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When Private and Public Meet:

Three CEDAW Committee Views on Intra-Familial Violence

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THREE CEDAW COMMITTEE VIEWS ON INTRA-FAMILIAL VIOLENCE

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WHEN PRIVATE AND PUBLIC MEET:  
THREE CEDAW COMMITTEE VIEWS ON INTRA-FAMILIAL VIOLENCE

**Rachael Lorna Johnstone\***

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**I. Introduction**

Although intra-familial violence was already well documented in the 1970s and known to be a global phenomenon, the matter of violence against women was omitted from the text of the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW).<sup>1</sup> Nevertheless, in light of the rights that did appear, such as the rights to life, health and freedom of movement, the committee for the elimination of discrimination against women (CEDAW committee) has for many years challenged states to take measures to reduce the risk facing women from violence in the private sphere. Similarly have other treaty bodies ap-

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\*University of Akureyri. Lecture delivered on April 21 in Catania at the International Law Seminar Series 2009.

<sup>1</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter, CEDAW].

proached the subject through the state reporting and monitoring processes.

Today, as the Optional Protocol to CEDAW begins to bear fruit, intra-familial violence is at the forefront of the work of the CEDAW committee: of the first 11 communications, 3 are specifically on the subject.<sup>2</sup> Although these cases pertain to Austria and Hungary, their impact is of global significance, as CEDAW has 185 state parties and its protocol 90. All the Mediterranean countries are parties to the main convention, and in the Mediterranean area, all the European countries and Libya are parties to the protocol. Despite nearly 30 years of CEDAW, domestic violence remains familiar throughout.

In part II, some suggestions are presented to explain the silence of the CEDAW text on violence against women. This is followed in part III by a skeleton review of the CEDAW committee's interest in intra-familial violence evidenced in its concluding comments on state reports and its general recommendations. In part IV, the Optional Protocol is briefly explained as an introduction to the main part of this essay which is a review of the three communications on intra-familial violence. Part V concludes the essay with some reflections on the significance of the three cases.

## II. Omitting Violence from the CEDAW Text

The word "domestic" has self-evident roots in the Latin *domus* for home. In contemporary English, it has twin meanings. "Domestic" can refer to matters that take place within the home or between close family members and as such are paradigms of liberal theory's "private sphere". Alternatively, "domestic" is used as an antonym of international to indicate matters that are wholly internal to a state and hence are of no international concern. Since one purpose of this paper is to demonstrate that intra-familial violence against women is indeed a matter of concern for international law, the term "domestic violence" will be eschewed and the term "intra-familial violence" preferred. Intra-familial violence is intended to mean violence within an intimate relationship, the occurrence of which is inseparable from the broader gender dynamics of the relationship. Not

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<sup>2</sup> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women 1999, 2131 U.N.T.S. 83 [hereinafter OP-CEDAW].

all violence against women is intra-familial as women and men are equally susceptible to public forms of violence, such as abuse by police officers or prison officers. Likewise, men and boys can be subjected to intra-familial violence, although women are far more likely than men to experience the phenomenon and when they do, the results are usually graver.<sup>3</sup> Intra-familial violence does not presuppose any particular form of family, thus acknowledging that same sex partners can also commit and be subjected to intra-familial violence.

The divisions of the international and the national and of public and private spheres are central to international law. They explain the omission from the CEDAW text of any mention of intra-familial violence. Intra-familial violence is doubly invisible in the classical model, doubly domestic. Firstly, since such violence does not involve state organs or agents operating in an official capacity, states cannot bear international responsibility for it; it is a matter of national (domestic) jurisdiction. Secondly, within states, such violence has historically been viewed as private (domestic) and thus a matter of inter-personal family relations, constitutively different from other (public and criminal) forms of violence.<sup>4</sup>

There is also a more mundane explanation for CEDAW's strange silence on violence against women: the CEDAW text was drafted with the Convention on the Elimination of Racial Discrimination (CERD) as a template.<sup>5</sup> Discrimination in CERD is defined as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."<sup>6</sup> Violence directed on the basis of race

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<sup>3</sup> CEDAW committee, *Goekce v Austria*, Views, Communication No. 5/2005 (August 6, 2007), U.N. Doc. CEDAW/C/39/D/5/2005, ¶ 3.3 [hereinafter *Goekce*]; *Yildirim v Austria*, Views, Communication No. 6/2005 (August 6, 2007) U.N. Doc. CEDAW/C/39/D/6/2005, ¶ 3.3 [hereinafter *Yildirim*]. On the extent and cost of domestic violence in general, see WHO MULTI-COUNTRY STUDY ON WOMEN'S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN: SUMMARY REPORT, (World Health Organization, Geneva 2005).

<sup>4</sup> See, e.g. Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 627 & 629 (1991).

<sup>5</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

<sup>6</sup> *Id.*, article 1.

would self-evidently fall under such a definition even though violence is not explicitly mentioned. However, there is no parallel with gender-based violence because the majority of gender-based violence, in particular intra-familial violence, does not take place within a “field of public life” but is rather hidden from view in the private sphere.

### III. The CEDAW Committee and Intra-Familial Violence

The post-war expansion of international human rights law has opened up states’ domestic jurisdictions to international scrutiny by developing accountability for the treatment of persons inside of states. Furthermore, conduct by non-state actors can also come to the attention of international law as states have positive obligations under human rights treaties to prevent human rights violations in the private sphere.

As the understandings of state responsibility for human rights violations have become more nuanced, in particular, with the gradual absorption of the tertiary model of state responsibility to respect, protect and fulfil human rights, intra-familial violence has become a key issue of concern for the human rights treaty bodies, no more so than the CEDAW committee.<sup>7</sup> States must first respect human rights by ensuring that the states’ own organs or agents do not commit human rights violations. States must also protect human rights, which is to ensure that non-state actors do not commit human rights violations. Finally, states must fulfil human rights, which means to guarantee basic minimums of well-being. The obligation to respect human rights is a negative obligation; states must not behave in particular ways. The obligations to protect and to fulfil human rights are positive obligations; states must take action subject to a due diligence standard; in the language of CEDAW, states must take “all appropriate measures.”

Although as explored in Part II, violence goes unmentioned in the CEDAW text, the right of women to live free from violence has been inferred

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<sup>7</sup> The tertiary model was first introduced by Asbjørn Eide, Special Rapporteur, *Report on the Right to Adequate Food as a Human Right*, E/CN.4/Sub.2/1987/23 (1987) ¶¶ 34–6, 112–5 and 167–81. It has now been operated to greater or lesser extent in all the human rights treaty bodies; see Rachael Lorna Johnstone, *Feminist Influences on the United Nations Human Rights Treaty Bodies*, 28 HUM. RTS. Q. 148, 154–180 (2006).

contextually by the CEDAW committee. This can now be seen at three levels of increasing specificity: firstly, in general recommendations pertaining to all women in all state parties; secondly in the CEDAW committee's concluding comments on state reports, pertaining to all women residing within a particular state party; and finally in considerations of communications which each pertain to an individual woman in a particular state party, such as those of A.T., Goekce and Yildirim which are considered below.<sup>8</sup>

In 1989, the CEDAW committee issued General Recommendation 12 on violence against women, in which it determined that a number of articles of CEDAW required state parties to take positive measures to protect women from violence in both public and private spaces. The CEDAW committee also requests states to include in their periodic reports information on the law, policies and support services available to protect women from violence as well as data on the incidence of violence against women.<sup>9</sup>

Three years later, the CEDAW committee issued the much more detailed General Recommendation 19 on violence against women.<sup>10</sup> General Recommendation 19 begins, for the avoidance of any doubt, by stating that: "Gender-based violence is a form of discrimination."<sup>11</sup> States are reminded that the "full implementation of the Convention require[s] States to take positive measures to eliminate all forms of violence against women."<sup>12</sup> The CEDAW committee relies on the term "gender-based violence" and this it defines as "violence that is directed against a woman be-

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<sup>8</sup> CEDAW Committee, *A.T. v Hungary*, Views, Communication No. 2/2003 (January 26, 2005) U.N. Doc. CEDAW/C/32/D/2/2003 [hereinafter *A.T.*]; *Goekce*, *supra* note 3; *Yildirim*, *supra* note 3. Communications can be brought also by identifiable groups of women but so far, all have been individual; OP-CEDAW, *supra* note 2, article 2.

<sup>9</sup> CEDAW committee, *General Recommendation No. 12: Violence Against Women*, 8<sup>th</sup> Session, 1989, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.8, 295 (2006) [hereinafter *Compilation of General Recommendations*, 2006]. The articles cited are 2 (to eliminate discrimination in all its forms, including by law), 5 (to eliminate sex-role stereotyping and prejudice in the private sphere), 11 (to guarantee equality in employment), 12 (to guarantee equality in healthcare), and 16 (to eliminate discrimination in marriage and family relations).

<sup>10</sup> CEDAW Committee, *General Recommendation No. 19: Violence Against Women*, 11<sup>th</sup> Session, 1992, reprinted in *Compilation of General Recommendations*, 2006, *id.*, 302.

<sup>11</sup> *Id.*, ¶ 1.

<sup>12</sup> *Id.*, ¶ 4.



cause she is a woman or that affects women disproportionately.”<sup>13</sup> It constitutes a violation of fundamental human rights to life; to be free of torture; to equal protection in humanitarian law; to liberty and security of the person; to equal protection under the law; to equality in the family; to health; and to just and favourable conditions of work.<sup>14</sup>

The CEDAW committee makes plain that state responsibility for violations of CEDAW does not necessarily depend on direct attributability of actions to a state actor, but that states also have due diligence obligations to take positive measures to protect women from non-state violations, in other words, obligations to protect human rights. “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”<sup>15</sup> This particular paragraph is quoted approvingly by the CEDAW committee in its evaluation of the merits of each of the three intra-familial violence communications.<sup>16</sup>

Specific articles of CEDAW are examined in the Recommendation and the CEDAW committee demonstrates how gender-based violence violates each of these articles.<sup>17</sup> “Family violence” (or what in this paper is called “intra-familial violence”) is specifically recognized as a violation of articles 5 (on sex-role stereotyping) and 16 (on equality in marriage and family life). The CEDAW committee also recognizes that some abusers use “abrogation of family responsibilities” as a method of violence and coercion.<sup>18</sup>

General Recommendation 19 includes a number of specific recommendations for state parties to assist them in meeting the requirements of the treaty and these include some that directly address intra-familial violence, such as the need for effective criminal law and civil remedies; services for victims, including refuges, counselling and rehabilitation; and rehabilitation for offenders.<sup>19</sup> Further, some of the general measures suggested per-

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<sup>13</sup> *Id.*, ¶ 6.

<sup>14</sup> *Id.*, ¶ 7.

<sup>15</sup> *Id.*, ¶ 9.

<sup>16</sup> *A.T.*, *supra* note 8, ¶ 9.2; *Goekce*, *supra* note 3, ¶ 12.1.1; *Yildirim*, *supra* note 3, ¶ 12.1.1.

<sup>17</sup> *General Recommendation 19*, *supra* note 10, ¶¶ 10-23.

<sup>18</sup> *Id.*, ¶ 23. *See also*, *A.T.* *supra* note 8, ¶ 2.2, arguing that *L.F.*'s refusal to pay child support constituted a form of violence against the author.

<sup>19</sup> *General Recommendation 19*, *supra* note 10, ¶ 24, especially (r).

tain to the issue of intra-familial violence, including adequate training for legal personnel, and public information programmes to change attitudes.<sup>20</sup>

General Recommendation 19 was cited by the CEDAW committee in their 1994 recommendation on Equality in Marriage and Family Relations in which the CEDAW committee reminded states parties to implement the earlier recommendation and thus ensure “that, in both public and family life, women will be free of the gender-based violence that so seriously impedes their rights and freedoms as individuals.”<sup>21</sup>

The state reporting process has also given the CEDAW committee ample opportunity to address the phenomenon of intra-familial violence.<sup>22</sup> In its early days, the CEDAW committee expressed concern about such violence when discussing the initial reports of state parties and it remains a prominent subject of discussion today.<sup>23</sup> In its most recent dialogue with Hungary on its combined fourth and fifth periodic report, concerns were expressed with regard to gender roles and stereotypes and these are revisited by the CEDAW committee in its consideration of *A.T.*<sup>24</sup> Intra-familial violence has also been a growing feature of the debate within other treaty bodies.<sup>25</sup>

It may be useful at this point to briefly reiterate the two aspects of due diligence for positive obligations: states must both *have* institutions and law in place to fulfil their obligations and *employ* those institutions ade-

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<sup>20</sup> *Id.*

<sup>21</sup> CEDAW Committee, *General Recommendation No. 21: Equality in Marriage and Family Relations*, 13<sup>th</sup> Session, 1994, reprinted in *Compilation of General Recommendations*, 2006, *supra* note 9, 308, ¶ 40.

<sup>22</sup> CEDAW, *supra* note 1, article 18.

<sup>23</sup> Remarks on early reports pertaining to domestic violence can be seen in *Report of the Committee on the Elimination of Discrimination Against Women (Fifth Session)*, U.N. GAOR 41<sup>st</sup> Sess., Supp. No. 45, U.N. Doc. A/41/45 (1986) ¶¶ 48 (Denmark), 128 (Portugal), 169 (Czechoslovakia) & 286 (Venezuela). It continues to be a priority in recent concluding comments, *see, e.g., Report of the Committee on the Elimination of Discrimination Against Women (Thirty-fourth, Thirty-fifth and Thirty-sixth Sessions)*, U.N. GAOR 61<sup>st</sup> Sess., Supp. No. 38, U.N. Doc. A/61/38 (2006) ¶¶ 33-36 (Cambodia), 76-77 (Eritrea), 122-123 (Macedonia), 151-152 & 157-158 (Togo), 195-196 (Mali), 235-236 & 240 (Australia), 278-279 (Thailand) & 330-331 (Venezuela).

<sup>24</sup> *A.T.*, *supra* note 8, ¶ 9.4.

<sup>25</sup> *See, Johnstone, supra* note 7, 161, 165, 168, 177.

quately.<sup>26</sup> In administrative law terms, a failure in the first would be a legal/policy failure; a failure in the second would be an operational failure. With reference to intra-familial violence this means that, at the level of law and policy, criminal and civil law must provide for protection and be backed by services, such as police and courts to operate it and safe places for victims to reside. At an operational level, the system must be employed adequately; therefore, those working within it must appropriately implement the law and provide protective services.

#### IV. The Optional Protocol

CEDAW was complimented in 1999 by its optional protocol which came into force on 22<sup>nd</sup> December 2000 and now begins to bear fruit in the form of “Views” issued by the CEDAW committee.<sup>27</sup> The state report and monitoring system and the issuance of general recommendations have proven powerful in enriching the understanding of the human rights enumerated in the CEDAW text. However, translating that understanding into effective protection for women poses a distinct challenge. The Optional Protocol provides a mechanism by which women who believe their rights are not being upheld can have their individual concerns assessed by the CEDAW committee. Should the CEDAW committee find a violation to have occurred, it will make declarations and recommendations with the aim of remedying the situation.

The communications procedure for CEDAW differs from its better-known counterpart under the Human Rights Committee as the CEDAW process permits group communications as well as individual ones.<sup>28</sup> All those considered by the CEDAW committee at the time of writing were based on individual cases. In its three decades of operation, communications to the Human Rights Committee have almost exclusively pertained to allegations of failure to respect human rights; that is, there is an asser-

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<sup>26</sup> Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GERMAN YB INT’L L. 9, 25-6.

<sup>27</sup> OP-CEDAW, *supra* note 2. Views can be found online at Division for Advancement of Women, *Convention on the Elimination of All Forms of Discrimination Against Women: Decisions/Views*, at: <<http://www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm>> (visited Oct. 17, 2008).

<sup>28</sup> Optional Protocol to the International Covenant for Civil and Political Rights 1966, 999 U.N.T.S. 171, articles 1 & 2 [hereinafter ICCPR-OP1]. OP-CEDAW, *supra* note 2, article 2.

tion that a state organ or agent has directly violated a protected right. Given the Human Rights Committee's reviews of state reports, there is an indication that communications alleging failures to protect or fulfil human rights might find a sympathetic audience, but the overwhelming majority have nonetheless concerned allegations of direct state responsibility for failing to respect human rights, i.e. a state organ or agent has acted in violation of the Covenant.<sup>29</sup>

### *A.T., Goekce and Yildirim*

The three communications on intra-familial violence so far considered by the CEDAW committee each concern a woman who has been the victim of violence at the hands of her intimate partner or ex-partner. Despite broad similarities in the basic legal claim of state responsibility, there are relevant differences in the facts and a substantial difference in the state parties' handling of the process.

### *Their Stories*

In the first case of *A.T. v. Hungary*, the author had separated from a violent former partner to whom she had never been legally married. Both are Hungarian nationals. They have two children together, one of whom is severely disabled.<sup>30</sup> At the time of the communication, A.T. continued to be subjected to "regular, severe domestic violence and serious threats" by her former partner which amounted to a "continuum of violence."<sup>31</sup> A.T. and her former partner, L.F., jointly owned an apartment in which A.T. continued to reside, but the Courts would not (and apparently could not) exclude L.F. from access. He had refused to sell his share to her.<sup>32</sup> A.T. could not move into a protective shelter as none could accommodate the disabled child.<sup>33</sup> After a process lasting 3 years, L.F. was convicted of 2 counts of committing grievous bodily harm and punished with a token

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<sup>29</sup> For a summary of cases by issue, see *Report of the Human Rights Committee (Eighty-fifth, Eighty-sixth & Eighty-seventh Sessions)*, U.N. GAOR, 61<sup>st</sup> Sess., Supp. No. 40, U.N. Doc. A/61/40 (2006), ¶¶ 107-226 (107-143 procedural matters; 144-202 substantive matters; and 203-226 remedies).

<sup>30</sup> *A.T.*, *supra* note 8, ¶ 2.1.

<sup>31</sup> *Id.*, ¶¶ 2.1 & 2.3. The "continuum" of the violence is relevant to the case because the violence began before the optional protocol came into force in Hungary and the author must establish admissibility *ratione temporis*. The CEDAW committee has no difficulty accepting that the violence is ongoing and therefore the protocol applies, *id.*, ¶ 8.5.

<sup>32</sup> *Id.*, ¶¶ 2.4 – 2.5.

<sup>33</sup> *Id.*, ¶ 2.1.

fine.<sup>34</sup> A.T.'s complaint is that the Hungarian legal system does not offer her, or other women in similar situations, adequate protection from intra-familial violence.<sup>35</sup>

In each of the two Austrian cases, concerning Sahide Goekce and Fatma Yildirim, the woman concerned had been murdered by her legal husband and the communication was made by two non-governmental organizations on behalf of the children of the deceased. Both women were Austrian citizens of Turkish origin.<sup>36</sup> Irfan Yildirim, husband and murderer of Fatma, is a Turkish national.<sup>37</sup> The nationality of Mustafa Goekce, husband and murderer of Sahide is not clear from the Views of the CEDAW committee, however, he is evidently also of Turkish origin.<sup>38</sup> Hereafter, all four persons shall be referred to by their given names, Sahide and Mustafa (*Goekce*) and Fatma and Irfan (*Yildirim*).

Both women had three children, Fatma's from a previous marriage. Two of Fatma's children are adults and one offered her a home when she left Irfan.<sup>39</sup> Sahide's children are all minors and their father is Mustafa.<sup>40</sup>

Sahide Goekce was regularly subjected to physical violence and threats over a period of three years. She was in regular contact with the police. The police made at least two requests for detention of Mustafa but these were denied by the public prosecutor.<sup>41</sup> After the first recorded attack in December, an expulsion and prohibition to return order was issued against Mustafa with respect to the family home although it is not clear for how long it lasted or whether it was observed by Mustafa.<sup>42</sup> No prosecution was brought against Mustafa for his threats to Sahide's life following the initial attack as such would have required Sahide's consent which was not forthcoming. Mustafa was acquitted of the charge of causing bodily harm because the injuries sustained were considered insufficiently seri-

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<sup>34</sup> *Id.*, ¶ 6.11.

<sup>35</sup> *Id.*, ¶¶ 3.1-3.6.

<sup>36</sup> *Goekce*, *supra* note 3, ¶ 1; *Yildirim*, *supra* note 3, ¶ 1.

<sup>37</sup> *Yildirim*, *supra* note 3, ¶ 9.3.

<sup>38</sup> *Goekce*, *supra* note 3, ¶ 8.8.

<sup>39</sup> *Yildirim*, *supra* note 3, ¶¶ 2.1 & 2.3.

<sup>40</sup> *Goekce*, *supra* note 3, ¶ 2.7.

<sup>41</sup> *Id.*, ¶¶ 2.1-2.12, especially 2.4 & 2.6.

<sup>42</sup> *Id.*, ¶ 2.2.

ous.<sup>43</sup> Following further incidents, two more expulsion and prohibition orders were issued, but requests for detention were denied by the prosecutor.<sup>44</sup> Sahide later agreed to a prosecution and cooperated but the process was nevertheless stopped by the prosecutor.<sup>45</sup> In the meanwhile, a three-month Court issued injunction had been issued against Mustafa and further evidence presented to the police of violence and threats, including information that Mustafa illegally possessed a handgun.<sup>46</sup> In December 2002, two days after the collapse of the prosecution against him, and hours after an emergency call out by Sahide for a patrol car which never came, Mustafa violated the injunction, entered the apartment and shot dead Sahide in front of their children.<sup>47</sup> Mustafa is serving a life sentence for murder in an institution for mentally disturbed offenders.<sup>48</sup>

Over the last two months of their short marriage, Irfan Yildirim regularly threatened to kill Fatma and became particularly menacing after Fatma announced her intention to seek a divorce, when he began also to threaten to kill her children.<sup>49</sup> Fatma left him and with her young daughter, moved into her adult daughter's apartment. On a visit to the marital home to collection possessions, Irfan assaulted her and later repeated his threats to her life. Fatma reported these threats to the police.<sup>50</sup> The police issued an expulsion and prohibition order against Irfan with respect to the marital apartment but their request that Irfan be detained was, as in the *Goekce* case, rejected by the public prosecutor.<sup>51</sup> Irfan continued to appear at Fatma's workplace to harass and threaten Fatma and police were repeatedly called.<sup>52</sup> A further request for Irfan's detention was again denied by the public prosecutor.<sup>53</sup> Fatma sought an interim injunction against her husband to protect herself and her minor daughter and a few days after filing for divorce, this was granted.<sup>54</sup> Despite the interim injunction pro-

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<sup>43</sup> *Id.*, ¶ 2.3.

<sup>44</sup> *Id.*, ¶¶ 2.4-2.6.

<sup>45</sup> *Id.*, ¶¶ 2.6 & 2.10.

<sup>46</sup> *Id.*, ¶¶ 2.7 & 2.9.

<sup>47</sup> *Id.*, ¶¶ 2.11 & 9.10.

<sup>48</sup> *Id.*, ¶ 2.12.

<sup>49</sup> *Yildirim*, *supra* note 3, ¶ 2.2.

<sup>50</sup> *Id.*, ¶ 2.3.

<sup>51</sup> *Id.*, ¶ 2.4.

<sup>52</sup> *Id.*, ¶¶ 2.6-2.9.

<sup>53</sup> *Id.*, ¶ 2.10.

<sup>54</sup> *Id.*, ¶¶ 2.11 & 2.12.

hibiting him from contacting Fatma or her young daughter and from going to the marital home or Fatma's workplace, Irfan followed Fatma home from work and stabbed her to death, near the apartment.<sup>55</sup> Irfan was convicted of murder and is serving a life sentence in Austria.<sup>56</sup>

The communications suggest that Fatma was the more independent and assertive of the two Austrian women but was also married to a more sophisticated abuser. She attempted to leave her husband and filed for divorce, in contrast to Sahide who lived in fear not only of her life, but also of the state that she believed may take away her children.<sup>57</sup> There is no record of regular physical abuse by Irfan against Fatma and he persuaded the police that he was not "highly aggressive."<sup>58</sup> Sadly, the Yildirim case suggests that Sahide would have been no safer had she, like Fatma, attempted to formally separate from her husband.

#### *The Claims*

A.T.'s complaint is principally that the Hungarian legal system cannot offer her, nor other women in similar situations, sufficient protection. As such, CEDAW has been inadequately implemented into domestic law. In particular, A.T. cites a number of articles from CEDAW, namely: the requirements on state parties to ensure that gender equality is incorporated into domestic legislation (article 2a); to prohibit in law discrimination against women (article 2b); to take all appropriate measures to eliminate discrimination in the private sphere (article 2e); to modify social and cultural patterns of conduct of men and women which sustain gender inequality (article 5a); and to ensure equality in marriage and family relations (article 16). A.T. claims that the state party has "passively neglected its "positive obligations" under the Convention and supported the continuation of a situation of domestic violence against her."<sup>59</sup> She cites the length of the criminal process against her former partner and the absence of restraining orders or detention of suspected abusers in the domestic system.<sup>60</sup>

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<sup>55</sup> *Id.*, ¶ 2.13.

<sup>56</sup> *Id.*, ¶ 2.14.

<sup>57</sup> *Goekce*, *supra* note 3, ¶¶ 4.4, 5.4 & 5.5.

<sup>58</sup> *Yildirim*, *supra* note 3, ¶ 4.2. Fatma reports a minor assault to the police days after leaving the family home, but this is not followed up, *id.*, ¶ 2.3.

<sup>59</sup> *A.T.*, *supra* note 8, ¶ 3.1.

<sup>60</sup> *Id.*, ¶ 3.2.

The Austrian cases raise a subtly different issue. In Austria, the non-governmental organizations which bring the communications consider that Austrian law is largely in compliance with the requirements of CEDAW. However, in the two instances addressed, it has not been adequately implemented. In *Goekce*, given the history of violence by Mustafa, the communication also asserts that the law is deficient to the extent that there is no possibility of detention to “protect women from highly violent persons, especially in cases of repeated, severe violence and death threats.” However, primarily, the failures in both Austrian cases are operational; the state party did not treat Mustafa Goekce as “an extremely violent and dangerous offender in accordance with criminal law” and likewise failed to protect Fatma from Irfan. Communications between the police and public prosecutor were slow and deficient which lead to the latter’s failure to detain or prosecute Mustafa.<sup>61</sup> Similarly, poor communication between the police and the prosecutor inhibited detention of Irfan Yildirim, at the cost of Fatma’s life.<sup>62</sup>

Specific provisions of CEDAW are cited in support of the communications, namely: the principle of non-discrimination (article 1); the obligation to eliminate discrimination in all its forms, including by law (article 2); the obligation to ensure the full development and advancement of women to guarantee their equal enjoyment of human rights in all fields (article 3); and the obligation to eliminate sex-role stereotyping and prejudice in the private sphere (article 5).<sup>63</sup> The authors rely explicitly on the principle of due diligence with reference to the operational failures of the criminal justice personnel.<sup>64</sup> Ultimately, the Austrian communications assert that the criminal justice personnel “particularly public prosecutors and judges, consider [intra-familial violence] a social or domestic problem,” instead of a criminal matter and example of gender-based discrimination.<sup>65</sup>

#### *The Process*

A substantial difference in the response of the state parties to the communications is also worthy of note. Hungary’s response perhaps represents a model of the communication process as envisaged by the drafters

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<sup>61</sup> *Goekce*, *supra* note 3, ¶ 3.1.

<sup>62</sup> *Yildirim*, *supra* note 3, ¶ 3.1.

<sup>63</sup> *Goekce*, *supra* note 3, ¶¶ 3.3-3.6; *Yildirim*, *supra* note 3, ¶¶ 3.3-3.6.

<sup>64</sup> *Goekce*, *supra* note 3, ¶ 3.5; *Yildirim*, *supra* note 3, ¶ 3.5.

<sup>65</sup> *Goekce*, *supra* note 3, ¶ 3.6; *Yildirim*, *supra* note 3, ¶ 3.6.



of the Protocol. The state party is advised of the communication, it acknowledges failings in its system and seeks guidance on how to better implement the convention without impinging on other human rights at stake, such as the rights to property and to freedom of movement. Hungary claims that it has already taken steps to address the problem and in some respects these steps reflect the remedies requested by A.T.<sup>66</sup> (However, A.T. in follow-up submissions asserts that the changes are largely superficial and that interim measures suggested by the CEDAW committee in her particular case have not been effectively implemented.<sup>67</sup>) Hungary accepts that the “legal and institutional system in Hungary is not yet ready to ensure the internationally expected, coordinated, comprehensive and effective protection and support for victims of domestic violence.”<sup>68</sup> Hungary’s most recent state report indicates that the changes recommended by the CEDAW committee in its Views have largely been introduced.<sup>69</sup>

Austria’s response, by contrast, is adversarial and defensive. Austria contests admissibility and maintains that its legal system is both legally and operationally adequate. Sahide died, according to Austria, because she did not cooperate with the criminal justice personnel.<sup>70</sup> Fatma’s death, by contrast, was simply unavoidable because the officials could not possibly have predicted Irfan’s actions.<sup>71</sup> In addition to blaming Sahide for failing to seek help and for “play[ing] down the incidents” of violence<sup>72</sup> the government’s submissions also try to colour the couple’s relationship as one in which violence was instigated by *both* parties, *i.e.* Austria implies that Sahide was equally responsible although no convincing evidence is provided to indicate that Sahide was herself violent.<sup>73</sup> Despite the cata-

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<sup>66</sup> A.T., *supra* note 8, ¶¶ 3.4 & 5.6-5.10. Hungary also makes reference to the concluding comments of the CEDAW committee on its own fourth and fifth periodic reports, *id.*, ¶ 5.7.

<sup>67</sup> *Id.*, ¶ 6.1.

<sup>68</sup> *Id.*, ¶ 7.4.

<sup>69</sup> Sixth Periodic Report of the Republic of Hungary to the United Nations on the Elimination of All Forms of Discrimination Against Women, (June 15, 2006) U.N. Doc. CEDAW/C/HUN/6 pp. 47-52.

<sup>70</sup> Goekce, *supra* note 3, ¶¶ 4.12-4.13.

<sup>71</sup> Yildirim, *supra* note 3, ¶¶ 4.2 & 8.4.

<sup>72</sup> Goekce, *supra* note 3, ¶ 4.8. It is likely that Sahide feared losing custody of the couple’s children if the full extent of Mustafa’s behaviour were known, *id.*, ¶ 5.5.

<sup>73</sup> Austria presents a statement from the couple’s minor son to the effect that Sahide had “started quarrelling with [Mustafa] and had attacked him” on one occasion, *id.*, ¶ 8.4.

logue of violence recorded, but not acted upon by the authorities, Austria also argues that the death threats might be seen only as “harsh statements” attributable to Mustafa’s “background” – presumably the fact that he is of Turkish origin.<sup>74</sup> Austria concludes that “Sahide Goekce could not be guaranteed effective protection because she had not been prepared to cooperate with the Austrian authorities.”<sup>75</sup>

Unsurprisingly, the authors contest Austria’s reading of events, noting that Sahide refused only once to testify against her husband and on other occasions, it was the prosecutor who chose to drop the cases.<sup>76</sup> They remind the CEDAW committee that Sahide sought help on a number of occasions, including making an emergency call only hours before her murder, but no help was forthcoming.<sup>77</sup> “Sahide Goekce repeatedly tried to obtain help from the police – but she and her family were not taken seriously; often their complaints were not recorded.”<sup>78</sup> Moreover, the authors of the communications suggest that Austria could benefit from a more nuanced appreciation of the dynamics of intra-familial violence and the difficulties and dangers facing victims when they do try to seek help.<sup>79</sup>

The Yildirim communication demonstrates, however, that even when a woman takes every step possible to leave a violent relationship and protect herself, protection by the Austrian state authorities is not forthcoming.<sup>80</sup>

#### *The CEDAW Committee’s Evaluations*

It comes as no great surprise that the CEDAW committee finds a violation in each of the three cases, based on the failure to protect the women concerned from non-state actors. The Hungarian case differs from the Austrian cases to the extent that in the former, there is a legal and policy failure: the Hungarian system is deficient and cannot protect women from

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Austria also asserts that Mustafa was “slightly injured” following one of the couple’s altercations, *id.*, ¶ 8.6.

<sup>74</sup> *Id.*, ¶ 8.8.

<sup>75</sup> *Id.*, ¶ 8.19.

<sup>76</sup> *Id.*, ¶ 9.6.

<sup>77</sup> *Id.*, ¶ 9.10.

<sup>78</sup> *Id.*, ¶ 9.11.

<sup>79</sup> *Id.*, ¶ 9.4.

<sup>80</sup> *Yildirim*, *supra* note 3, ¶ 5.3.

intra-familial violence.<sup>81</sup> In the Austrian cases, by contrast, the failure is operational: protection is available through the legal system which is largely adequate but it has not been applied by the state actors in the cases of Sahide and Fatma.<sup>82</sup>

To establish state responsibility for a violation of the state's positive obligations it is not necessary to attribute blame to any particular institution; instead, it is the state's *failure* to act that is relevant and that failure may be the very absence of an institution to guarantee the rights in question. Pisillo-Mazzeschi explains this thus:

*The practice, in fact, clearly indicates that it is enough to have, for purposes of responsibility, a general insufficiency of "governmental action" or a general lack of diligence on the part of the State authorities considered as a whole, as regards the international standard; and that it is not necessary instead to carry out an investigation to establish each time the subjective fault of the single individuals acting as State organs.*<sup>83</sup>

In A.T., no single institution or actor can be considered lacking; instead, the whole system is deficient. By contrast, in the Austrian cases, identifiable state actors have let the women down.

The CEDAW committee is asked to address the difficulty cited by the state parties concerned, especially Austria, in balancing competing human rights claims. There is a perceived tension between guaranteeing protection for women against intra-familial violence and simultaneously ensuring that the state and its institutions fully respects the rights of accused persons in the interim period between allegations first coming to light and the conclusion of a satisfactory – and fair – criminal process. Hungary's domestic courts upheld the accused's rights to property to the extent that they sent him back to the apartment where A.T. was residing and sanctioned her for attempting to prevent his access.<sup>84</sup> Austria cites the rights of Mustafa and Irfan to freedom and a fair trial as justifying their failure to detain the two men.<sup>85</sup> In its Views, the CEDAW committee reminds Hungary that: "Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to prop-

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<sup>81</sup> A.T., *supra* note 8, ¶ 9.3. Indeed, Hungary admits as much, *id.*, ¶ 5.6.

<sup>82</sup> Goekce, *supra* note 3, ¶¶ 12.1.2 – 12.1.5; Yildirim, *supra* note 3, ¶¶ 12.1.2-12.1.5.

<sup>83</sup> Pisillo-Mazzeschi, *supra* note 26, 43.

<sup>84</sup> A.T., *supra* note 8, ¶¶ 2.4 & 5.1.

<sup>85</sup> Goekce, *supra* note 3, ¶ 8.17; Yildirim, *supra* note 3, ¶¶ 8.13-8.14.

erty and the right to privacy.”<sup>86</sup> This comment is then cited with approval in the Austrian cases.<sup>87</sup> However, the CEDAW committee does not take the opportunity to develop practical guidelines on how the rights in question might be balanced. Such may become clearer as the body of jurisprudence increases. There may be future communications on similar grounds in which the CEDAW committee finds that there has been no violation. For example, if a state does have adequate institutions and legal provisions in force to protect women from intra-familial violence and in a given case, all organs have acted to the utmost of their professional competence and yet still a murder takes place, the state will *not* have violated its obligations to protect for the simple reason that it will have acted with due diligence.

The communications also raise an interesting question about the role and authority of general recommendations and concluding comments on state reports. In their carefully worded submissions, the authors of the Austrian communications cite obligations “stipulated” in general recommendations and concluding comments as well as some “soft-law” United Nations instruments and the binding International Covenant on Civil and Political Rights.<sup>88</sup> States’ obligations might well be “stipulated” in general recommendations and concluding comments but general recommendations and concluding comments cannot possibly be their source. Only the treaty itself can be a source of law for consideration by the CEDAW committee. In its considerations of the merits of the three cases, the CEDAW committee refers to its General Recommendation 19 and is ambiguous about its legal authority.<sup>89</sup> The CEDAW committee is careful to state that pertinent treaty articles have been violated and does not claim that there has been a violation of the recommendation (indeed, it is impossible to “violate” a recommendation). Recommendations are only interpretations of law but in the communications process, it becomes even more important that they are not considered legal sources themselves. To the extent that the CEDAW committee is operating in a quasi-judicial capacity, it must be careful not to operate also in legislative capacity.

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<sup>86</sup> *A.T.*, *supra* note 8, ¶ 9.3.

<sup>87</sup> *Goekce*, *supra* note 3, ¶ 12.1.5; *Yildirim*, *supra* note 3, ¶ 12.1.5.

<sup>88</sup> *Goekce*, *supra* note 3, ¶ 3.2; *Yildirim*, *supra* note 3, ¶ 3.2.

<sup>89</sup> *A.T.*, *supra* note 8, ¶¶ 9.2 & 9.4; *Goekce*, *supra* note 3, ¶¶ 12.1.1, 12.1.6 & 12.2; *Yildirim*, *supra* note 3, ¶¶ 12.1.1, 12.1.6 & 12.2.

## V. The Significance of the Cases

The CEDAW committee's Views in the three cases are of no great surprise to those who have been following its work. The CEDAW committee's evaluations of state reports and issuance of general recommendations have long transgressed the imaginary boundary of public and private spheres; the domestic is now the international. The application of this perspective to concrete individual cases represents the continuation of a direction already well established. Nevertheless, individual cases are a move from the general to the particular and as such, make the general concerns of the CEDAW committee pertinent to individual women's lives. This is true for A.T. and also for other women residing in state parties to the Protocol who can request protection directly.

Compliance with the Views of the CEDAW committee is no foregone conclusion. The CEDAW committee has only recently begun delivering its Views, but experience from the Human Rights Committee indicates that implementation of that committee's Views on communications in individual cases has been poor.<sup>90</sup> Views under either protocol are not binding on the state parties. The formal process under the Protocol to the ICCPR ends with the transmission of views to the state party and author and the inclusion of a summary of proceedings in the Human Rights Committee's annual report.<sup>91</sup> The CEDAW process requires state parties to give "due consideration" to views so transmitted and to submit a written response; the CEDAW committee may also further question the state parties' representatives when considering future state reports. Although this is clearly more thorough than the Optional Protocol to the ICCPR, there is still no enforcement mechanism.<sup>92</sup>

Nevertheless, Views take on a further significance when we consider how the protections of international treaties become absorbed into domestic law and process. Committees' Views, if not exactly judicial decisions

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<sup>90</sup> *Report of the Human Rights Committee (Eighty-fifth, Eighty-sixth & Eighty-seventh Sessions)*, *supra* note 29, ¶¶ 227-233, pp. 107-129.

<sup>91</sup> ICCPR-OP1, *supra* note 28, articles 5 & 6.

<sup>92</sup> OP-CEDAW, *supra* note 2, article 7. In practice, the Human Rights Committee operates a follow-up mechanism; for details, *see*, *Report of the Human Rights Committee (Thirty-seventh, Thirty-eighth and Thirty-ninth Sessions)*, vol. II, U.N. GAOR 45<sup>th</sup> Sess., Supp. No. 40, U.N. Doc. A/45/40, Annex XI, pp. 205-206.

are at least analogous to judicial decisions. Being specific examples, specific “cases,” they can be integrated into domestic legal systems more readily than concluding comments and general recommendations. In some states, Committees’ Views are considered as persuasive precedents.<sup>93</sup> Thus, although compliance with the recommendations given in individual Views may be wanting, the process itself adds to the body of sources for domestic advocates to cite to encourage full implementation of CEDAW in their national courts, even those of state parties that have not yet ratified the optional protocol.

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<sup>93</sup> *International Law Association, Committee on International Human Rights Law and Practice, INTERIM REPORT ON THE IMPACT OF THE WORK OF THE UNITED NATIONS HUMAN RIGHTS TREATY BODIES ON NATIONAL COURTS AND TRIBUNALS, New Delhi Conference, ¶¶ 16 & 27 (2002); International Law Association, Committee on International Human Rights Law and Practice, FINAL REPORT ON THE IMPACT OF FINDINGS OF THE UNITED NATIONS HUMAN RIGHTS TREATY BODIES, Berlin Conference, ¶¶ 175-176 (2004).*