

MEETING OF THE EXPERTS' GROUP ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN PROTECTION ORDERS

Permanent Bureau, The Hague, 12-13 February 2014

CONCLUSIONS AND RECOMMENDATIONS¹

The Experts' Group reached the following Conclusions and Recommendations:

Background to the Discussion

- 1) The protection orders, in the cross-border context, that were the subject of discussion of the experts are usually restricted to the enforcement of personal no-contact or proximity orders. These types of protection orders do not have final financial or property ownership consequences resulting from their enforcement and do not deal with the determination of final parental rights and responsibilities.
- 2) The experts discussed protection orders, in the cross-border context, that are used to prevent harmful behaviours where an individual's life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk. These behaviours include, *inter alia*: a) domestic and family violence; b) stalking; c) sexual assault and sexual violence; d) dating violence; e) interpersonal harassment and intimidation; f) forced marriage; g) so-called "honour crimes"; h) human trafficking; and, i) female genital mutilation (FGM).
- 3) Experts discussed protection orders regardless of the nature of the issuing authority, for example, authorities of a civil, administrative or other nature.

Policy Rationale for Potential Future Work

- 4) The experts recognised the importance of the human rights framework, and the high priority—at national, regional and international levels—accorded to the protection of women and children in particular from violence, as well as to the protection of victims of crime.
- 5) The experts noted that the recognition and enforcement of foreign protection orders is the subject of regional work within the European Union and within or among a number of individual States, but as of yet there is no global instrument in this area.
- 6) The experts noted that States and Regional Economic Integration Organisations (REIOs) which have legislated in this area have done so on the basis of inferences drawn from increasing cross-border mobility rates and national, regional and international statistics showing high levels of domestic violence and other harmful behaviours that are addressed by protection orders. Specific statistics as to the number of cases which would benefit from cross-border mechanisms with respect to protection orders at the

¹ Provisional English version pending the preparation of the French version.

international level are not available due to difficulties in collecting such statistics, lack of a centralised authority that would be tasked with collecting such statistics and the scale of the populations affected.

7) With the current lack of global mechanisms in this field, the experts highlighted the undue burdens and barriers currently faced by those seeking immediate protection through a national protection order when they move or travel abroad, including:

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

8) The experts observed, in the case of the safe return of the child to the State of habitual residence under the Hague *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, that the development of a future instrument in this field would assist in addressing the safe return of the taking parent in particular, which is not covered by the 1980 Child Abduction Convention or the Hague *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*. Further work in this area would also provide enhanced protection of children from violence. Some experts noted that current measures sometimes employed in this context, such as mirror orders, undertakings and similar mechanisms, are often not effective.

9) The experts discussed the expansion of definitions of violence globally, for example, to include such phenomena as stalking, intimidation, and the effects of children being exposed to violence between their parents, among others.

10) The experts took note of national policy work that has underlined the economic impact and consequences when protection orders are not recognised and enforced in cross-border circumstances, as health, labour market and other costs are accrued.

11) On the above bases, the experts concluded that there is a need for further work in this area, given the high international priority to prevent and mitigate violence.

Policy Orientations of Future Work

12) The experts underlined the importance of victim protection and harm prevention principles:

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

13) Experts at the meeting noted that in their jurisdictions the protection of the police and other enforcement officers from liability for good faith enforcement of protection orders is an important and established principle.

14) Experts agreed and underlined that appropriate due process rights of the person causing the risk should be respected.

15) Experts agreed that an undue burden should not be placed on the victim / protected person when seeking to have a protection order recognised and enforced abroad.

16) Experts referred to the internationally accepted standard that, with regard to violence against women, States are required to abide by the due diligence standard, requiring proactive measures to combat all forms of violence.

17) Experts' discussions highlighted the need to address issues of language barriers.

18) Experts noted that the existence of an instrument in this field would assist in highlighting principles for dealing with victims of domestic violence and other victims of violence in cross-border circumstances; for example, requirements for speedy resolution, confidentiality and referrals to support services. Such principles could form a basis for subsequent judicial education, Guides to Good Practice or other initiatives.

19) Experts underlined the importance of securing protection of personal data in particular in relation to the registration of orders either at the national or international level.

Discussion of Possible Solutions

"On-the-spot" / immediate enforcement

20) The experts discussed with great interest the feasibility of an instrument that would provide for "on-the-spot" / immediate enforcement of foreign protection orders. The experts discussed both the possibility to enforce: i) on the simple presentation of the order; and ii) on the simple presentation of the order accompanied by a multilingual enforcement certificate and / or e-certificate. It was felt that additional work and discussion among experts should take place to weigh further the benefits and drawbacks of these two solutions.

Advance establishment of protection orders

21) The experts agreed that advance establishment of a protection order in another jurisdiction should be available, in accordance with the conditions set out under the law of the jurisdiction where establishment is sought.

Advance recognition of foreign protection orders

22) The experts agreed that application for advance recognition of foreign protection orders should be available. Such advance recognition would not preclude protected individuals from availing themselves of additional mechanisms under national law, as appropriate.

23) The experts agreed that traditional private international law methods for the recognition and enforcement of a foreign decision were not usually appropriate in this area.

Central Authorities

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

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

Country Profile

25) Experts underlined the importance of victims' access to information in this area. The draft Country Profile prepared by the Permanent Bureau was well-received by the meeting, and it was recognised that it could, in a more final form, be used as one tool that could play a role in this respect.

Other tools and mechanisms

26) The experts discussed a number of other tools and mechanisms that could be used to assist with the recognition and enforcement of protection orders, such as:

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

Future Work / Next Steps

27) Experts recommended that the feasibility of a binding instrument be explored further with the assistance of the Experts' Group. Such instrument could include the three types of mechanisms for which there was interest: a) "on-the-spot" enforcement; b) advance establishment; and c) advance recognition. Experts were of the view that these mechanisms are not mutually exclusive.

28) Experts recognised the value of international co-operation in this area but noted that it would be difficult to achieve without an international framework creating obligations to co-operate. Designated authorities responsible for such co-operation would require a legal basis for the delineation of functions.

29) In addition, experts agreed that other tools should be explored further that could be used in combination with a binding instrument. The Country Profile was identified as one such tool.

30) In carrying the feasibility study forward, experts recommended that practical experience be drawn from the operation of existing national and regional instruments in this area, as well as from the 1996 Child Protection Convention, insofar as such experience could benefit the individuals protected by a protection order in cross-border circumstances.