

# The ECtHR *Talpis v. Italy* Judgment Challenging the Osman Test through the Council of Europe Istanbul Convention?

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**Abstract** This comment is meant as a first reaction to the *Talpis v. Italy* judgment, rendered by the European Court of Human Rights on 2 March 2017, and an attempt to reflect on legal obligations States have in countering violence against women, in light of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, adopted in 2011 in Istanbul and entered into force in 2014.

**Summary** 1. Introduction. – 2. The Facts of the *Talpis v. Italy* Case. – 3. The Decision of the European Court of Human Rights. – 3.1. Challenging the Osman Test. – 3.2. Domestic Violence as Torture. – 3.3. Domestic Violence as Discrimination on the Basis of Gender. – 4. Some Conclusions in Light of the Council of Europe Istanbul Convention.

**Keywords** Domestic violence. Human rights. Freedom from torture. Non-discrimination. Obligations.

## 1 Introduction

On 2 March 2017, the European Court of Human Rights (ECtHR) rendered a landmark judgment on States' positive obligations to counter domestic violence, in the case *Talpis v. Italy*<sup>1</sup>.

This comment<sup>2</sup> is meant as a first reaction to the decision, and an attempt to reflect on the legal obligations stemming from the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, adopted in 2011 in Istanbul and entered into force

1 European Court of Human Rights, *Talpis v. Italy*, Appl. No. 41237/14, 2 March 2017.

2 Please find the complete analysis, with a reflection on interpretation “in light of the Istanbul Convention”, in S. DE VIDO, “States’ Positive Obligations to Eradicate Domestic Violence: The Politics of Relevance in the Interpretation of the European Convention on Human Rights”, *ESIL in Reflection*, 6, 6, July 2017.

in 2014 (hereinafter “Istanbul Convention”)<sup>3</sup>. The Convention, which Italy ratified in 2013, was mentioned in significant paragraphs of the judgment under analysis, since it constitutes the most advanced legal instrument existing at the regional or international level to combat violence against women and domestic violence. It is based on four pillars, namely Prevention, Protection, Prosecution and Policies, and obliges State parties to adopt effective measures to counter gender-based violence against women, a widespread social phenomenon in Europe as well as in other areas of the world<sup>4</sup>. The *Talpis* case was examined under Article 2 (right to life), Article 3 (prohibition of torture, inhuman or degrading treatment), and Article 14 (prohibition of discrimination) in combination with Articles 2 and 3, of the European Convention on Human Rights (hereinafter the “European Convention”).

We argue that the Court has started to use the Istanbul Convention as a fundamental instrument to interpret positive legal obligations linked to the rights enshrined in the European Convention. In particular, the judgment contributes to the evolution of international human rights law in the protection of women’s rights, by gradually imposing a stricter due diligence standard with regard to obligations States must comply with in cases of domestic violence.

## 2 The Facts of the *Talpis v. Italy* case

Born in Moldova, the applicant, Elisaveta Talpis, had lived in Remanzacco (Udine, a city in the North-East of Italy) with her husband and two children since their arrival in Italy, in 2011. As a consequence of some episodes of violence perpetrated by her husband, she filed a complaint with the authorities on 5 September 2012, a few months after finding a place in a women’s shelter managed by an association for the protection of women from violence. The Public Prosecutor ordered the police to investigate as a matter of urgency. It took seven months before the applicant could be heard by the police. On that occasion, she declared that the abuse was not as severe as she previously declared. She later explained that her husband put pressure on her. The Public Prosecutor decided to continue investigation with regard to grievous bodily harm. On 25 November 2013, the applicant called the police. The agents arrived at her house, where they found the husband drunk. According to the declarations of the applicant

3 Istanbul, 11 May 2011, CETS No.210.

4 See, for example, the data of the WHO, published here <http://www.who.int/mediacentre/factsheets/fs239/en/> and the data provided by the European Union Agency for Fundamental Rights in a report of 2014 (<http://fra.europa.eu/en/publication/2014/violence-against-women-eu-wide-survey-main-results-report>).

and her son, the husband did not use violence against them. The man was driven to the hospital, from which he was discharged soon after. He was then stopped by the police on the streets, still drunk. At 5 in the morning, he entered his house and tried to attack his wife with a knife. Their son tried to stop his father, but the latter stabbed the young man to death. In the meantime, the applicant reached the street; her husband caught up with her and stabbed her. She survived. On 8 January 2015, the man was sentenced to life imprisonment for the murder of his son and the attempted murder of his wife. Before the decision against her husband was delivered, Elisaveta Talpis had filed a complaint with the ECtHR against Italy, claiming the Italian authorities failed to protect her from her violent husband, who, after years of abuse, attempted to kill her and eventually killed their son.

### 3 The Decision of the European Court of Human Rights

The Court rejected the two arguments presented by the Italian government with regard to admissibility, affirming that the period of six months within which the woman was entitled to file a complaint started from the date of the murder of the son's applicant. The second argument concerning the non-exhaustion of domestic remedies was rejected by the Court while dealing with the alleged violation of Article 2 of the European Convention.

On the merits, the Court referred to two of its previous judgments on domestic violence – namely the pioneering *Opuz v. Turkey*<sup>5</sup>, and the more recent *Rumor v. Italy*<sup>6</sup>.

The Court found, by a majority of six votes against one, that Italy violated Article 2 of the European Convention, as a consequence of the death of the applicant's son and the attempted murder of the applicant, and, by unanimity, that the State infringed Article 3 of the European Convention due to the failure of the authorities to protect the applicant against violence. The Court refused to analyse the case under Articles 8 and 13 of the European Convention, and found a violation of the principle of non-discrimination (Article 14 of the European Convention) by a majority of five votes against two.

5 European Court of Human Rights, *Opuz v. Turkey*, Appl. No. 33401/02, 9 June 2009.

6 European Court of Human Rights, *Rumor v. Italy*, Appl. No. 72964/10, 27 May 2014.

### 3.1 Challenging the Osman Test

With regard to Article 2 of the European Convention, the Court applied the so-called “Osman test”<sup>7</sup>. It provides that, in order to avoid an excessive burden on the authorities, the positive obligation to protect the right to life requires 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>8</sup>. According to the majority of the judges, the real and immediacy requirement was met in the *Talpis* case. Given the circumstances of the case, the Court considered indeed that the husband constituted a real threat for the applicant, and that the State had an obligation to adopt concrete measures in order to protect the individual whose life was threatened.

Two of the judges discussed the issue in their opinions, presenting divergent positions. Judge Eicke, who wrote a partly dissenting opinion, posited that the Italian police should have been aware of the fact that the husband was under investigation and that he was charged with violence against his wife. In particular, on the night of the murder, the police officials, who stopped the applicant’s husband for an identity check, failed to adopt the measures within the scope of their powers that «judged reasonably, might have been expected to avoid that risk»<sup>9</sup>. Therefore, the conclusions of the Court were correct. Judge Spano dissented, and started his partly dissenting opinion with this sentence: «the law has its limits, even human rights law». Concerning the immediacy of the risk, the lapses of time between the initial police intervention and the murder (more than one year) proved that the requirement of immediacy was not met. Secondly, as to the reality of the risk, the judge contended that «diluting the Osman standard [...] will simply impose an unrealistic burden on law enforcement authorities»<sup>10</sup>, and that the applicant’s husband lethal attack, a «volatile and unpredictable behaviour», could not «have been reasonably foreseen by the police»<sup>11</sup>. Arresting the husband could have been an option; however, if, on the one hand, States have obligations to effectively combat domestic violence, on the other hand, this fight «must be fought within

7 European Court of Human Rights, *Osman v. United Kingdom*, no. 23452/94, 28 October 1998.

8 *Osman*, cit., para. 116.

9 Para. 8 of the opinion.

10 Para. 9 of the opinion.

11 Para. 11 of the opinion.

the boundaries of law, not outside»<sup>12</sup>.

The arguments of both judges are very interesting. It is true that the Court has usually stuck to the Osman test, but a “revised Osman test”, as suggested by Judge De Albuquerque in the case *Valiuliene v. Lithuania*<sup>13</sup>, seems to have gradually entered the legal reasoning of the Court. Judge De Albuquerque acknowledged, in a case of domestic violence which caused to the victim minor bodily injuries, that the stage of “immediate risk” for a victim might be too late for the State to intervene, and that «a more rigorous standard of diligence is especially necessary» in societies where the problem of domestic violence is widespread. He reformulated the test as follows: «If a State knows or ought to know that a segment of its population, such as women, is subject to repeated violence and fails to prevent harm from befalling the members of that group of people when they face a present (but not yet imminent) risk, the State can be found responsible by omission for the resulting human rights violations. The constructive 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>14</sup>. The Court, in the *Talpis v. Italy* case, seems to follow the way paved by Judge De Albuquerque, where it stressed the “particular context” of domestic violence, and the aspect of repetition of violent acts<sup>15</sup>. Nonetheless, this conclusion cannot justify a disproportionate restriction of other rights. Hence, even though the arrest of Ms Talpis’ husband might have been a disproportionate measure, the officials could have driven the applicant’s husband to the hospital, or taken him home in order to assess whether the situation was safe.

### 3.2 Domestic Violence as Torture

The second consideration regards Article 3 of the European Convention. The judges unanimously concluded that there was a violation of the prohibition of torture, inhuman or degrading treatment enshrined in the Convention. What about the intensity test which is commonly applied by the ECtHR in order to trigger Article 3? As said by Judge Jočienė, in her dissenting opinion to the *Valiuliene* judgment, the «minimum level of se-

<sup>12</sup> Para. 15 of Judge Spano’s opinion.

<sup>13</sup> European Court of Human Rights, *Valiuliene v. Lithuania*, Appl. No. 33234/07, 26 March 2013.

<sup>14</sup> P. 30 of the *Valiuliene* judgment.

<sup>15</sup> *Talpis*, cit., para. 130.

verity» must be proved<sup>16</sup>. As a consequence, in the case of «very minor injuries», a case of domestic violence must be exclusively examined under Article 8 of the Convention<sup>17</sup>. In the *Talpis* case, we might argue that the level of severity had been reached, but the Court did not even mention the need to use a similar test. Accordingly, episodes of domestic violence are considered as sufficiently severe to trigger Article 3 of the Convention, without requiring an analysis of the level of intensity. Many scholars have discussed whether or not domestic violence can amount to torture, and, as early as the end of the nineteenth century, Frances Power Cobbe wrote a revolutionary article on the equation that domestic violence is torture, namely “Wife-torture in England”<sup>18</sup>. A very convincing argument is the one proposed by the then UN Special Rapporteur on torture and other inhuman, cruel or degrading treatment Manfred Nowak, who, in an illuminating report of 2008, outlined the element of powerlessness that characterises both domestic violence and torture: «the intention to keep the victim in a permanent state of fear based on unpredictable violence by seeking to reduce the person to submission and destroy his/her capacity for resistance and autonomy with the ultimate aim of achieving total control»<sup>19</sup>.

### 3.3 Domestic Violence as Discrimination on the Basis of Gender

The third consideration refers to the prohibition of discrimination on the basis of gender. The Court read Article 14 in conjunction with Articles 2 and 3 of the European Convention. Referring to the *Opuz v. Turkey* and the *Eremia v. Moldova*<sup>20</sup> case, the Court confirmed that discrimination occurs where it is possible to affirm that the acts of the authorities do not only amount to a failure to respond to episodes of violence, but also to a «repeated tolerance» that «reflect[s] a discriminatory attitude with regard to the applicant as woman»<sup>21</sup>. Mentioning worrying data on domestic violence in Italy, the Court acknowledged first that the phenomenon mainly affects women, and that, despite the reforms undertaken, a significant number

16 Para. 14 of the Judge Jočienė’s opinion.

17 Para. 15 of the Judge Jočienė’s opinion.

18 Contemporary Review, Strahan & Co.; First Edition (1878). See a reflection on the evolution, and related references, in S. De Vido, *Donne, violenza, diritto internazionale. La Convenzione di Istanbul del Consiglio d’Europa del 2011*, Milano, 2016.

19 A/HRC/7/3, para. 45.

20 European Court of Human Rights, *Eremia v. Moldova*, Appl. No. 3564/11, 28 May 2013.

21 *Talpis*, cit., para. 141.

of women is killed by their partners or former partners; secondly, that socio-cultural attitudes on domestic violence continue<sup>22</sup>. This affirmation differs from the judgment in the *Rumor* case, in which the Court posited that the Italian legal framework with regard to domestic violence was effective. According to the majority of the judges, «the circumstances were different»<sup>23</sup>, since the application of Italian criminal law in the most recent judgment did not prevent physical assault against the woman. Given the elements of the case, the majority of the judges concluded that a violation of the prohibition of discrimination occurred.

In his partly dissenting opinion, Judge Eicke summarised the jurisprudence of the Court on the application of Article 14 combined with Article 2 and 3 of the European Convention, stressing that, absent any evidence of discriminatory treatment by the officials, a violation of the prohibition of discrimination can arise only in cases of a «clear and systemic failure» of the national authorities to appreciate and address the seriousness and extent of the problem of domestic violence<sup>24</sup>. Therefore, according to the Judge, in the case at issue, the question was not only a matter of statistics, but whether or not the judgment in the *Rumor* case was premature or the situation in Italy had significantly changed in the lapses of time between the two judgments. However, as correctly pointed out by the Judge, the Court has not argued why it considered the Italian system effective in the *Rumor* case, and not effective in the *Talpis* one. Judge Spano reached a similar conclusion, arguing that «societal discrimination and high levels of domestic violence [...] are not, in and of themselves, enough to ground a finding of an Article 14 violation»<sup>25</sup>, and that «there is insufficient evidence of institutional discrimination in Italy», being the relevant framework being one that is effective<sup>26</sup>.

#### 4 Some Conclusions in Light of the Istanbul Convention

Given the analysis above, we might argue that positive obligations of States in responding to cases of domestic violence must be reconceived in light of the Istanbul Convention. In the *Talpis* case, the Court was well aware of the impact of the Istanbul Convention, where it stated that States have “particular” (*particulière*) due diligence obligations, and that the

22 *Talpis*, cit., para. 145.

23 *Talpis*, cit., para. 146.

24 Para. 19 of Judge Eicke’s opinion.

25 Para. 21 of the Judge Eicke’s opinion.

26 Para. 23 of the Judge Eicke’s opinion.

peculiarity of acts of domestic violence, as acknowledged in the preamble of the Istanbul Convention, «must be taken into account» during internal proceedings<sup>27</sup>. Article 49 of the Istanbul Convention provides that «Parties shall take the necessary legislative or other measures to ensure that investigations and judicial proceedings in relation to all forms of violence covered by the scope of this Convention are carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings», and Article 50 is aimed at ensuring that the «responsible law enforcement agencies respond to all forms of violence covered by the scope of this Convention promptly and appropriately by offering adequate and immediate protection to victims».

We might therefore argue that the “Osman test” with regard to Article 2 of the Convention, and the due diligence requirement must be read in light of the Istanbul Convention, in the sense that national authorities must consider the specific conditions of vulnerability of the victim, and adopt preventive measures even in the absence of the strict requirement of immediacy. In other words, in a situation similar to the one brought before the Court, the immediacy requirement should be satisfied given a “present” risk of violence (the fact that the woman found refuge in a shelter for women, that she reported episodes of violence to the authorities, that she called the police the night of the murder, etc.). The ECtHR is challenging – although not explicitly – the Osman test through the Istanbul Convention, following the pioneering thought of Judge De Albuquerque in the *Valiuliene* case.

An interesting element that was not analysed either by the Court or by the dissenting judges is linked to the support States are obliged to give to shelters for victims of violence under the Istanbul Convention. The applicant found refuge from her husband thanks to a local association. However, the social services of the municipality of Udine notified the association that there were no funds available to guarantee to the applicant another refuge or to pay the refuge found by the association itself. The Government counter-argued that the social services in Udine, which had developed a programme for victims of violence, were not in charge of the situation and therefore could not pay for the applicant’s refuge managed by a private association; the victim should have contacted the social services to ask for help<sup>28</sup>. In light of the Istanbul Convention, States are required to «recognise, encourage and support at all levels, the work of relevant non- governmental organisations and of civil society active in combating violence against women and establish effective co-operation with these organisations» (Article 9 Istanbul Convention). Even though

27 *Talpis*, cit., para. 129.

28 *Talpis*, cit., paras. 25 and 26.



the woman could have reported her situation to the social services of the municipality, nothing should have prevented her to receive a concrete aid by a private association, which, in turn, should have been financially supported by the competent authorities. Therefore, in the application of Article 14 of the Convention on Human Rights, the Court could have concluded that, despite remarkable and fundamental steps forward in the protection of women from domestic violence, the Italian legislative framework and its application by national authorities systematically discriminate against women. The Istanbul Convention obliges States to take concrete steps in countering violence against women and domestic violence, and can be used by the ECtHR judges to interpret the rights granted by the Convention in terms of positive obligations.

