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States' Positive Obligations to Eradicate Domestic Violence: The Politics of Relevance in the Interpretation of the European Convention on Human Rights

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This reflection draws on the judgment handed down by the European Court on Human Rights (hereinafter the 'ECtHR' or 'Court') in March 2017 in *Elisaveta Talpis v. Italy*¹ which concerns States' positive obligations to counter domestic violence.² It sheds light on the argumentative moves of the Court to eradicate domestic violence through a very specific approach of what is relevant for the sake of interpreting States' legal obligations. In particular, it demonstrates that the provisions of the Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence, adopted in 2011 in Istanbul and entered into force in 2014 (hereinafter 'Istanbul Convention'),³ can constitute 'relevant rules of international law' under Article 31(3)(c) of the Vienna Convention on the Law of the Treaties (VCLT) in the interpretation of applicable articles of the European Convention on Human Rights (hereinafter the 'European Convention').

Relying on previous European human rights jurisprudence, I argue that the Court has started to use the Istanbul Convention as a key instrument to interpret positive legal obligations deriving from the rights enshrined in the European Convention, in particular in Article 2 (right to life), and Article 14 (prohibition of discrimination). The ECtHR judges

¹ Available in French and Italian. [http://hudoc.echr.coe.int/eng#{"fulltext":\["talpis"\],"itemid":\["001-171994"\]}](http://hudoc.echr.coe.int/eng#{)

² No. 41237/14, 2 March 2017.

³ 11 May 2011, CETS No.210. State Parties: 22.

refer to the preamble and relevant articles of the Istanbul Convention in the *Talpis* judgment as a means to impose a stricter due diligence standard with regard to obligations States must comply with in cases of domestic violence. This standard marks an improvement of the mechanisms existing at regional level to eradicate domestic violence in order to achieve a higher standard of protection for victims.

In its interpretation activities over the years, the Court has not only considered the practice of Contracting Parties to the European Convention, but also ‘the evolution in the norms and principles applied in international law’ regarding a specific issue, the emergence of a ‘common ground in modern societies,’ and the practice which reflects States’ common values.⁴ Through the process of interpretation, the Court clarifies general obligations taking into account ‘the state of the law at the time of its application.’⁵ As a result of the *Talpis* judgment, the State is considered responsible for violating rights of the European Convention if it did not adopt measures to prevent domestic violence or if it did not intervene in a prompt way, even without the immediacy of the risk being proved. What is relevant in this and previous judgments on domestic violence is the importance given to a social problem, which according to the Court affects society in all Member States and requires a strong response using the European Convention as interpreted through the Istanbul Convention.

The reflection is divided into two parts: I will first analyse the *Talpis* judgment, emphasising the important findings of the decision in terms of domestic violence (1). I will then demonstrate to what extent the provisions of the Istanbul Convention can constitute relevant rules of international law in the interpretation of the European Convention with the purpose of identifying States’ legal obligations in preventing domestic violence (2).

⁴ *Demir and Baykara v. Turkey*, No. 34503/97, 12 November 2008, para. 85.

⁵ Report Fragmentation of International Law, Martti Koskenniemi, A/CN.4/L.682, 13 April 2006, para. 478 (b). See also M. Fitzmaurice, ‘Dynamic (Evolutive) Interpretation of Treaties’, 21 *The Hague Yearbook of International Law* (2008) 101.

1. The Evolution of Positive Obligations in Combating Domestic Violence: The *Talpis* Judgment

The case under analysis concerns gender-based violence against women, which is widespread in Italy and is usually perpetrated by a partner or a former partner that leads to the death of the woman or a family member who attempts to protect the woman (the applicant's son in the *Talpis* case). The data confirms that despite having adopted recent measures to combat violence or femicide (to kill a woman because she *is* a woman), it has not decreased in Italy and affects women of all ages and of all social conditions.

In this specific case, Talpis reported the violent behaviour of her husband to the police authorities but they only responded seven months later. After fatally stabbing the applicant's son and attempting to murder the applicant, Talpis' husband was sentenced to life imprisonment. Waiting for the judgment of the domestic courts, Elisaveta Talpis filed a complaint with the ECtHR against Italy, claiming the Italian authorities failed to protect her and her son from her violent husband.

The Court found, by a majority of six votes to 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. The Court unanimously found that the State infringed Article 3 of the European Convention (prohibition of torture) 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 (the right to respect for private and family life and the right to an effective remedy), and found a violation of the principle of non-discrimination (Article 14 of the European Convention) by a majority of five votes to two.

I will discuss two different aspects⁶ of the reasoning of the Court, before drawing some conclusions based on the general theory of interpretation of international law.

⁶ Another interesting element relates to the definition of domestic violence as torture, inhuman or degrading treatment, which will not be addressed in this contribution.

a) Challenging the Osman Test

With regard to Article 2 of the European Convention, the Court applied the so-called 'Osman test'.⁷ In order to avoid an excessive burden on the authorities, the test provides that 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.'⁸

According to the majority, the immediacy requirement was met in the *Talpis* case, despite the fact that a year passed between the initial police intervention and the murder.⁹ Given the circumstances of the case, the Court considered that the husband constituted a real threat to the applicant, and that the State had an obligation to adopt concrete measures in order to protect the individual whose life was threatened.

In that respect, it seems that a 'revised Osman test', as suggested by Judge De Albuquerque in the case *Valiuliene v. Lithuania*,¹⁰ has gradually entered the legal reasoning of the Court. In this case of domestic violence which caused minor bodily injuries to the victim, Judge De Albuquerque acknowledged 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

⁷ *Osman v. United Kingdom*, No. 23452/94, 28 October 1998.

⁸ *Osman v. United Kingdom*, para. 116.

⁹ See the two divergent partly dissenting opinions by Judge Eicke and Judge Spano. The latter in particular stressed that the requirement of the immediacy of the risk was not met (para. 11 of the opinion).

¹⁰ No. 33234/07, 26 March 2013.

is the reverse side of the context of widespread abuse and violence already known to the State authorities.¹¹

In the *Talpis* case, the Court 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 acts¹². Similarly, in the *O’Keeffe v. Ireland* case, concerning child abuse in school, the Court stressed the importance of ‘context’ in which the human rights violation occurred, based on two elements: the ‘particularly vulnerable nature of children,’ and the specific characteristics of primary education.¹³ In that specific case, although being ‘aware of the level of sexual crime by adults against minors,’ Ireland did not put in place ‘any mechanism of effective State control against the risks of such abuse occurring.’¹⁴ Nonetheless, the importance of context and the need to reconsider the Osman test cannot justify a disproportionate restriction on other rights.¹⁵ As example of proportionate measure in the *Talpis* case, 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.

b) Domestic Violence as Discrimination on the Basis of Gender

The second consideration refers to the prohibition of discrimination on the basis of gender. The Court read Article 14 together with Articles 2 and 3 of the European Convention. Referring to *Opuz v. Turkey*¹⁶ and the *Eremia v. Moldova*,¹⁷ 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.’¹⁸ Referring to disturbing data on domestic violence in Italy, the Court acknowledged first that the phenomenon mainly affects women, and that, despite reforms, the rate of femicide has not decreased; secondly, that socio-cultural attitudes

¹¹ *Valiuliene v. Lithuania*, p. 31.

¹² *Talpis v. Italy*, para. 130.

¹³ *O’Keeffe v. Ireland*, No. 35810/09, 28 January 2014, para. 146.

¹⁴ *O’Keeffe v. Ireland*, paras. 162 and 168.

¹⁵ See Judge Spano, para. 15 of the opinion.

¹⁶ No. 33401/02, 9 June 2009.

¹⁷ No. 3564/11, 28 May 2013.

¹⁸ *Talpis v. Italy*, para. 141.

on domestic violence continue.¹⁹ This affirmation differs from the judgment in the *Rumor* case,²⁰ in which the Court posited that the Italian legal framework with regard to domestic violence was effective. According to the majority, ‘the circumstances were different’²¹, since the application of Italian criminal law in *Talpis* did not prevent physical assault against the woman. Given the elements of the case, the majority of the judges ruled that there was a violation of the prohibition of discrimination.²²

2. The Provisions of the Istanbul Convention as ‘Relevant Rules’ of International Law

As interestingly argued, the metaphor of a game perfectly describes the activity of interpretation of international law, and those who engage in such an activity have ‘a more or less conscious intent to achieve a desired outcome.’²³ Article 31(3)(c) VCLT is the card that lawyers and courts use in their game, and indeed the ECtHR has referred to this provision in order to expand and restrict, for example, the scope of application of Article 6 of the European Convention.²⁴ In another case, the Court used a provision of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Oviedo Convention)²⁵ as relevant international law in order to clarify the content of the right to informed consent.²⁶ To mention another illustrative example, the ECtHR relied on the (Revised) European Social Charter in a case concerning the application of the freedom of assembly and association (Article 11 of the European Convention) to municipal civil servants; in that judgment, the Charter was used despite the respondent State being a non-State party.²⁷

¹⁹ *Talpis v. Italy*, para. 145.

²⁰ No. 72964/10, 27 May 2014.

²¹ *Talpis v. Italy*, para. 146.

²² The Court, as stressed by Judge Eicke, has not argued why it considered the Italian system effective in the *Rumor* case, but not in the *Talpis* judgment.

²³ A. Bianchi, ‘The Game of Interpretation in International Law’, A. Bianchi, D. Peat, M. Windsor (eds), *Interpretation in International Law* (OUP: Oxford, 2013), p. 54.

²⁴ *Ibid*, pp. 46-47.

²⁵ 4 April 1997, CETS No.164.

²⁶ *Evans v. United Kingdom*, No. 6339/05, 10 April 2007. F. Seatzu, S. Fanni, ‘The Experience of the European Court of Human Rights with the European Convention on Human Rights and Biomedicine’, 31(81) *Utrecht Journal of International and European Law* (2015) 5.

²⁷ *Demir and Baykara*, cit. See C. Pitea, ‘Interpreting the ECHR in light of ‘Other’ International Instruments: Systemic Integration or Fragmentation of Rules of Treaty Interpretation?’, N. Boschiero, T.

In *RMT v. United Kingdom*, the Court referred to the International Labour Organization Convention No. 87 and the European Social Charter to conclude that secondary action formed part of trade union freedom and therefore could be brought within the terms of Article 11 of the European Convention. Other international courts and tribunals have considered 'relevant rules of international law', both customary and treaty law, as means of interpretation.²⁸

In the *Talpis* case, the Court did not refer to different techniques of interpretation but it was well aware of the impact of the Istanbul Convention, where it stated that States – ratifying States, in particular, such as Italy, which is party to the Convention as of 2013 – have 'particular' (*particulière*) due diligence obligations, and that the peculiarity of acts of domestic violence, as acknowledged in the preamble of the Istanbul Convention, 'must be taken into account' during internal proceedings.²⁹ 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 [...] are carried out without undue delay', 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'. These are 'relevant rules of international law' that matter in analysing violations of articles of the European Convention in cases of domestic violence.

I 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

Scovazzi, C. Pitea, C. Ragni (eds), *International Courts and the Development of International Law* (Springer: Berlin, 2013) 545. Cfr. A/CN.4/L.682, para. 472.

²⁸ Some examples mentioned by C. MC Lachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', 54 (2) *International Comparative Law Quarterly* (2005) 279. In particular, the Iran-US Claims Tribunal, and PCA, *Ireland v. United Kingdom*, final 2 June 2003, 42 ILM (2003) 1118.

²⁹ *Talpis v. Italy*, para. 129.

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 called the police the night of the murder, etc.). The ECtHR is challenging – although not explicitly – the Osman test through the Istanbul Convention, considered as ‘relevant rule of international law’, and is consequently following the pioneering thought of Judge De Albuquerque in the *Valiuliene* case.

An interesting element that was not analysed either by the Court or 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 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.³⁰ 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 [...] and establish effective co-operation with these organisations’ (Article 9 Istanbul Convention). Even though the woman could have reported her situation to the social services, nothing should have prevented her from receiving concrete aid from a private association, which, in turn, should have been supported by the competent authorities. Therefore, in the application of Article 14 of the European Convention, the Court could have held that, despite remarkable steps forward in the protection of women from domestic violence, the Italian legislative framework and its application by national authorities systematically discriminate against women. It does not mean that the Court can assess whether or not violations of other international conventions than the European Convention have occurred – it would fall outside the scope of its mandate (Article 32 of the European Convention) – but that it can interpret the rights protected by the European Convention

³⁰ *Talpis v. Italy*, paras 25-26.

so as to take into account the evolution of the law and State practice. This could be a further step in the consideration of the provisions of the Istanbul Convention as relevant rules of international law, to the extent of pushing States to comply with its most advanced obligations. Should the situation be different for non-contracting States to the Istanbul Convention? As correctly pointed out, the Court ‘does not hesitate to employ treaties that are neither binding on all Member States nor binding on the respondent State’, hence differentiating its jurisprudence from other international courts and tribunals.³¹

Illuminating in that respect seems to be the concurring opinion of Judge Ziemele in the aforementioned *O’ Keefe* judgment, where he opined that the reasoning of the majority of the judges could have been better supported had it been based on the ‘developments in international human rights law to demonstrate that the underlying principle has been maintained and has given rise to a detailed set of proposals as to how to ensure (in the case at issue) the rights of children.’³² To contextualise, in cases of domestic violence, developments have indeed occurred to the extent that States are bound by stricter standards of due diligence as the ones elaborated in the Istanbul Convention. To quote again Judge Ziemele, ‘the nature of obligations is by definition an evolving concept, precisely in conjunction with the evolution of understanding and of means.’³³

My position is more prudent with regard to entirely new obligations, such as the support of and the cooperation with non-governmental organisations in countering domestic violence. Hence, the interpretation of Article 14 of the European Convention through the relevant rule of the Istanbul Convention should be deemed possible only with regard to ratifying countries of the latter, such as Italy.

³¹ A. Rachovitsa, ‘Fragmentation of International Law Revisited: Insights, Good Practices and Lessons to be Learned from the Case Law of the European Court of Human Rights’, 28 (4) *Leiden Journal of International Law* (2015) 863. See also M.K. Yasseen, ‘L’interprétation des traités d’après la Convention de Vienne sur le droit des traités’, 151 *Recueil des Cours* (1976) 63, and the panel report on Biotech Products (WT/DS291/R, DS292/R, DS293/R), 29 September 2006, para. 7.75: the Cartagena protocol was not taken into consideration because none of the parties was a party to the treaty.

³² Concurring opinion of Judge Ziemele, *O’ Keefe*, para. 9.

³³ *Ibid.*, para. 10. With regard to Article 31(3)(a) and (b), see Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties by Georg Nolte, A/CN.4/671, 26 March 2014, para. 56: ‘It is sufficient that the parties, by a subsequent agreement or a subsequent practice under article 31 (3), attribute a certain meaning to the treaty, or in other words, adopt a certain “understanding” thereof.’

3. Conclusions: New or Old Law Combatting Domestic Violence?

The Istanbul Convention obliges contracting States to take concrete measures in countering violence against women and domestic violence, and can be used by the ECtHR judges to interpret the rights granted by the European Convention in terms of positive obligations of States. As ‘relevant rules’ of international law, the provisions of the Istanbul Convention are useful to expand the scope of application of articles of the European Convention which are relevant in cases of domestic violence. Why is the Istanbul Convention so relevant? If we consider the number of ratifications, we can easily verify that less than half of Member States of the Council of Europe have ratified the Convention (23 at the time of writing). Nonetheless, the Convention has not come out of the blue. It demonstrates the evolution of European law with regard to domestic violence, it endorses the concept of ‘due diligence’ as elaborated by the ECtHR, and it identifies specific legal obligations for States parties. It confirms that the issue of domestic violence is a high priority in the activity of the Council of Europe, and that strong measures must be adopted in order to effectively eradicate it. One author has argued that there is no need to invoke Article 31(3)(c) VCLT since there are other rules of interpretation that can help, such as systemic and evolutive interpretation.³⁴ However, Article 31(3)(c) is in itself a very general principle of treaty interpretation that takes into account the fact that ‘treaties are creatures of international law’ and crystallises what lawyers and judges always do in the interpretation process.³⁵

In the case under analysis, I can argue that it was the Court that elaborated the *Osman* test, and it can be the Court that can adapt it to the new challenges posed by domestic violence, according to an evolutive interpretation that takes into account the developments of law and practice. It is the legal space in which ‘relevant rules of international law’ have something to say. The ECtHR is not new to this process (Oviedo Convention as previously mentioned), and in its forthcoming judgments we might reasonably expect a straightforward reference to the provisions of the Istanbul Convention as ‘relevant rules of international law’. Even though not all contracting

³⁴ Rachovitsa, ‘Fragmentation of International Law Revisited’, cit.

³⁵ MC Lachlan, ‘The Principle of Systemic Integration’, cit.

States to the European Convention have ratified the Istanbul Convention, the current 'particularly constructive character' of evolutive interpretation 'as it is used' by the ECtHR 'sometimes anticipates this consensus.'³⁶ The constructive character of this interpretation is relevant in particular with regard to the conventions adopted within the Council of Europe legal system, to which the Istanbul Convention belongs.

Is this 'old' or 'new' law? In its report on fragmentation, the International Law Commission posited that 'reference to other rules of international law [...] becomes a form of secondary evidence supporting the enquiry into science and community values and expectations, which the ordinary meaning of the words, and their object and purpose, invites.'³⁷ The ECtHR has demonstrated that it considers 'community values and expectations' when dealing with cases of domestic violence, even to the extent of gradually changing the 'classic' due diligence standard it has elaborated over time. The evolution of the jurisprudence of the Court, acting within the interpretative community of law-applying authorities,³⁸ has therefore shown the 'desired outcome' of the Court in contributing to the eradication of domestic violence in Europe. It is 'old' law - the European Convention – interpreted using 'new' law - the Istanbul Convention - that signifies a significant step forward in the protection of women from violence.

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³⁶ J.-M. Sorel, V. Bore-Eveno, 'Article 31', in O. Corten, P. Klein (eds), *The Vienna Convention on the Law of Treaties. A Commentary* (OUP: Oxford, 2011) 835.

³⁷ A/CN.4/L.682, para. 478.

³⁸ J. D'Aspremont, 'The Multidimensional Process of Interpretation', A. Bianchi, D. Peat, M. Windsor (eds), *Interpretation in International Law* (OUP: Oxford, 2013), p. 125.