



# EMERGENCY BARRING ORDERS IN SITUATIONS OF DOMESTIC VIOLENCE: ARTICLE 52 OF THE ISTANBUL CONVENTION



A collection of papers  
on the Council of Europe Convention  
on preventing and combating violence  
against women and domestic violence

COUNCIL OF EUROPE



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against women and domestic violence**

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# Contents

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<b>INTRODUCTION</b>	<b>5</b>
The duty of the state to protect	6
Protection orders in international law	8
<b>THE SCOPE OF ARTICLE 52</b>	<b>9</b>
The emergency barring order as a measure to ensure the safety of victims of domestic violence or those at risk	10
<b>ADDRESSING THE OBLIGATIONS UNDER ARTICLE 52 OF THE ISTANBUL CONVENTION</b>	<b>13</b>
The obligation to protect in case of immediate danger	13
Possible legal regimes of the emergency barring order (criminal, administrative, civil)	14
Elements of effective emergency barring orders	17
<b>BALANCING THE RIGHTS AND LEGAL SAFEGUARDS IN THE CONTEXT OF EMERGENCY BARRING ORDERS</b>	<b>24</b>
Privacy and other rights in balance	24
Legal safeguards	26
<b>IMPLEMENTING EMERGENCY BARRING ORDERS: EXAMPLES FROM COUNCIL OF EUROPE MEMBER STATES</b>	<b>28</b>
Overview of the situation in Council of Europe member states with respect to introducing emergency barring orders	28
Austria	30
Bulgaria	34
The Netherlands	37
Spain	39
<b>CONCLUSIONS</b>	<b>42</b>
<b>CHECKLIST FOR IMPLEMENTING EMERGENCY BARRING ORDERS</b>	<b>44</b>
<b>KEY COUNCIL OF EUROPE RESOURCES</b>	<b>46</b>
<b>BIBLIOGRAPHY</b>	<b>47</b>



# Introduction

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Protection of victims is a core element of a co-ordinated and strategic response to violence against women and domestic violence, and needs to be implemented alongside adequate and effective prevention, service provision and prosecution. In situations of immediate danger, the most effective way to protect domestic violence victims and guarantee their safety is by achieving a physical distance between the victim and the perpetrator.<sup>1</sup>

Article 52 of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter the Istanbul Convention) establishes the obligation of states parties to ensure protection to victims of domestic violence, among other measures, by ordering the perpetrator<sup>2</sup> to leave, to stay away from the home of the victim or person at risk, and not to contact the victim or person at risk, on the basis of an emergency barring order (EBO).

These measures (also called 'eviction orders') reflect a shift in paradigm for domestic violence interventions. In cases of domestic violence, it is usually the victim who is forced to flee from home, often accompanied by dependent children, with very few personal belongings and for an indefinite period of time. Regarding this situation as unfair, the drafters of the Istanbul Convention considered it important to shift this burden to the perpetrator by removing him or her from the residence of the victim and barring him or her from returning ("for a sufficient period of time") and contacting the victim. The perpetrator of domestic violence can also be arrested and detained. Such arrests tend to be short in duration, usually not more than one or two nights, leaving the victim unprotected when the perpetrator is released. Thus, there is need for additional protection in the form of protection orders.

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1. Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), paragraph 264.
  2. For the purposes of this document, the term "perpetrator" is used to describe persons who deliberately use violent and abusive behaviour to control their partner or former partner, whether or not they have been charged, prosecuted or convicted.

The purpose of this paper is therefore to support the implementation of Article 52 of the Istanbul Convention on EBOs by providing policy makers and practitioners with practical advice on how to introduce EBOs as an effective measure of protection for victims of domestic violence in situations of immediate danger of further (and often more severe) violence from the perpetrator. The paper begins with a detailed discussion of the nature of this measure and the steps to address the obligations under Article 52. It then analyses the relevant rights and legal safeguards in the context of EBOs. The last chapters of the paper include practical examples of implementation of this measure in a number of Council of Europe member states, as well as a checklist to assist in regulating and applying an EBO.

## **The duty of the state to protect**

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The insight that the protection of basic human rights, such as life, physical integrity and privacy, requires from states not only to refrain from violence against their citizens and others within their jurisdiction, but also to provide a certain degree of protection against violence by other members of society, has developed in international human rights law over the past twenty years. The European Court of Human Rights has consistently confirmed that especially Articles 2 (right to life), 3 (against torture and other inhuman and degrading treatment) and 8 (privacy) of the European Convention on Human Rights require that states not only refrain from violating these rights but also have certain legal safeguards and practices in place against such violations by non-state actors. Today, it is generally accepted that states are obliged to fulfil certain basic standards of protection of individuals against violence.

An important landmark decision in this respect was the case of *Osman v. United Kingdom* (1998), when the European Court of Human Rights acknowledged the obligation for authorities to protect an individual whose life was at risk from the criminal acts of another individual. This duty has been confirmed in a number of subsequent judgments concerning domestic violence.<sup>3</sup>

The standard of protection that is required from states is defined as due diligence. The principle of due diligence is included in Article 5 of the Istanbul Convention, which provides for the duty of the states to prevent, investigate, punish and provide reparation for acts of violence covered by the Istanbul

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3. See for example *A. v. Croatia* (2010), at 60; *Bevacqua v. Bulgaria* (2008), at 65; *Kontrova v. Slovakia* (2007), at 49.

Convention. The Committee of Ministers of the Council of Europe also included the obligation to exercise due diligence to prevent, investigate and punish acts of violence in its Recommendation Rec(2002)5 to the Council of Europe member states on the protection of women against violence.

The United Nations Committee on the Elimination of Discrimination against Women (CEDAW) confirmed the standard of due diligence when deciding on communications on domestic violence<sup>4</sup> and in its General Recommendation 28(2010).<sup>5</sup>

Article 18 of the European Union directive establishing minimum standards on the rights, support and protection of victims of crime (Victims' Rights Directive, 2012/29/EU) recognises a general duty to protect victims but leaves the measures to the discretion of member states.

Finally, the European Court of Human Rights has referred to the standard of due diligence in its landmark judgment in *Opuz v. Turkey* (2009).<sup>6</sup> In a number of recent cases, the European Court of Human Rights has held that a state's failure to protect against and adequately investigate domestic violence may constitute a violation of Article 2 of the European Convention on Human Rights (right to life),<sup>7</sup> Article 3 (prohibition of torture),<sup>8</sup> and/or Article 8 (right to respect for private and family life).<sup>9</sup>

The Council of Europe *Analytical study of the results of the 4th round of monitoring the implementation of Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence* (2014)<sup>10</sup> indicates that 36 member states had introduced a legal basis for competent authorities to issue EBOs.

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4. See *Yildirim v. Austria* 2007; *Goecke v. Austria* 2007.

5. General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, paragraph 19 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/472/60/PDF/G1047260.pdf?OpenElement>

6. See in particular the discussion at 77-86 and 131-149.

7. In *Opuz v. Turkey* (2009).

8. In *E.S. v. Slovakia* (2009); *Valiuliene v. Lithuania* (2013); *Eremia and Others v. Moldova* (2013); *Mudric v. the Republic of Moldova* (2013); *B. v. the Republic of Moldova* (2013).

9. In *A v. Croatia* (2010); *Hajduova v. Slovakia* (2010).

10. Council of Europe *Analytical study of the results of the 4th round of monitoring the implementation of Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence* (2014) <https://rm.coe.int/16805915e9>.

## **Protection orders in international law**

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International legal instruments and case law are paying increasing attention to protection orders in general, and EBOs in particular, as part of the protection against domestic violence that states need to provide.

The Istanbul Convention is the first international treaty to include a specific obligation to protect against violence through protection orders. Complementing this obligation, the European Union Directive 2011/99/EU on the European Protection Order and the European Union Regulation 606/2013/EU on mutual recognition of protection measures in civil matters, oblige EU member states to recognise protection orders issued in other EU member states, thereby enabling cross-border enforcement of such orders among EU member states. In addition, the Hague Conference on Private International Law is currently assessing the feasibility of and the need for global international law standards on the recognition and enforcement of foreign civil protection orders. These are encouraging developments demonstrating the importance attached to the enhancement of protective measures for victims of domestic violence.

# The scope of Article 52

The purpose of Article 52 of the Istanbul Convention is to put in place an effective measure of protection for victims in a situation of immediate danger of further acts of domestic violence being committed against them. To this end, it establishes the obligation to equip the competent authorities with the power to order the perpetrator to leave the residence of the victim and to bar him or her from returning or contacting the victim. The immediate danger must be assessed by the relevant authorities. The drafters also left it to the states parties to identify, in accordance with their legal and constitutional systems, the authority competent to issue such orders and the applicable procedure.

## **Article 52 – Emergency barring orders**

Parties shall take the necessary legislative or other measures to ensure that the competent authorities are granted the power to order, in situations of immediate danger, a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence of or contacting the victim or person at risk. Measures taken pursuant to this article shall give priority to the safety of victims or persons at risk.

The obligation contained in Article 52 to introduce EBOs for victims of domestic violence forms part of a wider system of protective measures for which the Istanbul Convention advocates. EBOs are flanked, among others, by the obligation to ensure longer-term restraining or protection orders for victims of domestic violence and other forms of violence against women (Article 53), the obligation of law enforcement agencies to respond immediately to calls for help (Article 50) - which would include calls for violations of an EBO or protection order - and the obligation to assess the level of risk at which an individual is in order to respond appropriately (Article 51).

The purpose of Article 52 is thus to provide instant protection in situations of immediate danger by ordering physical distance between the victim and the perpetrator. This can help to prevent further harm and sends an important message to the perpetrator that violence in the home will not be tolerated. It is important to note that for EBOs to be effective and give real safety to victims, they must be diligently enforced.

Article 52 leaves it to states parties to decide on the competent authority to be granted the power to issue an EBO. Therefore EBOs can be regulated differently in the different member states. The key elements that need to be guaranteed include the power to remove a perpetrator from the home of the victim, or shared with the victim, and to order him or her to stay away from the victim. The removal must take place immediately, but its duration must be limited and specified. Existing examples of such procedures range from a duration of 10 days to 4 weeks, with or without the possibility of renewal. EBO procedures must include legal safeguards and must be subject to legal review. EBOs can be issued by the police, as civil procedure injunctions, as preliminary caution in criminal procedure, or as an administrative measure.

## **The emergency barring order as a measure to ensure the safety of victims of domestic violence or those at risk**

### **Effective protection**

Since an EBO is a short-term measure that is much less restrictive than other types of measures separating the victim and the perpetrator (arrest and detention), an important concern is that the EBO does not provide effective protection in cases of severe violence. Therefore, EBOs should not be used as a substitute of arrest and detention when there is a risk of repeated and severe violence, including a lethal threat. The different measures included in national criminal codes and the Istanbul Convention should be considered and implemented in a comprehensive manner.

The EBO is a fast tool that (mostly) police can employ to protect victims and prevent violence from escalating with consequences on the physical integrity or health of the abused person. Its importance in the system of protection against violence stems precisely from the celerity of action it enables. Full protection of victims requires the use of long-term protection orders, both criminal and civil, as well as the availability of a whole set of protection measures foreseen in the Istanbul Convention: general and specialist services, in particular shelters, state-wide emergency helplines available 24 hours a day, rape crisis and sexual referral centres, access to information, and support through the legal process.

### **Emergency barring orders as preventive measures**

Article 52 of the Istanbul Convention requires EBOs to be available “in situations of immediate danger”, irrespective of the actual commission or conviction of

offences covered by the national criminal code. As recorded in the Explanatory Report of the Istanbul Convention, the term “immediate danger” refers to any situations of domestic violence in which harm is imminent or has already materialised and is likely to happen again (paragraph 265). This implies that a person has the right to be protected from violence if she/he has not been victimised yet.

This will have implications for the choice of legal regime within which to embed emergency barring orders. If EBOs are regulated only as a criminal law tool, measures will be needed to ensure that EBOs can be issued in situations of immediate danger to the victim, irrespective of charges, investigations or convictions.

### **Emergency barring orders and the need for an integrated, holistic and victim-centred approach to combating violence against women and domestic violence**

As provided for in the Istanbul Convention, comprehensive and co-ordinated policies are needed to eliminate violence against women and domestic violence, encompassing all relevant legislative and other measures to prevent such violence. All policies need to place the rights of the victims at the centre. Effective co-operation among all relevant actors, including civil society organisations, is of paramount importance, and parties must recognise, encourage and support at all levels the work of relevant non-governmental organisations active in combating violence against women, and establish effective co-operation with these organisations (Articles 7 and 9). The Istanbul Convention also states that parties must allocate appropriate financial and human resources for the implementation of integrated policies (Article 8) and establish one or more co-ordinating body/ies for the co-ordination, implementation, monitoring and evaluation of the policies and measures (Article 10). Finally, a comprehensive and co-ordinated policy requires effective monitoring, including systematic data collection and research (Article 11). The Istanbul Convention further contains a range of measures in the areas of prevention, provision, protection and prosecution.

### **Emergency barring orders and the continued need for domestic violence shelters**

None of the single measures outlined in the Istanbul Convention is in itself sufficient to prevent violence against women. This is also the case for EBOs. They cannot replace other measures, such as, for example, shelters (Article 23).

Victims of violence have the right to turn to the police or another authority for protection and to seek refuge in a shelter. Migrant women, for instance, are more likely to go to a women's shelter instead of calling the police because they are not familiar with the justice system of the host country or fear negative consequences for their residence status. Also, women victims of domestic violence might not always be able to stay in their home despite a barring order, for instance because the family of the aggressor lives there as well, or because they cannot afford to pay the rent. In situations of a particularly high danger, EBOs may not provide sufficient protection either, and therefore it is important to ensure an adequate number of shelters, particularly for women. Some EBO regulations might also only provide for a short-term protection (i.e. 48 hours). In short, EBOs do not replace domestic violence shelters but constitute an important complementary measure ensuring the victims' right to stay in their own home.

# **Addressing the obligations under Article 52 of the Istanbul Convention**

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## **The obligation to protect in case of immediate danger**

The core link between the duty to protect, according to the principle of due diligence, and the obligation to make EBOs available is the concept of “immediate danger”, included in Article 52 of the Istanbul Convention as the context for issuing such orders.

States have the duty to protect their citizens. They must ensure safety and order, and have the monopoly to use force within their jurisdiction. The protection of individuals is inherent to the modern concept of state. Thus, even before the Istanbul Convention was adopted, international human rights law obliged states to protect individuals in situations of immediate danger. The European Court of Human Rights for example, in its judgment in *Branko Tomasic v. Croatia* (2009), stated that:

*“[the] authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk”* (paragraph 51).

Therefore, it is important to elaborate on what is to be considered an “immediate danger”. According to the Explanatory Report of the Istanbul Convention, the term “immediate danger” refers to any situation of domestic violence in which harm is imminent or has already materialised and is likely to happen again (paragraph 265). In *Mudric v. the Republic of Moldova* (2013), the European Court of Human Rights considered that “risk to the applicant’s physical and psychological well-being was imminent and serious enough as to require the authorities to act swiftly” (paragraph 51).

In international case law, the duty to protect is often assessed when the violence has had lethal consequences (European Court of Human Rights *Osman* 1998, *Opuz* 2009; CEDAW *Goekce v. Austria* 2007; *Yildrim v. Austria* 2007). When a protection order is issued, the assessment of the future danger takes place in the light of previous incidents. For example, in *Mudric v. the Republic of Moldova* (2013) and *B. v. the Republic of Moldova* (2013), the judges of the European Court of Human Rights made a risk assessment based on previous violent incidents and the long processes of violence and harassment. Such case law has mostly focused on cases of serious violence, illustrating situations in which the protection orders alone had not been or would not have been enough to protect the victim. EBOs and protection orders can complement criminal procedure protection, for example by providing protection after the suspect has been released from detention.

It is not easy to assess the risk in advance. However, it should be kept in mind that the “immediate risk” refers to the risk of any violence, and not a risk of lethal violence or serious injury. In *Bevacqua v. Bulgaria* (2008, paragraphs 82-83), the European Court of Human Rights pointed out that the state cannot avoid responsibility by labelling the consequences of violence “as non-serious injury”. Nor should protection orders require proof of past violent incidents or the commission of a criminal offence.

An important safeguard is that the assessment of danger needs to be carried out by competent authorities. The police are generally trained to assess the risk of violence. Even if the police have sometimes downplayed signs of violence in domestic situations, adequate policy guidelines and additional training have been successfully used in some countries to increase the level of knowledge in the area of domestic violence among the police. Such training can significantly improve the understanding of the dynamics of domestic violence situations among all those that routinely handle such cases, including administrative authorities in some countries.

The Istanbul Convention, like other international instruments, leaves the choice of specific methods for the assessment of immediate danger to the discretion of the parties. Different examples from several member states of the Council of Europe are presented in Chapter VI below.

## **Possible legal regimes of the emergency barring order (criminal, administrative, civil)**

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The Istanbul Convention leaves it to the discretion of states parties to decide whether they allocate the task of issuing EBOs to the police, the court or some

other authority, and whether the procedure has an administrative, criminal or civil nature. Different countries have chosen to embed EBOs in different areas of law. Which legal regime to use depends on the possibilities they have to provide immediate protection to victims of violence against women and domestic violence. Where appropriate, emergency measures should be provided in different fields of law, in order to enable effective protection of victims at the right time, and in a co-ordinated way.

Different measures are also required to fulfil the obligation of the state to exercise due diligence in protecting the victims. Emergency provisions which require the victim to take initiative would, for instance, not be in compliance with the due diligence obligation.

The advantages and disadvantages of the different legal regimes are described below.

## **Administrative emergency barring orders**

In Austria, Finland and the Netherlands, the police issues the EBO (in the latter country it does so on behalf of the mayor). This arrangement guarantees immediate protection of victims or persons at risk in their home. Administrative EBOs can also provide protection to persons at risk preventively, before they are victimised.

Thus administrative EBOs fulfil three important requirements:

- ▶ The state actively provides protection to victims and persons at risk in situations of immediate danger (due diligence).
- ▶ Persons at risk receive preventive protection so that victimisation is avoided.
- ▶ The protective measure is enforced immediately after the police have been notified and have investigated the risk.

## **Civil law emergency protection orders**

Some countries have introduced EBOs in their civil law - for instance, Bulgaria. In the absence of administrative EBOs, this solution presents several disadvantages. The protection can hardly be provided immediately, unless courts are accessible around the clock, which is rarely the case. Even if the law requires a court to make the decision within 24 hours, as in Bulgaria, victims or persons at risk have to wait to get protection, which can be dangerous because during this time the perpetrator has full access to them.

A further difficulty is that civil law measures require the victim to take action and apply for an EBO. Thus the state is not fulfilling its due diligence duty to actively protect victims. Even if other persons/institutions can apply for an EBO, this does not replace the state obligation to protect in a situation of immediate danger.

Another problem with civil law EBOs is the cost for victims. Even if the application does not require paying a fee, victims usually have to bear the costs if they lose the case in court. Thus a civil EBO has several disadvantages and is often not effective in providing immediate protection.

On the other hand, civil law protection orders are necessary to ensure continuous protection after administrative EBOs expire. The two measures should be used complementarily in order to avoid gaps in protection, as required by the Istanbul Convention (Articles 52 and 53).<sup>11</sup> The combination of administrative EBOs and civil protection orders allows the state to fulfil its due diligence duty to protect the victim in a situation of immediate danger and provides the possibility of further protection to victims. This solution fulfils the aim of protecting *and* empowering victims. It is important to ensure that any interplay between an EBO and a longer-term civil law protection order allows for the will of the victim to be respected. Some may not opt for a long-term protection order while others will. The state is obliged to balance two fundamental rights of victims: the right to be protected from violence and the right to private life. The problem of violence cannot be solved by restricting the victim's right to contacts with the partner. In fact, victims of violence have the right not to be subjected to further violence by their partner *and* the right to stay together with him/her.

## Criminal law emergency barring orders

In criminal procedure, an EBO can be a prompt measure to remove the perpetrator from the home. It can be imposed by the police on the spot for a short period of time and confirmed by the prosecutor or the judge within a short time. The criminal EBO can be used to protect the victim when the perpetrator is released from police custody or prison (including pre-trial detention and release after serving a prison sentence), or as an independent protective measure.

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11. For example, in Austria the duration of the police EBO is automatically prolonged from two to four weeks if the victim applies for a civil law protection order. Civil courts are able to deliver a decision within four weeks so that no gap in protection occurs.

Pre-trial emergency measures can make it possible to issue a protection order as a condition for release of the perpetrator from pre-trial custody. Arrest is an important measure of protecting victims from violence. However, victims can be left without protection if the defendant is released from police custody and no further action is taken. The criminal EBO can thus be used in combination with pre-trial detention and release after serving a prison sentence, protecting the victim when the suspect is released, but it can also be issued as an independent protective measure. A violation of the criminal procedure EBO can lead to immediate arrest of the suspect.

However, one should be mindful that in many criminal justice systems protective measures can usually only be imposed after a conviction, which renders criminal law and criminal procedural law less suitable for regulating EBOs. Both emergency and post-sentencing barring orders fulfil a protective aim and are relevant to protect victims of violence against women and domestic violence. Immediately after the release of a perpetrator, in particular after serving a sentence, is usually considered a high-risk period for the victims.

## **Elements of effective emergency barring orders**

### **Immediate response**

The obligation to react to a situation of immediate risk implies that action is taken immediately by the authorities in order to avert the danger and protect victims from violence, i.e. as soon as the authorities are notified of it. This implies that a victim is protected by an EBO from the time the authorities intervene. It is not enough to advise the victim to report the violence and apply to court for an (emergency) protection order, because protection will not be in place immediately and the perpetrator would be free to access the victim. In several countries, the power to issue an emergency barring order has been given to the police because they are the only authority directly responsible for protecting people from violence and they are operational 24/7 and nation-wide.

### **Who can benefit from an emergency barring order?**

In most member states of the Council of Europe that have introduced the measure, EBOs are issued by the state (for example by the police) *ex officio*, or without requiring the victim to take action. One exception is Spain, which has introduced judicial EBOs. The regulation in Spain allows not only the victim, but also the victim's family, the police, the prosecutor and any relevant professional to request an EBO before the specialised courts on gender-based

violence.<sup>12</sup> The Istanbul Convention leaves it to the states parties to identify the most suitable procedure for EBOs.<sup>13</sup>

Third parties would generally not be able to apply for EBOs in the first phase of immediate danger (with exceptions like the aforementioned one in Spain), because the state responsibility to protect cannot be delegated to third parties. Third parties may, however, contact the police and notify the immediate risk of violence. There are situations in which victims might be helped by a third-party application so it may therefore be useful to enable third parties, such as family members or a social institution, to apply for a longer-term protection order. However, this is not required by the Istanbul Convention.

It is important that additional protective measures are in place after the EBO expires so that the victim or person at risk can apply for a longer-term protection order (Article 53 of the Istanbul Convention), which would empower the victim to take important decisions. While not every victim or person at risk may want to end the relationship with the perpetrator immediately, a protection order of a longer duration provides the necessary reflection period during which counselling or other services can be sought.

## **Competent authorities**

The due diligence principle requires state authorities to actively protect victims and persons at risk. When deciding on the competent authority responsible for issuing EBOs, consideration must be given to its ability to react. If the EBO is issued by the police, then they must respond to a domestic violence call immediately. If a victim calls the police and there are facts that point to an imminent risk for the victim to be harmed, the police should be able to protect the victim immediately. If the victim has to wait to get an EBO, even for 24 hours, it may be too long in cases of immediate danger.

If the EBO is issued by a civil law court, a solution must be found to allow for 24/7 access, for example by way of setting up specialist courts or a roster of specialist judges on call. This approach might entail high costs if these are to be set up in every region of the country. This arrangement may therefore not necessarily allow for immediate protection in all cases of imminent danger and in all regions.

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12. Realising Rights, 2011, page 77.

13. Explanatory Report of the Istanbul Convention, paragraph 264.

## **Criteria for issuing emergency barring orders**

The term “immediate danger” refers to any situations of domestic violence in which harm is imminent or has already materialised and is likely to happen again.<sup>14</sup> There is no requirement for the danger to be high or for a pre-existing history of abuse: the EBO needs to protect persons at risk before harm is done. Thus it is important to avoid a high threshold of violence as a condition to issue an EBO. It is equally important to avoid high standards of proof for any violent incident or threat. As a preventive tool, the purpose of an EBO is to ensure safety and it should not be linked to the proof of criminal responsibility.

## **Scope of protection**

Article 52 of the Istanbul Convention requires the protection of victims and persons at risk in their own home (order the perpetrator to leave the home and not to return) and also in public places (prohibition to contact the victim) for a sufficient time. All individuals should be protected regardless of their relationship or kinship with the perpetrator. It may be necessary to extend the protection to the children of the victim (e.g. by banning the perpetrator from the school or childcare facility). Electronic monitoring may help dealing with perpetrators who can be considered as prone to violating the order or in cases of high risk for the victim.

As Article 4 paragraph 3 of the Istanbul Convention requires its implementation without any discrimination on the grounds of sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status, none of these can bar victims from obtaining an EBO against the perpetrator. This is particularly important for the protection of migrant women (including undocumented migrants), whose access to rights and to justice is unfortunately often dependent on their residence status.

In addition, EBOs must be available to victims who do not live with the perpetrator to ensure, for instance, that couples who live with their respective parents are also covered.

## **Removal of the perpetrator from the victim’s residence**

Article 52 states that a perpetrator of domestic violence should be removed from the residence of the victim or the person at risk. This provision does not

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14. See Explanatory report to the Istanbul Convention, paragraph 265.

require it to be the joint residence of the victim and the perpetrator. According to the definition of domestic violence in Article 3 of the Istanbul Convention, this also includes former spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim. Failing to extend the protection to victims who do not reside or have never resided with the perpetrator would fall short of fulfilling the obligations under Article 52.

Who owns or is the legal tenant of the common place of residence is also irrelevant. The only requirement is that it is the place of residence of the victim. Similarly, there is no requirement for the victim to live there permanently: EBOs should also cover temporary residences, e.g. when a victim is threatened by the perpetrator in a shelter.

An EBO may thus require removing the perpetrator from his/her own home where it is shared with the victim. In fact, EBOs do not affect property rights but merely restrict the perpetrators' access to property for a limited time because of the danger they pose to the victim. Property or housing rights of abusive partners should not be taken into consideration in cases of immediate danger because the perpetrator's property rights cannot supersede the rights of the victim to life and physical and mental integrity.<sup>15</sup>

### **Duration of emergency barring orders: “for a sufficient period of time”**

The Istanbul Convention does not prescribe a specific duration for the EBO but refers to a “sufficient period of time”. Since priority is given to the safety of victims, this implies a time long enough to establish a safe situation for the victim. Since domestic violence is characterised by repeat victimisation, an EBO of ten days or even a month cannot be expected to avert the danger forever. Well-tuned successive protective measures should therefore be in place in order to ensure there is no gap in protection, including situations in which the victim her/himself does not dare to file for longer protection.

### **Prohibition to enter the victim’s residence or contacting the victim or person at risk**

Article 52 foresees a two-fold prohibition: to enter the residence of the victim or person at risk and to contact them. Thus any regulation that is limited only to banning the perpetrator from the residence of the victim, but allows him/

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15. See CEDAW *Gökce and Yıldırım v. Austria* 2005.

her to contact the victim or person at risk in other places, would fall short of fulfilling the obligation under the Istanbul Convention.

## **Who can appeal?**

In accordance with the general obligations provided for under Article 49 paragraph 2 of the Istanbul Convention, EBOs must not be prejudicial to the rights of the defence and the requirements of a fair and impartial trial, in conformity with Article 6 of the European Convention on Human Rights. This means that the perpetrator should have the right to appeal before the competent authorities, in accordance with the applicable internal procedures. However, guaranteeing the effective protection and safety of the victim or person at risk, as provided by Article 52 of the Istanbul Convention, requires that such appeal does not have a suspension effect. Likewise, the person protected by the EBO should have the right to appeal as a party to the case.

## **Empowerment and support of victims and persons at risk**

Article 52 of the Istanbul Convention aims at realising every person's human right to be free from violence, not only in public places but also at home. The Istanbul Convention stresses that measures taken to implement this provision should give priority to the safety of victims or persons at risk. This implies introducing not only legal measures, but also measures to support and promote the safety of victims and persons at risk. Case studies in Chapter VI below show examples of how this can be implemented.

## **Monitoring and sanctions for non-compliance with emergency barring orders**

Violating an EBO has to be considered a risk factor, especially if the EBO was issued in a situation of repeated violence or threats. In such cases, authorities need to take stronger measures to prevent further violence and protect victims and persons at risk.<sup>16</sup> The police are best placed to actively monitor compliance with the EBO (for example by means of electronic monitoring, keeping contact with the victim and/or patrolling in the vicinity). However, research shows that only a fraction of breaches of protection orders are ever reported to the police.

Although Article 52 of the Istanbul Convention does not specify to what extent a breach of an EBO should be sanctioned, it is widely accepted that the violation

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16. WAVE, 2012.

of such an order must lead to an official measure against the perpetrator. The practice in Council of Europe member states shows that violations of EBOs either carry an administrative or a criminal sanction, ranging from a fine to arrest. However, fines may be counter-productive in the context of domestic violence as the perpetrator may have legal obligations to financially support the victim and her children.

The victim is not restrained by an EBO. When Austria introduced the police EBO, there was a discussion in the country as to whether the victim should also be sanctioned for allowing the perpetrator to return to their common residence, because this can constitute incitement to an administrative offence. There are different reasons why the victim may want to contact the perpetrator or does not hinder him or her from entering the home, ranging from fear to love. The authorities should make it clear that it is the perpetrator who is restricted by the EBO, not the victim. If needed, the authorities should assist the victim if the perpetrator needs to enter the dwelling to pick up his or her belongings.

## **Multiagency co-ordination**

Co-operation between agencies should not depend on the goodwill of persons vested with the relevant competencies, but should be integrated into the system of preventive measures and entrenched in the law. Such co-operation should embrace all the relevant actors – the police, criminal courts, civil/family courts, social services, shelters, children's and youth welfare authorities, health services, and relevant NGOs, etc. - and place the rights and needs of victims at their centre. However, the right to privacy of the victim should be respected. Efficient procedures and guidelines for rapid and mutual notification of reports, decisions and action taken should be in place, so that no gaps in the protection of the victim occur.

## **Costs**

The right of the victim to be protected from violence is a basic human right, and the exercise of this right should not depend on the victim's financial means. Therefore it is important to ensure that no costs arise for the victim when an EBO is granted.

## **Cross-border application of emergency barring orders**

An increasing number of living arrangements in Europe today are such that people are required to cross borders on a regular basis, sometimes daily, in order to reach work, home, school, or to obtain healthcare. Therefore, ensuring protection for victims of domestic violence across borders is becoming an

increasing concern for the competent authorities. The Istanbul Convention, in Article 62 on the general principles of international co-operation, requests states parties to co-operate for the purpose of:

- ▶ preventing, combating and prosecuting all forms of violence covered by the Istanbul Convention (Paragraph 1a), and
- ▶ enforcing relevant judgments issued by judicial authorities, including protection orders (Paragraph 1d).

This would include EBOs within the meaning of Article 52 of the Istanbul Convention and/or if they have been issued by a court.

While the issue of cross-border application and enforcement might be more relevant to civil law protection orders because of their longer duration, it is important to work towards cross-border application of EBOs as well. A number of domestic violence cases concern individuals from different nationalities, in particular in border regions. Ensuring protection and safety for victims will therefore require cross-border applicability and enforcement for protection orders and EBOs.

A number of legal instruments are available to ensure EU-wide protection for victims of domestic violence and particularly the enforcement of both criminal, as well as civil protection orders across EU member states. Both the EU Directive 2011/99/EU on the European Protection Order and the EU Regulation 606/2013/EU on mutual recognition of protection measures in civil matters oblige EU member states to recognise protection orders issued in other member states, thereby enabling cross-border enforcement of such orders among EU member states.

# Balancing the rights and legal safeguards in the context of emergency barring orders

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## **Privacy and other rights in balance**

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What makes the issue of EBOs sensitive is the fact that the perpetrator can be removed from his/her own home. Therefore, his/her rights to privacy, family life, property, and the right to fair trial are human rights that must be balanced against the rights of the victim or person at risk to be safe from violence. These include the right to life, the right to physical and sexual integrity, and the right to family life.

In this context, it is important to note that violent crime is not a private matter between victim and perpetrator. The European Court of Human Rights has stated that “interference by the authorities with the private and family life may become necessary in order to protect the health and rights of a person or to prevent criminal acts in certain circumstances”.<sup>17</sup>

The CEDAW Committee has pointed out that “... the perpetrator’s rights cannot supersede women’s human rights to life and physical and mental integrity”.<sup>18</sup> While the right to privacy cannot be invoked to legitimise violence against another person, the right of the perpetrator to privacy can and should be taken into account in establishing how and by what measures violence is combated. There are several legal safeguards that should be in place when EBOs are designed and enforced (see section below on ‘legal safeguards’).

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17. *B. v. the Republic of Moldova* (2013), at 46; also *Opuz*, at 144; *Bevacqua*, at 83.

18. *Yildirim and Goecke* at 12.1.5.

An important aspect of the right to privacy is the right to family life. In the context of protection orders, parental rights and more specifically the visitation rights of the parent who is not living with the children tend to cause problems both to legislators and to enforcement agencies. This issue is relevant in the design of longer-term protection orders. As we have seen, EBOs are short-term protection measures. The discussions, processes and decisions about custody and visitation rights require more time than the short duration of EBOs and therefore the parental rights are seldom at issue in this context. The Istanbul Convention provides guidance in this respect. Article 31, paragraph 2, establishes that "Parties shall take the necessary legislative or other measures to ensure that the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim or children." Considerations for the safety of victims and children should thus take precedence over contact with children until safe and durable solutions such as supervised visitation can be arranged.

Neither should the right to property generally prevent an EBO from being issued. Rather, it is a question of balancing the conflicting rights, which means that when removing a violent person from his or her own property to protect the partner, whether or not she/he is a co-owner, it should be considered whether such a restriction in the use of property is proportionate and reasonable.

An important argument in the context of balancing rights in cases of domestic violence is equality. Criminal offences related to domestic violence, as is the case of any other crime, should be met with equal seriousness of investigation and punishment, wherever the crime takes place. Privacy cannot be considered as a mitigating factor. In fact, extensive research on domestic violence has shown that domestic violence is often more serious, causes more injury, is more often repeated and escalates over time more often than other forms of violence. Therefore, it is important to ensure that domestic violence is countered with equal seriousness as similar acts of violence.

The UN Special Rapporteur on violence against women, its causes and consequences has addressed this issue in the following manner:

"Another fundamental principle connected to the application of the due diligence standard is that of non-discrimination, which implies that States are required to use the same level of commitment in relation to prevention, investigation, punishment and provision of remedies for violence against women as they do with regards to the other forms of violence."<sup>19</sup>

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19. See E/CN.4/2006/61 paragraph 35.

## **Legal safeguards**

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There are several legal safeguards that must be respected when designing and issuing EBOs in order to respect the rights of the perpetrator. While the primary concern must be to design a mechanism that effectively ensures the safety of a victim of domestic violence or person at risk thereof, it is important not to lose sight of essential legal principles such as those of proportionality, legality, due process, and judicial review. These can act as safeguards in the legal provisions and procedures that regulate EBOs in order to protect perpetrators of domestic violence against an excessive or unfounded use of EBOs.

The principle of proportionality requires a correct balance to be found between the imposed measure (EBO) and the severity of the act that is sanctioned or prohibited (act of domestic violence or immediate danger of such act). This means that the competent authorities must have the power and the means, including the necessary training, to assess whether an immediate danger exists. It also means that of the variety of measures within the power of the competent authorities (for example the police: caution, EBO, arrest and police custody), the most appropriate and proportional action must be chosen. In many cases, an EBO will be the measure of choice in order to restrict the prohibited act (domestic violence) and ensure the safety of the victim. It is less invasive than arrest and deprivation of liberty, and may be more effective than a caution. EBOs are therefore an important tool to be put at the disposal of the competent authorities. Furthermore, proportionality and the perpetrators' procedural rights (as laid down in Article 6 of the European Convention on Human Rights) are safeguarded by the time limits of EBOs. In most European countries these time limits vary from one week to one month. The drafters of the Istanbul Convention decided to leave it to states parties to decide on the duration of EBOs, but pointed out that the period should be sufficient to provide effective protection to the victim. Any decision to extend this protective measure must be taken by a court.

In addition, the principle of legality requires legislation to be clear, ascertainable and non-retrospective. This means EBOs require a clear legal basis for the competent authority to act and shall keep discretionary powers to a minimum. It also means EBOs cannot be issued retrospectively.

Lastly, the principles of due process and judicial review balance the rights of an individual against the power of law and its application by the state. In the context of EBOs, this requires perpetrators to receive proper notice, usually in writing, of the measure taken against him or her, its exact content and

duration. It also means the perpetrator must be able to complain about the decision taken against him or her and have it reviewed by a court.

Usually the perpetrator is heard on the spot, that is in the home, before the EBO is imposed and the actual removal from the home takes place. However, the perpetrator is not always present. Because EBOs must be issued quickly in the face of immediate danger, it may not always be possible to hear the perpetrator before an EBO is imposed. In such situations, a prompt subsequent interview/hearing of the perpetrator is paramount.

Taken together, the specified short duration and the obligation to hear the perpetrator as soon as it is possible, without prejudice to the protection of the victim, are essential in safeguarding the procedural rights of the perpetrator.

# Implementing emergency barring orders: examples from Council of Europe member states

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## **Overview of the situation in Council of Europe member states with respect to introducing emergency barring orders**

There is great diversity of legal and law enforcement systems for EBOs in Council of Europe member states.<sup>20</sup> While it can be argued that the police are best placed to impose an EBO because they can do so on the spot without victims having to ask for it, the reality is rather more complex. In Sweden, it is the public prosecutor who has this power, and in the Netherlands it is the mayor. In both countries, the barring order is in fact delegated to the police, but authorised or approved by the competent power. In Sweden, this means that victims apply for an EBO at the police station, which was, at least in the first years, often refused. In some countries there are strong feelings against giving the police the power to expel someone from his or her home, and it is considered that a judge or other legal authority must be involved. In Italy, a woman can go to court and will be assigned a judge within 24 hours, who can issue a barring order in case of urgent need. Spain has no EBO as such, but the specialised courts dealing with domestic violence do convene very quickly and in urgent cases this can happen within the same day. In addition, if the police describe the situation as dangerous, the judge will issue such an order right away, and the police are obligated to arrest the perpetrator and keep him or her in custody until the order is issued, if immediate protection is needed.<sup>21</sup>

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20. Professor Carol Hagemann-White "Lessons learned from the process of monitoring the implementation of Recommendation Rec(2002)5 on the protection of women against violence", internal report submitted to the Council of Europe, February 2014.

21. Spain has both precautionary protection orders, with a very simple procedure on application to the magistrate on duty as well as protection orders in connection with criminal proceedings.

There are different reasons why preference may be given to one model over another. In Spain, the system of specialised courts offers the advantage that the judge can impose a whole range of measures beyond just expelling the perpetrator from the home, which leads to assessing regularly whether there are criminal acts to be punished. In Austria, the EBO is completely separate from the criminal investigation and the advantage is that EBOs are also used in situations where there is no solid evidence of a crime already committed, but good reason to believe that violence may occur.

The following four countries were selected for this study to reflect the level of diversity in Council of Europe member states and as examples of how EBOs can be implemented:

- ▶ **Austria** was the first country in Europe to introduce EBOs, in 1997, and it has since accumulated significant experience in the matter. On the basis of practical experience, Austria amended its law several times after 1997 in order to close gaps and improve regulations which did not prove to be effective in protecting victims.
- ▶ **Bulgaria** was the first country in South Eastern Europe to establish a protection order: the relevant law was adopted in 2005 and amended in 2009, reflecting the commitment of the parliament, government and women's rights NGOs to provide effective protection to victims of violence.
- ▶ **The Netherlands** was selected because of its administrative EBO and its provisions to support victims and address perpetrators in the context of EBOs.
- ▶ **Spain** provides a valuable example of addressing violence against women in a gender-sensitive and very comprehensive way, including not only legal but also social and economic measures. Since the introduction of the Organic Law of Comprehensive Protection Measures against Gender-based Violence<sup>22</sup> in 2004, Spain has gathered a unique experience in Europe applying a gender-specific solution to a problem which is recognised by the Istanbul Convention as affecting women disproportionately. Spain also introduced specific courts for cases of violence against women, dealing not only with criminal offences, but also with civil and family law.

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22. "Ley orgánica de medidas de protección integral contra la violencia de género" <http://www.mujeresenred.net/IMG/pdf/DEFINITIVA-VIOLENCIA.pdf>

## Austria

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**History and legal basis:** the first EBO came into force in Austria. The Domestic Violence Act was adopted in 1996 and came into force in May 1997. Three core measures were introduced: 1) EBOs issued by the police;<sup>23</sup> 2) domestic violence intervention centres in all provinces to provide immediate and proactive support to all victims; and 3) civil law protection orders to be requested by victims to protect them after expiry of the police barring order or independently from an EBO. The Domestic Violence Act also established several other important protective measures such the right of every victim of violence to receive proactive, comprehensive and empowering support through so-called “Intervention Centres” established in each of the nine provinces (run by NGOs and fully funded by the state).

The criminal justice system can also issue protection orders, but this instrument is rarely made use of and does not form part of the set of standard measures against violence against women and domestic violence. Also, they cannot be applied immediately because there are no special or fast-track courts.

**Who can apply:** the Austrian law protects the victim *ex officio* in the acute phase of violence and afterwards it gives agency to the victim to decide whether she/he wants further protection or not. In this subsequent phase only the victim is authorised to apply for a judicial protection order, with two exceptions: if the victim is a child (i.e. a person below 18 years of age), the (non-violent) parent can apply for a protection order on her or his behalf. The second exception is that the Youth Welfare Office can make an application for a protection order if children are in danger.

**Duration of the EBO:** the length of this police EBO was seven days when it was first introduced in 1997. It was subsequently prolonged to 10 days and, since 2009, the duration is two weeks with the possibility of prolonging to four weeks if the victim applies for a civil court protection order.

**Where and how are victims protected? Types of protection:** until September 2013, the EBO applied only to the home and immediate surroundings. Since then, the police can ban the perpetrator from the school or kindergarten if children are endangered. It does not matter whether the violence or threat of violence occurs in the home, in a public place or elsewhere. Police EBOs can also be used to protect women and children in a women’s shelter if, for instance,

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23. Based on section 38a of the Security Police Act (SPG).

the perpetrator is stalking them there. They are not, however, general bans on contact with the victim. Rather, a barring order may consist of three parts:

- ▶ an order to immediately vacate the home of the victim,
- ▶ an order not to return to the home of the victim or its vicinity,
- ▶ an order not to approach the school, kindergarten or another childcare facility if children are the endangered persons.

"Home" means the place where the victim lives, at least at the time of the incident, which includes temporary places of residence. However, the police cannot protect victims in the workplace or cannot prohibit contact with them there.

**Integration into a co-ordinated multi-agency policy:** the Austrian police barring orders are part of an integrated approach and a multi-agency intervention system which includes not only legislative measures to protect victims from domestic violence and hold perpetrators accountable, but also measures to support and empower victims and those affected by domestic violence.

**Authorities issuing the order:** the authority issuing the order in cases of imminent danger is the police. The administrative legal service is obliged to review the decision of the police officer within 48 hours and can reverse the order if the legal requirements were not fulfilled.<sup>24</sup>

**Gender-neutral approach in the legislation:** the legislator in Austria decided in favour of a gender-neutral approach that addresses every person in danger of violence. However, this does not mean that the gendered nature of the problem is ignored. Particular attention is given in the Austrian measures and policies to the fact that it is predominantly women who experience violence in the home.

**Who is protected? Persons covered:** the EBO protects *every person* at risk of immediate danger, without discrimination on any ground, in her/his home and surrounding area.<sup>25</sup> It is not necessary that victim and perpetrator are related or that they live or have lived together. Police barring orders can also be issued to protect victims of stalking. The law also applies to people in same-sex partnerships or relationships. It protects old people from violence by care-takers, as well as young people who are threatened in their home by peers (for instance violence among students living together). Migrants as well

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24. According to statistics, only 5% of police decisions are reversed - and the vast majority is confirmed.

25. The police must define the respective surroundings and to reflect this in their report. They also have to inform the perpetrator for which area the barring order is valid.

as undocumented migrant women victims of violence have the same right to be protected in their home. Police barring orders also protect children by providing an important alternative to removing them from the family home if they are at risk of violence, on the condition that there is a non-violent parent or other person in the household who is able to take care of them.

**Criteria to apply for emergency protective measures:** facts that point to an imminent danger to the life, health or freedom of a person. It is not necessary for an act of violence to have been committed already – the barring order is a preventive instrument to avoid violence to occur. The police have to carry out an investigation on the spot in order to assess the danger.

**Costs:** a police barring order incurs no costs for either victim or perpetrator. The judicial protection order is now also cost-free.

**Monitoring compliance:** the law requires the police to actively monitor compliance with the barring order and to check at least once in the first three days that the perpetrator did not return to the home of the victim.

**Consequences of the breach of an EBO:** if the perpetrator violates the order, he/she is charged with an administrative fine of up to 500 euros for every offence. In cases of repeated breaches of the barring order, he or she can also be arrested.

**Rights of perpetrators:** every perpetrator who is barred from a joint residence is issued with an information leaflet informing him/her about their rights. The leaflet includes information about:

- ▶ the barring order and the area where he/she is not allowed to enter;
- ▶ sanctions in cases of breach of the order;
- ▶ emergency accommodation in case he/she does not have a place to stay;
- ▶ where to get help;
- ▶ his/her obligation to provide an address where the court can serve a judicial order and what the consequences may be if he/she does not provide the authorities with an address, namely that a judicial order will come into force even without the perpetrator being notified. This helps to avoid unintended gaps in protection resulting from non-compliance with formal requirements.

**Who can appeal:** the perpetrator has the right to appeal to an administrative court against the decision of the police to issue a barring order, but the appeal has no suspension effect. If the appellant wins the case, he/she can

claim compensation. The victim is not a party in this procedure and does not have the right to appeal.

**Empowerment and support of victims:** victims receive from the police a document explaining their right to apply for a judicial protection order within two weeks of the EBO being issued. They are also informed about where to get help and that they will be contacted by the regional intervention centre which offers support to victims. The police notify the regional intervention centre about *all* cases of violence against women, domestic violence and stalking within 24 hours (per fax or by e-mail). The staff in the centres is trained to deal with different types of violence, and they are able to support victims adequately to deal with all aspects of their situation. Support is provided to all victims, regardless of their nationality, ethnicity, age, gender, sexual orientation, ability, residence status or any other status. Support to victims is not dependent on their willingness to report violence or take legal steps such as applying for a protection order. Some regional intervention centres also provide long-term support to victims and all help received from the intervention centres is free of charge.

**Multi-agency co-operation and the integrated approach:** in Austria, co-operation between the police, the civil/family court, the intervention centres, and the Youth Welfare Office is well integrated, whereas co-operation with the criminal justice system appears to be less developed. Similar observations can be made for the health sector.

*Co-operation between the police and the family courts:* The police are required to send a report on the EBO immediately to the family court, as well as submitting the key to the joint residence that they confiscated from the perpetrator.<sup>26</sup> The court must inform the police about applications for civil law protection orders and must send the decision to the police, as they are responsible for the enforcement.

*Co-operation between the police and the intervention centres:* The police are required to send a report on the EBO, as well as reports about stalking, to the regional intervention centre within 24 hours (in practice this usually happens within three to four hours).

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26. If the court does not issue a decision regarding a protection order within four weeks, the judge has to hand the key of the house over to the perpetrator; this seems to serve as another incentive for issuing the decision on time, because judges do not want to be seen as the ones providing the perpetrator with access to the victim and thus putting the latter in a potentially dangerous situation.

*Co-operation between the police and the Youth Welfare Office:* the police are also under the obligation to notify the Youth Welfare Office, the authority legally responsible for the protection of children, whenever children are involved.

*Co-operation between family courts and the intervention centres:* intervention centres support victims in applying for civil court protection orders and communicate with family courts to make sure the application is dealt with in due time, so that no gaps in protection occur.

## Bulgaria

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**History and legal basis:** the Law on the Protection against Domestic Violence (LPADV) was adopted in March 2005. It includes a provision for a civil law protection order. Amendments to the Law were adopted in 2009, making the violation of a protection order a criminal offence and increasing the duration of a protection order to 18 months.<sup>27</sup> Other measures were introduced to reinforce the protection of victims, e.g. enlarging the circle of individuals who are entitled to protection and accelerating enforcement of the law.

**Authorities issuing the order:** the civil law emergency protection order is issued by regional courts.

**Emergency measures, immediacy of the measure:** since victims apply for a protection order at the court, immediate protection is not ensured. However, victims can apply for an emergency order if there is an imminent danger to their life or health. In such a case, the regional court will issue an emergency protection order within 24 hours on receipt of the application. The police must help victims with their applications for EBOs: applications can be made at the police station and the police are obliged to forward them swiftly to the court. Emergency orders can be enforced immediately, and the police are responsible for enforcing some of the emergency provisions.

**Who can apply:** the victim herself or himself, a direct relative or a sibling can apply for an emergency order. The police can also file an application for an emergency protection order. Contrary to police barring orders, in which the police have to investigate and provide evidence, in the case of a civil law order, evidence usually has to be provided by the victim. Bulgarian law allows for several documents to be submitted in evidence, including reports by doctors or

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27. Bulgarian Gender Research Foundation/The Advocates for Human Rights, 2010.

social services, but it also states explicitly that even if there is no such evidence, the court shall issue a protection order based solely on the victim's statement.

In the case of minors under 14 years of age and persons with disabilities under legal guardianship, the Social Assistance Directorate (SAD), an immediate family member or a guardian may also apply.

**Who is protected:** the law protects<sup>28</sup> current and former spouses and cohabiting partners, persons who have a child in common, parents and children, siblings, relatives within two degrees, guardian/foster parents. The circle of victims entitled to receive protection was expanded in 2009 to include siblings up to the fourth degree, ascendants or descendants of the victim's partner and the victim's parent's partner.

**Criteria for applying for emergency protective measures:** the protection applies in cases of domestic violence defined as "any act or attempted act of physical, mental or sexual violence, as well as the forcible restriction of individual freedom or privacy".<sup>29</sup> The violence must have occurred within one month before the application for a protection order. Since the 2009 reform, the definition also includes emotional and economic violence. The law also recognises that a child exposed to domestic violence is a victim.

**What protective measures can be issued? Forms of protection and prevention:** the court has the possibility, once an application is made, to grant several forms of protection and relief, namely to:

- ▶ remove the perpetrator from the home of the victim for a period ranging from one month to one year;
- ▶ prohibit the perpetrator from returning to the home of the victim and the vicinity of the home;
- ▶ prohibit the perpetrator from visiting the workplace of the victim or any other place of the victim's social life or to approach the victim;
- ▶ temporarily relocate the residence of a child to make sure that she or he is safe and remains with the non-violent parent;
- ▶ order the perpetrator to refrain from committing further violence;
- ▶ order him/her to attend special programmes;
- ▶ advise the victim to apply for support services.

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28. Ibid.

29. Ibid, page 4.

**Implementation of protective measures:** the law foresees that the protective measures are enforced by the police immediately to guarantee that protection is in place quickly. The police must remove the perpetrator from the home and ensure he/she also complies with the other protective measures issued by the court. The police are also responsible for controlling compliance with the order.

**Length of the protection period:** emergency protective measures can be issued for a period ranging from one month to one and a half years (18 months).

**Consequences of non-compliance:** the violation of a protection order constitutes a criminal offence.

**Who can appeal against an emergency protection order:** both the perpetrator and the victim can appeal.

**Costs:** a protection order can be applied for free of charge, but depending on the outcome of the case, either the victim or the perpetrator bears the expenses. If the order is denied by the court, the victim has to bear the costs.

**Empowerment and support to victims:** Bulgarian law makes the state responsible also for supporting the victims, but resources were lacking when the law was first adopted. The 2009 amendments provided for a separate budgetary line in the Ministry of Justice to fund assistance to victims. The law also foresees granting funding to NGOs providing support to victims and working towards the prevention of violence. However, the current level of funding for NGOs is considered insufficient.

**Integration into a co-ordinated multi-agency policy:** the Bulgarian emergency protection order is part of a wide system of interventions to prevent domestic violence. Since 2006, a range of policies and measures have been put in place such as the adoption of a National Programme on Prevention and Protection from Domestic Violence, including a budget for its implementation; the creation of a 24-hour national hotline; the development of guidelines for the police; the setting-up of shelters for women victims of violence and their children, etc.<sup>30</sup> NGO reports indicate, however, that further progress could be made in relation to service provision and providing effective remedies to victims.<sup>31</sup>

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30. Ibid, page 4.

31. Ibid, page 8.

## The Netherlands

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**History and legal basis:** The Netherlands has a long history of measures to prevent violence against women and their children dating back to 1970 with the establishment of women's shelters. The Dutch EBO was introduced in January 2009, based on administrative law (*Wet Tijdelijk Huisverbod*). Civil law protection orders existed already before that, but they did not provide immediate protection. The current provisions make it possible to remove from the home a person who is posing an immediate danger to a partner he/she is living with.

In addition, the Dutch law also provides for EBOs in the criminal procedure. Such orders are commonly used during the pre-trial phase to protect victims of domestic violence and they are also available at the sentencing stage. This example refers only to the administrative EBO.

**Gender approach:** the legal provision in the Netherlands takes a gender-neutral approach, and the law applies to both women and men.

**Authorities issuing the order:** the Dutch EBO is an administrative measure formally emanating from the municipality represented by the mayor. In practice, the mayor can delegate the decision and implementation to the police, which is the case in two-thirds of the Dutch municipalities.<sup>32</sup>

**Immediacy of the EBO:** the EBO can be issued immediately after assessing the risk.

**Persons covered:** the EBO protects persons living in the same household (partner, parent, child, etc.) but does not protect a person in her/his home if the perpetrator does not live there. Therefore it does not provide protection from ex-partners or persons stalking a victim in her/his home.

**Criteria for applying for emergency protective measures:** the Dutch EBO applies in cases of serious and imminent risk. An assessment of the risk is legally required before the EBO can be imposed. This is done with a standard risk assessment instrument specifically developed for this purpose by a senior and specially trained police officer. A history of abuse is not legally required, thus the EBO can also be issued if there has been no previous violence. The aim of the EBO is to prevent violence from occurring in the first place.

**Types of protection:** the EBO provides for the removal of the perpetrator from the shared home and prohibits him/her to return there for the duration

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32. Kelly et al. (2011).

of the EBO. There is also a general prohibition for the perpetrator to contact the victim (or victims).

**Duration of the EBO:** the minimum duration of the EBO in the Netherlands is 10 days. After eight days, a standard evaluation is carried out to decide if the barring order needs to be prolonged in order to provide further protection. If this is the case, the administrative EBO can be prolonged for a further 18 days. After the extension of the EBO, the victim can apply for a civil protection order if protection is still needed. However, there is no legal regulation to ensure that the protection is prolonged immediately after the end of the EBO (28 days) and gaps in protection might occur.

**Consequences for non-compliance:** a breach of the order constitutes a criminal offence and will be reported.

**Who can apply for EBOs:** the EBO is issued by the police/mayor for 10 days and can be prolonged by the same authority for up to 28 days. The victim's request or consent is not required. Following the EBO, the victim can apply for a civil law protection order.

**Rights of perpetrators:** the evicted person is heard before an EBO is issued from 10 to 28 days. He/she also has the right to appeal against the measure. The victim has no right to appeal against the EBO.

**Rights of victims:** as stated above, the Dutch EBO is an administrative measure taken by the mayor or the police on behalf of the mayor. The victim's request or consent is not required. However, the victim has to be heard before the EBO is prolonged from 10 to 28 days.

**Costs:** there are no costs related to the EBO for the victim or the perpetrator. However, if the victim decides to apply for a civil court protection order, she/he has to pay a court fee. Victims with a low income can apply for legal aid to cover the costs.

**Empowerment and support of victims:** providing support to victims is part of the Dutch EBO, and the law requires that help is provided within 24 hours. Local support and advice centres (*Steunpunthuiselijkgeweld*) have been established in all regions of the Netherlands. The centres are informed by the police immediately after an EBO is issued. These centres do not only provide support to victims but they also offer interventions to other persons in the household and to the perpetrator, following a "systemic approach"<sup>33</sup>.

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33. Kelly et al. (2011).

A case manager co-ordinates the support measures and is also responsible for assessing the situation and giving advice to the mayor or the police before deciding whether the EBO should be prolonged after the initial 10 days. The support offered to victims and perpetrators is in principle voluntary, but if for instance the perpetrator refuses to deal with the problem, this may be seen as a sign of persisting risk and may lead to the extension of the barring order.

**Integration into a co-ordinated multi-agency policy:** the Dutch EBO is part of a wider set of measures (civil and criminal law measures, women's shelters, social and health care measures, etc.) to prevent violence against women and domestic violence. Local women's shelters and advice centres are also engaged in the co-ordination of multi-agency work.

## Spain

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**History and legal basis:** the Organic Act 1/2004 (OL 1/2004) on Comprehensive Protection Measures against Gender-based Violence<sup>34</sup> was unanimously adopted by the Spanish Parliament in 2004. Previously, in 2003, a law on protection orders was approved and subsequently amended with the adoption of the Organic Act.

**A gender-specific law:** the Organic Act of 2004 provides a comprehensive framework encompassing legal, institutional, and social support, health care, as well as educational, economic and awareness-raising measures for the protection and support of women victims of violence. Article 1 of the Organic Act defines gender-based violence as "violence which, as an expression of discrimination against women and the inequality in the power relationship between men and women, is perpetrated against the latter by their spouses or ex-spouses or men with whom they have or have had similar affective relationships, with or without cohabitation". This law also provides for specialised gender-based violence courts established in all regions of Spain to provide emergency services.

**Emergency measures:** the Organic Act of 2004 allows the authorities to apply various measures to protect and support victims, and gives the judges of specialised courts the possibility to issue integrated protection measures of criminal, civil and social nature, including emergency barring measures in the form of precautionary protection orders. If a crime has been committed, criminal proceedings are also initiated.

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34. Ley orgánica de medidas de protección integral contra la violencia de género <http://www.mujeresenred.net/IMG/pdf/DEFINITIVA-VIOLENCIA.pdf>

**Immediacy of the EBO:** According to the law, **EBOs** must be issued immediately and no later than 72 hours after the incident is reported. The gender-based violence court system in Spain is on call around the clock in order to be able to provide emergency measures. In Madrid, two gender-based violence courts are available 24 hours a day. However, it is not clear if this is the case in all regions of the country.<sup>35</sup> The Spanish police have developed a strict policy of zero tolerance towards gender-based violence and the police arrests perpetrators whenever there is a danger for the victim and until the emergency order is in place. However, meeting the threshold criteria for arrest is not always a straightforward matter.

**Authorities issuing the order:** the emergency barring measures are issued by the special gender-based violence courts.

**Persons protected:** the Spanish laws protect women from the violence of spouses or ex-spouses, or men with whom they have or have had similar affective relationships, with or without cohabitation.

**Criteria for applying for emergency protective measures:** precautionary and interim protection measures can be imposed if there is an objective risk to life, physical, sexual or moral integrity. Psychological abuse and minor threats and coercion are covered as well.

**Where are victims protected? What protective measures can be issued?** The court can order different measures depending on the situation and the needs of the victim. For instance, it can prohibit the perpetrator from contacting the victim, order him/her to leave the home and can prohibit their entering it again. It can also grant the victim the right to obtain preliminary custody of the children, since it is recognised in Spain that children exposed to domestic violence are at risk of violence themselves. Other interim measures can be taken in order to guarantee the well-being of the children, such as the payment of alimony.

**How long are victims protected:** interim protective measures are issued until a final decision is taken at the judge's discretion. Preliminary measures are usually provided for 30 days. After that the measures can be prolonged at the request of the victim.

**Who can apply for emergency protection orders:** standard application forms for protective measures are widely available in Spain. Not only the victim, but

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35. Kelly et al. (2011).

also family members can apply. In addition, private or public social service organisations who receive information about an incident of violence that would require protective measures are obliged to report to the police or the judicial system, which is obliged to subsequently initiate protective measures. The application form can be submitted through many institutions, not only the police or the court, but also through victim support organisations or governmental bodies.

**Rights of the victim:** the victim can apply for an emergency order, but generally the will of the victim does not bind the court. In any case the victim will be heard in court.

**Costs:** there are no costs involved for either the victims or the perpetrators when EBOs are issued or extended.

**Implementation:** police officers are obliged to use an assessment tool that was developed especially for the police. The tool also guides them in terms of the measures they have to apply in a certain situation. However, the decision about the EBO is not taken by the police, but by a specialised gender-based violence court.

**Consequences for non-compliance:** the breach of the order automatically constitutes a criminal offence. Electronic monitoring of perpetrators is one way of enforcing compliance, and this measure is regularly used when protective measures are violated by perpetrators.

**Rights of perpetrators:** perpetrators have the right to appeal as well as the right to be heard.

**Empowerment and support of victims:** the Spanish system provides for psycho-social and legal support to all women victims of violence and their children. Help is offered proactively to a victim on the condition that she reports the violence to the justice system. This support is comprehensive, and victims can get financial aid as well as housing. Employers who hire women victims of violence qualify for tax reductions.

**Multi-agency co-ordination:** the Spanish system foresees the co-operation of all agencies involved. Support is also provided by NGOs in co-operation with state agencies. Specific co-ordination measures have been established to ensure co-operation when EBOs are issued (*Punto de coordinación de órdenes de protección*).

# Conclusions

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The essential idea behind the concept of a modern state is that it should protect its citizens against immediate (and other) danger. This duty has evolved in the contemporary legal doctrine and international law, and it is a duty that is in many ways manifested in modern constitutions. Some of the latest developments have been the introduction of gender-sensitive tools in this regard, including acknowledging the specific violence that women are confronted with and the breadth of this violence.

The Istanbul Convention is one of these tools. It aims to protect women from all forms of violence, and if violence has already happened - to ensure that it stops immediately, let alone becomes more severe. Putting an effective end to violence in specific cases is not possible without the competent authorities taking immediate and adequate measures to protect the victims. Article 52 of the Istanbul Convention on EBOs requires states parties to adopt and implement such measures, but leaves it to the discretion of the states to decide on their modalities.

The findings of the 4th round of monitoring of the states' compliance with Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence (2014) pointed to a growing recognition that providing protection without delay and with measures that can be effective until the danger is no longer imminent, is increasingly recognised as an obligation of due diligence as well as a necessary precondition for prosecution.<sup>36</sup>

Legal systems of Council of Europe member states vary considerably in their regulation of the respective powers of the police, prosecutors, local authorities and courts. The different procedures chosen to implement Article 52 of the Istanbul Convention can all be effective if the competent authorities are able to respond within a very short time, and the police have the power to prevent further violence without any gap in the protection until the measure is authorised.

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36. Analytical study of the results of the 4th round of monitoring the implementation of Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence in Council of Europe member states, page 48, accessible at <https://rm.coe.int/16805915e9>

A distinct advantage of EBOs is that they are less restrictive on the rights and freedoms of those upon whom they are imposed than alternative means of protection for victims, such as arrest and detention. While Article 52 clearly states that priority should be given to the safety of victims or persons at risk, since EBOs may have a considerable, albeit temporary, effect on the rights of the perpetrator, this measure should foresee all the necessary safeguards to guarantee that their rights are adequately protected too.

EBOs, as required by the Istanbul Convention, are protective measures that require a ‘paradigm shift’ in understanding interventions to protect victims from domestic violence. Rather than asking victims to seek a place of safety from the violence, it shifts that burden to the perpetrator, who is ordered to leave the residence of the victim or person at risk and not to contact her or him. An EBO is an additional protection measure and it is not meant to replace any other means of intervention available to the competent authorities, such as the arrest or detention of the perpetrator, the initiation of legal proceedings or prosecution in criminal cases. Such a measure is also complementary to the continued existence and funding of shelters for victims of domestic violence and violence against women. However, as most other available measures may take a long time to be decided upon, EBOs have the advantage of swiftness of action on the part of the authorities. This is why, for the emergency measures to be efficient, there should be a careful consideration of all circumstances justifying the “emergency” and how these are assessed. Furthermore, barring orders are only efficient if they are properly enforced and if breaches are sanctioned. Ensuring that an abuser does in fact keep his or her distance is crucial. To issue an EBO that is not enforced may increase the level of danger of the victim, rather than decrease it.

# Checklist for implementing emergency barring orders

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In order to provide efficient protection to victims and persons at risk of domestic violence, while at the same time safeguarding the rights of the perpetrators against whom the EBO is issued, it is important to give due consideration to a number of elements. The following checklist can be of help in regulating and implementing EBOs.

## **Check if the EBO is designed and regulated in such a way that:**

- It allows the competent authority (police or other) to take action to protect victims and persons at risk of domestic violence, as soon as the authorities are notified of the violence or its imminence.
- It is issued following a thorough assessment of risks and danger posed to the victim or person at risk by the perpetrator.
- It prohibits the perpetrator to enter the victim's residence or contact the victim, as appropriate.
- It can also be issued without the victim or persons at risk taking action (*ex officio*).
- If a confirmation of the EBO is required, it can be obtained within a short time after being issued.
- It is available at no cost to the victim or person at risk.
- Its duration is sufficient to establish a safe situation for the victim or person at risk.
- It protects the victim or person at risk in their home (even if it is a temporary residence and even if the perpetrator is the owner of the place), but also in public places and at work.
- It protects the victim's children while at school and/or in childcare facilities.

- It protects victims and persons at risk without discrimination on any ground in particular:
  - undocumented migrants (i.e. no requirement for the victim to prove for the purposes of obtaining an EBO that she/he resides in the host country on legitimate grounds);
  - property status in relation to the residence concerned (this should not be an eligibility requirement for an EBO).
- It is without prejudice to the rights of the defence and the perpetrator's right to a fair trial, as established in Article 6 of the European Convention on Human Rights.
- The perpetrator has the right to challenge the EBO (without a suspending effect) before the competent authorities, and appropriate legal remedies are available to him/her in case the appeal is successful.
- Appropriate monitoring measures are in place (e.g. electronic monitoring) to ensure that the person against whom the EBO was issued keeps the physical distance to the victim or person at risk prescribed by the order.
- Its violation carries an appropriate sanction.
- Successive protection measures are available to the victim or person at risk (such as judicial protection orders) that can be applied immediately after the EBO expires, so that no gap in the protection arises.
- The EBO forms an integral part of a comprehensive system of protection and support measures for victims of violence against women and domestic violence.

# **Key Council of Europe resources**

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Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention, CETS No. 210, 2011)

Recommendation Rec (2002)5 of the Committee of Ministers to member States on the protection of women against violence

Analytical study of the results of the 4th round of monitoring the implementation of Recommendation Rec(2002)5 (2014)

Analytical study of the results of the third round of monitoring the implementation of Recommendation Rec (2002) 5 (2010)

## **Collection of papers on the Istanbul Convention**

Ensuring data collection and research: Article 11 of the Istanbul Convention (2016)

Prevention of violence against women: Article 12 of the Istanbul Convention (2014)

Raising awareness of violence against women: Article 13 of the Istanbul Convention (2014)

Domestic and sexual violence perpetrator programmes: Article 16 of the Istanbul Convention (2014)

Encouraging the participation of the private sector and the media in the prevention of violence against women and domestic violence: Article 17 of the Istanbul Convention (2015)

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**www.coe.int**

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