

***“Unless Blood Flows”: ¹A Comparative Analysis of the Legal Response to Domestic
Violence in Hungary and Australia in light of International Obligations.***

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ABSTRACT

Domestic violence has only in recent years been recognized as an international concern violating fundamental human rights that states need to work towards protecting. For decades' domestic violence was considered a 'private' issue that did not concern the state and an area from which a state should refrain from interfering.

This thesis will analyze the extent to which the two jurisdictions, Hungary and Australia are complying with their international obligations, primarily, the Convention on the Elimination of All Forms of Discrimination Against Women.

The thesis finds that both States face limitations in meeting their obligations under International Law, and that the commitment of the Government of the relevant State is of fundamental importance and influence over the extent to which a State is able to comply with its obligations, and ultimately, eliminating violence against women.

Table of Contents

ABSTRACT	i
Introduction	1
Hungary	2
Australian statistics	6
Chapter 1 – Domestic Violence and International Standards	9
1.1 Definitions	9
1.2 Limitations	13
1.3 Development of Anti-discrimination instruments focusing on women’s rights	13
1.4 The due diligence standard	16
1.5 Public/Private dichotomy	18
1.6 Due diligence as customary international law	19
Chapter 2 – Mechanisms of Justice & Intervention Orders	21
2.1 Ratifying or Acceding to the Convention	21
2.2 Hungarian Legislation	22
2.3 Australian Legislation	24
2.4 Intervention Orders	24
2.5 Intervention Orders in Hungary	25

2.6 IVO in Australia (Victoria)	28
Chapter 3 – Enforcement and Specialized services	33
3.1 Police response & training	33
3.2 Hungary.....	33
3.2.1 The Police Guide.....	35
3.3 Australia.....	36
3.3.1 Victoria Police	37
3.4.1 Hungary.....	40
3.4.2 Australia.....	41
3.5.1 Victims of crime	42
3.5.2 Increase in funding.....	43
Chapter 4 – Case Studies	45
4.1 Australia: The National Plan.....	45
4.2 Victoria: The Royal Commission	48
4.3 A European Perspective.....	50
A.T. v Hungary	52
Conclusion	59
Bibliography	63

Introduction

Violence against women, in particular intimate partner violence (“domestic violence”) is prevalent in every country in the world as a “pervasive violation of human rights and a major impediment to achieving gender equality”.¹ Despite increased recognition of the issue, according to the World Health Organization (“WHO”), 1 in 3 women continue to experience physical or sexual violence, overwhelmingly perpetrated by an intimate partner,² refer to figure 1.1.

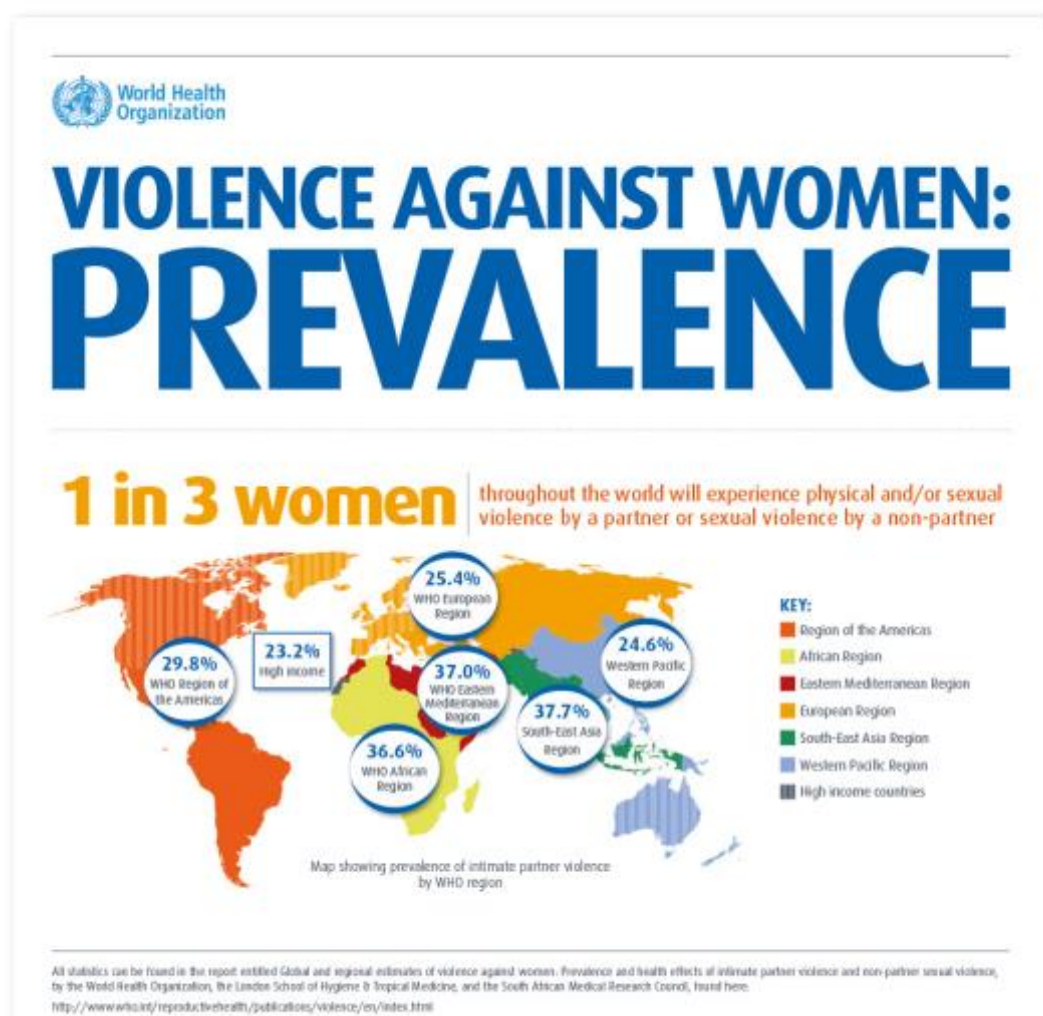


Figure 1: World Health Organization, “Violence Against Women: intimate partner and sexual violence against women”, Fact Sheet Number 239 January 2016 accessed at: <http://www.who.int/mediacentre/factsheets/fs239/en/>

¹ United Nations General Assembly, “In depth study on all forms of violence against women: Report of the Secretary General”, at p 9.

² World Health Organization, “Violence Against Women: intimate partner and sexual violence against women”, Fact Sheet Number 239 January 2016 accessed at: <http://www.who.int/mediacentre/factsheets/fs239/en/>.

The reality is that the statistics do not account for all women who have suffered from domestic violence; this is due to a number of factors, including underreporting and no statistical recording by states and organizations.

Hungary

Unfortunately, there is a lack of statistical information around the topic in Hungary, and what statistical information exists is provided and consolidated by Non-Government Organizations (“NGO’s”), such as NANE, (Women for Women together against violence; Nők a Nőkért Együtt az Erőszak Ellen Egyesülete) using predominantly European wide data and breaking it down to estimate its effects on Hungary. According to the statistical analysis provided by NANE in its “*Why does she stay?*”³ publication, between 30-40 women are killed in Hungary each year by their current or former partner.⁴

The European wide report by the ‘European Union Agency for Fundamental Rights, Violence Against Women’ attempted to address and respond to the lack of statistical data and scale of the problem, recognizing the failure of the member states to record statistics in this area.⁵

Figure 1.2 shows how Hungary compares statistically to other European Union (“EU”) countries in regards to experiences of domestic violence. It is noted that in most cases, Hungary has a lower percentage of women indicating their experience of the statements in question. However, this does not mean that in actual fact and reality, Hungarian women suffer less than their other European Union counterparts. As this thesis will show, there are factors, which

³ NANE Egyesület, “*Miert Marad?*” (Januar 2015)

⁴ *ibid* at 30.

⁵ Ami Sedghi, “*Violence against women: what the EU-wide survey tells us*”, The Guardian, 6 March 2014, accessible at <https://www.theguardian.com/news/datablog/2014/mar/05/violence-against-women-european-union-physical-sexual-abuse>.

contribute to these statistics, including cultural attitudes. Furthermore, the EU survey did not survey the entire female population of each country, it was limited to a sample of women, thus it is not an entirely accurate representation of the reality, but is useful as a stepping stone and general overview.

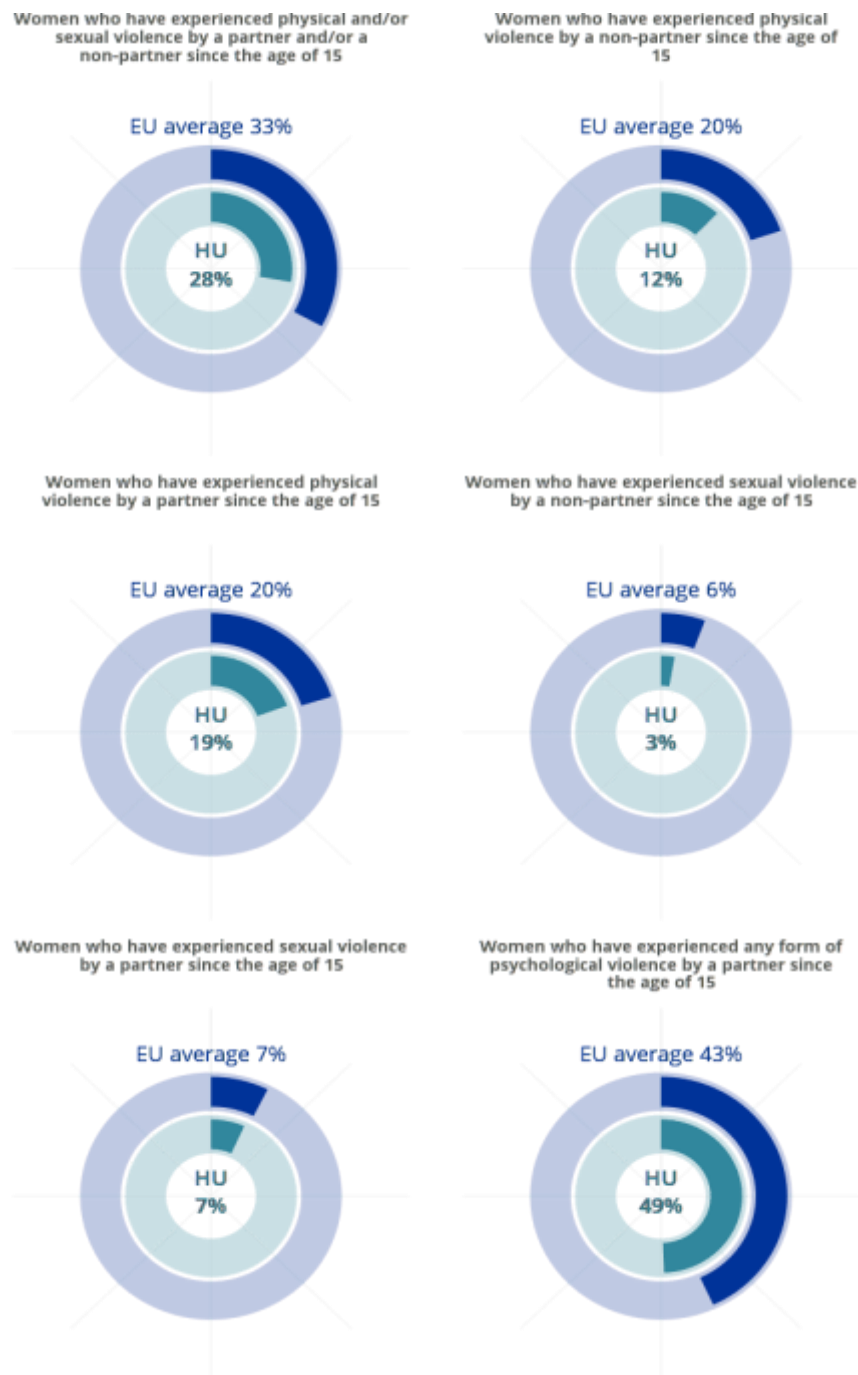


Figure 2 <http://fra.europa.eu/DVS/DVT/vaw.php>

Figure 1.3 illustrates how common women they believe violence against women is in their country. In Hungary, 50% of participants listed it as “fairly common”, and 5% as “not at all common”. 18% of participants noted the prevalence as “very common”. This shows, that half of participants recognize that violence against women is an issue which and is a sign of awareness of the issue, specifically with reference to the 18% of women who noted it to be very common.

6. Opinions, attitudes and awareness / Perceptions of frequency of violence against women

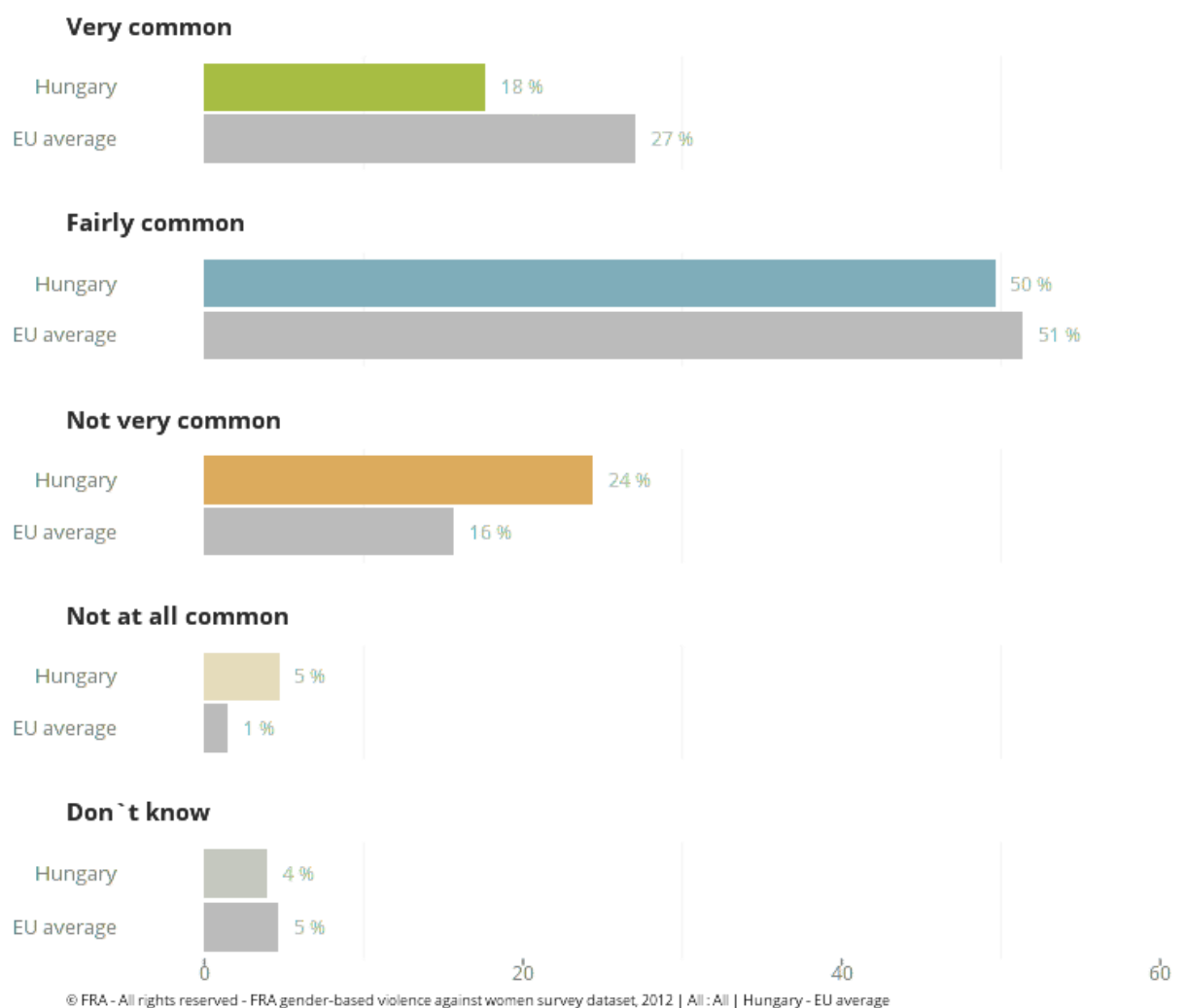


Figure 3 <http://fra.europa.eu/DVS/DVT/vaw.php>

As to the question:

Do you know any women in your circle of friends and family who have been a victim of any form of domestic violence?

In responding to the question of whether the participants knew anyone from their inner circle of friends who had been victims of domestic violence, Hungary was amongst the three lowest percentages for this answer. The author contends that this is not because the issue is not there, but rather because it is not disclosed to friends and family.⁶ When questioned about their awareness of institutions or services for victims of domestic violence only 7% could name three organizations, which was well below the European average, which was at 29%.

The questionnaire asked women to state the reasons for not contacting the police following the most serious incident of physical and or sexual violence by a partner and 59% of Hungarian participants stated that it was because they “dealt with it myself”⁷, once again Hungary represented the highest percentage with this answer out of all EU countries. Further 17% thought the police would not do anything,⁸ 11% thought the police could not do anything 16%⁹ embarrassed 13% wanted to keep it private or were embarrassed.¹⁰ This shows that there continues to be a huge stigma attached to being a victim of family violence in Hungary and that generally women do not have faith in the police's ability to help them. Hungarian women were the least satisfied with the response they received from organizations and services, with only 36% stating they were ‘satisfied’ and 59% that were not.¹¹ However, in relation to this

⁶ European Agency Union for Fundamental Rights, Survey Data Explorer, “The [report](http://fra.europa.eu/DVS/DVT/vaw.php) by the European Union Agency for Fundamental Rights (FRA)”, Violence Against Women at <http://fra.europa.eu/DVS/DVT/vaw.php>

⁷ *ibid.*

⁸ *ibid.*

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ *ibid.*

question, it should be noted that Hungary did have a low participation rate of those who chose to answer the question being limited to here respondents.

These statistics, despite being European wide data and only a sample size of the Hungarian population are important indicators of the prevalence of the issue and the stigma that still attaches to being a victim of domestic violence, which is clearly evident from the results given by Hungarian women.

The limitations to these statistics are inherently that this data is from a very small sample size of Hungarian women and whilst providing a general overview, it must be reviewed with caution and knowledge of the inadequate sampling size.

Australian statistics

1 in 3 Australian women experience intimate partner violence¹² with one woman being killed by a partner or ex almost every week.¹³ Victorian police family violence incident reports have been increasing over the last 4 years with 47,000 incidents reported in 2012, 59,000 in 2013, 64,000 in 2015 and 77,000 in 2016.¹⁴

The Australian Personal Safety Survey(“ABS”) reveals that many people may not be reporting family violence. The ABS showed that of the people who had stated they had experienced family violence by a current partner (approx. 66% of women), 25.6% had not told anyone and a further 39% stated that they had never sought advice or support.¹⁵ Further the

¹² Cox, P. (2015) Violence against women: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey 2012, Horizons Research Report, Issue 1, Australia's National Research Organisation for Women's Safety (ANROWS), Sydney; and Woodlock, D., Healey, L., Howe, K., McGuire, M., Geddes, V. and Granek, S. (2014) Voices against violence paper one: Summary report and recommendations, Women with Disabilities Victoria, Office of the Public Advocate and Domestic Violence Resource Centre Victoria.

¹³ Ibid.

¹⁴ Crime Statics Agency, “Family Incidents” 2016 at <https://www.crimestatics.vic.gov.au/crime-statistics/latest-crime-data/family-incidents-0>.

¹⁵ Australian Bureau of Statistics, ‘Personal Safety, Australia, 2012’ (Catalogue No 4906.0, Australian Bureau of Statistics, December 2013) Table 23, Table 24.

ABS showed that 95% of men and 80% of women who had experienced violence from a current partner had never contacted the police.¹⁶

At the end of March 2016 there had been 76,529 family incidents reported, a 10% rise in comparison to previous years. 75% of affected family members (victims) were female and women between the ages of 20-44 made up the majority of female victims.¹⁷ Alarming, between 2002-2012 488 women were killed by a current or former partner, this equates to almost one woman every week. The Victorian Coroners Court identified 136 homicides that occurred within an intimate relationship between 2000-2010, with a history of family violence in 60% of the intimate partner homicides.¹⁸ This clearly illustrates that family violence should be taken extremely seriously, as a pattern of behavior is often a predictor of these devastating consequences.

3,794 women aged 15 years and over attended a Victorian hospital with injuries resulting from intimate partner violence between 2009 and 2014, on average 759 women per year. In Victoria, intimate partner violence contributes more to death, especially in the age group of 15-44 than any other illness or ‘preventable risk factor’.¹⁹

It is evident from the statistics provided above that domestic violence is a major problem internationally. There are significant data limitations in all countries due to a variety of factors which must be kept in mind when making assessments based on the statistics. The body of the thesis will consider other relevant factors and how they affect compliance with international obligations.

¹⁶ Australian Bureau of Statistics, ‘Personal Safety, Australia, 2012’ (Catalogue No 4906.0, Australian Bureau of Statistics, December 2013) Table 23, Table 24.

¹⁷ Crime Statistics Agency, “Family Incidents” 2016 at <https://www.crimestatistics.vic.gov.au/crime-statistics/latest-crime-data/family-incidents-0>.

¹⁸ Coroners Court of Victoria, “Victoria’s systematic review of family violence deaths: First Report”, November 2012, at page 25, accessible at <http://www.familyviolencehumeregion.com.au/wp-content/uploads/2013/07/coroners-report.pdf>.

¹⁹ The Lookout, Fact Sheet 7, Family Violence Statistics, accessible at http://www.thelookout.org.au/sites/default/files/The-Lookout-fact-sheet-7-family-violence-statistics_0.pdf

There is a wide body of research already existing in the international field in regards to domestic violence. However, there is an extremely evident lack of concise, accurate and statistical information or research on how domestic violence is treated in Hungary and moreover why there seems to be a black hole in relation to any real and meaningful statistics or responses by the Hungarian government. This thesis will consider the reasons behind this and emphasize the importance of changing the current situation in Hungary.

There is a wide variety of information available on domestic violence in Australia, on simple glance one could assume that it is being addressed and dealt with adequately by the Australian government and general population. However, many significant and concerning gaps remain in this jurisdiction also, especially in light of its economic advantage over Hungary.

This thesis will focus predominantly on the development of antidiscrimination instruments such as the Convention on the Elimination of all Forms of Decimation Against Women as a catalyst for addressing domestic violence as a matter of international concern, mechanisms of justice; including legislation and intervention orders, police training and specialized services, most notably, shelters and finally it will conclude with a case study focusing on each jurisdiction. The thesis aims to conclude with an opinion of how the relevant jurisdictions are working towards complying with their international obligations and what current and future limitations they face in doing so.

Chapter 1 – Domestic Violence and International Standards

The way in which domestic violence is defined nationally and internationally is of great importance as it is generally through the use of definitions that a preliminary examination can be conducted on which behavior constitutes domestic violence, and alternatively which falls outside its scope. For this reason, it is imperative that domestic violence definitions are relatively broad in their scope to reflect that domestic violence is not restricted to a single type of violence between only a very subjectively limited idea of ‘relationship’. Therefore, a preliminary examination of the definitions used in the comparative jurisdictions provides a cursory insight into the societal and cultural background of the countries in question.

1.1 Definitions

The Hungarian domestic violence legislation, found in section 212/A of the Criminal Code²⁰ describes the situation in which an individual will meet the requirements of being a victim of ‘domestic violence’, characterized by the regularity of the offence.

The Hungarian legislation states that a perpetrator of domestic violence is someone:

‘Who on a *regular basis*: (a) seriously violates human dignity or is engaged in any degrading or violent conductagainst the parent of his or her child, or against a family member, former spouse or domestic partner *living in the same household or dwelling* at the time of commission’.²¹

The definition elicits two obvious and immediate concerning requirements. Firstly, “the act” needs to be perpetrated against the victim on “a regular basis”, and secondly, for an individual

²⁰ Hungary Criminal Code, section 212/A, Act C of 2012.

²¹ Ibid.

to fall into the category of victim, he or she must cohabit with the offender. Therefore, an “act” which does not occur “regularly” will not be deemed domestic violence even if it causes significant physical and psychological harm to the victim. This definition is extremely restrictive, limiting victims to those cohabiting with the offender and being subject to *regular* occurrences of violence. This definition in itself suggests that there is some tolerance in Hungarian society towards occasional use of violence within the family sphere, the requirement of regularity is seriously degrading to women and contributes to the gender stereotyping of the man as the ‘head of the house’, who should and is entitled to control the woman. Human Rights Watch criticized the requirement of multiple incidents in its country report of November 2013 stating that “the law distinguishes between categories of victims of domestic violence based on the number of assaults suffered rather than looking at the individual circumstances”.²² The Human Rights Watch report will be discussed further within the body of this thesis.

In contrast, the Australian Federal Legislation refers to domestic violence as “family violence”, perhaps to denote that its scope is applicable also to non-spousal relationships, however, for the purposes of this paper, the author intends to use the terms ‘domestic violence’ and ‘family violence’ interchangeably.

The definition for family violence is found in section 4AB of the Family Law Act²³ in Australia and states that:

²² Human Rights Watch, “*Unless Blood Flows: Lack of Protection from Domestic Violence in Hungary*”, November 2013 at p. 15.

²³ *Family Law Act* 1975, Section 4AB.

“Family violence means violent, threatening or other behavior by a person that coerces or controls a member of the persons family, or causes the family member to be fearful”.²⁴

There is no requirement for the victim to have any specific relationship with the accused, other than a familial connection for the domestic violence provisions to be engaged in the Australian legislation. The notion of family is not exhaustive and will encompass those individuals who the victim reasonably considers to be part of her family. Furthermore, the Victorian state definition for domestic violence will also be provided and analyzed, as this thesis will focus predominantly on case studies from Victoria. The definition of family violence in Victorian legislation is found in the Family Violence Protection Act 2008 under section 5, which provides that:

(1) For the purposes of this Act, *family violence* is-

- a) Behaviour by a person towards a family member of that person if that behaviour-
 - (i) is physically or sexually abusive; or
 - (ii) is emotionally or psychologically abusive; or
 - (iii) is economically abusive; or
 - (iv) is threatening; or
 - (v) is coercive; or
 - (vi) in any other way controls or dominates the family member and that family member to feel fear for the safety or wellbeing of that family member or another person; or
- b) Behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

²⁴ *Family Law Act 1975*, Section 4AB.

Much like the national legislation, the legislation defining family violence in Victoria is broad and encompasses a wide scope of behaviours and potential victims.

From this preliminary examination, one could reasonably hypothesize that the Australian legislation, given its broad nature, offers victims greater protection and redress. However, at this stage of the analysis this remains entirely speculative.

In the international context, the United Nations limits its domestic violence definition to violence against women, and states that violence against women is:

"Any act of gender-based violence that results in, or is likely to result in, physical, sexual or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."²⁵

This definition makes specific reference and is inclusive of sexual and mental harm, and further does not require the act to be between cohabitating spouses, and goes on to clarify that:

"Intimate partner violence refers to behaviour by an intimate partner or ex-partner that causes physical, sexual or psychological harm, including physical aggression, sexual coercion, psychological abuse and controlling behaviours."²⁶

Fundamentally, the UN definition recognises the role that gender discrimination plays in the prevalence of domestic violence by stating it as an "act of gender based violence". Neither the Hungarian nor Australian domestic violence legislations make specific reference to the role of gender discrimination in their definitions of domestic violence.

²⁵ World Health Organization, *Violence Against Women: intimate partner and sexual violence against women*, updated November 2014, accessed on 8 December 2015 at <http://www.who.int/mediacentre/factsheets/fs239/en/>

²⁶ *ibid.*

The most fundamental international human rights body dealing with discrimination against women, The Convention on the Elimination of all forms of Discrimination Against Women (“CEDAW”), through its general recommendation No. 19: ‘Violence Against Women’²⁷ clarified that the prohibition of discrimination includes:

Gender-based violence, that is violence directed against women because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.²⁸

1.2 Limitations

There are significant limitations to attaining any government based reports on the situation in Hungary as the Hungarian government has not specifically addressed this issue in any report or inquiry. For this reason, the work of non-governmental agencies is of exceptional importance when reviewing Hungary’s compliance with CEDAW and the circumstances. The fact that the government has never issued a report or inquiry on domestic violence is quite disappointing and concerning. This will be elaborated and discussed further in the coming chapters.

1.3 Development of Anti-discrimination instruments focusing on women’s rights

The first international instrument to recognise the principle of non-discrimination was the UN charter of 1945, which was followed by the 1948 adoption of the UN Declaration of Human Rights, which placed emphasis on the need to prevent ‘distinction based on sex’.²⁹ Despite this early recognition of gender discrimination as a violation of human rights, the first

²⁷ UN Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence against women*, U.N. Doc. A/47/38, 29 January 1992.

²⁸ Ibid at para 6.

²⁹ Universal Declaration of Human Rights 1948 at Article 2.

comprehensive international instrument, which specifically addressed gender inequality, was the CEDAW in 1979.

The CEDAW fundamentally acknowledged that women were victims of ‘unique human rights violations’.³⁰ The body of the treaty text did not make specific mention of the term ‘domestic violence’, however, this was later remedied through the adoption of two general recommendations.

Firstly, General Recommendation No. 12³¹ acknowledged the obligation of state parties to protect women against violence of any kind, occurring both within the private (family) and public sphere. This was fundamental in that it clarified the nature of the States obligation even when the violence was occurring within the home and without any direct involvement of the state.

Secondly, General Recommendation No. 19³² provided a broad definition of discrimination against women to include: ‘any practice of gender based violence’.³³ Importantly, the recommendation emphasised the role of cultural norms that regarded women as inferior to men as a cause of the patterns of gender based violence in society.³⁴ This proposition has been recognised by a number of researchers and studies as one of the many factors contributing to the prevalence of violence within a given society.

Academics Michael Flood and Bob Peace note in their work, that there exists a consistent body of evidence that demonstrates the association between ‘victim supportive

³⁰ General Recommendation No. 12 (eighth session, 1989).

³¹ Ibid

³² *ibid.*

³³ *ibid.*

³⁴ *ibid* at 11.

beliefs and values and the perpetration of violent behavior’³⁵, furthering that “men with more traditional, rigid, and misogynistic gender-role attitudes are more likely to practice marital violence”.³⁶

In a study among Queensland police officers, the officers who placed greater blame on the victim also indicated that they would be less likely to charge the offender.³⁷ Showing a correlation between victim blaming and treatment of perpetrators. One of the most consistent findings to emerge from studies of attitudes toward violence against women is a gender gap inequality. The way a society views gender roles is a consistent predictor of attitudes that support use of violence against women,³⁸ thus it is fundamentally important that CEDAW clarified and linked the correlation between gender discrimination and violence against women.

The detailed provisions included in recommendation 19 became the basis for the 1993 Declaration on the Elimination of Violence Against Women (“DVAW”), which became the first specific international instrument addressing gender-based violence. The Declaration significantly recognised that there was a need for ‘clear and comprehensive definition of violence against women’³⁹ and a ‘clear statement of the rights to be applied to ensure the elimination of violence against women in all its forms’.⁴⁰ Fundamentally the declaration, in Article 2, emphasises that violence against women is not limited to the acts described within the declaration itself, therefore removing any doubt that states are only under an obligation to protect against the specific violations mentioned. However, Article 2 goes on to provide guidance to state parties as to what should be understood as being encompassed within the term

³⁵ Factors Influencing Attitudes to Violence Against Women Michael Flood and Bob Pease *Trauma Violence Abuse* 2009; 10; 125 originally published online Apr 20, 2009; DOI: 10.1177/1524838009334131 at 137.

³⁶ Ibid at 126 referring to (Heise, 1998; O’Neil & Harway, 1997).³⁶

³⁷ Ibid at 127.

³⁸ Ibid.

³⁹ United Nations, General Assembly, *Declaration on the Elimination of Violence Against Women*, forty-eighth session, A/RES/48/104, 23 February 1994 at p. 3.

⁴⁰ Ibid.

violence against women. The declaration makes clear and concise recommendations on how states should enact policies for the elimination of violence against women.⁴¹

Following the adoption of DVAW by the General Assembly, was the appointment by the Commission of Human Rights of a Special Rapporteur on VAW, its causes and consequences. As emphasised by the Secretary General in the 2006 in depth study on violence against women, the mandate of the special rapporteur created an ‘institutional mechanism for regular in depth review and reporting on violence against women around the world’.⁴² Through country visits, analysis and research, the special Rapporteur has been instrumental in clarifying state obligations and international standards in this area.

As stated by Secretary General in his 2006 report, there are significant consequences that follow on from “categorizing violence against women as a matter of human rights”.⁴³ This international recognition creates binding obligations on States to “prevent, eradicate and punish such violence”⁴⁴ and clarifies “their accountability if they fail to comply”.⁴⁵

1.4 The due diligence standard

Under international human rights law, a State must act with due diligence in protecting its citizens, (women, in this context), from violence. The due diligence standard was adopted by the Inter-American human rights system in 1988 in the case of *Velasquez Rodriguez v*

⁴¹ Declaration on the Elimination of Violence Against Women, Article 4.

⁴² The mandate for the Special Rapporteur on violence against women, its causes and consequences, established by the commission on human rights in 1994 (commission on human rights resolution 1994/45) and was extended in 1997, 2000, 2003 (commission on human rights resolution 1997/44, 2000/45 and 2003/45, as found in A/61/122/Add.1

⁴³ United Nations, General Assembly, “*Secretary General’s In-Depth study on All Forms of Discrimination Against Women*”, A/61/122/Add.1, (6 July 2006) available from undocs.org/, A/61/122/Add.1 at p. 39

⁴⁴ Ibid.

⁴⁵ Ibid.

*Honduras*⁴⁶, which concerned the subject of forced disappearances. The court in that case held that,

“an illegal act which violates human rights and which is initially not directly imputable to the state can lead to international responsibility of the state, not because of the act itself, but because of a lack of due diligence to prevent the violation or to respond to it as required by the convention”.⁴⁷

This statement by the inter-American court became the basis of the due diligence standard that was subsequently adopted internationally.

In her report about the due diligence standard, Special Rapporteur Yakin Erturk, explains the certain basic principles which underlie the concept of due diligence. Fundamentally, she emphasized the due diligence standard as a right which can, under no circumstances be derogated.⁴⁸ Complying with the due diligence standard requires more than “the mere enactment of formal legal provisions” and requires state to act in good faith to “effectively prevent” violence against women,⁴⁹ and in doing so “states are required to use the same level of commitment in relation to prevention, investigation, punishment and provision of remedies for VAW as they do with regards to other forms of violence”.⁵⁰

The due diligence obligation explicitly challenges the public/private divide that by articulating the relationship between State responsibility and human rights violations by non-State actors. International law’s embrace of the public-private dichotomy obscures the fact that

⁴⁶ Case of Velásquez Rodríguez v Honduras, Velásquez Rodríguez and ors v Honduras, Interpretation of the judgment of reparations and costs, IACHR Series C no 9, IHRL 1390 (IACHR 1990), 17th August 1990, Inter-American Court of Human Rights [IACtHR].

⁴⁷ Ibid at page 52.

⁴⁸ United Nations, Economic and Social Council, Special Rapporteur Yakin Erturk, “Intergration of the Human Rights of Women and the Gender Perspective: Violence Against Women, The Due Dilligence Standard as a Tool for the Elimiantion of Violence Against Women, Report of the Special Rapporteur on violence against women, its causes and consequences, E/CN.4/2006/61 (20 January 2006) at para. 34

⁴⁹ ibid at paras 51-53.

⁵⁰ Ibid at para. 35.

violence experienced in private life constitutes a human rights violation; the due diligence obligation, most agree, explicitly challenges this formulation.⁵¹

1.5 Public/Private dichotomy

A major hurdle to meeting due diligence standard internationally is the continued existence of the public/private dichotomy. This dichotomy is harmful and prevents the full realization of violence against women as a human rights issue as societies and individuals continue to perceive violence within the family as a private issue, which does not deserve or warrant the intervention of outside actors. Special Rapporteur, Yakin Erturk highlighted that her research suggested that “even in societies where there is seemingly a high level of gender equality, violence occurring in the private sphere continues to be regarded as a matter underserving of public policy attention”.⁵² Such a comment illustrates that there is not always a clear and present link between acceptance of gender equality and action taken as a result of its recognition as an issue. As will be discussed through the forthcoming chapters of this thesis, it is still accepted, in some societies, by women themselves, that a certain amount of violence in the private sphere is normal,⁵³ and a part of life.

Whilst the due diligence standard has challenged the notion of “private sphere” outside the scope of state intervention, “issues of public violence still tend to be met with more immediate and effective response at both international and national levels than violence against women in the private sphere.”⁵⁴

⁵¹See Carin Benninger-Budel, Introduction to DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE 1, 2 (Carin Benninger-Budel ed., 2008).

⁵² AI. 2004. *Mens Violence against women in intimate relationships: an account of the situation in Sweden (19 April)*. [www2.amnesty.se/svaw/nsf/mvaw/\\$file/mvaw.pdf](http://www2.amnesty.se/svaw/nsf/mvaw/$file/mvaw.pdf).

⁵³ United Nations, Economic and Social Council, Special Rapporteur Yakin Erturk, “Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, Report of the Special Rapporteur on violence against women, its causes and consequences, E/CN.4/2006/61 (20 January 2006) para 60.

⁵⁴ United Nations, Economic and Social Council, Special Rapporteur Yakin Erturk, “Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, Report of the Special Rapporteur on violence against women, its causes and consequences, E/CN.4/2006/61 (20 January 2006) page 15 para. 63.

Noting the limitations surrounding the due diligence standard, The Special Rapporteur contended that the due diligence standard needed to be reimagined in order to respond more effectively to violence against women.⁵⁵ At the state level, suggestions included the incorporation of CEDAW and the optional protocol into state law, statements condemning violence against women made by powerful figures in society, such as the 2004 Australian government campaign “Violence Against Women, Australia says no”. The Special Rapporteur makes mention of this campaign in her report. The Campaign ran a series of advertisements on Australian television that depicted instances of violence occurring within the family, which was followed by a voiceover that stated “violence against women, Australia says no”. The advertisement was run frequently and became ingrained in the minds of most television viewers. It would be difficult to find an individual in Australia during that year that had not heard of this television campaign, and to this day, you hear mention of it. However, whether this campaign had any positive effect is unclear. It definitely caught the attention of the population, but whether this was just as any attention grabbing add would or more significantly remains unknown. The author of this thesis remembers seeing this campaign on television, being aged 12 at the time, it was a ‘catchy’ phrase that children mocked and copied at school, but largely, had no idea what it actually meant. Despite these shortcomings, the demonstrated a strong commitment by the government to convey to the population that violence would not be accepted in the community. However, as can be seen throughout this thesis and in many narrations around the issue, most of the time, expressive statements are not enough.

1.6 Due diligence as customary international law

Former secretary General Kofi Annan undertook an in depth study on all forms of violence against women, and officially endorsed the due diligence standard in his 2006 report. In the

⁵⁵ Ibid at para 74.

same year, Former special rapporteur on Violence Against Women, Yakin Erturk, issued guidance to states on how to comply with the due diligence standard and echoed the words of Annan in restating that the due diligence standard was so widely accepted and practiced that it had reached the level of customary international law. This is an extremely significant statement as declaring a law to be customary international law clarifies that every state in the world, despite their own legal systems, must accept and act in accordance with the due diligence standard.

As can be seen from the above discussion the development of international instruments creating obligations on states to promote gender equality and eliminate violence against women is a fundamental step towards meeting these goals. However, despite such obligations, states have not and will not always comply with the agreements they bind themselves by.

Chapter 2 – Mechanisms of Justice & Intervention Orders

The DVAW provides states with clear guidance as to how they should ensure compliance with the requirements therein and their CEDAW obligations. Some of these recommendations will now be considered in light of how the respective state parties comply or fail to comply with the standards.

2.1 Ratifying or Acceding to the Convention

Australia and Hungary have both signed and ratified CEDAW and its corresponding optional protocol, thereby declaring their commitment to ending discrimination against women, and recognizing that domestic violence (gender based violence) falls within its definition.⁵⁶

General recommendation 19 further clarifies that discrimination under the convention is not limited to acts done by or on behalf of the government; rather, article 2(e) requires states to take “all appropriate measures to eliminate discrimination against women by any person, organization or enterprise”.⁵⁷ The due diligence required to prevent, investigate and punish acts of violence is therefore breached if the state fails to enforce article 2(e).⁵⁸

To comply with the due diligence standard states are expected to develop sanctions in their respective domestic legislations that punish and condemn perpetrators of violence, and thereby inexplicably condemning violence against women.

⁵⁶ General Recommendations adopted by the Committee on the Elimination of Discrimination Against Women, eleventh session, 1992, General Recommendation No. 19: Violence Against Women at 6: *the convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionality.*

⁵⁷ Ibid at para 9.

⁵⁸ Ibid.

2.2 Hungarian Legislation

Until July 2013 Hungary did not have a stand-alone provision on domestic violence in their criminal code. Various human rights bodies, including human rights watch and the CEDAW committee itself emphasized that Hungary was falling short of its international obligations and failing to protect women from violence. In response to both local and international criticism Hungary introduced a domestic violence provision in their criminal code in section 212/A stating that a perpetrator of domestic violence is someone:

‘Who on a *regular basis*: (a) seriously violates human dignity or is engaged in any degrading or violent conduct, b) misappropriates or conceals any assets from conjugal or common property, and thus causing serious deprivation, against the parent of his or her child, or against a family member, former spouse or domestic partner *living in the same household or dwelling* at the time of commission’.⁵⁹

Whilst noting that the introduction of a stand-alone criminal provision was a step forward, Human rights watch noted significant gaps that remain in this area of law. Firstly, as mentioned earlier in the thesis, for the provision to apply there must be more than one incidence of violence (*regular basis*). Therefore, a single act of violence against a partner will not amount to domestic violence. The effect of this is that any legal action taken must be pursued by the victim herself through private motion and private prosecution without the assistance of the state or a public prosecutor, thereby “distinguishing between categories of victim based on the number of assaults suffered rather than the individual circumstances”.⁶⁰ Furthermore the

⁵⁹ Ibid.

⁶⁰ Human Rights Watch, “*Unless Blood Flows: Lack of Protection from Domestic Violence in Hungary*”, November 2013 at page 15.

domestic violence provision fails to extend protection to non-cohabitating spouses (unless they have children) excluding a significant proportion of victims.

Following on the concerns of the provision, it is noted that sexual violence or assault is not included as a category of domestic violence. Human Rights Watch questioned the Hungarian government on this, and was provided with the excuse that provisions on rape in the criminal code carried higher sentences than domestic violence provisions and thus it would make more sense that they be prosecuted under that head instead.⁶¹ Whilst this is still not an ideal excuse, one may be able to comprehend the logic but for the following reality; rape and sexual violence are not subject to public prosecution in Hungary, this means that all victims of rape and sexual violence must initiate their own motion and prosecution if they want to have the perpetrator held accountable. It is no exaggeration that excluding sexual crimes “from domestic violence and adjudicate such crimes under separate provisions of the criminal code that require the victim to pursue action defeats all logic”.⁶²

In its concluding observations of 26 March 2013, CEDAW commended Hungary on its progress in enacting domestic violence legislation, however noted several areas and principles of concern surrounding domestic violence and provided recommendations to be implemented before the next reporting date. Regretfully, the Rapporteur for follow up on concluding observations in her 2015 report found that the domestic violence related recommendations had only been partially implemented.⁶³ The committee considered the establishment of law on domestic violence to be partially implemented as it failed to adopt the law and did not

⁶¹ Human Rights Watch, “*Unless Blood Flows: Lack of Protection from Domestic Violence in Hungary*”, November 2013 at page 15 reference to, Hungarian Criminal Code, 2013, Section 197.

⁶² *ibid* at page 16.

⁶³ United Nations, Human Rights, Office of the High Commissioner, “*Follow up on concluding Observations of the Committee on the Elimination of Discrimination against Women*”, YH/follow-up/Hungary/61, (22 September 2015).

criminalize psychological violence and stalking.⁶⁴ Notably, Hungary did recognize economic violence as a form of domestic violence as recommended by CEDAW in March 2013.⁶⁵

2.3 Australian Legislation

As family law falls under the jurisdiction of the individual states in Australia, it is the responsibility of each state to enact domestic violence legislation. In most states legislation was enacted in the 1980s and 1990s.⁶⁶ In Victoria, domestic violence is legislated under the Family Violence Protection Act 2008.⁶⁷ Part one of the Act states its purpose to be to (a) maximize safety for children and adults who have experienced family violence; and (b) prevent and reduce family violence to the greatest extent possible; and (c) promote the accountability of perpetrators of family violence for their actions.⁶⁸ The definition of family violence under this act has already been mentioned in the introduction of this thesis and will therefore not be repeated here.

The following section on Intervention Orders will provide a clearer understanding of the requirements to protect women against violence in Australia.

2.4 Intervention Orders

Intervention orders (“IVO”), or otherwise known as restraining orders are commonly used in order to protect victims from all kinds of violence. Intervention orders are commonly issued in Australia in order to afford protection to women by ordering that a certain individual remain a minimum distance away from the affected persons (the woman), usually with further conditions attached as seen necessary by the Magistrate hearing the case.

⁶⁴ Ibid.

⁶⁵ United Nations, Convention on the Elimination of All Forms of Discrimination against Women, Committee on the Elimination of Discrimination Against Women, “*concluding observations on the combined seventh and eight periodic reports of Hungary, Information provided by Hungary in follow-up to the concluding observations*”, c/HUN/CO/7-8, (9 February 2015).

⁶⁶ Family Violence - A National Legal Response (ALRC Report 114) November 2010, Chapter four at 4.6.

⁶⁷ Family Violence Protection Act 2008 No. 52 of 2008

⁶⁸ *ibid* at Part 1 Section 1.

Whilst a form of intervention orders exists in Hungary, both CEDAW and Human Rights Watch have critiqued them as being ineffective.

2.5 Intervention Orders in Hungary

Intervention orders are found in Act LXXV⁶⁹ as civil restraining orders which are applicable in cases of violence amongst relatives (Article 6(4)) and through article 7(2) in relation to temporary restraining orders. A civil restraining order issued amongst relatives can be issued for up to 60 days. In contrast to the temporary order which is issued for 72 hours.⁷⁰ The only other way intervention orders can be made in Hungary are through criminal proceedings.⁷¹

The temporary IVO may be upheld within 72 hours before a court, during which time the court can extend the IVO for a maximum of 30 days. The legislative threshold for the extension of the IVO is satisfied if there is a *risk of violence*,⁷² however Human Rights Watch reported that in practice the threshold the courts use is much higher.⁷³ Women's organizations told Human Rights Watch that judges misunderstand the standard of proof required in issuing an IVO, commenting, "judges think they are presiding over a criminal case".

As it is specifically stated in the 2009 Act, the offender does not need to be present before the court in order for the court to issue a further IVO, however, judges often dismiss cases where the abuser does not show up. Budapest Family Court Judge, Peter Szepeshazi told Human Rights Watch that this was in fact a misinterpretation of the law, as the "law on restraining orders is *lex specialis* the only requirement is for courts to have summoned parties

⁶⁹ Act LXXVII of 2009 on restraining applicable in case of violence among relatives (more precisely: on the temporary preventive restraining order and preventive restraining order); 2009. évi LXXII. Törvény a hozzátartozók közötti erőszak miatt alkalmazható távoltartásról. The Act came into force on 1 October 2009.

⁷⁰ The ROL Act in Hungarian: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0900072.TV.

⁷¹ Art. 69 (1) a-e) of Act C. of 2012 on the /criminal Code: by which a probation officer in a criminal procedure may issue that the terms of probation require no contact regarding specified persons.

⁷² Ibid.

⁷³ Human Rights Watch, "Unless Blood Flows: Lack of Protection from Domestic Violence in Hungary", November 2013 at page 37.

in accordance with section 15 of the 2009 act”.⁷⁴ Despite this, judges frequently continue to dismiss cases where the abuser does not show up, causing even greater distress to the victim.

A Temporary Preventative Order (“TPO”) can be issued by the police or can be issued upon the report of victim, or a range of his/her relatives,⁷⁵ through the police. TPO has to be issued without delay by police (immediately on the scene Art 7(1)), however, in practice the TPO is often issued after, by an officer who is authorized by the chief of the relevant police station as not all officers are authorized to issue it, a personal restraining order has to be issued within the period of the temporary order (within 72 hours of TPO being issued). Violation of IVO is a minor offence punishable by custody or fine.⁷⁶

Civil law restraining (available in 2009) According to police records, the number of TPO’s were 1,463 in 2010, 2011 and 2012,⁷⁷ the fact that the numbers apparently did not change by a single digit within a three year period raises some questions on its reliability and accuracy. No further data is available on the issuing of restraining orders or their implementation, there is a severe lack of empirical data available in Hungary on all issues surrounding domestic violence, inclusive of IVO’s. this furthers the questioning of the fact that the exact same number of IVOS were apparently issued in 3 consecutive years.

CEDAW has expressed concern in regard to IVO’s in Hungary and has continuously recommended that the legislation be amended to offer greater protection. In 2013 CEDAW recommended that Hungary, “Amend its legislation concerning restraining orders with a view

⁷⁴ Human Rights Watch, “*Unless Blood Flows: Lack of Protection from Domestic Violence in Hungary*”, November 2013, Human Rights Watch email correspondence with judge Peter Szepeshazi, August 9 2013.

⁷⁵ Article 685 s b of the Criminal Code

⁷⁶ Art. 168. Of Act II. Of 2002.

⁷⁷ National Report Hungary by Judit Wirth, Mapping the Legislation and assessing the impact of protection order in the European member states, referring to “Hungary, National Police Headquarters General Directorate of Criminal Affairs, Department of Criminal Affairs, Crime Prevention and Victim Protection Unit (2011) Report on the implementation of police task sin relation to temporary preventative restraining orders applicable in cases of violence between relatives for period between 1 January 2010 and 31 December 2010, April 2011, No. 8728/20/2011 at Page 25.

to providing adequate protection to victims in all types of cohabitation and extend the duration of restraining orders”.⁷⁸

In response to this recommendation, in its 2015 follow up report Hungary stated the legislation in relation to restraining orders, which remained unchanged and stated that “Courts may order a preventative injunction to stay away for 60 days⁷⁹, previously this period was 40 days”. Hungary further stated that “we are not aware of any international rule that recommends a period beyond 60 days of respect of preventative injunctions to stay away and the EU regulation does not contain such a provision either”.⁸⁰ They made no amendments to the legislation to include a wider ambit of persons to whom such an application was available to and further tried to justify this by noting that restraining orders can be issued after the start of criminal proceedings regardless of family ties.⁸¹ This is insufficient and does not address CEDAWs concerns. CEDAW noted that Hungary took some steps to implement its recommendation by extending the duration of restraining orders from a maximum of 30 days to 60 days, however, “failed to amend its legislation concerning restraining orders”.⁸²

The punishment for breaching an intervention order in Hungary is a monetary fine or in exceptional cases detention. The system and usage of intervention orders in Hungary is in sharp contrast to the use of IVO’s in Australia, where arguably, legislatively, a much higher

⁷⁸ United Nations, Convention on the Elimination of All Forms of Discrimination against Women, Committee on the Elimination of Discrimination Against Women, “concluding observations on the combined seventh and eight periodic reports of Hungary, Information provided by Hungary in follow-up to the concluding observations”, c/HUN/CO/7-8, (9 February 2015) at para 21(b).

⁷⁹ *ibid* reference to section 16(2) of Act LXXII of 2009

⁸⁰ United Nations, Convention on the Elimination of All Forms of Discrimination against Women, Committee on the Elimination of Discrimination Against Women, “concluding observations on the combined seventh and eight periodic reports of Hungary, Information provided by Hungary in follow-up to the concluding observations”, c/HUN/CO/7-8, (9 February 2015) at para 12.

⁸¹ *ibid* at para 14.

⁸² United Nations, Human Rights, Office of the High Commissioner, “Follow up on concluding Observations of the Committee on the Elimination of Discrimination against Women”, YH/follow-up/Hungary/61, (22 September 2015) at page 2.

level of protection is offered to victims under IVO's and contravention is taken to be a criminal offence.

2.6 IVO in Australia (Victoria)

In Victoria, family violence related intervention orders are governed by the *Family Violence Protection Act 2008*.⁸³ This can already be contrasted to IVOS in Hungary, where they are governed by a few select provisions in other acts/codes, whereas in Australia, namely Victoria, there is an entire legislative act dedicated to IVO's. the act is substantial and covers family violence in a broad context, however Part 4 of the Act exclusively refers to Family Violence Intervention Orders.

A police officer, or an affected family member may make an application for an IVO, generally in the Magistrates' or Children's Court. Affected family member is defined broadly to include: "both biological relationships and relationships arising from marriage, a de facto partnership or an 'intimate personal relationship'".⁸⁴ It also includes a child who regularly resides with the other person or has previously done so (for example, a foster child) and a child of a person who has or has had an intimate family relationship with the relevant person.⁸⁵ Further, it covers current and former relationships.⁸⁶ An intimate relationship can exist regardless of whether the relationship involves or has involved a sexual relationship and regardless of the sex or gender identity of the people in the relationship.⁸⁷

People living in the same house, people living in the same residential facility and people reliant on care can also be covered. The Act expands the definition of family member to include

⁸³ *Family Violence Protection Act 2008* No. 52 of 2008.

⁸⁴ Ibid.

⁸⁵ Magistrates Court of Australia, "*Family Violence Intervention Orders*", "*What is the definition of affected family member?*" accessible at <https://www.magistratescourt.vic.gov.au/family-violence-intervention-orders>.

⁸⁶ Ibid.

⁸⁷ Ibid.

a person whom the victim regards or regarded as being ‘like a family member’ if it was reasonable for the victim to hold that view, given the circumstances of the relationship.⁸⁸

There is no specific evidentiary burden on establishing the need for an IVO, Section 65 (1) specifically states:

“Subject to this Act, in a proceeding for a family violence intervention order the court may inform itself in any way it thinks fit, despite any rules of evidence to the contrary”⁸⁹

Further, the court is empowered to make a ‘final order’, pursuant to section 74(1) if it is “satisfied on the balance of probabilities, that the respondent has committed family violence against the affected family member and is likely to do so again”.⁹⁰ In practice this is not a high threshold to meet, regardless of if the applicant is making the application herself or through the police. In order to show that the respondent is “likely to do so again”, the applicant may outline a pattern of behavior causing intimidation or nuisance, such as continuous text messages, harassment of friends and family, or any information she believes is relevant to disclose to the court.

The conditions of family violence orders can be extensive and detailed, requiring the respondent to remain x amount of meters or kilometers away from the applicant at all times, and refraining from contacting the applicant in all circumstances. In instances where there is a shared child, provision is often made that contact can be made, for example, by email or text message only in matters relating to the child.

The court may decide the length of the final order pursuant to section 97⁹¹, taking into account:

⁸⁸ *ibid.*

⁸⁹ Family Violence Protection Act 2008 No. 52 of 2008 at s 65(1).

⁹⁰ *Ibid* at s 74

⁹¹ *ibid* at Section 97.

2(a) the safety of the protected person is paramount; and

2(b) any assessment by the applicant of the level and duration of the risk from the respondent; and

2(c) if the applicant is not the protected person,ⁱ the protected person's views, including the protected person's assessment of the level and duration of the risk from the respondent.

Further section (3) states that:

The court may also take into account any matters raised by the respondent that are relevant to the duration of the order.

As can be seen from the legislation itself, there is much greater protection afforded to applicants in Australia and there are fewer restrictions that limit effective operation. There is no limit on the time for which a restraining order can be issued, nor is there a limit on the amount of times that a restraining order can be extended.

If a person breaches the conditions of an IVO, by perpetrating further family violence, or contravening any condition of the IVO, it becomes a criminal offence which can result in prosecution in the Magistrates Court.

The Magistrates' and Children's court of Victoria noted that since 2004-05 the number of contravention proceedings heard in Magistrates court has more than trebled, reaching 6331 in 2013-14.⁹² It must be noted that this does not necessarily indicate that more

⁹² Magistrates' Court of Victoria and Children's Court of Victoria, Submission to the Royal Commission into Family Violence, (June 2015) 978, 21.

people are breaching orders, or that there is a system failure, it could be indicative of changing police attitudes who are increasingly acknowledging the seriousness of breaches and reporting them, and, or, that women are more comfortable in calling the police if a breach occurs and reporting it.⁹³

Statistical data shows that the number of finalized applications for FVIVO has increased by 34.5% from 26,121 in 2009-10 to 35,147 in 2013-14.⁹⁴ Further, in 2013-14, 66% of all finalized applications were initiated by police, and 33% by affected family member. The proportion of applications initiated by police has increased from 52% to 66% over five years.⁹⁵ Arguably representing that Victorian police have increased their awareness of family violence and its severity and as a result are responding to incidents more effectively.

However, many victims of domestic violence have stated that police are not adequately responding to reported breaches of IVO's. In an Australian live documentary show called Q&A (Questions and Answers) a group of panelists discussed issues relating to domestic violence broadly and in relation to specific responses or actions taken by authorities. Christian Porter, Minister for Social Services head of His department, which is responsible for the National Plan to Reduce Violence against Women and their Children, stated that very few people end up in prison even when they have committed multiple IVO breaches.⁹⁶ In response to commentary from the audience on the matter of IVOS, Cathy Humphreys (Professor of Social Work at the University of Melbourne) noted that the ability of the police in Australia to take out an

⁹³ Royal Commission into Family Violence: Report and Recommendations at page 55.

⁹⁴ "An Overview of family violence in Victoria: findings from the Victorian family violence database 2009-10 to 2013-14", Royal Commission into Family Violence, at page 47.

⁹⁵ Ibid at page 49.

⁹⁶ Australian Broadcasting Corporation, Question&Answer, "Hitting Home Special", (25 November 2015) at <http://www.abc.net.au/tv/qanda/txt/s4340550.htm>.

intervention order on behalf of a victim is an extremely important tool that you don't see overseas.⁹⁷

In short, the mechanisms for an effective intervention order system are largely present but for dealing with breaches of such orders appropriately. No breach of an intervention order should be considered a minor breach, and changes should be made and brought into practice whereby all breaches are taken with the upmost seriousness and taken to be in practice serious criminal offences punishable by imprisonment not just in theory but in practice also.

⁹⁷ *ibid* at 20 minutes 37 seconds.

Chapter 3 – Enforcement and Specialized services

3.1 Police response & training

Brief mention of the police response was made in terms of intervention orders in chapter two. This section will explore, more extensively how police respond to domestic violence and any relevant guides that assist in their response.

3.2 Hungary

Human Rights Watch was concerned with the inadequate response of police to family violence matters. HRW only documented one case where police had issued a TVO without the victim first requesting it, however, it also noted, that in this exceptional case, the victim and officer were known to each other.⁹⁸ There is a clear hesitation by police to issue IVO's in Hungary despite the existence of guidelines for police in attending to a domestic violence call.

There is no comprehensive national strategy or policy on how to combat domestic violence. While there are guidelines for police, they are not sufficiently implemented and no comparable guidelines for prosecutors and judges. Lack of reliable data also complicates the assessment.⁹⁹

Human rights watch noted that despite the requirement that the abuser and victim be questioned separately when attending the scene of a domestic violence incident, research showed that this does not happen in reality.¹⁰⁰ Police do not appear to take an impartial, protective role when called to domestic violence incidents in Hungary, with one woman, interviewed by human rights watch stating that:

⁹⁸ Human Rights Watch, *“Unless Blood Flows: Lack of Protection from Domestic Violence in Hungary”*, November 2013 at page 26.

⁹⁹ Ibid at 13.

¹⁰⁰ Ibid at 17.

“The police just told my husband to not be so brutal next time. How could they say that when they saw that my face was brutally bruised and my nose was bleeding?”¹⁰¹

Another woman told human rights watch that:

“the police officer told me to my face that its ok [for a woman] to get a few slaps”¹⁰²

There are several similar statements made by women who Human Rights Watch interviewed. There is, without a doubt, an alarming trend that shows that police are not taking domestic violence incidents seriously, and instead of providing protection for victims, often even discourage victims from reporting the accused, “the officer kept advising the woman against reporting stating that the man will find out where she is”.¹⁰³ On several accounts, women were told that the police cannot do anything “unless blood flows”.

To a large extent, this inappropriate response of the police can be attributed to inadequate training on domestic violence. HRW found that basic training at police colleges does not focus adequate attention on domestic violence and how to work with victims of domestic violence.¹⁰⁴ The head teacher at the Police College in Budapest, Lieutenant Colonel Zsolt Endes, told human rights watch that during the 2 year police training, 14 hours are dedicated to domestic violence.¹⁰⁵ He was unable to describe or show what was involved in those 14 hours ‘dedicated to domestic violence’. It seems ludicrous that a head teacher at any organization, not be aware of its curriculum, to the point where it cannot provide a single example of how a relevant area is taught.

¹⁰¹ Human Rights Watch, “*Unless Blood Flows: Lack of Protection from Domestic Violence in Hungary*”, November 2013 at page 37, referring to human rights watch interview with Erika, shelter northeast Hungary, January 23, 2013.

¹⁰² Ibid referring to: Interview with Borbala, Ozd, December 11 2012.

¹⁰³ Ibid referring to: interview with Julia Foldi, Budapest, February 27, 2013.

¹⁰⁴ Human Rights Watch, “*Unless Blood Flows: Lack of Protection from Domestic Violence in Hungary*”, November 2013 at page 30.

¹⁰⁵ Human Rights Watch, “*Unless Blood Flows: Lack of Protection from Domestic Violence in Hungary*”, November 2013 referring to interview with Lieutenant Colonel Zsolt Endes, Police College Budapest, December 4, 2012.

3.2.1 The Police Guide

The “Police Guide to the handling of family violence and children’s protection and implementation”¹⁰⁶ is an official document which is intended to guide police officers when attending to a domestic violence scene. The guide, which is only available at Hungarian, sets out the appropriate ways in which a police officer act when attending to a DV case. If one was to restrict oneself to reading the guide, it would be easy to think that there is no issue with how police handle domestic violence incidents, as the guide sets out, what we may regard as, “norms” that you would expect would happen at such a sensitive attendance, such as (not limited to) requiring the police officer to: be sure that the victim is safe and if victim asks, escorting the victim to a shelter, in so far as this is possible, explaining the legal rights to the victim, interview victim and accused separately, collect information and evidence, and advising the victim, if the victim does not wish to leave at the time, of what they can do if they do not feel safe in the future. The guidelines are entirely reasonable and could be seen as inline with international obligations, however, in practice, these guidelines are often disregarded or not even known to the police officer.

In its publication “Why Does She Stay?”¹⁰⁷ NANE stated that in their experience, police do not know, or do not use family violence guidelines and laws, making calling the police ineffective, NANE emphasized that the current law and practice discourages victims from reporting rather than ensuring that the law is followed.¹⁰⁸

It seems that it is not the absence of police guidelines that hinders their response or renders their response ineffective, but a complete lack of training on the implementation of such guides, or further, not even knowing that such guides exist. The fact that NANE stated

¹⁰⁶ 32/2007. (OT 26.) ORFK utasítás a családon belüli erőszak kezelésével és a kiskorúak védelmével kapcsolatos rendi feladatok végrehajtására.

¹⁰⁷ *Miért marad?* Családon belüli és párkapcsolati erőszak. Hogyan segíthetünk? Harmadik, átdolgozott kiadás, 2015

¹⁰⁸ *ibid* at page 26.

that the police do not know or follow the family violence guidelines is extremely concerning. As documented by human rights watch, this results in victims being left completely alone, knowing that the police will not be able or in many cases not be willing to provide them with protection, who can they turn to?

3.3 Australia

Once again, there is a sharp contrast between the above-mentioned material and response and that in Australia. The police response to domestic violence is governed by the Code of practice for the investigation of family violence (2014, V3), which was first introduced in 2004. The code clearly expresses the response and service expected of Victoria police. It outlines what actions the police members are required to take to assess and manage risk, as well as expectations for victim support.¹⁰⁹

Minister for Families and Children Jenny Mikakos on the 16 June 2016 announced a \$675,000 funding boost to the Domestic Violence Resource Centre Victoria (DVRCV) to help meet current and future demand for family violence training across Victoria. Emily Maguire, CEO of DVRC stated that “As the only dedicated family violence registered training organization in Victoria, we know the difference that high-quality training can make to how family violence is identified, how risk is assessed and how victim/survivors are supported to stay safe”.¹¹⁰ in recent years there has been a 500% increase in the number of people trained by DVRCV with the number of training sessions across the state being more than double. Continued public focus on domestic violence will allow for such training and funding to keep up with demand and appropriately support victims with “this funding being a first step to increasing knowledge about family violence and risk assessment within Victoria and will enable us to deliver an additional 130 days of training to more than 3,000 practitioners who

¹⁰⁹ Royal Commission into Family Violence: Report and Recommendation, Section 14, page 2.

¹¹⁰ Domestic Violence Resource Centre Victoria, “*New funding to meet increased demand for family violence training*”, 16 June 2016.

provide direct support to victim/survivors of family violence”.¹¹¹

The additional training will focus on risk assessment, developing practical skills to recognize and respond to family violence and skilling practitioners to support children and young people living with family violence.¹¹²

3.3.1 Victoria Police

Victoria Police members are frequently the first point of contact for people experiencing family violence. The quality and sensitivity of the police response influences victims’ confidence in reporting family violence and seeking help.¹¹³

The Victoria Police Code of Practice for the Investigation of Family Violence lists the main functions of police in responding to family violence and standards of the response, being what the expectation that they are to uphold is.¹¹⁴

As per the code, these include to: maximize the safety and support to those involved; identify and investigate incidents of family violence and prosecute individuals accused of criminal offences arising from family violence; and assist in the prevention and deterrence of family violence in the community by responding to family violence appropriately.¹¹⁵

All police officers spend a considerable amount of their time responding to family violence incidents, as such, Victoria Police has developed a number of specialist roles dedicated to family violence work, however front line officers continue to a considerable amount of this work. Among the specialist positions are 17 family violence advisors and a

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Community Consultation, Richmond, 1 May 2015; Community consultation, Bendigo 1, 5 May 2015; Christine Craik, Submission 437, 1.

¹¹⁴ Victoria Police, ‘Code of Practice for the Investigation of Family Violence—Edition 3’ (2014) 2.

¹¹⁵ Victoria Police, ‘Code of Practice for the Investigation of Family Violence—Edition 3’ (2014) 2.

family violence liaison officer at every 24-hour police station.¹¹⁶

The Family Violence Command, established in March 2015, has overall responsibility for monitoring Victoria Police's organizational response to family violence, maintaining accountability, and improving police responses to family violence, sexual assault and child abuse.¹¹⁷ This ensures that victims are receiving adequate and appropriate assistance from police, and maintains a check on ensuring the phenomenon is treated with the upmost seriousness. No such system is visible from the materials researched and covered in Hungary.

Whilst Hungary does have guides on how to respond, there is no implementation strategy or monitoring body. This is perhaps something that Hungary could adopt to ensure that it strives to comply with CEDAW standards and fundamentally, protects its women.

However, this is not to say that the system in Australia is without flaws and all who have required the assistance of police in family violence matters were satisfied. In the Royal Commission Report, throughout community consultations, there was a juxtaposition of comments made by victims in how they perceived the response of the police, for clarity purposes, and to show the contrast, some excerpts are shown below:

"My ex at the time, we had recently separated, came to my house and became incredibly violent. I called the police and they arrived and put a protective order in place. The police initiated that order. I was totally unaware of the process. *The police were great.* The normal police came and then the dedicated family violence unit arrived."¹¹⁸

The Commission heard in public consultations and through submissions from victims that the

¹¹⁶Royal Commission into Family Violence March 2016, Victoria Police, Submission 923, Attachment 3, 38.

¹¹⁷ *ibid* in reference to Statement of McWhirter, 27 July 2015, 9 [37]–[38].

¹¹⁸ Royal Commission Community Consultation, Melbourne, 30 April 2015.

quality of police responses varies from station to station and from police member to police member:

“.. the hardest part ... is an inconsistency of response—one police officer who is on board and educated and then an officer who has no idea”.¹¹⁹

“Police, so inconsistent, some are great [and] some are awful, they don’t keep in touch with women, there are police prosecutors who seem to act on behalf of the perpetrator”.¹²⁰

This represents that whilst there are ‘effective’ implementation techniques in place, ultimately there is a difference in practice depending largely on the individual police officer.

A new recruit at the police Academy will spend approximately two weeks studying family violence, with one or two days spent providing context on family violence as a social issue and the remaining time spent learning the increasingly complex legislative and policy requirements.¹²¹ Once on the job, members estimate that 60–70 per cent of their time on the frontline is spent tending to family violence matters.¹²²

Further to Victoria, each State and Territory has enacted legislation which, not only, criminalizes domestic violence but creates a mandate for the police force to investigate and prosecute crimes on behalf of the community in a court of law. “In accordance with Article 2 of CEDAW and paragraphs 24 (b) (r) and (t) of General Recommendation 18, the legislative provisions, enforcement agencies and mechanisms for prosecution seek to give adequate protection to all women against domestic violence on an equal basis with men and respect their

¹¹⁹ *ibid*, Community consultation, Melbourne, 30 April 2015.

¹²⁰ *ibid*.

¹²¹ Royal Commission into Family Violence March 2016 Chapter 14 page 8.

¹²² Royal Commission into Family Violence March 2016, The Police Association Victoria, Submission 636, 26.

integrity and dignity.”¹²³

As such, it would appear from this analysis that Australia (Victoria) is in a better position to respond to family violence through the frontline services, police, than Hungary. However, there are still significant gaps and the system is far from perfect.

3.4 Shelters

The availability of shelters is crucial to achieving an appropriate response to family violence and protecting women. The UN Handbook for Legislation on Violence Against Women recommends that states make available one shelter per every 10,000 inhabitants.¹²⁴ This means, in Australia there should be 2,300¹²⁵ spaces available, whereas, Hungary would need approximately 1,000 spaces.¹²⁶

3.4.1 Hungary

According to the Ministry of Human Resources there are a total of 122 shelter beds for victims of domestic violence in Hungary.¹²⁷ Only 28 of these beds are located in a shelter with a secret address.¹²⁸ Human Rights Watch found that all but one shelters addresses were publically listed and even the location of the secret house has been revealed during court proceedings.¹²⁹ Shelter staff told HRW that the address of shelters from which the women is initiating legal proceedings are continuously listed in court documents that are sent to both parties. This is absolutely nonsensical and a complete failure of the Hungarian government and

¹²³ United Nations, Convention on the Elimination of All Forms of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women, Australia, c/aul/co7/add.1, (30 July 2010), at 82.

¹²⁴ United Nations, Development of Economic and Social Affairs: Division for the Advancement of Women, “Handbook for Legislation on Violence Against Women”, (2010) at 3.6.1.

¹²⁵ 23, million divided by 10,000

¹²⁶ 10 million divided by 10,000

¹²⁷ Human Rights Watch, “*Unless Blood Flows: Lack of Protection from Domestic Violence in Hungary*”, November 2013 referring Human Rights Watch interview with Roland Kisgyori, Ministry of Human Resources, Budapest, May 10, 2013.

¹²⁸ Ibid.

¹²⁹ Human Rights Watch, “*Unless Blood Flows: Lack of Protection from Domestic Violence in Hungary*”, November 2013 at 45.

authorities to provide much needed protection for women at the most vulnerable times of their lives.

Women with or without children can stay at a shelter/crisis center for a period of 30 days with a possibility of extending this by another 30 days.¹³⁰ At the end of the 60 days, only women with children may apply for a further period of accommodation in a public mothers home.¹³¹ Women without children do not have any further options and generally end up homeless or returning to their abusers.¹³²

3.4.2 Australia

In its 2012 response to CEDAW's concluding observations, Australia presented information regarding how it seeks to tackle the issue of domestic violence and homelessness, primarily through its National Plan. It pledged that together with the states the government has committed "a range of initiatives to help women and children escaping from domestic violence under the \$1.1 billion National Partnership Agreement on Homelessness."¹³³ Out of over 180 initiatives under the Agreement, 30 initiatives are specifically targeted towards women and children escaping domestic violence across Australia.¹³⁴ Between 2010-11, under the Agreement, assistance was provided over 16,400 times to women and children experiencing domestic violence.¹³⁵ To this end, Australia asserted that the assistance will "reduce the number of women turned away from support services, protecting the human rights of victims of domestic violence and ensuring appropriate protective services are provided in accordance with

¹³⁰ *ibid* at 46.

¹³¹ *Ibid*.

¹³² *ibid*.

¹³³ United Nations, Convention on the Elimination of All Forms of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women, Australia, c/aul/co7/add.1, (30 July 2010).

¹³⁴ Human Rights Watch, *"Unless Blood Flows: Lack of Protection from Domestic Violence in Hungary"*, November 2013 at 30.

¹³⁵ *ibid*.

paragraphs 24 (b), (k), (r), and (t) of the CEDAW Committee's general recommendation no. 19".¹³⁶

3.5.1 Victims of crime

Victims of Crime Compensation and Counseling Services provide free and professional compensation and counseling support to victims of crime in Victoria.

Under the Crime Compensation Act victims of domestic violence in Victoria may be entitled to compensation of up to \$70,000.¹³⁷ The funding from Victims of Crime can be used for a number of assistance services that ensure that women are safe once they are able to leave their partners, these include the installation of high tech security systems such as cameras around the house, SOS devices which immediately alert police when activated and designated safe rooms within a house that can only be opened and locked from the inside.

These programs are aimed as alternatives to shelters and aim to focus on the housing needs of the women. However, not all women wish to stay at their 'family homes', understandably this residence may represent to them years of suffering, and moreover many women, despite all the security measures available, will never feel safe in a home they shared with someone who abused them, and with someone who will always know that that is where they live. The paramount focus should be on the needs of the women (and her children where relevant), whether that be that she is committed to staying at home (without the partner) or moving to a new location, there should be an equal amount of support and resources provided regardless of her choice.

¹³⁶ *ibid.*

¹³⁷ Victims of Crime, Domestic Violence, <http://victimsofcrime.com.au/domestic-violence/>.

3.5.2 Increase in funding

On the 27th of September, Victorian Premier Daniel Andrews' and his government announced a \$21 million funding towards building new family refuges for victims of domestic violence. This funding addresses one of the recommendations the state government committed to implementing as a result of the Royal Commission. The units are set to be built in mid 2017 in areas of high need across the state. The units will have separate bedrooms for women and their children with a support facility located at the site in order to provide victims with support and easy access to services 24 hours a day.¹³⁸

The new refuges are part of a \$152 million Family Violence Housing focus which will aim to address the current hole between immediate support and long term accommodation. By June 30 2017, 184 new social housing properties will be constructed across the state and 124 new houses and flats are to be leased.¹³⁹

There is a significant lack of resources in Hungary for women who have 'escaped' abusive relationships, with even the services that are available being limited to very short term periods and disturbingly, with no apparent real security as their addresses are publicly listed. This is extremely concerning and falls short of the standard required by CEDAW. Government funding needs to be provided for shelters and services to help women avoid homelessness and returning to their abusers, however this also requires a change in social attitudes and increased awareness that violence against women is not acceptable in any society regardless of historical gender views. Whilst Australia appears to be providing a wider range of resources and support services to women in Australia seeking refuge and shelters, the reality is that given its economic

¹³⁸ Emily Brooks, "Victorian Government Invests \$21 Million In New Refuges For Domestic Violence Victims: **Addressing another one of the 227 recommendations from the Royal Commission**", *The Huffington Post*, (27 September 2016) accessed at http://www.huffingtonpost.com.au/2016/09/26/victorian-government-invests-21-million-in-new-refuges-for-dome/?utm_hp_ref=au-politics

¹³⁹ *ibid.*

and general development advantage over Hungary, a significant amount of improvement and commitment still remains to be shown.

The difficulty in contrasting the two jurisdictions comes down to a number of factors, however, it cannot be discounted that Australia is economically a more prosperous country with a greater amount of resources and greater social awareness of domestic violence as an issue. Thus it cannot be concluded that Australia is providing better protection to women merely by comparing funding or numbers, a broader picture and perspective must be taken into account, taking into account the differences between the two countries.

Discounting the economic imbalance, the author would still conclude that Australia is much closer to meeting its obligations in terms of shelters and support Centre's than its Hungarian counterpart. This is of course a result of various factors and reasons which go beyond the scope of this thesis. However, it is worth once again mentioning that the governments lack of commitment to combating domestic violence, or even recognizing it as an epidemic is hugely apparent in Hungary and the basis of many of its shortcomings.

Chapter 4 – Case Studies

This chapter will focus an individual section of case studies on Hungary (or more broadly Europe and its developments in regard to domestic violence) and Australia through its National Plan, and then more specifically Victoria and the recommendations of the recent Royal Commission.

The aim of this chapter is to contrast and demonstrate the difference that exists in how not only states, but also continents around the world have developed procedures to combat this global phenomenon.

4.1 Australia: The National Plan

In its 2010 concluding observations of Australia, CEDAW expressed concern over the “unacceptably high levels of violence against women that persists in Australia”, further it noted that whilst a National Council was established in 2008 to advice on the development of a national plan to reduce violence, it urged Australia “to adopt, implement and fund as a matter of urgency”¹⁴⁰ the National Plan.

In its follow up to the concluding observations of the committee in 2012, Australia emphasized that whilst there is no uniform national legislation on domestic violence (as each state is responsible for this area), it did have, a “single unified strategy that brings together government efforts to reduce violence against women- the national plan to reduce violence against women and their children 2010-2022 (The national plan)”, endorsed by the Council of Australian Government.¹⁴¹ In its report, Australia goes into detail about the national plan and

¹⁴⁰ United Nations, Convention on the Elimination of All Forms of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women, Australia, c/aul/co7/add.1, (30 July 2010). at para 28.

¹⁴¹ Ibid at para 7.

how it plans to implement it through 3 year “Action plans”. Moreover, in its introduction of the national plan, and first publication, Australia stated that:

*“The National Plan sets out a framework for action over the next 12 years. This plan shows Australia’s commitments to upholding the human rights of Australian women through the Convention on the Elimination of All Forms of Discrimination against Women, the Declaration to End Violence Against Women”*¹⁴²

The target of the national plan is to significantly reduce violence against women and their children in the 12-year time frame. The national plan is highly ambitious and sets clear goals and performance indicators, with periodic reviews and moves to the next stage (action plans), and is a promising step in the right direction to eliminating violence against women. However, it has experienced significant shortcomings, noted by CEDAW and other organizations and individuals.

In 2013, two years after its publication, The Rapporteur for follow up on concluding observations concluded that “the national plan had not universally reached service providers on the ground or impacted the wider regional, rural and remote communities”¹⁴³ and further, the first three yearly action plan, which was due to be developed by July 2011 had still not been presented in August 2011. Further, the third action plan was due for release in mid 2016, and was considerably delayed, only being released on the 28 October 2016.

Progress of National Plan

It is beyond the scope of this thesis to analyze each stage of the action plan in great detail, however the following will provide a brief overview on the achievements to date. The National Plan’s first three year Action Plan: *Building a Strong Foundation 2010-2013*

¹⁴² Australian Government, Department of Social Services, “National Plan to Reduce Violence Against Women and Children 2010-2020”, foreword.

¹⁴³ United Nations, Office of the High Commissioner, “Follow up”, AA/follow-up/Australia /55 (3 September 2013) at page 1.

established key organizations and platforms for future policy and service delivery, including Australia's national research organization for women's safety (ANROWS) and our watch and the line social marketing campaign.¹⁴⁴ Further, national support services were set up to support women who had been victims of violence, including 1800RESPECT, "Australia's first national telephone and online counseling service for women experiencing, or at risk of, domestic and family violence and sexual assault".¹⁴⁵

The Second Action Plan: *Moving Ahead 2013-2016* involved a number of national inquiries being made in order to collect information on areas that required progress and informing the way in which the plan should move forward. Conclusions and recommendations made by such inquiries "provided... an increased understanding of causes and costs of violence and of the key issues that need to be addressed to enable us to move forward".¹⁴⁶

As noted above the Third Action Plan was released at the end of October: *Promising Results 2016-2019*, and will focus on building on the progress already made and filling in the gaps.¹⁴⁷ The third action plan, in its introduction, recognizes that whilst the Council of Australian States and States independently have committed themselves and increased resources to eliminating violence against women, In 2015, 80 women were murdered in Australia with approximately three-quarters killed by a current or former partner.¹⁴⁸ This indicates that despite increased funding, increased awareness and a national action plan, Australia is far from achieving its goal of eliminating violence against women. However, it is promising that in its third action plan, it continues to set goals and relies extensively on recommendations made by the Council of Australian Government Advisory Panel on Reducing Violence Against Women

¹⁴⁴ Australian Government, Department of Social Services, "National Plan to Reduce Violence Against Women and Children 2010-2020, Second Action Plan Report at Page 8.

¹⁴⁵ *ibid*

¹⁴⁶ Australian Government, Department of Social Services, "National Plan to Reduce Violence Against Women and Children 2010-2020, Third action plan page 9

¹⁴⁷ *ibid* at page 5.

¹⁴⁸ *Ibid* at page 9.

and their children in informing and reassessing its approach to meeting its goals.

4.2 Victoria: The Royal Commission

Independent of the National Plan, Victoria launched a Royal Commission into Family Violence in February 2015.¹⁴⁹ The aims of the Royal Commission were to make recommendations which would work towards reducing and eventually eliminating family violence and ensuring the safety of people who are or may be affected by family violence.¹⁵⁰

The Commission welcomed submissions from the general community, both from organizations and individuals. In total, 968 submissions were received. Of these, 491 were from individuals and 477 were from organizations.¹⁵¹

The final report stated that “nearly 850 people attended the 44 consultation sessions, which were held in 21 locations in metropolitan Melbourne and regional Victoria. They included individuals who had experienced family violence as well as representatives of organizations working in the family violence system”.¹⁵²

The outcome of the Royal Commission was a significant report, covering a broad range of topics, including, risk assessment, information sharing, police, courts, offences and sentencing, housing, financial security, primary prevention and many more. The commission concluded its report with 227 final recommendations that are directed at improving the current system, aiming to transform the response to family violence and building structures to guide and oversee a long term reform program that addresses all facets of family violence.¹⁵³

The final report noted important developments that had occurred during the Royal

¹⁴⁹ Royal Commission into Family Violence 2016

¹⁵⁰ *ibid.*

¹⁵¹ *ibid* at page 29.

¹⁵² *Ibid.*

¹⁵³ *ibid.*

Commission, such as:

- 1) in March 2015 Victoria police announced the establishment of the first family violence command in an Australian police jurisdiction, headed by assistant commissioner Dean McWhirter.
- 2) In August 2015 the government announced that in 2016 respectful relationships education would be introduced into the school curricula from foundation to year ten. This is a significant development, as part of eliminating violence against women required the education of the community that such behavior will not be tolerated and is not acceptable. Including respectful relationship education in school curriculum will allow children and young people to grow up with the message being the norm to them, making it more likely that they will engage in healthy relationships.
- 3) In October 2015 the government announced \$50,000 in funding for Women's Health association of Victoria to help prevent family violence and launched a new online guide developed by women's health Victoria to support regional prevention planning.

Further, the Commission made mention of the national response to domestic violence, noting that the commonwealth government has committed approximately \$200 million to the National Plan between 1 July 2009 and 30 June 2017. Noting further that the commonwealth provides funding to the states and territories to assist them in delivering a variety of services.

Both the National plan and the Royal Commission into Family Violence represent a promising move forward in addressing domestic violence, and eventually eliminating it. Whilst there are flaws and obstacles which have and will continue to challenge achieving the overall goal of a society free of violence against women, both the national and state commitments represent a step in the right direction.

4.3 A European Perspective

In the European sphere, the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) has emerged as a means by which individuals subject to domestic violence, who feel that the state has not acted according to its convention obligations, can make a direct complain to the European Court of Human Rights (ECtHR). There are a number of provisions under the ECHR, which have been engaged to find the state in violation for not protecting victims of domestic violence. The most commonly engaged articles in such cases are Article 2, 3, 8 and 14.

This Chapter will consider *A.T v Hungary*¹⁵⁴, a case brought before the CEDAW committee, and will analyze how the facts could be applicable to an Article 8 claim to the ECtHR and will consider a compliance assessment in deciding whether the facts of the case could potentially establish a violation of Article 8 under the ECtHR.

Article 2 ECHR: *Opuz v Turkey*

The court in *Opuz* remarkably, vigorously denounced the state authorities for their failure to protect the applicant and the applicant's mother from the acts of her ex-husband. The ECtHR, when analyzing domestic violence cases looks to the due diligence exercised (or neglected) by the state authorities. The Court denounced the legislative framework as it placed too much importance on the requirement that a victim must make and maintain a complaint, and thereby the failure to continue an investigation and prosecution in cases where victims withdraw their complaints. The court stressed that the domestic authorities in the case, should have been able to pursue the proceeding as a matter of public interest regardless of the victim's withdrawal of complaints. The court expressly criticized the Magistrate Court judge and the

¹⁵⁴ Communication No.: 2/2003, Ms. A.T v. Hungary, 26 January 2005, thirty second session.

Public Prosecutor for not using their initiative to invoke one or more of the protective measures available under the law. Throughout the judgment the court clearly and expressly denounces the actions (or inactions) of the state authorities, finding a violation of both Article 2 & 3. The use of powerful and illustrative language in the judgment (such as ‘manifestly inadequate’¹, and ‘a lack of efficacy and certain degree of tolerance’)¹ emphasizes that the court intended to send a strong message that domestic violence will not and should not be tolerated. *Opuz* marked significant progress in recognizing the human rights violations that occur in incidents of domestic violence, and brought the issue to the forefront and away from the notion of a ‘private matter’, that requires no state interference.

Why not an Article 8 consideration?

Interestingly, the judgment does not focus on Article 8, which is arguably a dominant provision engaged in domestic violence cases. It is unclear why this is the case but can perhaps be attributed to the fact that the facts in the case were so severe that they required, and established, a breach of 2 Articles that have a significantly higher threshold requirement and therefore the court did not consider it necessary to consider Article 8.

Article 8: *A. v. Croatia*

However, on the other hand, the decision of *A. v. Croatia*, one year after *Opuz*, demonstrates a somewhat discouraging turn in the courts approach to domestic violence. Whilst the court finds a violation of Article 8 in this case, it declines to consider the applicants Article 2 and 3 claims. The judgment, whilst somewhat denouncing the inaction of Croatia, seems very ‘gentle’ in comparison with *Opuz*. The court in this judgment is quick to focus on the positive aspects of the way in which the domestic authorities handled the incidents, using statements such as, ‘*the court cannot but agree*’,¹ before easing into its criticism, which, even when doing so, articulates its statements and views in a manner that is starkly more neutral than it was in

Opuz. It is understandable that the nature of this case is less ‘severe’ than *Opuz* as it did not result in the loss of a life, however, this shouldn’t prevent the court from continuing its emphasis on the denunciation of the states failures to respond to domestic violence and the fundamental need to protect the human rights of victims of domestic violence. It was disappointing that a year after *Opuz*, the court appeared to retreat back to hiding behind the veil so often apparent in its judgments, the margin of appreciation.

It is interesting too, that whilst Article 8 is more or less the article engaged in domestic violence cases, it was in the consideration of Article 2 & 3 in *Opuz* that the court made its most powerful observations on this fundamental human rights issue.

A.T. v Hungary

In light of the various approaches taken by the ECtHR on the issue of domestic violence, this section will now consider the facts of *A.T. v Hungary*¹ and apply its own Article 8 analysis and a theoretical judgment in view of the approach and method taken by the court.¹

The Facts of this case will be very briefly discussed by way of overview, but will be more evident throughout the analysis.

The Complainant alleged that she had been subjected to regular severe domestic violence and treatment by her common law husband and the father of her two children (L.F.) even after he moved out of the couple’s home. LF made repeated threats to kill the complainant and rape the children, however the complainant did not go to a shelter to seek assistance as she reported that no shelter in the country was equipped to take in a fully disabled child together with his mother and sister. The complainant reported multiple incidents where she was subject to beatings, including an incident after which she was hospitalized for a week. After the complainant changed the locks of the home to prevent him

from entering, the Pest District Court found in his favor, a decision which was then upheld by Budapest Regional Court. The complainant criticized that:

- (1) Hungary had failed to provide effective protection from her former common law husband thereby neglecting its ‘positive’ obligation under CEDAW
- (2) There was a lack of protection orders or restraining orders under current Hungarian law;
- (3) LF had not spent any time in custody and this constituted a violation of her rights under the Convention as well as violations of General Recommendation 19 of the Committee.

The complainant called for serious change in the way in which Hungary handled domestic violence situations and victims, including protection orders, training programs and free legal aid. The Committee ultimately found in favor of the Complainant, taking into account General Recommendation No. 19 and finding a violation under article 2(a), (b) and (e) and article 5(a) in conjunction with article 16 of the Convention on the Elimination of All Forms of Discrimination against Women.

The next section will now consider how the European Court of Human Rights could have interpreted the case and whether it could have fallen under their jurisdiction.

Article 8 analysis

The applicant’s case falls within the private life aspect of Article 8. In *Niemietz v Germany*¹⁵⁵ the court established that the right to private life included ‘the right to establish and develop relationships with other human beings.’¹⁵⁶ The applicant had been in a relationship with LF (her ex partner) and was subject to 4 years of regular and severe domestic violence

¹⁵⁵ *Niemietz v Germany*, A 251-B (1992); 16 EHRR 97.

¹⁵⁶ *Ibid* at para 29.

incidents.¹⁵⁷ The applicant and LF had 2 children. It has been well established by the jurisprudence of this court that the physical and moral integrity of an individual is covered by the concept of private life.¹⁵⁸

Whilst the essential object of Article 8 is to protect the individual from arbitrary actions of the public authorities, there may exist, in addition, a positive obligation, which may involve the requirement of a state to adopt measures in the sphere of the relations of individuals between themselves,¹⁵⁹ as “under article 8 states have a duty to protect the physical and moral integrity of an individual from other persons, they are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.”¹⁶⁰

LF presented a clear threat to the applicant’s physical integrity; the applicant was subject to battering on several occasions beginning in March 1998 and presented 10 medical certificates to this end.¹⁶¹ On 27 July 2001 LF broke into the family apartment and subjected the applicant to severe beatings, which necessitated hospitalization.¹⁶² Furthermore the Budapest Regional Court issued a decision in regards to LF’s access to the family home and concluded that he had the authority to enter the residence as the applicant lacked substantiation of her claims of beating and stated that LF’s right to property cannot be restricted.¹⁶³ The applicant contends that since that date and due to earlier attacks, her physical integrity and physical and mental health have been at serious risk and she lives in constant fear.¹⁶⁴

Regarding the two incidents of battery and assault there have been ongoing criminal proceedings. One of the incidents left the applicant in hospital for one week with serious kidney

¹⁵⁷ *A.T. v. Hungary*, CEDAW 2005 at para 2.1.

¹⁵⁸ *A. v. Croatia* at para 17

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid* 19.

¹⁶¹ *A.T. v. Hungary*, CEDAW 2005 at para 2.3.

¹⁶² *ibid.*

¹⁶³ *ibid* at para. 2.4.

¹⁶⁴ *ibid.*

injuries, LF had not been detained at this time and no action was taken by the Hungarian authorities to protect the applicant. The applicant reiterates that the resistance to change is strong and that decision makers still do not understand why they should interfere with what they continue to perceive as ‘private affairs’.¹

The applicant contends that the unreasonably lengthy proceedings and the failure of the state to take any protective measures violate her rights under Article 8 of the convention. Further to this, the applicant believes that whatever the outcome of the delayed criminal proceedings, they have been delayed for so long and her safety has been so severely neglected that she has not received timely and effective protection from the Hungarian authorities.¹⁶⁵

The state submitted that several sets of criminal proceedings were initiated against LF and that he had been convicted on one count of assault and sentenced to a fine of 60,000 forints.¹⁶⁶ The state admits that it was not capable of providing immediate protection to the applicant and recognizes the incomplete set of remedies. The state, however argues that special emphasis has been placed on the handling of domestic violence cases by police officers.¹⁶⁷

The court stresses that it is not its task to take the place of the competent Hungarian authorities in determining the most appropriate methods of protecting individuals from attacks on their personal integrity,¹⁶⁸ but it is rather the role of this court to review and supervise decisions that the authorities have taken.

The Hungarian authorities were aware of the circumstances of the applicant as the applicant had reached out to various support services, and quite obviously, presented to the hospital with serious injuries on two occasions. There is no objection by the state authorities to

¹⁶⁵ *ibid* at 6.2.

¹⁶⁶ *ibid* at para. 5.3.

¹⁶⁷ *ibid* at para. 5.8.

¹⁶⁸ *A. v. Croatia* para 34.

the contention that they were aware of the applicant's situation. On the contrary, the state accepts that it was not capable of providing immediate protection to the applicant; however, the state is quick to emphasize that it is making progress in the field of protection of victims of domestic violence. Whether or not this is accurate is irrelevant to the current analysis, as it does not reduce the suffering experienced by the applicant.

The court would like to emphasize that there is a substantial public interest in pursuing allegations of domestic violence, and states have an obligation to investigate complaints and provide protection to the complainants. The court in *Opuz* made clear that domestic violence is not to be viewed as a matter of only 'private affairs', and it is essential that this perception of not interfering to protect the victims of such attacks is eliminated. The applicant contends that this attitude remains prominent in Hungary amongst the community as well as the authorities. The court points out that the Council of Europe in its Recommendation of 30 April 2002¹⁶⁹ stated that policies needed to be introduced that were based on the 'maximum safety and protection of victims'¹⁷⁰, and further that 'member states should penalize serious violence against women'. The council of Europe emphasized the importance of 'raising public awareness and training for professionals'.¹⁷¹ Furthermore the Council of Europe in its recommendation stressed that States should classify "all forms of violence within the family as criminal offences",¹⁷² and further to "enable the judiciary to adopt interim measures aimed at protecting the victims"¹⁷³, there was a clear lack of effective criminal provisions in this case and furthermore a complete lack of any procedure by which interim protection could be afforded to the victim. The imposition of a fine for an act of criminal violence is questionable.

¹⁶⁹ Council of Europe, Committee of Ministers - on the Protection of Women Against Violence, *Recommendation Rec (2002)5*.

¹⁷⁰ *ibid* at rec. 3(a).

¹⁷¹ *Ibid* at rec. 3(d).

¹⁷² *ibid* at rec. 34.

¹⁷³ *Ibid* at rec. 58(b).

While it is up to the competent state to decide on its criminal legislation and sanctions, it is of concern to this court that the imposition of a fine is considered adequate in response to a criminal action of assault/battery.

There is an emerging European consensus that domestic violence will not be tolerated and that states have a positive obligation to act in the protection of victims. Whilst the states enjoy a certain margin of appreciation in their application of the convention and implementation of laws, in this case, there is a clear and absolute lack of intervention by the state and a complete disregard for the applicant's physical and moral integrity. The national authorities left the applicant in a state of fear and danger for a prolonged period in which they failed to satisfy their positive obligation to ensure her right to respect for her private life.

There has accordingly been a violation of Article 8 of the Convention.

With regard to the jurisprudence of the ECtHR in cases of domestic violence, it is likely that a case presenting facts as in *A. T v Hungary* would in fact fall within the scope of Article 8 and constitute a violation of the article for the reasons discussed above. Article 8 has the potential to be a source of last resort action for domestic violence victims, and the court should therefore use its judgments as a catalyst for continuously denouncing states who fail to protect victims of domestic violence. The court should aim to stringently criticize inadequate state action to ensure that a clear and unambiguous message creates an unequivocal consensus in all European states that domestic violence will not be tolerated and should be at the forefront of the national authority's agenda, in both protecting potential victims, and actual victims. The notions of private life have changed, and whilst relationships between individuals clearly fall into the category of private life, this is not coexistent with a presumption that such affairs should not involve, moreover require, positive state action.

It is clear that Australia and Europe have very different approaches to Human Rights in general, let alone to specific provisions and actions in relation to Domestic Violence. European Human Rights issues are, to some extent governed by the European Charter of Human Rights, under which, such cases as described above in this chapter may be litigated when an individual feels that one or more of their rights within the charter has been violated by a state. In Australia there is no Human Rights charter and thus no Human Rights Court, individuals rely on the legislation as it stands, and the government in its entirety to protect them from human rights violations.

Australia does have a stronger commitment to introducing and implementing 'national plans' and having clear objectives in relation to confronting the domestic violence phenomenon and has invested a great deal of money in doing so. It remains questionable whether having a human rights charter has a correlation with the human rights situation in the given country. As apparent from the case studies, there are complex differences in the relevant jurisdictions overall operation of the judicial and social system that make providing an analysis of compliance difficult as many factors must be taken into account. The conclusion proceeding this chapter will provide a brief discussion of this.

Conclusion

Throughout the analysis and research undertaken for this thesis it has become apparent that there are significant gaps in compliance with international standards in both jurisdictions. However, this is not limited to the two jurisdictions discussed and seems to be an international trend, or rather, a failure of all states, individually and collectively to denounce violence against women and work towards eliminating the issue in the near future.

Of major concern to the author is the lack of commitment shown by the Hungarian government in regards to this complex issue that ultimately requires the complete cooperation of governments if it is to achieve or improve compliance. All services and support are provided by NGO's in Hungary, and to the knowledge of the author, this is not likely to change anytime soon. The Hungarian government and authorities seem to have taken a blind eye to the issue, or continue to follow archaic beliefs that it is a private issue. This has clearly been rejected by the United Nations and several other authoritative bodies who have specifically stated that domestic violence is not a private issue, and governments can and will be held accountable. Notably, there was a case brought against Hungary to the CEDAW committee, in which the committee recognized that Hungary had failed in its obligations to protect victims of domestic violence. This occurred in 2005, and whilst some improvements have been made to the legislation since then, such as the introduction of a domestic violence provision, it does not seem that the attitude or situation has seen any improvement. Notably, the 2013 Human Rights Watch report noted significant shortfalls and concerns.

It is appreciated that governments are often overwhelmed with multiple issues at a given time with limited budgets and resources, however, this is not, in the authors view, an excuse

for the complete inaction taken by the Hungarian Government. Hungarian NGO's such as NANE, should be immensely credited for the commitment and work that they do to try and bridge the gap that the government continues to ignore. The Hungarian government needs to wake up to its obligations and put domestic violence and gender equality at the forefront of its agenda.

In contrast, Australia, a country of economic prosperity, especially when contrasted with Hungary, shows promising signs of moving towards eliminating violence against women, however, given this aforementioned prosperity and standard of living, the rate of domestic violence incidents and deaths is a national shame.

The Australian government has shown a clear commitment to addressing domestic violence through its National Plan, and funding of State programs. In recent years the government has invested a large amount of money in education and training, as a view that such education and training is fundamental in prevention of domestic violence. To this end, Australia has implemented programs in Secondary Schools which teach children and teenagers about respectful relationships and gender equality, recognizing that in order to achieve a society free from domestic violence, prevention and education of the future generations is paramount. At the time of writing the focus on education is means of preventing domestic violence is evident on a variety of forums. The Australian government introduced an advertisement which depicts young children mimicking the behavior of their elders, sending a message that, contempt towards violence against women starts at an early age and environmental factors are undeniably relevant. The focus on prevention is easy to understand, as it penetrates the ultimate aim of a society free of domestic violence, however, it leaves behind those who are currently victims of domestic violence.

As a society, the knowledge that violence against women is not acceptable is likely to be much higher in Australia than Hungary, but, it is important to note that this is not because the people in Australia are ‘better’ or any such reason. Australia is a comparatively young country with a short history, a history that does not involve the many atrocities that European states endured. Centuries worth of gender discrimination, and acceptance, by men and women, that women are subordinate to men undoubtedly require greater efforts and a longer time period of education and development to be overcome. It is for this reason that the author finds it difficult to honestly compare the compliance of Hungary in contrast to Australia. It is a fundamentally unequal comparison and this must be kept in mind at all times. It is evident in CEDAW country reports that CEDAW adjusts its criticisms of States according to which State it is addressing, and this is entirely appropriate. States cannot possibly be compared on a global scale when their histories, traditions and cultures are so different, even when those traditions and cultures require changing, this will take decades, however, it is not impossible, if the government of those states is committed to achieving the aim.

If we are to disregard the various imbalances between Hungary and Australia, it could be stated that Australia is doing more to comply with its international obligations in protecting women and demonstrates a much greater commitment to achieving the elimination of violence against women. However, even in taking into account economic imbalances and social differences, it is worth noting that the Australian government, simply by its denouncement of Violence against women and recognition of it as a national shame is already significantly ahead of its Hungarian counterpart.

The Hungarian government needs to start taking Domestic violence seriously, and stop blaming the blind dog, and listen to and turn into practice the words so eloquently written by NANE:

“There can only be peace and stability in a society where we do not tolerate domestic violence. We can only achieve this through gradual steps. We believe Domestic Violence is preventable, recognizable and stoppable.”¹⁷⁴

¹⁷⁴ NANE Egyesult, “Miert Marad?” at p. 87 (translated).

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