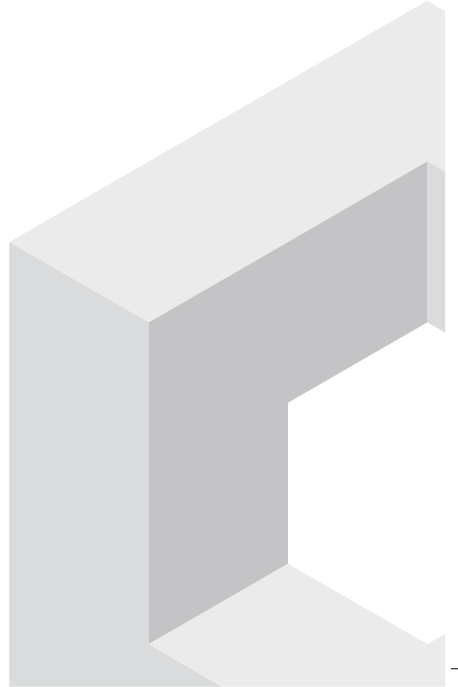


DANGEROUSNESS AND CRIMINAL JUSTICE

A Dialogue Between Italy and Türkiye

Edited by Valentina Bonini, Rahime Erbaş and Selin Türkoğlu

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Dangerousness and Risk Assessment in Proceedings for Gender-based Violence

Valentina Bonini

1. Dangerousness of the perpetrator and protection of the victim as central issues in combating gender-based violence

The idea of dangerousness and safety has changed profoundly over the past decades, shifting from a social dimension – which focused on the recognition, implementation, and protection of people’s social and economic rights – to a criminal dimension centred around defense from crime, in a handover from social justice to criminal justice for the protection of people’s fundamental rights.

This course is also clear in the regulatory approach regarding the family. From the second half of the last century, legislative policies have been introduced to recognize the right to equality within the family and the need to abandon hierarchical and unequal logics in intra-family relations. In the most recent years, more and more ground has been gained by criminal law,¹ which has become a necessary tool to combat violence linked to patriarchal legacy, which has been proved particularly long and difficult to be overcome.

1. On the evolution of family criminal law in Italy, from the original approach of the Rocco code to today’s legal framework, see M. Bertolino, *Violenza e famiglia: attualità di un fenomeno antico*, in «Riv. it. dir. proc. pen.», 4, 2015, pp. 1710 ff.; in a broader perspective, B. Pezzini, *Il diritto e il genere della violenza: dal codice Rocco al codice rosso (passando per la Convenzione di Istanbul)*, in B. Pezzini, A. Lorenzetti, *La violenza di genere dal codice Rocco al codice Rosso*, Turin, Giappichelli, 2020, pp. 11 ff.; as well as, if wished, V. Bonini, *La violenza di genere*, in Aa.Vv., *Diritto e genere nella prospettiva europea*, Naples, ES, 2021, pp. 161 ff. For an analysis of the procedural issues, P. Maggio, *Rapporti familiari e tutela processuale penale*, in «Processo penale e giustizia», 6, 2022, p. 595.

Thus, gender-based violence – specifically domestic and intimate partner violence – is a criminological field on which national and supranational legislators have focused their attention, making it the subject of ever more comprehensive regulation.

In this area, the intertwining of dangerousness (of violent behaviour), punishment (of perpetrators of violence) and protection (of victims of violence) is made particularly evident by the choices expressed in international legal documents, which have been an important input and an authoritative guide for national legislators.

While the legal framework of the European Union on this issue is still under construction,² the institutions of the Council of Europe have already produced extraordinarily important legal documents, where the response to the phenomenon places the greatest emphasis on “protection, prosecution and punishment” through criminal justice.³ Although Member States are urged to develop comprehensive, constant and widespread cultural and educational policies for the prevention of gender-based violence, criminal justice is undoubtedly listed as the main instrument to fight domestic and IPV violence.

Victim protection on the one side, prosecution and punishment of perpetrators on the other side are two of the pillars on which the Council of

2. On 10th May 2023 the European Parliament has approved with a qualified majority the accession to the Istanbul Convention, concluding the parliamentary process on the matter, though the EU's accession does not exempt remaining six member states from ratifying it themselves. On the issue, see <https://www.europarl.europa.eu/news/en/press-room/20230505IPR85009/combating-violence-against-women-meps-back-eu-accession-to-istanbul-convention>. See 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», 13, 4, 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», 50, 6, 2013, pp. 1787-1807.

3. In the area of the Council of Europe the most comprehensive legal framework on the topic is the Convention on preventing and combating violence against women and domestic violence, adopted in Istanbul on 11th May 2011. Among the four pillars (prevention, protection, prosecution and punishment, integrated policies) on which the complex action against violence is built, Article 5 stipulates that State Parties are under an obligation to take legislative and other measures to exercise due diligence in preventing, investigating, punishing, and providing redress for acts of violence committed by third parties.

Europe built the framework of the most relevant source on this subject: the Istanbul Convention (thereafter, IC). Several parts of the IC call for a strong response, in which criminal justice must play a fundamental role⁴ in tackling this phenomenon. Indeed, although it has deep socio-cultural roots and a very complex structure, cultural initiatives and policies alone are not enough to counter it effectively.⁵

This approach has also long been adopted by the ECtHR case-law in the wake of a broader and more general reconstruction aimed at strengthening conventional rights, resulting in obligations to protect them. The recognition of the fundamental human 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) measures protecting the person from third-party aggression. Moving along these lines, the Strasbourg judges have developed an articulated system of protection for victims of gender-based violence with respect to the violations of the rights under Articles 2, 3, 8 and 14 ECHR.⁶

4. Articles 33 to 48 charge criminal law with the task of punishing several violent behaviour patterns with «effective, proportionate and dissuasive sanctions, taking into account their seriousness» (Article 45); Articles 49 to 58 concern criminal proceedings, with a special focus on the protection of the victim (Articles 50, 51, 52, 53, 56).

5. Ample space, however, is given to the prevention of violence, which represents one of the «pillars» on which the Istanbul Convention is based, recognising and emphasising the cultural dimension of this form of violence, demanding active policies under the general obligations in Article 12, in order to «promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men». In this regard, it has been highlighted that there is a continuous intertwining 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», 18, 2018, p. 141 and p. 144.

6. The case law of the Strasbourg judges is now extensive, the most copious 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. Türkiye*, 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», 1, 2016, pp. 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*, Intersentia, 2022; in Italian, see M. Montagna, *Obblighi convenzionali, tutela della vittima e completezza delle indagini*, in www.archiviopenale.it, 2019.

As regards gender-based violence, the widespread need for safety has therefore been translated into an individual need for protection of the victim, since the risk of repetition and escalation of this form of violence is particularly high, due to the relational structure and its cyclic pattern.⁷ So, when gender-based violence occurs in close relationships, its dangerousness is not addressed to society indistinctly, but is focused on the victim: as we shall see, this produces specific duties to protect victims, but also makes it more complex to assess the level of danger because of the need to consider a number of factors that usually do not enter into the criminal proceedings.

2. The duty to protect: risk assessment and risk management in the Istanbul Convention and in European Court of Human Rights case-law

The relevance of the protective action is expressly recognised in Article 18 of the IC, which, among the general obligations of the adhering States, mentions «the necessary legislative or other measures to protect all victims from any further acts of violence». For protection to be effective, other duties of a procedural nature 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).

It is also to the Council of Europe convention document that we owe the useful indication of the ways in which the protection offered must be adequate and immediate. In this regard, Article 51 states that the competent authorities must assess the lethality risk so as to take the necessary measures to offer the victim safety and support. The protective measures can be aimed at offering to the victim an easy access to shelter (Article 23) but, mainly, they consist of measures aimed at ordering the perpetrator to stay away from the residence of the victim and preventing any further contact (Articles 52 and 53). In the angle of the IC, the latter shall be preferred, in order to avoid putting an unfair disadvantage on

7. The shift from a widespread dimension of the need for safety to a particular dimension of the need for protection must not, however, lead to consider the phenomenon as a merely private question. On the contrary, this idea is firmly rejected by stressing the importance to react to gender-based violence through criminal proceedings, to limit *ex parte* proceedings (Article 55 Istanbul Convention), and to prohibit alternative dispute resolution processing (Article 48 Istanbul Convention), which would reduce violence to a mere conflict between equals.

those who have suffered violence by forcing them to leave their home, work and usual environment in order to be protected from the risk of further aggression.

In this framework, which places the victim's safety at the heart of the interventions to counteract domestic violence and violence against women,⁸ a role of primary importance is played by the risk assessment procedure, which represents the fundamental precondition to provide a protective shield adequate to the risk of lethality and repetition of violent behaviour to which the victim is exposed. Indeed, in the presence of a plurality of possible measures (civil barring orders, judicial precautionary measures, preventive measures imposing restraining orders on the perpetrator, accommodation of the victim in shelters) that can be adopted to make sure that the victim is not exposed to the danger of suffering new attacks on fundamental goods, the *an* and the *quomodo* of protection are conditional on a careful and timely assessment of the existence and extent of the risk of repeat victimisation.

Therefore, even the most comprehensive and articulated regulatory frameworks of protective measures may be ineffective if an adequate risk assessment procedure is not provided and organised.

It is no coincidence, indeed, that both the IC and ECtHR case-law pay special attention to this crucial step for the protection of the victims of violence.

In this regard, Article 51 of the IC assigns the risk assessment procedure a crucial value. The part of the convention where this aspect is dealt with leads to this consideration: contemplated in Chapter VI (dedicated to criminal proceedings), it establishes a more general obligation to take measures enabling the authorities to respond «promptly and appropriately» to violence, so as to offer «adequate and immediate protection to victims» (Article 50). This provision precedes the regulation of typical protective measures, such as barring orders (Article 52) in the form of restraining or protection orders (Article 53).

Article 51 also offers useful indications to identify the subjects, the object, and the purpose of the assessment, as well as certain tools that are more specifically set forth in the Explanatory Report to the Convention, in light of the regulatory coordination with other provisions thereof.

8. In this sense, the Explanatory Report to the Istanbul Convention (§ 260) notes that «concerns for the victim's safety must lie at the heart of any intervention in cases of all forms of violence covered by the scope of this Convention».

Firstly, it is clear that State Parties are under an obligation to adopt legislative or other (operational, organisational, financial) provisions to ensure that the competent authorities carry out such risk assessment. On the subjective level, the generic reference to «competent authorities» places the obligation to assess the existence of danger among the tasks of both the police and the judicial authority (judge and public prosecutor).⁹ As to the object of the evaluation, this concerns the risk of lethality (and therefore the possibility of an escalation so severe as to jeopardize life), the risk of a repetition of violent behaviour and the overall «seriousness of the situation», which actually appears to be a criterion for assessing the extent of the risk. The purpose of the assessment, as has already been mentioned, is the management of the risk within a «coordinated framework of safety and support», which suggests that the intervention should provide both protection measures as such and measures to support, sustain, and accompany the victim along a pathway out of violence that will ensure their lasting safety.

Shifting our gaze slightly to the Strasbourg Court's jurisprudence on domestic and intimate partner violence, the risk assessment procedure retains a prominent position in providing effective protection from new exposure to violent acts.

As part of a broader construction of positive obligations to protect fundamental rights such as those set under Articles 2 and 3 of the ECHR, the Court has been progressively focusing on the centrality of the risk assessment procedure for some time.

A first fundamental step was already taken in the late 1990s with a ruling made in a different criminological context from that of gender violence, on the basis of which the so-called *Osman Test*¹⁰ was formulated with the aim of verifying whether, at the time of the events, the authorities knew or should have known of the existence of a real and immediate danger to a person's life that would have required the adoption of protective measures.¹¹

9. Such a subjective extension is also confirmed in the Explanatory Report, § 260.

10. ECtHR, Grand Chamber, 28 October 1998, *Osman v. United Kingdom*, appl. no. 23452/94.

11. ECtHR, Grand Chamber, 28 October 1998, *Osman v. United Kingdom*, § 116. The Court stated that the obligation to protect arises when «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

Since then, the State's obligation to protect the victim from assaults committed by third parties has been introduced in the presence of a «real and immediate» risk of death (Article 2 ECHR) or serious injury (Article 3 ECHR). Therefore, to fulfil this obligation, the competent authorities must first conduct an adequate assessment of the risk and, when it appears to have the characteristics of reality and actuality,¹² appropriate protective measures must be taken.¹³

In short, also in the approach of the Strasbourg judges, risk assessment represents a fundamental precondition to ensure the observance of the duty to protect the victim, so much so that, following a substantial series of rulings of the Court, important general principles have recently been established in this regard, reconstructing the characteristics that the risk assessment procedure must present when it concerns cases of domestic violence.

In *Kurt v. Austria*,¹⁴ the Grand Chamber of the European judges emphasised that the assessment of danger responds to the general obligation of protection,¹⁵ and then stressed a principle already stated in the *Talpis v. Italy* ruling,¹⁶

within the scope of their powers which, judged reasonably, might have been expected to avoid the risk»; it is also made clear that the scope of the positive obligation «must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities».

12. In giving prominence to a “real and immediate risk”, the Strasbourg judges offer a characterisation of the danger that closely resembles the characteristics of reality and actuality of the precautionary requirements as provided for in Article 274 of the Italian Code of Criminal Procedure.

13. 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», 15, 2015, pp. 343-368.

14. ECtHR, Grand Chamber, 15 June 2021, *Kurt v. Austria*, appl. no. 62903/15. See 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. dir. proc. pen.», 4, 2021, pp. 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.

15. ECtHR, Grand Chamber, 15 June 2021, *Kurt v. Austria*, appl. no. 62903/15, § 159 observes that «the assessment of the nature and level of risk constitutes an integral part of the duty to take preventive operational measures where the presence of a risk so requires».

16. ECtHR, 2 March 2017, *Talpis v. Italy*, appl. no. 41237/14, § 122, where it was clarified that «the risk of a real and imminent threat must be assessed taking due account of the particular context of domestic violence». 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, *Re-thinking the (legal) limits of the state in the case of Talpis v Italy*, in G. Picelli, I. Kherkerulidze,

requiring that the risk assessment be conducted taking into account the particular characteristics of domestic violence.¹⁷

On the basis of the structural specificities and peculiar dynamics of violence exercised in the context of intimate relationships, of its root firmly sunk in an inequal relationship, an *ad hoc* procedure is outlined. It is complemented with a series of features aimed at assessing the victim's exposure to the danger of being subjected to new aggressions more adequately. This danger cannot in fact be appropriately detected and assessed through the more classic and well-known criteria for evaluating dangerousness. As these are calibrated to the risk of repetition of the crime that is directed indiscriminately towards society, they are focused exclusively on the accused and on the objective characteristics of the criminal action already committed.

Here, the horizon along which risk assessment must be conducted becomes broader and, therefore, more complex. For this reason, it requires a plurality of assessment parameters, as well as tools tailored to this specific criminological context.

3. Risk assessment in proceedings for intimate partner violence: features and complexity

In a virtuous interweaving of the precedents of the ECtHR and the analyses conducted by GREVIO,¹⁸ the Grand Chamber's ruling *Kurt v. Austria* offers an extensive and, at the same time, analytical reconstruction of the risk assessment procedure in cases of domestic violence.

A. Borroni (eds), *Reconsidering gender-based violence and other forms of violence against women: comparative analysis in the light of the Istanbul Convention*, Lecce, Libellula University Press, 2018. The same applies to ECtHR, 9 July 2019, *Volodina v. Russia*, appl. no. 41261/17; as well as ECtHR, 26 May 2020, *Munteanu v. Moldova*, appl. no. 34168/11.

17. ECtHR, Grand Chamber, 15 June 2021, *Kurt v. Austria*, appl. no. 62903/15, § 164, where it is recalled that «the existence of a real and immediate risk to life must be assessed taking due account of the particular context of domestic violence» The need to adapt the general features of the Osman Test to the specificities of domestic violence and violence in intimate relationships had already emerged in the arguments put forward in other cases brought to the attention of the ECtHR, such as in the concurring opinion of Judge Pinto De Albuquerque in *Valiuliene v. Lithuania*, 23 March 2013, appl. no. 33234/07.

18. As is well known, GREVIO (Group of Experts on Action against Violence against Women and Domestic Violence) is an independent expert body that was established by the Istanbul Convention (Article 66 ff.) with a mandate to monitor the implementation of the convention itself. Valuable resources for reading the Convention as *diritto vivente* (established and uniform

After mentioning the precedents that assign fundamental importance to the duty of protection and recalling that such protection must be provided in a manner that takes into account the specificities of violence in close relationships, the ECtHR offers useful indications as to the characteristics that the risk assessment must have when conducted with reference to incidents of domestic violence.

The promptness and timeliness of intervention, the use of standardised tools recognised by the international community, the use of clear guidelines and criteria for law enforcement officers, as well as the autonomous, proactive, and global assessment of the risk of lethality and/or of recurrence are themes that have already been dealt with in previous rulings of the Strasbourg judges and have been emphasised by GREVIO. The Grand Chamber's ruling has now established and clarified the essential characteristics of this delicate and complex operation.

An initial clarification concerns the timing of intervention. The first requirement identified by the ECtHR, when it emphasises the need for an immediate response to complaints of domestic violence, is reminiscent of a general procedural obligation: where the authorities fail to intervene promptly after a complaint has been made, the judicial initiative loses effectiveness, resulting in a situation of inertia that may facilitate the repetition of acts of violence,¹⁹ either due to the underestimation of the violence itself, or to the failure to take specific measures. In this framework, early intervention by the relevant authorities must also consist of a timely risk assessment, as victim safety is a central action in combating relational violence.

Regarding the necessary instruments to conduct the operation, the practices followed in several Member States are judged positively in the Explanatory Report to the IC and by GREVIO. In this connection, it is noted that the authorities should proceed with risk assessment, preferably through the use of standardised instruments containing predetermined questions, that have had international recognition, and are based on the results of solid scien-

case law) are offered by the numerous national reports drawn up by GREVIO (<https://www.coe.int/en/web/istanbul-convention/country-monitoring-work>) as well as by the Mid-term Horizontal Review of GREVIO baseline evaluation reports of 2021, where a useful summary of the main critical issues and good practices observed during GREVIO's actions can be found.

19. ECtHR, Grand Chamber, 15 June 2021, *Kurt v. Austria*, § 165.

tific research.²⁰ With a view to offering clear guidelines to authorities with an assessment obligation, it is suggested that they should adopt one of the internationally recognised instruments:²¹ these consist of a predetermined set of questions that must be answered, thus enabling the capture of elements indicating the level of risk through the prior identification of red flags.

The use of such tools should guarantee not only greater uniformity of assessment, but also an adequate overview of the risk profiles considered, so as to take into account circumstances that do not normally find their way into criminal proceedings because, for instance, they are connected to the victim's condition and to the relationship existing between the victim and the perpetrator.

On the other hand, it is clear that the use of standardised tools can in no way result in a formalistic flattening of the assessment, which the Grand Chamber itself requires to be conducted in an autonomous, proactive and comprehensive manner,²² also offering guidance on the meaning of these requirements. In this regard, the Strasbourg judges make it clear that the assessment can be said to be autonomous and proactive when it is not based solely on the victim's perception of the risk reported but extends to a series of additional elements that must be gathered by the authorities and by the judicial police in fulfilment

20. *Ibid.*, § 167.

21. The best known ones are B-SAFER (Brief Spousal Assault Form for the Evaluation of Risk), DASH (Domestic Abuse, Stalking and Harassment and honour-based violence), SARA (Spousal Assault Risk Assessment), MARAC (Multi-Agency Risk Assessment Conference), Vi-Gen, DVSI (Domestic Violence Screening Instrument), ODARA (Ontario Domestic Assault Risk Assessment). These instruments were developed within individual national experiences and have been endorsed by the international scientific community. They are often updated and made available in broader, more simplified versions (in terms of the number and type of questions) so that they can be used at different levels of investigation. For a survey in this regard, see the official EU publication by EIGE, *A guide to risk assessment and risk management of intimate partner violence against women for police*, Luxembourg, 2019, pp. 13 ff.; for a cross-sectional analysis, see J. Campbell, D. Webster, N. Glass, *The danger assessment: validation of a lethality risk assessment instrument for intimate partner femicide*, in «Journal of Interpersonal Violence», 24, 2009, pp. 653 ff.; R. Kropp, *Intimate partner violence risk assessment and management*, in «Violence and Victims», 23, 2008, pp. 202 ff, as well as on the Spanish procedure, González-Álvarez, López-Ossorio, Urruela, Rodríguez-Díaz, *Integral Monitoring System in case of gender violence. VioGen System*, in «Behavior and Law Journal», 1, 2018, pp. 29 ff.

22. ECtHR, Grand Chamber, 15 June 2021, Kurt v. Austria, §168, which states that «the authorities are under a duty to carry out a lethality risk assessment which is autonomous, proactive and comprehensive».

of the duty to conduct timely and complete investigations. While the victim's statements are relevant to test the level of risk perceived by the victim, the prosecuting authorities must use them as a starting point for conducting investigations and for assessing the information gathered.

The final requirement that the Grand Chamber outlines for the risk assessment procedure is also consistent with the more general procedural obligation to carry out thorough investigations: the complexity of this form of violence requires a global assessment, embracing a plurality of factors – individual and relational, static and dynamic – that are not normally the subject of analysis in court. Recalling the observations made on this point by GREVIO, the Court introduced risk factors that concern not only the accused person and the seriousness of the act for which he or she is being prosecuted, but also involve the relationship between the accused and the victim and their personal conditions, which are to be appraised both from the historical and prognostic perspectives.²³

The wide range and the different nature of the elements that must be considered in order to conduct an adequate risk assessment require the acquisition of data that do not normally enter the criminal trial process and demand skills that, physiologically, do not belong to criminal trial practitioners. This makes the operation particularly complex.

The Strasbourg judges are aware of this complexity and, in line with the requirements of the Istanbul Convention, they emphasised the need for specific training of judicial police officers and authorities on the characteristics of domestic violence, since knowledge of the structural specificities of this phenomenon is essential for an accurate appraisal of the elements involved and thus an adequate assessment of the risk of repetition of aggressive behaviour.²⁴

23. ECtHR, Grand Chamber, 15 June 2021, *Kurt v. Austria*, § 140, which identifies «previous acts of violence, [...] the prior issuing of a restrictive measure, [...] threats to take away common children, acts of sexual violence, threats to kill the victim and her children, threats of suicide», while dynamic factors, which may vary depending on the time at which the assessment is conducted, may be summarised as «the fact that the victim had filed for separation or the break-up of the relationship, [...] psychological problems of the perpetrator, [...] and coercive and controlling behaviour», with a special focus on the possession of or access to firearms, as the Istanbul Convention explicitly emphasised in § 2 of Article 51.

24. ECtHR, Grand Chamber, 15 June 2021, *Kurt v. Austria*, § 143, where GREVIO's indications are quoted: «training of police, prosecutors and judges on domestic violence was essential

On the other hand, the ECtHR makes no secret of its concern that even *ad hoc* trained judicial personnel may find it difficult to conduct analyses of risk factors involving scientific expertise belonging to other professional fields (physicians, psychologists, social workers, etc.). In this sense, it is easy to detect how helpful the use of standardised tools can be as a guide for the identification of the risk factors and how valuable these can be in the assessment procedure; this helps not to overlook situations whose relevance has been highlighted in criminological studies.²⁵

In conclusion, it is clear from the observations of the Grand Chamber that risk assessment in domestic violence is mandatory (as it is crucial to ensure protection for the victim) but also of great complexity for legal practitioners, who may find themselves lacking the necessary skills and tools to fulfil this delicate task.

4. The Italian legal and judicial “state of play” between regulatory gaps and interpretative shortcomings: a proposal

The complexity of the procedure to assess the risk of repetition of intimate partner violence also emerges strongly in the Italian experience.

As there is no specific discipline regulating this procedure, it therefore ends up being placed within regulatory frameworks that are designed and constructed for other assessment processes. Thus, depending on the situation, risk assessment is carried out when establishing whether there are grounds for precautionary measures in relation to danger under Article 274 of the Italian Code of Criminal Procedure; when adopting emergency precautionary measures, as in the cases referred to in Articles 381 and 384-*bis* of the Italian Code of Criminal Procedure; in prevention proceedings leading to the adoption of a warning by the Questore (the state functionary in charge of public order) and of the stricter measure of Court-mandated special surveillance; when alternative measures to detention or when pris-

in order to evaluate the risk of reoffending and order the necessary measures of protection»; for a reference to “well-trained law-enforcement officials”, see also *sub* §§ 171-172.

25. ECtHR, Grand Chamber, 15 June 2021, *Kurt v. Austria*, § 171, where it is stated that «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 assessment».

on benefits allowing a certain amount of freedom are at issue while the subject *in vinculis* is doing their sentence.²⁶

Indeed, the Italian legislator cannot be said to have failed to consider the need to protect the victim of gender violence and has in fact progressively enriched the pre-precautionary, precautionary, executive and preventive range of measures with a set of instruments and provisions, which are intended to operate for the most “iconic” types of offence, *i.e.*, those amenable to the criminological field in question.²⁷

This “generosity” in creating new protective measures for the victim is not, however, coupled by any attention to the provision of a specific procedure for assessing the risk of repetition and escalation of violence.²⁸ There is a lack of an indication on the cross-cutting nature of the risk assessment (for their entire duration of the proceedings and in relation to all the authorities involved); on the need to take into account the specificities of relationship violence (e.g., distinguishing between coercive control and occasional violence and probing into elements that are symptomatic of the former pattern); on the need for *ad hoc* training of the professional entrusted

26. In addition to this, there are circumstances in which the authority is called upon to assess the risk under Article 51 of the Istanbul Convention outside criminal proceedings, such as in the case where the civil judge is hearing a request for a protection order under Article 342-*bis* of the Italian Civil Code for family abuse, or in proceedings in which the custody and/or visitation rights of children are discussed. As far as the latter is concerned, it is worth mentioning the recent ruling of the ECtHR of 10 November 2022, *I.M. vs. Italy*, in which the country was condemned for violation of Article 8 ECHR for failure to protect two children during contact sessions their (non-custodial) father, despite the ill-treatment suffered and the actuality of the threats of repetition of violence.

27. In this regard, for an overview, see A. Muscella, *Forme di tutela cautelari e preventive delle vittime di violenza di genere: riflessioni a margine delle novità introdotte dal “codice rosso”*, in www.archiviopenale.it, 2020; P. Di Nicola Travaglini, F. Menditto, *Codice Rosso. Il contrasto alla violenza di genere: dalle fonti sovranazionali agli strumenti applicativi*, Milano, Giuffrè, 2020; for an extensive critical overview, see P. Maggio, *Rapporti familiari e tutela processuale penale*, in www.processopenaleegiustizia.it, 2022.

28. Only Article 384-*bis* of the Italian Code of Criminal Procedure (devoted to the precautionary measure of emergency removal from the family home, which can be carried out by the judicial police against a person caught in the act of committing an offence typically expressive of domestic violence) provides that there must be «well-founded reasons to believe that the criminal conduct may be repeated, placing the life or the physical or psychological integrity of the offended person in serious and concrete danger», thus modulating the risk assessment according to the type of aggression, the type of victim, and the seriousness and actuality of the danger.

ed with the assessment; and again on the characteristics of autonomy, pro-activity, all-inclusiveness, which lead to the due appreciation of further risk factors (concerning the victim and the relational situation).

The lack of a dedicated discipline is not in itself grounds for censure by the bodies of the Council of Europe, according to which the implementation of obligations to protect victims of violence is sufficient when the assessment of the risk of repetition to which they are exposed takes place on the basis of procedures that comply with the above-mentioned criteria and are governed by secondary sources or based on good practices.

It was this consideration that shielded Italy from censure in GREVIO's national report,²⁹ which notes that the use of the SARA protocol (and its subsequent versions) had been advocated in the national anti-violence plan (2017-2020).³⁰ Nevertheless, GREVIO itself observes that this protocol is not implemented sufficiently, nor is it widespread as it should be in Italian judicial practice. For this reason, Italy is urged to fine-tune this mechanism and disseminate it adequately, besides ensuring that it is repeated at every stage of proceedings, if necessary, that it takes due account of the victim's voice, and that it is the result of a multi-agency response.³¹

It is therefore not surprising that – even though new legal provisions were introduced after the ruling against Italy in the notorious Talpis case³²

29. GREVIO, *Baseline Evaluation Report Italy*, 2020, <https://rm.coe.int/grevio-report-italy-first-baseline-evaluation/168099724e>.

30. See Department for Equal Opportunities of the Presidency of the Council of Ministers, *Piano strategico nazionale sulla violenza maschile contro le donne* (National Strategic Plan on Male Violence against Women 2017-2020), p. 32 (<https://viva.cnr.it/wp-content/uploads/2019/08/piano-strategico-nazionale-sulla-violenza-maschile-contro-donne-2017-2020.pdf>).

31. GREVIO, *Baseline Evaluation Report Italy*, 2020, § 233, where the monitoring body «urges the Italian authorities to develop further their risk assessment and management procedures and ensure their wide dissemination within all statutory agencies involved in dealing with cases of gender-based violence; ensure risk assessments are repeated at all the relevant stages of proceedings [...] and that such assessments take into consideration the views and concerns expressed by the victims; ensure their risk-assessment and management procedures are a central element of a coordinated multiagency response».

32. As is well known, Law no. 69 of 19 July 2019, often referred to as “Code Red”, was adopted to fill gaps that the European Court of Human Rights had highlighted in the Talpis case, where tragic events had unfolded as a result of the authorities’ persistent inaction. In addition to intervening on a procedural level to ensure a timely hearing of the victim and prompt investigative action, the legislative intervention also provided an opportunity to introduce additional criminal offences and to tighten and stiffen the punitive treatment.

– the ECtHR has repeatedly censured the Italian system of protection of victims of relationship violence.

The sequence of rulings that found Italy in breach of its obligations under the ECHR dramatically characterised the first part of 2022, revealing the inadequacy and ineffectiveness of a system that, while opting for strong choices on paper, has in other respects failed to build the fundamental pillars of protection.

In the space of four months, the Court ruled against Italy on no less than three occasions – in which failure to comply with Articles 2 and 3 ECHR is linked to the absence, tardiness, or inadequacy of the risk assessment procedure – and found negligence and omissions on the part of prosecuting judicial authorities.

Based on the conclusions reached the year before in *Kurt v. Austria*, the Court ascertained a first violation of the obligation to protect the right to life in the *Landi v. Italy* case of April 2022.³³ With reference to the specific case, which resulted in the murder of the applicant's son at the end of a long escalation of violence in the family, the Court noted lack of timeliness of intervention as well as of inadequacy of assessment. From the first point of view, the Strasbourg judges stigmatised the fact that the investigating authority failed to take the required action, either in the immediate or in the subsequent phases, and remained substantially inactive with respect to the victim's needs for protection. The judges also observed that, even though the judicial police had indicated the presence of several danger factors³⁴ and the need to adopt more intensive protective measures, the prosecutor had decided not to carry out any risk assessment. Moreover, the Court censured the prosecutor's lack of knowledge of the structural specificities

33. ECtHR, 7 April 2022, *Landi v. Italy*, appl. 10929/19, §92 observes in this regard that protective measures should have been taken by the authorities irrespective of the complaints lodged and/or possibly withdrawn by the applicant, or of the fact that the victim's perception of the risk had changed. The specific situation was in line with general characteristics requiring a proactive and autonomous assessment, which can take into account the indications of the victim, without however being bound to those, as they are susceptible to repeated variation (being, as they are, closely dependent on the cycle of violence).

34. ECtHR, 7 April 2022, *Landi v. Italy*, appl. 10929/19, § 88, where the risk factors mentioned include the perpetrator's history of violent behaviour, non-compliance with a protection order, the escalation of violence, the victim's repeated requests for help both by means of urgent calls and by filing formal complaints.

and dynamics of domestic violence, which must be taken into due account when selecting and assessing the relevant elements to decide on the presence of a risk of lethality.³⁵

In the light of these considerations, the Court found that the Italian authorities knew or ought to have known that there was a real and immediate risk to the applicant's life and/or that of her children, based on the evidence at hand. Also, the judges applied the so-called Osman Test complemented by the guidance offered by the Grand Chamber in *Kurt v. Austria* and found a breach of the duty of protection under Article 2 ECHR.

Shortly thereafter, non-observance of the obligation to assess risk was at the basis of a further ruling in which the ECtHR found a violation of Article 3 ECHR for failure to protect the victim against the repetition of domestic violence in the household.³⁶ In *De Giorgi v. Italy*, although the case was not as tragic as the previous one,³⁷ the censures of the Strasbourg judges were in line with what was stated two months earlier in the *Landi v. Italy* ruling, where the inertia and the inability of the judicial authority to conduct an assessment of the existence and substantial nature of the danger that took due account of the structural characteristics and dynamics of relationship violence were stigmatised.

Also in this case, the judicial police had conducted an autonomous, proactive, and comprehensive risk assessment procedure in the light of the context of domestic violence and had represented the situation of concrete and actual risk to the life of the applicant and her children to the judicial authority, which, nonetheless, remained inactive. Not only did the public prosecutor fail to request the application of precautionary measures, but more importantly they failed to promptly initiate an effective investigation³⁸ in which to carry out an adequate risk assessment procedure. This reveals a lack of knowledge of the specific features of domestic violence, wrongly interpreted as mere marital conflict.³⁹

35. ECtHR, 7 April 2022, *Landi v. Italy*, appl. 10929/19, §92, where it is noted that no assessment of the risk of lethality took into account the specific context of domestic violence.

36. ECtHR, 16 June 2022, *De Giorgi v. Italy*, appl. 23735/19.

37. *Ibid.*, § 66, states, however, that the conduct is such that it constitutes a violation of Article 3 ECtHR, which prohibits inhuman and degrading treatment.

38. *Ibid.*, § 75.

39. *Ibid.*, § 77.

Again, inertia and underestimation on the part of the judicial authority were at the basis of the ruling in the case *M.S. v. Italy*,⁴⁰ where an infringement of Article 3 ECHR was found within a procedural case that presented numerous complaints for acts of relationship violence, some of which were time-barred.⁴¹ In this context, the Strasbourg judges identified certain complaints that the authority had failed to consider in relation to its duty to carry out immediate and proactive risk assessment: in fact, the repeated assaults reported had not led to any initiative for thirteen months despite a clear criminal escalation, which exposed the applicant to a substantial and actual risk of suffering new violence.

Within the framework of a more pervasive investigative inertia, which was clearly stigmatised as a violation of the procedural obligations arising from Article 3 ECHR, there was also a censure of a risk assessment. With respect to certain crimes, such assessment lacked, above all, promptness, and timeliness, once again attesting to the negligence of the prosecuting authority.⁴²

This very brief review shows us a picture that highlights the recurrent lack and inadequacy of risk assessment procedures, which do not comply with the characteristics outlined by the Court's case law and the binding indications of the Istanbul Convention, as highlighted by GREVIO.

Moreover, the Italian authorities themselves acknowledged the shortcomings of the action taken so far and identified possible improvement measures in the next national anti-violence plan (2021-2023),⁴³ which highlights the authorities' inability to assess the level of risk as a persistent critical issue. In line with the picture drawn in Strasbourg, while the system

40. ECtHR, 7 July 2022, *M.S. v. Italy*, appl. 32715/19.

41. *Ibid.*, § 144, observes in this regard that offences related to domestic violence, even if committed by private individuals, should be regarded as more serious and, therefore, considers it incompatible with the procedural obligations arising from Article 3 ECHR that proceedings for such acts should be terminated by a measure that is motivated by inaction on the part of the authorities.

42. ECtHR, 7 July 2022, *M.S. v. Italy*, appl. 32715/19, § 131.

43. See Department of Equal Opportunities of the Presidency of the Council of Ministers, *Piano strategico nazionale sulla violenza maschile contro le donne* (National Strategic Plan on Male Violence against Women), adopted on 17 November 2021, p. 42 (<https://www.pariopportunita.gov.it/wp-content/uploads/2021/11/PIANO-2021-2023.pdf>).

written on paper is considered adequate, attention is drawn to the persistence of shortcomings in “institutional practice”.⁴⁴

The complex and comprehensive character of risk assessment requires «to implement, from the moment of the investigation following the report and/or complaint of violence, a counselling/intervention space for the judge’s decision-making»,⁴⁵ and to resort to extra-legal expertise (psychologists, social workers, criminologists, victim support services).

It is immediately clear, however, that this is a highly demanding task. It is difficult to imagine that this procedure can be carried out on the initiative of the police and of judicial authorities, in all cases for domestic and relationship violence, throughout the criminal proceedings and during the enforcement of the sentence, and that it can be repeated whenever the need arises because of ever-changing risk factors.

Because of the high (and growing) number of crime reports concerning this criminological area,⁴⁶ such an obligation seems impracticable.

The anti-violence plan outlined a selective mechanism that, like medical triage, allows a selection of cases for which a more accurate assessment (violence triage) is required. A two-step procedure is proposed: a first step involves the use of agile tools for assessing the dangerousness of the situation; where these show the presence of actual risk factors, one must proceed to «structured in-depth assessments, following which, when dangerous subjects are involved, a procedure should be initiated for the immediate and effective management of the risk of violence».⁴⁷

Moreover, this procedure might become more widespread, more uniform, more standardised and more comprehensive if, in the first step, the

44. *Ibid.*, p. 42.

45. *Ibid.*

46. Official statistics deliver steadily growing numbers for typical cases of intra-family violence (ill-treatment, beatings and injuries, sexual violence) and relationship violence (persecutory acts). Tables on the trend of complaints and the number of suspects can be read at <https://www.istat.it/it/violenza-sulle-donne/il-percorso-giudiziario>. Partially confirming the observations made so far, there were 13,261 complaints in the year 2014 for the crime of ill-treatment, which rose to 23,728 in 2021, while the number of suspects for the offence of persecutory acts in 2018 was 20,761.

47. See Department for Equal Opportunities of the Presidency of the Council of Ministers, *Piano strategico nazionale sulla violenza maschile contro le donne*, cit., p. 42.

subjects involved used those risk assessment tools that are built on the basis of logarithms capable of acquiring, cross-referencing and analysing a very high volume of data.⁴⁸ By limiting the involvement of the computational tool to the first stage of the procedure, any undue interference with and compression of the assessment task reserved for the judicial authority would be avoided, as the latter would be entrusted with this delicate task precisely because it is aware that the assessment is complex. In short, the intervention of the judge would not be limited to a mere power of supervision over the machine, with the risk of handing over the decision to automated processing;⁴⁹ rather, it would be a matter of attributing to the output of the machine the effect of charging the public prosecutor and the judge with the obligation to carry out an immediate, autonomous, proactive and global assessment of the risk of repetition/escalation of relationship violence.

Such a twofold structure of the procedure not only averts the risk of drifting towards the technological/efficiency-based “robot judge”, but, on the contrary, restores to human assessment a centrality that risks being lost when it is crushed by the weight of numbers and overwhelmed by the difficulty of reading multiple, heterogeneous and complex data, such as that from which to infer the risk of a repetition and/or escalation of violence in close relationships.

48. In this regard, see M. Gialuz, *Quando la giustizia penale incontra l'intelligenza artificiale: luci e ombre dei risk assessment tools tra Stati Uniti ed Europa*, in www.dirittopenalecontempo.it, 2019; for appropriate considerations on the European and Italian frameworks regarding the limits of the type of personal data that can be assessed, see B. Galgani, *Dangerousness and New Technologies: Procedural Issues from the Italian Perspective*, *retro*, Chapter 4; B. Galgani, *Considerazioni sui “precedenti” dell'imputato e del giudice al cospetto dell'AI nel processo penale*, in www.sistemapenale.eu, 2020, pp. 81 ff.; S. Quattrocolo, *Artificial Intelligence, Computational Modelling and Criminal Proceedings. A framework for a European Legal Discussion*, Berlin, Springer, 2020.

49. See Article 11 of Directive 2016/680/EU, which places a prohibition on «decisions based solely on automated processing»; on this subject, see S. Signorato, *Il diritto a decisioni penali non basate esclusivamente su trattamenti automatizzati: un nuovo diritto derivante dal rispetto della dignità umana*, in «Riv. it. dir. proc. pen.», 2021, pp. 101 ff.

