

Access to Justice and Right to Victim's protection in the Case-law of the European Court of Human Rights About Domestic Violence*

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TABLE OF CONTENTS: 1. Introduction. – 2. The positive obligation under Article 2 of the European Convention of Human Rights. – 3. The application of the Osman test in the context of domestic violence. – 4. The statement of the court in *Landi v. Italy*. – 5. The adequacy of the assessment of risk conducted by domestic authorities.

1. Introduction

Access to justice in cases of gendered violence is a crucial point to pursue the goals to prevent the phenomenon, prosecute and punish the perpetrators, and protect the victims. In this perspective, while the EU legal framework on the issue is still under construction¹, the Council of Europe and its institutions have produced quite important documents and case-law, building a strong response to counteract gender-based violence, especially in its form of domestic and intimate partner violence, through criminal law and procedure.

Although Member States are urged to develop comprehensive and widespread cultural initiatives and policies as a core action to prevent gendered violence, criminal justice has a pivotal role in the fight against this form of criminality, being the courtroom the main place for the victim to get protection as well².

* The article has been subjected to double blind peer review, as outlined in the journal's guidelines.

¹ Lively is the debate about the choice of the legal solution within the EU, looking both at the ratification of the Istanbul Convention and at the adoption of an autonomous Directive (European Commission 2022/0066, Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence). On the topic, C. Rigotti – C. McGlynn, *Towards an EU criminal law on violence against women: the ambitions and limitations of the Commission's proposal to criminalise image-based sexual abuse*, in *New Journal of European Criminal Law*, 2022. The EU has so far adopted a series of specific measures but a comprehensive regulatory framework on the phenomenon is still lacking; R. Lamont, *Beating domestic violence? Assessing the EU's contribution to tackling violence against women*, in *Common Market Law Review*, 2013, p. 1787-1807.

² It has been highlighted that there is a connection between the prevention of violence and the protection of victims: in this sense, see L. Grans, *The Istanbul Convention and the positive obligation to prevent violence*, in *Human Rights Law Review*, 2018, p. 141 and p. 144.

Roberta Rossi

*Access to Justice and Right to Victim's protection in the Case-law of the European Court of Human Rights
About Domestic Violence*

Hence, victim protection on the one hand, prosecution and punishment of perpetrators of violence on the other hand, are two of the main pillars on which the Council of Europe built the framework of the most relevant source on this subject: the Istanbul Convention calls for a criminalisation of gendered violence, for a timely and effective investigation and trial where protective measure can respond to the victim's need of safety.

A special attention is, therefore, reserved to victim's protection in its intertwining with criminal justice: Article 18 of the Istanbul Convention sets a general obligation to adopt «the necessary legislative regulation or other measures to protect all victims from any further acts of violence» and, for this provision to be effective, procedural duties are also established, requiring that judicial proceedings be carried out without undue delay (Article 49) while offering adequate and immediate protection to victims (Article 50).

A similar approach has been developed by the European Court of Human Rights in the wake of a broader and more general case-law aimed at protecting human rights: so, the protection of fundamental rights binds the State Parties not only to the traditional negative obligation (i.e. the State's duty to refrain from conduct detrimental to the rights of the person) but also to positive action to intervene through substantive and procedural measure protecting the person from third-party aggressions.

Moving along these lines, the Strasbourg judges have progressively developed an articulated system of protection for victims of domestic violence with respect to the violations dealt with, in particular, Article 2, 3, 8 and 14 ECHR³.

2. The positive obligation under Article 2 of the European Convention of Human Rights

The positive obligation under Article 2 of the European Convention of Human Rights, which states a primary duty on the State to secure the right to life, requires the State not only to refrain from the intentional taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.

This could also imply in certain circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life

³ The case law of the Strasbourg judges is now extensive, the most part of which concerns Articles 2 and 3, in some cases drawing on Article 8, while the violation of the prohibition of discrimination in Article 14 has been identified only in the presence of deep-rooted discriminatory practices and structural prejudice against women (see ECtHR's leading case, 9 June 2009, *Opuz v. Turkey*, appl. no. 33401/02, but also ECtHR, 9 July 2019, appl. no. 41262/17, *Volodina v. Russia*). On the subject, see J. D. Mujuzi, *Preventing and combating domestic violence in Europe: the jurisprudence of the European Court of Human Rights*, in *International Survey of Family Law* 2016, p. 165 ff.; the most recent developments are dealt with by R. McQuigg, *The evolving jurisprudence of the European Court of Human Rights on domestic abuse*, in P. Czech – L. Heschl – K. Lukas – M. Nowak, G. Oberleitner (eds.), *European Yearbook on Human Rights*, Cambridge, 2022; in Italian, see M. Montagna, *Obblighi convenzionali, tutela della vittima e completezza delle indagini*, in www.archiviopenale.it, 2019.

*Access to Justice and Right to Victim's protection in the Case-law of the European Court of Human Rights
About Domestic Violence*

is at risk from the criminal acts of another individual. This basic principle was for the first time affirmed in the leading case *Osman v. the United Kingdom*⁴.

Having regard to the nature of the right protected by Article 2, a core right in the scheme of the Convention, 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.

According to the so called «Osman test» it must be established that the authorities knew or ought to have known at the relevant time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

The court held in *Osman* that the obligation to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. This is a question which can only be answered in the light of all the circumstances of any particular case.

Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees contained in Articles 5 and 8 of the Convention.

3. The application of the Osman test in the context of domestic violence

After *Osman*, the case-law *Opuz v. Turkey*⁵, and *Talpis v. Italy*⁶, adapted and developed the application of the Osman test in the context of domestic violence.

According to these leading cases, children and other vulnerable individuals – into which category fall victims of domestic violence – in particular are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.

The fundamentals of domestic violence show that children are always affected when violence is acted in the family. Violence against children belonging to the

⁴ ECtHR, 28 October 1998, application no. 87/1997/871/1083, *Osman v. the United Kingdom*. Regarding the spread of the so-called Osman Test in the argumentation of supranational courts and the difficulty of adapting it to different scenarios, see F.C. Ebert – R. I. Sijniensky, *Preventing violations of the right to life in the European and the Inter-American Human Rights Systems: from the Osman Test to a coherent doctrine on risk prevention?*, in *Human Rights Law Review* 2015, p. 343-368.

⁵ ECtHR, 9 June 2009, application no. 33401/02, *Opuz v. Turkey*.

⁶ ECtHR, 2 March 2017, application no. 41237/14, *Talpis v. Italy*. For a commentary on the ruling, see P. Mazzina, *La violenza domestica e le azioni positive (di secondo livello) dello Stato: brevi riflessioni costituzionali sulla recente sentenza della Corte edu Talpis c. Italia*, in www.archiviopenale.it, 2017; G. Baldi, *Rethinking the (legal) limits of the state in the case of Talpis v Italy*, in G. Picelli – I. Kherkerulidze – A. Borroni (eds.), *Reconsidering gender-based violence and other forms of violence against women: comparative analysis in the light of the Istanbul Convention*, Bari, 2018.

common household, including deadly violence, may be used by perpetrators as the ultimate form of punishment against their partner. Intimate partner violence is never limited to the direct victim, which is why equal measures have to be taken to protect the children, even more so if the children had already been directly affected by violence and been the target of death threats.

The leading case *Kurt v. Austria*⁷ clarified that the existence of a real and immediate risk to life must be assessed taking in due account the particular context of domestic violence.

In such a situation it is above all a question of the recurrence of successive episodes of violence within the family. It is well known that domestic violence is never a one-off event, as it often constitutes not just an isolated accident, but rather a continuous practice of intimidation and abuse.

In such case, as long as the offender is not successfully kept from contacting the victim, the risk of further violence remains. Therefore, the State authorities should react, with due diligence, to each and every act of domestic violence and take all necessary measures to make sure that such acts do not lead to more serious consequences. It follows that the duty to prevent and protect comes into play when the risk to life is present, even if it is not imminent.

Judge Pinto De Albuquerque expressed several years ago in his concurring opinion in the case of *Valiuliene v. Lithuania*⁸ that «[r]ealistically speaking, at the stage of an «immediate risk» to the victim it is often too late for the State to intervene. In addition, the recurrence and escalation inherent in most cases of domestic violence makes it somehow artificial, even deleterious, to require an immediacy of the risk».

Consecutive cycles of domestic violence, often with an increase in frequency, intensity and danger over time, are frequently observed patterns in that context. The Explanatory Report to Article 52 of the Istanbul Convention clarifies that the term «immediate danger» in that provision refers to any situations of domestic violence in which harm is imminent or has already materialised and is likely to happen again.

Based on what is known today about the dynamics of domestic violence, the perpetrator's behaviour may become more predictable in situations of a clear escalation of such violence; indeed, a perpetrator with a record of domestic violence poses a significant risk of further and possibly deadly violence.

This means that special diligence is required from the authorities when dealing with cases of domestic violence. They have to take duly into account this general knowledge of domestic violence when they assess the risk of a further escalation of violence and take an immediate response to allegations of domestic violence.

⁷ ECtHR, [GC], 15 June 2021, application no. 62903/15, *Kurt v. Austria*. L.S. Rossi, *La tutela del diritto alla vita nell'ambito delle violenze domestiche: di nuovo al vaglio della Corte di Strasburgo i doveri e i limiti derivanti dall'art. 2 Cedu*, in *Riv. It. diritto e procedura penale* 2021, p. 1612 ff.; L.M. Weinberger, *Kurt v Austria: a missed chance to tackle intersectional discrimination and gender-based stereotyping in domestic violence cases*, in *Strasbourg Observers*, 18 August 2021.

⁸ ECtHR, [GC], 26 March 2013, application no. 33234/07, *Valiuliene v. Lithuania*.

Roberta Rossi

*Access to Justice and Right to Victim's protection in the Case-law of the European Court of Human Rights
About Domestic Violence*

This falls under ECtHR jurisdiction: the court's case-law reiterates that an examination of the State's compliance with its duty under Article 2 must include an analysis of the adequacy of the assessment of risk conducted by the domestic authorities.

According to the catalogue of positive obligations held in *Kurt vs. Austria*:

a) an immediate response to allegations of domestic violence is required from the authorities.

b) the authorities must establish whether there exists a real and immediate risk to the life of one or more identified victims of domestic violence by carrying out an autonomous, proactive and comprehensive risk assessment. The reality and immediacy of the risk must be assessed taking due account of the particular context of domestic violence cases.

c) if the outcome of the risk assessment is that there is a real and immediate risk to life, the authorities' obligation to take preventive operational measures is triggered. Such measures are intended to avoid a dangerous situation as quickly as possible and must be adequate and proportionate to the level of the risk assessed.

Thus, an examination of the State's compliance with this duty under Article 2 must comprise an analysis of both the adequacy of the assessment of risk conducted by the domestic authorities and, where a relevant risk triggering the duty to act was or ought to have been identified, the adequacy of the preventive measures taken.

Where it has found that the authorities failed to act promptly after receiving a complaint of domestic violence, it has held that this failure to act deprived such complaint of any effectiveness, creating a situation of impunity conducive to the recurrence of acts of violence.

*4. The statement of the court in Landi v. Italy*⁹

By lodging an application against the Italian State with the European Court of Human Rights, Ms Landi alleged that the Italian State had failed to take the requisite action to protect her and her two children from the domestic violence inflicted by her partner, which had led to the murder of her one-year-old son and her own and her daughter attempted murder.

In its ruling, the court noted that, despite the adequacy of the regulatory framework implemented in the Italian penal system¹⁰, the national authorities had failed in their duty to conduct an immediate and proactive assessment of the risk of the recurrence of the violent acts committed against Ms Landi and her children, and

⁹ ECtHR, 7 April 2022, application no. 10929/19, *Landi v. Italy*.

¹⁰ R. Lopez, *Violenza domestica: strumenti normativi adeguati, ma spesso ignorati*, in *Processo penale e giustizia*, 2022, p. 841 ff.

Roberta Rossi

*Access to Justice and Right to Victim's protection in the Case-law of the European Court of Human Rights
About Domestic Violence*

to adopt operational and preventive measures to mitigate the risk and to protect those concerned, as well as to censure N.P.'s conduct.

The public prosecutors, in particular, had remained passive in front of the serious risk of ill-treatment of Ms Landi, and their inaction had enabled the applicant's partner to continue to threaten, harass and attack her unhindered and with impunity.

Whereas the Italian police (*Carabinieri*) carried out an independent, proactive and comprehensive risk assessment independently of the applicant's complaint and with due regard to the particular context of domestic violence cases, seeking, in light of the alleged existence of a real and immediate risk to the life of the applicant and her children, preventive measures, the prosecutors (whose task was to assess these proposals) did not show the particular diligence required in their immediate response to the applicant's allegations of domestic violence.

The court held that the national authorities had known, or should have known, the real and imminent risk for Ms Landi's and her children's lives. They should therefore have assessed the risk of further violence and taken appropriate and adequate action to protect the applicant and her children.

However, they had failed in that obligation, as they had reacted neither "immediately", as required in cases of domestic violence, nor at any other time.

The court held that, relying on the information known at the material time to the effect that there was a real and imminent risk of further violence against Ms Landi and her children, in the light of the allegations of escalating domestic violence submitted by the applicant and in view of N.P.'s mental health issues, the authorities had failed to show the requisite diligence.

They had not conducted a lethality risk assessment specifically designed for domestic violence, and in particular for the situation faced by the applicant and her children, which would have justified practical preventive measures to protect them from such a risk.

In blatant disregard of the wide range of protective measures directly available to them, the authorities, which could have implemented protective measures by alerting the social and psychological services and placing Ms Landi and her children in a women's refuge, had shown little diligence in preventing the violence against the applicant and her children, which had led to the attempted murder of the applicant and the actual murder of her son M.

In those circumstances, the court concluded that the authorities could not be considered to have displayed due diligence. They therefore failed in their positive obligation to protect the right to life of the applicant and her son within the meaning of Article 2 of the Convention.

We must note, with specific reference to Italian State, that in Landi proceeding the Italian Government further contended that the applicant had failed to exhaust domestic remedies since she had never lodged a complaint with the Italian jurisdiction alleging a violation of her rights.

Roberta Rossi

*Access to Justice and Right to Victim's protection in the Case-law of the European Court of Human Rights
About Domestic Violence*

The court recalled that in its report on Italy, Grevio had urged the Italian authorities to fill the legislative void concerning the absence of effective civil remedies against any State authority failing in its duty to take the necessary preventive or protective measures in matters of domestic violence.

In these circumstances, the court considered that the applicant did not have a civil remedy to pursue in order to assert the State's failure to act. According to its well-established case-law, where no domestic remedy is available, the six-month period to submit the application runs from the date of the act complained of. This being so, the court noted that the applicant had submitted her application within six months of the killing of her son, which event might be considered as the time that she became aware of the ineffectiveness of the remedies in domestic law, as a result of the authorities' failure to stop N.P. committing further violence.

This means, as for Italy, that in the very moment in which a murder or another fact of violence happens the victim can lodge an application against the Italian State with the ECtHR – of course, only if the Italian authorities have failed their duty to protect her.

5. The adequacy of the assessment of risk conducted by domestic authorities

We must notice that, according to the jurisprudence of the court, the duty to conduct a «autonomous» and «proactive» risk assessment refers to the requirement for the authorities not to solely rely on the victim's perception of the risk, but to complement it by their own assessment.

Indeed, owing to the exceptional psychological situation in which victims of domestic violence find themselves, there is a duty on the part of the authorities examining the case to ask relevant questions in order to obtain all the relevant information, including from other State agencies, rather than relying on the victim to give all the relevant details.

In *Talpis*, the court did not accord decisive weight to the victim's own perception of risk of domestic violence (for instance the withdrawing of the complaint, the changing of statements, statements denying past violence, and the return of the victim to the perpetrator).

In *Opuz*, the court noted, in particular, 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 which could prevent the likelihood of an aggressor carrying out his threats against the physical integrity of the victim».

Any risk assessment or decision on the measures to be taken must therefore not depend on the victim's statements alone.

In *Landi*, the court rejected the argument of the Italian Government that, since Ms Landi had withdrawn her complaints and had decided to continue to live with N.P., the authorities had not known and could not have known that the applicant and her

Roberta Rossi

*Access to Justice and Right to Victim's protection in the Case-law of the European Court of Human Rights
About Domestic Violence*

son's lives were at risk, as there had been no tangible evidence that their lives were in imminent danger.

The court stated that the authorities could have adopted the protective measures under Italian legislation whether or not there had been a complaint or any change in the victim's perception of the risk. Indeed, the authorities had failed to consider the specific context of domestic violence, as would have been required under the above-mentioned court's case-law.

We must underline that it is precisely the context of domestic violence that makes it unacceptable to blame the victim for hesitating to take action. Women in violent relationships often show ambivalent behaviour towards the offender. Emotional attachment, the hope for change, but particularly the ongoing fear could all be reasons for this ambivalence, which have an effect on women's attitudes concerning the criminal prosecution of the offender.

Being late in filing a report is one possible consequence. Grevio's reports indicate that women typically search protection orders after serious levels of victimization and after abuse over a significant length of time. In other words, any complaints of domestic violence are usually filed after several episodes of violence and often following a very violent incident which renders the continuation of the relationship unsustainable, intolerable (or even potentially lethal) for the victim.

Factors such as financial dependency, migrant status, disability and age could compound the abuse and impact the victim's ability to break away from the cycle of violence.

This, in turn, means that special requirements are imposed on the law-enforcement authorities when dealing with victims of domestic violence. Moreover, the assessment of risk and identification of safety measures should be conducted continuously and during all the phases of the procedure by police officers, prosecutors and judges from the first meeting with the victim all the way to a possible sentence, as the risk could change, and new information might need to be taken into account.

If risk management was not reliable and ongoing, victims might be lulled into a false sense of security, exposing them to greater risk. Crucially, the assessment must address systematically the risk not only for the woman concerned, but also for her children.

Thus, the responsibility for taking the appropriate operational measures should not be shifted from the authorities to the victim.

We must underline that is fundamental for the authorities dealing with victims of domestic violence to receive regular training and awareness-raising, particularly in respect of risk assessment tools, in order to understand the dynamics of domestic

Roberta Rossi

*Access to Justice and Right to Victim's protection in the Case-law of the European Court of Human Rights
About Domestic Violence*

violence, thus enabling them to better assess and evaluate any existing risk, respond appropriately and ensure prompt protection¹¹.

Grevio submitted that the legal system in place should make available clear guidelines and criteria governing action or intervention of the law enforcement officials in sensitive situations such as in domestic violence cases. In line with Article 15 of the Istanbul Convention, such training could significantly improve the understanding of the dynamics of domestic violence, as well as its links with harm to children.

The use of standardised checklists, which indicate specific risk factors and have been developed on the basis of sound criminological research and best practices in domestic violence cases, can contribute to the comprehensiveness of the authorities' risk assessment¹².

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ABSTRACT: The European Court of Human Rights developed the positive obligation to secure the right to life under Article 2 of European Convention of Human Rights in the context of domestic violence, establishing that domestic authorities must carry out an immediate, autonomous, proactive and comprehensive assessment of the risk of the recurrence of violent acts committed against the victim. Furthermore, if the outcome of the risk assessment is that there is a real and immediate risk to life, the authorities must take preventive operational measures that must be adequate and proportionate to the level of the risk assessed to avoid a dangerous situation as quickly as possible.

ABSTRACT: La Corte Europea dei Diritti dell'Uomo ha sviluppato l'obbligazione positiva di garantire il diritto alla vita ai sensi dell'articolo 2 della Convenzione Europea dei Diritti dell'Uomo nel contesto della violenza domestica, stabilendo che le autorità nazionali debbano effettuare una valutazione immediata, autonoma, proattiva e completa del rischio di reiterazione di atti violenti commessi nei confronti della vittima. Inoltre, se l'esito della valutazione dovesse consistere in un rischio reale e immediato per la vita, le autorità devono adottare misure operative preventive adeguate e

¹¹ Regarding the lack of specific training among the Italian justice professionals, see the Commissione parlamentare di inchiesta sul femminicidio nonché su ogni forma di violenza di genere, Doc. XXII-bis n. 4, *Rapporto sulla violenza di genere e domestica nella realtà giudiziaria*, Roma 2021.

¹² On the topic see V. Bonini, *Protezione della vittima e valutazione del rischio nei procedimenti per violenza domestica tra indicazioni sovranazionali e deficit interni*, in www.sistemapenale.it, 2023; A. Marandola, *Perché la giornata internazionale per l'eliminazione della violenza contro le donne non sia commemorativa ma propositiva*, in www.sistemapenale.it, 2022.

Roberta Rossi

*Access to Justice and Right to Victim's protection in the Case-law of the European Court of Human Rights
About Domestic Violence*

proporzionate al livello del rischio valutato, al fine di scongiurare una situazione pericolosa nel minor tempo possibile.

KEYWORDS: domestic violence – victim's protection – right to life – Istanbul Convention – European Convention of Human Rights.

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