingdom, if a police officer arrests an alleged abuser and issues a Domestic Violence Protection Notice, the officer must then apply for a Domestic Violence Protection Order.⁵⁶ Such an order may be granted without the consent of the person whom the order is designed to protect. In Turkey, the public prosecutor may forward a request to the family court for a protection order.⁵⁷ Generally, the protected person would file for the extension of a protection order, if necessary. In jurisdictions such as India, Finland, South Africa and the United Kingdom, the protection order may be discharged or varied by the court upon petition from the claimant or respondent.⁵⁸

vii. Notice Given to Respondent and Respondent Rights

24. Jurisdictions may take different approaches to procedures for notification of the respondent and for the protection of a respondent's due process rights. In the United Kingdom, *ex parte* orders may be granted without prior notice to, or hearing of, the respondent, if the court deems this necessary for the protection of the victim.⁵⁹ However, if the court issues an *ex parte* order, the respondent must subsequently be afforded notice of the order and a right of hearing.⁶⁰ Long-term protection orders or occupation orders (orders regulating occupation rights of the house or dwelling as defined in Section 33 of the *Family Law Act of 1996*) cannot be imposed without notice and a hearing. A respondent cannot be deemed to have breached an order unless previously notified of its existence. In Japan, a protection order becomes effective only when the

⁵¹ *Crime and Security Act 2010* (England and Wales), Section 24 (available at < <http://www.legislation.gov.uk/ukpga/2010/17/contents> > (last consulted 8 January 2012)).

⁵² *Act on the Restraining Order 1998* (898/1988), Section 11 (available at < <http://www.finlex.fi/en/laki/kaannokset/1998/en19980898.pdf> > (last consulted 8 January 2012)).

⁵³ *Protection of Women Against Domestic Violence Act*, *supra*, note 41, at Section 23.

⁵⁴ *Domestic Violence Act (1998)*, *supra*, note 30, at Section 5.

⁵⁵ For instance in Argentina, China, Finland, India, Japan, South Africa, Turkey, and the United Kingdom.

⁵⁶ *Crime and Security Act 2010*, *supra*, note 51, Sections 24, 27 and 28.

⁵⁷ *Family Violence in Turkey and Access to Protection*, *supra*, note 48, p. 34.

⁵⁸ *Protection of Women Against Domestic Violence Act*, *supra*, note 41, at Section 25; *Act on the Restraining Order 1998*, *supra*, note 52, at Section 16; *Domestic Violence Act (1998)*, *supra*, note 30, at Section 10; *Family Law Act of 1996*, *supra*, note 33, Part IV, at Section 49.

⁵⁹ *Family Law Act of 1996*, *ibid.*, at Section 45.

⁶⁰ *Ibid.*, at Section 45(3).

respondent has been sent notification of the judgment or has heard the judgment in court, and immediate appeal of the decision is also possible.⁶¹ In Argentina, within 48 hours of the complaint being filed, the court must hold a hearing to determine whether to grant a protection order and which measures should be imposed.⁶² The alleged offender must appear before the court, which will hear both parties and determine whether the protection order should be granted.

viii. Penalties Applied for Breach

25. In the case of breach of a protection order, most jurisdictions provide that police may arrest the violator. Breach of a protection order is generally punishable by a fine or imprisonment or both. In most United States of America jurisdictions a first violation of a protection order is a misdemeanour (*i.e.*, a minor criminal offense).⁶³ In South Africa, at the issuance of a protection order, there is also the issuance of a warrant for arrest in the event of a breach.⁶⁴ In both South Africa and the United Kingdom, violation of a protection order may result in a fine or imprisonment not exceeding five years or both. In Japan, violation of a protection order can result in imprisonment for one year or a fine of no more than 1,000,000 yen.⁶⁵ In Turkey, if the perpetrator violates the protection order and the police are informed, the police should begin an investigation and notify the public prosecutor.⁶⁶ The public prosecutor must pursue all violations of protection orders. Violation of a protection order may result in imprisonment for three to six months.

ix. Effectiveness of Enforcement Practices

26. The strength of enforcement practices for protection orders varies widely across and within jurisdictions. Enforcement is largely the responsibility of police agencies. In India, special Protection Officers are also appointed to protect women against instances of abuse.⁶⁷ These Protection Officers may be relied on to enforce orders, as if the Protection Officer fails to enforce an order, he or she may be fined or imprisoned or both.⁶⁸ In the United States of America, police enforcement guides further strengthen enforcement practices.⁶⁹ In Spain, special law enforcement units and agencies have been set up to deal specifically with domestic violence.⁷⁰ In Japan, protection orders have largely been enforced by warnings, and police work with Spousal Violence Counselling and Support Centres and Women's Protection Shelters to enforce protection orders and to offer victims temporary protection.⁷¹

⁶¹ *Act on the Prevention of Spousal Violence and the Protection of Victims*, *supra*, note 29, at Art. 15(2) and Art. 16.

⁶² See for example *Ley 11.243 Código de Procedimiento Penal Incorporación del Capítulo V Medida Cautelar* (Provincia de Buenos Aires) Art. 8 (available at < http://www.cnm.gov.ar/LegProvincial/BUENOS%20AIRES_Legislacionsobreviolenciafamiliar.pdf > (last consulted 23 February 2012).

⁶³ J. Palmer, "Eleventh Annual Review of Gender and Sexuality Law, Criminal Law Chapter: Domestic Violence," 11 *Georgetown Journal of Gender & the Law* 97 (2010), p. 126.

⁶⁴ *Domestic Violence Act (1998)*, *supra*, note 30, at Section 8.

⁶⁵ *Act on the Prevention of Spousal Violence and the Protection of Victims*, *supra*, note 29, at Art. 29.

⁶⁶ *Law 4320 on the Protection of the Family*, *supra*, note 30, at Clause 2.

⁶⁷ *Protection of Women Against Domestic Violence Act*, *supra*, note 41, Chapter III.

⁶⁸ *Ibid.*

⁶⁹ See for example *Protecting Victims of Domestic Violence: A Law Enforcement Officer's Guide to Enforcing Orders Nationwide* (International Association of Chiefs of Police) (available at < <http://www.vaw.umn.edu/documents/protect/protect.html> >).

⁷⁰ *Law 27-2003 Reguladora de la Orden de protección de las víctimas de la violencia doméstica*, Art. 1. See also *Organic Act 1/2004 on Integrated Protection Measures Against Gender Violence*, Title V, establishing specific courts specialising in domestic violence cases.

⁷¹ Ota, *supra*, note 39, p. 42.

4. Proposed and Existing National and Regional Models of Cross-Border Recognition and Enforcement of Civil Protection Orders

A. European Union

27. The European Union has two legislative initiatives currently under consideration or recently adopted in this field, one in the form of a Regulation which addresses only civil protection orders,⁷² and another in the form of a Directive which addresses protection measures under its authority in criminal matters.⁷³ The two legislative proposals are intended to be complementary, and are part of a broader package of measures aimed at advancing the policy goal of “strengthening the rights and protection of victims, in particular in criminal proceedings,” within the European Union.⁷⁴

1. Proposal for a Regulation of the European Parliament and of the Council on Mutual Recognition of Protection Measures in Civil Matters⁷⁵

i. Scope and Definitions

28. The proposed Regulation applies to “protection measures,” defined as “any decision, whatever it may be called,” taken exclusively in “civil proceedings” by an authority in a Member State ordered in “accordance with its national law and with a view to protecting a person when serious reasons exist to consider the person's physical and / or psychological integrity or liberty to be at risk.”⁷⁶ The proposed Regulation underlines that the protection measures covered should be “preventative and temporary” and it includes measures which are issued in *ex parte* proceedings where the person causing the risk is not summoned to appear, as well as those measures issued in proceedings with notice to the respondent.⁷⁷

29. The proposed Regulation offers the following definition of the type of “protection measures” included in its scope:

- “(i) an obligation not to enter certain localities, places or defined areas where the protected person resides, works or that he visits; or
- (ii) an obligation not to enter into contact, in any form, with the protected person, including by phone, electronic or ordinary mail, fax or any other means; or
- (iii) an obligation not to approach the protected person closer than a prescribed distance; or
- (iv) a decision attributing the exclusive use of the common housing of two persons to the protected person.” (Art. 2 (a))

30. Protection measures issued by courts, tribunals, and also administrative and other national authorities “designated by a Member State as having competence” to issue protection measures would be included under the proposed Regulation.⁷⁸ The proposed Regulation carves out from its scope certain protection measures already covered by the

⁷² Under Art. 81, Chapter 3 “Judicial Cooperation in Civil Matters,” of the *Treaty on the Functioning of the European Union (Consolidated version: 30.3.2010 Official Journal of the European Union C 83/47)*.

⁷³ *Ibid.*, under Art. 82, Chapter 4, “Judicial Cooperation in Criminal Matters”.

⁷⁴ See *Resolution of the Council of 10 June 2011 on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings* (2011/C 187/01).

⁷⁵ *Proposal for a Regulation of the European Parliament and of the Council on mutual recognition of protection measures in civil matters*, European Commission, Brussels 18.5.2011 (COM(2011)276 final), 2011/0130 (COD) (< http://ec.europa.eu/justice/policies/criminal/victims/docs/com_2011_276_en.pdf >). The proposal is currently under consideration by relevant European Union bodies, under its co-decision procedure.

⁷⁶ *Ibid.*, Art. 2(a).

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, Art. 2(b).

European "Brussels II-bis" Regulation,⁷⁹ while at the same time establishing special rules in relation to protection measures which will supersede the general rules set out by the "Brussels I" Regulation.⁸⁰

ii. Jurisdiction Rules

31. The proposed Regulation sets forth a clear jurisdictional rule such that the authorities of the Member State "where the person's physical and / or psychological integrity or liberty is at risk"⁸¹ will have jurisdiction to take appropriate measures. The European Commission's commentary notes that a highly predictable basis for jurisdiction was desired, and that the proposed jurisdictional basis would generally, but not always, coincide with the habitual residence of the individual in need of protection.⁸²

iii. Recognition and Enforcement Mechanisms

32. Under the proposed Regulation, recognition of a protection measure taken in one Member State will occur automatically in another Member State "without any special procedure being required and without the possibility of opposing its recognition,"⁸³ so long as the decision instituting the measure has been certified in the State of origin following a certification procedure set out in Article 5. The person at risk wishing to rely upon the protection measure must present a certificate to the competent authority in the Member State where recognition and / or enforcement are sought.⁸⁴

33. The proposed Regulation appends a standard form⁸⁵ which must be followed in the issuing of the certificate, and which may be issued in the Member State of origin *ex officio* by a competent authority or at the request of the protected person.⁸⁶ The certificate must contain "a description of the measure which shall be formulated in such a way as to facilitate the recognition and, where applicable, the enforcement in the second Member State."⁸⁷ References to national law or to local places or specific addresses relevant to a protection measure are to be excluded from the certificate.⁸⁸

34. It is stipulated that protection measures within the scope of the proposed Regulation will be directly enforced, when necessary, in the Member State of recognition by competent authorities without the need for a declaration of enforceability.⁸⁹

iv. Bases for Refusal of Recognition and Enforcement and Fundamental Rights Provisions

35. The proposed Regulation allows no appeal of the issuing of a certificate,⁹⁰ and allows no review as to the substance of a protection measure in the Member State in which recognition or enforcement is sought.⁹¹ It allows only one ground for refusal of recognition of a foreign protection measure (available only upon the application of the

⁷⁹ Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

⁸⁰ See Recital 6 and Art. 1 of the *Proposal for a Regulation, supra*, note 75. "Brussels I" being the *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (OJ L 12, 16.1.2001, p. 1).

⁸¹ *Proposal for a Regulation, supra*, note 75, Art. 3.

⁸² *Ibid.*, p. 6-7.

⁸³ *Ibid.*, Art. 4.

⁸⁴ *Ibid.*, Art. 5(1).

⁸⁵ *Ibid.*, p. 21.

⁸⁶ *Ibid.*, Art. 5(3).

⁸⁷ *Ibid.*, Art. 5(2).

⁸⁸ *Ibid.*, p. 21.

⁸⁹ *Ibid.*, Art. 9.

⁹⁰ *Ibid.*, Art. 7(2).

⁹¹ *Ibid.*, Art. 11.

person causing the risk): that the protection measure of the court of origin is irreconcilable with a decision taken in the Member State of recognition.⁹²

36. In harmony with the Charter of Fundamental Rights of the European Union⁹³ the proposed Regulation specifies that a certificate in the State of origin shall not be issued unless safeguards for fundamental rights set out in the proposed Regulation have been respected.⁹⁴ When a respondent does not enter an appearance in proceedings in the Member State of origin, he or she has the right to apply for a review of the protection measure in that State, in order to raise defects in notification of the proceedings or to assert that *force majeure* prevented contestation of the measures.⁹⁵ Additionally, with respect to *ex parte* protection measures taken without the respondent being summoned to appear, the respondent has the right to challenge the measure under the law of the Member State of origin, if the measure is intended to be recognised and / or enforced in another Member State.⁹⁶

37. The proposed Regulation also includes a number of provisions for the harmonisation of minimum standards concerning the obligation, in both the State of origin and State of recognition and / or enforcement, to give notice to the person causing the risk and to the protected person of "any information related to the issuing, recognition, possible enforcement and sanctions, suspension or withdrawal of the protection measure."⁹⁷

v. Applicable Law and Other Features

38. While the measure of protection ordered in the certificate will be determined by the law of the Member State of origin,⁹⁸ the proposed Regulation contains a provision for adapting an unknown foreign protection measure under the law of the Member State of recognition and / or enforcement. The competent authority of the latter shall, "to the extent possible, adapt the protection measure to one known under its own law which has equivalent effects attached to it and pursues similar aims and interests."⁹⁹

39. The proposed Regulation specifies that no legalisation or similar formality will be required under the Regulation,¹⁰⁰ sets out provisions for requests for translation into the language(s) of the recognising / enforcing Member State,¹⁰¹ and establishes a favourable right to legal aid for applicants in Member States of enforcement.¹⁰²

40. The proposed Regulation does not provide for any Central Authority or other administrative co-operation system,¹⁰³ nor establish a centralised database (electronically or otherwise) for certificates issued under Article 5.

⁹² *Ibid.*, Art. 12.

⁹³ *Ibid.*, p. 8.

⁹⁴ *Ibid.*, Art. 10.

⁹⁵ *Ibid.*, Art. 10(2).

⁹⁶ *Ibid.*, Art. 10(3).

⁹⁷ *Ibid.*, Art. 13 and p. 8.

⁹⁸ The law of the Member State of origin will similarly apply to "any rectification of the certificate" under the proposed Regulation (*ibid.*, Art. 7 (1)).

⁹⁹ *Ibid.*, Art. 8.

¹⁰⁰ *Ibid.*, Art. 14.

¹⁰¹ *Ibid.*, Art. 5(4) and Art. 15.

¹⁰² Art.16, *ibid.*, states: "An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses, shall be entitled, in any proceeding relating to the enforceability of the protection measure, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State of recognition."

¹⁰³ It does, however, require Member States to communicate to the European Commission the national "authorities having competence in matters falling within the scope" of the proposed Regulation (*ibid.*, Art. 22).

2. Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order¹⁰⁴

i. Scope and Definitions

41. While this Directive focuses on mutual recognition of protection measures under European Union authority in criminal matters,¹⁰⁵ the model it sets out for cross-border co-operation may be of interest for this Preliminary Note. While excluding protection measures adopted in civil matters, the Directive applies to protection measures independent of the nature of the judicial or equivalent authority (criminal, civil or administrative) which adopts the measure.¹⁰⁶ The Directive also suggests that a Member State's competent authority executing a foreign protection measure should have a degree of flexibility to exercise discretion in adopting "any measure which it deems adequate and appropriate under its national law in a similar case," due to the diversity in Member States as to the variety of authorities – civil, criminal or administrative – which are competent to issue and enforce protection measures.¹⁰⁷

42. Article 5 of the Directive sets out the conditions for a protection measure under the national law in the issuing State, which must impose "on the person causing danger one or more of the following prohibitions or restrictions":

- "a) a prohibition from entering certain localities, places or defined areas where the protected person resides or visits;
- b) a prohibition or regulation of contact, in any form, with the protected person, including by phone, electronic or ordinary mail, fax or any other means; or
- c) a prohibition or regulation on approaching the protected person closer than a prescribed distance."

43. Thus, the Directive enumerates types of protection measures very similar to those enumerated in the proposed Regulation (with the exception of Art. 2(a)(iv) in the proposed Regulation concerning exclusive use of common housing), detailed *supra* (para. 29).¹⁰⁸ Unlike the proposed Regulation, however, the Directive does not specify that such measures should be of a "temporary" nature, and thus one would assume that protection measures of a longer or indefinite duration would also fall under the scope of the Directive.

¹⁰⁴ Participating Member States of the European Union will have three years to transpose this recently-adopted Directive into national law subsequent to its entry into force on 10 Jan. 2012. *Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order* (available at < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:338:0002:0018:EN:PDF> >). The United Kingdom is opting into this Directive, while Ireland and Denmark are not taking part.

¹⁰⁵ See *supra*, note 73. A protection measure which falls under the Directive must be issued in the original Member State "with a view to protecting a person against a criminal act by another person [...] following criminal conduct, or alleged criminal conduct, in accordance with the national law of the issuing State" (*ibid.*, Art.1).

¹⁰⁶ *Ibid.*, Recital 10. Thus the Directive may embrace *de facto* some of the same types of measures, or very similar measures, to those that fall under the *Proposed Regulation* (*supra*, note 75).

¹⁰⁷ *Ibid.*, Recital 20.

¹⁰⁸ Protection measures under the Directive can, as under the proposed Regulation, be issued by any competent "judicial or equivalent authority" in a Member State (*i.e.*, including administrative authorities). *Ibid.*, Art. 1 and Recital 10.

ii. Rules on Competence of Courts, Recognition and Enforcement Mechanisms and Governing Law

44. Under the mutual recognition scheme of the Directive, the protected person must make a request for a “European protection order,” meeting the criteria of the Directive and using a standard form which will be transmitted to a competent authority in the executing State.¹⁰⁹ Upon receipt of the European protection order, the competent authority in the executing State is required to recognise the order “without undue delay” and also to “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.”¹¹⁰ The European protection order must be recognised “with the same priority which would be applicable in a similar national case.”¹¹¹

45. The executing State under the Directive has competence to adopt and to enforce measures taken in recognition of the European protection order, and to apply its national laws to this adoption and enforcement.¹¹² In case of breach of the measures taken in the executing State, the competent authority may impose criminal sanctions if breach amounts to a criminal offence under its law, take any other non-criminal measures as a consequence of the breach, or take any “urgent and provisional measure [...] pending, where appropriate, a subsequent decision by the issuing State.”¹¹³ If there is no available national measure in a similar case that could be taken in the executing State, the competent authority of the executing State must report any breach of the protection measure described in the European protection order to the competent authority of the issuing State.¹¹⁴

46. The competent authority in the issuing State retains exclusive competence to “take decisions relating to [...] the renewal, review and modification, revocation and withdrawal of the protection measure and, consequently, of the European protection order.”¹¹⁵

iii. Bases for Refusal of Recognition and Enforcement and Fundamental Rights Provisions

47. The competent authority of the executing State has a number of reasons which it may invoke to refuse recognition of a European protection order, all relating to criminal law issues.¹¹⁶ Upon refusal of recognition, the competent authority in the executing State has an obligation to “without undue delay, inform the issuing State and the protected

¹⁰⁹ *Ibid.*, Arts 6 to 8. According to Art. 6(5), a competent authority issuing a protection measure which falls under the scope of the Directive is obliged to give information to the protected person as to the existence of the European protection order, and as to how to apply.

¹¹⁰ *Ibid.*, Art. 9.

¹¹¹ *Ibid.*, Art. 15. Recognition of the European protection order must be expedited “taking into consideration any specific circumstances of the case, including the urgency of the matter, the date foreseen for the arrival of the protected person on the territory of the executing State and, where possible, the degree of risk for the protected person.”

¹¹² *Ibid.*, Art. 11(1).

¹¹³ *Ibid.*, Arts 11(2)(a) to (c).

¹¹⁴ *Ibid.*, Art. 11(3). Notification to the issuing State in the case of breach must be provided in any case, as stipulated in Art. 12, using standard form in Annex II to the Directive.

¹¹⁵ *Ibid.*, Art. 13(1)(a). The national law of the issuing Member State will continue to apply (Art. 13(2)), and the issuing State will have an obligation to notify the competent authority of the executing Member States of such subsequent decisions “without delay” (Art. 13(5)), after which the executing Member State must discontinue or adjust the protection measure as appropriate (Art. 13(6) and (7)).

¹¹⁶ The grounds for refusal include: 1) the protection measure “relates to an act that does not constitute a criminal offence under the law of the executing State”; 2) “criminal prosecution against the person causing danger, for the act or behaviour in relation to which the protection measure has been adopted is statute-barred under the law of the executing State, when the act or behaviour falls within its competence under its national law”; 3) “recognition of the European protection order would contravene the *ne bis in idem* principle”; 4) “under the law of the executing State, the person causing danger cannot, because of his age, be held criminally responsible for the act or behaviour in relation to which the protection measure has been adopted”; 5) “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”; and other reasons (*ibid.*, Art. 10(1)).

person of this refusal and of the grounds relating thereto.”¹¹⁷ The person causing danger must also be given the opportunity to be heard and to challenge the protection measure, in conformity with European human rights norms.¹¹⁸

iv. Other Features

48. Each Member State may designate a central authority or central authorities to assist its competent authorities in the application of the Directive. These central authority(ies) may be designated as “responsible for the administrative transmission and reception of any European protection order, as well as for all other official correspondence relating thereto.”¹¹⁹ The European protection order is required to be translated by the competent authority of the issuing State into the / an official language of the executing State.¹²⁰

49. The Directive stipulates that a protected person should effectively be given “national treatment” with respect to costs for the recognition of the European protection order and that Member States in implementation of the Directive should ensure that a protected person is not required to initiate further proceedings in the executing Member State in order to give effect to the European protection order after its recognition.¹²¹

B. Uniform Act of the Uniform Law Conference of Canada

50. The Uniform Law Conference of Canada (the ULCC), has adopted, as of 30 November 2011, the *Uniform Enforcement of Canadian Judgments and Decrees Amendment Act, 2011* (hereinafter the “Uniform Act”) to be recommended for adoption in Canadian provincial and territorial jurisdictions. This new Uniform Act amends *The Uniform Enforcement of Canadian Judgments and Decrees Act* of the ULCC,¹²² in order to provide for the recognition and enforcement of foreign civil protection orders (*i.e.*, those issued in foreign States) in Canada. As of the drafting of this Note, at least one Canadian province (Saskatchewan) has begun the legislative process of making this Act law.¹²³

i. Scope and Definitions

51. The Uniform Act defines a “foreign civil protection order” as:

“[A] foreign judgement, or portion of a foreign judgement, made by a court of a foreign state that prohibits a person from:

- (a) being in physical proximity to a specified person or following a specified person from place to place;
- (b) contacting or communicating with, either directly or indirectly, a specified person;
- (c) attending at or within a certain distance of a specified place or location; or

¹¹⁷ *Ibid.*, Art. 10(2)(a).

¹¹⁸ *Ibid.*, Art. 6(4) and Recital 17.

¹¹⁹ *Ibid.*, Art. 4(2).

¹²⁰ *Ibid.*, Art. 17(1).

¹²¹ *Ibid.*, Recital 29.

¹²² *Foreign Protection Orders: Joint ULCC/CCSO Working Group Report With Draft Act and Commentaries*, *supra*, note 16, p. 2. See also *Proposed Amendments by the Joint ULCC/CCSO Working Committee to the Uniform Enforcement of Canadian Judgments and Decrees Act* (2005), which describes the policy background to the ULCC’s previous addition of Canadian civil protection orders to the *Uniform Enforcement of Canadian Judgments and Decrees Act* (available at < http://www.ulcc.ca/en/poam2/Civil_Protection_Orders_En.pdf >).

¹²³ See Bill No 31, “An Act to amend *The Enforcement of Canadian Judgments Act, 2002* and to make related amendments to *The Enforcement of Foreign Judgments Act*” (First Session, 27th Legislature, Saskatchewan) (available at < <http://docs.legassembly.sk.ca/legdocs/Bills/27L1S/Bill27-31.pdf> >).

- (d) engaging in molesting, annoying, harassing or threatening conduct directed at a specified person.” (Section 9.1)

52. As specified in the above definition, the foreign civil protection order must be issued by a foreign court (*i.e.*, only by “tribunals which exercise a judicial function”) and only in the context of “civil proceedings.”¹²⁴ The Uniform Act does not apply to criminal code orders such as the Canadian Criminal Code “peace bond.”¹²⁵ Protection orders falling within the scope of the Uniform Act are “[r]estricted to the enforcement of personal non-contact or proximity orders, as exclusive possession orders or orders relating to a specific address (*i.e.*, stay away from a particular school) will have no application for inter-jurisdictional enforcement.”¹²⁶

ii. Jurisdiction Rules, Recognition and Enforcement Mechanisms, and Applicable Law

53. The report introducing the Uniform Act notes its chosen policy approach:

“[W]here a [...] Court has determined that an individual needs protection it should as much as possible receive immediate recognition and enforcement on its face... [r]ather than presuming that the Court may have got it wrong or acted inappropriately, the ULCC concluded that the presumptive approach will be to respect the order until it is effectively challenged, rather than challenging the order until it is formally duplicated.”¹²⁷

54. Thus, the Uniform Act supplies no direct rules on jurisdiction. Furthermore, it removes the requirement of registration or other formalities for the enforcement of foreign protection orders and by default covers all foreign protection orders meeting the definition specified in the Act.¹²⁸ A foreign civil protection order will be “deemed to be an order of [the relevant provincial or territorial court] and may be enforced in the same manner as an order of that court for all purposes”¹²⁹ and will be “enforceable by a law enforcement agency in the same manner as an order of [the relevant provincial or territorial court].”¹³⁰

55. By addressing law enforcement agencies directly, the Uniform Act seeks to facilitate the immediate enforcement of a foreign protection order “at the scene of an incident without the inherent risk to the potential victim that a delay and departure to seek legal advice would entail”.¹³¹ The Uniform Act also provides a liability protection section such that police officers and agencies will be given immunity for good faith enforcement of a foreign civil protection order or a “purported civil protection order.”¹³²

¹²⁴ *Uniform Enforcement of Canadian Judgements and Decrees Act*, Section 1.

¹²⁵ *Foreign Protection Orders: Joint ULCC/CCSO Working Group Report With Draft Act and Commentaries*, *supra*, note 16, p. 3. See also *supra*, note 43, for a description of the Canadian Criminal Code peace bond.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*, pp. 3-4.

¹²⁸ *Ibid.*, Section 9.1 and Section 9.3(2).

¹²⁹ *Ibid.*, Section 9.2.

¹³⁰ *Ibid.*, Section 9.3(2).

¹³¹ *Ibid.*, p. 9.

¹³² *Ibid.*, Section 9.5 (p. 9). The Comment to this Section notes that: “Again, enforcement of a “false order” has as its consequence the temporary improper separation of two or more individuals when at least one of those individuals supported that separation. The validity or details of the purported order may be sorted out soon enough as could any potential charge for obstruction in the case of a truly fraudulent order or an “order” that was entirely misrepresented.”

iii. Bases for Refusal of Recognition and Enforcement and Fundamental Rights Provisions

56. The Uniform Act contains no explicit bases for non-recognition and / or appeal at the enforcement stage of a foreign protection order, and presumes that the person against whom the protection order is enforced (or either party) can challenge or adjust the order, if necessary, after any potential danger has passed for the protected person.¹³³

57. The Uniform Act, however, contains a “carve out” option in the enforcement of foreign protection orders on a per country basis: “an exception is [...] made for those foreign states that are specifically named in the regulations as foreign states whose judgments will not be recognised and enforced.”¹³⁴ Only the civil protection orders of certain named nations will be expressly excluded as a matter of legislative decision.¹³⁵

iv. Other Features

58. The Uniform Act does not provide for any database or legal, judicial or administrative co-operation mechanisms between States. Nor does it address issues of translation or legalisation of foreign protection orders, other than the specification in commentary that formal prerequisites should not stand in the way of enforcement of such orders.¹³⁶ However, commentary also notes that, “[i]n any event, the individual seeking to enforce the order will always bear the responsibility of seeking to ensure that the law enforcement agency in question is able to recognize the order as a foreign judgment that should be enforced”.¹³⁷

C. Federal Legislation and Uniform Acts in the United States of America

1. The Violence Against Women Act

i. Scope and Definitions, Jurisdiction Rules, Recognition and Enforcement Mechanisms and Applicable Law

59. The United States of America *Violence Against Women Act of 1994* (amended and reauthorised 2000 and 2005; hereinafter “VAWA”)¹³⁸ is federal legislation composed of broad measures which primarily aim to combat domestic violence (and other harmful interpersonal behaviour¹³⁹) at the national level. Section 2265 of the Act provides for the recognition and enforcement, under its “full faith and credit” provision, of valid protection orders between all states, tribal governments and territories of the United States of America.¹⁴⁰ All 50 states and the District of Columbia have enacted legislation permitting

¹³³ *Ibid.*, pp. 3-5.

¹³⁴ *Ibid.*, p. 7; see Sections 9.1 and Section 10(b.1).

¹³⁵ *Ibid.*, pp. 10-11. The attenuated basis for refusal of enforcement is explained in the following way: “Given the limited in personam subject matter of these orders, it is presumed that this power [to exclude the protection orders of certain foreign States] will be used sparingly. Unlike judgments for money or that deal with vested rights or the ownership of property, a foreign civil protection order most often merely requires one individual to stay away from another individual to avoid the risk of physical harm to one or the other. Traditional foreign judgment enforcement issues such as bias or fraud are of much less relevance or even import in this narrow protective context and may readily be addressed at a later date when the immediate risk of violence has been resolved in favour of enforcement.”

¹³⁶ *Ibid.*, p. 9.

¹³⁷ *Ibid.*, pp. 4-5.

¹³⁸ Public Law No 103-322, 108 Stat. 1902-55 (codified at various Sections of 8 U.S.C [United States Code], 18 U.S.C. and 42 U.S.C.).

¹³⁹ See *infra*, para. 61, for a description of the range of behaviours included within the scope of VAWA.

¹⁴⁰ 18 U.S.C. Section 2265.

victims of domestic violence to petition for a civil protection order against an alleged abuser.¹⁴¹

60. Under VAWA, a “valid” protection order is one in which: (a) the issuing state, tribal or territorial court had both personal and subject matter jurisdiction according to their law; and (b) the respondent against whom the order has been granted has had reasonable notice and opportunity to be heard.¹⁴² Under the full faith and credit provision of VAWA, courts must enforce a valid protection order of another state “just as if it were issued” in the enforcing state.¹⁴³ It was clarified in the 2000 reauthorization of VAWA that a protected person does not have to register a protection order in the sister state court, but that the decision should be immediately enforceable across state lines.¹⁴⁴ There are no direct jurisdiction rules under VAWA.

61. Under VAWA, a “protection order” includes a wide array of civil and criminal orders, which, however, must be issued by courts only:

“(A) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendent elite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and (B) any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking.”¹⁴⁵

62. In terms of applicable law, the existence and validity of the order is determined by the law of the state, tribal or territorial court of the United States of America that issued the order. The enforcement mechanisms and remedies are determined by the law of the state in which the order is being enforced.¹⁴⁶ Thus what constitutes a violation of the protection order and the penalty is determined by the law of the enforcing State.

¹⁴¹ Palmer, *supra*, note 63, pp. 138-139.

¹⁴² 18 U.S.C. Section 2265(b).

¹⁴³ E. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and the Interstate Enforcement of Protection Orders*, 98 Northwestern University Law Review 827 (Spring 2004), p. 829.

¹⁴⁴ 18 U.S.C. Section 2265(d)(2), providing: “No prior registration or filing as prerequisite for enforcement.— Any protection order that is otherwise consistent with this section shall be accorded full faith and credit, notwithstanding failure to comply with any requirement that the order be registered or filed in the enforcing State or tribal jurisdiction.”

¹⁴⁵ 18 U.S.C. Section 2266(5). It should be noted that certain types of “mutual” protection orders are carved out of the VAWA full faith and credit provisions, namely: “Section 2265(c) states that a protection order issued against the original petitioner is not entitled to full faith and credit if no cross- or counter-petition, complaint, or other written pleading was filed seeking such an order, or a counter-petition was filed, but the court did not make specific findings that each party was entitled to such an order.” See Sack, *supra*, note 143, p. 840.

¹⁴⁶ Sack, *ibid.*, p. 839.

ii. Bases for Refusal of Recognition and Enforcement and Fundamental Rights Provisions

63. As noted above, recognition and enforcement of a protection order can be refused if the protection order is not valid, based on jurisdictional defects (personal and subject-matter) or defects in "reasonable notice" and the opportunity to be heard for the person against whom the order would be enforced.¹⁴⁷ Under this latter due process provision, *ex parte* orders will also be considered valid "as long as notice and opportunity to be heard is provided within the time required by the issuing state's law" and "in any event within a reasonable time after the order is issued."¹⁴⁸

iii. Other Features and Implementation Issues

64. Law enforcement officers are usually the first on the scene to enforce civil protection orders and to prevent further violence. Since the passage of VAWA 1994, difficulties in enforcement of out-of-state protection orders have centred on confusion between types of orders and the lack of procedures for enforcement. However, since the original enactment of VAWA, many states have put in place procedures for enforcement of out-of-state civil protection orders and have established guidelines on best practices.¹⁴⁹ In 2010, the National Council of Juvenile and Family Court Judges published a new guide for improving the enforcement of civil protection orders which offers best practices for the judiciary and for law enforcement officers.¹⁵⁰

65. Furthermore, since 1997, the federal government, as part of its National Crime Information Center ("NCIC"), created a national protection order registry run by the Federal Bureau of Investigation.¹⁵¹ Protection order registries located in individual states can transmit their protection order information to the national database, records of which can then be accessed and verified by law enforcement professionals across the country in order to ensure their effective enforcement.¹⁵²

66. Amendments to VAWA were added in its 2000 re-authorisation in order to encourage more effective enforcement. The re-authorisation also included provisions prohibiting enforcing states from notifying the alleged perpetrator that a protection order had been registered in the enforcing state (except at the request of the victim), provisions for greater technical and computer systems for communication and enforcement of civil protection orders, as well as grants to encourage arrest policies. The VAWA 2005 Reauthorization Act principally focused on extending protections to battered immigrant women.¹⁵³

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*, pp. 841-842.

¹⁵⁰ M. Sheeran, *Civil Protection Orders: A Guide to Improving Practice*, National Council of Juvenile and Family Court Judges Family Violence Department (2010) (available at < <http://www.ncjfcj.org/resource-library/publications/civil-protection-orders-guide-improving-practice> >). As noted in its preface, this Guide was a follow-up to previous versions.

¹⁵¹ Sack, *supra*, note 143, p. 842.

¹⁵² *Ibid.*

¹⁵³ For a summary table of the successive VAWA legislation and amendments, see "Comparison of VAWA 1994, VAWA 2000 and VAWA 2005 Reauthorization Bill," National Coalition Against Domestic Violence, 1/16/06 (available at < http://www.ncadv.org/files/VAWA_94_00_05.pdf >).

2. The Uniform Interstate Enforcement of Domestic Violence Protection Orders Act

67. The *Uniform Interstate Enforcement of Domestic Violence Protection Orders Act* (hereinafter, the "UIEDVPOA"), passed in 2000 (amended 2002), is a Uniform Act on the subject of the inter-state enforcement of domestic violence protection orders developed by the National Conference of Commissioners on Uniform State Laws ("NCCUSL/ULC").¹⁵⁴ Nineteen states of the United States of America have to date passed versions of the UIEDVPOA.¹⁵⁵ While the express intention of the Act was to "establish uniform procedures" and greater certainty in the field of cross-border enforcement of protection orders, it has been noted that the UIEDVPOA may have in practice added further complexity to the national picture with respect to inter-jurisdictional recognition of protection orders.¹⁵⁶

68. The UIEDVPOA defines "protection order" more narrowly than the VAWA legislation, including only orders "issued under the domestic-violence or family-violence laws" of the state which issues the order.¹⁵⁷ Thus the Act excludes orders against non-family and non-intimate persons, and may also exclude many domestic and family violence orders if they fall within states' general civil or criminal law statutes.¹⁵⁸ UIEDVPOA also excludes protection orders where "the protected party does not have standing to seek enforcement under the law of the issuing state," referring to a 1892 U.S. Supreme Court decision "in which the ability of a private party to seek a private remedy was considered the hallmark of a non-penal statute."¹⁵⁹ This may exclude civil protection orders initiated by police officers or other authorities from the Act's purview.

D. Latin American Instruments: 1979 Convention on Execution of Preventive Measures and 1994 Protocol of Ouro Preto on Preventive Measures

69. The Organization of American States (OAS) 1979 *Inter-American Convention on the Execution of Preventive Measures*¹⁶⁰ and the Mercosur 1994 *Protocol of Ouro Preto on Preventive Measures*¹⁶¹ are two regional instruments which cover a broad scope of "preventive measures" (*medidas cautelares*) which are to be given effect in cross-border situations amongst States Parties. The Inter-American Convention has seven States Parties,¹⁶² while the Mercosur Protocol has four.¹⁶³

70. The two instruments are essentially parallel in their scope and in the practical mechanisms which they set up, with the one important exception of Article 10 of the OAS Convention which gives jurisdiction to courts of States Parties to take emergency

¹⁵⁴ Information on the Act available on the website of the NCCUSL/ULC: < <http://uniformlaws.org/Act.aspx?title=Interstate%20Enforcement%20of%20Domestic%20Violence%20Protection%20Orders%20Act> >.

¹⁵⁵ Alabama, California, Delaware, District of Columbia, Idaho, Indiana, Kansas, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, U.S. Virgin Islands, Utah, and West Virginia (website of the NCCUSL/ULC, *ibid.*, last consulted 16 January 2012).

¹⁵⁶ Sack, *supra*, note 143, p. 845.

¹⁵⁷ UIEDVPOA, Section 2, 9 U.L.A. 30. The UIEDVPOA approach has been explained on the grounds of constitutionality concerns about parts of the VAWA full faith and credit provision, with respect to the enforcement of non-final and criminal out-of-state protection orders in particular. See Sack, *ibid.*, pp. 845-846, and Part III, at p. 851 *et seq.* for an analysis of the constitutionality of the VAWA provisions.

¹⁵⁸ Sack, *ibid.*, p. 846.

¹⁵⁹ *Ibid.*, pp. 846-847.

¹⁶⁰ *Convención Interamericana sobre Cumplimiento de Medidas Cautelares (Montevideo, 1979)*.

¹⁶¹ *Protocolo de Medidas Cautelares del 16 de diciembre de 1994*.

¹⁶² Argentina, Colombia, Ecuador, Guatemala, Paraguay, Peru and Uruguay.

¹⁶³ Argentina, Brazil, Paraguay and Uruguay.

jurisdiction to execute preventive or urgent measures of a territorial nature.¹⁶⁴ As the instruments are fundamentally equivalent in substance, the Inter-American instrument only will be briefly summarised here.

71. The Inter-American Convention establishes a co-operation system of requests for the execution of "preventive measures" among States Parties through the exchange of letters rogatory which may be transmitted through a designated Central Authority, through consular or diplomatic agents, through judicial channels, or to the court addressed by the interested parties themselves.¹⁶⁵ The Convention also sets out applicable law rules¹⁶⁶ and very limited grounds for the refusal of an execution of a letter rogatory request (manifest contradiction of the State's "public policy") and for the lifting of a preventive measure.¹⁶⁷

72. With respect to the broad range of the "preventive measures" falling within the scope to the Convention, it is specified that the terms "preventive measures," "security measures" and "guarantee measures" are equivalent terms when "they are used to mean procedures or measures whose purpose is to guarantee findings or effects of a pending or future proceeding concerning the security of persons, property, or of obligations to give, to do or not do a specific thing in civil, commercial or labour matters, or in criminal trials in which civil damages are sought."¹⁶⁸ The Inter-American Convention further specifies that the covered preventive measures must be ordered by a "judge or court" of another State Party and have a purpose to "guarantee the security of persons, such as the protective custody of minor children or provisional maintenance" and "to guarantee the security of property, such as the preventive attachment of immovable and movable property, the registration of the suit or the administration and seizure of businesses".¹⁶⁹

73. Experts attending a recent meeting of the American Association of Private International Law (ASADIP)¹⁷⁰ suggested that in their view both of the above Latin American instruments could be applicable to foreign civil protection orders concerning domestic and / or interpersonal violence, but none of the experts present at the meeting reported knowing of the instruments being invoked in such cases. In the course of further research, the Permanent Bureau did not find examples of any cases of the instruments being used to date to secure the recognition and enforcement of a civil protection order issued in the context of domestic, family or interpersonal violence. However, further research might help clarify the possibility and practicality of using these regional instruments as models for further work.

¹⁶⁴ E. Vescovi in collaboration with C. Fresnedo de Aguirre, "Problemas del proceso "internacional" y cooperación jurídica internacional en los Estados mercosureños," Chapter 9 in *Derecho Internacional Privado de los Estados Del Mercosur*, P. Fernandez Arroyo (co-ordinator), V. P. de Zavalía, Buenos Aires, 2003, p. 396.

¹⁶⁵ Arts 13 to 16.

¹⁶⁶ Art. 3 *et seq.* The main applicable law rule of the Convention is that "[t]he grounds for preventive measure shall be decided in accordance with the laws and by the judges of the place of proceedings," with the measure's "execution and the counter-preventive measure or guaranty [...] determined by the judges of the place where execution is sought, in accordance with its law" (Art. 3). Amendment of the preventive measure and "sanctions resulting from malicious and unwarranted claims" are governed by the law of the place where the measure is executed (Art. 4).

¹⁶⁷ Arts 12 and 4, respectively. Art. 4, para. 2, specifies that "[o]nly in the event that the party affected justifies the absolute lack of grounds for the measure or when the petition is based on the impairment of the guaranty provided, the judge of the State of execution may lift such measure in accordance with its own law."

¹⁶⁸ Art. 1.

¹⁶⁹ Art. 2.

¹⁷⁰ Meeting of ASADIP in San José, Costa Rica, 24-25 November 2011 (see < <http://asadip.wordpress.com/2011/12/13/jornadasasamblea-asadip-2011/> >).

E. Australia and New Zealand Reciprocal National Legislation

74. National legislation from Australia and New Zealand on domestic, family and / or interpersonal violence allows for the mutual recognition and enforcement of foreign protection orders among the two countries. All eight states and territories of Australia have protection order legislation which provides for the recognition and enforcement of protection orders from, as a federal State, other Australian states or territories, and from New Zealand.¹⁷¹ New Zealand legislation,¹⁷² as well as providing for the recognition of protection orders from Australia, provides for the possibility of recognising protection orders from “prescribed foreign countries,”¹⁷³ listed by Order in Council by the Governor General of New Zealand.¹⁷⁴

5. Applicability of Regional or National Models to the International Level

75. As briefly summarised in this Note, there currently exist a number of national and regional models which possess a variety of features and approaches employed to address the cross-border recognition and enforcement of civil protection orders. A number of the approaches taken in these models likely have the potential to be transposed, with adjustments, to a new international scheme in this area under the auspices of the Hague Conference on Private International Law. The Hague Conference has already developed several Conventions for the benefit of a target group of vulnerable persons, which embrace a range of measures of protection to be made effective in cross-border circumstances.¹⁷⁵ A number of the national or regional inter-jurisdictional regimes which currently exist in this area, such as VAWA, also now have the benefit of post-implementation analysis, legislative revision, and practical experience, which could provide additional guidance on the development of an effective international instrument and / or mechanisms in this area.

76. As mentioned *supra* (at para. 4), Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Hague Conventions welcomed work in this area and recommended that account should be taken of the possible use of protection orders in context of the 1980 Convention.

77. Further general research in this area and on the feasibility of an international instrument on the topic however would need to be undertaken, exploring, *inter alia*, such issues as: a) the comparative benefits of the models described above (and possibly other models) and appropriate features that might be transposed to the international level; b) the scope and features of protection measures to be included in a new instrument (and possible carve-outs of existing systems of protection measures); c) the core private international law issues to be covered by such an instrument (*i.e.*, whether to cover jurisdiction and applicable law issues as well as recognition and enforcement issues);

¹⁷¹ *Crimes (Domestic and Personal Violence) Act 2007* (New South Wales); *Intervention Orders (Prevention of Abuse) Act 2009* (South Australia); *Domestic and Family Violence Act 2007 [2009]* (Northern Territory); *Domestic and Family Violence Protection Bill 2011* (Queensland); *Domestic Violence and Protection Orders Act 2008* (A.C.T.); *Family Violence Act 2004* (Tasmania); *Family Violence Protection Act 2008* (Victoria); *Restraining Orders Act 1997* (Western Australia). It has been previously noted that a flaw in cross-border mechanisms for the recognition and enforcement of protection orders among Australian states and territories exists in that “the onus is on the victim [to register an order for enforcement] following a move to a new state.” A new national register of protection orders was planned in order to administratively assist with “ensuring ongoing protection for victims on relocation.” Wilcox, *supra* note 34, p. 20.

¹⁷² *The Domestic Violence Act 1995 No 86* (as at 25 February 2012), Public Act (available at < <http://www.legislation.govt.nz/act/public/1995/0086/latest/DLM371926.html> >).

¹⁷³ *Ibid.*, see Section 2 (re: definition of “prescribed foreign country”) and Section 105.

¹⁷⁴ As of the writing of this Note, no prescribed foreign countries could be found to be listed, other than Australia.

¹⁷⁵ See Art. 3 of both the 1996 Hague Convention and of the *Hague Convention of 13 January 2000 on the International Protection of Adults* which enumerate, in a non-exhaustive fashion, the types of measures of protection falling within the scope of each Convention, the specific substance of which inevitably vary due to the diversity of national laws.

d) the need to include rules for administrative co-operation between States Parties; e) ways to ensure effective enforcement of protection measures in a cross-border context under a new instrument;¹ f) how to manage the civil and criminal aspects and the often hybrid nature of these protection orders;² g) possible interactions with and support for existing Hague Conventions, in particular the 1980 and the 1996 Hague Conventions, taking into account recent Conclusions and Recommendations of Special Commissions on these Conventions;³ and a number of other matters.

6. Suggestions for Possible Next Steps

78. If the Council feels that further exploration on the possible development of an international instrument in this area is desirable, the Permanent Bureau would suggest additional research of relevant comparative law and practice, taking into consideration matters suggested above at paragraph 77. Members may wish to consider recent work undertaken by the Uniform Law Conference of Canada as a useful starting point when contemplating further work by the Hague Conference in this area (see *supra*, Section 4(B), at paras 50 *et seq.*). In addition, Council might consider authorising the circulation of a Questionnaire to Members in order to assess the desirability and feasibility of an instrument in this area, and to gain further information on existing legislation in Members' internal law in this field (both substantive norms and rules of private international law relevant to this area). The Permanent Bureau could then prepare a further report for the Council to evaluate next steps.

¹ See, *supra*, note 6 and paras 53 to 55 and paras 64 to 66, *supra*, concerning the crucial and delicate aspect of enforcement in this field of law.

² The Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Art. 23(5), and the "Brussels I" Regulation (*supra*, note 80), Art. 5(4), may provide some interesting precedents in this respect. Consultation with relevant United Nations bodies, such as the United Nations Office on Drugs and Crime (UNODC), which have expertise in international co-operation in criminal matters may also be beneficial.

³ See *supra*, para. 4.

ANNEXES

STATE	LEGISLATION
Albania	Law on Measures against Violence In Family Relations (2006)
Antigua and Barbuda	Domestic Violence (Summary Proceedings) Act No 3 of 1999
Argentina	<i>Ley de protección integral para prevenir, sancionar y erradicar la violencia contra las mujeres en los ámbitos en que desarrollen sus relaciones interpersonales, Ley 26.485 (11 March 2009); additional legislation by state</i>
Australia	Legislation by state or territory: Crimes (Domestic and Personal Violence) Act 2007 (New South Wales); Intervention Orders (Prevention of Abuse) Act 2009 (South Australia); Domestic and Family Violence Act 2007 [2009] (Northern Territory); Domestic and Family Violence Protection Bill 2011 (Queensland); Domestic Violence and Protection Orders Act 2008 (A.C.T.); Family Violence Act 2004 (Tasmania); Family Violence Protection Act 2008 (Victoria); Restraining Orders Act 1997 (Western Australia).
Austria	Second Protection Against Violence Act 2009
Azerbaijan	Law on Prevention of Domestic Violence (2010)
Bahamas	Domestic Violence (Protection Orders) Act 2007
Barbados	Domestic Violence (Protection Orders) Act 1993
Belgium	<i>Loi du 28 janvier 2003 visant a l'attribution du logement familial au conjoint ou au cohabitant légal victime d'actes de violence physique de son partenaire, et complétant l'article 410 du code pénal (M.B. 12/02/03)</i>
Belize	Domestic Violence Act (2000)
Bhutan	DRAFT: Domestic Violence Bill 2010
Bosnia-Herzegovina	Law on Protection from Domestic Violence (B.H.); Law on Protection from Domestic Violence (Srpska); Proposed amendments for Law on Protection from Domestic Violence (2008)
Botswana	Domestic Violence Act (No 10 of 2008)
Brazil	Law 11340 (The Maria da Penha Law) of 7 August 2006
Bulgaria	Protection Against Domestic Violence Act (State Gazette 27 of 29 March 2005)
Cambodia	Law on the Prevention of Domestic Violence and the Protection of Victims 2005
Canada	Legislation by province or territory: e.g., Protection Against Family Violence Act (2006) (Alberta); The Domestic Violence and Stalking Act (2005) (Manitoba); Family Violence Protection Act (2006) (Newfoundland and Labrador); Protection Against Family Violence Act (2005) (Northwest Territories); Domestic Violence Intervention Act (2003) (Nova Scotia); Family Abuse Intervention Act (2006) (Nunavut); Victims of Family Violence Act (1996) (Prince Edward Island); Victims of Domestic Violence Act (1995) (Saskatchewan); Family Violence Prevention Act (2002) (Yukon); etc.
Cape Verde	<i>Código do Processo Penal, 7 February 2005</i>
Chile	<i>Ley 20.066 de Violencia Intrafamiliar (2005); Ley 20.427 Modificando la Ley de Violencia Intrafamiliar 20.066 y otros Cuerpos Legales, y Tipifica el Maltrato a los Adultos y Adultas Mayores (2010)</i>

China (People's Republic of)	Court Guidance on Cases Involving Domestic Violence in Marriage; Domestic and Cohabitation Relationships Violence Ordinance (as amended 2009) (Special Administrative Region of Hong Kong)
Colombia	<i>Ley 1257 del 2008 por la cual se dictan normas de sensibilización, prevención y sanción de formas de violencia y discriminación contra las mujeres, se reforman los códigos penal, de procedimiento pena, la ley 294 de 1996 y se dictan otras disposiciones</i>
Costa Rica	Domestic Violence Law No 7586
Cyprus	Law 212(I)/2004 amending the Violence in the Family (Prevention and Protection of Victims) Law 2000 (L.119(I)/2000)
Czech Republic	Act Nr. 135/2006 Coll. on Protection against Domestic Violence
Denmark	Removal and Powers to Issue Exclusion Orders Act (law No 449 of 9 June 2004)
Dominican Republic	<i>Ley 24-97, Sobre Violencia Intrafamiliar</i> (1997)
El Salvador	Law against Domestic Violence (Decree 902) (1996; amended 2004)
Estonia	Amendments to the Code of Criminal Procedure and Code of Civil Procedure Regarding Restraining Orders (2006)
Fiji	Family Law Act (2003); Domestic Violence Decree (2009)
Finland	Act on the Restraining Order (1998); Law on Within-the-Family Restraining Order (2005)
France	<i>Loi N°2004-439 du 26 Mai 2004 Relative Au Divorce</i> (2004); Act of 12 December 2005
Georgia	Law on Elimination of Domestic Violence, Protection of and Support to its Victims (2006)
Germany	Act on Civil Law Protection against Violence (2002)
Ghana	Domestic Violence Act 2007 (Act 732)
Greece	Law 3500/2006, For Combating Domestic Violence
Guatemala	Act on the Prevention, Punishment and Eradication of Domestic Violence (1996)
Guyana	Domestic Violence Act 1996
Honduras	<i>La Ley contra la Violencia Doméstica</i> 1997
Iceland	Act No 94/2000, amending the Code of Criminal Procedure
India	Protection of Women from Domestic Violence Act (2005)
Indonesia	Law No 23 of 2004 regarding Elimination of Household Violence (2004)
Ireland	Domestic Violence (Amendment) Act 2002; Domestic Violence Act, 1996
Israel	Prevention of Family Violence Law 1991, amended 2000
Italy	Act No 154/2001 on Measures against Violence in Family Relations
Jamaica	Domestic Violence Act (Amendment) Act 2004
Japan	Act on the Prevention of Spousal Violence and the Protection of Victims (2001), as amended 2007
Kyrgyzstan	Law on Social and Legal Protection from Violence within the Family (Law No 62) (2003)

Liechtenstein	Violence Protection Act (2001)
Luxembourg	Domestic Violence Act of 8 September 2003
Malaysia	Domestic Violence Act 1994 (Act 521)
Malta	Act XX on Domestic Violence 2005
Mauritius	Domestic Violence (Amendment) Act (2004)
Mexico	Law on Access of Women to a Life Free of Violence (2007)
Moldova (Republic of)	Law No 167 of 2010 on the Amendment and Supplementing of Certain Legislative Acts in the Field of Domestic Violence
Mongolia	Law to Combat Domestic Violence (2005)
Namibia	Combating of Domestic Violence Act (No 4 of 2003)
Nepal	Domestic Violence (Offense and Punishment) Act 2066 (2009)
Netherlands	Summary Temporary Restraining Order Act (2008)
New Zealand	Domestic Violence Act 1995 No 86 (as of 1 July 2010)
Norway	Section 222a of the Criminal Procedure Act as amended 2002
Paraguay	Law 1600 against Domestic Violence
Philippines	Anti-Violence against Women and their Children Act (2004)
Portugal	Law 59/2007 revising the Criminal Code and Code of Criminal Procedure (2007)
Saint Lucia	Domestic Violence Act 1994
Saint Vincent and the Grenadines	Domestic Violence Summary Proceedings Act 1995
San Marino	Law No 97 of 20 June 2008 on the Prevention and Elimination of Violence against Women and Gender Violence
Serbia	Family Law (Official Gazette of the RS, No 18/2005)
Seychelles	Family Violence (Protection of Victims) Act (2000)
Sierra Leone	Domestic Violence Act 2007
Singapore	Part VII of the Women's Charter (Chapter 353), as per 1999 amendment to the Administration of Muslim Law Act
Slovakia	Act 491/2008 Coll. amending the Police Forces Act
Slovenia	Family Violence Prevention Act 2008
South Africa	Domestic Violence Act (1998); Protection from Harassment Act (2010)
Spain	Act Regulating the Protection Order for Victims of Domestic Violence (2003); Organic Act on Integrated Protection Measures against Gender Violence (2004)
Sri Lanka	Prevention of Domestic Violence Act (No 34 of 2005)
Sweden	Restraining Orders Act 1988
Switzerland	Amendments to the Civil Code (2006)
Tajikistan	DRAFT: Law on Social and Legal Protection Against Domestic Violence
The former Yugoslav Republic of Macedonia	Law on the Family 2004 (with 2006 and 2008 amendments)

Trinidad and Tobago	Domestic Violence Act No 27 of 1999
Turkey	Law No 4320 on the Protection of the Family (1998), as amended 2007
Uganda	Domestic Violence Act 2009
Ukraine	Domestic Violence (Prevention) Act 2001
United Kingdom of Great Britain and Northern Ireland	Family Law Act of 1996 (England and Wales); Domestic Violence Crime, and Victims Act 2004 (England, Wales and Northern Ireland); The Forced Marriage (Civil Protection) Act 2007 (England, Wales and Northern Ireland); Crime and Security Act 2010 (England and Wales)
United States of America	Legislation by state (civil protection order legislation exists in all 50 states and the District of Columbia)
Uruguay	Law 17,514 on Domestic Violence (2002)
Vietnam	Law on Domestic Violence Prevention and Control (2007)
Zimbabwe	Domestic Violence Act (2007)
Total: 86 (and 2 Draft Laws)	SOURCE: The United Nations Secretary General's Database on Violence Against Women. Available at: < http://webapps01.un.org/vawdatabase/advancedSearch.action >

1. Argentina

1. Under national law, any person who suffers injury or physical or mental abuse by any member of the “family group” (defined as relationships originating in marriage or civil unions) can petition a judge with jurisdiction over family matters for injunctive relief in the form of “precautionary measures” (*medidas preventivas*).¹ Such injunctive measures may include: exclusion orders of the respondent from the household (and orders for return of the petitioner to the household from which he /she was excluded because of fear for personal safety); prohibition of the respondent to access the home of the victim and places of work and study; provisional measures of maintenance; and custody and rights of communication with children of the family.² Each of Argentina’s 23 provinces and the City of Buenos Aires have legislation against domestic violence that provides for a court to grant precautionary protection measures.³ The provincial laws vary by region but in general provide for injunctive orders parallel to those in national legislation.

2. Argentina has also provided for the formation of a specialised police section within the federal police to assist national courts of first instance adjudicating on civil family matters and family violence, and to assist individuals in situations of family violence.⁴ Competent judges can request members of this police unit to execute household exclusion orders or other measures taken for the personal safety of individuals.⁵

2. People’s Republic of China

3. The *Marriage Law of the People’s Republic of China* (1980; amended 2001), specifically outlaws family violence⁶ and 25 out of 33 provinces and administrative regions have adopted legislation concerning domestic violence.⁷ While there is no national legislation in the People’s Republic of China regarding civil protection orders, in 2008 the Institute of Applied Laws under the Supreme People’s Court issued “Court Guidance on Cases Involving Domestic Violence in Marriage,” which instructed local courts to issue protection orders “to prohibit offenders from beating, threatening,

¹ *Ley de protección integral para prevenir, sancionar y erradicar la violencia contra las mujeres en los ámbitos en que desarrollen sus relaciones interpersonales*, Ley 26.485, 11 March 2009, Art. 6 and Art. 26 (available at < http://www.cnm.gov.ar/LegNacional/Ley_26485_decreto_1011.pdf > (last consulted 8 January 2012)).

² *Ibid.* at Art. 26.

³ See e.g., *Provincia de Buenos Aires: Ley 12.2569 Violencia Familiar*, Art. 4 and Art. 7 (available at < http://www.cnm.gov.ar/LegProvincial/BUENOS%20AIRES_Legislacionsobreviolenciafamiliar.pdf >); *Provincia de Catamarca: Ley 4.493 Violencia Familiar*, Art. 3 (available at < <http://www.cnm.gov.ar/LegProvincial/CatamarcaLegislacionViolenciaFamiliar.pdf> >); *Provincia Salta: Ley 7.403 Protección de víctimas de violencia familiar*, Art. 8 (available at < http://www.cnm.gov.ar/LegProvincial/SALTA_Legislacionsobreviolenciafamiliar.pdf >). A complete list of provincial legislation relating to domestic violence is available on the website of the *Consejo Nacional de Mujeres* (< <http://www.cnm.gov.ar/LegProvincial/LegislacionProvincial.html> >). (All websites last consulted 8 January 2012)

⁴ *Decreto Nacional 235/96 Reglamentario de la Ley 24.417 De Protección contra la Violencia Familiar*, Art. 11.

⁵ *Ibid.*

⁶ *Marriage Law of the People’s Republic of China* (promulgated by Order No 9 of the Chairman of the Standing Committee of the National People’s Congress, 10 September 1980, amended 28 April 2001, Art. 3 (prohibiting family violence and the maltreatment or desertion of a family member) (available at < http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384064.htm > (last consulted 8 January 2012)). See also Refugee Review Tribunal (RRT) of Australia, *Research Response Number: CHN35378*, 15 September 2009, p. 3 (available at < <http://www.mrt-rrt.gov.au/ArticleDocuments/71/chn35378.pdf.aspx> > (last consulted 8 January 2012)). However, no clear definition of what constitutes domestic violence is given in legislation. According to judicial interpretation issued by the Supreme People’s Court, domestic violence does not cover psychological damage. See R. De Silva De Alwis, “Opportunities and Challenges for Gender-Based Legal Reform in China,” 5 *East Asia Law Review* 197, 271 (2010).

⁷ *RRT Research Response, ibid.*, p. 11-12 (citing to US Department of State 2009, *Country Reports on Human Rights Practices – China*, 25 February 2009, Section 5).

harassing, or stalking victims or having unwelcome contact with their children.”⁸ Victims can seek an emergency restraining order for fifteen days or a long-term protection order for three to six months.⁹ Such orders can also require alleged abusers to temporarily move out of the home. These orders are limited in scope, as they only cover couples in the process of divorcing or within six months of divorce.¹⁰

4. In the Special Administrative Region of Hong Kong, the *Domestic and Cohabitation Relationships Violence Ordinance* (as amended in 2009) establishes a legal regime of civil protection orders for victims of domestic violence and their children, where victims can petition the court for a restraining order.¹¹ The court may authorise arrest for breach of an order.¹²

3. Finland

5. The national 1998 *Act on the Restraining Order* provides protection for victims of intimate partner violence and domestic violence.¹³ The *Act on Within-the-Family Restraining Orders* (2005) expanded protection orders to include all permanently cohabitating persons.¹⁴ A restraining order takes the form of a no-contact order preventing the alleged abuser from contacting the victim.¹⁵ Any person can apply for a restraining order against another person who is a threat to or is harassing the petitioner.¹⁶ A victim can apply for an order from the police or the directly from the district court. Public prosecutors, police or the social service authority may apply for an order on behalf of a victim who is too afraid or unable to apply on his or her own.¹⁷

6. There are four types of restraining orders. A temporary restraining order is imposed immediately by a civil servant (*i.e.*, police officer, public prosecutor) or by the district court with the right to arrest in the case of breach.¹⁸ A basic restraining order, as described above, prohibits the abuser from contacting, following or observing the victim. A basic restraining order may be imposed for a maximum term of one year.¹⁹ An extended restraining order further prohibits the abuser from being in a certain area, in the vicinity of the victim’s residence and place of work or any other comparable place.²⁰ A within-the-family order may be imposed against an abuser within the same household. The order requires that the alleged abuser leave the household.²¹ Within-the-family orders may be imposed for a maximum period of three months.²² These civil remedies may be pursued in conjunction with criminal cases.²³

⁸ See “Government Improves Anti-Domestic Violence Efforts; Victim Protection Remains Limited,” Congressional-Executive Commission on China (CECC), highlighting Art. 27 of the Court Guidance which outlines the role of courts in issuing protection orders (available at < <http://www.cecc.gov/pages/virtualAcad/index.php?showsingle=%20115327> > (last consulted 8 January 2012)).

⁹ De Alwis, *supra*, note 6, p. 271.

¹⁰ *Ibid.*, p. 272.

¹¹ *Domestic and Cohabitation Relationships Violence Ordinance*, (2009) Ch. 189 (H.K.) (available at < [http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/2CD1B62629047F40482575EE004AF537/\\$FILE/CAP_189_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/2CD1B62629047F40482575EE004AF537/$FILE/CAP_189_e_b5.pdf) > (last consulted 8 January 2012)).

¹² *Ibid.*, Section 5.

¹³ *Act on the Restraining Order 1998* (898/1988) (available at < <http://www.finlex.fi/en/laki/kaannokset/1998/en19980898.pdf> > (last consulted 8 January 2012)).

¹⁴ *Ibid.* at Section 1.

¹⁵ *Ibid.* at Section 3.

¹⁶ *Ibid.* at Section 2.

¹⁷ *Ibid.* at Section 5.

¹⁸ *Ibid.* at Section 11.

¹⁹ *Ibid.* at Section 7.

²⁰ *Ibid.* at Section 3(3).

²¹ *Ibid.* at Section 3(2).

²² *Ibid.* at Section 7.

²³ *Ibid.* at Section 10.

4. India

7. The 2005 *Protection of Women against Domestic Violence Act* is a gender-specific act.²⁴ The law defines "domestic violence" using United Nations Model Legislation on Domestic Violence to include actual abuse or the threat of abuse that is physical, sexual, verbal, emotional or economic. Harassment by way of unlawful dowry demands to the woman or her relatives are also covered under this definition.²⁵ Victims of domestic violence can seek protection orders, eviction orders, residency orders, custody orders and compensatory orders, and protection orders may include provisions for no contact, restraint of an abuser to commit further violence or aid and abet in such violence, and prohibition of alienation of assets.²⁶ A victim of domestic violence may also obtain a residence order that removes the alleged abuser from the household, restrains the alleged abuser from dispossessing any possessions from the shared household, and prohibiting the alleged abuser or relatives from entering the household.²⁷ The magistrate may grant an *ex parte* emergency order on the basis of an affidavit declaring that the petitioner has suffered from domestic abuse.²⁸ A protection order is in force until the aggrieved person applies for a discharge.²⁹

8. Victims or witnesses of domestic violence should report instances of domestic violence to appointed officers known as Protection Officers,³⁰ who can be called on to enforce protection orders.³¹ If the Protection Officer fails to discharge duties as directed, he or she can be punished with imprisonment, fines or both.³² Immunity is granted to Protection Officers acting in good faith.³³ Victims of domestic violence and Protection Officers may petition a magistrate for a protection order.³⁴

5. Japan

9. Victims of spousal violence (which includes those in "de facto" marriages) may submit a written petition to the court for a protection order.³⁵ A victim of physical spousal violence or life threatening intimidation may petition the court for an order: (1) prohibiting the abuser from approaching the victim for a period not exceeding six months; (2) barring the abuser from the shared home for a period not exceeding two months; (3) prohibiting the abuser from calling the victim, requesting a meeting, or engaging in certain behaviour for a period not exceeding six months; and (4) prohibiting the abuser from approaching the victim's child or relatives.³⁶ Protection orders only apply to bodily harm or life threatening intimidation³⁷ and petitions for protection orders may only be made after the victim has gone to the police or to counselling.³⁸ There are no

²⁴ *Protection of Women Against Domestic Violence Act*, 2005, Section 3 (available at < http://www.liiofindia.org/in/legis/cen/num_act/powfdva2005435/ > (last consulted 8 January 2012)). See also *Kant v. Sharma* [(2008) DMC 1 MP], holding that female relatives cannot be made respondents under the Act.

²⁵ *Ibid.*

²⁶ *Ibid.* at Sections 18-19, 21-22.

²⁷ *Ibid.* at Section 19.

²⁸ *Ibid.* at Section 23.

²⁹ *Ibid.* at Section 25.

³⁰ *Ibid.* at Sections 8-9.

³¹ *Ibid.* at Sections 8-9.

³² *Ibid.* at Section 33.

³³ *Ibid.* at Section 35.

³⁴ *Ibid.* at Section 12.

³⁵ *Act on the Prevention of Spousal Violence and the Protection of Victims*, 2001, amended 2004 and 2007 (< available at <http://www.cao.go.jp/en/doc/sv.pdf> > (last consulted 8 January 2012)).

³⁶ *Ibid.* at Art. 10.

³⁷ *Ibid.*

³⁸ *Ibid.* at Art. 12(1)(v).

temporary or interim protection orders while a petition is being processed.³⁹ Protection orders come into effect when the respondent receives notice of the decision, either in court or by way of the written decision.⁴⁰ At the issuance of a protection order, the court notifies the police headquarters in the appropriate jurisdiction informing the police of the contents of the order.⁴¹ Violation of a protection order is punishable by imprisonment for no more than one year or a fine of no more than 1,000,000 yen.⁴² For temporary protection, victims of domestic violence can receive help from local women's shelters.⁴³ The 2000 *Law on Proscribing Stalking Behaviour and Assisting Victims* (the *Stalking Control Act*), provides for measures to protect victims of stalking, and can also be used in domestic violence cases.⁴⁴

6. South Africa

10. Under the *Domestic Violence Act* (1998), a victim of domestic violence can petition the court for a protection order.⁴⁵ Once the applicant establishes prima facie evidence of domestic violence and that undue harm may result from not receiving a protection order, the court may grant an interim protection order.⁴⁶ The respondent must be notified of the interim order and given an opportunity in court to argue why a protection order should not be granted.⁴⁷ The court can grant a protection order if the respondent does not appear in court or if the court believes from the evidence at the hearing that the order is necessary.⁴⁸ Protection orders may prohibit the abuser from committing acts of violence, entering the shared residence, victim's residence or victim's place of employment, or committing any other act specified by the order, including the seizing of weapons.⁴⁹ Upon issuing a protection order, the court must then issue a warrant of arrest for the respondent.⁵⁰ The warrant gives the South African Police Service powers of arrest if the respondent violates any condition of the protection order.⁵¹ If any member of the South African Police Service has reasonable grounds to suspect that the protected person may be in imminent harm, the member must arrest the respondent.⁵² Violation of a protection order may result in a fine or imprisonment not exceeding five years or both.⁵³

11. In December 2011, the President signed into law the *Protection from Harassment Act* (2010). The law is intended to provide victims of harassment with an effective remedy against such behaviour, including applying to the court for a protection order against harassment.⁵⁴ The Act does not prevent a person who may apply for relief against harassment or stalking from also applying for relief under the *Domestic Violence Act* (1998).⁵⁵ The process for applying for, issuing and enforcing protection orders under this Act is analogous to that under the *Domestic Violence Act* (1998). A protection order

³⁹ *Ibid.* at Art. 14(1).

⁴⁰ *Ibid.* at Art. 15(2).

⁴¹ *Ibid.* at Art. 15(3).

⁴² *Ibid.* at Art. 29.

⁴³ "To Victims of Spousal Violence" (2008 edition), Japanese Gender Equality Bureau, Cabinet Office (available at < <http://www.gender.go.jp/e-vaw/foreignpdf/01english.pdf> > (last consulted 8 January 2012)).

⁴⁴ T. Ota, "Legal Strategies for the Issue of Domestic Violence in Asia," in *East and South East Asia Regional Workshop on Domestic Violence Legislation: Moving towards Regional Networking and Strategies* (1-3 December 2003: Bangkok, Thailand), pp. 37-53, at p. 42 (available at < http://www.unifem-eseasia.org/projects/evaw_403/finalreport.pdf > (last consulted 8 January 2012)).

⁴⁵ *Domestic Violence Act* (1998), Section 4. Any complainant may petition the court for a protection order. (Available at < <http://webapps01.un.org/vawdatabase/uploads/South%20Africa%20-%20Domestic%20Violence%20Act%201998.pdf> > (last consulted 8 January 2012)).

⁴⁶ *Ibid.* at Section 5.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* at Section 6.

⁴⁹ *Ibid.* at Section 7.

⁵⁰ *Ibid.* at Section 8(1)(a).

⁵¹ *Ibid.* at Section 8(4)(a).

⁵² *Ibid.* at Section 8(4)(b).

⁵³ *Ibid.* at Section 17.

⁵⁴ *Protection from Harassment Act*, 2010, preamble and Section 2 (available at < <http://www.info.gov.za/view/DownloadFileAction?id=156361> > (last consulted 8 January 2012)).

⁵⁵ *Ibid.* at Section 1(2).

may prohibit the respondent from engaging in or attempting to engage in harassment, enlisting the help of another person to engage in harassment, or committing any other act as specified in the protection order.⁵⁶ Section 4 of the Act sets out specific guidelines as to protection orders regarding harassment via electronic communication.

7. Turkey

12. *Law 4320 on the Protection of the Family* (1998; amended 2007) permits a victim of abuse (a spouse, child or other family member) by another family member living in the same dwelling to apply, either directly or through a prosecutor, for a protection order from a family court.⁵⁷ A family court judge can issue a protection order for a maximum of six months.⁵⁸ The protection order can require the abuser to refrain from violent acts and threats, leave the home, stay away from the home or school of the victim and children, refrain from possession of weapons, refrain from using intoxicating substances in the house, and / or any other measure deemed appropriate by the judge.⁵⁹ If there is a new violation, the order can be renewed for another six months.⁶⁰ Law enforcement agents are responsible for monitoring compliance with the order, and the regulation on implementation of the Law states that law enforcement monitoring should include weekly visits to the victim's house. If the perpetrator violates the protection order the victim or a representative of the victim may inform the police, who can begin an investigation and inform the Public Prosecutor, who is then obliged to file suit against the offender.⁶¹ Violation of a protection order may result in imprisonment for three to six months.⁶²

13. Differing views on what constitutes a spouse or other family member for the purposes of the order may limit the effectiveness of enforcement of protection orders, and there has been differing practice and jurisprudence as to whether protection orders can be granted only to married spouses under the civil code or to divorced, unmarried and religiously married women as well.⁶³ In March 2011, a draft law was submitted to parliament, Proposal to Revise the Law on the Protection of the Family,⁶⁴ which would expand the coverage of protection orders to allow women, children, spouses, those engaged to be married, and those living in close relationships to obtain protection orders. It also includes provisions to protect individuals whose engagement, marriage or relationship has ended.⁶⁵

8. United Kingdom

14. Since the *Family Law Act of 1996*, the United Kingdom (England and Wales) has enacted a range of legislation to combat domestic violence, including legislation pertaining to the issuing of protection orders. A victim of domestic abuse can obtain either an occupation order, where one party is required to leave the home, or a non-molestation order where the alleged abuser is enjoined and restrained from interfering with the victim.⁶⁶ Married and formerly married persons as well as cohabitating couples,

⁵⁶ *Ibid.* at Section 10.

⁵⁷ *Law 4320 on the Protection of the Family*, 1998, amended 2007 (available in Turkish at < http://www.ksgm.gov.tr/kanun_4320.php >; available in English at < http://www.justice.gov.tr/basiclaws/family_%20protection.pdf > (last consulted 8 January 2012)).

⁵⁸ *Ibid.* See also *He Loves You, He Beats You: Family Violence in Turkey and Access to Protection*, Human Rights Watch, May 2011, p. 15-16 (available at < <http://www.hrw.org/sites/default/files/reports/turkey0511webwcover.pdf> > (last consulted 8 January 2012)).

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Law 4320 on the Protection of the Family*, *supra*, note 57.

⁶² *Ibid.*

⁶³ *Ibid.*, p. 17.

⁶⁴ *Family Violence in Turkey and Access to Protection*, *supra*, note 58, p. 22. See also Draft Law (available in Turkish at < <http://www2.tbmm.gov.tr/d23/2/2-0886.pdf> > (last consulted 8 January 2012)).

⁶⁵ *Ibid.*, p. 23.

⁶⁶ *Family Law Act of 1996* (England and Wales), Part IV (available at < <http://www.legislation.gov.uk/ukpga/1996/27/contents> > (last consulted 8 January 2012)).

both heterosexual and same-sex, may obtain a protection order. If an applicant has "home rights," as defined by the Act, the applicant may obtain an occupation order requiring the respondent to leave the dwelling-house or part of the dwelling-house.⁶⁷ The court may use its discretion and consider all circumstances in granting the order.⁶⁸ A non-molestation order contains a provision prohibiting a person ("the respondent") from molesting another person who is associated with the respondent, or a provision prohibiting the respondent from molesting a relevant child.⁶⁹ Courts have flexibility in specifying a time period for the protection order.⁷⁰ The *Domestic Violence, Crime and Victims Act of 2004* amended the 1996 Act.⁷¹ It stipulates that a knowing breach of a protection order can be a criminal offence,⁷² carrying a possible fine, imprisonment for a term not exceeding five years, or both.⁷³ The *Crime and Security Act of 2010* provides that members of the police force may issue a domestic violence protection notice ("DVPN").⁷⁴ A DVPN may be issued if the authorising officer believes that a person has been violent or has threatened violence towards an associated person, and that the issuance of such an order is necessary to protect the associated person.⁷⁵ A person arrested in breach of a DVPN must be brought before the magistrates' court within 24 hours of arrest. The law further provides that if a DVPN has been issued, a constable (officer) must apply for a Domestic Violence Protection Order ("DVPO").⁷⁶ Victims of domestic violence may apply for a DVPO as well. The court may grant a DVPO upon the finding that: (1) the court is satisfied on the balance of probabilities that the respondent has been violent towards, or has threatened violence towards, the associated person; and, (2) the court believes a DVPO is necessary to protect the associated person.⁷⁷ A DVPO may be granted without the consent of the associated person.⁷⁸

15. Protection orders ("restraining orders") may also be granted to protect against harassment and stalking.⁷⁹ Victims of harassment as well as prosecutors may petition the court for a restraining order.⁸⁰

⁶⁷ *Ibid.* at Section 33(2A)(3)(f).

⁶⁸ *Ibid.* at Section 33(2A).

⁶⁹ *Ibid.* at Section 42(1).

⁷⁰ *Ibid.* at Section 42(7).

⁷¹ *Domestic Violence, Crime and Victims Act of 2004* (England and Wales and Northern Ireland), (available at < <http://www.legislation.gov.uk/ukpga/2004/28/contents> > (last consulted 8 January 2012)).

⁷² *Family Law Act of 1996*, *supra* note 66, at Section 42A.

⁷³ *Ibid.* at Section 42A(5).

⁷⁴ *Crime and Security Act 2010* (England and Wales), Section 24 (available at < <http://www.legislation.gov.uk/ukpga/2010/17/contents> > (last consulted 8 January 2012)).

⁷⁵ *Ibid.* at Section 24(2).

⁷⁶ *Ibid.* at Section 27.

⁷⁷ *Ibid.* at Section 28.

⁷⁸ *Ibid.*

⁷⁹ *Protection from Harassment Act of 1997* (England and Wales), Section 5 (available at < <http://www.legislation.gov.uk/ukpga/1997/40/contents> > (last consulted 8 January 2012)).

⁸⁰ *Ibid.* at Section 5(4).