

**PROTECTION ORDERS AS TOOLS OF DEFENDING WOMEN  
VICTIMS OF DOMESTIC VIOLENCE IN LIGHT OF THE EUROPEAN  
STANDARDS: AUSTRIA AND HUNGARY**

by Szabolcs TABA

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SUPERVISOR: Professor DR. Petra BÁRD LL.M. PhD  
Central European University  
Budapest, Hungary

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*“Culture does not make people. People make culture. If it is true that the full humanity of women is not our culture, then we can and must make it our culture.”*

Chimamanda Ngozi ADICHIE, novelist

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## **EXECUTIVE SUMMARY**

The thesis aims at presenting the role of protection orders as tools of defending victims of domestic violence against women. It assesses the development and the significance of these measures in the context of states' due diligence obligation. It provides an analysis of the relevant case law of the European Court of Human Rights and the Court of Justice of the European Union, and defines the cornerstones of the protection level to be provided by the state. It presents and compares the rules in force in Austria and in Hungary and identifies their weaknesses. It argues that the objective of the protection orders of providing prompt assistance for victims is undoubted. However, as can be seen in practice, the legal provisions and their realization is often incomprehensibly far from the intended goals as if the legislator had not understood the essence of the issue. Without improvement, some of the rules are nothing more than just providing the opportunity for the state of claiming the completion of one of its international obligations. In order for the protection orders effectively to fulfil their mission, states, officials of law enforcement authorities and even ordinary citizens must realize the deep-rooted nature of violence against women. Therefore, not only the rules and the practice of the authorities should be improved, but people's mindset also has to be altered for attaining the objectives pursued. This positive change should be facilitated by the state itself which would presumably have repercussions on the legislator's approach.

## ABBREVIATIONS

1. Beijing Declaration: Beijing Declaration and Platform for Action
2. CEDAW: Convention on the Elimination of All Forms of Discrimination against Women
3. CEDAW Committee: Committee on the Elimination of Discrimination against Women
4. CJEU: Court of Justice of the European Union
5. CoE: Council of Europe
6. CoM: Committee of Ministers
7. Convention of Belém do Pará: Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women
8. Council Framework Decision: Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA)
9. Court: European Court of Human Rights
10. DEVAW: Declaration on the Elimination of Violence against Women
11. ECHR: Convention for the Protection of Human Rights and Fundamental Freedoms
12. ECtHR: European Court of Human Rights
13. EU: European Union
14. EU Court: Court of Justice of the European Union
15. Execution Act: Act of 27 Mai 1896 on the Execution and Security Procedures (*Austria*)
16. IACHR: Inter-American Commission on Human Rights
17. IACtHR: Inter-American Court of Human Rights

18. Istanbul Convention: Council of Europe Convention on preventing and combating violence against women and domestic violence
19. Luxembourg Court: Court of Justice of the European Union
20. Model Act: Model Act on the Restraining Orders Applicable against Perpetrators of Domestic Violence (made by SPRONZ, Júlia and WIRTH, Judit)
21. RO Act: Act LXXII of 2009 on the Restraining Orders Applicable in Case of Violence between Relatives (*Hungary*)
22. Security Police Act: Federal Act on the Organization of the Security Management and the Activity of the Security Police (*Austria*)
23. Special Rapporteur: Special Rapporteur on violence against women, its causes and consequences
24. Strasbourg Court: European Court of Human Rights
25. Treaty of Lisbon: Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community
26. UN: United Nations

## I. INTRODUCTION

Violence against women is an issue that pervades the long history of humanity – the vast majority of it invisibly. Being “a manifestation of historically unequal power relations between women and men”<sup>1</sup>, every society is touched on by it<sup>2</sup>. It has become so natural in our daily lives that just calling it into question does generate tensions possibly since those responsible for taking effective steps in favour of remedying the situation might also be affected. Through its causes and consequences, it concerns areas so intimate and delicate that it has been considered easier not to deal with it instead of facing up to its existence.

According to a study effectuated in the European Union<sup>3</sup> (hereinafter: “EU”), the prevalence of physical and sexual violence against women has reached alarming levels. The analysis informs us that “[o]ne in three women (33 %) has experienced physical and/or sexual violence since she was 15 years old”<sup>4</sup>. Those who must have suffered from physical and/or sexual violence by a partner or from physical violence by someone other than their partner equally amounted to 22%.<sup>5</sup> Even if “[t]he most common forms of physical violence involve[d] pushing or shoving, slapping or grabbing, or pulling a woman’s hair”<sup>6</sup>, the numbers speak for

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The links referred to in the thesis have been last accessed on 9 November 2018 and no information relating to cases, reports, etc. has been taken into account beyond this date.

The legal norms in force on 9 November 2018 have been referred to based on their version applicable on that day. The legal norms that were no longer of any effect on 9 November 2018 have been referred to according to their last version in force, except when otherwise indicated.

The English translation of the titles of the publications are given in footnotes in the respective Annex.

<sup>1</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence. Istanbul, Turkey, 5 November 2011. CETS No. 210 (UNTS, No. I-52313). Preamble

<sup>2</sup> See, *inter alia*, Beijing Declaration and Platform for Action, § 112. In: Fourth World Conference on Women. Beijing, China, 4-15 September 1995. Report, A/CONF.177/20/Rev.1

<sup>3</sup> European Union Agency for Fundamental Rights. “Violence against women: an EU-wide survey. Main results report”. March 2014. Accessible:

<http://fra.europa.eu/en/publication/2014/violence-against-women-eu-wide-survey-main-results-report>.

<sup>4</sup> *Id.*, at p. 21

<sup>5</sup> *Id.*, at p. 21 and 22

<sup>6</sup> *Id.*, at p. 21



themselves. The frequency of sexual violence is also appalling: since the age of 15, 11 % of women have experienced sexual violence and 5 % of women have been raped.<sup>7</sup>

The global numbers represent similar rates of occurrence. Based on the analysis of the World Health Organization<sup>8</sup>, “35% of women worldwide have experienced either physical and/or sexual intimate partner violence or non-partner sexual violence”<sup>9,10</sup>. As to intimate partner violence, globally, “one third (30%) of all women who have been in a relationship have experienced physical and/or sexual violence by their intimate partner”<sup>11</sup>. No part of the world is exempted from the phenomenon, though there are differences between the regions<sup>12</sup>.

If only a slight proportion of women were victimized, the issue would not be less important. In light of the above statistics, no doubt should come up as to the need of action. We should also take into account that, though men might also be victims of gender-based violence, women are exposed to it in most of the cases.<sup>13</sup> Women’s vulnerability is explained by their general subordination<sup>14</sup> to men in so many areas of social life. The complexity of the issue is thus given: the problem of violence against women committed by men must be resolved in a system ruled also by men. Nevertheless, states must protect each and every of their citizens, and, as a consequence of the gravity of the subject and the exposure of the victims, due consideration must be given to the issue. As the European Court of Human Rights (hereinafter: “Court” or “ECtHR” or “Strasbourg Court”) has noted in several of its judgments, “the particular vulnerability of the victims of domestic violence and the need for

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<sup>7</sup> *Id.*

<sup>8</sup> World Health Organization. “Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence”. 2013.

Accessible: <http://www.who.int/reproductivehealth/publications/violence/9789241564625/en>

<sup>9</sup> *Id.*, at p. 2

<sup>10</sup> In virtue of the methodology of the document, the lower age limit of being victim of violence against women is 15 years. *Id.*, at p. 6, footnote b.

<sup>11</sup> *Id.*, at p. 2

<sup>12</sup> *Id.*, at p. 16-20

<sup>13</sup> Cf. Council of Europe Convention on preventing and combating violence against women and domestic violence, *supra* note 1, Preamble.

Given that the perpetrators are mostly men and the victims are women, the latter will be referred to as female and the former as male throughout the thesis.

<sup>14</sup> *Id.*

active state involvement in their protection has been emphasized in a number of international instruments”<sup>15</sup>. Further to the human rights dimension, societies also have great interests of other types in handling violence against women. Due to the estimations, “the cost of violence against women could amount to around 2 per cent of the global gross domestic product”<sup>16</sup>.

In order for the problem to have the chance to be solved, it must come out of the obscurity and be handled as a hot issue. As Elizabeth M. SCHNEIDER puts it, “[t]he challenge is not simply to reject privacy for battered women and opt for state intervention, but to develop both a more nuanced theory of where to draw the boundaries between public and private and a theory of privacy that is empowering”<sup>17</sup>, with other words, “to develop a right to privacy which is not synonymous with the right to state non[-]interference with actions within the family, but which recognizes the affirmative role that privacy can play for battered women”<sup>18</sup>.

Several factors have motivated me to choose violence against women as the topic of my thesis. I consider the protection of those in need of it the core of human rights. In my view, there exists no activity more noble than to take care about others. Moreover, violence against women has become a hot issue worldwide and also in Hungary. In this respect, one has to think about the great publicity that the “Me Too Movement” received after the harassment scandals in Hollywood. The events had major consequences in the Hungarian artistic world, too. Its actuality in Hungary is enhanced by the fact that, though Hungary signed the *Council of Europe Convention on preventing and combating violence against women and domestic*

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<sup>15</sup> *Bevacqua and S. v. Bulgaria*, no. 71127/01, judgment of 12 June 2008, ECtHR, § 65. Cf. Explanatory Report of the Istanbul Convention, § 58.

<sup>16</sup> “The economic costs of violence against women”. Remarks by UN Assistant Secretary-General and Deputy Executive Director of UN Women, Lakshmi Puri at the high-level discussion on the “Economic Cost of Violence against Women”. New York, 21 September 2016. Accessible: <http://www.unwomen.org/en/news/stories/2016/9/speech-by-lakshmi-puri-on-economic-costs-of-violence-against-women>

<sup>17</sup> SCHNEIDER, Elizabeth M. “The Violence of Privacy”. *Connecticut Law Review*, vol. 23, 1990-1991, p. 972-999, at p. 975

<sup>18</sup> *Id.*, at p. 998.

The last sentence of SCHNEIDER’s article also merits to be cited here: “[T]he personhood is the aspect of privacy that I am seeking to preserve for battered women.” *Id.*, at p. 999, footnote 106.

violence<sup>19</sup> (hereinafter: “Istanbul Convention”) in 2014, it has not yet been ratified, and, in view of the current developments<sup>20</sup>, no progress can be expected in the near future.

Violence against women is an emerging field of human rights. More and more international documents are dealing with it expressing that the knowledge, the experience and the legal tools that might provide effective protection against violence are also increasing. The thesis analyses whether the various types of restraining orders, whereby the perpetrator<sup>21</sup> is prohibited for a pre-defined period of time from contacting the victim and other persons, or entering to or visiting certain places, are proper instruments of protecting victims and preventing violence. The topic is all the more interesting, since state must sometimes act against the will of the person to be protected. The legislators and the implementation bodies do not therefore find themselves in an easy situation: they have to finely balance between the public and private nature of the issue while trying to correspond to their due diligence obligation. Different solutions have been worked out in different jurisdictions based on their

<sup>19</sup> *Supra* note 1

<sup>20</sup> In this respect, take into account the utterances, be they premeditated or unintentional, of Hungarian politicians of the ruling coalition, [(i) according to a former Member of Parliament, it would solve the problem of domestic violence if women gave birth to more children – his colleagues of the same party dissociated themselves from this remark later on (see: [http://nol.hu/belfold/a\\_fidesz\\_szerint\\_a\\_gyerekszules\\_megoldja\\_a\\_csaladon\\_beluli\\_eroszakot-1331717](http://nol.hu/belfold/a_fidesz_szerint_a_gyerekszules_megoldja_a_csaladon_beluli_eroszakot-1331717)); (ii) a former Secretary of State of the ruling coalition commented in the Parliament that the fact that a female Member of Parliament was beautiful, did not necessarily mean that she was also intelligent (see: [https://index.hu/belfold/2013/09/12/kover\\_szerint\\_rendben\\_van\\_illes\\_megjegyzese/](https://index.hu/belfold/2013/09/12/kover_szerint_rendben_van_illes_megjegyzese/))] or the attacks made, again, by the ruling coalition against gender studies [in the aftermath of statements unfriendly to gender studies (see: [https://index.hu/belfold/2017/02/17/a\\_kdnp\\_ugatja\\_az\\_egyetemet/](https://index.hu/belfold/2017/02/17/a_kdnp_ugatja_az_egyetemet/)), the Hungarian Government banned them {see: Annex 3, line 115 of the Government Decree No. 139/2015. (VI. 9.) on the Register of Higher Education Qualifications and the Inclusion of New Qualifications into the Register [in Hungarian: a felsőoktatásban szerezhető képesítések jegyzékéről és új képesítések jegyzékbe történő felvételéről szóló 139/2015. (VI. 9.) Korm. rendelet], as repealed with effect from 13 October 2019 by Section 6, and Annex 4, point 13 of the Government Decree No. 188/2018. (X. 12.) on the Amendment of Government Decree No. 283/2012. (X. 4.) on the System of Teacher Training, Order of Specialization and the Register of Teacher Programs, and Government Decree No. 139/2015. (VI. 9.) on the Register of Higher Education Qualifications and the Inclusion of New Qualifications into the Register [in Hungarian: a tanárképzés rendszeréről, a szakosodás rendjéről és a tanárszakok jegyzékéről szóló 283/2012. (X. 4.) Korm. rendelet, valamint a felsőoktatásban szerezhető képesítések jegyzékéről és új képesítések jegyzékbe történő felvételéről szóló 139/2015. (VI. 9.) Korm. rendelet módosításáról szóló 188/2018. (X. 12.) Korm. rendelet]; cf. [https://index.hu/belfold/2018/08/09/nem\\_indulhat\\_tobb\\_genderszak\\_magyarorszagon/](https://index.hu/belfold/2018/08/09/nem_indulhat_tobb_genderszak_magyarorszagon/)}. These events can in no way be called as expressions of the Government’s pro-women approach.

<sup>21</sup> In this sense, the term “perpetrator” does not necessarily mean criminal responsibility. Cf. “Mapping the Legislation and Assessing the Impact of Protection Orders in the European Member States (POEMS). National Report Austria”. Prepared by LOGAR, Rosa. 8 January 2014, footnote 1. Accessible: <http://poems-project.com/wp-content/uploads/2015/02/Austria.pdf>.

different perceptions of the problem. Nevertheless, at least under the supervision of the ECtHR, a common approach might be observed to a certain extent. Even though no international instrument provides detailed rules on the design and implementation of protection orders, an international control might serve as a guarantee, at least in the long run, for a shared understanding. Having a supranational judicial forum, states may feel constraint, thus incited, to better formulate and apply the relevant measures.

Since around the turn of the millennium, significant practical developments have occurred in Europe concerning the fight against violence against women. The ECtHR has developed nuanced principles regarding the application of states' due diligence obligation, with the first case not dealing with violence against women nor domestic violence though<sup>22</sup>. The Council of Europe (hereinafter: "CoE") has adopted the Istanbul Convention that explicitly deals with, among others, protection orders.<sup>23</sup> Having been "first introduced in the United States in the mid-1970s"<sup>24</sup>, protection orders spread over the world. Though in various forms and with different contents, they are now present in every EU Member State.<sup>25</sup> In Europe, Austria played an important role in their dissemination. The Austrian model was considered as an example in many countries including Hungary<sup>26</sup>. Austria's pioneering role in not only the application of protection orders but also in making efforts to end domestic violence and

<sup>22</sup> *Osman v. the United Kingdom*, application no. 87/1997/871/1083, judgment of 28 October 1998, ECtHR [Grand Chamber]

<sup>23</sup> See: Articles 52 and 53

<sup>24</sup> Handbook for Legislation on Violence against Women. United Nations, New York, 2010. ST/ESA/329. Accessible: <http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>

<sup>25</sup> In this regard, see: BALDRY, Anna – FERREIRA, Ana – NIEMI, Johanna – SOSA, Lorena – VAN DER AA, Suzan. "Mapping the legislation and assessing the impact of protection orders in the European Member States". Wolf Legal Publishers, 2015. Accessible: <http://poems-project.com/wp-content/uploads/2015/04/Intervict-Poems-digi-1.pdf>.

Croatia has not been included in the report (see: p. 34, footnote 12). Nevertheless, Croatia now also applies protection orders. See: Autonomous Women's House Zagreb – The Advocates for Human Rights. "Implementation of Croatia's Domestic Violence Legislation: Follow-up Report". March 2016, at p. 7. Accessible: [https://www.theadvocatesforhumanrights.org/uploads/croatia\\_final\\_report\\_2016.pdf](https://www.theadvocatesforhumanrights.org/uploads/croatia_final_report_2016.pdf).

<sup>26</sup> Decision No. 53/2009. (V. 6.) of the Constitutional Court – on the prior constitutionality inquiry into the Act on the Restraining Orders Applicable in Case of Violence between Relatives [later promulgated as the Act LXXII of 2009], §§ II.3.2. and II.3.4.

violence against women is widely recognized.<sup>27</sup> After one and a half decades of applying protection orders within the EU, the European leaders considered that it was time to regulate the matter so as to provide protection orders issued in one Member State with legal effect in another.<sup>28</sup>

In the light of the foregoing, it might be concluded that the European continent is rich in theoretical and practical experiences concerning violence against women. The topic is, more or less, on the agenda of not only the individual states but also of the political and human rights organizations of the region. The thesis will therefore analyse the legislative and judicial background of addressing the issue in Europe. It will examine the situation on different levels taking into account various jurisdictions. Two countries and two inter- or supranational levels have been chosen for the comparison. As mentioned above, Austria enjoys a good reputation in this field, and its methods are followed by many others. In contrast, Hungary started its legislative activities a bit later. When doing so, though it built on the experiences of its neighbour, it made its laws with serious deficiencies that had, and still have, to be corrected. Even though no perfect system exists<sup>29</sup>, the two states' results might be compared to one another in an interesting manner from which practically useful conclusions will also be drawn. Furthermore, the comparison cannot be devoid of including the analysis of the ECtHR's relevant decisions. This is all the more compelling, since, nowadays, no self-

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<sup>27</sup> Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). First (baseline) evaluation of Austria on the implementation of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. 27 September 2017, GREVIO/Inf(2017)4, § 2

<sup>28</sup> See: (i) Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order. OJ L 338, 21.12.2011, p. 2; and (ii) Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, OJ L 181, 29.6.2013, p. 4

<sup>29</sup> In this respect, one should consider that the fourth and the fifth views ever adopted by the Committee on the Elimination of Discrimination against Women considered cases brought against Austria. In both of them, the Committee set out that the State party had violated the Convention. See: (i) *Şahide Goekce (deceased) v. Austria*, views, 6 August 2007. Communication No. 5/2005, CEDAW/C/39/D/5/2005; and (ii) *Fatma Yildirim (deceased) v. Austria*, views, 1 October 2007. Communication No. 6/2005, CEDAW/C/39/D/6/2005.

The demand of completeness requires mentioning that the first and the third case of the Committee were dealing with Hungary. Of them, only one is relevant for the purposes of the thesis. See: *A.T. v. Hungary*, views adopted on 26 January 2005. Communication No. 2/2003, CEDAW/C/36/D/2/2003.

respecting CoE Member State can, or should, afford not to take into account these judgments when making new laws or considering the need for amending the existing ones. Paying due regard to its increasing engagement, the overview will also touch on the EU's legislation, partly by way of looking at how the Court of Justice of the European Union (hereinafter: "CJEU" or "EU Court" or "Luxembourg Court") defines its role in interpreting the rules currently in force at the EU level.

The document and its conclusions are primarily based on desk research. In this context, I tried for the literature relevant for the countries selected. I relied on analyses, articles and other publications made by experts, as well as reports and other documents issued by bodies of treaties to which these states are parties. The case law holds a central stage in the analysis, since, on the one hand, the imperfection of written norms is sometimes corrected by judicial or quasi-judicial decision-making, and, on the other hand, provisions might be interpreted differently over time. Moreover, I have made several interviews that serve as sources of first-hand information on the practical realization of the provisions. The interviewees included the director and a staff member of an intervention centre, a women's rights activist, a former director of a families' temporary home, two judges and two legal professionals. Nevertheless, the use of these sources deserves two remarks. Notwithstanding my efforts, I did not have the opportunity to meet with the representatives of each of the important areas, that is to say, at least the police, the prosecution, the judiciary and the NGO sector. In this respect, it is to be mentioned that neither the Hungarian National Police Headquarters nor the Budapest Police Headquarters showed openness when I officially requested for appointments for making interviews with their agents.<sup>30</sup> Whatever the reason, their attitude is highly regrettable, since

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<sup>30</sup> The former remained silent, whereas the latter refused my request while providing no explanation therefor. In light of the current situation in Hungary, it is worth remembering what the European Parliament laid down in its resolution on the elimination of violence against women: "[...] women do not report men's violence against them and are sometimes deterred from doing so by a lack of confidence in the police [...]" [European Parliament resolution of 26 November 2009 on the elimination of violence against women. 26 November 2009,

the police as key actors of applying protection orders are in possession of invaluable experiences and data obtained in the course of their intervention. Furthermore, the interviews were made mainly with Hungarian professionals as a consequence of material reasons. Nevertheless, these personal meetings provided experiences of great value. This is despite the fact that the selection of subjects was not the result of taking a representative sample, and the observations of a legal professional from a certain geographical area may differ from those that could be obtained from another one.<sup>31</sup>

In the thesis, I will present to what extent the rules pertinent to protection orders in Austria and in Hungary correspond to the state's duty to protect and prevent, the so-called due diligence obligation, in light of the Strasbourg Court's and the Luxembourg Court's interpretation. Within this framework, the notion of domestic violence and the most relevant international instruments will be introduced in Chapter II. In Chapter III, the origin and the meaning of states' due diligence obligation, one of the central notions of the combat against violence against women, will be explained. Chapter IV will elaborate on the relevant case law of the ECtHR and the CJEU, and will assess the main characteristics of the judgments defining the contours of states' obligations. Chapter V presents the dichotomy of victim's right to protection and state's obligation to protect. It deals with an important issue, namely, whether the victim has the right to refuse protection, or, beyond a certain point, the state is obliged to protect her. The Austrian and the Hungarian systems will be compared in Chapter VI. This part will develop those sorts of orders that these jurisdictions have developed and are applying. The comparison will be carried out with a critical eye concentrating on the shortcomings of the safety net currently in operation. In the Conclusion, I will give a

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P7\_TA(2009)0098, Article SJ Taking into account the subject of the thesis, the conduct of the police can hardly contribute to increasing the confidence demanded.

<sup>31</sup> See: the third interview with Judge F, Hungary. Hungary, 7 September 2018. The interviewee's data are handled confidentially. The interview has been recorded. The recording is in the author's possession. For the sake of clarity, Judge F's comment referred to the quality of the cooperation between courts and the police. (S)he praised the cooperation with the police within the jurisdiction of the court where (s)he is working.

summary of the main findings of the document providing examples whereby the level of protection should be enhanced.

The focus of my research has been restricted to domestic violence against women. However, domestic violence cannot be strictly separated from violence against women, being the latter a broader concept. Secondly, it must be understood that domestic violence has male victims, too. Moreover, the male-female distinction does not sufficiently reflect that the issue involves LGBTQI people who, based on their sexual orientation or identity, would otherwise seem excluded from a wrongly formulated framework.<sup>32</sup> And finally, children form another large group of victims of domestic violence who themselves often suffer as witnesses either directly or indirectly. Their destiny is in most cases inseparable from their mothers’.

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<sup>32</sup> Cf. GREVIO Shadow Report NGO-Coalition. Austrian NGO-Shadow Report to GREVIO. September 2016, at p. 35



*“There is one universal truth, applicable to all countries, cultures and communities: violence against women is never acceptable, never excusable, never tolerable.”*

BAN KI-MOON, former United Nations Secretary-General

## II. THE NOTION OF VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE

Presumably, violence against women is as old as the history of human society. Nevertheless, its international articulation has had to wait, understandably, until the *mankind* became sensitive to human rights in general or even beyond. Though the international human rights legislation gained momentum after the World War II and several treaties were worked out with regard to discrimination against women<sup>33</sup> the importance of which is indeed incontestable, the issue found breeding grounds with the help of the *Convention on the Elimination of All Forms of Discrimination against Women*<sup>34</sup> (hereinafter: “CEDAW”). The CEDAW does not specifically speak about violence against women. More than a decade after its adoption, the *Committee on the Elimination of Discrimination against Women* (hereinafter: “CEDAW Committee”), as the body<sup>35</sup> in charge of supervising the implementation of the CEDAW, took the view in its General Recommendation No. 12 issued on violence against women<sup>36</sup> (1989) that “the Convention require[s] the States parties to act to protect women against violence of any kind occurring within the family, at the work place or in any other area of social life”. Again, it was not due to the convention itself but the interpretation of the committee established by the treaty that this norm evolved. Later, the CEDAW Committee

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<sup>33</sup> See: (i) Convention on the Nationality of Married Women. New York, United States of America, 29 January 1957. Resolution of the General Assembly of the United Nations No. A/RES/1040 (XI). UNTS Vol. 309, 1958 I-4468, p. 65; (ii) Convention concerning Discrimination in Respect of Employment and Occupation. Geneva, Switzerland, 25 June 1958. ILO Convention No.111; (iii) Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. New York, United States of America, 7 November 1962. Resolution of the General Assembly of the United Nations No. A/RES/1763 (XVII). UNTS Vol. 521, 1964 I-7525, p. 231; and (iv) Convention against Discrimination in Education. Paris, France, 14 December 1960. UNTS Vol. 429, 1962 I-6193, p. 93

<sup>34</sup> Convention on the Elimination of All Forms of Discrimination against Women. New York, United States of America, 18 December 1979. UNTS Vol. 1249, 1981 I-20378

<sup>35</sup> For further information on the CEDAW Committee, see: <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/CEDAWIndex.aspx>.

<sup>36</sup> CEDAW Committee, General recommendation No. 12: Violence against women. 1989, A/44/38

confirmed its evolutive approach. The General recommendation No. 19 (1992) issued on violence against women<sup>37</sup> expressed that “[t]he full implementation of the Convention required States to take positive measures to eliminate all forms of violence against women”<sup>38</sup>. Since “[g]ender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence”<sup>39</sup>, the wide interpretation has been made unambiguous. Based on the recommendation, violence against women can be defined as “violence that is directed against a woman because she is a woman or that affects women disproportionately”<sup>40</sup> “seriously inhibit[ing] women’s ability to enjoy rights and freedoms on a basis of equality with men”<sup>41</sup>.<sup>42</sup> The next step of the notion’s evolution was the adoption of the Declaration on the Elimination of Violence against Women<sup>43</sup> (1993; hereinafter: “DEVAW”) by the United Nations (hereinafter: “UN”). According to its definition, violence against women means “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”<sup>44</sup>. This terminology is reiterated verbatim in the Beijing Declaration and Platform for Action<sup>45</sup> (hereinafter: “Beijing Declaration”) adopted by the Fourth World Conference on Women in Beijing<sup>46</sup>. The connection between the two documents is of the same kind as to the illustrative list of conducts constituting violence against women. On this basis, violence against women involves among others “(a) [p]hysical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household,

<sup>37</sup> CEDAW Committee, General recommendation No. 19: Violence against women. 1992, A/47/38

<sup>38</sup> *Id.*, § 4

<sup>39</sup> *Id.*, § 6

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*, § 1

<sup>42</sup> Cf. European Union Agency for Fundamental Rights. “Violence against women: an EU-wide survey. Main results report”. *Supra* note 3, at p. 9

<sup>43</sup> Resolution of the General Assembly of the United Nations. Declaration on the Elimination of Violence against Women. 20 December 1993, A/RES/48/104

<sup>44</sup> *Id.*, Article 1

<sup>45</sup> See: Beijing Declaration, *supra* note 2, § 113

<sup>46</sup> On the Fourth World Conference on Women, see: <http://www.un.org/womenwatch/daw/beijing/fwcwn.html>.

dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; (b) [p]hysical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; [and] (c) [p]hysical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.”<sup>47</sup> The importance of these provisions lies in several factors. Firstly, they not only encompass physical and sexual effects, as the most trivial consequences, of committing violence but the psychological outcome as well. The term “family” is interpreted extensively, since in addition to the abuse perpetrated within the household, it also comprises “non-spousal violence”. Therefore, cohabitation and the nature of the relationship bear no relevance. Violence committed by someone other than a partner is also covered given that such a case might belong to the circle of those “occurring within the general community”<sup>48</sup>. It is clear that the state itself might, by way of those acting imputably to it, be responsible for violent acts. Nonetheless, by using the word “condoned”, the scope has been widened to violence where, even though the act to be persecuted was committed by a natural person unrelated to the state, the responsibility of the latter materializes in that the state remained passive (or not active enough) thus making the violence possible to occur or increasing its effects.<sup>49</sup> Finally, the means of handling the issue leaves the door open for the inclusion of further interpretations. As to the definition of violence against women, it should be specifically mentioned that, in a certain way, it highlights the importance of psychological suffer. It is very difficult to observe this form of abuse both for the abused and the authorities’ representatives inasmuch as it does not necessarily go hand-in-hand with obvious traces risking that it will be neglected in our societal structure.

<sup>47</sup> See: (i) DEVAW, Article 2; and (ii) Beijing Declaration, *supra* note 2, § 113

<sup>48</sup> *Id.*

<sup>49</sup> This element will be further elaborated when dealing with state’s due diligence obligation in Chapter II.

It has to be strengthened that the above documents have been adopted by the majority of states.<sup>50</sup> Though these definitions are not found in legally binding documents<sup>51</sup>, they served as reference models for the adoption of treaties. The first example is the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*<sup>52</sup> (hereinafter: “Convention of Belém do Pará”) the approach of which is essentially identical.<sup>53</sup> The *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*<sup>54</sup> has a very important added value, namely, the express mention of economic consequences, further to physical, sexual and psychological harm.<sup>55</sup> Even though an exemplificative specification does not suffer from the inability of widening the scope of a provision, a direct formulation may grant clarity and underline the importance of the rule.<sup>56</sup>

As to the scope of the thesis, the most important legally binding document, which defines violence against women and domestic violence, is the Istanbul Convention. This holds true no matter that Hungary is not party to it. Generally, the Strasbourg Court, similarly to constitutional courts, has a tendency to take into account legal instruments not applicable *per se*. The idea behind this practice is that this tool helps to outline the direction of the development of the law. By virtue of the Istanbul Convention, violence against women

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<sup>50</sup> The DEVAW and the resolution of the General Assembly endorsing, as requested in its Recital 2, the Beijing Declaration (Fourth World Conference on Women. 8 December 1995, A/RES/50/42) were adopted without vote. The significance of adopting a resolution in this manner is the fact that it is used only “[w]hen consensus on the text is reached” [and] “all of the Member States agree to adopt the draft resolution without taking a vote”. Nevertheless, “[i]t is important to note that consensus does not mean that all Member States agree on every word or even every paragraph in the draft resolution. Member States can agree to adopt a draft resolution without a vote but still have reservations about certain parts of the resolution. The important point is that there is nothing in the resolution that is so disagreeable to any Member State that they feel it must be put to a vote.” See: “How Decisions are Made at the UN”. Accessible: <https://outreach.un.org/mun/content/how-decisions-are-made-un>.

<sup>51</sup> As to this statement, *cf.* the reasoning relating to the due diligence obligation being part of customary international law in Chapter III.

<sup>52</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women. Belém do Pará, Brazil, 9 June 1994. See: Article 7, subparagraph b and g.

<sup>53</sup> See: Article 2. However, it is a question of interpretation, whether the words “shall be understood to include” is, similarly to “shall be understood to encompass, but not be limited to” as worded in the DEVAW, an illustrative or an exhaustive reference.

<sup>54</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Maputo, Mozambique, 11 July 2003

<sup>55</sup> Article 1, point j)

<sup>56</sup> The emphasis on the prohibition of committing violence “in peace time and during situations of armed conflicts or of war” might be traced back to the circumstances on the African continent. *Id.*

“mean[s] all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.<sup>57</sup>

As can be observed, this definition also incorporates acts of economic relevance “which can be related to psychological violence”<sup>58</sup>. The Istanbul Convention explicitly foresees in its Preamble that it builds on the case law of the Strasbourg Court.<sup>59</sup> In light of this fact, the wording “or are likely to result in”, though it is not a novelty in violence against women definitions, can be seen differently. In some respects, it paves the way for introducing barring and restraining orders in a prospective way as provided for by the Istanbul Convention, that is, anytime when state action is needed for protecting someone even before the act of violence occurs.<sup>60</sup> Failing appropriate intervention from its part, a state may face legal consequences.

The Istanbul Convention not only incorporates “gender-based violence” as a conceptual element into the definition of “violence against women”, but, in line with the CEDAW Committee’s General recommendation No. 19, it defines it as “violence that is directed against a woman because she is a woman or that affects women disproportionately”<sup>61</sup>. With this approach, “gender-based violence [...] is both the cause and the result of unequal power relations based on perceived differences between women and men that lead to women’s subordinate status”<sup>62</sup>. The consequence of this attitude is that the causes are not necessary to be examined for a situation to qualify as discriminatory. For example, it has become for the Strasbourg Court a standard practice to make use of statistics on the prevalence of violence

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<sup>57</sup> Article 3, point a

<sup>58</sup> Explanatory Report of the Istanbul Convention, § 40

<sup>59</sup> *Id.*, § 29

<sup>60</sup> Istanbul Convention, Articles 52-53

<sup>61</sup> Istanbul Convention, Article 3, point d; *cf.* Explanatory Report of the Istanbul Convention, § 44; CEDAW Committee, General recommendation No. 19, *supra* note 37, § 6

<sup>62</sup> Explanatory Report of the Istanbul Convention, § 44

against women contained in reports on the respective country as a tool of assessing whether discrimination occurred.<sup>63</sup>

Finally, the Istanbul Convention also provides a definition for domestic violence, whereby it “mean[s] all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim”<sup>64</sup>. This is a “gender neutral definition that encompasses victims and perpetrators of both sexes”<sup>65</sup>. Similarly to the DEVAW and the Beijing Declaration, it does not of course make distinction between whether the act of violence has been committed between existing or former partners, and its application is irrespective of cohabitation.

To conclude, these are the definitions offered by international law. However, pursuant to the principle of subsidiarity<sup>66</sup>, victims encounter the law and its agents firstly at the national level. It is therefore crucial how domestic law defines the circle of those protected by it. Assessing the level of protection is a complex task. The state has several means of protecting victims and preventing the occurrence of violence of which the application of protection orders is only one. (Other<sup>67</sup>) means of criminal law are also at the state’s disposal. When making its decision, the legislator, if all goes well, applies logical reasoning. By way of example, the Hungarian Criminal Code<sup>68</sup> contains the crime of “violence in relationship”<sup>69</sup>. Nevertheless,

<sup>63</sup> See, for example: *Talpis v. Italy*, application no. 41237/14, judgment of 2 March 2017, ECtHR, § 145.

<sup>64</sup> Article 3, point b

<sup>65</sup> Explanatory Report of the Istanbul Convention, § 41.

On the debate between the women-focused and the gender-neutral approaches during the drafting of the Istanbul Convention, see: ACAR, Feride – POPA, Raluca Maria. “From Feminist Legal Project to Groundbreaking Regional Treaty: The Making of the Council of Europe Convention on Preventing and Combating Violence against Woman Domestic Violence”. *European Journal of Human Rights*, 2016, vol. 3, p. 287-319.

<sup>66</sup> Treaty on European Union, Article 5, paragraph 3. Consolidated version: OJ C 202, 7.6.2016, p. 13

<sup>67</sup> There exist restraining orders in criminal law, too.

<sup>68</sup> Act C of 2012 on the Criminal Code. In Hungarian: “a Büntető Törvénykönyvről szóló 2012. évi C. törvény”.

<sup>69</sup> (Hungarian) Criminal Code, Section 212/A. In Hungarian: “kapcsolati erőszak”.

The official translation of the (Hungarian) Criminal Code calls the offence “domestic violence”. Nevertheless, this wording does not properly reflect the Hungarian expression.

The translation of the (Hungarian) Criminal Code is accessible:

[http://thb.kormany.hu/download/a/46/11000/Btk\\_EN.pdf](http://thb.kormany.hu/download/a/46/11000/Btk_EN.pdf).

its scope is rather restricted, since it protects as victims, among others, (i) the parent of the perpetrator's child, as well as (ii) relatives, (iii) former spouses and (iv) common-law partners living, at the time of the commission or before it, in the same household or apartment.<sup>70</sup> The limited applicability of this provision has been criticized by many, since its application is conditional on whether the perpetrator and the victim live together, excepted when they have child<sup>71</sup>. Furthermore, violence committed against an intimate or ex-intimate partner does not fall within its scope<sup>72</sup>, and the crime does not regulate sexual<sup>73</sup> nor psychological violence<sup>74</sup>. This is a so-called subsidiary crime, that is, it applies only when no other more serious crime has occurred (for example, sexual violence<sup>75</sup>). The Hungarian Government argues that this provision "punish[es] violent behaviours that do not reach the level of physical violence, yet severely injure the victim's human dignity, and caus[e] economic impossibility"<sup>76</sup>. Nevertheless, not covering all criminal acts relevant to domestic violence under this head has detrimental consequences.

<sup>70</sup> The translation has been made by using the official translation of the (Hungarian) Criminal Code (*supra* note 68).

<sup>71</sup> "Hungary's Compliance with the ICCPR: Domestic Violence". Joint submission of The Advocates for Human Rights, Hungarian Women's Lobby, NANE Women's Rights Association and PATENT Association. Prepared for the 122nd session of the Human Rights Committee, February 2018, § 13. Accessible: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fCSS%2fHUN%2f30263&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fCSS%2fHUN%2f30263&Lang=en)

<sup>72</sup> Hungarian Women's Lobby and European Roma Rights Centre. "Alternative report submitted to the UN CEDAW Committee for consideration in relation to the examination of the combined seventh and eighth periodic reports of Hungary". January 2013, at p. 8.

Accessible: [http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/HUN/INT\\_CEDAW\\_NGO\\_HUN\\_13260\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/HUN/INT_CEDAW_NGO_HUN_13260_E.pdf)

<sup>73</sup> "Hungary's Compliance with the ICCPR: Domestic Violence". Joint submission of The Advocates for Human Rights, Hungarian Women's Lobby, NANE Women's Rights Association and PATENT Association. *Supra* note 71, § 14

<sup>74</sup> CEDAW Committee. (i) Concluding observations on the combined seventh and eighth periodic reports of Hungary, adopted by the Committee at its fifty-fourth session (11 February–1 March 2013). 26 March 2013, CEDAW/C/HUN/CO/7-8, § 20; (ii) Follow-up letter sent to the State party (Hungary). 22 September 2015, YH/follow-up/Hungary/61, at p. 1

<sup>75</sup> (Hungarian) Criminal Code, Section 197

<sup>76</sup> Concluding observations on the combined seventh and eighth periodic reports of Hungary. Addendum. Information provided by Hungary in follow-up to the concluding observations. 2 March 2015, CEDAW/C/HUN/CO/7-8/Add.1, § 4

In Austria, there exists no specific crime of domestic violence. Nevertheless, the Criminal Code<sup>77</sup> defines persons against whom the commission of a crime qualifies as an aggravating circumstance.<sup>78</sup> They include only relatives<sup>79</sup>, former spouses, former registered partners and former common-law partners. Given that cohabitation is also required and the targeted persons do not cover unregistered (ex) intimate partners, the provision cannot be considered as satisfying all aspects.<sup>80</sup>

Far from the place where a provision will be applied, *id est*, in the international sphere, it is more probable that ideal rules will be made. National legislators rarely function perfectly, and, when it comes to reality, domestic laws might suffer from serious shortcomings. In the next chapter, it will be shown how states' obligation to protect and prevent has been developed and what this obligation includes.

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<sup>77</sup> Criminal Code, Federal Gazette No. 60/1974. The full name of the act in German: "Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen (Strafgesetzbuch – StGB)", BGBl. Nr. 60/1974

<sup>78</sup> (Austrian) Criminal Code, Article 33, paragraph (2), point 1

<sup>79</sup> (Austrian) Criminal Code, Article 72

<sup>80</sup> However, it fulfils the requirements of Article 46, point a, of the Istanbul Convention. See: Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). First (baseline) evaluation of Austria on the implementation of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, *supra* note 27, § 146.



### III. DUE DILIGENCE OBLIGATION

#### 1. THE MEANING AND HISTORY OF DUE DILIGENCE OBLIGATION

The due diligence obligation is an established standard based on which it is for the state “to prevent [...] violations, to investigate and sanction perpetrators or to provide appropriate reparations to [the victim]”.<sup>81</sup> It amounts to a positive obligation, whereby a state is required actively to create those circumstances in which protected rights are effective in practice. As a consequence of this rule, the state can be held responsible<sup>82</sup> “for an act otherwise solely attributed to a non-state actor”<sup>83</sup> should it be proved that the authorities failed to complete the aforementioned requirements. The standard does not only exist in the field of violence against women and it was born elsewhere.

The doctrine was created out of the world of written norms.<sup>84</sup> From its long history<sup>85</sup>, *Velásquez Rodríguez v. Honduras*<sup>86</sup>, the landmark decision of the Inter-American Court of Human Rights (hereinafter: “IACtHR”) has to be mentioned here as the first milestone. Thereafter, the doctrine was regionally granted normative recognition by the adoption of the Convention of Belém do Pará<sup>87</sup> and the Istanbul Convention<sup>88</sup>.

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<sup>81</sup> *Opuz v. Turkey*, application no. 33401/02, judgment of 9 June 2009, ECtHR, § 84

<sup>82</sup> On the indirect nature of this responsibility, see: HESSBRUEGGE, Jan Arno. “The Historical Development of the Doctrines of Attribution and Due Diligence in International Law”. New York University Journal of International Law and Politics, 2004, vol. 36, p. 265-306, at p. 268.

<sup>83</sup> Explanatory Report of the Istanbul Convention, § 59

<sup>84</sup> CHINKIN, Christine. “Sources”. In: MOECKLI, Daniel – SHAH, Sangeeta – SIVAKUMARAN, Sandesh – HARRIS, David (ed.). “International Human Rights Law”. Oxford University Press. Oxford, 2012, at p. 92

<sup>85</sup> See: (i) ERTÜRK, Yakin – Special Rapporteur on violence against women, its causes and consequences. “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”. 20 January 2006. E/CN.4/2006/61. § 19; and, as referred to therein in footnote 2, (ii) Hessbruegge, Jan Arno. “The Historical Development of the Doctrines of Attribution and Due Diligence in International Law”, *supra* note 82

<sup>86</sup> *Velásquez Rodríguez v. Honduras*, merits, judgment of 29 July 1988, IACtHR, Series C No. 4.

<sup>87</sup> *Supra* note 52, Article 7, subparagraph b and g

<sup>88</sup> *Supra* note 1, Article 5, paragraph (2)

*Velásquez Rodríguez v. Honduras* was a case on forced disappearance, actually the first case decided by the IACtHR<sup>89</sup> followed shortly by others of the same kind and against the same respondent<sup>90</sup>. Mr. Angel Manfredo VELÁSQUEZ RODRÍGUEZ, a university student, was allegedly kidnapped in 1981, then detained and tortured by members of armed forces.<sup>91</sup> From 1981 to 1984, 100 to 150 persons<sup>92</sup>, all “considered dangerous to State security”<sup>93</sup> owing to having been involved in activities of this kind<sup>94</sup>, disappeared in Honduras “follow[ing a] similar pattern”<sup>95</sup>. In this case, the Guatemalan authorities either disavowed the fact of disappearance, or were unable or unwilling to take the necessary steps in order to ascertain what had happened. The victim, or his corpse, was never found. On the grounds of the foregoing, the court established that “[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of *due diligence* to prevent the violation or to respond to it as required by the [American] Convention [on Human Rights]”<sup>96</sup> (emphasis added).<sup>97</sup>

In its General recommendation No. 19<sup>98</sup>, the CEDAW Committee formulated that “[u]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with *due diligence* to prevent violations of rights or to

<sup>89</sup> Cf. (i) <https://iachr.ils.edu/cases/vel%C3%A1squez-rodr%C3%ADguez-v-honduras> [website of the Law School, Loyola Marymount University, Los Angeles (United States of America), “Velásquez Rodríguez v. Honduras”] and (ii) [http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda\\_casos\\_contenciosos.cfm?lang=en](http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=en) (website of the IACtHR, “Decisions and Judgments”)

<sup>90</sup> See: (i) *Godínez Cruz v. Honduras*, merits, judgment of January 20 1989, IACtHR, Series C No. 5. and (ii) *Fairén Garbi and Solís Corrales v. Honduras*, merits, judgment of March 15 1989, IACtHR, Series C No. 6. (no violation found to have been established by the court)

<sup>91</sup> *Velásquez Rodríguez v. Honduras*, *supra* note 86, § 3

<sup>92</sup> *Id.*, § 147, point a

<sup>93</sup> *Id.*, § 147, point d, subpoint i

<sup>94</sup> *Id.*, § 147, point g, subpoint i

<sup>95</sup> *Id.*, § 147, point b

<sup>96</sup> American Convention on Human Rights: “Pact of San José, Costa Rica”. San José, Costa Rica, 22 November 1969. UNTS Vol. 1144, 1979 I-17955, p. 143

<sup>97</sup> *Velásquez Rodríguez v. Honduras*, *supra* note 86, § 172. Cited, *inter alia*, by *Opuz v. Turkey*, *supra* note 81, § 83

<sup>98</sup> *Supra* note 37

investigate and punish acts of violence, and for providing compensation” (emphasis added).<sup>99</sup>

This provision, while it reiterates the essence of the statement of *Velásquez Rodríguez v. Honduras*, expounds that the appropriate state response to the commitment of a violation encompasses investigation, punishment and compensation<sup>100</sup>.

The UN world conferences on women<sup>101</sup> well demonstrated the increasing importance of, and interest in, the subject. The participants of the Vienna World Conference on Human Rights (1993) declared that “[t]he human rights of women should form an integral part of the United Nations human rights activities”<sup>102</sup> and urged “Governments, institutions, intergovernmental and non-governmental organizations to intensify their efforts for the protection and promotion of human rights of women and the girl-child”<sup>103</sup>.

The significance of the DEVAW, the next milestone of the emergence of the obligation, lies in the fact that this is the first document that was adopted by the international community<sup>104</sup> as a whole, in the shape of a resolution of the UN General Assembly, that contains the due diligence formula.

<sup>99</sup> CEDAW Committee, General recommendation No. 19, § 9. The state’s responsibility for private actors’ actions is derived from Articles 2(e), 2(f) and 5 of the CEDAW.

<sup>100</sup> As a matter of interest, it is worth mentioning at this point that, as Mrs. ERTÜRK has found in her report, the compensation as an aspect of due diligence “remains grossly underdeveloped”. “[I]n a few States”, “compensation [is] available to women through funds for victims of crime or through civil proceedings (see: ERTÜRK, Yakin. “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”, *supra* note 85, § 55). In Austria, for example, “[i]f compensation cannot be obtained from the perpetrator” in the criminal or in a separate civil law proceedings, the victim might be entitled to state compensation from a scheme set up by the law [see: Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). First (baseline) evaluation of Austria on the implementation of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, *supra* note 27, § 128].

<sup>101</sup> See: (i) World Conference of the International Women's Year. Mexico City, Mexico, 19 June to 2 July 1975. Report, E/CONF.66/34; (ii) World Conference of the United Nations Decade for Women: Equality, Development and Peace. Copenhagen, Denmark, 14 to 30 July 1980. Report, A/CONF.94/35; (iii) World Conference to review and appraise the achievements of the United Nations Decade for Women: Equality, Development and Peace. Nairobi, Kenya, 15 to 26 July 1985. Report, A/CONF.116/28/Rev.1; (iv) Fourth World Conference on Women. Beijing, China, 4-15 September 1995. Report, A/CONF.177/20/Rev.1. For further information on the conferences, see: <http://www.un.org/womenwatch/daw/beijing/>.

<sup>102</sup> World Conference on Human Rights, Vienna, Austria, 14-25 June 1993. Vienna Declaration and Programme of Action, § I/19

<sup>103</sup> *Id.*

<sup>104</sup> *Cf. supra* note 50

In the spirit of the combat for the eradication of gender-based violence, the position of the Special Rapporteur on violence against women, its causes and consequences (hereinafter: “Special Rapporteur”) has been created by the Commission on Human Rights<sup>105</sup> with the mandate of seeking information and recommending appropriate measures “within the framework of [...] *all* [...] international human rights instruments” (emphasis added)<sup>106</sup>.

The due diligence standard was incorporated into the jurisprudence of violence against women by the Inter-American human rights system.<sup>107</sup> The report of the Inter-American Commission on Human Rights (hereinafter: “IACHR”) in *Maria da Penha Maia Fernandes v. Brazil*<sup>108</sup> (2001) demonstrated that the continuous tolerance by the authorities of violence against women by the lack of sufficient protection for the victim and the impunity of the perpetrator went far beyond the case: “it [was] a pattern”<sup>109</sup> that “encourage[d] violence against women”<sup>110</sup> in the society. Due to the facts of the case, the husband shot her wife, while she was sleeping. The victim survived, and, despite of several operations she had to undergo, she “suffered irreversible paraplegia and other physical and psychological trauma”.<sup>111</sup> It lasted for more than seventeen years for the Brazilian authorities to put an end to the procedure with a final decision<sup>112</sup>, and when the investigation of the IACHR’s report was made, already fifteen years had passed<sup>113</sup>. The significance of the decision cannot be

<sup>105</sup> See: Resolution 1994/45. Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women. 4 March 1994, E-CN.4/RES/1994/45.

The three-year appointment was subsequently prolonged.

<sup>106</sup> *Id.*, § 7

<sup>107</sup> Actually, the first such case could be: *Raquel Martí de Mejía v. Peru*, case 10.970, report no. 5/96, 1 March 1996, Inter-American Commission of Human Rights. (See: United Nations. “In-depth study on all forms of discrimination against women. Report of the Secretary-General”. 6 July 2006. A/61/122/Add.1, Box 10, at p. 72. Accessible: <http://www.un.org/womenwatch/daw/vaw/SGstudyvaw.htm>.) In this case, the petitioner claimed that her husband was abducted by a military group, and she herself, who witnessed the event, was raped.

<sup>108</sup> *Maria da Penha Maia Fernandes v. Brazil*, case 12.051, report no. 54/01, April 16, 2001, Inter-American Commission of Human Rights

<sup>109</sup> *Id.*, § 55

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*, § 8

<sup>112</sup> See: SPIELER, Paula. “The Maria da Penha Case and the Inter-American Commission on Human Rights: Contributions to the Debate on Domestic Violence Against Women in Brazil”. *Indiana Journal of Global Legal Studies*, 2011, vol. 18, Issue 1, Article 6, p. 121-143, at p. 133

<sup>113</sup> *Maria da Penha Maia Fernandes v. Brazil*, *supra* note 108, § 32

overestimated.<sup>114</sup> As the result of the recommendation of the IACHR, a national campaign was launched in Brazil<sup>115</sup> in order to raise awareness on violence against women. As to legislative amendments, among other things, protection measures were introduced, whereby the perpetrator became removable from the proximity of the victim.<sup>116</sup>

Yakin ERTÜRK, the then incumbent Special Rapporteur, expounded in her 2006 report that the due diligence standard was systematically applied by various human rights bodies.<sup>117</sup> She added that the principle amounted to customary international law.<sup>118</sup> The UN Secretary General also confirmed the states' international law obligations under the clause in his report on violence against women.<sup>119</sup> The CEDAW Committee, when revising its General Recommendation No. 19, also endorsed "the prohibition of gender-based violence against women" as a principle of customary international law.<sup>120</sup> The document prepared by the Special Rapporteur analyses how due diligence obligation could be completed the most efficiently. It points out that too much emphasis is laid on the consequences of an infringement occurring, instead of further concentrating on its prevention.<sup>121</sup> She welcomes, as a good practice, the introduction of "civil remedies such as restraining or expulsion orders"<sup>122</sup>. The possibility of having recourse to mediation between the victim and the perpetrator is clearly refused. Instead, making the investigation and, as the result of a due

<sup>114</sup> See: SPIELER, Paula. "The Maria da Penha Case and the Inter-American Commission on Human Rights: Contributions to the Debate on Domestic Violence Against Women in Brazil", *supra* note 112, at p. 134-143

<sup>115</sup> *Id.*, at p. 137

<sup>116</sup> *Id.*, at p. 142

<sup>117</sup> See: ERTÜRK, Yakin. "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", *supra* note 85, § 28

<sup>118</sup> *Id.*, § 29. See also: CHINKIN, Christine. "Sources", *supra* note 84, at p. 93.

<sup>119</sup> United Nations. "In-depth study on all forms of discrimination against women. Report of the Secretary-General". *Supra* note 107, § 254

<sup>120</sup> CEDAW Committee, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, § 2. 26 July 2017, CEDAW/C/GC/35

<sup>121</sup> See: ERTÜRK, Yakin. "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", *supra* note 117, § 15

<sup>122</sup> *Id.*, § 39

process, the imposition of sanctions are those that correspond to women's interests.<sup>123</sup> The report broadens the scope of due diligence in that it defines different levels, where activity must be pursued. Without appropriate measures applied on the individual women's, the community's, the state's, and on the transnational level, the goal of a world free from violence against women cannot be achieved.<sup>124</sup> Tools employed as broadly as possible have the potential to disseminate information on the subject. Educating the society that "subordination and violence are not a fate" yields that those involved dare to ask for, and receive, real help in case of need.<sup>125</sup>

## 2. DUE DILIGENCE OBLIGATION IN THE COUNCIL OF EUROPE

The importance of due diligence was stressed also within the framework of the CoE since the emergence of the term in the human rights practice. In its Declaration on equality of women and men<sup>126</sup> (1988), the Committee of Ministers (hereinafter: "CoM") referred to the equality between the sexes "as a sine qua non of democracy and an imperative of social justice"<sup>127</sup>, and suggested that national and international strategies provide for, *inter alia*, "the eradication of violence in the family and in the society"<sup>128</sup>. The 3<sup>rd</sup> European Ministerial Conference held in 1993<sup>129</sup> emphasized the essence of due diligence obligation when noted that "the responsibility of States is engaged with regard to acts of violence carried out by public officials and that it may also be engaged with regard to private acts of violence if the State does not take action with sufficient *swiftness* to prevent the violation of rights or investigate acts of violence, to sanction them and provide support for the victims"<sup>130</sup> (emphasis added). In

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<sup>123</sup> *Id.*, §§ 39 and 53

<sup>124</sup> *Id.*, § 76

<sup>125</sup> On the empowerment of women's, see: *id.*, §§ 78-81 and 85.

<sup>126</sup> Declaration on equality of women and men, Committee of Ministers, 16 November 1988

<sup>127</sup> *Id.*, Article I

<sup>128</sup> *Id.*, Article VI, point f

<sup>129</sup> Declaration on Policies for Combating Violence against Women in a Democratic Europe. 3<sup>rd</sup> European Ministerial Conference on equality between women and men. Rome, Italy, 21-22 October 1993

<sup>130</sup> *Id.*, § 18

2002, the CoM recognized in its recommendation on the protection of women against violence<sup>131</sup> that “states have an obligation to exercise due diligence to prevent, investigate and punish acts of violence, whether those acts are perpetrated by the state or private persons, and provide protection to victims”. In its Appendix, the recommendation suggested several actions for the Member States for achieving its targeted objectives. In this respect, the CoM proposed the introduction of stay-away injunctions and restraining orders “as interim measures aimed at protecting the victims”<sup>132</sup>. The drafters invoked Austria and Finland as countries where such measures had already been established.<sup>133</sup> In its Recommendation on gender equality standards and mechanisms (2007)<sup>134</sup>, the CoM reiterated the significance of “the development, adoption and enforcement of effective national gender equality legislation”.<sup>135</sup>

After a series of non-binding instruments, the CoE adopted the Istanbul Convention in 2011. Article 5, paragraph 2, on due diligence is articulated so as to correspond to the case law of the ECtHR<sup>136</sup>. Based on the Explanatory Report, due diligence “is not an obligation of result, but an obligation of means”<sup>137</sup>. Therefore, its compliance has to be examined on a case-by-case basis. The report underlines that reparation includes the “guarantee of non-repetition of the violation”, too. Thus, the issue of a protection order may fall under the category of not only the protection, but also the redemption element of due diligence.

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<sup>131</sup> Recommendation Rec(2002)5 of the Committee of Ministers to member States on the protection of women against violence. 30 April 2002

The strengthening of the CoE’s commitment is presented by the fact that when the Explanatory Memorandum of the recommendation cited § 18 of the Declaration on Policies for Combating Violence against Women in a Democratic Europe, it replaced the wording “with sufficient *swiftness*” by “with sufficient *diligence*” (emphases added). Explanatory Memorandum, § 53

<sup>132</sup> Recommendation Rec(2002)5, *supra* note 131, Appendix to Recommendation Rec(2002)5, § 58, point b

<sup>133</sup> Recommendation Rec(2002)5, *supra* note 131, Explanatory Memorandum, Appendix to the recommendation, § 92

<sup>134</sup> Recommendation CM/Rec(2007)17 of the Committee of Ministers to member states on gender equality standards and mechanisms. 21 November 2007

<sup>135</sup> *Id.*, § 14

<sup>136</sup> Explanatory Report of the Istanbul Convention, § 58

<sup>137</sup> *Id.*, § 59

The Istanbul Convention entered into force on 1 August 2014. It was ratified by 33 Member States, including Austria, out of 47.<sup>138</sup> Hungary, though signed, has not yet ratified the treaty.<sup>139</sup> However, the gaps on the map of the treaty do not mean that those living in non-ratifying Member States remain without assistance, since, as mentioned above, the ECtHR has made a rich case law<sup>140</sup> on due diligence obligation.

The Convention for the Protection of Human Rights and Fundamental Freedoms<sup>141</sup> (hereinafter: “ECHR”) protects victims of violence against women under Article 2 (right to life), 3 (prohibition of torture) as well as—in conjunction with the foregoing—13 (right to an effective remedy) and 14 (prohibition of discrimination).

Already in 1993, the CoM proposed “the elaboration of a possible Protocol to the European Convention on Human Rights embodying the fundamental right of women and men to equality”<sup>142</sup>. As a result, Protocol No. 12 was adopted in 2000, including a provision relating to the general prohibition of discrimination (Article 1)<sup>143</sup>, the ratification and implementation of which was later urged by the CoE<sup>144</sup>. Another provision, adopted as early as 1984, should be further mentioned, namely Article 5 (equality between spouses) of Protocol No. 7. Even

<sup>138</sup> According to the situation as of 9 November 2018. Cf. <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>.

<sup>139</sup> On an attempt in the Hungarian Parliament at the launch of the ratification procedure, see: Proposal No. H/2390 for Decision of the Parliament on the Ratification of the Istanbul Convention (in Hungarian: “H/2390 sz. országgyűlési határozati javaslat az Isztambuli Egyezmény elfogadásáról”).

Accessible: <http://www.parlament.hu/irom40/02390/02390.pdf>. The proposal did not pass.

<sup>140</sup> Cf. the Preamble of the Istanbul Convention. A separate part in Chapter IV deals with the case law of the ECtHR.

<sup>141</sup> Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, Italy, 4 November 1950. CETS No. 005 (UNTS Vol. 213, 1955 I-2889, p. 221). Protocols omitted.

<sup>142</sup> (i) Declaration on Policies for Combating Violence against Women in a Democratic Europe. 3<sup>rd</sup> European Ministerial Conference on equality between women and men. *Supra* note 129, § 28, point a; (ii) Report by the Secretary General prepared by the Directorate of Human Rights. 3<sup>rd</sup> European Ministerial Conference on equality between women and men. § 29

<sup>143</sup> The new provision relates not only to equality between women and men but also to racism and intolerance. Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, § 9

<sup>144</sup> Resolution “Bridging the gap between de jure and de facto equality to achieve real gender equality”. MEG 7 (2010) 1 resolution, § 19. 7<sup>th</sup> Council of Europe Conference of Ministers responsible for Equality between Women and Men. Baku, Azerbaijan, 24-25 May 2010



though these Articles are not as relevant to violence against women, their existence is a significant sign of the organization's devotion to the whole issue.

### 3. DUE DILIGENCE OBLIGATION IN THE EUROPEAN UNION

Though the Charter of Fundamental Rights of the European Union<sup>145</sup> does not specifically mention the due diligence obligation, similarly to the ECHR, it contains specific provisions relevant for the protection of the victims of violence against women, such as Article 1 (human dignity), 2 (right to life), 3 (right to the integrity of the person), 21 (non-discrimination), 23 (equality between women and men) and 47 (right to an effective remedy [...]). In addition, the EU, based on Article 59, paragraph 2, of the ECHR, as incorporated by Protocol No. 14, has the legal possibility for, and, based on the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (hereinafter: "Treaty of Lisbon"), the obligation<sup>146</sup> of, acceding to the ECHR.

As to soft law adopted by the EU in the field of violence against women, the European Parliament resolution of 26 November 2009 on the elimination of violence against women<sup>147</sup> needs to be mentioned. The European Parliament drew attention to the causes and the harmful consequences of the phenomenon, and calls the whole EU, including its different bodies and the Member States, for acting and setting up efficient mechanisms.

As a lower-level legal instrument, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and

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<sup>145</sup> Charter of Fundamental Rights of the European Union. OJ C 326, 26.10.2012, p. 391

<sup>146</sup> See: (i) Article 6, paragraph 2, of the Treaty on European Union, as amended by Article 1, paragraph 8, of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon: OJ C 306, 17.12.2007, p. 1; UNTS Vol. 2702, 2010 I-47938, p. 3) and (ii) Declaration No. 2 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon signed on 13 December 2007 (OJ C 115, 9.5.2008, p. 335)

<sup>147</sup> European Parliament resolution of 26 November 2009 on the elimination of violence against women, *supra* note 30

protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA<sup>148</sup>, issued based on Article 82, paragraph 2, point c, of the Treaty on the Functioning of the European Union, contains specific rights to be afforded, as minimum requirement, to victims of crimes by the Member States. Directive 2012/29/EU sets standards to follow in criminal proceedings. Even though the term “due diligence” is not mentioned therein, the obligations relevant to domestic violence that Member States are obliged to transpose into their national legal systems might all be interpreted as part of it. States are bound to ensure that measures necessary to protect victims and avoid their secondary and repeat victimization are available. These measures include “procedures established under national law for the physical protection of victims and their family members”.<sup>149</sup> Though the recitals of Directive 2012/29/EU do not form part of legally binding rules, Recital (52) explicitly mentions interim injunctions and protection or restraining orders as examples to such measures. Directive 2012/29/EU recognizes the importance of victims’ individual assessment to establish their specific protection needs.<sup>150</sup> In this respect the fact that one has been victim of domestic violence, as a factor of having suffered “considerable harm”, must be taken into account.<sup>151</sup>

Further to Directive 2012/29/EU, there are two other significant EU instruments that are relevant to our topic, namely, Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order<sup>152</sup> and Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual

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<sup>148</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. OJ L 315, 14.11.2012, p. 57.

The Directive was adopted in accordance with the Resolution of the Council of 10 June 2011 on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings (OJ C 187, 28.6.2011, p. 1). On the transposition and the implementation of the Directive, see: Guidance Document of the Directorate-General for Justice. Ref. Ares(2013)3763804 - 19/12/2013.

<sup>149</sup> Directive 2012/29/EU, Article 18

<sup>150</sup> Directive 2012/29/EU, Article 22, paragraph 1

<sup>151</sup> Directive 2012/29/EU, Article 22, paragraph 3

<sup>152</sup> Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order. OJ L 338, 21.12.2011

The Directive was adopted in accordance with the Resolution of the Council of 10 June 2011 on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings.

recognition of protection measures in civil matters<sup>153</sup>. Both instruments set the target of providing cross-border protection for those who might otherwise be in danger. They oblige Member States to recognize, without any special procedure, protection measures, criminal (Directive 2011/99/EU) or civil [Regulation (EU) No 606/2013], adopted by another.<sup>154</sup> Member States are not required to introduce new measures or to amend the existing ones; they are only to ensure protection available under their domestic law.<sup>155</sup> The legislator was not primarily motivated by assisting victims of gender-based violence, since the scope of the Directive and the Regulation is extended to victims of all kind.<sup>156</sup> By adopting these rules, the EU intended to ensure the realization of the freedom of movement for persons. Interestingly, a new sort of due diligence obligation emerged. Both instruments emphasize that the fact that their “objective [...] cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level” served as a basis for their adoption in terms of the principle of subsidiarity.<sup>157</sup> However, it is unclear whether the omission of such legislation or its inadequate character, could lead, or could have led, to action against the EU, similarly to the inaction of a state when it should not have remained passive.

It should be noted that the EU signed the Istanbul Convention in 2017. Consequently, after ratification, the Convention will become part of the *acquis*, and will bind not only the EU bodies but each and every Member States, too. Nevertheless, this possibility does not mean that the Convention’s becoming binding in this manner will overwrite the non-ratification of certain Member States, since “the two Council Decisions on the signature of the Convention authorized the signing of the Convention by the EU with regard to matters related to judicial

<sup>153</sup> Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, OJ L 181, 29.6.2013, p. 4

<sup>154</sup> See: (i) Directive 2011/99/EU, Article 1; (ii) Regulation (EU) No 606/2013, Article 4, paragraph 1

<sup>155</sup> See: (i) Directive 2011/99/EU, Recital 8; (ii) Regulation (EU) No 606/2013, Recital 12

<sup>156</sup> See: (i) Directive 2011/99/EU, Recital 9; (ii) Regulation (EU) No 606/2013, Recital 6

<sup>157</sup> See: (i) Directive 2011/99/EU, Recital 39; (ii) Regulation (EU) No 606/2013, Recital 39

cooperation in criminal matters and asylum and non-refoulement”<sup>158</sup>. Consequently, the EU competence in respect of the Istanbul Convention will be limited.<sup>159</sup>

As can be seen, the EU is rather active in the field of violence against women though with hands tied by the principles of subsidiarity and proportionality<sup>160</sup>. The future might bring further actions mainly if the Istanbul Convention enters into force in respect of it.

In the following Chapter, the relevant ECtHR and CJEU case law will be assessed in order to present the international framework of the protection to be ensured by the states.

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<sup>158</sup> Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs. Violence against women and the EU accession to the Istanbul Convention. 2017, PE 596.815, at p. 90. Accessible:

[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596815/IPOL\\_STU\(2017\)596815\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596815/IPOL_STU(2017)596815_EN.pdf)

<sup>159</sup> According to the EU’s study, “[h]owever, uncertainties remain on the extent to which the EU will remain limited by the legal bases of the Council Decisions, considering the potential for broader EU competence in this area”. *Id.*, at p. 92.

<sup>160</sup> Treaty on European Union, Article 5, paragraph 4

“[T]he perpetrator’s rights cannot supersede women’s human rights to life and to physical and mental integrity.”

CEDAW Committee

## IV. DUE DILIGENCE OBLIGATION IN THE CASE LAW OF THE EUROPEAN JUDICIAL FORA

The ECtHR has considered the due diligence obligation in several of its judgments. Of them, those delivered in *Osman v. the United Kingdom*<sup>161</sup> and *Opuz v. Turkey*<sup>162</sup> are indisputably the most important ones, which, however, are to be treated together with other relevant decisions.<sup>163</sup> In this Chapter, the relevant judgment of the CJEU, namely the one issued in *Magatte Gueye and Valentín Salmerón Sánchez*<sup>164</sup> will also be processed, as it deals with domestic violence in the context of the permissibility of restraining orders mandatorily prescribed at the national level. I am looking through these judgments providing a compilation of the principles that govern the field of violence against women and define the outcome of the review of national legislations and state practices.

### 1. THE EUROPEAN COURT OF HUMAN RIGHTS AND THE CEDAW COMMITTEE

#### 1.1. *Osman v. the United Kingdom*

In *Osman*, not the issue of violence against women was at stake—though many of the facts go well with such a case. Nevertheless, the Court established therein a set of criteria, the so-called *Osman test*<sup>165</sup>, by which it subsequently assessed in violence against women cases whether the national authorities had completed their duties deriving from Article 2 of the ECHR, that is, the protection of the lives of those within the jurisdiction of the state concerned. As follows from the Court’s interpretation, the right to life does not only indicate

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<sup>161</sup> *Supra* note 22

<sup>162</sup> *Opuz v. Turkey*, *supra* note 81

<sup>163</sup> The effects of the *Osman test* were significant to the case law of the ECtHR in the field of human trafficking, too. In this regards, see, for example: *Rantsev v. Cyprus and Russia*, application no. 25965/04, judgment of 7 January 2010, ECtHR, §§ 286 and 296.

<sup>164</sup> *Magatte Gueye and Valentín Salmerón Sánchez*, C-483/09 and C-1/10, preliminary judgment of 15 September 2011, Court of Justice of the European Union, ECR [2011] I-08263

<sup>165</sup> See: *Osman v. the United Kingdom*, *supra* note 22, § 116

the prohibition of the “unlawful taking of life” but also the protection of individuals by setting up and operating an effective criminal law system with a view to “prevention, suppression and sanctioning<sup>166</sup>” of violations.<sup>167</sup>

In this case, Paul PAGET-LEWIS, a teacher, developed a pathological attachment at Homerton House School towards his pupil, Ahmet OSMAN, who was fourteen years old at the material time. There was no indication of sexual relationship between them, or harassment of this sort. Motivated by his jealousy, the teacher threatened Leslie GREEN, the pupil’s friend at the same school; once, he followed the friends in his car; he even changed his name to one very similar to Ahmet’s (as discovered, the teacher had already altered his original name taking up that of one of his former pupils whom he had taught previously at another school, and he was known under this new name at Homerton House School). Several events occurred that remained unsolved, although suspecting the teacher thereof appeared to be logic: graffiti was drawn around the school pointing to sexual contact between Ahmet and Leslie, school files relating to these pupils were stolen, a brick was thrown to the window of the house of the OSMAN family, etc. The teacher was examined by a psychiatrist on three occasions following meetings with the leadership of the school and the education authority. As a result, he was forbidden to go on with working at the Homerton House School though not permitted from teaching in general. After a while, the police were also involved in the proceedings. Mr. PAGET-LEWIS blamed Mr. PERKINS, the deputy head teacher, for his desperate situation, and also made reference to “doing something” in the future. The police attempted to arrest him but

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<sup>166</sup> On the lack of the state’s appropriate handling of a violation as a possible sign of the state’s complicity, see, in another context, the letter of Elie WIESEL to Antonio CASSESE: “not to prosecute criminals would amount to condoning their crimes”. Cited by CASSESE, Antonio. “International Criminal Law”. Oxford University Press. Oxford, 2008, at p. 325, footnote 23. Antonio CASSESE was the first President of the International Criminal Tribunal for the former Yugoslavia, and Elie WIESEL was a Holocaust survivor, professor, Nobel Peace Prize laureate. The correspondence was on the importance of the punishment of acts against humanity committed during the Yugoslav Wars.

The “condoning argument” also appeared, for example, in *Maria da Penha Maia Fernandes v. Brazil*: “The failure to prosecute and convict the perpetrator under these circumstances is an indication that the State *condones* the violence suffered Maria da Penha, and this failure by the Brazilian courts to take action is exacerbating the direct consequences of the aggression by her ex-husband.” (emphasis added) *Supra* note 108, § 55.

<sup>167</sup> *Osman v. the United Kingdom*, *supra* note 22, § 115

not for the threatening, as they were allegedly not informed of the seriousness thereof, but for acts of vandalism committed against the property of the OSMAN family. However, the arrest remained unsuccessful due to his disappearance. When the teacher reappeared, he shot Ahmet's father to death and seriously wounded Ahmet, then drove to Mr. PERKINS' house, where he wounded him and killed his son. Mr. PAGET-LEWIS was arrested and convicted.<sup>168</sup>

The applicants, Ahmet OSMAN and his mother, based their complaint on the assumption that the authorities failed to protect the OSMAN family despite the menace that Mr. PAGET-LEWIS constituted during a long period of time.<sup>169</sup> The provision referred to by the applicants were Articles 2, 6(1), 8 and 13 of the Convention of which the Court found violation only of Article 6(1) what is marginal in respect of our assessment.

In its analysis, the ECtHR reminded of the unpredictability of human behaviour, the existence of policy priorities and the scarcity of financial resources.<sup>170</sup> Whereas it would be desirable, it is, at the same time, utopian that the state be able to prevent the occurrence of each violation. The law cannot expect the realisation of what "impose[s] impossible or disproportionate burden on the authorities"<sup>171</sup>. This could be called the lower limit of the required performance of the state. It means that should the authorities fail to prevent a crime what would otherwise not burden them disproportionately, the responsibility of the state could be invoked. For the interpretation of this standard, the Court provided further reference. For finding a violation, it must be pointed out that "the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk"<sup>172</sup>. At

<sup>168</sup> As to the fact of the case, see: *Osman v. the United Kingdom*, *supra* note 22, §§ 11-59.

<sup>169</sup> *Id.*, § 10

<sup>170</sup> *Id.*, § 116

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

this point, the judgment contains an interesting analysis. We might assume that the Court came forward with this standard as a response to the arguments of the respondent Government. The United Kingdom, while acknowledging the positive obligations inherent in Article 2, suggested to exclude the responsibility should the level of the failure to protect have not qualified—employing criminal law elements—at least as “wilful disregard” or “gross dereliction”<sup>173</sup>. The Court rejected this defence, since “[s]uch a rigid standard” is capable of undermining the protection inherent in the Convention.<sup>174</sup> Instead, what is compatible with the Convention is that the State is obliged to perform in a way that is reasonably expectable of it.<sup>175</sup> Not surprisingly, the reasonableness of expectations can only be assessed “in light of all the circumstances”<sup>176</sup>.

Here, I would like to refer back to the beginning of the Court’s train of thought. Even though the prohibition of “impossible or disproportionate burden [to be imposed] on the authorities”<sup>177</sup> assessed, among others, in light of the “priorities and resources”<sup>178</sup> has been put into words in a general way, it would be interesting to examine, whether this principle contains the same level of expectation in each situation, or in case of those which pose greater threat to the community as a whole, for example in the event of terrorist acts, the state would have to perform better.

In its assessment, the Court created an upper limit, too, in order to restrain the state from exaggerated activism. Exercising their powers in crime prevention, national authorities are expected not only to act in light of their narrow exclusionary possibilities as expressed above

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<sup>173</sup> *Id.*, § 107

<sup>174</sup> *Id.*, § 116

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*, § 116

<sup>178</sup> *Id.*



but also of the “due process and other guarantees” contained by the Convention especially, as enlisted in the judgment, in Articles 5 and 8.<sup>179</sup>

According to the above, the state’s possibility, and obligation, to act can be found between these two limits the contents of which are always interpreted on a case-by-case basis. It should be noted here, nevertheless, that *Osman*, as put forward earlier, is not about violence against women, though many of the threats posed by Mr. PAGET-LEWIS to the persons concerned in the affair, being the teacher driven by his attachment, are similar to those that could be found therein. As a consequence, the limits established might generally be applicable in violence against women cases only by improvement. It is this aspect where the introduction of the *Opuz test*<sup>180</sup> will provide further specification.

## 1.2. CEDAW Committee

Understandably, a state summoned to the Court might argue that protective measures, for example detention, were not taken due to the obligation, for instance, to respect the private life of the perpetrator. This argument should in fact be forgotten in violence against women cases. In such instances, “the victim’s right to protection must take priority”<sup>181</sup>. This principle was laid down by the CEDAW Committee in *A.T. v. Hungary, Şahide Goekce (deceased) v.*

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<sup>179</sup> *Id.*

As a point of interest, when the Hungarian Constitutional Court made its prior constitutionality inquiry into the Act on the Restraining Orders Applicable in Case of Violence between Relatives (later promulgated as the Act LXXII of 2009), it strengthened that state intervention in the private sphere might be justified in case the intervention is needed and proportional taking into account its objective, namely, the protection of the victims of domestic violence. See: Decision No. 53/2009. (V. 6.) of the Constitutional Court, *supra* note 26, § IV.4.1. Cited by TAMÁSI, Erzsébet – BOLYKY, Orsolya. “A távoltartás gyakorlati alkalmazásának körülményei”. *Iustum Aequum Salutare*, 2014, vol. 4, p. 51–84, at p. 56. Accessible: <http://ias.jak.ppke.hu/hir/ias/20144sz/03.pdf>.

<sup>180</sup> *Opuz v. Turkey*, *supra* note 81

<sup>181</sup> LOGAR, Rosa. “Good Practices and Challenges in Legislation on Violence against Women”. Expert Paper for the Expert Group Meeting on good practices in legislation on violence against women, United Nations Division for the Advancement of Women. 20 May 2008, Vienna (Austria). EGM/GPLVAW/2008/EP.10, at p. 11. Accessible: <http://www.un.org/womenwatch/daw/egm/vaw/legislation/2008/expertpapers/EGMGPLVAW%20Paper%20Rosa%20Logar.pdf>

*Austria and Fatma Yildirim (deceased) v. Austria*<sup>182</sup>, then accepted and approved by the ECtHR<sup>183</sup>. As the CEDAW Committee formulated, “[a]lthough [...] it is necessary in each case to determine whether detention would amount to a disproportionate interference in the basic rights and fundamental freedoms of a perpetrator of domestic violence, such as [the right to property, the right to privacy,]<sup>184</sup> the right to freedom of movement and to a fair trial, the Committee is of the view [...] that the perpetrator’s rights cannot supersede women’s human rights to life and to physical and mental integrity”<sup>185</sup>. The CEDAW Committee suggested the application of a “pro-arrest” policy.<sup>186</sup>

Though the supremacy of a victim’s interests is emphasized, the CEDAW Committee, similarly to the ECtHR, also talks about the necessity of “determin[ing] whether detention would amount to a disproportionate interference in the basic rights and fundamental freedoms of a perpetrator”<sup>187</sup>. This is not the only likeness between the jurisprudence of the two human rights bodies. The “knew or ought to have known” element of the *Osman test* is well reflected

<sup>182</sup> See: (i) *A.T. v. Hungary*, *supra* note 29, § 9.3; (ii) *Şahide Goekce (deceased) v. Austria*, *supra* note 29, §§ 12.1.5 and 12.3(b); and (iii) *Fatma Yildirim (deceased) v. Austria*, *supra* note 29, §§ 12.1.5 and 12.3(b).

It is worth mentioning that this standard was devised by the CEDAW Committee in the case against Hungary [see: (i)] and not in the ones against Austria [see: (ii) and (iii)]. Cf. LOGAR, Rosa. “Good Practices and Challenges in Legislation on Violence against Women”, *supra* note 181, at p. 11.

As a matter of interest, I would like to draw attention to a case from Pennsylvania, United States of America, in which the appellant, convicted of spousal sexual assault, involuntary spousal deviate sexual intercourse and simple assault, found injurious the provisions of the Spousal Sexual Assault Statute based on which the court condemned him. He argued that the statute violated his right to privacy. In contrast, the Supreme Court of Pennsylvania, confirming the impugned sentence, established that “[t]he state has a compelling interest in protecting the fundamental right of all individuals to control the integrity of his or her own body”. The court also noted that “[w]hen discussing the passage of this piece of legislation, Rep. HARPER stated, ‘I think that we as legislators should make laws to protect those who cannot protect themselves [...]’. Further, the court added that “[t]he crimes of rape and involuntary deviate sexual intercourse are crimes of violence clearly within the ambit of the state’s power to police.” [See: *Commonwealth v. Shoemaker* (1986), Supreme Court of Pennsylvania, 518 A.2d 591, 359 Pa. Super. 111. The case was mentioned by: SCHNEIDER, Elizabeth M. “The Violence of Privacy”. *Supra* note 17, at p. 988, footnote 61.] What is striking here is that some of the core elements of the due diligence obligation can be found therein, as well as the formulation of the primacy of victim’s rights was much ahead of the above-cited parallel decisions of human rights bodies.

<sup>183</sup> *Opuz v. Turkey*, *supra* note 81, § 147

<sup>184</sup> See: *A.T. v. Hungary*, *supra* note 29, § 9.3

<sup>185</sup> See: *Şahide Goekce (deceased) v. Austria*, *supra* note 29, § 12.1.5; and *Fatma Yildirim (deceased) v. Austria*, *supra* note 29, § 12.1.5

<sup>186</sup> See: *Şahide Goekce (deceased) v. Austria*, *supra* note 29, § 3.8; and *Fatma Yildirim (deceased) v. Austria*, *supra* note 29, § 3.8

<sup>187</sup> *Id.*

in *Şahide Goekce (deceased) v. Austria*<sup>188</sup> and *Fatma Yildirim (deceased) v. Austria*<sup>189</sup> (but not yet in *A.T. v. Hungary*<sup>190</sup>)<sup>191</sup>. The tests of the two institutions are but not the same. While the ECtHR required “a real and immediate risk to the life”, the CEDAW Committee was satisfied if the victim was “in serious danger”<sup>192</sup>. Given that the victims in both cases before the CEDAW Committee deceased prior to lodging the communications, the question may seem to remain hypothetical whether the latter formula sets up a lower standard of risk. However, the answer thereto is able to well illustrate the development of the jurisprudence of the ECtHR.

### 1.3. *Opuz v. Turkey*

The Court’s line of argumentation in *Opuz*<sup>193</sup> has deeply been inspired by the jurisprudence of the CEDAW Committee representing the link between different organs and the positive effect that they might produce on each other’s activities.

In this case, the applicant was living in a violent marriage with her husband, H.O. They became acquainted with each other through the relationship of their parents, as the applicant’s mother and the husband’s father, A.O., also formed a couple. The applicant and H.O. had three children. Despite the regular abuses and threats of the husband, and sometimes of his father as well, against the applicant and her mother, no effective prosecution was carried out given that the constant withdrawal of the complaints prevented the authorities from doing so. Once, H.O. even tried to run over his wife and her mother. The husband was charged with attempted murder, but the proceedings were discontinued, as the victims withdrew their former statements maintaining that the event had been due to an unfortunate accident. The

<sup>188</sup> *Şahide Goekce (deceased) v. Austria*, *supra* note 29

<sup>189</sup> *Fatma Yildirim (deceased) v. Austria*, *supra* note 29, § 3.8

<sup>190</sup> *A.T. v. Hungary*, *supra* note 29

<sup>191</sup> See: *Şahide Goekce (deceased) v. Austria*, *supra* note 29, § 12.1.4; and *Fatma Yildirim (deceased) v. Austria*, *supra* note 29, § 12.1.4

<sup>192</sup> *Id.*

<sup>193</sup> *Opuz v. Turkey*, *supra* note 81

applicant sought to divorce from his husband, but this motion was later also revoked. The applicant and her mother requested protective measures from the authorities. On an occasion, the applicant was seriously injured with a knife by her husband, though the bodily harm was not life-threatening. As a consequence, an indictment was issued against him. According to A.O. and H.O., the mother attempted to separate her daughter and H.O., and the deterioration of the relationship must have been traced back to her actions. After the knife assault, the applicant moved to her mother's place. The mother complained of the intensification of the threats from the part of H.O. and A.O. She also claimed that she was harassed by telephone, and A.O. presented himself several times in front of the house holding a knife or a shotgun. These events led to a tragedy, namely, H.O., after almost seven years from the first assault had been reported to the authorities, shot her mother-in-law to death. The husband was convicted to life imprisonment that was mitigated due to the argument of the defence that the mother had provoked him before the shooting. Having served six years in prison, he was released pending the examination of his appeal. The applicant claimed before the Court that her ex-husband was still threatening her and her current partner, and the authorities failed to protect them.<sup>194</sup>

The Court found violation of Articles 2, 3 and 14, taken in conjunction with Articles 2 and 3, of the Convention, whereas it established that there was no need to examine the case separately under Article 6 and 13. In its assessment, the Court stated that though it could not be showed whether the course of events would have occurred differently should the authorities have acted otherwise, “a failure to take reasonable measures which could have had a *real prospect* of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State”<sup>195</sup> (emphasis added). This is a clear split with the more stringent aspects in *Osman* in the light of which it is arguable whether there would still be no violation

<sup>194</sup> As to the facts of the case, see: *id.*, §§ 7-69.

<sup>195</sup> *Id.*, § 136

in it.<sup>196</sup> As the Turkish Government argued that any action from their part would have infringed the couple's family life<sup>197</sup>, the Court enlisted a set of factors, including the seriousness of the offence, whether the accused used a weapon and the history of the relationship, that can be balanced when deciding on whether the prosecution should continue even after the withdrawal of the complaint<sup>198</sup>. According to the Court, there exists "in some instances" a hierarchy of the rights guaranteed in the Convention<sup>199</sup>, and, referring at this juncture back to *A.T. and Yildirim*, "in domestic violence cases perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity"<sup>200</sup>. Interpreting its findings in *Osman*<sup>201</sup>, the Court added that "once the situation has been brought to their attention, the national authorities cannot rely on the victim's attitude for their failure to take adequate measures"<sup>202</sup>. Applying this rule to the present case, the withdrawal of the victim's complaint does not amount to an excuse of the state for not acting properly, as suggested by its due diligence obligation. This finding has a serious consequence on states: even though the domestic legislation does not permit the pursuance of proceedings for certain reasons<sup>203</sup>, the state itself is under the obligation of protecting victims. Thus, the necessary internal impunity of the inactive domestic officials does not necessarily lead to the state's impunity in the

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<sup>196</sup> This approach has been elaborated in *E. and Others v. the United Kingdom*, again as an answer to the respondent Government's argument. In this case, "the Government argued that notwithstanding any acknowledged shortcomings it has not been shown that matters would have turned out any differently, in other words, that fuller co-operation and communication between the authorities under the duty to protect the applicants and closer monitoring and supervision of the family would not necessarily have either uncovered the abuse or prevented it." According to the Court, "[t]he test under Article 3 however does not require it to be shown that "but for" the failing or omission of the public authority ill-treatment would not have happened. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State."

*E. and Others v. the United Kingdom*, application no. 33218/96, judgment of 26 November 2002, ECtHR, § 99

<sup>197</sup> *Opuz v. Turkey*, *supra* note 81, § 140

<sup>198</sup> *Id.*, § 138

<sup>199</sup> *Id.*, § 144

<sup>200</sup> *Id.*, § 147

<sup>201</sup> In *Osman*, the Court found that "it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge". *Supra* note 22, § 116.

<sup>202</sup> *Opuz v. Turkey*, *supra* note 81, § 153

<sup>203</sup> The Court made a comparative analysis on whether the authorities of the Member States of the CoE had the legal possibility to continue criminal proceedings only in possession of the victim's complaint. To this end, see: *id.*, § 87-89.

international sphere. Based on the foregoing, it can be argued that the Court significantly widened the scope of the state's protective obligation, namely, the upper limit of the *Osman test*.

#### 1.4. *Valiulienė v. Lithuania*

The *Osman test* was further expanded in *Valiulienė v. Lithuania*<sup>204</sup>, in which the applicant was assaulted on five occasions by her live-in partner within a period of one month. Each time, the victim suffered minor injuries which did not result in any health problems. As stated by the applicant, the ill-treatment continued after she had reported the incidents to the police. The applicant also complained of an e-mail supposedly sent to her by the son of the assailant in which the man threatened her. The conduct of the national authorities was not consistent in the case. The proceedings were lengthy without any formal result. Four and a half years after the submission of the claim, the public prosecutor discontinued the proceedings referring to an amendment that had entered into force two years before. Based on this legislative change, the prosecution of minor bodily harm should have been carried out by the victim him- or herself except when the prosecutor considered the case of public importance. However, he did not do so.<sup>205</sup> By the time the applicant had the opportunity personally to proceed in the case, the crime became time-barred.<sup>206</sup> The Court found violation of Article 3 of the Convention, whereas it did not deem necessary to examine the application separately under Article 8.

The case is interesting for several reasons. Here, I would like to point out the separate opinions annexed to the judgment. Judge JOČIENĖ was of the opinion that the insults suffered by the applicant did not reach the minimum level of severity required for the incident to

<sup>204</sup> *Valiulienė v. Lithuania*, application no. 33234/07, judgment of 26 March 2013, ECtHR

<sup>205</sup> The Law on Protection Against Domestic Violence, allegedly as a consequence of the on-going case before the Court, was adopted only years later. The act declared domestic violence cases of public importance. See: *id.*, § 37.

<sup>206</sup> As to the facts of the case, see: *id.*, §§ 7-8, 14 and 21.

qualify under Article 3.<sup>207</sup> As opposed to her, Judge PINTO DE ALBUQUERQUE would have gone even further articulating a more gender-sensitive decision. Admitting that the due diligence obligation is not an obligation of result but of means<sup>208</sup>, he became aware of a slight modification of the *Osman test* as applied by the Court in the present case. He suggested making the rule stricter and setting the lower limit of the test even lower, namely applying “real and *present* risk”<sup>209</sup> (emphasis added) instead of “real and immediate risk”. Providing with an exhaustive list of the most important international legal instruments in the field of violence against women, he argued that the obligation of the national authorities of waiting until the occurrence of an imminent risk would not be a realistic requirement taking into account the specificities of the issue. As domestic violence cases tend to escalate suddenly, the state intervention at a later stage might risk being out of time. “Even though the risk might not be imminent, it is already a *serious risk*”<sup>210</sup> when it is present”<sup>211</sup> (emphasis added). He added that such “anticipated duty to prevent and protect is the reverse side of the context of widespread abuse and violence already known to the State authorities”<sup>212</sup>.

I would like to emphasize that the reasons of Judge PINTO DE ALBUQUERQUE did not form part of the majority decision. It is also true that the Court did not even mention *Osman* in its decision nor the *Osman test*. However, the concurring findings seem to be not only relevant but sound, too.<sup>213</sup> In *Valiulienė*, no serious injuries were caused to the victim. The only death

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<sup>207</sup> See: *id.*, at p. 50. Interestingly, Judge JOČIENĖ is a woman (and appointed to the Court in respect of Lithuania).

<sup>208</sup> See: *id.*, at p. 27. As cited there, see also: Explanatory Report of the Istanbul Convention, § 59.

<sup>209</sup> *Valiulienė v. Lithuania*, *supra* note 204, at p. 31

<sup>210</sup> At this point, I would like to refer back to the case law of the CEDAW Committee, especially what I have written in connection with the “serious danger” requirement.

<sup>211</sup> *Valiulienė v. Lithuania*, *supra* note 204, at p. 31

<sup>212</sup> *Id.*

<sup>213</sup> In this respect, it is important to mention what Judge PINTO DE ALBUQUERQUE was talking about during his presentation at the Central European University on 16 February 2018. He strengthened the force of justified separate opinions which might have significance in their decisive effect on other judges’ approaches in future cases.

threat was carried out in an e-mail by a third person<sup>214</sup>—on the credibility of which the Court did not rule given that the police were not informed thereof at the material time.<sup>215</sup> The judgment also took note of the concluding observation on Lithuania issued by the CEDAW Committee in which concerns were raised owing to “the high prevalence of violence against women”<sup>216</sup> in the country.

### **1.5. *Rumor v. Italy and Talpis v. Italy***

In *Rumor v. Italy*<sup>217</sup>, the applicant was beaten up, threatened with a knife and a pair of scissors by her partner, and was prevented from leaving the apartment by taking her keys away. When the three children woke up as a consequence of the clamour, they witnessed part of the incident. The applicant was taken to the hospital where she was diagnosed by concussion and several bruises. The partner was arrested, accused and convicted of “attempted murder, kidnapping, aggravated violence and threatening behaviour”<sup>218</sup>. He was allowed to serve part of the punishment in form of a house arrest in a reception centre. The court first refused his application filed for this purpose, as the place requested was in the municipality where the applicant lived. However, the second one, located 15 kilometres far from her residence, was approved. The partner had the opportunity to work out of the centre. After serving the sentence, he continued living there. The applicant was granted the sole custody of the children with the restriction that the father, after having served the imprisonment, might request the restoration of his parental rights.<sup>219</sup>

The applicant complained that the Italian authorities failed to protect and support her after the violence, and relied on Articles 3 and 14 of the Convention. She adduced among other things

<sup>214</sup> The perpetrator was a Belgian citizen. The menacing e-mail was written by his son, born from a different mother, and in Dutch. It is not detailed where the son might have lived at that time, but it can be speculated that not in Lithuania.

<sup>215</sup> *Valiulienė v. Lithuania*, *supra* note 204, § 68

<sup>216</sup> *Id.*, § 39

<sup>217</sup> *Rumor v. Italy*, application no. 72964/10, judgment of 27 May 2014, ECtHR

<sup>218</sup> *Id.*, § 12

<sup>219</sup> As to the facts of the case, see: *id.*, §§ 6-30.



that she suffered from serious psychological distress as an aftermath of the aggression.<sup>220</sup> The Court held unanimously that there had been no violation.

Putting aside the detailed overview of the arguments, I would like to highlight only some elements of the judgment. As to the complaint that relied upon the nearness of the reception centre to the applicant's home, the Court concluded that, after having refused the first proposal relating to the receiving facility, the domestic court carefully assessed the circumstances of the centre approved leaving no doubts pertinent to the rightness of the decision.<sup>221</sup> The Court rejected the argument concerning the lack of informing the applicant of the fact that the convicted was granted the permission to stay in a house arrest the proximity of which even increased her fear.<sup>222</sup> In this respect, the Court noted that "the Convention may not be interpreted as imposing a general obligation on states to inform the victim of ill-treatment about the criminal proceedings against the perpetrator, including about possible release on parole from prison or transfer to house arrest"<sup>223</sup>. The victim also resented that the aggressor did not have to undergo psychological treatment, due to the simple fact that the domestic court did not order such therapy—which was not objected to by the Court.<sup>224</sup>

As can be seen here, no tragic event took place and no physical injuries were caused. The latter is to be emphasized as the applicant claimed that she suffered serious psychological trauma caused by the attack and the way the authorities handled the case. However, it seems that these consequences did not result for the Court in a sufficient amount of violation to

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<sup>220</sup> As to the applicant's arguments, see: *id.*, §§ 39-48.

<sup>221</sup> *Rumor v. Italy*, *supra* note 217, §§ 44, 66-68. As to the compatibility of this finding with the Istanbul Convention, see: MCQUIGG, Ronagh J. A. "Domestic Violence as a Human Rights Issue: *Rumor v. Italy*". *European Journal of International Law*, 2015, vol. 26, no. 4, p. 1009-1025, at p. 1022.

<sup>222</sup> *Rumor v. Italy*, *supra* note 217, §§ 41 and 72

<sup>223</sup> *Id.*, § 72. Cf. Article 56, paragraph 1, point c, of the Istanbul Convention: "Parties shall take the necessary legislative or other measures to protect the rights and interests of victims, [...], at all stages of investigations and judicial proceedings, in particular by [...] informing them, under the conditions provided for by internal law, of their rights and the services at their disposal and the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein, as well as the outcome of their case[.]" Cited by: MCQUIGG, Ronagh J. A. "Domestic Violence as a Human Rights Issue: *Rumor v. Italy*", *supra* note 221, at p. 1023.

<sup>224</sup> *Rumor v. Italy*, *supra* note 217, §§ 43 and 70

establish the breach of the Convention. This approach is arguable, and we consider that it does not go well with the case law developed by the Court.<sup>225</sup> Presumably, should the husband committed relevant violence against the applicant while he was in a house arrest, to which he did otherwise have physical opportunity, the outcome of the assessment must have been the opposite. Further, it is also possible to argue that the Court did not fully respect the *Osman test*, especially with its gender-sensitive way of application established in *Opuz*. Therefore, the analysis of the Court seems rather speculative, since the findings might be interpreted as having been deducted from the final result of the events instead of taking into account each and every factual element.

Now, let us move on to *Talpis v. Italy*<sup>226</sup>. In this case, the applicant's husband, an alcoholic, regularly abused his wife. They had two children, a daughter and a son. Once, even the daughter was beaten up, when she tried to stop her drunken father from assaulting the mother. On an occasion, the husband threatened the applicant with a knife. She sought refuge with the aid of an association dealing with victims of domestic violence. In the meantime, she filed a claim against his husband and requested emergency protection measures of the authorities. When, seven months after the submission of the claim, the applicant was heard, she decreased the severity of the aggressive behaviour of her husband compared to the allegations she contended in her original application. Being a Romanian and Moldavian citizen, she traced back the differences between her statements to the fact that at the time when she submitted her claim, she did not have sufficient command of the Italian language. (Before the Court, she justified this modification with the psychological pressure her husband's had put on her.) When the police were called out for the family's house during the night, they found on the spot the door of the bedroom broken and bottles of alcoholic drinks lying on the floor. The

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<sup>225</sup> On whether the conclusions of the Court would have been the same should the case have emerged after the entry into force of the Istanbul Convention, see: MCQUIGG, Ronagh J. A. "Domestic Violence as a Human Rights Issue: Rumor v. Italy", *supra* note 221.

<sup>226</sup> *Supra* note 63

applicant informed the police that she had lodged a complaint against her husband which she had subsequently modified. The policemen did not observe any sign of physical trauma. Due to his alcoholic state, the policemen brought the husband to the hospital. He left the hospital during the same night. When going home drunk, he was stopped by the police carrying out an identity check on him. After being given a warning, he was released. When he arrived home, he tried to attack the applicant with a knife. Their son intervened to protect his mother. The son died from his injuries, whereas the mother was seriously wounded.<sup>227</sup>

The Court found violation of Articles 2, 3, and Article 14 taken in conjunction with Articles 2 and 3, of the Convention, as well as it held that it was not necessary to examine separately the alleged breach of Articles 8 and 13.

For the first sight, it is not striking that the Court found violation. However, the decision-making was not unanimous in case of Article 2 and 14. As to Article 2, the Court evaluated as decisive the long period of time that elapsed from the submission of applicant's claim without the assessment of the merits of the case. Judge SPANO argued that the majority put impossible burden on the domestic authorities. For him, it was not clear what kind of measures should have been taken by the police that could also have had the potential to respect the rights of the husband. The dissenting opinion assessed that the attack was the result of an "unpredictable human behaviour" instead of "ongoing and repeated direct or indirect threats to life".<sup>228</sup> He warned of the limited nature of the tools to protect victims of domestic violation saying that "the doctrine of positive obligations cannot remedy all human rights violations occurring in the private sphere if due process considerations, also worthy of Convention protection, are not to be rendered obsolete".<sup>229</sup>

<sup>227</sup> As to the facts of the case, see: *Talpis v. Italy*, *supra* note 63, §§ 1 and 6-48.

<sup>228</sup> *Id.*, § 11 of Judge SPANO's partly dissenting opinion

<sup>229</sup> *Id.*, § 15

Judge EICKE drafted his partly concurring, partly dissenting opinion with the knowledge of the standpoint of Judge SPANO. Interestingly, Judge EICKE provided a more thorough summary of the telltale facts that could have led the police to the need of intervention. For him, one of the most important indicators was the alcoholic state in which the perpetrator allegedly committed those acts in respect of which the proceedings were pending.<sup>230</sup> Nevertheless, the police failed to intervene despite the clear signs of the husband's intoxicated state.

As argued by the majority, should the authorities have acted in due time, namely, should they have handled the applicant's complaint and request for protection measures with "particular diligence"<sup>231</sup> as required in domestic violence cases<sup>232</sup>, there would have been a "real chance to change the course of events"<sup>233</sup>. The Court also stressed that "the real and immediate risk needs to be evaluated in the particular context of the domestic violence"<sup>234</sup>.

It has to be pointed out that during the night of the fatal events, the police intervened twice though allegedly by different officers. The proceedings against the husband were pending for a longer period of time. These are the elements for which the national authorities were blamed by the Court. The Court referred to the specificities of domestic violence that must have been taken into account when assessing the circumstances.

## 1.6. Summary

It can be established that the Court's practice is in constant change. As we could see in the fine-tuning of the *Osman test*, the Court tends to apply a more victim-friendly approach capable to better react to the aspects of domestic violence. We can argue that, in *Valiulienė*, by introducing just an implicit "present" into the test, the reality of a case-by-case analysis

<sup>230</sup> *Id.*, § 3 of Judge EICKE's the partly concurring, partly dissenting opinion

<sup>231</sup> *Talpis v. Italy*, *supra* note 63, § 129 (based on the French version of the judgment)

<sup>232</sup> *Id.* (based on the French version of the judgment)

<sup>233</sup> *Id.*, § 121 (based on the French version of the judgment)

<sup>234</sup> *Id.*, § 122 (based on the French version of the judgment)

was stressed. Such a move confirms the gender approach that has already been noticed in the case law of the CEDAW Committee, namely that “the perpetrator’s rights cannot supersede women’s human rights to life and to physical and mental integrity”<sup>235</sup>. Although a state would consequently be obliged to do more, however, it could also benefit therefrom. If the level of protection is set too wide, the risk of finding a violation *ex post* is significantly higher in case of a tragedy occurred compared to a situation where the state is allowed to intervene at an earlier stage of the danger, that is, when state measures are needed as soon as a “present” risk is observed.

New arguments and principles specific to this issue appeared in the judgements since the adoption of *Osman*. This trend is all the more important, since it needs to be explained in a coherent way why the state is obliged to intervene in the private sphere that was considered for so long free from external interference. For this purpose, the Court applies the results of psychology to underpin a specific assessment of violence against women.<sup>236</sup> Consequently, the behaviour of the victims different from what one rationally would expect from them can nevertheless rationally be explained. I believe that this direction should be strengthened, namely that the Court attempts thoroughly to comprehend the relevant processes to provide an adequate legal answer. Without a deeper understanding of the inner dynamics of violence against women, damaging gendered patterns and bias will not disappear from the society, and

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<sup>235</sup> *Supra* note 185

<sup>236</sup> See: Judge PINTO DE ALBUQUERQUE’s concurring opinion in *Valiulienė v. Lithuania*, *supra* note 204, at p. 27, footnote 9. Here, the reference was made by the Judge to a rape case in which the Court took note of the submission of an intervener. Based on the “evolving understanding of the manner in which rape is experienced by the victim[,] [...] victims of sexual abuse – in particular, girls below the age of majority – often provide no physical resistance because of a variety of psychological factors or because they fear violence on the part of the perpetrator.” *M.C. v. Bulgaria*, application no. 39272/98, judgment of 4 December 2003, ECtHR, § 164. On the psychical effects of violence on victim’s behaviour, see also: *Karen Tayag Vertido v. The Philippines*, views, 1 September 2010. Communication No. 18/2008, CEDAW/C/46/D/18/2008, § 2.8.

the omissions of authorities will only reproduce these flaws, including merely formalistic legal reactions.<sup>237</sup>

The Court might be criticized arguing that it is not fully consistent and its practice pertinent to the admissibility and obligation of state intervention is not yet crystallized. For example, the decision made in *Rumor* was objectionable in light of the appearing principles. Nonetheless, the Court is in a good situation, since it delivers its decisions not *in abstracto* but as a response to a concrete violation, though by elaborating and applying standards. The Court might still be reluctant to take a more progressive stand, whereas it is much easier to find a violation *ex post*, that is, when a tragedy has already taken place.

## 2. COURT OF JUSTICE OF THE EUROPEAN UNION

In the era of globalization, even the bodies and courts dealing with human rights issues produce significant effect on one another. The CJEU delivered an important preliminary ruling in *Gueye*<sup>238</sup> in which it endorsed a fairly radical solution to protect the victims of domestic violence. In this joined case, the Luxembourg Court had to decide whether the protection system introduced by Spain was in line with the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA – hereinafter: “Council Framework Decision”)<sup>239</sup>. According to the Spanish Criminal Code<sup>240</sup>,

<sup>237</sup> On the negative effects of not understanding the nature of violence against women, see: *Karen Tayag Vertido v. The Philippines*, *supra* note 236, §§ 2.9, 3.4-3.5, 8.2, 8.4-8.6.

In this respect, it is interesting to mention that Directive 2012/29/EU makes mandatory for the Member States of the European Union that “officials likely to come into contact with victims” receive appropriate training “to increase their awareness of the needs of victims and to enable them to deal with victims in an impartial, respectful and professional manner” [Article 25, paragraph 1]. According to the Directive, Member States must also ensure that particular attention is paid to victims of gender-based violence, violence in a close relationship and sexual violence during the individual assessment of whether they need specific protection and to “what extent they would benefit from special measures [...] due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation” [Article 25, paragraph 1 and 3].

<sup>238</sup> *Supra* note 164

<sup>239</sup> Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA). OJ L 82, 22.3.2001, p. 1. The Council Framework Decision was repealed by Directive 2012/29/EU.

<sup>240</sup> Organic Act No. 10 of 23 November 1995 on the Criminal Code. In Spanish: “Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal”.

the person who commits certain crimes, for example homicide, assault causing injury, deprivation of liberty, crimes infringing sexual liberty and privacy, against a spouse or even a person with whom the perpetrator was in an emotional relationship, even without cohabitation, a prohibition on approaching the victim as an ancillary punishment for a duration of minimum one month and maximum ten years, depending on the character of the main punishment, is to be prescribed obligatorily.<sup>241</sup> Should the convicted infringe the rules of the restraining decision, he commits a separate crime and is sanctioned by imprisonment.<sup>242</sup>

In this case, the courts imposed on the two convicted, Mr. GUEYE and Mr. SALMERÓN SÁNCHEZ, prohibition on approaching the victims for seventeen and sixteen months, respectively. However, the partners continued the cohabitation despite the judgment. The cohabitation lasted for months. The convicted were arrested and brought before the court. The victims contended in their testimonies that they had decided to cohabit with their partners voluntarily and free from coercion, and during the cohabitation, no violence had taken place. The offenders were convicted again.<sup>243</sup>

The request for preliminary ruling was filed by the appeal court that had to decide on the submission of the convicted. The offenders objected to the punishment arguing that resuming cohabitation with the free consent of the partners did not constitute violation of the stay-away order.<sup>244</sup>

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The forthcoming provisions relevant to the judgment in *Gueye* have in principle remained unaffected since the issue of the judgment. See: (Spanish) Criminal Code, Article 40, paragraph 3; Article 48, paragraph 2; Article 57, paragraph 2 and 3; Article 173, paragraph 3; and Article 468, paragraph 2.

<sup>241</sup> *Gueye*, *supra* note 164, §§ 12-14

<sup>242</sup> *Id.*, § 15

<sup>243</sup> *Id.*, §§ 19-20, 22-25

<sup>244</sup> *Id.*, § 26

The CJEU had to determine, among others, whether the obligatory prescription of a restraining order contradicted to the Council Framework Decision when the victim herself did not seek for the punishment being applied<sup>245</sup>.

As the EU Court established, the first paragraph of Article 3<sup>246</sup> of the Council Framework Decision implied that “the victim [must] be able to give testimony in the course of the criminal proceedings which can be taken into account as evidence”.<sup>247</sup> However, this right did not constitute any right for the victim to define the penalties. In addition, the EU Court was of the opinion that “the objective [of the criminal law pertaining to domestic violence] is not only to protect the interests of the victim as he or she perceives that but also other more general interests of society”<sup>248</sup>. As a consequence, it held that the imposition of a mandatory stay-away order was not inconsistent with the Council Framework Decision, “particularly

<sup>245</sup> It is not clear whether the victims objected in this case to the punishment as sanction for the offenders’ non-compliance with the ancillary penalty or (and) they originally stood against the prescription of the restraining order (see: *id.*, § 27). Taking into consideration the interpretation of the Supreme Court of Spain in its non-binding resolution, it might be the former (see: *id.*, § 36). However, this question may be relevant only in respect of the domestic law of Spain and not of the consequences of the assessment of the EU Court. See: *id.*, § 27.

<sup>246</sup> The first paragraph of Article 3 (Hearings, and provision of evidence) of the Council Framework Decision provides that “[e]ach Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence”.

Further to that, the EU Court has also established its decision on Article 2, paragraph 1 (Respect and recognition – “Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It [...] shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings.”), and Article 8 (Right to protection – “1. Each Member State shall ensure a suitable level of protection for victims and, where appropriate, their families or persons in a similar position, particularly as regards their safety and protection of their privacy, where the competent authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy. 2. To that end, [...] each Member State shall guarantee that it is possible to adopt, if necessary, as part of the court proceedings, appropriate measures to protect the privacy [...] of victims and their families or persons in a similar position. [...]”).

The relevant provisions of Directive 2012/29/EU currently in force are as follows: (i) Article 10 (Right to be heard): “1. Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence. [...]”; (ii) Article 18 (Right to protection): “Without prejudice to the rights of the defence, Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying. When necessary, such measures shall also include procedures established under national law for the physical protection of victims and their family members.” (Many other provisions generally relevant to the issue of domestic violence are not mentioned at this point.)

<sup>247</sup> *Gueye, supra* note 164, § 58

<sup>248</sup> *Id.*, § 61



where interests other than the specific interests of the victim must be taken into consideration”<sup>249</sup>.

As we could see, Spain opted for a tool in protecting victims of domestic violence by fairly roughly intervening in privacy, as the measure was employed even against the express will of the victim. The judgment is of great significance in that it endorsed that interference. Nevertheless, the ground-breaking nature of the decision is to be interpreted with reservations. Firstly, there seem to be exceptions to the application of the stay-away order the prescription of which is literally mandatory. Namely that, as the Spanish Government argued during the proceedings before the CJEU, the “non-binding resolution”<sup>250</sup> of the Supreme Court of Spain establishing that “the consent of the woman does not exclude liability to punishment as a consequence of non-compliance of the restraining measure”<sup>251</sup> “does not preclude the courts and tribunals from being able to depart from that interpretation provided that reasons for doing so are stated”<sup>252</sup>. In other words, it is allowed to disregard the application of the punishment in well-justified cases. Secondly, the ruling evaluated the rights of the victims in criminal proceedings, though it also included arguments on the protection of the interests of the victims and other persons. Superficially, it tends to interpret the lower level of the ECtHR’s test in the EU framework. However, it would be inappropriate to consider it so, as no allusion has been made to any other human rights instruments. The request for ruling made reference only to the Council Framework Decision. The interpretation of the relevant EU provisions might change should the EU accede to the ECHR.<sup>253</sup>

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<sup>249</sup> *Id.*, § 62

<sup>250</sup> *Id.*, § 36

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*, § 43

<sup>253</sup> According to Rosa LOGAR, an obligatory restraining order of an excessive duration is against the defendant’s rights to privacy which the legislator is to be aware of. See: the interview with LOGAR, Rosa, executive director, Domestic Abuse Intervention Centre Vienna. Vienna, 3 May 2018. The notes made during the interview are in the author’s possession.

Notwithstanding these restrictions, *Gueye* is indeed significant as a decision being another station on the long way of providing more efficient protection for the victims of domestic violence. Its appropriateness in the framework of human rights would be indeed tested if the convicted would have lodged, or others in similar position would lodge, a claim to the Strasbourg Court under Article 8 of the Convention.

The next Chapter will deal with issue of whether victim's right to protection melts at some point into state's obligation to protect where the victim has no longer the right to refuse this protection.

“[T]he objective is not only to protect the interests of the victim but also other more general interests of society.”

Court of Justice of the European Union, case *Magatte Gueye and Valentín Salmerón Sánchez*

## V. VICTIM’S RIGHT TO PROTECTION OR STATE’S OBLIGATION TO PROTECT?

### 1. GENERAL ISSUES

As discussed above, victims have the right to seek for state’s protection on the one hand—and everyone, including the victim, the right to privacy on the other. The latter comprises victim’s own decision on whether she claims protection. Nonetheless, her capacity to decide is, and must be, limited when it comes to domestic violence. Criminal law acknowledges the right to (attempt) suicide. In a state governed by the rule of law, no one should be punished if one intends not to live any longer. Nevertheless, this right is interpreted narrowly in that no one should provide assistance for others to suicide—except for euthanasia. The analogy of throwing one’s life away and domestic violence is just seeming in the sense that when one determines to kill oneself everyone else is excluded from making this decision. In contrast, when the victim of domestic violence withdraws her denunciation and *decides* to continue suffering cannot necessarily be considered as the result of an autonomous decision-making process, since by the nature of violence, the victim’s mindset is significantly limited in these cases. As a consequence, state must accept these acts with some reservations. According to the due diligence obligation, the state might be left responsible for the consequences when the victim, having this state of mind, deliberates, for example, under coercion and, after all, a tragedy occurs. *Opuz* has clearly demonstrated that governments are held “accountable for failing to take adequate steps to protect victims of repeated domestic violence, even absent any active malfeasance on the state’s part”<sup>254</sup>. There is no clear-cut solution as to how to handle individual cases, since state interventions are to be ordered on a case-by-case basis and

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<sup>254</sup> ABDEL-MONEM, Tarik. “Opuz v. Turkey: Europe’s Landmark Judgment on Violence against Women”. Human Rights Brief, 2009, vol. 17, issue 1, p. 29-33, at p. 29

state must balance its obligation to protect and to respect for one's private and family life<sup>255</sup>. It is worth recalling again that out of these two rights, the former has priority.<sup>256</sup> Nevertheless, the Court provided for several aspects that must be taken into consideration when assessing the decision to pursue the prosecution<sup>257</sup> despite the withdrawal of the complaint, such as "the seriousness of the offence"<sup>258</sup>, "the chances of the defendant offending again"<sup>259</sup>, "the continuing threat to the health and safety of the victim or anyone else"<sup>260</sup>, "the history of the relationship"<sup>261</sup> and "the defendant's criminal history".<sup>262</sup> The Court added that "the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints"<sup>263</sup>. As a critique to the factors formulated by the Court, the list does not include all the elements that might emerge, "such as forced sex, extreme jealousy, and the use of drugs and alcohol"<sup>264</sup>. "As a practical matter state authorities should seek out richer and more sophisticated data on how to evaluate cases."<sup>265</sup>

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<sup>255</sup> Article 8 of the Convention

<sup>256</sup> *Supra* note 185

<sup>257</sup> *Opuz v. Turkey*, *supra* note 81, § 138

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*, § 139

<sup>264</sup> HANNA, Cheryl. "Health, Human Rights, and Violence against Women and Girls: Broadly Redefining Affirmative State Duties after *Opuz v. Turkey*". *Hastings International and Comparative Law Review*, 2011, vol. 34, p. 127-148, at p. 145.

<sup>265</sup> *Id.* In this context, HANNA mentions that "[t]he National Institute of Justice [in the United States], for example, has developed an assessment tool based on a review of women who were killed by their intimate partners. It lists fifteen factors, and found that women who score eight or higher have a very grave risk of being murdered." (*Id.*)

It is worth adding that in Austria, several risk assessment methods are used for evaluating "the lethality risk, the seriousness of the situation and the risk of repeated violence" (Istanbul Convention, Article 51). See: Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). First (baseline) evaluation of Austria on the implementation of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, *supra* note 27, § 170. As to the risk factors detected within the framework of a research project in Austria, see: *Cf.* LOGAR, Rosa. "Murder rarely happens out of the blue. Danger management and safety management as methods to prevent severe violence". *Domestic Violence Intervention Centre Vienna*, 2014, at p. 4-5.

Accessible: <https://www.interventionsstelle-wien.at/download/?id=440>.

It is unclear whether the Hungarian authorities apply any risk method for risk evaluation. Nevertheless, the respective directive of the Commander in Chief of the Police issued for the implementation of rules relating to civil law restraining orders comprises no indication to it. See: Directive No. 2/2018. (I. 25.) of the Commander in

The Court in *Opuz* could not but find violation of the Convention stating that “the response to the conduct of the applicant’s former husband was manifestly inadequate to the gravity of the offences in question”<sup>266</sup>. So, even if national authorities acted in conformity with what domestic laws provided for (in *Opuz*, discontinuing the investigation after the applicant withdrew her complaint), this cannot be evaluated so as to exempt the state from liability. State’s obligation to act is in a certain way objective, though within the limits of the impossible and disproportionate on the one hand, and the respect of due process and privacy on the other. Though the reaction of the authorities can in several instances be criticised, they are not in an easy position. The risk of the authorities intervening only in cases that have as “bad facts” as were in *Opuz* is real.<sup>267</sup>

## 2. VICTIM’S AUTHORIZATION OR PRIVATE MOTION IN CRIMINAL PROCEEDINGS

The approach of a legal system towards domestic violence might be well demonstrated by assessing whether victim’s private motion is needed for instituting criminal proceedings. This issue is all the more important, since victims are generally not in such an emotional position that they could turn to the authorities, or they might later on amend their testimonies made in a previous stage of the proceedings.

There are three types of criminal proceedings in respect of their initiation: (i) victim’s private motion<sup>268</sup> or authorization<sup>269</sup> is *not required*—though, of course, she can initiate it by

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Chief of the Police on the Implementation of Police Tasks Relating to the Handling of Violence between Relatives [in Hungarian: “a hozzátartozók közötti erőszak kezelésével összefüggő rendőrségi feladatok végrehajtásáról szóló 2/2018. (I. 25.) ORFK utasítás”].

<sup>266</sup> *Opuz v. Turkey*, *supra* note 81, § 160

<sup>267</sup> HANNA, Cheryl. “Health, Human Rights, and Violence against Women and Girls: Broadly Redefining Affirmative State Duties after *Opuz v. Turkey*”, *supra* note 264, at p. 145

According to a research conducted by a judge at the Central District Court of Pest (in Hungarian: “Pesti Központi Kerületi Bíróság”; Budapest, Hungary), the police do not act in many instances where domestic violence occurs, though they are aware of the situation, as it later turns out before the court when the victim seeks for civil law protection. See: (i) SZÜRÖSNÉ TAKÁCS, Andrea. “Nyolcéves lettem! – A hozzátartozók közötti erőszak miatt alkalmazható távoltartás első nyolc éve. 1. rész”. *Családi jog*, 2018, vol. 1, p. 18-23, at p. 22.; and (ii) SZÜRÖSNÉ TAKÁCS, Andrea. “Nyolcéves lettem! – A hozzátartozók közötti erőszak miatt alkalmazható távoltartás első nyolc éve. 2. rész”. *Családi jog*, 2018, vol. 2, p. 13-19, at p. 14.

<sup>268</sup> In Hungarian: “magánindítvány”

applying to the authorities—relating to offences subject to *public* prosecution; (ii) victim's private motion or authorization is *required* relating to offences subject to *public* prosecution; (iii) victim's private motion or authorization is *required* relating to offences subject to *private* prosecution.

As a matter of indication, the Istanbul Convention requires only in case of Articles 36 (sexual violence, including rape), 37 (forced marriage), 38 (female genital mutilation) and 39 (forced abortion and forced sterilization) that initiating the prosecution is not subordinated to the victim's report.<sup>270</sup> Consequently, it is not forbidden under it when so ordered by the national law for psychological violence<sup>271</sup>, stalking<sup>272</sup>, physical violence<sup>273</sup> or sexual harassment<sup>274</sup>.

In *Opuz*, the Strasbourg Court made a comparative analysis on whether Member States made the continuance of criminal proceedings in domestic violence cases after the withdrawal of victim's complaint upon the discretion of authorities. Already at that time, Austria belonged to the group in the members of which the authorities were required to continue criminal proceedings, whereas the Hungarian authorities had a certain margin of appreciation.<sup>275</sup> Unfortunately, the contents of the ECtHR's analysis is not publicized. It would have been interesting to learn of the reasons based on which it reached the above conclusions, since the Hungarian Criminal Code in force at the time provided that the victim did not have the right to withdraw her private motion that she had previously submitted.<sup>276</sup> Be it as it may, the law enforcement authorities may find themselves in a difficult situation, when, at a later stage of

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<sup>269</sup> In German: "Ermächtigung"

<sup>270</sup> Istanbul Convention, Article 44, paragraph 4, subject to reference Article 44, paragraph 1, points d and e

<sup>271</sup> Istanbul Convention, Article 33

<sup>272</sup> Istanbul Convention, Article 34

<sup>273</sup> Istanbul Convention, Article 35

<sup>274</sup> Istanbul Convention, Article 40

<sup>275</sup> *Opuz v. Turkey*, *supra* note 81, §§ 87-88

<sup>276</sup> See: Act IV of 1978 on the Criminal Code (in Hungarian: "a Büntető Törvénykönyvről szóló 1978. évi IV. törvény"), Section 31, paragraph (6).

In Austria, the authorization can be withdrawn before the closure of the taking of evidence of first instance. See: (Austrian) Code of Criminal Procedure, Federal Gazette No. 631/1975 (in German: "Strafprozeßordnung", BGBl. Nr. 631/1975), Article 92, paragraph (2).

the proceedings, the victim refuses to give evidence based on the family relationship with the perpetrator<sup>277</sup>, since victim's testimony might be the most significant evidence. To cover this possibility, the authorities are urged to make a thorough investigation and to collect all evidence on the one hand, and, on the other, they have to take all necessary measures to ensure that the perpetrator cannot manipulate the victim, for example, in the court room, or in front of it, while waiting for the court session.<sup>278</sup>

## 2.1. Austria

Out of the crimes relevant to violence against women, only the prosecution of deception<sup>279</sup> and sexual harassment<sup>280</sup> necessitate victim's authorization. International human rights bodies, in this respect, the CEDAW Committee, contributed to a great extent to streamlining the relevant provisions. In consequence of the tragedies that led the CEDAW Committee to find the violation of the CEDAW in *Şahide Goekce (deceased) v. Austria*<sup>281</sup> and *Fatma Yildirim (deceased) v. Austria*<sup>282</sup>, the requirement of obtaining the victim's authorization for the prosecution of dangerous threats made in the family<sup>283</sup> was abolished.<sup>284</sup> Thus, "victims

<sup>277</sup> As to Hungary, see: Act XC of 2017 on the Criminal Procedure (in Hungarian: "a büntetőeljárásról szóló 2017. évi XC. törvény"), Section 171, and Section 172, paragraph (1), point a). Nevertheless, the victim's testimony is to be taken into consideration despite of the withdrawal of her consent to testifying at a later stage of the proceeding. In this respect, see: (Hungarian) Code of Criminal Procedure, Section 177, paragraph (4).

As to the Austrian rules pertinent to the refusal of giving evidence, see: (Austrian) Code of Criminal Procedure, Article 156, paragraph (1), point 1, and Article 157, paragraph (1), point 1.

<sup>278</sup> Cf. Directive 2012/29/EU, Article 19, and Article 23, paragraph 3, point (b). *Supra* note 148.

As to the danger of the communication between the victim and the perpetrator, see: PATENT Association, "Bírószágok monitorozása a párkapcsolati erőszakkal érintett esetek kezelésében", Budapest, 2014, at p. 32.

Accessible:

[http://www.patent.org.hu/dokumentumok/jogyakorlatok/birosagfigyelo/Birosagok\\_monitorozasa\\_a\\_parkapcsolati\\_eroszakkal\\_erintett\\_esetek\\_kezeleseben\\_2014.pdf](http://www.patent.org.hu/dokumentumok/jogyakorlatok/birosagfigyelo/Birosagok_monitorozasa_a_parkapcsolati_eroszakkal_erintett_esetek_kezeleseben_2014.pdf).

<sup>279</sup> (Austrian) Criminal Code, Article 108

<sup>280</sup> (Austrian) Criminal Code, Article 218, paragraphs (1) and (1a)

Though this legislative change was not required by the Istanbul Convention, the provision relating to sexual harassment was criticized by NGOs given that it criminalizes only unwanted physical contacts ignoring those committed verbally or non-verbally. See: GREVIO Shadow Report NGO-Coalition, *supra* note 32, at p. 71.

<sup>281</sup> *Şahide Goekce (deceased) v. Austria*, *supra* note 29

<sup>282</sup> *Fatma Yildirim (deceased) v. Austria*, *supra* note 2929

<sup>283</sup> (Austrian) Criminal Code, Article 107, former paragraph (4)

<sup>284</sup> Comments by the Republic of Austria on the Recommendations made by the CEDAW Committee on August 6, 2007 concerning the Communications *Sahide GOEKCE*, No. 5/2005 and *Fatma YILDIRIM*, No. 6/2005, § A.I.2. In: GREVIO Shadow Report NGO-Coalition, *supra* note 32, at p. 117

[became] relieved of the pressure exerted by their families to withdraw their authorization for criminal prosecution”.

In Austria, cases where the crime is to be privately prosecuted are irrelevant to domestic violence.

## 2.2. Hungary

Compared to the Austrian provisions in force, the Hungarian Criminal Code requires victim’s private motion in many more instances, such as, in case of (i) battery causing minor bodily injury<sup>285</sup>; (ii) minor cases of sexual coercion<sup>286</sup>; (iii) sexual violence if committed “by force or threat against the life or bodily integrity of the victim”<sup>287</sup> and if no further qualifying element is realized; (iv) indecent exposure by “expos[ing one]self before another person in an indecent way if [...] such conduct violates the victim’s dignity”<sup>288</sup>; (v) violence in relationship<sup>289</sup> (aa) by seriously violating the victim’s human dignity by any degrading and violent conduct, or (bb) by misappropriating any assets belonging to conjugal or common property and thus causing serious deprivation to the victim;<sup>290</sup> and (vi) harassment<sup>291</sup>.

To return to violence in relationship, public prosecution is not conditioned by victim’s private motion when the crime, committed regularly, qualifies as battery causing minor bodily

<sup>285</sup> (Hungarian) Criminal Code, Section 164, paragraph (2). In Hungarian: “könnyű testi sértés”.

<sup>286</sup> (Hungarian) Criminal Code, Section 196, paragraph (1). In Hungarian: “szexuális kényszerítés”.

It qualifies as a minor case, when the crime is committed without realizing any of the aggravating factors. If any crime requiring no private motion has also been committed in connection with sexual coercion, no private motion is needed for the prosecution of the latter either. See: (Hungarian) Criminal Code, Section 207.

<sup>287</sup> (Hungarian) Criminal Code, Section 197, paragraph (1), point a). In Hungarian: “szexuális erőszak”.

If any crime requiring no private motion has also been committed in connection with sexual violence, no private motion is needed for the prosecution of the latter either. See: (Hungarian) Criminal Code, Section 207.

The translation was made by using the code’s English version in Jogtár (electronic collection of Hungarian laws).

<sup>288</sup> (Hungarian) Criminal Code, Section 205, paragraph (3). In Hungarian: “szemérenstestítés”.

<sup>289</sup> (Hungarian) Criminal Code, Section 212/A, paragraph (1). In Hungarian: “kapcsolati erőszak”.

This crime is *subsidiary* meaning that any act will be prosecuted under this Section only if no other more serious crime has been realized thereby.

As to those protected by this Section, see: p. 16.

<sup>290</sup> The translation was made by using the code’s English version in Jogtár.

<sup>291</sup> (Hungarian) Criminal Code, Section 222. In Hungarian: “zaklatás”.



injury<sup>292</sup>, slander committed by physical assault<sup>293</sup>, a minor case of battery causing serious bodily injury<sup>294</sup>, a minor case of violation of personal freedom<sup>295</sup> or duress<sup>296</sup>.

The preservation of private motion for domestic violence has fiercely been criticized by human rights organizations. Their concern is that, firstly, the law requires of violations to have been committed on a regular basis.<sup>297</sup> Consequently, battering a woman as a partner only once does not amount to an additional element necessary for establishing violence in relationship, and the victim's private motion is required, since the act might only qualify as battery causing minor bodily injury. Sexual abuse is also not included in violence in relationship, and victim's private motion is thus required in some instances.<sup>298</sup> For example, for the prosecution of an abuse committed against an intimate partner who is not regarded as a relative, this application is still necessary.<sup>299</sup> The Hungarian Government argued in its follow-up report to the CEDAW Committee that "[e]liminating the criterion of committal on a regular basis, similar to cohabitation<sup>300</sup>, would also mean that a special element of the offence would be annulled, which professionally justifies the creation of an independent offence"<sup>301</sup>. It is not clear whether the CEDAW Committee accepted this argument. In its concluding observation, "[w]hile welcoming the announcement of the State party that it would

<sup>292</sup> *Supra* note 285

<sup>293</sup> (Hungarian) Criminal Code, Section 227, paragraph (2). In Hungarian: "tetteleges becsületsértés".

<sup>294</sup> (Hungarian) Criminal Code, Section 164, paragraphs (3) and (4). In Hungarian: "súlyos testi sértés".

These minor cases are as follows: when the crime (i) causes injury or illness taking more than eight days to heal, but is committed without realizing any of the aggravating factors; or is committed (ii) "with malice aforethought or with malicious motive", (iii) "against a person incapable of self-defence or unable to express his or her will", or (iv) "against a person whose ability to defend him- or herself is diminished due to his or her old age or disability".

The translation was made by using the code's English version in Jogtár.

<sup>295</sup> (Hungarian) Criminal Code, Section 194, paragraph (1). In Hungarian: "személyi szabadság megsértése".

It qualifies as a minor case, when the crime is committed without realizing any of the aggravating factors.

<sup>296</sup> (Hungarian) Criminal Code, Section 195. In Hungarian: "kényszerítés".

<sup>297</sup> "Hungary's Compliance with the ICCPR: Domestic Violence". Joint submission of The Advocates for Human Rights, Hungarian Women's Lobby, NANE Women's Rights Association and PATENT Association. *Supra* note 71, § 13

<sup>298</sup> In this context, see what has been written in respect of sexual coercion and sexual violence.

<sup>299</sup> "Hungary's Compliance with the ICCPR: Domestic Violence". Joint submission of The Advocates for Human Rights, Hungarian Women's Lobby, NANE Women's Rights Association and PATENT Association. *Supra* note 71, § 14

<sup>300</sup> As to cohabitation, see: p. 12 and 15.

<sup>301</sup> Concluding observations on the combined seventh and eighth periodic reports of Hungary. Addendum. Information provided by Hungary in follow-up to the concluding observations. *Supra* note 76, § 7

criminalize domestic violence in the Criminal Code, it remain[ed] concerned about the lack of specific provisions related to other forms of violence, such as economic and psychological violence and stalking”<sup>302</sup>. In the follow-up stage, it has been established that “the State party failed to adopt the said law and to criminalize psychological violence and stalking”<sup>303</sup>. The requirement of private motion was criticized more explicitly in the Human Rights Committee’s concluding observations.<sup>304</sup>

The victim’s situation is aggravated by the fact that battery causing minor bodily injury and slander committed by physical assault are subject to private prosecution, that is, the prosecutor’s role is taken by the victim with no state support. On top of that, in case of (alleged) mutual commission, the defendant may also submit an application. In such a case, the victim too will become a defendant.<sup>305</sup>

### 2.3. Summary

No serious criticisms similar to those against Hungary might be formulated *vis-à-vis* Austria. Nevertheless, it must be mentioned that prosecuting slander committed with gender-based motivation needs victim’s authorization in Austria.<sup>306</sup> However, slander does not typically constitute domestic violence cases, and if committed, it is publicly prosecuted. It is still to be added that for slander to be committed in Hungary, it must be made in public<sup>307</sup> or in a manner whereby a greater number of people, the exact number of which is impossible to be defined in advance, have real chance to become aware of it later<sup>308</sup>. In the contrary, according

<sup>302</sup> CEDAW Committee. Concluding observations on the combined seventh and eighth periodic reports of Hungary. *Supra* note 74(i), § 20

<sup>303</sup> CEDAW Committee. Follow-up letter sent to the State party (Hungary). *Supra* note 74(ii), at p. 1

<sup>304</sup> Human Rights Committee. Concluding observations on the sixth periodic report of Hungary. 9 May 2018, CCPR/C/HUN/CO/6, § 25

<sup>305</sup> (Hungarian) Code of Criminal Procedure, Section 53, paragraphs (1) and (2)

<sup>306</sup> Cf. (Austrian) Criminal Code, Article 115; Article 117, paragraph (3); and Article 283, paragraph (1)

<sup>307</sup> (Hungarian) Criminal Code, Section 227, paragraph (1), point b)

<sup>308</sup> See: BH1981. 223. (case law). “BH” stands for “bírószági határozat” (*i.e.* judicial decision).

to the Austrian rules, it is enough for the commission to take place in front of “several people”, that is, more than two persons other than the perpetrator and the victim.<sup>309</sup>

The dilemma of to what extent protection is the right of the victim and, at the same time, the obligation of the state is reflected in the detailed rules of protection orders. The next Chapter will treat the respective national provisions in Austria and in Hungary with the aim of presenting the advantages and the shortcomings of the systems applied. The current framework may be improved only if we are aware of all of its deficiencies.

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<sup>309</sup> Cf. (Austrian) Criminal Code, Article 115, paragraph (2)

## VI. PROTECTION ORDERS

### 1. GENERAL ISSUES

Domestic violence is different from the most of the crimes in that its commitment is cyclical and repetitive in nature. Due to its characteristics and since it mostly occurs behind the walls of the homes, sometimes, it can hardly be detected. Even though its signs are visible, dealing with it is rendered more difficult by the fact that it has been considered as a private matter for so long. Within the framework of its due diligence obligation, the state is nevertheless obliged to target the issue with legislative measures effectively implemented in practice.

One of the tools in the hands of the state authorities aiming at protecting the victims from violence is the protection order. Protection orders have become very popular in various legislations even though their effectiveness significantly depends upon not only their conditions but also their practical application, with other words, the approach and professional knowledge of the officials implementing them. According to an EU-wide study on the impact of protection orders, “now that various international and EU bodies have promoted a (well-functioning) system of protection orders, the[ir] absence [...] can even constitute a violation of international human rights treaties.”<sup>310</sup>

There exist several forms of protection orders. Their common denominator is that the abuser is prohibited to contact the abused thereby. The aforesaid study applied the following definition for them: “[a] protection order is a decision, provisional or final, adopted as part of a civil, criminal, administrative or other procedure, imposing rules of conduct (prohibitions, obligations or limitations) on an adult person with the aim of protecting another person

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<sup>310</sup> BALDRY, Anna *et al.* “Mapping the legislation and assessing the impact of protection orders in the European Member States”, at p. 31. *Supra* note 25

against an act that may endanger his/her life, physical, psychological or sexual integrity, dignity, or personal liberty”<sup>311</sup>.

Protection orders are not a panacea for all situations. In fact, their existence can even expose victims to a greater danger in the sense that applying protection orders in serious cases *au lieu de* detention might result in fatal consequences. Therefore, law enforcement officials’ appropriate preparation is of primordial significance.<sup>312</sup>

Even though detaining the (alleged) perpetrator is the surest way of removing him from the victim’s proximity, the conditions necessary for its application are not always fulfilled. In Austria, for arrest<sup>313</sup> and pre-trial detention<sup>314</sup> to be ordered, a person must (approx.) reasonably be suspected of having committed a criminal offence<sup>315</sup>. In case of pre-trial detention, the court must hear the suspected. In case of emergency barring order, the police are entitled to act when it can be assumed that a dangerous assault is imminent.<sup>316</sup> The applicant may also apply for a court decision if, among others, the continuation of living together with the assailant has become unreasonable due to an attack or threat.<sup>317</sup> In Hungary, the respective rules are similar. Custody<sup>318</sup> and pre-trial detention<sup>319</sup> may be ordered, if a person is reasonably suspected of having committed a crime<sup>320</sup>. Moreover, in case of the latter, it is also required that the act is punishable with imprisonment and the criminal proceedings are ongoing. In contrast, civil law restraining orders and emergency barring

<sup>311</sup> *Id.*, at p. 36

<sup>312</sup> Cf. Directive 2012/29/EU, Article 25. *Supra* note 148

<sup>313</sup> In German: “Festnahme”

<sup>314</sup> In German: “Untersuchungshaft”

<sup>315</sup> (Austrian) Code of Criminal Procedure, Article 170, paragraph (1), and Article 173, paragraph (1).

<sup>316</sup> Federal Act on the Organization of the Security Management and the Activity of the Security Police, Federal Gazette No. 566/1991 [in German: “Bundesgesetz über die Organisation der Sicherheitsverwaltung und die Ausübung der Sicherheitspolizei (Sicherheitspolizeigesetz – SPG)”, BGBl. Nr. 566/1991], Article 38a, paragraph (1)

<sup>317</sup> Act of 27 Mai 1896 on the Execution and Security Procedures, Imperial Gazette No. 79/1896 [in German: “Gesetz vom 27. Mai 1896, über das Exekutions- und Sicherungsverfahren (Exekutionsordnung)”, RGBl. Nr. 79/1896], Article 382b, paragraph (1)

<sup>318</sup> In Hungarian: “örizet”

<sup>319</sup> In Hungarian: “letartóztatás”

<sup>320</sup> (Hungarian) Criminal Code, Section 274, paragraph (1), and Section 276, paragraph (1)

orders are linked to much less stricter conditions, namely, that the commission of violence must reasonably be inferred from the circumstances of the case.<sup>321</sup> Therefore, in justified cases, applying protection orders may seem the best solution.

There exists no international legal norm as to how state needs to realize its obligation to protect. The ECtHR assesses the applications on a case-by-case basis making use of general rules. Endorsing its statement in *Opuz*, it has recently declared that the “States have a positive obligation to establish and apply effectively a system punishing all forms of domestic violence and to provide sufficient safeguards for the victims”<sup>322</sup>. As has been set out in the foregoing, this state duty is not an obligation of result<sup>323</sup> and is limited in scale. The latter means that not the impossible is required from the state, and procedural and other human rights guarantees are to be respected.

## 2. FORMS OF PROTECTION ORDERS

There are three types of protection orders: (i) emergency barring orders, (ii) civil law protection orders and (iii) criminal law protection orders. All of them exist in the Austrian legal system and, since Hungary took the Austrian system as a basis, also in Hungary. In Austria, the first domestic violence-specific measures were introduced in 1996<sup>324</sup>, whereas in Hungary in 2006<sup>325</sup>. There were restraining measures in these jurisdictions even before the incorporation of the above amendments, typically in criminal law. However, given that these

<sup>321</sup> Act LXXII of 2009 on the Restraining Orders Applicable in Case of Violence between Relatives (in Hungarian: “a hozzátartozók közötti erőszak miatt alkalmazható távoltartásról szóló 2009. évi LXXII. törvény”; hereinafter: RO Act), Section 6, paragraph (3), and Section 16, paragraph (1)

<sup>322</sup> See: *Bălșan v. Romania*, application no. 49645/09, judgment of 23 May 2017, ECtHR, § 57

<sup>323</sup> *Supra* note 137

<sup>324</sup> Federal Act on the Protection against Domestic Violence, Federal Gazette No. 759/1996 [the full name of the act in German: “Bundesgesetz über Änderungen des allgemeinen bürgerlichen Gesetzbuchs, der Exekutionsordnung und des Sicherheitspolizeigesetzes (Bundesgesetz zum Schutz vor Gewalt in der Familie – GeSchG)”, BGBl. Nr. 759/1996]. The main body of the act entered into force on 30 April 1997, the rest on 1 January 1997.

<sup>325</sup> Act LI of 2006 on the Amendment of the Act XIX of 1998 on the Criminal Procedure (in Hungarian: “a büntetőeljárásról szóló 1998. évi XIX. törvény módosításáról szóló 2006. évi LI. törvény”). The respective part of the Act entered into force on 1 June 2006.

tools did not specifically target domestic violence, they were not as sophisticated, and could not therefore be as effective as those posteriorly included.

By way of issuing an emergency barring order, the authorities, typically the police, are allowed for taking immediate action for the sake of the victim's security even without her consent. The logic behind this measure lies in the state's mission of preventing the escalation of a violent situation or the repetition of violence. Even though this objective also characterizes each form of restraining orders, this one's significance is highlighted by the fact that it is at this stage where the situation is brought into the scope of the authorities, and the measures applied and services provided for the victim in this phase do make difference. If the authorities do not carry out an appropriate risk assessment, and, therefore, make a wrong decision, it might lead to fatal consequences. A correct reaction necessitates an effective system and good communication between different authorities, since the signs of violence in the family might also appear at school or in health care institutions. The obligatory nature of this phase also helps the victim to gain power for making decisions and for reacquiring control over her life.

The next stage of handling violence situation is when civil court orders are petitioned. Victims, or other persons entitled to do so, may turn to the court even though no emergency barring orders have been issued. In these proceedings, the court renders its decision on the application within a short deadline for the sake of compliance with the objective of the legal institution, that is, providing prompt assistance for the victim. The time for which the order remains in effect is a crucial question, since, protected by it and supported by other measures, empowering the victim is essential for her definitely to get out of the cycle of violence<sup>326</sup>.

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<sup>326</sup> Cf. LOGAR, Rosa. "Murder rarely happens out of the blue. Danger management and safety management as methods to prevent severe violence", *supra* note 265, at p. 4

In criminal proceedings, as an alternative to stricter measures restricting the defendant's free movement or as part of rules of conduct established for the duration of the probation period, the defendant is prohibited from approaching the victim according to pre-defined conditions.

It is however not to be forgotten that the devil is in the detail, or still more in the application of the legal provisions. The next part will deal with comparing the respective rules in the Austrian and Hungarian laws. There is a logical hierarchy between protection orders. Emergency barring orders are able to provide immediate assistance in less serious cases. Further, the victim herself is entitled to apply for civil law protection order for ensuring protection after the end of the validity of the emergency barring order, or even if no measure has been applied by the police. Given that not every violent behaviour entails criminal proceedings, only those the degree of severity of which falls within the scope of criminal law, the presentation of protection measures will follow the foregoing order.<sup>327</sup>

## 2.1. Emergency Barring Orders

### 2.1.1. Austria

In Austria, the police are the body that is entrusted with issuing emergency barring orders<sup>328</sup>. Consequently, the respective rules are provided in the Federal Act on the Organization of the Security Management and the Activity of the Security Police<sup>329</sup> (hereinafter: "Security Police Act").

The police are allowed to prohibit a person who is deemed to pose a danger to the endangered person's life, health or freedom from entering an apartment where the latter person lives and from its immediate surroundings.<sup>330</sup> If the endangered person is under fourteen, the ban also

<sup>327</sup> Cf. in respect of Austria: Federal Act on the Organization of the Security Management and the Activity of the Security Police (*supra* note 316), Article 38a, paragraph (8), sentence 3. In respect of Hungary: RO Act, Section 5, paragraph (7), and Section 16, paragraph (4).

<sup>328</sup> In German: "Betretungsverbot"

<sup>329</sup> *Supra* note 316

<sup>330</sup> Security Police Act, Article 38a, paragraph (1), subparagraph 1



refers to the childcare facility or the educational institution which the child attends.<sup>331</sup> It has to be added that the latter provision was promulgated in the aftermath of a tragic event now before the ECtHR. In *Kurt v. Austria*, a husband, who had regularly abused and threatened his wife and their two children, a boy and a girl, shot her son into dead after having entered into the school which the children attended. The daughter was able to escape. There was an expulsion order in effect at that time against the husband. However, it did not involve the educational institution. The teachers had no information of the situation, and, therefore, let the perpetrator to communicate with the children in private. In fact, there was no provision in the Security Police Act at the material time that could have made it possible to expand the prohibition for the territory of the school.<sup>332</sup>

Several provisions serve as legal guarantees. Though the abuser's keys are removed, he has the opportunity to take with him his personal belongings.<sup>333</sup> For justified reasons, he may also go back to the apartment in the presence of the police.<sup>334</sup> The underlying facts of the case are supervised within 48 hours from the issuance.<sup>335</sup> The act expressly provides that the principle of proportionality is to be observed.<sup>336</sup> Proportionality can pose difficult situations when it comes to deciding on whether the expulsion order is (still) capable of ensuring the victim's safety or a more serious measure restricting the abuser's personal liberty<sup>337</sup> should be ordered. Also concerning *Kurt v. Austria*, despite of having instituted criminal proceedings, the public prosecutor did not order such measures.<sup>338</sup>

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<sup>331</sup> Security Police Act, Article 38a, paragraph (1), subparagraph 2

<sup>332</sup> See: *Kurt v. Austria*, application no. 62903/15, questions to the parties communicated on 30 March 2017, ECtHR, parts A and B. The case is also referred to by LOGAR, Rosa. "Murder rarely happens out of the blue. Danger management and safety management as methods to prevent severe violence", *supra* note 265, at p. 1

<sup>333</sup> Security Police Act, Article 38a, paragraph (2), points 3 and 4

<sup>334</sup> Security Police Act, Article 38a, paragraph (2), sentence 3

<sup>335</sup> Security Police Act, Article 38a, paragraph (6)

<sup>336</sup> Security Police Act, Article 38a, paragraph (2), sentence 2

<sup>337</sup> *Supra* notes 313, 314, 318 and 319

<sup>338</sup> *Kurt v. Austria*, *supra* note 332, part A

The police are under the obligation of informing the endangered person that she is entitled to seek restraining order from the court that has jurisdiction. The emergency ban issued by the police remains valid for two weeks.<sup>339</sup> Should the victim submit her request to the civil court for a protection against violence in apartments<sup>340</sup> or a general protection against violence<sup>341</sup>, the duration of the ban will expand to four weeks in total at maximum.<sup>342</sup> Also as a consequence of the murder in *Kurt v. Austria*, the police must inform the head of the institution in respect of which the ban has been issued if a victim under the age of fourteen is involved.<sup>343</sup>

The police must control the compliance of the order. The check must take place “at least once during the first three days of its validity”<sup>344</sup>. Further to this, the police may also summon the abuser to the headquarter in order to explain him in person the contents and the significance of the ban. The so-called “preventive clarification of the law”<sup>345</sup> provides another tool of promoting the culture of compliance<sup>346</sup>.

The Security Police Act includes a provision that has psychological effects and serves as a factor of contributing to the success of the whole protection system. According to this, the apartment keys that have been taken away from the abuser are to be deposited by the police at the court, if the victim requests a civil law restraining order.<sup>347</sup> Judges are not legally obliged

<sup>339</sup> Security Police Act, Article 38a, paragraph (8)

<sup>340</sup> See: Part 2.2.1. (i)

<sup>341</sup> See: Part 2.2.1. (ii)

<sup>342</sup> Security Police Act, Article 38a, paragraph (8)

<sup>343</sup> Security Police Act, Article 38a, paragraph (4), subparagraph 2, point b)

<sup>344</sup> Security Police Act, Article 38a, paragraph (8)

<sup>345</sup> The name of the measure in German: “präventive Rechtsaufklärung”. See: Security Police Act, Article 38a, paragraph (6a).

<sup>346</sup> It is worth referring to the interview with Judge Tamás MATUSIK. He have said that, based on his experiences, protection orders do have deterrent effect, and only the most dangerous perpetrators, who should otherwise be detained, do not comply with its conditions. (See: the interview with MATUSIK, Tamás, DR., judge, criminal matters, head of the Investigating Judges Unit, Central District Court of Buda (in Hungarian: “Budai Központi Kerületi Bíróság”). Budapest, 28 November 2018. The interview has been recorded. The recording is in the author’s possession.) Though the conversation was made referring to the Hungarian context and criminal proceedings, this statement might also be valid for other forms of protection orders. Moreover, if the rules written in a document are further strengthened during a personal meeting, the law might have more power.

<sup>347</sup> Security Police Act, Article 38a, paragraph (6)

to decide on the matter within the four-week period of time to which the effect of an emergency ban is automatically prolonged in case the victim turns to the court. Nevertheless, since it is now the court that is in the possession of the keys, it is the judge who symbolically gives the keys back if he or she does not render decision within this timeframe, or he or she refuses the application.<sup>348</sup> It is not known why the legislator has opted for this solution instead of setting a concrete deadline for the courts. Anyway, the system seems to operate correctly.<sup>349</sup>

Among the obligations of the police to provide information is found one of the elements to which the Austrian system may owe its success.<sup>350</sup> The Federal Minister of the Interior, together with the Federal Minister of Health and Women, is empowered to commission victim protection institutions<sup>351</sup> to address the needs of victims threatened by violence, or persistent stalking as provided for in the Criminal Code<sup>352</sup>, for the purpose of providing them with counselling and support.<sup>353</sup> These so-called intervention centres were established after the Federal Act on the Protection against Domestic Violence had come into force in 1997, and there is one in each province.<sup>354</sup> In case the police issue an emergency ban, they inform of it the competent intervention centre within 24 hours<sup>355</sup>.<sup>356</sup> They offer their services free of charge.<sup>357</sup> Even though they do not provide services only to women, they apply gender-specific approach for meeting the strict professional rules in the field of domestic violence.

<sup>348</sup> Mapping the Legislation and Assessing the Impact of Protection Orders in the European Member States (POEMS). National Report Austria. *Supra* note 21, at p. 5

<sup>349</sup> *Id.*

<sup>350</sup> Rosa LOGAR, as a lecturer invited for the class “The Law and Politics of Combatting Violence Against Women” held on 6 February 2018 at the Central European University, was on the opinion that the success of the protection system in Austria lay in the country’s leading role in women’s rights movement, the inclusion of the intervention centres, training sessions held for professionals and state funding.

<sup>351</sup> In German: “Interventionsstelle”

<sup>352</sup> (Austrian) Criminal Code, Article 107a

<sup>353</sup> Security Police Act, Article 25, paragraph (3)

<sup>354</sup> See: GREVIO Shadow Report NGO-Coalition, *supra* note 32, at p. 49

<sup>355</sup> *Id.*

In fact, the cooperation of the police and the intervention centres is the realization of a state obligation which is the “smooth co-operation of all relevant institutions”. See: Recommendation Rec(2002)5, *supra* note 131, Appendix to Recommendation Rec(2002)5, § 58, point e.

<sup>356</sup> Security Police Act, Article 38a, paragraph (4), subparagraph 1

<sup>357</sup> See: GREVIO Shadow Report NGO-Coalition, *supra* note 32, at p. 49

The centres are funded by the state. Their overall budget amounted to €7.32 million in 2015.<sup>358</sup> The independence of these centres are well demonstrated by the fact that even though the applications were submitted by the Domestic Abuse Intervention Centre Vienna<sup>359</sup> and another in civil organization in both *Şahide Goekce (deceased) v. Austria*<sup>360</sup> and *Fatma Yildirim (deceased) v. Austria*<sup>361</sup>, the system and the subvention of the centres remained.

Non-compliance with the order, as an administrative offence, is sanctioned by a fine up to 500 euros, or in the event of default thereon, to up to two weeks' imprisonment.<sup>362</sup> If the abuser does not fulfil the conditions of the preventive clarification of the law, he may also be sanctioned.<sup>363</sup>

As to the statistics, 8,637 emergency bans were issued by the Austrian police forces in 2016<sup>364</sup>. 18,373 victims of domestic violence obtained the services of the intervention centres. 83.5 % of the victims were women or girls, and 91.8 % of the perpetrators were men.<sup>365</sup>

### 2.1.2. Hungary

In 2003, “having recognized the significant presence of domestic violence in the Hungarian society”<sup>366</sup>, the Parliament requested the Government to introduce legislation pertinent to

<sup>358</sup> *Id.*

<sup>359</sup> In German: “Wiener Interventionsstelle gegen Gewalt in der Familie”. In the communications issued by the CEDAW Committee (*supra* note 29), the centre is called Vienna Intervention Centre against Domestic Violence.

<sup>360</sup> *Supra* note 29

<sup>361</sup> *Supra* note 29

<sup>362</sup> Security Police Act, Article 84, paragraph (1), subparagraph 2

<sup>363</sup> Security Police Act, Article 84, paragraph (1a)

<sup>364</sup> Statistics of the Domestic Abuse Intervention Centre Vienna, 2016, at p. 74. Accessible: <https://www.interventionsstelle-wien.at/statistiken/statistiken-der-wiener-interventionsstelle>.

The report from 2017 does not contain statistics for the whole country but only for Vienna.

For the purposes of comparison, 170 orders were issued in 1997, 1,093 in 1998, and 3,027 in 2000. See: the website of the Federal Ministry of the Interior.

Accessible: <https://bmi.gv.at/news.aspx?id=31654F682F704C653641453D>.

At this juncture, it is worth adding what Rosa LOGAR shared during the interview (*supra* note 253). She expressed her fear concerning the risks of the deterioration of the women's rights situation in Austria from 2017 onwards. Mrs. LOGAR also mentioned that, as a sign of this observation, the number of emergency bans issued was showing a downward trend.

<sup>365</sup> Statistics of the Domestic Abuse Intervention Centre Vienna, 2016, at p. 74, *supra* note 364. It is not clear whether these numbers refer to the cases handled by the intervention centres, or are calculated applying the total number of emergency bans issued. *Cf.* the similar statistics for the year 2015, at p. 70 of the German version, and at p. 38 of the English version of the respective publications.

restraining orders<sup>367</sup>. Nevertheless, the result of the legislator's efforts in 2006 was a measure incorporated into the Code of Criminal Procedure that created even a less favourable situation for victims of violence.<sup>368</sup> The Parliament adopted the Act LXXII of 2009 on the Restraining Orders Applicable in Case of Violence between Relatives (hereinafter: "RO Act")<sup>369</sup> only in 2009 having introduced two forms of restraining orders, the temporary preventive restraining<sup>370</sup> order and the preventive restraining order<sup>371</sup>. While the former is an expulsion order, the latter is the restraining order applicable by civil courts.

The person against whom a restraining order has been issued is forbidden to contact the abused in any form, to enter into the apartment serving as her habitual residence and to contact the persons as defined in the order.<sup>372</sup> For the application of the RO Act, it is also needed that the abused have a title for the use of the apartment other than favour<sup>373</sup>. This restriction is not applicable when the abused is upbringing a child common with the abuser.<sup>374</sup> This provision is considered a serious flaw. The General reasoning of the RO Act itself does not provide any justification therefor. Thus, it seems that the aim has been that only legally unambiguous situations fall within the scope of the RO Act, since favour as a title is difficult to prove.

When the first version of the RO Act was adopted, a prior constitutionality inquiry was requested by the President of the Republic<sup>375</sup>. A judge of the Constitutional Court noted in his

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<sup>366</sup> See: Preamble of the Decision of the Parliament 45/2003. (IV. 16.) on the National Strategy Regarding the Prevention of Domestic Violence and its Effective Treatment<sup>366</sup> [repealed by the Decision No. 30/2015. (VII. 7.) of the Parliament]

<sup>367</sup> *Id.*, § I, point a

<sup>368</sup> PATENT Association's comment on the measure. See: General reasoning (in Hungarian: "Általános indokolás") of the RO Act.

<sup>369</sup> *Supra* note 321

<sup>370</sup> In Hungarian: "ideiglenes megelőző távoltartás"

<sup>371</sup> In Hungarian: "megelőző távoltartás"

<sup>372</sup> RO Act, § 5(2)

<sup>373</sup> In Hungarian: "szívességi lakáshasználat". According to this construction, the tenant is entitled to use a real estate without having to pay rentals.

<sup>374</sup> RO Act, § 5(3)

<sup>375</sup> SÓLYOM László, the then President of the Republic, was the first President of the Constitutional Court between 1990-1998.

dissenting opinion that the “restraining act is on provisions on the prevention of danger(s). [...] The presence or lack of dangers can always be disputable posteriorly, since if the police intervene, it will never turn out what would have happened in lack of the intervention.”<sup>376</sup> However, as argued by professionals, the legislator defined the final circle of those protected too restrictively. The constitutional question emerged because of the manner in which two notions had been defined.

According to the wording in force, a restraining order based on the RO Act may be issued if all the circumstances of the case provide reasonable grounds for assuming that “violence between relatives” has been committed.<sup>377</sup> The abuser’s act or omission is qualified as “violence” (i) if the *act* seriously and directly endangers the abused person’s dignity, life or right to sexual autonomy, or bodily or mental health, or (ii) if the *omission* seriously and directly endangers the abused person’s dignity or life, or bodily or mental health.<sup>378</sup> In the original version of the RO Act that had been assessed by the Constitutional Court, the notion of violence also included any endangering act or omission of a regular and repetitive character.<sup>379</sup> However, the Constitutional Court found that the phrasing was too broad.<sup>380</sup>

The RO Act provides that a restraining order may be issued only if the abused and the abuser are relatives of one another. According to the original formulation, “relatives” included, further to “close relatives”<sup>381</sup> and “relatives”<sup>382</sup> as defined by the Civil Code<sup>383</sup>, not only the

<sup>376</sup> Decision No. 53/2009 (V. 6.) of the Constitutional Court [in Hungarian: “53/2009. (V. 6.) AB határozat”] – on the prior constitutionality inquiry into the Act on the Restraining Measures Applicable in Case of Violence between Relatives (promulgated as Act LXXII of 2009); dissenting opinion of BRAGYÓVA András, § 2. Cited by DOMOKOS, Andrea (ed.). “A családon belüli erőszak büntetőjogi és társadalmi megítélése”. Károli Gáspár University of the Reformed Church in Hungary, Faculty of Law, Budapest, 2017, at p. 84. Accessible: [http://www.kre.hu/ajk/images/doc3/A\\_csaladon\\_beluli\\_eroszak\\_buntetojogi\\_es\\_tarsadalmi\\_megitelese.pdf](http://www.kre.hu/ajk/images/doc3/A_csaladon_beluli_eroszak_buntetojogi_es_tarsadalmi_megitelese.pdf).

<sup>377</sup> *Supra* note 321

<sup>378</sup> RO Act, Section 1, paragraph (1), points (a)-(b)

<sup>379</sup> Decision No. 53/2009 (V. 6.) of the Constitutional Court, Reasoning (in Hungarian: “Indokolás”), Part II, § 2

<sup>380</sup> Consequently, a Hungarian court could later on render a decision (BH2015.70) according to which the issue of a restraining order was not justified in respect of a husband who had spat on his wife several times in front of their children, had broken her mobile phone and had held her down causing her light injuries, since the incident had taken place in a mutual tense environment and no serious and direct violence had occurred.

<sup>381</sup> Close relatives are as follows: spouses, next of kin, adopted children, stepchildren, foster children, adoptive parents, stepparents, foster parents and siblings. See: Act V of 2013 on the Civil Code (in Hungarian: “a Polgári

former spouse, the former common-law partner<sup>384</sup>, the former registered common-law partner, the guardian and the person under guardianship as currently<sup>385</sup>, but also the former fiancé(e) and those who were in intimate relationship without cohabitation during, or after, the existence of such relationship<sup>386</sup>.

As to the abuser, another restriction relies on the rule that requires of him to have capacity to act.<sup>387</sup> This provision divests victims of the protection provided by the RO Act against abusers who are minors, and those whose capacity has been restricted by the court.<sup>388</sup>

Briefly, the Constitutional Court deliberated that the text before it had been drafted in a too vague manner that could have led to a disproportionate restriction of the abuser's basic rights. As to the notion of violence, the Constitutional Court gave the example of repeating offensive words that could have qualified as grounds for issuing a restraining order despite the fact that the level of their dangerous character would not have been as serious. As the Constitutional Court argued, this situation could have led to interpretation uncertainties.<sup>389</sup>

I cannot but disagree with the decision of the Constitutional Court. Such an approach exposes women to threat, since the promulgated act does not cover every potential victim and act of

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Törvénykönyvről szóló 2013. évi V. törvény”), Section 8:1, paragraph (1), point 1. The former Civil Code (Act IV of 1959 on the Civil Code; in Hungarian: “a Polgári Törvénykönyvről szóló 1959. évi IV. törvény”), which was in force in 2009, defined the notion, in its effect, in the same manner in Section 685, point b).

<sup>382</sup> Relatives are as follows: *close relatives* (*supra*), common-law partners, spouses of the next of kin, spouse's next of kin and siblings, and siblings' spouses. See: (Hungarian) Civil Code, Section 8:1, paragraph (1), point 2. The former Civil Code, which was in force in 2009, defined the notion, in its effect, in the same manner in Section 685, point b), except that it also contained fiancé(e)s.

<sup>383</sup> *Supra* note 381

<sup>384</sup> Even if the original draft assessed by the Constitutional Court contained former common-law partners among those protected, surprisingly, the adopted version of the law did not. These victims were only included in 2013 (the amendment entered into force in 2014) as a consequence of numerous criticisms. In this respect, see for example: (i) ALFÖLDI, Ágnes Dóra, DR. “Személyek az ügyészség ideiglenes megelőző és megelőző távoltartás alkalmazása során kialakult gyakorlatából”. *Családi Jog*, 2011, vol. 2, p. 34-39, at p. 37; and (ii) Proposal of the President of the National Judicial Authority (in Hungarian: “Országos Bírósági Hivatal”) for the Amendment of the Act LXXII of 2009 on the Restraining Orders Applicable in Case of Violence between Relatives. 9 May 2013, 30.022-21/2013.OBH, at p. 2.

Accessible: [https://birosag.hu/sites/default/files/tavoltartas\\_jogalkotasi\\_javaslat\\_2009.\\_evi\\_lxxii.\\_tv.pdf](https://birosag.hu/sites/default/files/tavoltartas_jogalkotasi_javaslat_2009._evi_lxxii._tv.pdf).

<sup>385</sup> RO Act, Section 1, paragraph (5)

<sup>386</sup> Decision No. 53/2009 (V. 6.) of the Constitutional Court, Reasoning, Part II, § 2

<sup>387</sup> RO Act, Section 1, paragraph (3)

<sup>388</sup> See: GERÉBY, Zsuzsanna, DR. “A hozzátartozók közötti erőszak miatt alkalmazható távoltartásról, avagy egy jogszabály “sötét oldala” bírói szemszögből”. *Családi Jog*, 2010, vol. 4, p. 6-11, at p. 7

<sup>389</sup> Decision No. 53/2009 (V. 6.) of the Constitutional Court, Reasoning, Part 4, § 4.1

violence. It should be the subject of further research to point out the circle of those against whom crime was committed and who fell out of the protection of the RO Act owing to the restriction of its scope. It is arguable whether the Constitutional Court would make the same decision if it had to reconsider the issue in light of the development of the international case law pertinent to violence against women. Nevertheless, the relevant international documents define violence, implicitly or explicitly, so as to also cover acts committed against a non-cohabiting (former) intimate partner.<sup>390</sup>

The temporary preventive restraining order is valid for a maximum time of 72 hours<sup>391</sup>. No prolongation is allowed even though the victim applies to the competent civil court for a preventive restraining order. The law is not consistent in this context, since it provides that the court must decide within three days from the start of the temporary preventive restraining order.<sup>392</sup> Given the calculation of time limits, there might be a 24 hour-period during which the victim remains without protection in case the court then finds the issuance of a preventive restraining order well-founded.<sup>393</sup> Fortunately, based on the judicial practice, judges render their decisions before the end of the validity of the emergency barring order as a solution to this serious inconsistency.<sup>394</sup>

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<sup>390</sup> See: Chapter II

<sup>391</sup> RO Act, Section 6, paragraph (4)

<sup>392</sup> RO Act, Section 15, paragraph (6)

<sup>393</sup> The Act CXXX of 2016 on the Civil Procedure (in Hungarian: “a polgári perrendtartásról szóló 2016. évi CXXX. törvény”), as the law applicable for the procedure of issuing the preventive restraining orders [RO Act, Section 13, paragraph (2)], provides that the day of the act that entails the calculation of the time limit expressed in days is to be excluded from the calculation. See: Section 146, paragraph (3). [The former Act on the Civil Procedure (Act III of 1953 on the Civil Procedure; in Hungarian: “a polgári perrendtartásról szóló 1952. évi III. törvény”), which was in force in 2009, provided in the same manner in Section 103, paragraph (2).] In this case, this act is the arrival of the application sent by the police to the court. Cf. RO Act, Section 7, paragraph (2).

This anomaly is not rectified by the rule according to which the police are obliged to request the preventive restraining order at the court immediately after the issue of the emergency ban. Cf. RO Act, Section 7, paragraph (2).

<sup>394</sup> See: GERÉBY, Zsuzsanna, DR. “A hozzátartozók közötti erőszak miatt alkalmazható távoltartásról, avagy egy jogszabály “sötét oldala” bírói szemszögből”, *supra* note 388, at p. 9



The abuser has the right to legal remedy against a temporary restraining order issued against him. The court has jurisdiction to decide on the application.<sup>395</sup>

It is recalled that Hungarian women rights activists produced in 2008, that is, before the enactment of the RO Act, a model act that was transmitted to the Government<sup>396</sup> (hereinafter: “Model Act”). As provided for by the Model Act, the temporary restraining order is issued by the police for ten days, and its duration may be prolonged, *ex officio* or upon application, by twenty days.<sup>397</sup> Should the abused submit an application to the court for a restraining order, the validity of the temporary restraining order is automatically prolonged until the court’s decision is delivered to the abuser.<sup>398</sup>

If the restrained person infringes the police order, he commits a regulatory offence and may be sanctioned by detention as a last resort.<sup>399</sup>

Unfortunately, I am unable to provide statistics on the number of the restraining orders issued by the police, since I have found no relevant data, and my requests to the police for interviews have been refused or remained unanswered.<sup>400</sup>

### 2.1.3. Summary

Based on the foregoing, while the Austrian system seems proactive, the Hungarian protection is rather retroactive when considering the phrasing of the respective laws. Even though the difference is nuanced, it might be very important in practice. In contrast to the (Austrian)

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<sup>395</sup> RO Act, Section 12

<sup>396</sup> Model Act on the Restraining Orders Applicable against Perpetrators of Domestic Violence (in Hungarian: “Modell-törvény a családon belüli erőszak elkövetőivel szemben alkalmazható távoltartásról”), made by SPRONZ, Júlia (PATENT Association) and WIRTH, Judit (NANE Women’s Rights Association). In: WIRTH, Judit (ed.). “Rendszerbe zárva. Hogyan kezeli az igazságügyi rendszer a nők és gyerekek elleni férfierőszak jelenségét ma Magyarországon?” Published by PATENT Association and NANE Women’s Rights Association, 2011, p. 147-160. Accessible: [http://nane.hu/wp-content/uploads/2016/03/rendszerbe\\_zarva.pdf](http://nane.hu/wp-content/uploads/2016/03/rendszerbe_zarva.pdf).

<sup>397</sup> Model Act, Section 9, paragraph (1)

<sup>398</sup> Model Act, Section 25, paragraph (2)

<sup>399</sup> Act II of 2012 on the Regulatory Offences, on the Regulatory Offence Procedure and the Regulatory Offence Registration System (in Hungarian: “a szabálysértésekről, a szabálysértési eljárásról és a szabálysértési nyilvántartási rendszerről szóló 2012. évi II. törvény”), Section 168

<sup>400</sup> Cf. *supra* note 30

Security Police Act, the (Hungarian) RO Act seems to require that an act of violence have been committed.<sup>401</sup> It must be noted, however, that according to the General reasoning, the objective of the RO Act is still to “handle the phenomenon of domestic violence before a more serious situation, a crime is committed causing many times irreparable consequences”. The wider protection provided by the Security Police Act can also be observed in that it offers assistance to any kind of victim, irrespective of the form of relationship or cohabitation.<sup>402</sup> A partnership without any qualifying factors does not complete the requirement of the RO Act.<sup>403</sup>

Besides, the legislator had to narrow the scope of RO Act as to the definition of violence in the aftermath of the decision of the Constitutional Court, thus attributing more weight to the need of limiting the power of the police referring to the constitutional rights rather than to give them a certain margin of appreciation and to consider them capable of assessing the situation at hand.<sup>404</sup>

The Austrian police must, and can be, more proactive given that it is provided that they have to check the compliance with the ban<sup>405</sup>, and are expressly given the opportunity to summon the abuser during the validity time thus enhancing him for compliance. An Austrian emergency ban remains valid for much longer thus providing more time for the victim to decide on whether to apply for a restraining order to the civil court on the one hand, and putting less time-pressure on the court on the other when rendering its decision.

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<sup>401</sup> Cf. Security Police Act, Article 38a, paragraph (1); RO Act, Section 6, paragraph (3), and Section 16, paragraph (1)

<sup>402</sup> According to BALDRY, Anna *et al.* “[out of the EU countries assessed, o]nly in Austria can emergency barring orders be imposed on non-cohabiting violent persons and stalkers as well”. See: BALDRY, Anna *et al.* “Mapping the legislation and assessing the impact of protection orders in the European Member States”, at p. 8, *supra* note 25.

<sup>403</sup> Cf. GERÉBY GERÉBY, Zsuzsanna, DR. “A hozzátartozók közötti erőszak miatt alkalmazható távoltartásról, avagy egy jogszabály “sötét oldala” bírói szemszögből”, *supra* note 388, at p. 7

<sup>404</sup> Cf. Decision No. 53/2009 (V. 6.) of the Constitutional Court, dissenting opinion of BRAGYÓVA András, § 2

<sup>405</sup> In Hungary, even the implementation rules contain no such provision. Cf. Directive No. 2/2018. (I. 25.) of the Commander in Chief of the Police.

The lack of a general system providing assistance for the victims, as described in Austria, is also an obstacle for women to get empowered and opt for a life free from violence in Hungary. In contrast, the intervention centres in cooperation with the state are acting a crucial role contributing a lot to the success of protection in Austria. In this context, it is recalled that the UN recommends to “establish [...] one women’s advocacy and counselling centre for every 50,000 women, which provides proactive support and crisis intervention for complainants/survivors, including legal advice and support, as well as long-term support for complainants/survivors, and specialized services for particular groups of women”<sup>406</sup>. The shortcomings of shelter services also qualify as an indicator. Along with the UN, the Explanatory Report of the Istanbul Convention recommends one shelter place for every 10,000 inhabitants.<sup>407</sup> Whereas the GREVIO report set out in 2016 that “[e]stimates submitted by NGOs indicate that applying this ratio to Austria would require an additional 68 *shelter* places”<sup>408</sup>, Hungary “[fell] far short of this standard [in 2013] and would need around 1,000 *spaces* to meet it”<sup>409</sup> (emphases added).

The possibility in both countries of sanctioning non-compliance with the emergency barring order by a less severe measure than detention carries the risk that even the more dangerous

<sup>406</sup> Handbook for Legislation on Violence against Women. *supra* note 24, at p. 31

<sup>407</sup> See: (i) *id.*; and (ii) Explanatory Report of the Istanbul Convention, § 135. Cf. Istanbul Convention, Article 23: “Parties shall take the necessary legislative or other measures to provide for the setting-up of appropriate, easily accessible shelters *in sufficient numbers* to provide safe accommodation for and to reach out pro-actively to victims, especially women and their children.” (emphasis added)

<sup>408</sup> See: Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). First (baseline) evaluation of Austria on the implementation of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, *supra* note 27, § 105

<sup>409</sup> Human Rights Watch. “Unless Blood Flows. Lack of Protection from Domestic Violence in Hungary”. 6 November 2013. Accessible:

<https://www.hrw.org/report/2013/11/06/unless-blood-flows/lack-protection-domestic-violence-hungary>.

Cf. CEDAW Committee. Concluding observations on the combined seventh and eighth periodic reports of Hungary, adopted by the Committee at its fifty-fourth session (11 February–1 March 2013), *supra* note 74(i), § 21, point (d)

infringements will not be sanctioned in an appropriate manner.<sup>410</sup> This margin of appreciation risks the victims' rights to a disproportionate extent.

## 2.2. Civil Law Protection Orders

### 2.2.1. Austria

In Austria, the rules relating to civil law protection orders are contained in a separate law, in the Act of 27 Mai 1896 on the Execution and Security Procedures (hereinafter: "Execution Act").<sup>411</sup> These protection orders take the form of interim injunctions, meaning that they may form integral part of civil proceedings.<sup>412</sup> Nevertheless, these injunctions may also be requested irrespective of bringing an action against the abuser. There exist three forms of interim injunctions for which the victim may apply to the court. The sanctions triggered by the non-compliance with them are twofold. The original regime is contained by the Execution Act itself.<sup>413</sup> Based on this, the court may upon request impose fine. In case of repeated violence, the court may also order imprisonment of up to one year. The system proved to be inadequate, since its implementation could last for weeks or months.<sup>414</sup> Therefore, another regime has been introduced that coexists along with the former one. Now, as an administrative offence enforced by the police<sup>415</sup>, non-compliance may be sanctioned by a fine up to 500 euros, or in the event of default thereon, an imprisonment up to two weeks'.<sup>416</sup>

No nationwide statistics are at the disposal of researchers as to the application of interim injunctions. The Domestic Abuse Intervention Centre Vienna published the data relevant to

<sup>410</sup> In respect of Hungary, cf. "Hungary's Compliance with the ICCPR: Domestic Violence". Joint submission of The Advocates for Human Rights, Hungarian Women's Lobby, NANE Women's Rights Association and PATENT Association. *Supra* note 71, at p. 10

<sup>411</sup> *Supra* note 317

<sup>412</sup> Cf. Execution Act, Article 378, paragraph 1, and Article 381, point 2

<sup>413</sup> Execution Act, Article 355, paragraph 1

<sup>414</sup> Mapping the Legislation and Assessing the Impact of Protection Orders in the European Member States (POEMS). National Report Austria. *Supra* note 21, at p. 28

<sup>415</sup> *Id.*

<sup>416</sup> Amendment of the Security Police Act, Federal Gazette No. 152/2013 [the full name of the act in German: "Bundesgesetz, mit dem das Sicherheitspolizeigesetz geändert wird und Verstöße gegen bestimmte einstweilige Verfügungen zum Schutz vor Gewalt und zum Schutz vor Eingriffen in die Privatsphäre zu Verwaltungsübertretungen erklärt werden (SPG-Novelle 2013)", BGBl. I Nr. 152/2013], Article 2, paragraph (1)

the cases handled by them according to which they recorded 1,071 interim injunctions pursuant to Article 382b, 382e and 382g of the Execution Act.<sup>417</sup> The statement of the intervention centre made in 2015 seems still valid: “[i]t is not known how many interim injunctions have been applied for in which areas [...]. These data would be crucial in order to verify whether, and to what extent, interim injunctions are effective as a protection measure.”<sup>418</sup> Nevertheless, Austria has committed itself to collect segregated information as to the protection of victims of violence as a state party not only to the CEDAW<sup>419</sup> but to the Istanbul Convention<sup>420</sup>, too.

#### *(i) Protection against Violence in Apartments*<sup>421</sup>

This injunction may be ordered at the request of a person whose cohabitation with the abuser has been made unreasonable “by means of a physical attack, a threat with such behaviour or a behaviour which seriously hinders mental health” provided that the apartment is needed by the applicant for urgent accommodation purposes.<sup>422</sup> According to the rules, the defendant is obliged to leave the apartment and its surroundings and is forbidden to return.<sup>423</sup> Normally, the defendant is to be heard before the court renders its decision. However, this may be waived especially when further threat is expected from his part.<sup>424</sup> As ensured by the rules pertinent to emergency bans, the abuser has the right to take away his personal belongings, and his keys are removed.<sup>425</sup>

<sup>417</sup> Statistics of the Domestic Abuse Intervention Centre Vienna, 2017, at p. 36. Accessible: <https://www.interventionsstelle-wien.at/statistiken/statistiken-der-wiener-interventionsstelle>.

<sup>418</sup> Statistics of the Domestic Abuse Intervention Centre Vienna, 2015, English version, at p. 13. Accessible: <https://www.interventionsstelle-wien.at/statistiken/statistiken-der-wiener-interventionsstelle>

<sup>419</sup> CEDAW Committee, General recommendation No. 19, *supra* note 37, § 24, point (c)

<sup>420</sup> Cf. Istanbul Convention, Article 11

<sup>421</sup> In German: “Schutz vor Gewalt in Wohnungen”. See: the title of Article 382b of the Execution Act.

<sup>422</sup> Execution Act, Article 382b, paragraph (1)

<sup>423</sup> Execution Act, Article 382b, paragraph (1), subparagraphs 1 and 2

<sup>424</sup> Execution Act, Article 382c, paragraph (1)

<sup>425</sup> Execution Act, Article 382d, paragraph (2)

The Execution Act generally provides that should an interim injunction be ordered without the applicant having initiated the judicial procedure necessary for ensuring the right at issue, the court must determine a reasonable time limit for bringing the claim.<sup>426</sup> In case of domestic violence, such procedures might be, among others, divorce, annulment of marriage, division of marital assets and the determination of the right to use the apartment.<sup>427</sup> After the futile expiry of this time limit, the injunction becomes invalid.<sup>428</sup> As an exception, the Execution Act provides for no such time limit in case the validity of the injunction does not exceed six months.<sup>429</sup> Practically, this means that the general maximum duration is six months.<sup>430</sup> However, if the victim initiates any of these proceedings, the validity of the injunction may be prolonged till the end of such proceeding.<sup>431</sup>

## ***(ii) General Protection against Violence***<sup>432</sup>

The law ensures protection against violence embodied in physical assault, threat of such behaviour or conduct seriously harming mental health irrespective of cohabitation.<sup>433</sup> According to the conditions of this injunction, the defendant must refrain from staying in

<sup>426</sup> Execution Act, Article 391, paragraph (2)

<sup>427</sup> Execution Act, Article 382b, paragraph (3)

<sup>428</sup> Execution Act, Article 391, paragraph (2)

<sup>429</sup> Execution Act, Article 382b, paragraph (2)

<sup>430</sup> Cf. the website of the Federal Government of Austria – domestic violence. Accessible: [https://www.bmgf.gv.at/home/EN/Women\\_Equality/Domestic\\_Violence#f1](https://www.bmgf.gv.at/home/EN/Women_Equality/Domestic_Violence#f1).

<sup>431</sup> Cf. (i) Execution Act, Article 382c, paragraph (1), according to which “[t]he decision granting an injunction shall determine the time for which the order is made”. (ii) Based on the case law (OGH 04.06.1985 4 Ob 512/85 – “OGH” stands for “der Oberste Gerichtshof”, i.e. the Supreme Court of Justice of the Republic of Austria), “[t]he determination of the time for which the injunction is granted may be carried out by specifying [...] an event [...], for example until the judgment becomes final in a proceeding relevant to the injunction.” Other relevant cases (RIS-Justiz RS0004925) are accessible:

[https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=09aec8ca-9fe6-44b9-86de-f0d2920e5a16&Abfrage=Gesamtabfrage&SearchInAsylGH=&SearchInAvn=&SearchInAvsv=&SearchInBegut=&SearchInBgblAlt=&SearchInBgblAuth=&SearchInBgblPdf=&SearchInBks=&SearchInBundesnormen=&SearchInDok=&SearchInDsk=&SearchInErlaesse=&SearchInGbK=&SearchInGemeinderecht=&SearchInJustiz=&SearchInBvwg=&SearchInLvwg=&SearchInLgbl=&SearchInLgblNO=&SearchInLgblAuth=&SearchInLandesnormen=&SearchInNormenliste=&SearchInPruefGewO=&SearchInPvak=&SearchInRegV=&SearchInSpg=&SearchInUbas=&SearchInUmse=&SearchInUvs=&SearchInVerg=&SearchInVfgh=&SearchInVwgh=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=RS0004925+&Dokumentnummer=JJR\\_19750708\\_OGH0002\\_0050OB00113\\_7500000\\_001#hit1](https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=09aec8ca-9fe6-44b9-86de-f0d2920e5a16&Abfrage=Gesamtabfrage&SearchInAsylGH=&SearchInAvn=&SearchInAvsv=&SearchInBegut=&SearchInBgblAlt=&SearchInBgblAuth=&SearchInBgblPdf=&SearchInBks=&SearchInBundesnormen=&SearchInDok=&SearchInDsk=&SearchInErlaesse=&SearchInGbK=&SearchInGemeinderecht=&SearchInJustiz=&SearchInBvwg=&SearchInLvwg=&SearchInLgbl=&SearchInLgblNO=&SearchInLgblAuth=&SearchInLandesnormen=&SearchInNormenliste=&SearchInPruefGewO=&SearchInPvak=&SearchInRegV=&SearchInSpg=&SearchInUbas=&SearchInUmse=&SearchInUvs=&SearchInVerg=&SearchInVfgh=&SearchInVwgh=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=RS0004925+&Dokumentnummer=JJR_19750708_OGH0002_0050OB00113_7500000_001#hit1).

<sup>432</sup> In German: “Schutz vor Gewalt in Wohnungen”. See: the title of Article 382e of the Execution Act.

<sup>433</sup> Execution Act, Article 382e, paragraph (1)

designated places and contacting the victim in any form.<sup>434</sup> Nevertheless, such restrictions cannot be inconsistent with the defendant's significant interests.<sup>435</sup> Similarly to the former injunction, no time limit is provided for bringing a claim if the validity of the injunction does not exceed, in this case, one year.<sup>436</sup> If the abuser does not comply with the injunction, its validity may be extended to up to one more year without the court having to set such time limit.<sup>437</sup> This sort of injunction may also be prolonged till the end of any of the abovementioned proceedings<sup>438</sup>, if it is combined with protection against violence in apartments.<sup>439</sup>

### ***(iii) Protection against Invasion of Privacy***<sup>440</sup>

The so-called stalking injunction is applicable when the victim's privacy has been breached. The defendant may be prohibited, among others, to contact the victim in any form, including by applying a third person to this end.<sup>441</sup> It is an important rule that the two-week validity of an emergency barring order is not prolonged to four weeks if this injunction is requested by the applicant before the court.<sup>442</sup> Consistently with the foregoing measures, no time limit is provided for bringing an action against the abuser if the validity of the injunction does not exceed one year, and its validity may also be prolonged in case the abuser violates it.<sup>443</sup>

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<sup>434</sup> Execution Act, Article 382e, paragraph (1)

<sup>435</sup> Execution Act, Article 382e, paragraph (1)

<sup>436</sup> Execution Act, Article 382e, paragraph (2)

<sup>437</sup> Execution Act, Article 382e, paragraph (2). *Cf.* the website of the Federal Government of Austria – domestic violence, *supra* note 430

<sup>438</sup> *Supra* note 427

<sup>439</sup> Execution Act, Article 382e, paragraph (3). *Cf.* the website of the Federal Government of Austria – domestic violence, *supra* note 430

<sup>440</sup> In German: “Schutz vor Eingriffen in die Privatsphäre”. See: the title of Article 382g of the Execution Act.

<sup>441</sup> Execution Act, Article 382g, paragraph (1)

<sup>442</sup> Security Police Act, Article 38a, paragraph (8)

<sup>443</sup> Execution Act, Article 382g, paragraph (2)

### 2.2.2. Hungary

The rules of the civil law protection orders, as officially called, the preventive restraining orders<sup>444</sup>, are also defined by the RO Act. Therefore, it is unnecessary to repeat some of the shortcomings that characterize the emergency bans, since they are also valid to this form of protection orders. These imperfections relate to the personal scope of the act, the notion of violence and the restricted protection of those who are entitled to use the apartment by favour only.

The procedure might be initiated either by the police or by the abused. If the police issue a temporary preventive restraining order, they must at the same time notify the court. In such a case, the court must conduct the proceeding.<sup>445</sup> Besides, any victim may request for the court's order even if an emergency ban has not been issued by the police, because either they refused to do so<sup>446</sup>, or they have not at all been informed of the violence. As regards to this distinction, it is not at all indifferent who has initiated the court's proceeding. Based on the case law, if the police turn to the court *ex officio*, the abused is not entitled to the rights of a party, with other words, she cannot withdraw the application, since it was formally not submitted by her but by the police. Consequently, even if the woman wishes the termination of the procedure and that no restraining order be issued, the court is obliged to rule on the merits. Such an approach does have significance, given the emotional logic of domestic violence. Victims are often unsure about what they themselves want, and for them, opting for the known, though dangerous, continuance of cohabitation seems a more rational decision instead of beginning the often long way of release from the circle of violence. Besides, the abusers might also put pressure on them for terminating the procedure. That is why,

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<sup>444</sup> *Supra* note 371

<sup>445</sup> RO Act, Section 7, paragraph (2); and Section 14, paragraph (1)

<sup>446</sup> It occurs rather often that though the police are aware of the violence, no decision is made from their part. In this context, see (i) the research referred to in *supra* note 267; and (ii) ALFÖLDI, Ágnes Dóra, DR. "Szemelvények az ügyészség ideiglenes megelőző és megelőző távoltartás alkalmazása során kialakult gyakorlatából", *supra* note 384(i), at p. 35.



empowering women in these difficult times is a precondition of the success of their protection. Nevertheless, when the victim herself files the request, she does have the right to withdraw it.<sup>447</sup> If so, there is a risk that the case will get out of the reach of the authorities. Despite the RO Act providing for a so-called signalling system, according to which predefined authorities<sup>448</sup> are to notify the designated organ responsible for coordinating in family protection matters<sup>449</sup> of any act of domestic violence known to them, a woman who does not have a child might in practice easily fall out of this safety net<sup>450</sup>.

In case of a proceeding requested by the applicant, if the victim does not attend the trial in person without any substantial reason therefor, the court discontinues it.<sup>451</sup> Having regard to the urgency of the matter, the court, in most of the cases, must render its decision after hearing the parties. Neither suspension nor stay of the proceedings is allowed.<sup>452</sup>

The court will issue the restraining order if all the circumstances of the case provide reasonable grounds for assuming that an act of “violence between relatives” has been committed.<sup>453</sup> The period for which the order may be issued is however very short.<sup>454</sup> The validity of a preventive restraining order cannot exceed sixty days<sup>455</sup>. No prolongation is

<sup>447</sup> As to the case law on the significance of who has submitted the application, see: Curia [in Hungarian: Kúria] Pfv. II. 21.149/2013.

<sup>448</sup> According to Section 2, paragraph (1), of the RO Act, these authorities are as follows: healthcare providers; providers of personal care, in particular family assistance services, family support centres, child welfare services, children’s welfare centres, children’s or families’ temporary homes; public education institutions; guardianship authority; police; prosecution offices; courts; probation offices; organizations providing care and compensation services for victims; refugee reception stations, temporary accommodation for refugees.

<sup>449</sup> In Hungarian: “családvédelmi koordinációért felelős szerv”. According to Section 1/A of the Government Decree No. 331/2006. (XII. 23.) on the Fulfilment of Functions and Competencies of Child Protection and Guardianship and on the Organization and the Competency of the Guardianship Authority [in Hungarian: a gyermekvédelmi és gyámügyi feladat- és hatáskörök ellátásáról, valamint a gyámhatóság szervezetéről és illetékességéről szóló 331/2006. (XII. 23.) Korm. rendelet], this organ is the guardianship office.

<sup>450</sup> See: (i) the second interview with Judge F (Hungary, 7 August 2018; the interviewee’s data are handled confidentially; the interview has been recorded; the recording is in the author’s possession); and (ii) the interview with X and Y, legal professionals in Hungary (Hungary, 24 September 2018; the interviewees requested anonymity; the notes made during the interview are in the author’s possession)

<sup>451</sup> RO Act, Section 15, paragraph (3)

<sup>452</sup> RO Act, Section 15, paragraph (5)

<sup>453</sup> RO Act, Section 16, paragraph (1)

<sup>454</sup> CEDAW Committee. Concluding observations on the combined seventh and eighth periodic reports of Hungary. *Supra* note 74(i), § 20

<sup>455</sup> RO Act, Section 16, paragraph (2)

allowed, and only a new violation may justify its reapplication.<sup>456</sup> The period of validity is all the more incomprehensible that should the preventive restraining order be applied as a protection measure ordered according to Regulation (EU) No 606/2013<sup>457</sup>, its maximum duration is twelve months.<sup>458</sup> However, for the application of the latter, a separate protection measure needs to have been issued in another EU Member State. One should be reminded that even this sixty-day validity was one of the beneficial results of a significant amendment in 2013. Before, the restraining order could be issued only for thirty days. In this context, the Model Act proposes that if the restraining order is requested when no other proceeding—be it criminal or civil—has been initiated relating to domestic violence, the duration cannot be less than two months and cannot exceed three months.<sup>459</sup> If the order is requested when such proceeding is pending, the order remains valid until the court’s decision is rendered in the respective proceeding.<sup>460</sup> If these proposals had duly been considered during the preparation of the draft, the outcome could now have more potential to provide for real protection for victims.

The interim execution of the restraining order was introduced along with the prolongation of the validity. This novelty was significant, since, before the enactment of this amendment, the victim had to wait for the execution until the decision became final. This controversy could lead to situations where the court’s decision became enforceable much later than the duration of the protection had finished.<sup>461</sup> Now, the defendant has to respect the conditions contained

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<sup>456</sup> RO Act, Section 5, paragraph (5)

<sup>457</sup> *Supra* note 153

<sup>458</sup> RO Act, Section 17/A, paragraph 5

<sup>459</sup> Model Act, Section 33, paragraph (1)

<sup>460</sup> Model Act, Section 33, paragraph (2)

<sup>461</sup> As to the case law on this question, see: (i) BH2011. 311. (Supreme Court [in Hungarian: “Legfelsőbb Bíróság”] Pfv. II. 22.166/2010.); (ii) EBH2012. P.3. (Curia Pfv. II. 22.341/2011.; “EBH” stands for “elvi bírósági határozat”, *i.e.* judicial decision of principle); (iii) Curia Pfv. II. 21.149/2013.

*Cf.* (i) GERÉBY, Zsuzsanna, DR. “A hozzátartozók közötti erőszak miatt alkalmazható távoltartásról, avagy egy jogszabály “sötét oldala” bírói szemszögből”, *supra* note 388, at p. 10 (ii) GYENGÉNÉ DR. NAGY, Márta, DR. “A megelőző távoltartás bírósági gyakorlata”. *Családi Jog*, 2011, vol. 2, p. 27-33, at p. 28

in the restraining order notwithstanding his appeal<sup>462</sup>, and the law provides for a three-working day time limit within which the appeal court must rule on the motion<sup>463</sup>.

In practice, the issue of mutual physical violence is problematic. According to the case law of the appeal courts, the law protects the non-violent party only. Therefore, if the victim causes injuries in self-defence, she cannot rely on the protection of law.<sup>464</sup> It is to be seen whether this will ever change, since the Fundamental Law of Hungary and the Criminal Code give a more important role to self-defence.<sup>465</sup>

Considering restraining orders as effective tools is undermined by the fact that should the defendant violates its conditions, the act, similarly to the infringement of an emergency ban, does not amount to a crime but only to a regulatory offence.<sup>466</sup> Such person may be sanctioned by detention—though, only as a last resort. Moreover, the person who intends to notify the court of an act of violence with the purpose of requesting the issue of an order

<sup>462</sup> RO Act, Section 16, paragraph (2a). That the legislator forgot to provide for the interim execution is even more incomprehensible that it did not fail to do so in case of the temporary preventive restraining order. See: RO Act, Section 8, point f).

<sup>463</sup> RO Act, Section 16, paragraph (9)

<sup>464</sup> Cf. GYENGÉNÉ DR. NAGY, Márta, DR. “A megelőző távoltartás bírósági gyakorlata”, *supra* note 461(ii), at p. 29.

Judge F has also strengthened during the first interview (Hungary, 28 June 2018; the interviewee’s data are handled confidentially; the interview has been recorded; the recording is in the author’s possession) that the current practice protects the innocent victims only, that is, those who tolerate the battery and cause no injury to the attacker.

As to mutual assault, the ECtHR has formulated important statements in *Kalucza v. Hungary* (application no. 57693/10, judgment of 24 April 2012, § 66):

(i) “[If a restraining order] could not be ordered in cases of mutual assaults, then the aim of providing effective protection to victims would be seriously undermined. The possibility that the victim acted in legitimate self-defence cannot be ruled out at that stage.”

(ii) “[I]n the case of mutually violent parties, restraining orders should be issued in respect of both parties in order to prevent contact between them.”

<sup>465</sup> Cf. Fundamental Law of Hungary (in Hungarian: “Magyarország Alaptörvénye”), Article V; (Hungarian) Criminal Code, Section 22. It has to be noted that the former Constitution (Act XX of 1949 on the Constitution of the Republic of Hungary – repealed by the Fundamental Law of Hungary; in Hungarian: “a Magyar Köztársaság Alkotmányáról szóló 1949. évi XX. törvény”) did not identify this right, and the former Criminal Code (Act IV of 1978, Section 29) did not contain so detailed rules thereon.

<sup>466</sup> Act II of 2012, Section 168. Cf. “Hungary’s Compliance with the ICCPR: Domestic Violence”. Joint submission of The Advocates for Human Rights, Hungarian Women’s Lobby, NANE Women’s Rights Association and PATENT Association. *Supra* note 71, at p. 10.

might be discouraged, since referring to unfounded facts amounts to a regulatory offence, too.<sup>467</sup> At least, the latter cannot result in detention.

Again, I am unable to provide statistics on the number of preventive restraining orders, since there exists no single statistical system in the country despite the urgency of the CEDAW Committee and the critics of NGOs<sup>468</sup>. The only national data that are at disposal refer to the number of cases in which the public prosecutor participated in the proceedings before the court. Based on the general prosecutor's report to the Parliament for 2017, public prosecutors found important to defend victims' rights in 1,450 cases.<sup>469</sup> In comparison, this number was 1,274 in 2016 and 1,320 in 2015.<sup>470</sup> Unfortunately, the reports do not contain any other relevant information as to these proceedings. It seems that whether public prosecutors join the case depends much on the local practice. While a research stated that this took place almost

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<sup>467</sup> Act II of 2012, Section 181

<sup>468</sup> See: (i) CEDAW Committee. Concluding observations on the combined seventh and eighth periodic reports of Hungary. *Supra* note 74(i), § 20; (ii) "Hungary's Compliance with the ICCPR: Domestic Violence". Joint submission of The Advocates for Human Rights, Hungarian Women's Lobby, NANE Women's Rights Association and PATENT Association. *Supra* note 71, § 8; and (iii) "Enjoyment of civil and political rights by women in Hungary". Submission of the Hungarian Women's Lobby, NANE Women's Rights Association and PATENT Association for the 122<sup>nd</sup> session of the Human Rights Committee, February 2018, at p. 6. Accessible: [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fCSS%2fHUN%2f30260&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fCSS%2fHUN%2f30260&Lang=en).

The EU has also issued recommendations in the field of data collection. *Cf.* (i) European Parliament resolution of 25 February 2014 with recommendations to the Commission on combating Violence Against Women. Recommendation 2 on prevention and combat measures. 25 February 2014, P7\_TA(2014)0126. OJ C 285, 29.8.2017, p. 2; and (ii) Council of the European Union. Council conclusions - "Preventing and combating all forms of violence against women and girls, including female genital mutilation", § 3. JUSTICE and HOME AFFAIRS Council meeting, Luxembourg, 5 and 6 June 2014.

<sup>469</sup> Report of the General Prosecutor of Hungary to the Parliament on the activity of the prosecution service in 2017. 3 September 2018, B/1258, at p. 35.

Accessible: [http://ugyeszseg.hu/pdf/ogy\\_besz/ogy\\_beszamolo\\_2017.pdf](http://ugyeszseg.hu/pdf/ogy_besz/ogy_beszamolo_2017.pdf). In a previous version of the report, 1,452 cases have been indicated. Now, the number of cases is missing and only a 14% increase is present. (Another version must have been uploaded to the website. The date of publication is not indicated.) Nevertheless, further to the 14%, information relating to 1,450 cases is still present in the English version of the report (observations made on 28 November 2018).

Extracts in English are available: [http://ugyeszseg.hu/pdf/ogy\\_besz/ogy\\_beszamolo\\_2017\\_eng.pdf](http://ugyeszseg.hu/pdf/ogy_besz/ogy_beszamolo_2017_eng.pdf). The information referring to restraining orders can be found at p. 24.

<sup>470</sup> Report of the General Prosecutor of Hungary to the Parliament on the activity of the prosecution service in 2016. 27 September 2017, B/17351, at p. 35.

Accessible: [http://ugyeszseg.hu/pdf/ogy\\_besz/ogy\\_beszamolo\\_2016.pdf](http://ugyeszseg.hu/pdf/ogy_besz/ogy_beszamolo_2016.pdf).

Extracts in English are available: [http://ugyeszseg.hu/pdf/ogy\\_besz/ogy\\_beszamolo\\_2016\\_eng.pdf](http://ugyeszseg.hu/pdf/ogy_besz/ogy_beszamolo_2016_eng.pdf). The information referring to restraining orders can be found at p. 18.

never in a court in Budapest<sup>471</sup>, an interview with legal professionals working in the countryside revealed that prosecutors' participation was conditioned upon victim's particular vulnerability, such as disability, old age, childhood or repetitive violence.<sup>472</sup>

### 2.2.3. Summary

Even the names of the measures demonstrate a huge difference as to the effects of the civil law protection orders in the two countries. Two of the Austrian injunctions are closely integrated to another procedure whereby not only the violent situation may temporarily be solved, but an overall solution is also offered by the legal system, as has been proposed by the Model Act in Hungary—but refused by the legislator to apply. In contrast, even though the maximum duration of the restraining orders in Hungary has been doubled, sixty days still seem rather restricted. It is so notwithstanding the fact that in case of another act of violence, a reapplication may be submitted. Nevertheless, this method results that the victim is left without protection during the period between the two orders<sup>473</sup>, and since no order was in effect in time of the commission of the new act, the perpetrator cannot be held liable for any breach.

A major weakness shows up when the proceeding has been initiated by the victim and she withdraws her applications each time. On the one hand, it is understandable that the state is bound by the principle of the right to bring proceedings. Nevertheless, multiple withdrawals must be suspicious to the officials and must take a closer look at what is happening in that particular relationship. Even though the law provides opportunity for them to do so, a worrisome criticism has been stated against the Hungarian regime, namely, in case no child is involved in the violence, it is extremely difficult to reach the woman and to provide protection

<sup>471</sup> Cf. the research made at the Central District Court of Pest.

SZÜRÖSNÉ TAKÁCS, Andrea. "Nyolcéves lettem! – A hozzátartozók közötti erőszak miatt alkalmazható távoltartás első nyolc éve. 2. rész", *supra* note 267. Családi jog, 2018, vol. 2, p. 13-19, at p. 14.

<sup>472</sup> See: the interview with X and Y, *supra* note 450(ii)

<sup>473</sup> Of course, the law itself provides general protection. However, a restraining order in effect is able to take into account the victim's specific needs.

for her<sup>474</sup>. These women might become even less visible when the police do not issue an emergency ban and redirect them to the court. This is the point where the Austrian intervention centres prove to be effective. In the end, it is the victim who has to make the decisions necessary for her life. Nevertheless, if she can see that a protection system has been set up where support is provided, she might have greater confidence to show up and will less likely leave the system thanks to the empowerment process.

Initiating the court's procedure on an *ex officio* basis and the practical response to the legal challenges in Hungary correspond to the requirements of state's due diligence obligation. This objective is pursued by the public prosecutor's possibility to join the proceedings.<sup>475</sup> According to the case law, the public prosecutor has the right to ask the court to order the restraining in respect of a person who was also abused but relating to whom the police did not issue an emergency ban.<sup>476</sup> In my view, this right is ensured only in case of applications submitted by the police. An opposite practice would contradict to the current logic of the RO Act that considers the applicant as "the master of the case" when the action has been brought by her. However, this practical solution still does not fill all the gaps.

### 2.3. Criminal Law Protection Orders

In both countries, the third type of the protection orders are regulated by the code of criminal procedure and the criminal code. What they have in common is that these measures serve as alternatives to more serious sanctions. When they are breached by the defendant, they provide

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<sup>474</sup> *Supra* note 450

<sup>475</sup> RO Act, Section 13, paragraph (5)

<sup>476</sup> EBH2012. P.3. (Curia Pfv. II. 22.341/2011.)

Concerning the public prosecutors' procedural rights, the judgment states that "[...] as to the proceedings relating to the preventive restraining order, the legislator presupposes the vulnerable situation of the abused and that the right holder is generally unable to protect her rights in case of domestic violence."

*Cf.* the following statement in case Curia Pfv. II. 21.149/2013: "Basically, the [RO Act] builds upon the authority's *ex officio* procedure and measure, since it recognizes that the (potential) abused, that is, the intimidated victims of domestic violence, who mostly live with the abuser in the same apartment and fear for expected retaliation, are usually not in a position to stand up for their rights and to ask for the procedure and the measures of the police or the court." Cited by KŐRÖS, András, DR. "Távoltartási ügyek a Kúria gyakorlatában"<sup>476</sup>. *Családi Jog*, 2014, vol. 2, p. 36-42, at p. 41.

more severe consequences as opposed to the violation of emergency barring orders or civil restraining orders. Consequently, they might have a greater dissuasive effect. Since the defendant is at parole owing to such order, physically, he still has the potential to abuse his partner except when an electronic device developed to this end prevents him from doing so. Therefore, criminal law protection orders are equally ineffective against a dangerous perpetrator.<sup>477</sup> In these cases, the only means whereby the victim can be protected is his detention.<sup>478</sup>

### 2.3.1. Austria

In Austria, protective measures may be applied in several means. Nevertheless, they are of negligible importance in the field of violence against women, since they have been used to an insignificant extent to this end<sup>479</sup> and “perpetrators are—if they are detained at all—often released without any protective orders”<sup>480</sup>.

One of the possible applications is when protective measures are prescribed as an alternative to pre-trial detention. In pursuance of the Code of Criminal Procedure, pre-trial detention cannot be ordered when a less serious measure is also able to attain the objective pursued.<sup>481</sup> Among such measures are found, in case of violence in respect of which an emergency barring order may be issued<sup>482</sup>, the prohibition to contact the victim, to enter a particular apartment and its surroundings, and, as a specific condition of the alternative sanction, the confirmation of the prohibition of violating an emergency barring order or an interim injunction. In the context of the latter, the law specifically mentions the injunction issued

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<sup>477</sup> Mapping the Legislation and Assessing the Impact of Protection Orders in the European Member States (POEMS). National Report Austria. *Supra* note 21, at p. 5

<sup>478</sup> However, it has been strengthened by Verena TADLER, expert of the Domestic Abuse Intervention Centre Vienna, during the interview (Vienna, 3 May 2018; the notes made during the interview are in the author’s possession) that pre-trial detention is not often ordered when it comes to violence against women.

<sup>479</sup> Mapping the Legislation and Assessing the Impact of Protection Orders in the European Member States (POEMS). National Report Austria. *Supra* note 21, at p. 5

<sup>480</sup> *Id.*, at p. 14

<sup>481</sup> (Austrian) Code of Criminal Procedure, Article 173, paragraph (1)

<sup>482</sup> Security Police Act, Article 38a

pursuant to Article 382b of the Execution Act. It is however unclear why the other injunctions cannot be taken into consideration in the process. If the defendant is released from pre-trial detention, the victim must be informed thereof.<sup>483</sup>

If the defendant is charged of having committed several crimes, the public prosecutor may suspend the investigation with respect to some of them, if, for example, this measure is unlikely to have any significant consequences on the criminal sanctions to be imposed.<sup>484</sup> The continuation of suspended proceedings may however be ordered at a later stage.<sup>485</sup> Combining the suspension with setting rules of conduct is another possibility of protecting victims of domestic violence.<sup>486</sup>

The public prosecutor has the possibility to suspend the prosecution for a probation period<sup>487</sup> lasting for at least one year but no longer than two years provided that the defendant agrees with the obligations set by the prosecutor.<sup>488</sup> Different rules of conduct<sup>489</sup> may be made and probation services<sup>490</sup> may be arranged for the offender when, *inter alia*, further to suspending the prosecution by the public prosecutor, the punishment is conditionally suspended or a

<sup>483</sup> Cf. (Austrian) Code of Criminal Procedure, Article 65, point 1, subpoint (a); Article 66a; Article 172, paragraph (4); and Article 177, paragraph (5).

According to the (Austrian) Code of Criminal Procedure, Article 66a, paragraph (1), subparagraphs 1 and 2, those “who might have been hurt in their sexual integrity and self-determination, or who might have been exposed to violence committed in apartments (Security Police Act, Article 38a)”, as well as minors are considered at any rate “particularly vulnerable victims” (in German: “besonders schutzbedürftige Opfer”). The (Hungarian) Code of Criminal Procedure defines the circle of those victims who *ex lege* qualify as “persons benefitting from special treatment” (in Hungarian: “különleges bánásmódot igénylő személy”) in a narrower manner, since, further to minors, only victims of crimes against sexual freedom and sexual moral are considered as such [Section 82, points a) and c)] in this context. Cf. Article 22, paragraph 3, of Directive 2012/29/EU, according to which “[i]n the context of the individual assessment [of victims to identify specific protection needs], particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; victims whose relationship to and dependence on the offender make them particularly vulnerable. In this regard, victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be duly considered.”

<sup>484</sup> (Austrian) Code of Criminal Procedure, Article 192, paragraph (1), point 1. In German: “Einstellung bei mehreren Straftaten” (*i.e.* termination in case of several offences).

<sup>485</sup> (Austrian) Code of Criminal Procedure, Article 192, paragraph (2); Article 193, paragraph (3)

<sup>486</sup> Mapping the Legislation and Assessing the Impact of Protection Orders in the European Member States (POEMS). National Report Austria. *Supra* note 21, at p. 6

<sup>487</sup> In German: “Probezeit”

<sup>488</sup> (Austrian) Code of Criminal Procedure, Article 203, paragraphs (1) and (2)

<sup>489</sup> In German: “Weisungen” (*i.e.* instructions)

<sup>490</sup> In German: “Bewährungshilfe”



conditional release from imprisonment is granted.<sup>491</sup> As such, the defendant may be ordered “to reside in a particular place, at a particular family’s or in a particular home, to avoid a particular apartment, particular places or surroundings, to abstain from alcoholic beverages, to acquire or practice an appropriate profession that is the most suitable for his knowledge, skills and affinity, to report any change of residence or workplace, and to report to the court or other authority at specific intervals.”<sup>492</sup> The offender may also be ordered to make every endeavour to repair the damage caused by his act.<sup>493</sup> With his consent, he may also be instructed to undergo an addiction, psychotherapeutic or medical treatment, excluding surgery.<sup>494</sup> Nevertheless, the instructions and prohibitions made and the treatment ordered cannot interfere with the offender’s privacy or life to an unreasonable extent.<sup>495</sup>

As to pre-trial detention, the maximum durations are provided for by the Code of Criminal Procedure.<sup>496</sup> These certainly refer to the duration of rules of conduct ordered as less serious measures instead of detaining the defendant. Should special rules of conduct be determined combined with probation services, the effect of these rules cannot of course extend beyond the end of such services.<sup>497</sup> If no probation services have been arranged, the court is bound by no specific provision as to the duration.<sup>498</sup>

Unfortunately, no statistics are available on the application of preventive measures in criminal proceedings.<sup>499</sup>

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<sup>491</sup> (Austrian) Criminal Code, Article 50, paragraph (1)

<sup>492</sup> (Austrian) Criminal Code, Article 51, paragraph (2)

<sup>493</sup> (Austrian) Criminal Code, Article 51, paragraph (2)

<sup>494</sup> (Austrian) Criminal Code, Article 51, paragraph (3)

<sup>495</sup> (Austrian) Criminal Code, Article 51, paragraph (1)

<sup>496</sup> (Austrian) Code of Criminal Procedure, Article 178

<sup>497</sup> (Austrian) Criminal Code, Article 50, paragraph (3)

<sup>498</sup> (Austrian) Criminal Code, Article 50, paragraph (3)

<sup>499</sup> Mapping the Legislation and Assessing the Impact of Protection Orders in the European Member States (POEMS). National Report Austria. *Supra* note 21, at p. 32

### 2.3.2. Hungary

In Hungary, the rules are based on logic similar to those in Austria. However, in certain aspects, there is a huge difference between the two countries, since, contrary to the latter, victims are given more opportunity to be involved in the decisions as to protective orders in criminal proceedings. It is so at least in a part of them.

Probation services<sup>500</sup> may be arranged for the defendant in several phases of the criminal procedure.<sup>501</sup> The public prosecutor may suspend the procedure for at least one year in case its termination is anticipated owing to the defendant's future conduct.<sup>502</sup> Even though no probation services are ordered in such a case<sup>503</sup>, the public prosecutor may define rules of conduct, such as, to make good the damage caused to the victim or to take part in psychiatric or alcohol addiction treatment.<sup>504</sup> Probation services may also be ordered, when (i) the court defers the imposition of punishment for a predetermined period of time "if there are reasonable grounds to believe that [this] will serve the purpose of rehabilitation"<sup>505</sup>; (ii) along with determining work to be performed by the defendant, the court defers the imposition of punishment depending upon the same conditions as in (i)<sup>506</sup>; (iii) the court imposes imprisonment while suspending its execution<sup>507</sup>; (iv) the convicted is conditionally released from imprisonment after having served a certain part thereof<sup>508</sup>. If probation services are ordered, rules of conduct are also laid down which the defendant is obliged to respect.<sup>509</sup>

<sup>500</sup> In Hungarian: "pártfogó felügyelet"

<sup>501</sup> (Hungarian) Criminal Code, Section 69, paragraph (1)

<sup>502</sup> (Hungarian) Code of Criminal Procedure, Section 416, paragraphs (1) and (4). In Hungarian: "feltételes ügyészi felfüggesztés" (*i.e.* conditional suspension by the public prosecutor).

<sup>503</sup> (Hungarian) Code of Criminal Procedure, Section 419, paragraph (4).

<sup>504</sup> (Hungarian) Code of Criminal Procedure, Section 419, paragraphs (2) and (3)

<sup>505</sup> (Hungarian) Criminal Code, Section 65, paragraph (1). In Hungarian: "próbára bocsátás" (*i.e.* probation).

The translation was made by using the code's English version in Jogtár.

<sup>506</sup> (Hungarian) Criminal Code, Section 67, paragraph (1). In Hungarian: "jóvátételi munka" (*i.e.* work performed in amends).

<sup>507</sup> (Hungarian) Criminal Code, Section 85, paragraph (1). In Hungarian: "szabadságvesztés végrehajtásának felfüggesztése" (*i.e.* suspension of the execution of imprisonment).

<sup>508</sup> (Hungarian) Criminal Code, Section 38, paragraph (1), and Section 41. In Hungarian: "feltételes szabadságra bocsátás" (*i.e.* conditional release).

<sup>509</sup> (Hungarian) Criminal Code, Section 71, paragraph (2)

These rules are similar to those that may be determined in Austria. Likewise, the defendant must “stay away from the victim, or from her residence, place of work or the educational institution she attends, including any place frequented by her.”<sup>510</sup> The duration of probation services is equal to the duration of the measure in relation to which it has been ordered, but generally, it cannot last for more than 5 years.<sup>511</sup> In case of work performed in amends, it ceases when the work is done or after one year.<sup>512</sup>

As can be seen, however, these rules have not been specifically made to tackle domestic violence, since they do not take into consideration the particularities thereof and their infringement is sanctioned by withdrawing the preferential treatment. It is doubtful whether this is dissuasive enough.

Contrary to Austria, the restraining order that may be issued during criminal proceedings has very detailed rules. The reason thereof lies in the fact that the possibility of restraining the perpetrator from the victim<sup>513</sup> was incorporated into the former Code of Criminal Procedure<sup>514</sup> much ahead of creating civil law restraining orders as a solution, as hoped, for the phenomenon of domestic violence. Since this choice was unjustified and the draft was unprepared, the legislator created disturbances.<sup>515</sup> Given that the rules significantly changed owing to the entry into force of the new Code of Criminal Procedure in July 2018, the presentation of the provisions necessitates the comparison of the old and the current regime.

The result of the amendment turned out to be ineffective to a great extent. What might have been shocking of the characteristics of the measure was that its duration could originally not exceed thirty days. Even though the upper limit of the duration was increased to sixty days

<sup>510</sup> (Hungarian) Criminal Code, Section 71, paragraph (2), point b)

The translation was made by using the code’s English version in Jogtár.

<sup>511</sup> (Hungarian) Criminal Code, Section 70, paragraph (1)

<sup>512</sup> (Hungarian) Criminal Code, Section 70, paragraph (2)

<sup>513</sup> In Hungarian: “távoltartás” (*i.e.* restraining)

<sup>514</sup> Act XIX of 1998 on the Criminal Procedure. In Hungarian: “a büntetőeljárásról szóló 1998. évi XIX. törvény”. Cf. *supra* note 325.

<sup>515</sup> Cf. *infra* Part 2.1.2.

(the minimum duration, viz. ten days, remained unaffected) by an amendment later on, the overall assessment of the measure did not change.<sup>516</sup> The surprising effect of this provision can be better understood if it is compared to other coercive measures, such as pre-trial detention, obligation to stay in a place<sup>517</sup> and house arrest<sup>518</sup>, as regulated in the former Code of Criminal Procedure. The duration of all of them could be prolonged, contrary to that of the restraining order. The restraining order, however, could be ordered repeatedly in case another act of violence occurred.<sup>519</sup> With other words, though the intention was no longer to consider violence against women as a private matter, the victim has had to wait until another incident took place after the termination of the measure rather than the state would have conferred the right upon the court, as was in case of the other measures, to decide upon the necessity of prolongation.

There was a hierarchy among the coercive measures in the former Code of Criminal Procedure. Obviously, pre-trial detention qualified as the most severe deprivation of liberty. Should the defendant have broken the rules pertinent to the obligation to stay in a place or the house arrest, pre-trial detention may have been ordered instead, as was the case with the restraining order.<sup>520</sup> Nonetheless, in case of infringement of the rules of the obligation to stay in a place or the house arrest, pre-trial detention may have been ordered even if the maximum duration of pre-trial detention was attained. In contrast, if such a situation occurred with restraining order, the only alternative was imposing a fine.<sup>521</sup> What the act expressly provided for was that in case of infringing the conditions of restraining order, pre-trial detention *may have been applied*, or, if this was not necessary, fine may have been imposed.<sup>522</sup> However, I

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<sup>516</sup> It is to be noted that the amendment entered into force on 1 September 2008, that is, more than two years after the inclusion of the legal institution into the Hungarian legal system.

<sup>517</sup> In Hungarian: “lakhelyelhagyási tilalom”

<sup>518</sup> In Hungarian: “házi őrizet”

<sup>519</sup> Former (Hungarian) Code of Criminal Procedure, Section 138/B, paragraph (1)

<sup>520</sup> Former (Hungarian) Code of Criminal Procedure, Section 139

<sup>521</sup> Former (Hungarian) Code of Criminal Procedure, Section 132, paragraph (4)

<sup>522</sup> Former (Hungarian) Code of Criminal Procedure, Section 139, paragraph (2)

am of the opinion that this formulation did not provide sufficient protection for the victim, as it did not give any point of reference for the judge. In a society where gender-bias is prevalent, the danger deriving from these lenient provisions was realistic.<sup>523</sup> Further, it has to be noted that fine is one of the least coercive measures applicable in criminal proceedings<sup>524</sup>, and is not at all suitable for the protection of the victim's bodily integrity and life.

Another restrictive element of the restraining orders applicable in criminal proceedings was the way it was ordered. Having a well-founded suspicion that the alleged perpetrator had committed a crime punishable by imprisonment was a precondition for its application.<sup>525</sup> It was therefore not at all surprising that professionals had to indignantly observe that this institution was incapable of providing its ultimate objective, namely, the prompt protection of those in danger. (It has to be recalled that from 2006 to 2009, such as till the promulgation of the RO Act, only the former Code of Criminal Procedure provided for restraining orders.) Moreover, the applicable procedure was fairly complicated and time-consuming. Evaluating the first two years of its application, a judge practicing in this field estimated that the process of a request submitted by the victim<sup>526</sup> required approximately thirty-forty days at the best from the commission of the act of violence.<sup>527</sup>

<sup>523</sup> On the bias of judges, see: (i) PATENT Association. "Bírószágok monitorozása a párkapcsolati erőszakkal érintett esetek kezelésében", *supra* note 278; and (ii) PATENT Association. "Monitoring How Courts Treat Domestic Violence in Hungary: A Court Watch Program. A Summary of the Research Conducted by PATENT Association in 2015-2016", Budapest, 2016.

Accessible: [http://patent.org.hu/dokumentumok/kozpolitika\\_kutatas/zarotanulmany\\_ang\\_webre.pdf](http://patent.org.hu/dokumentumok/kozpolitika_kutatas/zarotanulmany_ang_webre.pdf) (in English) and [http://patent.org.hu/dokumentumok/kozpolitika\\_kutatas/zarotanulmany\\_magy\\_webre.pdf](http://patent.org.hu/dokumentumok/kozpolitika_kutatas/zarotanulmany_magy_webre.pdf) (in Hungarian – longer version).

<sup>524</sup> "Warning" (in Hungarian: "rendreutasítás") and "leading someone out of the court room" (in Hungarian: "kivezetetés a tárgyalóteremből") are even less coercive, but they are not relevant in this case.

<sup>525</sup> Former (Hungarian) Code of Criminal Procedure, Section 138/A, paragraph (2)

<sup>526</sup> *Inter alia*, the prosecutor may also have submitted the request. See: former (Hungarian) Code of Criminal Procedure, Section 138/B, paragraph (2).

<sup>527</sup> KAPOSSYNNÉ DR. CZENE, Magdolna. "A távoltartás két éve a bíróságok gyakorlatában". In: WIRTH, Judit (ed.). "Rendszerbe zárva. Hogyan kezeli az igazságügyi rendszer a nők és gyerekek elleni férfierőszak jelenségét ma Magyarországon?" Published by PATENT Association and NANE Women's Rights Association, 2011, p. 109-146, at p. 119. Accessible: [http://nane.hu/wp-content/uploads/2016/03/rendszerbe\\_zarva.pdf](http://nane.hu/wp-content/uploads/2016/03/rendszerbe_zarva.pdf).

A shortened English version of the article and the publication is accessible:

<http://www.nokjoga.hu/sites/default/files/filefield/system-failure-2011.pdf>.

It is indicative that in the period 2006-2008 examined by KAPOSSYNNÉ DR. CZENE, restraining was ordered in 141 cases, in 137 cases out of which the time needed for the procedure amounted to 25-30 days. *Id.*, at p. 130.

In the meanwhile, the victim was continuously exposed to danger. If the maximum duration expired, the whole procedure applied once again from the beginning.

The case law further aggravated victim's situation. Opinion No. 1/2007 of the Criminal College prescribed that if a restraining order was requested exclusively by the victim and the time needed to notify the defendant as well as to secure the documents for clarifying the data, as a consequence of the application being incomplete, exceeded three days within which the decision had to be made<sup>528</sup>, given that the law did not provide for postponing the court's session, the request had to be refused. In case of a fresh application, it was to be examined whether, taken into account the purpose of the legal institution, the prohibition of re-submitting the same application was infringed.<sup>529</sup>

The Code of Criminal Procedure currently in force has considerably rewritten the provisions of the restraining orders. Twelve years after the coming into force of the rules of restraining orders in the criminal procedure, the duration of the measure is no longer pre-determined and if the restraining order expires, it can be prolonged in a way similar to the rules applicable in case of the other coercive measures.<sup>530</sup> Consequently, it can remain in force during the whole procedure which is considered a significant development. However, a well-founded suspicion is still required for ordering it.<sup>531</sup> Secondly, the law made the background for a more justified decision by rendering the defendant's appearance obligatory even when the application was not lodged by the prosecutor<sup>532</sup> but by the victim.<sup>533</sup> Even in the latter situation, the prosecutor

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<sup>528</sup> Cf. former (Hungarian) Code of Criminal Procedure, Section 214, paragraph (1)

<sup>529</sup> In Hungarian: 1/2007. BK vélemény. Part "Be. 138/A-B. §", § 2, points a) and b). It was issued with the purpose of making the practice consistent, and its application was obligatory.

<sup>530</sup> (Hungarian) Code of Criminal Procedure, Sections 289-291

<sup>531</sup> (Hungarian) Code of Criminal Procedure, Section 276, paragraph (1)

<sup>532</sup> According to Section 471, paragraph (1), if the application is submitted by the prosecutor, it is *ab ovo* his or her duty to see to the defendant's presence. In the former (Hungarian) Code of Criminal Procedure, this situation was dealt with by Section 211, paragraph (1).

<sup>533</sup> See: MATUSIK, Tamás. "A büntetőeljárási távoltartás szabályozásának jogalkalmazásbeli problémái". *Belügyi Szemle*, 2013, vol. 9, p. 13-26, footnote 12 at p. 19

is requested by the court to ensure that the defendant will appear at the court's session.<sup>534</sup> In this case, an important tool is at the prosecutor's disposal, that is, he or she is allowed to order the custody of the defendant.<sup>535</sup> This means was not provided for by the former Code of Criminal Procedure.<sup>536</sup> Thirdly, the law now provides for a more realistic time-limit in case of applications submitted by the victim according to which the court must hold the session within five days from the arrival of the application to the court.<sup>537</sup> Even though the former Code of Criminal Procedure provided for a three-working day deadline relating to the investigating judge's general obligation to render the decision<sup>538</sup>, as a consequence of the procedural rules relating to organizing the session, the result was, as mentioned in the foregoing, an excessive duration of the process incapable of providing real support. Finally, the new Code of Criminal Procedure renders obligatory that should the court refuse to issue a restraining order requested by the victim, the judge must inform her of the possibility of submitting an application for a restraining order in pursuance of the RO Act. In fact, if the victim so requires, the court forwards the application to the police.<sup>539</sup> However, it is doubtful whether the police will issue an emergency barring order in this situation where the act of violence at issue will likely have become remote. If the police refuse to do so, the victim will have to submit another application at the civil court.

The practice cannot be foreseen at this point. Nevertheless, in spite of the fact that the rules of criminal procedure have significantly been improved<sup>540</sup>, it is assumed that this kind of

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<sup>534</sup> (Hungarian) Code of Criminal Procedure, Section 472, paragraph (1)

<sup>535</sup> (Hungarian) Code of Criminal Procedure, Section 274, paragraph (2), point b). *Cf.* the interview with Judge MATUSIK, *supra* note 346.

<sup>536</sup> Former (Hungarian) Code of Criminal Procedure, Section 126, paragraph (2)

<sup>537</sup> (Hungarian) Code of Criminal Procedure, Section 468, paragraph (4).

The court holds only one session for hearing the application.

<sup>538</sup> *Supra* note 528

<sup>539</sup> (Hungarian) Code of Criminal Procedure, Section 478, paragraph (4)

<sup>540</sup> In fact, the improvements correspond to many of the proposals made by Judge MATUSIK. *Cf.* MATUSIK, Tamás. "A büntetőeljárás távoltartás szabályozásának jogalkalmazásbeli problémái". *Supra* note 533.

As has been confirmed by Judge MATUSIK during the interview (*supra* note 346), the legislator must have read his article.

restraining order will still not become the one that is suitable for providing an immediate relief for victims.

Similarly to Austria, no overall statistics are available on the preventive measures and restraining orders applied in criminal proceedings.

### 2.3.3. *Summary*

Since a new Code of Criminal Procedure has just entered into force in Hungary, it is too early to evaluate the outcome. However, it can already be stated that we can witness very positive developments as to the text of the law. The time within which requests are processed seems to have significantly decreased. Even though a decision on the request cannot in all cases be rendered within the five-day deadline<sup>541</sup>, the current regime ensures a much speedier process. Nevertheless, the procedural obstacles, such as, further to the time-consuming decision-making, the need for reasonable suspicion against the defendant, make it impossible for this legal institution to provide real-time protection for the victims.

It can be stated in respect of both Austria and Hungary that the provisions relating to the rules of conduct which the defendant might be obliged to comply with are provided for in a general manner and do not specifically tackle the issue of domestic violence. In this context, the Austrian experts have formulated their criticism according to which “criminal law protective orders are hardly imposed in the area of violence against women and domestic violence”, and victims are generally not involved when such rules are determined.<sup>542</sup> The colleagues of the

<sup>541</sup> Cf. interview with Judge MATUSIK, *supra* note 346. He has also mentioned that since, generally, the victim does not submit her request at the court, it might take much longer for the application to get to the court. This might be more problematic for the victim than when the court cannot hold the session within five days from the arrival of the application.

<sup>542</sup> Mapping the Legislation and Assessing the Impact of Protection Orders in the European Member States (POEMS). National Report Austria. *Supra* note 21, at p. 20 and 36



intervention centres are trying to change this practice by being more active towards the authorities.<sup>543</sup>

Criminal law measures are not enough on their own. Given the specific logic of criminal law, namely, its sanctioning system can be activated only after the criminal proceedings have attained a certain phase, these measures are unable to address the issue comprehensively. Therefore, linking the criminal law and the civil law systems to one another is of high importance. Whereas the duration of the civil law protection orders in Austria might be enough for them to last until protection measures are applied in criminal proceedings, the same cannot be said in case of Hungary. As Tamás MATUSIK suggested, the real combination of the two regimes is also desired in the sense that the personal scope of the RO Act should be widened in order for the latter to become the real ante-room of the criminal law system. He also proposes that the applicant should be informed during the civil proceeding of the criminal law restraining order, and the civil law measure should automatically shift to the criminal one when the investigation reaches the stage required. Thus, the victim would not have to submit another application in the criminal procedure.<sup>544</sup> Moreover, the victim should be informed during the investigation that before having reasonable suspicion, a criminal law restraining measure is not allowed to be ordered, and she should be incentivized to transform her request into one for a civil law measure.<sup>545</sup>

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<sup>543</sup> *Id.*, at p. 20

<sup>544</sup> *Cf.* the interview with Judge MATUSIK, *supra* note 346

<sup>545</sup> See: MATUSIK, Tamás. “A büntetőeljárás távoltartás szabályozásának jogalkalmazásbeli problémái”. *Supra* note 533, at p. 18

*“Since no one was born violent, the respect of human rights begins with working on ourselves.”*

The Author

## VII. CONCLUSION

As the ECtHR stated in *Kalucza*, “[states] are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals”<sup>546</sup>. This obligation refers both to enacting appropriate legal rules and to their application, and the right to protection concerns each and every person irrespective of their characteristics. According to the Strasbourg Court’s jurisprudence, this statement embodies a rather strict norm in the sense that states are obliged to do everything within their power to attain the objective, namely, averting any real and immediate (*present*) risk, though doing the impossible or what would otherwise impose disproportionate burden on them is not expected. When completing their tasks, they are to respect the rights of the other party.

The first step of realizing these purposes consists of making laws that are capable of protecting the victims according to the due diligence principle. It has been presented in the foregoing that both the Austrian and the Hungarian systems need to be further developed. Even the Austrian regime, which has served as an example for making many others, suffers from deficiencies mainly when it comes to the criminal law. Whereas the structure of an overall (civil law) protection system has already been established in Austria, and it is functioning more or less effectively, the shortcomings of the Hungarian safety net are so serious that, in its current form it cannot achieve the ends pursued. Certainly, I do not intend to ignore the significance of the Austrian professionals’ critique by which the criminal law measures should be given a more important role. Without decisive criminal measures applied against the most dangerous perpetrators, real protection cannot exist.<sup>547</sup> However, the

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<sup>546</sup> *Kalucza v. Hungary*, *supra* note 464, § 59

<sup>547</sup> Cf. in this respect the statement in “Mapping the Legislation and Assessing the Impact of Protection Orders in the European Member States (POEMS). National Report Austria”, *supra* note 21, at p. 6: “If a victim has

Hungarian system is currently providing nothing more than a temporary ease for those who are at all entitled to it. Even if it is not a general practice in the EU that victims of any kind of relationship with the perpetrator might get protection from civil law measures, this does not alter the fact that, due to its personal scope, the RO Act is unable to provide assistance for everyone who would otherwise need it. In Hungary, the length of the civil law protection is very short, and there is no relationship between the restraining orders and the civil proceeding that the victim might initiate for resolving the legal situation between her and her abuser. It is important to mention at this juncture that in case an act of violence occurs that could have been averted by proper legislation, the ECtHR might still establish the liability of the respondent state despite the fact that, legally, none of the authorities or the officials might have acted wrongfully, since such a legislative deficiency does not fall within the scope of impossibility. Whether the duration of stay-away measures applied in Spain correctly takes into consideration the perpetrator's right to privacy is still open to discussion, the duration of the civil restraining orders in Hungary seems to ignore victim's rights. Not surprisingly, applicants can try to benefit from restraining orders in an abusive manner<sup>548</sup>, since these measures are, in many aspects, out of touch with reality.<sup>549</sup> As to the Hungarian criminal law system, the new Code of Criminal Procedure is very promising. I am of the opinion that the most important step forward would be to go on with implementing through the whole legal system what the new law has commenced, namely, interconnecting the two restraining order regimes. Should the success of this approach persuade the legislator, the refinement of the RO Act would no longer be just a dream. It would be necessary to amend it so as it can provide

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experienced and reported a crime, the criminal justice system should automatically be responsible for investigating which protective measures might be necessary and take action to actively protect victims (due diligence) instead of "playing the ball back to the victim". This requires, of course, a much more active and quick response by the criminal justice system (*i.e.* special courts and fast tracks) [...]."

<sup>548</sup> Judge MATUSIK has said during the interview (*supra* note 346) that the court sessions dealing with civil restraining orders often serve as just fora for dispute settlements.

<sup>549</sup> For the experiences concerning the first eight years of the RO Act, see: SZÜRÖSNÉ TAKÁCS, Andrea. "Nyolcéves lettem! – A hozzátartozók közötti erőszak miatt alkalmazható távoltartás első nyolc éve. 1. rész" and "Nyolcéves lettem! – A hozzátartozók közötti erőszak miatt alkalmazható távoltartás első nyolc éve. 2. rész", *supra* note 267(i) and (ii).

real and effective assistance for the victims by making its protection last till the end of the underlying procedure as proposed by the Model Act.<sup>550</sup>

In a societal framework where gender discrimination is a given and will remain so for a while, victims should not be left on their own. In such a situation, the system must give them the opportunity to see that one can, and is able to, live without being threatened by violence. That is why the services provided by the intervention centres in Austria are so significant.<sup>551</sup> In contrast, even though there exist good examples in Hungary as to shelters<sup>552</sup>, such centres do not function there and their role is not fulfilled by the coordination organ responsible for family protection neither. Moreover, the activities of the civil organizations, which are, and would be, able to provide assistance of this kind are currently ignored by the state at the best.<sup>553</sup> Based on the current governmental attitude in Hungary, an approach where civil organizations receive state funding in order for them to provide general services to victims, including their representation against the state itself, seems so remote. Such activities are desired though, since only actors other than the state authorities themselves are able to criticize state measures in a credible manner.

Adequate training of the law enforcement professionals is also necessitated.<sup>554</sup> The overall picture that I could obtain during the interviews is not homogeneous, but the majority was on the opinion that the training sessions are offered in the field of violence against women in an

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<sup>550</sup> See also: Human Rights Watch. Review of Hungary's Compliance with CEDAW. Special Attention to articles 2(a), 2(b) and 2(e). February 2012, at p. 2

<sup>551</sup> In fact, domestic violence is a societal question, too. A story has been shared with me during the interview with X and Y [*supra* note 450(ii)] according to which a woman let her abusive partner come back saying: "Who could otherwise feed the animals?"

<sup>552</sup> See: the third interview with Judge F, *supra* note 31

<sup>553</sup> The situation of the Hungarian civil organizations, which provide services for victims of violence against women, was presented by Judit WIRTH. See: interview with WIRTH, Judit, women's rights expert, NANE Women's Rights Association, Hungary. Budapest, 15 June 2018. The interview has been recorded. The recording is in the author's possession.

<sup>554</sup> Judge F has accentuated during the third interview (*supra* note 31) the importance of sharing information. (S)he has mentioned that, at the beginning, judges did not always signalize to the competent authority the acts of domestic violence observed owing to the proceeding before them fearing that the alleged abuser would in response submit an objection of impartiality. Now, judges fulfil their obligation to signalize such cases much more bravely.

insufficient way.<sup>555</sup> Training is all the more important, since by the help of understanding, participants can feel closer to the issue that results in, further to increased knowledge, destructing discriminative attitude and injurious passivity.<sup>556</sup> They are also required for a prompt answer to acts of violence. Further to creating appropriate environment for acting in favour of the victims, statistics sufficiently broken down are also needed without which it is impossible to provide exact evaluation on the efficiency of the protection measures. These are missing both in Austria and in Hungary—though mainly in the latter. Decision-makers should realize the importance of these tools and apply the means whereby the assessment can be made in accordance with the state’s international obligations.

“States [...] [are obliged to] take all legal and other measures that are necessary to provide effective protection of women against gender-based violence”<sup>557</sup>. I am of the view that should the issue of domestic violence be regarded “as a violation of women’s human rights to autonomy, agency and integrity, rather than [...] [their mere] protection [...]”<sup>558</sup>, the mindset of the society would change a lot in a positive way. In this context, I also believe that people’s mindset count more than written norms, or, with other words, we should start by working on ourselves.

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<sup>555</sup> Judit WIRTH has mentioned during the interview (*supra* note 553) that the effect of eliminating civil organizations from holding training sessions for professionals in the field of violence against women is visible owing to the deterioration of the quality of the work performed by these professionals.

<sup>556</sup> N, former director of a families’ temporary home in Hungary, has told during the interview (Hungary, 31 March 2018) that the police made critical flaws when acting in the shelter after an abusive partner had found it. (The interviewee’s data are handled confidentially. The notes made during the interview are in the author’s possession.)

<sup>557</sup> CEDAW Committee, General recommendation No. 19, *supra* note 37, § 24, point (t)

<sup>558</sup> “The Reform of India’s Sexual Violence Laws. Submissions prepared by Professor Sandra Fredman FBA QC (hon), with the assistance of members of Oxford Pro Bono Publico, on the invitation of the Justice Verma Committee investigating the reform of India’s sexual violence laws”. University of Oxford, Oxford Pro Bono Publico, January 2013, at p. 1

## **ANNEXES**

## ANNEX I – BIBLIOGRAPHY

### A. BOOKS

1. CASSESE, Antonio. "International Criminal Law". Oxford University Press. Oxford, 2008
2. CHINKIN, Christine. "Sources". In: MOECKLI, Daniel – SHAH, Sangeeta – SIVAKUMARAN, Sandesh – HARRIS, David (ed.). "International Human Rights Law". Oxford University Press. Oxford, 2012
3. EDWARDS, Alice. "Violence against Women under International Human Rights Law". Cambridge University Press. New York, 2011
4. HOLTMAAT, Rikki – NABER, Jonneke. "Women's Human Rights and Culture. From Deadlock to Dialogue". Intersentia. Cambridge – Antwerp – Portland, 2011.
5. LAPIDUS, Lenora M. – MARTIN, Emily J. – LUTHRA, Namita. "The Rights of Women. The Authoritative ACLU Guide to Women's Rights". New York University Press. New York – London, 2009
6. MCQUIGG, Ronagh J. A. "International Human Rights Law and Domestic Violence. The effectiveness of international human rights law", Abingdon, Oxon, England. Routledge, 2011
7. WESTENDORP, Ingrid – WOLLESWINKEL, Ria (ed.). "Violence in the domestic sphere". Intersentia. Antwerp – Oxford, 2005

### B. REPORTS

1. United Nations. Report of the World Conference of the United Nations Decade for Women: Equality, Development and Peace. Copenhagen (14 to 30 July 1980). Full report. 19 September 1980, A/CONF.94/35  
Accessible: <http://www.un.org/womenwatch/daw/beijing/copenhagen.html>
2. A framework for model legislation on domestic violence. Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85. 2 February 1996, E/CN.4/1996/53/Add.2  
Accessible:  
[http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=720](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=720)
3. Integration of the Human Rights of Women and the Gender Perspective. Violence against Women. Violence against women in the family. Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85. 10 March 1999, E/CN.4/1999/68  
Accessible:  
[http://repository.un.org/bitstream/handle/11176/223821/E\\_CN.4\\_1999\\_68-EN.pdf?sequence=3&isAllowed=y](http://repository.un.org/bitstream/handle/11176/223821/E_CN.4_1999_68-EN.pdf?sequence=3&isAllowed=y)

4. Women against Violence Europe. "Prevention of Domestic Violence against Women. European Survey, Good Practice Models. WAVE Training Programme". 2000  
Accessible: [http://files.wave-network.org/researchreports/Prevention\\_of\\_Domestic\\_Violence\\_2000.pdf](http://files.wave-network.org/researchreports/Prevention_of_Domestic_Violence_2000.pdf)
5. World Health Organization. "World report on violence and health". 2002  
Accessible: [http://apps.who.int/iris/bitstream/10665/42495/1/9241545615\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/42495/1/9241545615_eng.pdf)
6. ERTÜRK, Yakin – Special Rapporteur on violence against women, its causes and consequences. "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". 20 January 2006, E/CN.4/2006/61  
Accessible: [https://digitallibrary.un.org/record/565946/files/E\\_CN-4\\_2006\\_61-EN.pdf](https://digitallibrary.un.org/record/565946/files/E_CN-4_2006_61-EN.pdf)
7. Co-ordination Action on Human Rights Violations. "The justice system as an arena for the protection of human rights for women and children experiencing violence and abuse. Final Report". Compiled by Dr Humphreys, Cathy and Carter, Rachel. February 2006  
Accessible: [http://www.cahrv.uni-osnabrueck.de/reddot/CAHRVreportJusticeSystems\(3\).pdf](http://www.cahrv.uni-osnabrueck.de/reddot/CAHRVreportJusticeSystems(3).pdf)
8. United Nations. "In-depth study on all forms of discrimination against women. Report of the Secretary-General". 6 July 2006, A/61/122/Add.1  
Accessible: <http://www.un.org/womenwatch/daw/vaw/SGstudyvaw.htm>
9. European Commission. "Feasibility study to assess the possibilities, opportunities and needs to standardise national legislation on violence against women, violence against children and sexual orientation violence". 2010  
Accessible:  
[http://www.europarl.europa.eu/mwg-internal/de5fs23hu73ds/progress?id=8AmKnBXEuR9AsKe58Wi-e-ZNT41kX7\\_ZONZpkbHOD4](http://www.europarl.europa.eu/mwg-internal/de5fs23hu73ds/progress?id=8AmKnBXEuR9AsKe58Wi-e-ZNT41kX7_ZONZpkbHOD4),
10. World Health Organization. "Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence". 2013  
Accessible:  
<http://www.who.int/reproductivehealth/publications/violence/9789241564625/en>
11. Hungarian Women's Lobby and European Roma Rights Centre. "Alternative report submitted to the UN CEDAW Committee for consideration in relation to the examination of the combined seventh and eighth periodic reports of Hungary". January 2013  
Accessible:  
[http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/HUN/INT\\_CEDAW\\_NGO\\_HUN\\_13260\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/HUN/INT_CEDAW_NGO_HUN_13260_E.pdf)
12. Mapping the Legislation and Assessing the Impact of Protection Orders in the European Member States (POEMS). National Report Hungary. Prepared by WIRTH, Judit. Without date  
Accessible: <http://poems-project.com/wp-content/uploads/2015/02/Hungary.pdf>



13. Analytical study of the results of the 4th round of monitoring the implementation of Recommendation Rec(2002)5 on the protection of women against violence in Council of Europe member states. Prepared by PROF. I.R. DR. HAGEMANN-WHITE, Carol. Council of Europe, 2014  
 Accessible: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805915e9>
14. Mapping the Legislation and Assessing the Impact of Protection Orders in the European Member States (POEMS). National Report Austria. Prepared by LOGAR, Rosa. 8 January 2014  
 Accessible: <http://poems-project.com/wp-content/uploads/2015/02/Austria.pdf>
15. European Union Agency for Fundamental Rights. “Violence against women: an EU-wide survey. Main results report”. March 2014  
 Accessible: <http://fra.europa.eu/en/publication/2014/violence-against-women-eu-wide-survey-main-results-report>
16. BALDRY, Anna – FERREIRA, Ana – NIEMI, Johanna – SOSA, Lorena – VAN DER AA, Suzan. “Mapping the legislation and assessing the impact of protection orders in the European Member States”. Wolf Legal Publishers, 2015  
 Accessible: <http://poems-project.com/wp-content/uploads/2015/04/Intervict-Poems-digi-1.pdf>
17. “Promoting best practices in tackling violence against women”. Report of the Committee on Equality and Non-Discrimination of the Parliamentary Assembly of the Council of Europe. 26 October 2015, Doc. 13914
18. “Monitoring How Courts Treat Domestic Violence in Hungary: a Court Watch Program. A Summary of the Research Conducted by PATENT Association in 2015-2016”. PATENT Association. Budapest, 2016  
 Accessible:
  - i. in English:  
[http://patent.org.hu/dokumentumok/kozpolitika\\_kutatas/zarotanutmany\\_ang\\_webre.pdf](http://patent.org.hu/dokumentumok/kozpolitika_kutatas/zarotanutmany_ang_webre.pdf)
  - ii. in Hungarian (longer version):  
[http://patent.org.hu/dokumentumok/kozpolitika\\_kutatas/zarotanutmany\\_magy\\_webre.pdf](http://patent.org.hu/dokumentumok/kozpolitika_kutatas/zarotanutmany_magy_webre.pdf)
19. Autonomous Women’s House Zagreb – The Advocates for Human Rights. “Implementation of Croatia’s Domestic Violence Legislation: Follow-up Report”. March 2016  
 Accessible: [https://www.theadvocatesforhumanrights.org/uploads/croatia\\_final\\_report\\_2016.pdf](https://www.theadvocatesforhumanrights.org/uploads/croatia_final_report_2016.pdf)
20. Women Against Violence Europe. “Compilation of Country Profiles”. July 2016  
 Accessible: [http://files.wave-network.org/researchreports/WAVEReport2015\\_Compilation\\_Country\\_Profiles.pdf](http://files.wave-network.org/researchreports/WAVEReport2015_Compilation_Country_Profiles.pdf)

21. Women Against Violence Europe. “WAVE Thematic Paper. Preventing and eradicating femicide”. 14 February 2017.  
Accessible: [http://files.wave-network.org/researchreports/Thematic\\_Paper\\_Femicide\\_15Febr2017.pdf](http://files.wave-network.org/researchreports/Thematic_Paper_Femicide_15Febr2017.pdf)
22. “Emergency barring orders in situations of domestic violence: Article 52 of the Istanbul Convention. A collection of papers on the Council of Europe Convention on preventing and combating violence against women and domestic violence”. Prepared by LOGAR, Rosa and NIEMI, Johanna. Council of Europe, June 2017  
Accessible: <https://rm.coe.int/article-52-convention-istanbul-english-version/168073cae6>

### C. ARTICLES, PUBLICATIONS

1. ABDEL-MONEM, Tarik. “Opuz v. Turkey: Europe’s Landmark Judgment on Violence against Women”. Human Rights Brief, 2009, vol. 17, issue 1, p. 29-33
2. ACAR, Feride – POPA, Raluca Maria. “From Feminist Legal Project to Groundbreaking Regional Treaty: The Making of the Council of Europe Convention on Preventing and Combating Violence against Woman Domestic Violence”. European Journal of Human Rights, 2016, vol. 3, p. 287-319
3. ALFÖLDI, Ágnes Dóra. “A családon belüli erőszak megítélése és megelőzésének eszközei a magyar és az európai uniós jogban”<sup>559</sup>. Jogelméleti Szemle, 2011, vol. 3, p. 55-80  
Accessible: <http://jesz.ajk.elte.hu/alfoldi47.html>
4. ALFÖLDI, Ágnes Dóra, DR. “Szemelvények az ügyészség ideiglenes megelőző és megelőző távoltartás alkalmazása során kialakult gyakorlatából”<sup>560</sup>. Családi Jog, 2011, vol. 2, p. 34-39
5. “A családon belüli erőszak bizonyítása és jogkövetkezményei – Jogegységesítést kezdeményez a Páneurópa Jogász Unió”<sup>561</sup>, Jogi Fórum  
Accessible: <http://www.jogiforum.hu/hirek/33677>
6. BERCES, Viktor – DOMOKOS, Andrea. “A családon belüli erőszak szankcionálásának büntetőjogi lehetőségeiről”<sup>562</sup>. Jogelméleti Szemle, 2011, vol. 3, p. 77-85  
Accessible: [http://jesz.ajk.elte.hu/2017\\_3.pdf](http://jesz.ajk.elte.hu/2017_3.pdf)
7. DOMOKOS, Andrea (ed.). “A családon belüli erőszak büntetőjogi és társadalmi megítélése”<sup>563</sup>. Károli Gáspár University of the Reformed Church in Hungary, Faculty of Law, Budapest, 2017  
Accessible:  
[http://www.kre.hu/ajk/images/doc3/A\\_csaladon\\_beluli\\_eroszak\\_buntetojogi\\_es\\_tarsadalmi\\_megitelese.pdf](http://www.kre.hu/ajk/images/doc3/A_csaladon_beluli_eroszak_buntetojogi_es_tarsadalmi_megitelese.pdf)

<sup>559</sup> In English: “Evaluation and Preventive Tools of Domestic Violence in the Hungarian and the European Union Law”

<sup>560</sup> In English: “Excerpts from the Prosecutors’ Practice Relating to Temporary Preventive and Preventive Restraining Orders”

<sup>561</sup> In English: “Proving Domestic Violence, and its Consequences – Lawyers’ Pan-European Union Initiates a Law Coherence Procedure”

<sup>562</sup> In English: “Possibilities of Punishing Domestic Violence in Criminal Law”

<sup>563</sup> In English: “Considering Domestic Violence from Societal and Penal Aspects”

8. GALAJDA, Ágnes, DR. – SZEPESHÁZI, Péter, DR. “A családon belüli erőszak különböző aspektusai a szakemberek gyakorlatában”<sup>564</sup>. Családi Jog, 2010, vol. 4, p. 32-34
9. GERÉBY, Zsuzsanna, DR. “A hozzátartozók közötti erőszak miatt alkalmazható távoltartásról, avagy egy jogszabály “sötét oldala” bírói szemszögből”<sup>565</sup>. Családi Jog, 2010, vol. 4, p. 6-11
10. GYENGÉNÉ DR. NAGY, Márta, DR. “A megelőző távoltartás bírósági gyakorlata”<sup>566</sup>. Családi Jog, 2011, vol. 2, p. 27-33
11. HANNA, Cheryl. “Health, Human Rights, and Violence against Women and Girls: Broadly Redefining Affirmative State Duties after *Opuz v. Turkey*”. *Hastings International and Comparative Law Review*, 2011, vol. 34, p. 127-148
12. HESSBRUEGGE, Jan Arno. “The Historical Development of the Doctrines of Attribution and Due Diligence in International Law”. *New York University Journal of International Law and Politics*, 2004, vol. 36, p. 265-306
13. KAPOSSYNÉ DR. CZENE, Magdolna. “A távoltartás két éve a bíróságok gyakorlatában”<sup>567</sup>. In: WIRTH, Judit (ed.), “Rendszerbe zárva. Hogyan kezeli az igazságügyi rendszer a nők és gyerekek elleni férfierőszak jelenségét ma Magyarországon?”<sup>568</sup> Published by PATENT Association and NANE Women’s Rights Association, 2011, p. 109-146<sup>569</sup>  
Accessible: [http://nane.hu/wp-content/uploads/2016/03/rendszerbe\\_zarva.pdf](http://nane.hu/wp-content/uploads/2016/03/rendszerbe_zarva.pdf)
14. KORÖS, András, DR. “Távoltartási ügyek a Kúria gyakorlatában”<sup>570</sup>. Családi Jog, 2014, vol. 2, p. 36-42
15. MATUSIK, Tamás. “A büntetőeljárás távoltartás szabályozásának jogalkalmazásbeli problémái”<sup>571</sup>. *Belügyi Szemle*, 2013, vol. 9, p. 13-26
16. MCQUIGG, Ronagh J. A. “Domestic Violence and the ECJ: Joined Cases C-483/09 and C-1/10 *Magatte Gueye and Valentin Salmeron Sanchez*”. *European Public Law*, 2012, vol. 4, p. 645-654
17. MCQUIGG, Ronagh J. A. “Domestic Violence as a Human Rights Issue: *Rumor v. Italy*”. *European Journal of International Law*, 2015, vol. 26, no. 4, p. 1009-1025
18. PATENT Association, “Bíróságok monitorozása a párkapcsolati erőszakkal érintett esetek kezelésében”, Budapest, 2014<sup>572</sup>  
Accessible:  
[http://www.patent.org.hu/dokumentumok/jogyakorlatok/birosagfigyelo/Birosagok\\_monit\\_oroza\\_a\\_parkapcsolati\\_eroszakkal\\_erintett\\_esetek\\_kezeleseben\\_2014.pdf](http://www.patent.org.hu/dokumentumok/jogyakorlatok/birosagfigyelo/Birosagok_monit_oroza_a_parkapcsolati_eroszakkal_erintett_esetek_kezeleseben_2014.pdf)
19. PESTI, Brigitta. “A hozzátartozók közötti erőszak miatt alkalmazható távoltartásról, alkalmazásának gyakorlati problémáiról”<sup>573</sup>. *Jogelméleti Szemle*, 2013, vol. 2, p. 140-146

<sup>564</sup> In English: “Different Aspects of Domestic Violence in Professionals’ Practice”

<sup>565</sup> In English: “Restraining Orders Applicable in Case of Violence between Relatives, or the “Dark Side” of a Law from Judicial Point of View”

<sup>566</sup> In English: “The Judicial Practice of the Preventive Restraining Order”

<sup>567</sup> In English: “Two Years of the Restraining Orders in the Courts’ Practice”

<sup>568</sup> In English: “System Failure. Male Violence against Women and Children as Treated by the Legal System in Hungary Today”

<sup>569</sup> A shortened English version of the article and the publication is accessible:

<http://www.nokjoga.hu/sites/default/files/filefield/system-failure-2011.pdf>.

<sup>570</sup> In English: “Restraining Order Cases in the Practice of the Curia”

<sup>571</sup> In English: “Shortcomings of Restraining Orders Applicable in Criminal Proceedings”

<sup>572</sup> In English: “Monitoring of How Courts Treat Domestic Violence Cases”

- Accessible: <http://jesz.ajk.elte.hu/pesti54.pdf>
20. SCHNEIDER, Elizabeth M. "The Violence of Privacy". Connecticut Law Review, 1990-1991, vol. 23, p. 972-999
  21. SPIELER, Paula. "The Maria da Penha Case and the Inter-American Commission on Human Rights: Contributions to the Debate on Domestic Violence Against Women in Brazil". Indiana Journal of Global Legal Studies, 2011, vol. 18, issue 1, article 6, p. 121-143
  22. SPRONZ, Júlia. "A jog hálójában"<sup>574</sup> Published by PATENT Association, 2016  
Accessible: <http://mek.oszk.hu/16000/16039/16039.pdf>
  23. SPRONZ, Júlia – WIRTH, Judit. "Modell-törvény a családon belüli erőszak elkövetőivel szemben alkalmazható távoltartásról"<sup>575</sup>. In: WIRTH, Judit (ed.), "Rendszerbe zárva. Hogyan kezeli az igazságügyi rendszer a nők és gyerekek elleni férfierőszak jelenségét ma Magyarországon?"<sup>576</sup> Published by PATENT Association and NANE Women's Rights Association, 2011, p. 147-160  
Accessible: [http://nane.hu/wp-content/uploads/2016/03/rendszerbe\\_zarva.pdf](http://nane.hu/wp-content/uploads/2016/03/rendszerbe_zarva.pdf)
  24. SZÜRÖSNÉ TAKÁCS, Andrea. "Nyolcéves lettem! – A hozzátartozók közötti erőszak miatt alkalmazható távoltartás első nyolc éve. 1. rész"<sup>577</sup>. Családi jog, 2018, vol. 1, p. 18-23
  25. SZÜRÖSNÉ TAKÁCS, Andrea. "Nyolcéves lettem! – A hozzátartozók közötti erőszak miatt alkalmazható távoltartás első nyolc éve. 2. rész"<sup>578</sup>. Családi jog, 2018, vol. 2, p. 13-19
  26. TAMÁSI, Erzsébet – BOLYKY, Orsolya. "A távoltartás gyakorlati alkalmazásának körülményei"<sup>579</sup>. Iustum Aequum Salutare, 2014, vol. 4, p. 51–84  
Accessible: <http://ias.jak.ppke.hu/hir/ias/20144sz/03.pdf>
  27. TÓTH, Andrea Noémi. "Távoltartás osztrák mintára?"<sup>580</sup>. Debreceni Jogi Műhely, 2013, vol. 3, p. 107-119  
Accessible:  
[http://www.debrecenijogimuhely.hu/archivum/3\\_2013/tavoltartas\\_osztrak\\_mintara/](http://www.debrecenijogimuhely.hu/archivum/3_2013/tavoltartas_osztrak_mintara/)
  28. TÓTH, Andrea Noémi. "Múlt, jelen, jövő: merre tart a távoltartás?"<sup>581</sup>. Pro Futuro, 2015, vol. 1, p. 84-100  
Accessible:  
[http://profuturo.lib.unideb.hu/file/4/55b0e9bccec10/szerzo/Toth\\_Andrea\\_Noemi-Mult,\\_jelen,\\_jovo....pdf](http://profuturo.lib.unideb.hu/file/4/55b0e9bccec10/szerzo/Toth_Andrea_Noemi-Mult,_jelen,_jovo....pdf)

---

<sup>573</sup> In English: "Restraining Orders Applicable in Case of Violence between Relatives and Their Practical Problems"

<sup>574</sup> In English: "In the Law's Web"

<sup>575</sup> In English: "Model Act on the Restraining Orders Applicable against Perpetrators of Domestic Violence"

<sup>576</sup> In English: "System Failure. Male Violence against Women and Children as Treated by the Legal System in Hungary Today"

<sup>577</sup> In English: "I Have Become Eight Years Old – The First Eight Years of the Restraining Orders Applicable in Case of Violence between Relatives. Part 1"

<sup>578</sup> In English: "I Have Become Eight Years Old – The First Eight Years of the Restraining Orders Applicable in Case of Violence between Relatives. Part 2"

<sup>579</sup> In English: "The Circumstances of the Application of Restraining Orders"

<sup>580</sup> In English: "Restraining Orders Based on Austrian Sample?"

<sup>581</sup> In English: "Past, Present, Future: Where Are Restraining Orders Heading?"

29. TÓTH, Éva. „Szabadíts meg a Gonosztól!” A távoltartás dilemmái”<sup>582</sup>. Ügyészek Lapja, 2011, vol. 4, p.15-33.

Accessible:

[http://www.ugyeszek.hu/ftp/tartalom/ugyeszek\\_lapja/2011/ul\\_2011\\_4\\_all.pdf?phpMyAdmin=5e79130c4a2a408b3f002bed9c4d2fba](http://www.ugyeszek.hu/ftp/tartalom/ugyeszek_lapja/2011/ul_2011_4_all.pdf?phpMyAdmin=5e79130c4a2a408b3f002bed9c4d2fba)

#### D. OTHER DOCUMENTS

1. LOGAR, Rosa. “The Austrian Model of Intervention in Domestic Violence Cases”. Expert paper for the Expert Group Meeting organized by the UN Division for the Advancement of Women. 17 to 20 May 2005, Vienna (Austria)

Accessible:

<http://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/experts/logar.dv.pdf>

2. Violence against Women. Information for the Special Rapporteur on violence against women. Letter of the Counsellor of the Permanent Mission of Austria to the United Nations Office at Geneva. October 2005, No. 900.912/12/2005

Accessible: [www2.ohchr.org/english/issues/women/rapporteur/Austria.doc](http://www2.ohchr.org/english/issues/women/rapporteur/Austria.doc)

3. Resolution of the Assembly of the Inter-Parliamentary Union – How Parliaments Can and Must Promote Effective Ways of Combating Violence against Women in All Fields. Nairobi, 12 May 2006

4. LOGAR, Rosa. “Good Practices and Challenges in Legislation on Violence against Women”. Expert Paper for the Expert Group Meeting on good practices in legislation on violence against women, United Nations Division for the Advancement of Women. 20 May 2008, Vienna (Austria). EGM/GPLVAW/2008/EP.10

Accessible:

[http://www.un.org/womenwatch/daw/egm/vaw\\_legislation\\_2008/expertpapers/EGMGPLVAW%20Paper%20Rosa%20Logar.pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGPLVAW%20Paper%20Rosa%20Logar.pdf)

5. Federal Chancellery of Austria. “Ten Years of Austrian Anti-Violence Legislation. International Conference in the Context of the Council of Europe Campaign to Combat Violence Against Women, Including Domestic Violence, 5 to 7 November 2007 Vienna and St. Pölten, Austria”. Vienna, December 2008

Accessible: <https://www.interventionsstelle-wien.at/tagungsdokumentation-10-jahre-oesterreichische-gewaltschutzgesetze>

6. Handbook for Legislation on Violence against Women. United Nations, New York, 2010. ST/ESA/329

Accessible:

<http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>

7. World Health Organization. “Responding to Intimate Partner Violence and Sexual Violence against Women. WHO Clinical and Policy Guidelines”. 2013

---

<sup>582</sup> In English: ““Deliver from Evil!” Dilemmas of Restraining Orders”

Accessible:

[http://apps.who.int/iris/bitstream/10665/85240/1/9789241548595\\_eng.pdf?ua=1](http://apps.who.int/iris/bitstream/10665/85240/1/9789241548595_eng.pdf?ua=1)

8. “The Reform of India’s Sexual Violence Laws. Submissions prepared by Professor Sandra Fredman FBA QC (hon), with the assistance of members of Oxford Pro Bono Publico, on the invitation of the Justice Verma Committee investigating the reform of India’s sexual violence laws”. University of Oxford, Oxford Pro Bono Publico, January 2013
9. Proposal of the President of the National Judicial Authority for the Amendment of the Act LXXII of 2009 on the Restraining Orders Applicable in Case of Violence between Relatives.<sup>583</sup> 9 May 2013, 30.022-21/2013.OBH

Accessible:

[https://birosag.hu/sites/default/files/tavoltartas\\_jogalkotasi\\_javaslat\\_2009\\_evi\\_lxxii\\_tv.pdf](https://birosag.hu/sites/default/files/tavoltartas_jogalkotasi_javaslat_2009_evi_lxxii_tv.pdf)

10. Wiener Informationsstelle gegen Gewalt in der Familie. “Victims’ Rights to Support and Protection from Violence. Legislation for the Protection from Violence in Austria”. Information booklet, September 2013

Accessible: <https://www.interventionsstelle-wien.at/english-summary>

11. Human Rights Watch. “Unless Blood Flows. Lack of Protection from Domestic Violence in Hungary”. 6 November 2013

Accessible: <https://www.hrw.org/report/2013/11/06/unless-blood-flows/lack-protection-domestic-violence-hungary>

12. LOGAR, Rosa. “Murder rarely happens out of the blue. Danger management and safety management as methods to prevent severe violence”. Domestic Violence Intervention Centre Vienna, 2014

Accessible: <https://www.interventionsstelle-wien.at/download/?id=440>

13. TÓTH, Andrea Noémi, DR. “A távoltartás jogintézménye”<sup>584</sup>. PhD dissertation. Debrecen (Hungary), 2015

Accessible:

[https://dea.lib.unideb.hu/dea/bitstream/handle/2437/219200/TothAndrea\\_tezis\\_magyar\\_tikositott.pdf?sequence=2&isAllowed=y](https://dea.lib.unideb.hu/dea/bitstream/handle/2437/219200/TothAndrea_tezis_magyar_tikositott.pdf?sequence=2&isAllowed=y)

14. “The economic costs of violence against women”. Remarks by UN Assistant Secretary-General and Deputy Executive Director of UN Women, Lakshmi Puri at the high-level discussion on the “Economic Cost of Violence against Women”. New York, 21 September 2016

Accessible:

<http://www.unwomen.org/en/news/stories/2016/9/speech-by-lakshmi-puri-on-economic-costs-of-violence-against-women>

15. Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs. Violence against women and the EU accession to the Istanbul Convention. 2017, PE 596.815

<sup>583</sup> In Hungarian: “Az Országos Bírósági Hivatal elnökének előterjesztése a hozzátartozók közötti erőszak miatt alkalmazható távoltartásról szóló 2009. évi LXXII. törvény módosítására”

<sup>584</sup> In English: “Restraining Orders as Legal Instruments”



Accessible:

[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596815/IPOL\\_STU\(2017\)596815\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596815/IPOL_STU(2017)596815_EN.pdf)

16. Report of the General Prosecutor of Hungary to the Parliament on the activity of the prosecution service in 2016<sup>585</sup>. 27 September 2017, B/17351

Accessible: [http://ugyeszseg.hu/pdf/ogy\\_besz/ogy\\_beszamolo\\_2016.pdf](http://ugyeszseg.hu/pdf/ogy_besz/ogy_beszamolo_2016.pdf)

17. “Enjoyment of civil and political rights by women in Hungary”. Submission of the Hungarian Women’s Lobby, NANE Women’s Rights Association and PATENT Association for the 122<sup>nd</sup> session of the Human Rights Committee, February 2018

Accessible:

[https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fCSS%2fHUN%2f30260&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fCSS%2fHUN%2f30260&Lang=en)

18. “Hungary’s Compliance with the ICCPR: Domestic Violence”. Joint submission of The Advocates for Human Rights, Hungarian Women’s Lobby, NANE Women’s Rights Association and PATENT Association. Prepared for the 122<sup>nd</sup> session of the Human Rights Committee, February 2018

Accessible:

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fCSS%2fHUN%2f30263&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fCSS%2fHUN%2f30263&Lang=en)

19. Human Rights Committee. Concluding observations on the sixth periodic report of Hungary. 9 May 2018, CCPR/C/HUN/CO/6

20. Report of the General Prosecutor of Hungary to the Parliament on the activity of the prosecution service in 2017<sup>586</sup>. 3 September 2018, B/1258

Accessible: [http://ugyeszseg.hu/pdf/ogy\\_besz/ogy\\_beszamolo\\_2017.pdf](http://ugyeszseg.hu/pdf/ogy_besz/ogy_beszamolo_2017.pdf)

21. BODOR, Tibor – CSÁK, Zsolt – MÁZINÉ SZEPESI, Erzsébet – SOMOGYI, Gábor – SZOKOLAI, Gábor – VARGA, Zoltán. “Nagykommentár a büntetőeljárásról szóló 1998. évi XIX. törvényhez”<sup>587</sup>. In: Jogtár<sup>588</sup>

22. HEGEDŰS, István – JUHÁSZ, Zsuzsanna – KARSAI, Krisztina – KATONA, Tibor – MEZŐLAKI, Erik – SZOMORA, Zsolt – TÖRŐ, Sándor. “Kommentár a Büntető Törvénykönyvről szóló 2012. évi C. törvényhez”<sup>589</sup>. In: Jogtár

## E. WEBSITES

1. Committee on the Elimination of Discrimination against Women

Accessible: <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/CEDAWIndex.aspx>

2. Council of Europe – “Chart of signatures and ratifications of Treaty 210. Council of Europe Convention on preventing and combating violence against women and domestic violence”

<sup>585</sup> Extracts in English are available: [http://ugyeszseg.hu/pdf/ogy\\_besz/ogy\\_beszamolo\\_2016\\_eng.pdf](http://ugyeszseg.hu/pdf/ogy_besz/ogy_beszamolo_2016_eng.pdf).

<sup>586</sup> Extracts in English are available: [http://ugyeszseg.hu/pdf/ogy\\_besz/ogy\\_beszamolo\\_2017\\_eng.pdf](http://ugyeszseg.hu/pdf/ogy_besz/ogy_beszamolo_2017_eng.pdf).

<sup>587</sup> In English: “Commentary of the Act XIX of 1998 on the Criminal Procedure”

<sup>588</sup> Electronic collection of Hungarian laws

<sup>589</sup> In English: “Commentary of the Act C of 2012 on the Criminal Code”

- Accessible:  
<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>
3. Dag Hammarskjöld Library, United Nations (web archive)  
 Accessible:  
[https://web.archive.org/web/20140116222203/http://www.un.org/depts/dhl/resguide/r48\\_en.shtml](https://web.archive.org/web/20140116222203/http://www.un.org/depts/dhl/resguide/r48_en.shtml)
  4. Domestic Abuse Intervention Centre Vienna  
 Accessible:  
<https://www.interventionsstelle-wien.at/statistiken/statistiken-der-wiener-interventionsstelle>
  5. European Union Agency for Fundamental Rights  
 Accessible:  
<http://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-data-explorer-violence-against-women-survey>
  6. Federal Government of Austria – domestic violence  
 Accessible: [https://www.bmgf.gv.at/home/EN/Women\\_Equality/Domestic\\_Violence#f1](https://www.bmgf.gv.at/home/EN/Women_Equality/Domestic_Violence#f1)
  7. Federal Ministry of the Interior (Austria) – on the Federal Act on the Protection against Domestic Violence (*infra*)  
 Accessible: <https://bmi.gv.at/news.aspx?id=31654F682F704C653641453D>
  8. Index – Hungarian news portal
    - i. “Kövér szerint rendben van Illés beszólása”<sup>590</sup>  
 Accessible:  
[https://index.hu/belfold/2013/09/12/kover\\_szerint\\_rendben\\_van\\_illes\\_megjegyzese/](https://index.hu/belfold/2013/09/12/kover_szerint_rendben_van_illes_megjegyzese/)
    - ii. “A KDNP nekiment az ELTE-nek, a társadalmi nemektől félti a nemzetet”<sup>591</sup>  
 Accessible:  
[https://index.hu/belfold/2017/02/17/a\\_kdnp\\_ugatja\\_az\\_egyetemet/](https://index.hu/belfold/2017/02/17/a_kdnp_ugatja_az_egyetemet/)
    - iii. “Nem indulhat több gender szak Magyarországon”<sup>592</sup>  
 Accessible:  
[https://index.hu/belfold/2018/08/09/nem\\_indulhat\\_tobb\\_genderszak\\_magyarorszagon/](https://index.hu/belfold/2018/08/09/nem_indulhat_tobb_genderszak_magyarorszagon/)
  9. Inter-American Court of Human Rights – “Decisions and Judgments”  
 Accessible:  
[http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda\\_casos\\_contenciosos.cfm?lang=en](http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=en)
  10. Law School, Loyola Marymount University, Los Angeles (United States of America) – “Velásquez Rodríguez v. Honduras”

<sup>590</sup> In English: “Mr. Kövér Thinks Mr. Illés’ Quirk Was Alright”

<sup>591</sup> In English: “KDNP Sets about ELTE. They Consider Gender Dangerous for the Nation”

<sup>592</sup> In English: “No More Gender Studies Can Be Launched in Hungary”



Accessible: <https://iachr.ils.edu/cases/vel%C3%A1squez-rodr%C3%ADguez-v-honduras>

11. Legislation Online – Criminal Codes – Spain

Accessible: <http://www.legislationline.org/documents/section/criminal-codes>

12. Nol.hu – Hungarian news portal

- i. “Szüljön! - sötétség a magyar parlamentben”<sup>593</sup>

Accessible:

[http://nol.hu/belfold/a\\_fidesz\\_szerint\\_a\\_gyerekszuless\\_megoldja\\_a\\_csaladon\\_beluli\\_eroszakot-1331717](http://nol.hu/belfold/a_fidesz_szerint_a_gyerekszuless_megoldja_a_csaladon_beluli_eroszakot-1331717)

13. United Nations Entity for Gender Equality and the Empowerment of Women (UN Women)

- i. Beijing and its Follow-up

Accessible: <http://www.un.org/womenwatch/daw/beijing/>

- ii. Global Database on Violence against Women

Accessible: <http://evaw-global-database.unwomen.org/en>

- iii. “How Decisions are Made at the UN”

Accessible: <https://outreach.un.org/mun/content/how-decisions-are-made-un>

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<sup>593</sup> In English: “Give Birth! – Darkness in the Hungarian Parliament”

## ANNEX II – LEGAL INSTRUMENTS AND PROCEDURAL DOCUMENTS

### A. TREATIES

1. Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, Italy, 4 November 1950. CETS No. 005 (UNTS Vol. 213, 1955 I-2889, p. 221)<sup>594</sup>
2. Convention on the Nationality of Married Women. New York, United States of America, 29 January 1957. Resolution of the General Assembly of the United Nations No. A/RES/1040 (XI). UNTS Vol. 309, 1958 I-4468, p. 65
3. Convention concerning Discrimination in Respect of Employment and Occupation. Geneva, Switzerland, 25 June 1958. ILO Convention No.111
4. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. New York, United States of America, 7 November 1962. Resolution of the General Assembly of the United Nations No. A/RES/1763 (XVII). UNTS Vol. 521, 1964 I-7525, p. 231
5. Convention against Discrimination in Education. Paris, France, 14 December 1960. UNTS Vol. 429, 1962 I-6193, p. 93
6. American Convention on Human Rights: "Pact of San José, Costa Rica". San José, Costa Rica, 22 November 1969. UNTS Vol. 1144, 1979 I-17955, p. 143
7. Convention on the Elimination of All Forms of Discrimination against Women. New York, United States of America, 18 December 1979. Resolution of the General Assembly of the United Nations No. A/RES/34/180. UNTS Vol. 1249, 1981 I-20378, p. 13
8. Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women. Belém do Pará, Brazil, 9 June 1994
9. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. New York, United States of America, 6 October 1999. Resolution of the General Assembly of the United Nations No. A/RES/54/4. UNTS Vol. 2131, 2000 A-20378, p. 83
10. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Maputo, Mozambique, 11 July 2003
11. Council of Europe Convention on preventing and combating violence against women and domestic violence. Istanbul, Turkey, 5 November 2011. CETS No. 210 (UNTS, No. I-52313)<sup>595</sup>

### B. HUNGARIAN LEGAL INSTRUMENTS

1. Act XX of 1949 on the Constitution of the Republic of Hungary<sup>596</sup> [repealed by the Fundamental Law of Hungary]
2. Fundamental Law of Hungary<sup>597</sup>

<sup>594</sup> Protocols omitted. Explanatory Reports to the Convention as indicated in the text have also been used.

<sup>595</sup> The Explanatory Report to the Convention as indicated in the text have also been used.

<sup>596</sup> In Hungarian: "a Magyar Köztársaság Alkotmányáról szóló 1949. évi XX. törvény"

3. Act III of 1953 on the Civil Procedure<sup>598</sup> [repealed by the Act CXXX of 2016]
4. Act IV of 1959 on the Civil Code<sup>599</sup> [repealed by the Act V of 2013]
5. Act IV of 1978 on the Criminal Code<sup>600</sup> [repealed by the Act C of 2012]
6. Act XIX of 1998 on the Criminal Procedure<sup>601</sup> [repealed by the Act XC of 2017]
7. Act LI of 2006 on the Amendment of the Act XIX of 1998 on the Criminal Procedure<sup>602</sup>
8. Act LXXII of 2009 on the Restraining Orders Applicable in Case of Violence between Relatives<sup>603</sup>
9. Act II of 2012 on the Regulatory Offences, on the Regulatory Offence Procedure and the Regulatory Offence Registration System<sup>604</sup>
10. Act C of 2012 on the Criminal Code<sup>605</sup>
11. Act V of 2013 on the Civil Code<sup>606</sup>
12. Act CXXX of 2016 on the Civil Procedure<sup>607</sup>
13. Act XC of 2017 on the Criminal Procedure<sup>608</sup>
14. Government Decree No. 331/2006. (XII. 23.) on the Fulfilment of Functions and Competencies of Child Protection and Guardianship and on the Organization and the Competency of the Guardianship Authority<sup>609</sup>
15. Government Decree No. 139/2015. (VI. 9.) on the Register of Higher Education Qualifications and the Inclusion of New Qualifications into the Register<sup>610</sup>
16. Government Decree No. 471/2017. (XII. 28.) on the Detailed Rules of the Issuance of the Temporary Preventive Restraining Order<sup>611</sup>
17. Government Decree No. 188/2018. (X. 12.) on the Amendment of Government Decree No. 283/2012. (X. 4.) on the System of Teacher Training, Order of Specialization and the Register of Teacher Programs, and Government Decree No. 139/2015. (VI. 9.) on the

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<sup>597</sup> Adopted on 25 April 2011. In Hungarian: “Magyarország Alaptörvénye”

<sup>598</sup> In Hungarian: “a polgári perrendtartásról szóló 1952. évi III. törvény”

<sup>599</sup> In Hungarian: “a Polgári Törvénykönyvről szóló 1959. évi IV. törvény”

<sup>600</sup> In Hungarian: “a Büntető Törvénykönyvről szóló 1978. évi IV. törvény”. A translation of the Criminal Code, the source of which is unknown, is accessible: [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=190526](http://www.wipo.int/wipolex/en/text.jsp?file_id=190526).

<sup>601</sup> In Hungarian: “a büntetőeljárásról szóló 1998. évi XIX. törvény”

<sup>602</sup> In Hungarian: “a büntetőeljárásról szóló 1998. évi XIX. törvény módosításáról szóló 2006. évi LI. törvény”

<sup>603</sup> In Hungarian: “a hozzátartozók közötti erőszak miatt alkalmazható távoltartásról szóló 2009. évi LXXII. törvény”

<sup>604</sup> In Hungarian: “a szabálysértésekről, a szabálysértési eljárásról és a szabálysértési nyilvántartási rendszerről szóló 2012. évi II. törvény”

<sup>605</sup> In Hungarian: “a Büntető Törvénykönyvről szóló 2012. évi C. törvény”. The official translation of the Criminal Code is accessible: [http://thb.kormany.hu/download/a/46/11000/Btk\\_EN.pdf](http://thb.kormany.hu/download/a/46/11000/Btk_EN.pdf).

<sup>606</sup> In Hungarian: “a Polgári Törvénykönyvről szóló 2013. évi V. törvény”

<sup>607</sup> In Hungarian: “a polgári perrendtartásról szóló 2016. évi CXXX. törvény”

<sup>608</sup> In Hungarian: “a büntetőeljárásról szóló 2017. évi XC. törvény”

<sup>609</sup> In Hungarian: “a gyermekvédelmi és gyámügyi feladat- és hatáskörök ellátásáról, valamint a gyámhatóság szervezetéről és illetékességéről szóló 331/2006. (XII. 23.) Korm. rendelet”

<sup>610</sup> In Hungarian: “a felsőoktatásban szerezhető képesítések jegyzékéről és új képesítések jegyzékbe történő felvételéről szóló 139/2015. (VI. 9.) Korm. rendelet”

<sup>611</sup> In Hungarian: “az ideiglenes megelőző távoltartó határozat meghozatalának részletes szabályairól szóló 471/2017. (XII. 28.) Korm. rendelet”

Register of Higher Education Qualifications and the Inclusion of New Qualifications into the Register<sup>612</sup>

18. Ministerial Decree No. 52/2009. (IX. 30.) IRM on the Detailed Rules of the Issuance of the Temporary Restraining Orders<sup>613</sup> [repealed by Government Decree No. 471/2017. (XII. 28.)]
19. Decision No. 45/2003. (IV. 16.) of the Parliament on the National Strategy Regarding the Prevention of Domestic Violence and its Effective Treatment<sup>614</sup> [repealed by the Decision No. 30/2015. (VII. 7.) of the Parliament]
20. Decision No. 115/2003. (X. 28.) of the Parliament on the National Strategy of the Social Crime Prevention<sup>615</sup> [repealed by the Decision No. 86/2013. (X. 17.) of the Parliament on the Repeal of the Decision No. 115/2003. (X. 28.) of the Parliament on the National Strategy of the Social Crime Prevention<sup>616</sup>]
21. Decision No. 30/2015. (VII. 7.) of the Parliament on Defining the National Strategic Goals Regarding the Effective Treatment of Violence in Relationships<sup>617</sup>
22. Directive No. 32/2007. (OT 26.) of the Commander in Chief of the Police on the Implementation of Police Tasks Relating to the Handling of Domestic Violence and the Protection of Minors<sup>618</sup> [repealed by Directive No. 2/2018. (I. 25.) of the Commander in Chief of the Police]
23. Directive No. 37/2009. (OT 22.) of the Commander in Chief of the Police on the Implementation of Police Tasks Relating to the Temporary Preventive Restraining Order Applicable in Case of Violence between Relatives<sup>619</sup> [repealed by Directive No. 2/2018. (I. 25.) of the Commander in Chief of the Police]
24. Directive No. 2/2018. (I. 25.) of the Commander in Chief of the Police on the Implementation of Police Tasks Relating to the Handling of Violence between Relatives<sup>620</sup>
25. Bill No. T/9837. on Restraining Orders Applicable in Case of Domestic Violence (not passed)<sup>621</sup>

Accessible: <http://www.parlament.hu/irom37/9837/09837.pdf>

<sup>612</sup> In Hungarian: “a tanárképzés rendszeréről, a szakosodás rendjéről és a tanárszakok jegyzékéről szóló 283/2012. (X. 4.) Korm. rendelet, valamint a felsőoktatásban szerezhető képesítések jegyzékéről és új képesítések jegyzékbe történő felvételéről szóló 139/2015. (VI. 9.) Korm. rendelet módosításáról szóló 188/2018. (X. 12.) Korm. rendelet”

<sup>613</sup> In Hungarian: “az ideiglenes megelőző távoltartó határozat meghozatalának részletes szabályairól szóló 52/2009. (IX. 30.) IRM rendelet”

<sup>614</sup> In Hungarian: “a családon belüli erőszak megelőzésére és hatékony kezelésére irányuló nemzeti stratégia kialakításáról szóló 45/2003. (IV. 16.) OGY határozat”

<sup>615</sup> In Hungarian: “a társadalmi bűnmegelőzés nemzeti stratégiájáról szóló 115/2003. (X. 28.) OGY határozat”

<sup>616</sup> In Hungarian: “a társadalmi bűnmegelőzés nemzeti stratégiájáról szóló 115/2003. (X. 28.) OGY határozat hatályon kívül helyezéséről szóló 86/2013. (X. 17.) OGY határozat”

<sup>617</sup> In Hungarian: “a kapcsolati erőszak elleni hatékony fellépést elősegítő nemzeti stratégiai célok meghatározásáról szóló 30/2015. (VII. 7.) OGY határozat”

<sup>618</sup> In Hungarian: “a családon belüli erőszak kezelésével és a kiskorúak védelmével kapcsolatos rendőri feladatok végrehajtásáról szóló 32/2007. (OT 26.) ORFK utasítás”

<sup>619</sup> In Hungarian: “a hozzátartozók közötti erőszak miatt alkalmazható ideiglenes megelőző távoltartás rendőrségi feladatainak végrehajtásáról szóló 37/2009. (OT 22.) ORFK utasítás”

<sup>620</sup> In Hungarian: “a hozzátartozók közötti erőszak kezelésével összefüggő rendőrségi feladatok végrehajtásáról szóló 2/2018. (I. 25.) ORFK utasítás”

<sup>621</sup> In Hungarian: “T/9837. számú törvényjavaslat a családon belüli erőszak miatt alkalmazható távoltartásról”

26. Proposal No. H/2390 for Decision of the Parliament on the Ratification of the Istanbul Convention (not passed)<sup>622</sup>

Accessible: <http://www.parlament.hu/irom40/02390/02390.pdf>

### C. AUSTRIAN LEGAL INSTRUMENTS

1. Act of 27 Mai 1896 on the Execution and Security Procedures, Imperial Gazette No. 79/1896<sup>623</sup>
2. Criminal Code, Federal Gazette No. 60/1974<sup>624</sup>
3. Code of Criminal Procedure, Federal Gazette No. 631/1975<sup>625</sup>
4. Federal Act on the Organization of the Security Management and the Activity of the Security Police, Federal Gazette No. 566/1991<sup>626</sup>
5. Federal Act on the Protection against Domestic Violence, Federal Gazette No. 759/1996<sup>627</sup>
6. Second Act on the Protection against Domestic Violence, Federal Gazette No. 40/2009<sup>628</sup>
7. Amendment of the Security Police Act, Federal Gazette No. 152/2013<sup>629</sup>

### D. EUROPEAN UNION

1. Treaty on European Union (consolidated version: OJ C 202, 7.6.2016, p. 13)
2. Treaty on the Functioning of the European Union (consolidated version: OJ C 202, 7.6.2016, p. 47)
3. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (OJ C 306, 17.12.2007, p. 1; UNTS Vol. 2702, 2010 I-47938, p. 3)
  - i. Declaration No. 2 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon signed on 13 December 2007 (OJ C 115, 9.5.2008, p. 335)

<sup>622</sup> In Hungarian: “H/2390 sz. országgyűlési határozati javaslat az Isztambuli Egyezmény elfogadásáról”

<sup>623</sup> In German: “Gesetz vom 27. Mai 1896, über das Exekutions- und Sicherungsverfahren (Exekutionsordnung)”, RGBl. Nr. 79/1896

<sup>624</sup> The full name of the act in German: “Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen (Strafgesetzbuch – StGB)”, BGBl. Nr. 60/1974

<sup>625</sup> In German: “Strafprozeßordnung“, BGBl. Nr. 631/1975

<sup>626</sup> In German: “Bundesgesetz über die Organisation der Sicherheitsverwaltung und die Ausübung der Sicherheitspolizei (Sicherheitspolizeigesetz – SPG)”, BGBl. Nr. 566/1991

<sup>627</sup> The full name of the act in German: “Bundesgesetz über Änderungen des allgemeinen bürgerlichen Gesetzbuchs, der Exekutionsordnung und des Sicherheitspolizeigesetzes (Bundesgesetz zum Schutz vor Gewalt in der Familie – GeSchG)”, BGBl. Nr. 759/1996

<sup>628</sup> The full name of the act in German: “Bundesgesetz, mit dem die Exekutionsordnung, die Zivilprozessordnung, das Außerstreitgesetz, das Gerichtliche Einbringungsgesetz 1962, das Strafgesetzbuch, die Strafprozessordnung 1975, das Strafvollzugsgesetz, das Tilgungsgesetz 1972, das Staatsanwaltschaftsgesetz, das Verbrechenopfergesetz, das Strafregistriergesetz, das Sicherheitspolizeigesetz und das Allgemeine Bürgerliche Gesetzbuch geändert werden (Zweites Gewaltschutzgesetz – 2. GeSchG)”, BGBl. I Nr. 40/2009

<sup>629</sup> The full name of the act in German: “Bundesgesetz, mit dem das Sicherheitspolizeigesetz geändert wird und Verstöße gegen bestimmte einstweilige Verfügungen zum Schutz vor Gewalt und zum Schutz vor Eingriffen in die Privatsphäre zu Verwaltungsübertretungen erklärt werden (SPG-Novelle 2013)”, BGBl. I Nr. 152/2013

4. Charter of Fundamental Rights of the European Union. OJ C 326, 26.10.2012, p. 391
5. Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, OJ L 181, 29.6.2013, p. 4
6. Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order. OJ L 338, 21.12.2011, p. 2
7. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. OJ L 315, 14.11.2012, p. 57
8. Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings. OJ L 82, 22.3.2001, p. 1 [repealed by Directive 2012/29/EU of the European Parliament and of the Council]
9. Resolution of the Council of 10 June 2011 on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings. OJ C 187, 28.6.2011, p. 1
10. European Parliament resolution of 26 November 2009 on the elimination of violence against women. 26 November 2009, P7\_TA(2009)0098
11. European Parliament resolution of 25 February 2014 with recommendations to the Commission on combating Violence Against Women. 25 February 2014, P7\_TA(2014)0126. OJ C 285, 29.8.2017, p. 2
12. Council of the European Union. Council conclusions - "Preventing and combating all forms of violence against women and girls, including female genital mutilation". JUSTICE and HOME AFFAIRS Council meeting, Luxembourg, 5 and 6 June 2014
13. Guidance Document of the Directorate-General for Justice related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. Ref. Ares(2013)3763804 - 19/12/2013

#### **E. COUNCIL OF EUROPE**

1. Declaration on equality of women and men, Committee of Ministers, 16 November 1988
2. Report by the Secretary General prepared by the Directorate of Human Rights. 3rd European Ministerial Conference on equality between women and men. 3rd European Ministerial Conference on equality between women and men. Rome, Italy, 21-22 October 1993
3. Declaration on Policies for Combating Violence against Women in a Democratic Europe. 3<sup>rd</sup> European Ministerial Conference on equality between women and men. Rome, Italy, 21-22 October 1993
4. Recommendation Rec(2002)5 of the Committee of Ministers to member States on the protection of women against violence. 30 April 2002
5. Recommendation CM/Rec(2007)17 of the Committee of Ministers to member states on gender equality standards and mechanisms. 21 November 2007

6. Resolution “Bridging the gap between de jure and de facto equality to achieve real gender equality”. MEG 7 (2010) 1 resolution. 7<sup>th</sup> Council of Europe Conference of Ministers responsible for Equality between Women and Men. Baku, Azerbaijan, 24-25 May 2010

#### **F. COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN**

1. General recommendation No. 12: Violence against women. 1989, A/44/38
2. General recommendation No. 19: Violence against women. 1992, A/47/38
3. Concluding comments on the combined fourth and fifth periodic report of Turkey. 15 February 2005, CEDAW/C/TUR/CC/4-5
4. Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women. Combined seventh and eighth periodic reports of States parties. Hungary. 22 September 2011, CEDAW/C/HUN/7-8
5. List of issues and questions with regard to the consideration of periodic reports. Austria. 21 August 2012, CEDAW/C/AUT/Q/7-8
6. List of issues and questions with regard to the consideration of periodic reports. Hungary. 21 August 2012, CEDAW/C/HUN/Q/7-8
7. List of issues and questions with regard to the consideration of periodic reports: Austria. Addendum. Replies of Austria to the list of issues to be taken up in connection with the consideration of its combined seventh and eighth periodic reports. 21 November 2012, CEDAW/C/AUT/Q/7-8/Add.1
8. List of issues and questions with regard to the consideration of periodic reports: Hungary. Addendum. Replies of Hungary to the list of issues to be taken up in connection with the consideration of its combined seventh and eighth periodic reports. 21 November 2012, CEDAW/C/HUN/Q/7-8/Add.1
9. Concluding observations on the seventh and eighth periodic reports of Austria, adopted by the Committee at its fifty-fourth session (11 February–1 March 2013). 22 March 2013, CEDAW/C/AUT/CO/7-8
10. Concluding observations on the combined seventh and eighth periodic reports of Hungary, adopted by the Committee at its fifty-fourth session (11 February–1 March 2013). 26 March 2013, CEDAW/C/HUN/CO/7-8
11. Concluding observations on the combined seventh and eighth periodic reports of Hungary. Addendum. Information provided by Hungary in follow-up to the concluding observations. 2 March 2015, CEDAW/C/HUN/CO/7-8/Add.1
12. Concluding observations on the combined seventh and eighth periodic reports of Austria. Addendum. Information provided by Austria in follow-up to the concluding observations. 29 April 2015, CEDAW/C/AUT/CO/7-8/Add.1
13. Follow-up letter sent to the State party (Hungary). 22 September 2015, YH/follow-up/Hungary/61
14. Follow-up letter sent to the State party (Austria). 14 December 2015, YH/follow-up/Austria/62

15. Consideration of reports submitted by States parties under article 18 of the Convention. Ninth periodic report of States parties due in 2017. Austria. 15 May 2017, CEDAW/C/AUT/9
16. General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19. 26 July 2017, CEDAW/C/GC/35

#### **G. RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS**

1. Declaration on the Elimination of Discrimination of Women. 7 November 1967, A/RES/22/2263
2. Declaration on the Elimination of Violence against Women. 20 December 1993, A/RES/48/104
3. Fourth World Conference on Women. 8 December 1995, A/RES/50/42
4. Elimination of domestic violence against women. [Resolution on the report of the Third Committee (A/58/501)]. 19 February 2004, A/RES/58/147

#### **H. UNITED NATIONS WORLD CONFERENCES**

1. World Conference of the International Women's Year. Mexico City, Mexico, 19 June to 2 July 1975. Report, E/CONF.66/34
2. World Conference of the United Nations Decade for Women: Equality, Development and Peace. Copenhagen, Denmark, 14 to 30 July 1980. Report, A/CONF.94/35
3. World Conference to review and appraise the achievements of the United Nations Decade for Women: Equality, Development and Peace. Nairobi, Kenya, 15 to 26 July 1985. Report, A/CONF.116/28/Rev.1
4. World Conference on Human Rights. Vienna Declaration and Programme of Action. Vienna, Austria, 14-25 June 1993
5. Fourth World Conference on Women. Beijing, China, 4-15 September 1995. Report, A/CONF.177/20/Rev.1

#### **I. COMMISSION ON HUMAN RIGHTS**

1. Resolution 1994/45. Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women. 4 March 1994, E/CN.4/RES/1994/45
2. Resolution 2003/45. Elimination of violence against women. 23 April 2003, E/CN.4/RES/2003/45

#### **J. HUMAN RIGHTS COUNCIL**

1. Report of the Working Group on the issue of discrimination against women in law and in practice on its mission to Hungary. 21 April 2017, A/HRC/35/29/Add.1



2. Report of the Working Group on the issue of discrimination against women in law and in practice on its mission to Hungary: comments by the State. 6 June 2017, A/HRC/35/29/Add.4

#### **K. GROUP OF EXPERTS ON ACTION AGAINST VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE (GREVIO)**

1. Report submitted by Austria pursuant to Article 68, paragraph 1 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report). Published on 6 September 2016, GREVIO/Inf(2016)2
2. GREVIO Shadow Report NGO-Coalition. Austrian NGO-Shadow Report to GREVIO. September 2016
3. Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). First (baseline) evaluation of Austria on the implementation of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. 27 September 2017, GREVIO/Inf(2017)4
4. Comments submitted by Austria on GREVIO's final report on the implementation of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report). Published on 27 September 2017, GREVIO/Inf(2017)11
5. Recommendation on the implementation of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence by Austria. Published on 30 January 2018, IC-CP/Inf(2018)1

#### **L. OTHER LEGAL INSTRUMENTS**

1. Organic Act No. 10 of 23 November 1995 on the Criminal Code<sup>630</sup>
2. Committee against Torture. General Comment No. 2. Implementation of article 2 by States parties. 24 January 2008, CAT/C/GC/2

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<sup>630</sup> In Spanish: “Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal”

## ANNEX III – CASE LAW

### A. EUROPEAN COURT OF HUMAN RIGHTS

1. *Airey v. Ireland*, application no. 6289/73, judgment of 9 October 1979
2. *Osman v. the United Kingdom*, application no. 87/1997/871/1083, judgment of 28 October 1998 [Grand Chamber]
3. *E. and Others v. the United Kingdom*, application no. 33218/96, judgment of 26 November 2002
4. *M.C. v. Bulgaria*, application no. 39272/98, judgment of 4 December 2003
5. *Kontrová v. Slovakia*, application no. 7510/04, judgment of 31 May 2007
6. *Bevacqua and S. v. Bulgaria*, no. 71127/01, judgment of 12 June 2008
7. *Sandra Janković v. Croatia*, application no. 38478/05, judgment of 5 March 2009
8. *Opuz v. Turkey*, application no. 33401/02, judgment of 9 June 2009
9. *Rantsev v. Cyprus and Russia*, application no. 25965/04, judgment of 7 January 2010
10. *Kalucza v. Hungary*, application no. 57693/10, judgment of 24 April 2012
11. *Valiulienė v. Lithuania*, application no. 33234/07, judgment of 26 March 2013
12. *Rumor v. Italy*, application no. 72964/10, judgment of 27 May 2014
13. *Talpis v. Italy*, application no. 41237/14, judgment of 2 March 2017
14. *Kurt v. Austria*, application no. 62903/15, questions to the parties communicated on 30 March 2017
15. *Bălșan v. Romania*, application no. 49645/09, judgment of 23 May 2017

### B. COURT OF JUSTICE OF THE EUROPEAN UNION

1. *Magatte Gueye and Valentín Salmerón Sánchez*, C-483/09 and C-1/10, preliminary judgment of 15 September 2011, ECR [2011] I-08263

### C. HUNGARIAN CASE LAW

1. BH1981. 223.<sup>631</sup> (Supreme Court Bf. IV. 619/1980.<sup>632</sup>)
2. Decision No. 53/2009 (V. 6.) of the Constitutional Court<sup>633</sup> – on the prior constitutionality inquiry into the Act on the Restraining Orders Applicable in Case of Violence between Relatives [later promulgated as the Act LXXII of 2009]
3. Opinion No. 1/2007 of the Criminal College<sup>634</sup>
4. Curia Pfv. II. 21.149/2013<sup>635</sup>

<sup>631</sup> “BH” stands for “bíróági határozat” (*i.e.* judicial decision).

<sup>632</sup> In Hungarian: “Legfelsőbb Bíróság”

<sup>633</sup> In Hungarian: “53/2009. (V. 6.) AB határozat”

<sup>634</sup> In Hungarian: “1/2007. BK vélemény”

5. BH2011. 311. (Supreme Court Pfv. II. 22.166/2010.)
6. EBH2012. P.3.<sup>636</sup> (Curia Pfv. II. 22.341/2011.)
7. BH2013. 307. (Curia Pfv. II. 20.524/2013.)
8. BH2014. 2. (Curia Bfv. II. 854/2013.)
9. BH2014. 275. (Curia Pfv. II. 20.845/2013.)
10. BH2015. 70. (Curia Pfv. II. 21.305/2014.)
11. BH2015. 330. (Curia Pfv. II. 21.179/2015.)

#### D. COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

1. *A.T. v. Hungary*, views adopted on 26 January 2005. Communication No. 2/2003. CEDAW/C/36/D/2/2003
2. *Şahide Goekce (deceased) v. Austria*, views, 6 August 2007. Communication No. 5/2005, CEDAW/C/39/D/5/2005
3. *Fatma Yildirim (deceased) v. Austria*, views, 1 October 2007. Communication No. 6/2005, CEDAW/C/39/D/6/2005
4. *Karen Tayag Vertido v. The Philippines*, views, 1 September 2010. Communication No. 18/2008, CEDAW/C/46/D/18/2008

#### E. OTHER CASE LAW

1. OGH 04.06.1985 4 Ob 512/85<sup>637</sup> (Austria)
2. *Commonwealth v. Shoemaker* (1986), Supreme Court of Pennsylvania, 518 A.2d 591, 359 Pa. Super. 111
3. *Velásquez Rodríguez v. Honduras*, merits, judgment of 29 July 1988, Inter-American Court of Human Rights, Series C No. 4.
4. *Godínez Cruz v. Honduras*, merits, judgment of 20 January 1989, Inter-American Court of Human Rights, Series C No. 5.
5. *Fairén Garbí and Solís Corrales v. Honduras*, merits, judgment of 15 March 1989, Inter-American Court of Human Rights, Series C No. 6.

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<sup>635</sup> In Hungarian: “Kúria”

<sup>636</sup> “EBH” stands for “elvi bírósági határozat” (*i.e.* judicial decision of principle).

<sup>637</sup> “OGH” stands for “der Oberste Gerichtshof” (*i.e.* the Supreme Court of Justice of the Republic of Austria). Other relevant cases (RIS-Justiz RS0004925) are accessible:

[https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=09aec8ca-9fe6-44b9-86de-f0d2920e5a16&Abfrage=Gesamtabfrage&SearchInAsylGH=&SearchInAvn=&SearchInAvsv=&SearchInBegut=&SearchInBgblAlt=&SearchInBgblAuth=&SearchInBgblPdf=&SearchInBks=&SearchInBundesnormen=&SearchInDok=&SearchInDsk=&SearchInErlaesse=&SearchInGbk=&SearchInGemeinderecht=&SearchInJustiz=&SearchInBvwg=&SearchInLvwg=&SearchInLgbl=&SearchInLgblNO=&SearchInLgblAuth=&SearchInLandesnormen=&SearchInNormenliste=&SearchInPruefGewO=&SearchInPvak=&SearchInRegV=&SearchInSpg=&SearchInUbas=&SearchInUmse=&SearchInUvs=&SearchInVerg=&SearchInVfgh=&SearchInVwgh=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=RS0004925+&Dokumentnummer=JJR\\_19750708\\_OGH0002\\_00500B00113\\_7500000\\_001#hit1.](https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=09aec8ca-9fe6-44b9-86de-f0d2920e5a16&Abfrage=Gesamtabfrage&SearchInAsylGH=&SearchInAvn=&SearchInAvsv=&SearchInBegut=&SearchInBgblAlt=&SearchInBgblAuth=&SearchInBgblPdf=&SearchInBks=&SearchInBundesnormen=&SearchInDok=&SearchInDsk=&SearchInErlaesse=&SearchInGbk=&SearchInGemeinderecht=&SearchInJustiz=&SearchInBvwg=&SearchInLvwg=&SearchInLgbl=&SearchInLgblNO=&SearchInLgblAuth=&SearchInLandesnormen=&SearchInNormenliste=&SearchInPruefGewO=&SearchInPvak=&SearchInRegV=&SearchInSpg=&SearchInUbas=&SearchInUmse=&SearchInUvs=&SearchInVerg=&SearchInVfgh=&SearchInVwgh=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=RS0004925+&Dokumentnummer=JJR_19750708_OGH0002_00500B00113_7500000_001#hit1.)

6. *Raquel Martí de Mejía v. Peru*, case 10.970, report no. 5/96, 1 March 1996, Inter-American Commission of Human Rights
7. *Maria da Penha Maia Fernandes v. Brazil*, case 12.051, report no. 54/01, 16 April 2001, Inter-American Commission of Human Rights

## ANNEX IV – INTERVIEWS

1. National Institute of Criminology<sup>638</sup>. Budapest, Hungary, 25 January 2018<sup>639</sup>
  - i. BOLYKY, Orsolya, DR. – head of unit, researcher
  - ii. SÁRIK, Eszter, DR. – researcher
2. N<sup>640</sup>. Former director of a families’ temporary home in Hungary. Hungary, 31 March 2018<sup>641</sup>
3. Domestic Abuse Intervention Centre Vienna<sup>642</sup>. Vienna, Austria, 3 May 2018<sup>643</sup>
  - i. LOGAR, Rosa<sup>644</sup> – executive director
  - ii. TADLER, Verena – expert
4. WIRTH, Judit. Women’s rights expert, NANE Women’s Rights Association<sup>645</sup>, Hungary. Budapest, 15 June 2018<sup>646</sup>
5. Judge F, Hungary.<sup>647</sup> Dates of the interviews<sup>648</sup>:
  - i. Hungary, 28 June 2018
  - ii. Hungary, 7 August 2018
  - iii. Hungary, 7 September 2018
6. Hungary, 24 September 2018<sup>649</sup>
  - i. X – legal professional, Hungary
  - ii. Y – legal professional, Hungary<sup>650</sup>
7. MATUSIK, Tamás, DR. Judge, criminal matters, head of the Investigating Judges Unit, Central District Court of Buda, Budapest. Budapest, 28 November 2018<sup>651</sup>

<sup>638</sup> In Hungarian: “Országos Kriminológiai Intézet”

<sup>639</sup> The notes made during the interview are in the author’s possession.

<sup>640</sup> The interviewee’s data are handled confidentially.

<sup>641</sup> The notes made during the interview are in the author’s possession.

<sup>642</sup> In German: “Wiener Interventionsstelle gegen Gewalt in der Familie”

<sup>643</sup> The notes made during the interviews are in the author’s possession.

<sup>644</sup> Rosa LOGAR participated as an invited lecturer at the class “The Law and Politics of Combatting Violence Against Women” held on 6 February 2018 at the Central European University. The notes made during her lecture have also been used.

<sup>645</sup> The full name of the association in Hungarian: “Nők a Nőkért Együtt az Erőszak Ellen” (*i.e.* “Women for Women Together against Violence”)

<sup>646</sup> The interview has been recorded. The recording is in the author’s possession.

<sup>647</sup> The interviewee’s data are handled confidentially.

<sup>648</sup> The interviews have been recorded. The recordings are in the author’s possession.

<sup>649</sup> The notes made during the interview are in the author’s possession.

<sup>650</sup> The interviewees requested anonymity.

<sup>651</sup> The interview has been recorded. The recording is in the author’s possession.