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BEHIND CLOSED DOORS

Challenging the Osman Test in Safeguarding Minors from Domestic
Violence

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Abstract

Historically seen as a private matter, domestic violence against children has only been recently acknowledged as a human rights violation. The European Court of Human Rights has contributed significantly to this shift by extending the State's responsibility to prevent violations of Art 2 ECHR perpetrated by non-State actors. As the main tool for assessing compliance with the core obligation to take protective operational measures, the Osman test holds substantial relevance within the Court's jurisprudence. In recent years, the ECtHR has invoked the Osman test in various scenarios beyond its original conception, including in the context of domestic violence.

By thoroughly analysing relevant case law and highlighting international legal standards, this thesis critically assesses the application of the Osman test in the context of domestic violence, identifying its limitations in addressing the ongoing and escalating threats faced by children. It emphasises the need for revising the Osman test by omitting the immediacy requirement to better protect children from the far-reaching consequences of this distinct form of criminality. This thesis thus advocates adopting a more proactive approach that recognises the cyclical and unpredictable nature of domestic violence.

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Table of Abbreviations

Art	Article
CEDAW	UN Convention on the Elimination of All Forms of Discrimination against Women
CoE	Council of Europe
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
OHCHR	Office of the High Commissioner for Human Rights
Para	Paragraph
UN	United Nations
UNICEF	United Nations Children's Fund
WHO	World Health Organization

1. Introduction

“The legal system is designed to protect men from the superior power of the state but not to protect women or children from the superior power of men.”¹

Worldwide, about one in four children under the age of five live in households where their mother is subjected to intimate partner violence. In addition, an estimated three-quarters of children between the ages of two and four are regularly experiencing physical and psychological violence by their parents or caregivers.² These alarming figures highlight the critical issue of violence against children within the family unit. Irrespective of nationality, culture or race, domestic violence constitutes a widespread social phenomenon which profoundly affects millions of children’s lives every day. The impact of this distinct form of violence is multifaceted, resulting in immediate physical harm and long-term emotional and psychological trauma that can hinder a child’s development.³ The unique vulnerability of children in this environment requires robust legal frameworks and effective State interventions to ensure their protection.⁴

The European Court of Human Rights (hereinafter the ECtHR or the Court) has made a significant contribution to the legal discourse by recognising domestic violence as a human rights violation under the European Convention on Human Rights (hereinafter the ECHR or the Convention). In its jurisprudence, the Strasbourg Court regularly emphasises the State’s obligation to protect individuals from harm inflicted by private actors. A key component of the Court’s approach is the Osman test, which originated in the case of *Osman v. The United Kingdom* to assess the State’s duty to protect life under Art 2 ECHR. While the Osman test has been a cornerstone in determining State liability, its application in cases of domestic violence involving children has raised significant concerns among scholars and judges.⁵

This thesis critically examines the suitability of the traditional Osman test for addressing the specific risks and vulnerabilities associated with domestic violence against children. It will

¹ Herman, *Trauma and Recovery*, 72.

² UNICEF, ‘A Familiar Face - Violence in the Lives of Children and Adolescents’, 19.

³ Pinheiro, *World Report on Violence against Children*, 50-51.

⁴ Pinheiro, 6.

⁵ McQuigg, ‘Domestic Abuse and Article 2 of the European Convention on Human Rights: Applying the Grand Chamber Judgment in *Kurt v. Austria*’, 564–67.

explore whether the test remains an effective tool for ensuring that State obligations under Art 2 ECHR are fulfilled, considering the continuous nature of domestic violence and the unique challenges faced by children in this context.

Following this introduction, Chapter 2 will delve into the intersection of children's rights and domestic violence. While international human rights bodies often frame domestic violence as gender-based violence primarily affecting women, the direct and indirect impact on children tend to be overseen.⁶ This Chapter will explore the multifaceted nature of child maltreatment within the domestic setting, thereby highlighting the various forms of abuse that children may experience and the far-reaching consequences on their development and well-being. Given their particular importance in this context, the ECtHR frequently cites relevant legal standards enshrined in the Convention on the Rights of the Child (hereinafter CRC) and the Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter Istanbul Convention) in its case-law.⁷ This Chapter will thus focus on outlining key provisions of both legal frameworks which significantly influence the ECtHR's case law on domestic violence. Both Conventions set out high standards for safeguarding children's rights, with particular emphasis on State action to prevent and respond to domestic violence effectively.

Having established the international legal framework in the field of domestic violence involving children, the thesis then turns to the comprehensive analysis of positive State obligations under Art 2 ECHR. As the principal tool for assessing the State's duty to prevent violations of the right to life, the ECtHR developed the *Osman* test in 1998. Throughout the following years, the Court invoked this test in diverse contexts beyond its initial conception, including in the context of domestic violence.⁸ In order to demonstrate the development of the *Osman* test, Chapter 3 will encompass an analysis of the ECtHR's case law on domestic violence regarding Art 2 ECHR. Except for the original *Osman* case, the analysis will primarily deal with cases in which children were directly or indirectly affected by intimate partner violence.

The demonstrated transformation of the *Osman* test lays the groundwork for the subsequent and last Chapter to assess whether the *Osman* test, as applied by the Court, adequately

⁶ McQuigg, *The Istanbul Convention, Domestic Violence and Human Rights*, 75.

⁷ ECtHR, *Kurt v. Austria* [GC] paragraphs 75–86 and 94.

⁸ Stoyanova, *Positive Obligations under the European Convention on Human Rights*, 203–4.

addresses the unique vulnerabilities of children and is consistent with the standards set by the CRC and the Istanbul Convention. Based on the landmark case *Kurt v. Austria*, limitations of the Osman test in its current application are identified. Accordingly, the Chapter continues by revising the Osman test to improve the protection of children from domestic violence. It advocates for adopting a more proactive approach that recognises the ongoing and unpredictable nature of domestic violence.

This thesis employs a qualitative case law analysis to critically assess the ECtHR's jurisprudence on domestic violence, particularly focusing on cases involving children. By systematically reviewing and analysing pivotal judgments in this context, this study aims to identify the pattern, the development, and the shortcomings in the Court's application of the Osman test. This method allows for a detailed examination of how current jurisprudence meets or falls short of international standards for the protection of children from domestic violence and provides recommendations for legal reform to strengthen protective measures. The scope of this work is limited to an analysis of the protection of children from domestic violence under Art 2 ECHR. Notwithstanding their relevance to this specific context, it does not extend to the protection afforded by Art 3 (prohibition of torture and inhuman or degrading treatment), Art 8 (right to respect for private and family life) and Art 14 (prohibition of discrimination). While acknowledging the significant impact of domestic violence on women, this thesis focuses specifically on children due to their particular vulnerability and the urgent need for targeted legal protection to ensure their safety. The aim is to critique the application of the traditional Osman test to domestic violence cases and to advocate for its revision in order to better protect children from the far-reaching consequences of this distinct form of criminality.

2. Children's Rights in the Context of Domestic Violence

Far from being a private matter, domestic violence is often a product of deep-rooted social inequalities and patterns of discrimination. In most cases, it constitutes a simultaneous attack on human rights of women and children.⁹ While the experiences of women and children may be similar due to the common household and the same perpetrator, it is important to consider both as victims in their own sphere and to distinguish their rights.

This chapter will first delve into the theoretical definition of domestic violence. It will be shown that domestic violence was only recently analysed through a human rights lens and that there is no uniform definition of the term. Since domestic violence is predominately perpetuated by men, international human rights bodies address it as a form of gender-based violence.¹⁰ Thereby, it is often forgotten that children are also either directly or indirectly affected by domestic violence. For that reason, the legal dimensions of child maltreatment will be explored in the following chapter. International human rights standards will then be examined in detail to highlight applicable rights of children in this context as well as the urgent need for comprehensive State intervention and protection measures.

2.1 *Domestic Violence as a Human Rights Issue*

Domestic violence, also called 'domestic abuse', remains a widely under-reported human rights issue across the globe. It constitutes a pattern of behaviour by one person to gain supremacy over another within an intimate relationship. Domestic violence encompasses various forms of physical, psychological, emotional, and sexual abuse and happens irrespective of the age, sexual orientation, faith, gender or race. Neither the socioeconomic and cultural background nor the educational level do play a role. Anyone can be a victim of domestic abuse. Hence, it is of crucial importance to recognise the signs of abuse. It includes any behavioural action that frightens, blames, intimidates, hurts, injures or wounds another person. The incidents are not isolated cases but tend to accumulate over time and increase in severity.¹¹

⁹ Harrison, 'Statistically Speaking: The Long-Term Effects of Domestic Violence on Children', 63–64.

¹⁰ McQuigg, *The Istanbul Convention, Domestic Violence and Human Rights*, 75.

¹¹ United Nations, 'What Is Domestic Abuse?'.

Despite its pervasiveness within societies, there has been a lack of comprehensive analysis of domestic violence in international law. This is evidenced by the fact that the European Union (EU) currently has no specific, comprehensive legislation dealing with abusive behaviour.¹² It was only in the 1990s that the shift in perspective from domestic violence being a private matter to a recognised human rights concern occurred.¹³ The General Recommendation 19 of the United Nations (UN) Committee on the Elimination of Discrimination against Women (CEDAW Committee) states that the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) includes a prohibition of violence against women in both the public and private spheres, despite the fact that the Convention does not contain any specific provision regarding domestic violence.¹⁴ This interpretation guides the CEDAW Committee in its recommendations for State parties to adopt different measures, emphasising the need for them to take responsibility and fulfil their obligation to protect victims in this area. Furthermore, in 1993, the UN General Assembly issued the Declaration on the Elimination of Violence against Women, which urges States to take all necessary measures to prevent acts of violence against women, whether perpetrated by State or non-State actors. The appointment of a Special Rapporteur on Violence against Women in 1994 and the subsequent development of model legislation on domestic violence in 1996 further demonstrated the international community's commitment to combating this issue.¹⁵

The paradigm shift in the concept of protection against violence affecting children occurred in 1989, when the CRC was adopted by the General Assembly. Children were no longer seen as mere victims, but right bearing individuals whose dignity and integrity need to be respected and promoted. As the first and only human rights treaty globally, the Convention tackles domestic abuse of minors in its Art 19 by establishing State obligations to protect children from all forms of violence. Thereby State parties must adopt preventive as well as responsive measures to fulfil their duty under Art 19 and effectively eliminate violence against children.¹⁶ Due to its significance for the present topic, the CRC and its relevant provisions for protecting children in the context of intra-familial harm will be subject to an own subsection within this chapter.

¹² FRA, *Violence against Women*, 11.

¹³ FRA, 7.

¹⁴ CEDAW Committee, 'General Recommendation No. 19: Violence against Women', para. 9.

¹⁵ McQuigg, 'Domestic Violence as a Human Rights Issue: Rumor v. Italy', 1010–11.

¹⁶ Tobin, *The UN Convention on the Rights of the Child*, 688–89.

At the regional level, the Council of Europe (CoE) proves to be the most active international organisation in the fight against domestic violence during the recent years.¹⁷ After the adoption of Recommendation (2002)5 on the Protection of Women against Violence by the Committee of Ministers, the CoE set up a Task Force in 2005 to monitor its implementation by the Member States.¹⁸ The ECtHR has not dealt with cases concerning domestic violence until the year 2007. Throughout its jurisprudence, the Court established that the practice of domestic violence can constitute a violation of several rights within the ECHR, namely Art 2 (right to life), Art 3 (prohibition of torture), Art 8 (right to respect for private and family life) as well as Art 14 (prohibition of discrimination).¹⁹ Hence, domestic violence is now formally recognised as a human rights violation on an international scale. To further demonstrate the commitment to address and combat violence against women in all its forms, the Istanbul Convention was adopted in 2011 and entered into force in 2014. The Istanbul Convention represents a significant benchmark in the history of tackling domestic violence and will therefore be discussed in detail later in this chapter.²⁰

2.2 Child Maltreatment

While international human rights bodies have made progress in recognising and addressing gender-based violence, their focus has been predominantly on adult women as victims. However, amidst this commendable progress, one particularly vulnerable group remains underrepresented: children. Whether as witnesses or targets of abuse, children face profound challenges that are often overlooked in the legal discourse. This is particularly problematic regarding the harmful effects of living in an abusive environment.²¹

To date, there is no universally accepted definition of child maltreatment.²² According to the WHO, the generic term child maltreatment comprises the abuse and neglect of individuals under the age of 18 and includes “*all types of physical and/or emotional ill-treatment, sexual abuse, neglect, negligence and commercial or other exploitation, which results in actual or potential harm to the child’s health, survival, development or dignity in the context of a*

¹⁷ FRA, *Violence against Women*, 10.

¹⁸ McQuigg, ‘Domestic Violence as a Human Rights Issue: Rumor v. Italy’, 1012.

¹⁹ ECtHR and Council of Europe, ‘Key Theme - Article 2 Domestic Violence’, 4–5.

²⁰ McQuigg, ‘Domestic Violence as a Human Rights Issue: Rumor v. Italy’, 1022.

²¹ WHO, ‘Child Maltreatment’.

²² Hoyano and Keenan, *Child Abuse*, 7.

*relationship of responsibility, trust or power.*²³ Compared to this definition, the CRC adopts a broader approach in its Art 19, which defines violence through a range of acts and omissions.²⁴ Due to the domestic context, many victims never receive the support from health professionals, thereby perpetuating a culture of silence and neglect. This deficiency leads in turn to the ongoing cycle of violence since underage victims of domestic abuse are more likely to become perpetrators themselves in the adulthood.²⁵

Both direct and indirect exposure to maltreatment within the childhood impairs the physical as well as the mental health of children, irrespective of differences in cultural and geographical settings worldwide. The most immediate consequences are typically evident in the child's personal development during childhood, although they can also persist into adulthood.²⁶ In the context of domestic violence, these events occur within the family unit which turns the family home from a place of safety to an escape room. The trust in others is significantly affected by the traumatic events, which can result in difficulties in dealing with love, trust and empathy. Depending on the age of the child and the form of violence, the consequences can be of physical, emotional and/or psychological nature.²⁷ Minors lack the capacity to comprehend the reasons for the violence and are frequently exposed to a sense of powerlessness that compels them to withdraw from the perpetrator and distance themselves. They experience fear, insecurity, rejection, worthlessness, and emotional isolation. As coping mechanism for these feelings, minors tend to be at higher risk to behavioural abnormalities such as alcohol and drug abuse or smoking.²⁸ Furthermore, violent practices have an additional effect on the human brain by hindering normal developmental processes.²⁹ This can result in behavioural patterns that constitute post-traumatic stress disorder (PTSD) and depression.³⁰ Depending on the extent to which a person's psyche is affected, victims may also be at an increased risk of turning suicidal thoughts into actions.³¹

²³ WHO, 'Child Maltreatment'.

²⁴ See further Chapter 2.3.5.

²⁵ Harrison, 'Statistically Speaking: The Long-Term Effects of Domestic Violence on Children', 64.

²⁶ Mahfooz, 'Psychological Consequences of Domestic Violence on Children', 430.

²⁷ Filip, Popp, and Andrioni, 'The Domestic Violence Effects on the Development of Future Adults', 306–8.

²⁸ Campbell and Lewandowski, 'Mental and Physical Health Effects of Intimate Partner Violence on Women and Children', 361–62.

²⁹ Huth-Bocks, Levendosky, and Semel, 'The Direct and Indirect Effects of Domestic Violence on Young Children's Intellectual Functioning', 272.

³⁰ Gonzalez and Corbin, 'The Cycle of Violence: Domestic Violence and Its Effects on Children', 413–15.

³¹ Pinheiro, *World Report on Violence against Children*, 63.

It is evident that domestic violence is a pervasive phenomenon, affecting individuals from all social classes. However, the economic and financial circumstances of a family can further elevate the risk of violence. Factors such as a low level of education, unemployment, and social isolation can influence whether a child experiences violence during its developmental years.³² Domestic abuse is further likely to occur within patriarchal systems which perpetrate the superior status of men within a society. In such systems, power imbalances and gender inequalities create an environment where violence against women and children is condoned and justified.³³ The risk of violence within a family is nevertheless the result of a complex interplay of external and internal factors. The latter include the individual characteristics and traits of the family members and the interactions between the parents and the child. Parents who suffer from low self-esteem, frequent and uncontrollable outbursts of anger, and/or substance addiction are more likely to engage in violent behaviour. Regarding children, characteristics such as the age and the sex play a significant role. A child's vulnerability is particularly high between birth and the age of four, as this period is characterised by dependency on the parents. The sex of the child has a different effect depending on the form of violence. While girls are much more frequently affected by sexual assault, corporal punishment appears to predominantly affect male children. Minors with disabilities, chronic illnesses and behavioural problems are at an above-average risk of all forms of violence.³⁴

Minors who experience maltreatment find themselves in vulnerable and precarious situations where they are unable to protect themselves or seek help independently. For this reason, children are highly dependent on States to protect their rights and ensure their well-being.³⁵ Efforts to prevent violence against children in the context of domestic violence require multi-faceted strategies that aim to address the root causes. By adopting preventive measures such as awareness-raising, promoting gender-equality and expanding response and support services, the State can address underlying risk factors and promote positive family dynamics.³⁶ In addition, the enforcement of laws and regulations prohibiting maltreatment acts play a key role in safeguarding children's rights. However, navigating State intervention also requires a delicate balance between safeguarding victims and preserving familial integrity. Cases of domestic violence often involve complex dynamics, including issues of

³² Dodaj, 'Children Witnessing Domestic Violence', 164.

³³ Pinheiro, *World Report on Violence against Children*, 72.

³⁴ Pinheiro, 67–68.

³⁵ Phillips, 'How to End the Cycle of Domestic Violence', 65–66.

³⁶ Dodaj, 'Children Witnessing Domestic Violence', 166.

power, control and dependency, which can complicate intervention efforts. In addition, cultural and societal norms may influence perceptions of family privacy and autonomy, further impeding the implementation of interventions. International human rights standards provide valuable tools for establishing guidelines that prioritise the safety and well-being of victims while respecting the rights of all family members.³⁷ Therefore, the relevant international human rights standards, with a particular focus on the CRC and the Istanbul Convention, will be examined in-depth in the forthcoming chapter.

2.3 UN Convention on the Rights of the Child

The CRC was adopted unanimously by the UN General Assembly in November 1989 and entered into force in September 1992. Over the years, the CRC has been supplemented by three additional protocols.³⁸ The adoption marked a historic milestone as it was the first time that a child, defined as any person under the age of 18, was legally recognised as person with own rights under binding international law.³⁹ The Convention comprises a total of 54 articles and represents a significant advancement in the field of human rights. It is the first international treaty to combine political and civil rights with cultural, social and economic rights. There is no hierarchy between the rights enshrined. Rather, all rights are indivisible, interrelated and interdependent and universal in nature, as they apply to all children worldwide without any distinction. Within the substantive rights, there are four fundamental legal guarantees: the right to life and development, the right to non-discrimination, the right to participation and the primary consideration of the best interests of the child. Based on these general principles, the legal instrument aims to ensure the necessary protection and assistance for children.⁴⁰

Today, the CRC is the most important legal document for the protection of children's rights internationally and the most widely ratified treaty in the history of human rights.⁴¹

³⁷ Pinheiro, *World Report on Violence against Children*, 83–85.

³⁸ Sax and Hainzl, *Die verfassungsrechtliche Umsetzung der UN-Kinderrechtskonvention in Österreich*, 16–17.

³⁹ Liebel, *Wozu Kinderrechte*, 42.

⁴⁰ Rossa, *Kinderrechte*, 12–13.

⁴¹ Human Rights Council and Treaty Mechanisms Division and OHCHR, 'Committee on the Rights of the Child'.

2.3.1 The Best Interests of The Child (Art 3)

The principle of the best interests of the child manifests the *raison d'être* of the CRC and performs a threefold function within the Convention. First, it constitutes a substantive right which ensures that the well-being of the child is taken into consideration in each individual and general decisions affecting the minor. As a fundamental principle for the interpretation of the legal provisions, it guarantees that every right of the Convention is to be read in light of Art 3 CRC. Hence, the principle is relevant to every single provision of the Convention and may be invoked in conjunction with the latter. Thirdly, the principle functions as rule of procedure. This requires an evaluation of the positive and negative impacts in any decision-making process affecting the child. Overall, State parties have the obligation to guarantee the best interests of the child and must ensure that the fundamental rights of children are respected when implementing the CRC. Nevertheless, it is important to note that the principle does not have an absolute or overriding character. The best interests of the child should be a primary consideration in all decision affecting children, but it does not automatically take precedence over any other interest. Depending on the individual case, other legally protected interests may require greater weight. Yet, as guiding principle of the Convention, it holds a high priority and requires a justification in a comprehensible manner why other considerations predominated in the respective case.⁴²

The significant role of the best interests of the child is rooted in recognising the vulnerability, dependency and legal status of children.⁴³ This approach ensures that their interests are not neglected, and their needs are considered. According to Art 3 para 1 CRC, the best interests of the child must be a primary consideration in any action affecting children. That means a larger weight must be given to the children's well-being when balancing it with competing interests. This self-executing applies directly to a broad range of actors, including the private and public sphere.⁴⁴

Due to its vagueness and undetermined criteria, Art 3 para 1 CRC is often criticised. State parties with different legal and cultural background would balance the needs of children differently. Thus, the best interests of the child would be interpreted very subjectively and

⁴² Schmahl, *United Nations Convention on the Rights of the Child*, 71–73.

⁴³ Ruggiero, 'Article 3', 26.

⁴⁴ CRC Committee, 'General Comment No. 14 (2013)', para. 12.

dependent on political and religious beliefs.⁴⁵ In fact, there is no objection against different interpretations if the margin of appreciation is not undermined. The concept needs to be interpreted in a dynamic way and analysed in light of the specific circumstances of each individual case. The individual development and maturity of each child as well as its right to express its view freely must be taken into account.⁴⁶ Hence, there is a complementary connection to Art 12 CRC which provides the method for State parties to determine the best interests of the child.⁴⁷

While the CRC generally grants parents primary authority to determine the best interests of their children, Art 3 para 2 highlights the pivotal role of State parties in fulfilling this duty regarding their protection and care. This shift in meaning contradicts provisions such as Articles 5, 9, or 18 CRC, which typically permit State intervention only in a subsidiary way if the interests of the child are severely neglected. Art 3 para 2 CRC yet signifies that the State's responsibility is not merely subsidiary but rather central. Consequently, the duty for protection and care must be understood in a more comprehensive manner as an umbrella provision, thus entailing the adoption of general legislative and administrative measures aimed at safeguarding the well-being of all children within their jurisdiction.⁴⁸

2.3.2 *Obligations of State Parties (Art 4)*

Art 4 CRC imposes a general obligation on State parties to implement the rights enshrined in the Convention. It functions as an overarching provision, complementing the more specific rights set in the Convention. In essence, it provides the most comprehensive set of guidelines and requires the State parties to take all administrative and legislative measures necessary for the effective implementation of children's rights.⁴⁹ Regarding the choice of measures for the implementation, State parties enjoy a wide margin of appreciation regarding the choice of measures for the implementation.⁵⁰ Nevertheless, it must be ensured that the laws and policies do not only relate to State actors and bodies but also target actors of the private sphere, including parents. This comprehensive approach highlights the pivotal role of the latter in

⁴⁵ Freeman, *Article 3*, 28.

⁴⁶ Ruggiero, 'Article 3', 25.

⁴⁷ Schmahl, *United Nations Convention on the Rights of the Child*, 78–79.

⁴⁸ Schmahl, 83–85.

⁴⁹ Ruggiero, 'Article 4', 418–19.

⁵⁰ Schmahl, *United Nations Convention on the Rights of the Child*, 90.

safeguarding children's rights. Therefore, Art 4 CRC extends the duty to respect, ensure, and fulfil the Convention rights beyond the public to the private sphere.⁵¹

2.3.3 *Right to Life (Art 6)*

Being one of the general principles of the Convention, the right to life and the right to survival and development are fundamental for the enjoyment of all other Convention rights. Given its paramount role within the Convention, this right is non-derogable and inalienable. Yet, it cannot be classified as an absolute right.⁵² Art 6 para 1 CRC protects the preservation as well as the quality of children's lives from the moment of birth to legal adulthood. The State has the negative obligation to not interfere with the right and the positive obligation to take all preventive measures for protecting the child against harmful practices perpetrated by State or non-State actors. In practice, this means that public authorities must take appropriate measures to address foreseeable threats to life posed by third parties, such as parents in cases of domestic violence.⁵³ Therefore, the State obligations go beyond the usual extent, entailing the need for comprehensive legislative as well as administrative measures as a response to potential harmful practices. Furthermore, the effective implementation of the right requires the enactment of appropriate laws within the respective domestic criminal law.⁵⁴

By ensuring the development and survival of the Child to the maximum extent possible, Art 6 para 2 CRC constitutes another umbrella protection within the Convention. Several provisions like Art 19 CRC (Right to Protection from All Forms of Violence)⁵⁵ establish specific State obligations to ensure the survival of the child. Art 6 para 2 simply encompasses the general duty to adopt positive measures to safeguard children from abuse, neglect or any other violent acts.⁵⁶ Therefore, the concrete guidelines are better elaborated within the relevant provisions. Regarding the right to development, it is important to note that the term must be understood broadly as a holistic concept. It does not focus on economic aspects, but rather on the psychological, mental, physical, and intellectual condition.⁵⁷

⁵¹ Schmahl, 95.

⁵² Schmahl, 120-121.

⁵³ Schmahl, 123-124.

⁵⁴ Vaghri, 'Article 6', 35-36.

⁵⁵ See Chapter 2.3.5.

⁵⁶ Schmahl, *United Nations Convention on the Rights of the Child*, 130.

⁵⁷ Vaghri, 'Article 6', 37-38.

2.3.4 *Right to Be Heard (Art 12)*

Art 12 CRC reiterates that the Convention does not regard children as passive, but as active actors who must be involved in all matters affecting them. States parties should not only respect their interests, but also promote and enable their active participation.⁵⁸ The first paragraph of the norm states that every child has the right to freedom of expression his or her own views and that their weight must be taken into account according to maturity and age. This is a substantive but also a procedural right that must always be guaranteed in the implementation of the Convention. Particularly in measures relating to child protection, this norm can contribute to strengthening the status of children by considering their view in the respective matter. State parties have a responsibility to facilitate expression, to inform children of the right, and should not restrict the right by requiring children to demonstrate the ability to form their views. Even children who do not express themselves verbally, whether because of their age or personal circumstances, do form opinions.⁵⁹

The right to be heard in all judicial and administrative proceedings, as set out in paragraph 2, is particularly relevant in cases of domestic violence and related proceedings. State parties must ensure that the child is heard, either in person or through a representative, and that it is clear how the child's views have been taken into account in the relevant proceedings. Art 12 thus serves Art 3 by ensuring that the best interests of the child are safeguarded. In addition, access to legal remedies must be facilitated to address and actively defend against violations of children's rights. Thereby, the procedure must follow a safe and effective manner, without detrimental consequences for the child.⁶⁰

2.3.5 *Protection from All Forms of Violence (Art 19)*

The protection of family integrity has long been a fundamental principle of international human rights law. The basic assumption has been that the family context should generally provide the highest level of protection for children. However, international child protection is called into question when parents act not only as protectors of the child's welfare, but also as endangers when home is no longer a safe place. At the latest after the publication of the 2006

⁵⁸ Lansdown, 'Article 12', 42.

⁵⁹ Lansdown, 44–45.

⁶⁰ Lansdown, 45–46.

World Report on Violence against Children,⁶¹ it became clear how many children are exposed to domestic violence on a daily basis. To date, international human rights law has been reluctant to respond to domestic violence in a comprehensive manner since it would have resulted in interferences within the family unit. This deficiency has been remedied by Art 19 CRC. This self-executing norm constitutes the core subjective right of children to be protected from violence. It refers to all forms of violence and makes specific reference to the intra-familial harm. Leading to a paradigm shift in the protection of the family unit and to the conscious promotion of a non-violent upbringing, this right applies irrespective of religious and cultural differences within the society. As a core rule for protection against domestic violence, Art 19 CRC holds a unique position, as there is no human rights treaty with a similar provision to date.⁶² This norm not only safeguards the human dignity of children, but also regards them as independent rights holders rather than objects needing assistance.⁶³

Art 19 CRC encompasses “*all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*”⁶⁴ The wording thus implies a broad interpretation of the norm, prohibiting all forms of violence by all possible actors. Furthermore, there is no specific threshold that must be exceeded for the right to apply. Even the slightest form of physical violence, such as a slap or a smack, is prohibited. This all-encompassing ban is justified by the far-reaching consequences of the practices. The consequences of violence during childhood are profound, affecting the physical, mental and emotional health of children. It impairs cognitive and social development and results in trauma. Any harm can usually be traced into adulthood and beyond, thus constituting transgenerational effects. Hence, any form of humiliation, physical or psychological violence is prohibited, irrespective the severity of the impact.⁶⁵

The protection from all forms of violence, especially within the domestic context, imposes a far-reaching obligation on the State. Unlike many other rights enshrined in the CRC, Art 19 encompasses a range of measures that require not only legislative and administrative action, but also educational and social initiatives. It must be ensured that private individuals do not

⁶¹ Pinheiro, *World Report on Violence against Children*, 50–53.

⁶² Schmahl, *United Nations Convention on the Rights of the Child*, 272–75.

⁶³ Tobin, *The UN Convention on the Rights of the Child*, 688.

⁶⁴ Article 19 para 1 CRC.

⁶⁵ Schmahl, *United Nations Convention on the Rights of the Child*, 272–75.

violate the integrity of the child by exposing them to various forms of harmful practices. States parties need to set preventive as well as responsive measures, thus guaranteeing a comprehensive and multi-faceted protection.⁶⁶ Therefore, the mere legal criminalization of corporal punishment within a State's legal framework is considered insufficient. States must adopt a comprehensive approach that goes beyond legal prohibitions and includes awareness-raising campaigns and policies, educational programmes and training for parents, caregivers and professionals on non-violent methods of discipline. While States have some discretion in determining the specific measures to fulfil their obligations under Art 19, it is essential that these methods are effectively safeguarding minors. As established, this includes not only the enactment of legislation, but also the establishment of mechanisms for its enforcement, monitoring and evaluation.⁶⁷

While Art 19 para 1 CRC outlines the forms of violence that fall under the scope of the convention, para 2 goes into greater detail on specific measures. However, the examples of appropriate measures presented in this section are not part of an exhaustive list. Instead, they serve to illustrate a modus operandi for State authorities to consider when developing and implementing effective responses to cases involving violence against children. In essence, the CRC calls for proactive and effective action by the State, which encompasses not only the rapid investigation of cases of abuse, but also a detailed and comprehensive analysis and investigation of suspected cases. The appointment of suitably qualified personnel and the provision of sufficient resources are essential prerequisites for a thorough and independent investigation. All procedures must be child-sensitive and involve the child wherever possible.⁶⁸ Art 19 CRC even requires the identification of children who are at increased risk of becoming victims of various forms of abuse. In order to ensure safety and prevent risks in individual cases, targeted and appropriate interventions must therefore be carried out. Furthermore, it is imperative that judicial measures be employed, including criminal prosecution and prevention of impunity for perpetrators.⁶⁹

⁶⁶ Pinheiro, *World Report on Violence against Children*, 47.

⁶⁷ Schmahl, *United Nations Convention on the Rights of the Child*, 275–77.

⁶⁸ Whalen, 'Article 19', 300–301.

⁶⁹ Schmahl, *United Nations Convention on the Rights of the Child*, 278–79.

2.3.5.1 UN CRC Committee General Comment No. 13

The widespread prevalence of violence against children is alarming. The extent and the intensity of the harmful practices have led the Committee on the Rights of the Children (COM) to issue the General Comment No. 13 in the year 2011 to counteract challenges. While State parties do either lack the legal framework to address child maltreatment or the resources for enforcing the laws, the COM holds the view that the occurrence of violence against children is in any case avoidable.⁷⁰ Contrary to the common assumption that intra-familial harm can be eliminated by recognising the symptoms and reacting accordingly, the COM shifts the focus to understanding the root causes to nip the crime in the bud. The General Comment No. 13 takes exactly this approach and guides State parties through their obligations enshrined in Art 19 CRC. Children are perceived as independent rights holders with distinct needs and interests rather than victims. Consequently, they take a significant role in the decision-making processes and cannot be ignored in matters affecting them.⁷¹

The General Comment No. 13 provides comprehensive definitions for various forms of violence. The non-exhaustive list ranges from violence at the hands of adults to harmful practices among children or by children themselves.⁷² Given the scope and intent of this thesis, only the definitions of physical and mental violence as well as neglect perpetrated by parents will be examined in-depth.

Beginning with the definition of negligent treatment, this term refers to the failure to adequately address both the psychological and physical requirements of children. When parents neglect their child, they are not fulfilling their duty to care for the child's emotional and physical well-being. This could involve not providing enough food, shelter, or emotional support, which can have serious consequences for the child's development and overall health. In cases of domestic violence, the effects of psychological or emotional neglect need to be emphasised. This occurs when children are exposed to intimate partner violence, thereby witnessing their parental relational conflict. In this case the physical and psychological needs of the child are not met, and it lacks emotional support and love.⁷³ Mental violence can also occur in various forms. It includes harmful interactions between the parent and the child

⁷⁰ CRC Committee, 'General Comment No. 13 (2011)', para. 3.

⁷¹ CRC Committee, paras 2–3.

⁷² CRC Committee, para. 19.

⁷³ CRC Committee, para. 20.

which leave the latter unwanted, unloved, worthless, threatened, terrorized, scared, rejected, isolated, ignored, insulted, hurt or humiliated. The definition thus must be understood in a broad and comprehensive manner, encompassing verbal and emotional abuse.⁷⁴ Physical violence constitutes a generic term for torture, inhuman or degrading treatment or punishment, corporal punishment, harassment, and bullying. The definition by the COM encompasses non-fatal and fatal violations.⁷⁵ Overall, it is important to note that these definitions apply, irrespective of the severity, the intent or the frequency of the harmful practices. Furthermore, there are no exceptions to the prohibition of violence against children. Their integrity and human dignity do not leave space for any acceptable form of harm.⁷⁶

As described in the previous subchapter, Art 19 CRC obliges State parties to prohibit, prevent and respond to all forms of violence against children. In its General Comment No. 13, the COM aims to offer guidance on understanding these obligations. The treaty body relies on an interdisciplinary and cohesive framework rather than on isolated and fragmented measures which are not effectively eliminating intra-familial harm. As suitable measures, the COM refers not only to legislation, but also to implementation and enforcement. Domestic laws must be aligned with the purpose of the Convention and entail a comprehensive policy on child protection.⁷⁷ Appropriate sanctions must be set against perpetrators and integrated services established for supporting caregivers.⁷⁸ Administrative measures should encompass national coordination, defining stakeholder roles, transparent budgeting, reliable national data for impact analyses, good training and research programs in child protection.⁷⁹ To fully implement the obligations outlined in Art 19 CRC, State parties must further adopt social and educational measures. These include poverty reduction strategies, access to health and social welfare services, adequate housing and employment policies. To counteract the roots of the problem, educational measures must tackle cultural norms and traditions that perpetuate domestic violence. Therefore, the media plays an important role in raising awareness and promoting positive child-rearing within the civil society.⁸⁰

⁷⁴ Tobin, *The UN Convention on the Rights of the Child*, 696.

⁷⁵ CRC Committee, 'General Comment No. 13 (2011)', para. 22.

⁷⁶ CRC Committee, para. 17.

⁷⁷ CRC Committee, paras 39–40.

⁷⁸ CRC Committee, para. 41.

⁷⁹ CRC Committee, para. 42.

⁸⁰ CRC Committee, paras 43–44.

While para 1 of the respective norm sets out the general obligation to undertake all appropriate measures, para 2 identifies specific areas in which the State parties should adopt preventive and responsive measures. The former requires general and individual prevention to protect children's rights. The latter comprises identifying, reporting, treating and following up child maltreatment.⁸¹ First, signs of actual maltreatment must be identified to intervene as soon as possible. However, risk factors can only be recognised if the person who knows about the occurrence of domestic violence is willing and able to help. This requires spreading the necessary guidance on how to identify and interpret indicators for domestic abuse. Therefore, State parties need to develop a functioning system in which complaints can be made in a safe manner and where active involvement of children is guaranteed. Additionally, minors should be provided with 24-hour hotlines which are help-oriented.⁸² Once the responsible State authorities receive the report, they should be equipped with the legal and social skills for coordinating the appropriate response. Investigations must be conducted thoroughly, while respecting the child's view and its short- and long-term needs.⁸³

The duty to follow-up instances of child-maltreatment entail determining clear responsibilities for supporting the child and family, from reporting to follow-up. All relevant parties must be informed about the aim of the interventions and its details such as the duration and the review mechanism. Effective measures shall not be unnecessarily delayed and should always be guided by the best interests of the child. While their vulnerability must be considered in all matters affecting them, the CRC nevertheless requires State parties to view children as rights holders who are entitled to enjoy the full realisation of convention rights. This also implies that impunity of perpetrators must be encountered by judicial measures. The latter should be part of an integrated, interdisciplinary and coordinated framework which facilitate the cooperation between relevant actors. It can include mediated responses, court interventions, restorative justice measures, disciplinary proceedings or criminal law procedures, depending on the specific circumstance of the case.⁸⁴

⁸¹ Article 19 CRC.

⁸² CRC Committee, 'General Comment No. 13 (2011)', paras 48–49.

⁸³ CRC Committee, paras 50–51.

⁸⁴ CRC Committee, paras 53–55.

2.4 The Istanbul Convention

Another important legal instrument to combat domestic violence is the Istanbul Convention, which entered into force in August 2014 and constitutes a significant milestone in the fight against domestic violence. However, it should be noted that it is primarily aimed at women and girls under the age of 18. Its application to male children depends on the individual State parties, which would have to extend its scope.⁸⁵ As the ECtHR repeatedly refers to the Istanbul Convention, in particular to the State obligations in the fight against domestic violence, it is of great relevance to address these in the following.⁸⁶

The protection of women against all forms of violence and the elimination of such violence is the primary objective of the Istanbul Convention. According to the drafters of the Convention, this aim requires adopting an all-encompassing strategy, starting with combating stereotypes and cultural behaviours disadvantage women. The three P's approach further specifies the obligations of State parties by requiring them to take measures to prevent, protect and prosecute. Throughout the years, this approach was extended by several human rights documents by another P, for policy. The latter has a profound added value since the Convention demands comprehensive and coordinated policies at national level for fulfilling the enshrined provisions. These policies must involve all relevant stakeholders such as NGOs, government authorities, institutions, and civil society organisations and should strengthen their cooperation.⁸⁷

The Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) ensures that State parties comply with the Istanbul Convention. The monitoring body issues reports to evaluate the implementation of Convention rights on a country-by-country basis periodically and adopts recommendations. In case of a massive, serious or persistent pattern of violent acts in respective countries, GREVIO also has the possibility to act immediately and initiate a special inquiry procedure.⁸⁸

⁸⁵ Grans, 'The Istanbul Convention and the Positive Obligation to Prevent Violence', 136–37.

⁸⁶ Villanueva Sainz-Pardo, 'Women and Children versus Domestic Violence. Legal Reflections, Needs and Challenges in Spain Today', 665–66.

⁸⁷ Niemi-Kiesiläinen, Peroni, and Stoyanova, *International Law and Violence against Women*, 7–9.

⁸⁸ CoE, 'Steps in Evaluation Procedures - Istanbul Convention Action against Violence against Women and Domestic Violence'.

2.4.1 Protection and Support for Child Witnesses (Art 26)

The Convention aims to prevent and combat not only violence against women, but also domestic violence in particular. The latter includes “*all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim*”.⁸⁹ According to the Explanatory Report of the Istanbul Convention, this comprises intimate partner violence between spouses or partners and intergenerational violence, which usually occurs between parents and children. The latter encompasses all forms of violence, whether physical, psychological, sexual or economic, occurring between the child and the parents. It is not necessary for the victim and the perpetrator to live in the same household for the Istanbul Convention to apply. Rather, a broader approach should be adopted so that the Convention can be applied in as many cases as possible.⁹⁰ Furthermore, if it does not already constitute a separate offence in the respective law, it is also considered as an additional aggravating circumstance if the violence is repeated, or a child is directly or indirectly involved.⁹¹

The Istanbul Convention recognises the unique role of children in the context of gender-based violence. Children are perceived as particularly vulnerable to gender-based violence, especially when the violence is perpetrated against their mother. In the most extreme cases, children can become direct victims on their own, which can have life-threatening consequences. The perpetrator does not necessarily need to be the father, it can also be the mother’s partner or ex-partner.⁹² As previously stated in the preceding chapters of this thesis, the indirect experience of violence has the same effects on the child as direct violence. The child’s well-being, health and development are significantly impaired, with consequences persisting to adulthood and beyond.⁹³ Recognising the significant impact of violence on children, the drafters of the Convention incorporated in Chapter IV a right specifically tailored to protect and support child witnesses. Art 26 stipulates that States must always acknowledge the needs and rights of children who have witnessed violence when providing them with services and support. In order for a child to be considered within the scope of the

⁸⁹ Article 3 (a) Istanbul Convention.

⁹⁰ CoE, ‘Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence’, paras 41–42.

⁹¹ CoE, paras 237–239.

⁹² Villanueva Sainz-Pardo, ‘Women and Children versus Domestic Violence. Legal Reflections, Needs and Challenges in Spain Today’, 668.

⁹³ Villanueva Sainz-Pardo, 669.

standard, it is not necessary for them to have been a direct witness to the violence. It is sufficient if the child has been passively exposed to the violence through noise such as screams or the long-term consequences of violence. It is therefore important to interpret the term ‘child witness’ in a broad manner and for States to implement it accordingly within their domestic law. Children should be regarded as victims of violence even if they have not experienced it first-hand. They are characterised by a particular vulnerability. This is also reflected in para 2 of the norm, which calls for the inclusion of psychosocial interventions in measures designed for children. In line with the guiding principle of the Convention on the Rights of the Child, it is recommended that this State duty is implemented with due consideration of the best interests of the child.⁹⁴

2.4.2 State Obligations and Due Diligence (Art 5)

In 2001, the International Law Commission established Draft articles on Responsibility of States for Internationally Wrongful Acts.⁹⁵ To date, these principles have been widely recognised as customary international law. According to these principles, a State bears responsibility for acts contrary to international law insofar as these can be attributed to it. This includes the behaviour of those actors who perform their services on behalf of or in the name of the State, such as law enforcement officials.⁹⁶ Art 5 (1) of the Istanbul Convention sets out two negative obligations in precise terms, requiring the parties to refrain from all forms of violence against women and holding them additionally responsible for any misconduct by those acting on their behalf too. However, to avoid a legal gap in the standard of protection, States must also “*exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence*”⁹⁷ by non-State actors. This positive obligation is enshrined in Art 5 (2) of the Istanbul Convention and complies with international human rights law. If contracting parties are unable to fulfil these negative and/or positive obligations, they can be held to account within the scope of the Convention.⁹⁸

⁹⁴ CoE, ‘Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence’, paras 143–144.

⁹⁵ International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries’.

⁹⁶ CoE, ‘Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence’, para. 57.

⁹⁷ Article 5 (2) Istanbul Convention.

⁹⁸ CoE, ‘Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence’, para. 59.

According to the Explanatory Report to the Convention, it was particularly important for the drafters to emphasise the principle of due diligence. This was due to the fact that this principle has been a central theme in the case law of the European Court of Human Rights. In the landmark case of *Opuz v. Turkey*,⁹⁹ the Court held that Art 2 ECHR requires State authorities to exercise due diligence in protecting the right to life. This means, for example, that they must take preventive operational measures to protect a person whose life is in danger.¹⁰⁰ Whether or not the measures successfully averted the risk in the individual case is irrelevant. It is therefore not a question of an obligation to achieve a specific result, but rather an obligation of conduct (or also known as obligation of means). It is incumbent upon the State to apply the most appropriate and effective means to minimize the risk and provide the competent authorities with the necessary basis for the investigation, punishment and reparation of violent acts.¹⁰¹

Since the prevention of harmful acts is not solely dependent on the State, the mere failure cannot be construed as State responsibility. Otherwise, the State parties would be obliged to always prevent violence against all women and in all places. This requirement would not reflect the reality within State parties, as the fulfilment of the duty is dependent on private individuals, the specific circumstances of each case, and the activities in question. Furthermore, the capacity to act effectively, the resources available, the reasonableness of the actions taken, and the level of knowledge possessed cannot be assumed to be the same in every State. Hence, State parties are afforded a certain degree of discretion in fulfilling their obligations, which will become more precise once all aforementioned factors are taken into account. In essence, the concept of due diligence serves to provide substance and meaning to a specific set of primary rules, thereby guiding their interpretation and application. In the context of domestic violence, the concept of due diligence has added value by defining the State obligation to counteract violent acts committed by private individuals in a more precise manner. Consequently, only the absence of efforts that are within the capacity of State parties to undertake can result in a failure to comply with Art 5.¹⁰²

⁹⁹ ECtHR, *Opuz v. Turkey* paragraph 131.

¹⁰⁰ CoE, 'Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence', para. 58.

¹⁰¹ CoE, para. 59.

¹⁰² Ollino, 'State Obligations and Due Diligence', 137–40.

As previously established, State parties are obliged to exert their utmost efforts to comply with their obligations under Art 5. According to GREVIO, this entails investing in equal strong terms in all kinds of measures that not only concern the prevention, but also the investigation, punishment, and reparation.¹⁰³ This requirement is in alignment with international human rights law and the jurisprudence of the ECtHR. In its case law, the Strasbourg Court established that State authorities are required to take all reasonable steps to ensure that the investigation and prosecution are effective. In evaluating the conduct of the State, the judges will consider whether the actions in question were reaching the threshold of reasonableness without requiring them to go beyond of what is deemed rational in the respective case. State parties are further required to exercise special diligence due to the nature of the crime. The substance of due diligence regarding the duty to investigate and prosecute becomes more precise if the norm is read in conjunction with other relevant provisions of the Convention. As set out in Chapter IV of the Convention, the authorities must ensure that there is an immediate response to risks and that proceedings are conducted without undue delay.¹⁰⁴ In general, the due diligence concept constitutes a fundamental principle underpinning the Convention. Therefore, it should be borne in mind when interpreting the Convention rights.¹⁰⁵

Although the Istanbul Convention applies only to women and girls, it has had a significant impact on the jurisprudence of the ECtHR in cases of domestic violence. The Court recognises the due diligence concept and refers to it when assessing the conduct of the respective State. In addition, provisions on investigation and procedure, such as the obligation to respond promptly under Art 50 or the requirement of a risk assessment and risk management under Art 51, are linked to the criteria of the Osman test applied by the Court in cases of domestic violence.¹⁰⁶ These two provisions will therefore be analysed in more detail in the following subchapter.

2.4.3 Immediate Response (Art 50) and Risk Assessment (Art 51)

As a guideline for the first stage of criminal proceedings, Article 50 obliges State parties to respond promptly to acts of violence, to provide immediate protection to victims and to gather

¹⁰³ GREVIO, 'GREVIO Baseline Evaluation Report Italy', para. 28.

¹⁰⁴ Ollino, 'State Obligations and Due Diligence', 142.

¹⁰⁵ Ollino, 142–43.

¹⁰⁶ Niemi, 'General Obligations', 580.

evidence efficiently. It thus complements the general obligation set out in Article 49. However, the full implementation of this obligation in practice is hampered by the lack of definition of what constitutes ‘immediate’, ‘prompt’ or ‘adequate’. The Explanatory Report to the Istanbul Convention attempts to remedy this shortcoming by providing examples of measures that comply with this obligation. First, State parties must ensure that competent law enforcement officials have access to the scene of the crime and that victims are always treated appropriately. Victims must be interviewed in places where they feel safe and secure, by personnel trained in these sensitive issues and, where appropriate, in a gender-sensitive manner.¹⁰⁷ It is the responsibility of State parties to implement these measures in order to provide victims with adequate and immediate protection. These requirements are in line with the ECtHR’s jurisprudence on positive obligations. According to the Strasbourg Court, the positive obligation under Art 2 ECHR implies adequate legislation and an enforcement mechanism. It also includes an immediate response in situations where a person is at risk, to ensure that acts of violence are not ignored by the authorities. In cases of domestic violence, this obligation is often triggered by someone, not necessarily the victim, calling for help because of an act of violence that has occurred or is likely to occur in the near future.¹⁰⁸

Overall, the investigation must be prompt, comprehensive and reflect a multidisciplinary approach. As soon as a suspected case of domestic violence is reported to the police, they must immediately gather evidence. The interview with the victim(s) must be conducted in the absence of the suspect and with due respect for their human dignity. Particular attention should be paid to the context and frequency of the incidents. Additionally, it is deemed important that the evidence is not based solely on the victim’s statements, as this allows the investigation to continue even if the victim withdraws her complaint. In practice, this often happens due to the general belief that the criminal justice system is rarely effective in stopping the violence, or the increased fear of repercussions. Evidence should therefore be proactively gathered, including medical expertise and witness statements. Possible witnesses also include children, regardless of their legal right to refuse.¹⁰⁹

The obligation of the State to respond to all forms of violence against women by providing them with immediate and adequate protection necessarily entails interferences with the

¹⁰⁷ CoE, ‘Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence’, paras 257–258.

¹⁰⁸ Niemi, ‘Immediate Response, Prevention and Protection’, 585–86.

¹⁰⁹ Niemi, 587–89.

victim's private and family life. Consequently, State parties must incorporate risk assessment tools to evaluate potential risks of state interference and tailor the intervention to the specific circumstances. Otherwise, victims of domestic abuse run the risk of inadequate protection or unintended exacerbation of harmful acts. In order to effectively address violence against women and domestic violence, State parties are obliged under Article 51 to adopt risk assessment and risk management tools.¹¹⁰ This approach aims to minimise the risk of further harm while maximising the effectiveness of protection measures. Paragraph 1 specifies that any interventions must assess three key factors: “*the lethality risk, the seriousness of the situation and the risk of repeated violence*”.¹¹¹ By implementing risk assessment tools, State parties not only fulfil their due diligence obligations under the Istanbul Convention, but also under international human rights law. In its landmark case *Osman v. The United Kingdom*, the ECtHR applied the so-called Osman test to assess whether the United Kingdom complied with this due diligence obligation in relation to Art 2 ECHR, the right to life.¹¹² The development of the Osman test and the criteria for risk assessment tools established by the Court will be examined in detail in Chapter 3 of this thesis.

The wording of Art 51 does not imply a specific form or model of risk assessment tool. Consequently, State parties have a certain degree of discretion in determining the method of domestic implementation. In practice, this has led to a wide variety of approaches.¹¹³ For example, Malta implemented it through legislation,¹¹⁴ France through decrees,¹¹⁵ Italy through national action plans¹¹⁶ and Finland through protocols.¹¹⁷ Regarding the type, there are currently two main models of risk assessment: actuarial tools and structured clinical judgements. Actuarial tools use statistical data and mathematical models to predict risk in an objective manner, whereas structured clinical judgments rely on expert opinion in evaluating information. The former focuses on the relation between risk factors and the desired outcome, while the latter allows for a more subjective manner.¹¹⁸ GREVIO does not have a clear preference for the model or the method of implementation. The monitoring body only highlighted the need for written guidelines to avoid inconsistencies in practice and the

¹¹⁰ CoE, ‘Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence’, paras 260–261.

¹¹¹ Article 51 (1) Istanbul Convention.

¹¹² Parisi, ‘Risk Assessment and Risk Management’, 590–91.

¹¹³ Parisi, 591–92.

¹¹⁴ GREVIO, ‘GREVIO Baseline Evaluation Report Malta’, para. 210.

¹¹⁵ GREVIO, ‘GREVIO Baseline Evaluation Report on France’, para. 234.

¹¹⁶ GREVIO, ‘GREVIO Baseline Evaluation Report Italy’, para. 227.

¹¹⁷ GREVIO, ‘GREVIO Baseline Evaluation Report on Finland’, para. 213.

¹¹⁸ Van Der Put, Gubbels, and Assink, ‘Predicting Domestic Violence’, 101.

importance of involving civil society organisations working on gender-based violence. In addition, the risk management plan must be coordinated and reflect a multi-agency approach to ensure that victims are safe and protected from all forms of violence throughout the intervention. Therefore, all aspects of the victim's life need to be considered when assessing risk. This includes in particular the risk to children.¹¹⁹

In cases of domestic violence, the risk factors, the specific circumstances as well as the vulnerability of the victim may change over time. Consequently, in order to guarantee the victim's safety, risk assessments must be conducted on a regular basis and cannot be viewed as static tools. Law enforcement agencies must pay particular attention to the likelihood of recidivism and the risk of lethal violence, in order to prevent the exacerbation of harmful practices.¹²⁰ In response to intrafamilial violence, it is important to ensure that the measures adopted are proportionate to the risk identified and respect the rights of the accused. It is essential that risk assessors are properly trained and supervised, and that they can be held accountable for their responses to risk assessment. Monitoring the institutional response to domestic violence is therefore crucial to ensure that evolving risks are taken into account and risk management strategies are adapted accordingly.¹²¹

Paragraph 2 of Art 51 requires State parties to ensure that in each risk assessment procedure, information on the possession of firearms by the suspect is collected. The Explanatory Report to the Istanbul Convention indicates that perpetrators who own a firearm or are likely to come into possession of firearms present a greater risk of homicide. Furthermore, the access to firearms exerts control over the victim and has intimidating effects. In adopting protective measures such as protection or restraining orders, State parties must consider the immediate confiscation or removal of ammunition to mitigate the risk.¹²²

¹¹⁹ Parisi, 'Risk Assessment and Risk Management', 592–93.

¹²⁰ CoE, 'Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence', paras 260–261.

¹²¹ Parisi, 'Risk Assessment and Risk Management', 595–97.

¹²² CoE, 'Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence', para. 263.

3. The Osman Test

Children experience domestic violence on a daily basis in different countries around the world, making it one of the most common forms of abuse, regardless of cultural or national differences. As mentioned in the previous chapter, the matter was initially regarded as a private issue by States and society, thus rendering it an invisible crime. Today, domestic violence is acknowledged as a violation of human rights at the international level that affects countless family households in all Council of Europe Member States.¹²³ The European Court of Human Rights has made a significant contribution to this development by holding States accountable for the most serious cases of domestic violence through its interpretation of the European Convention on Human Rights. Many States are still reluctant to deal with cases of domestic violence, leaving victims, especially children, unprotected. The ineffectiveness of national authorities in the fight against domestic violence highlights once again the important role of the ECtHR, which is seen as the last hope for justice and ensuring the best interests of the child. Its binding decisions at the international level have not only highlighted the transnational nature of the problem but have also improved the protection of women and children from violence by private individuals.¹²⁴

Domestic violence can result in violations of several rights enshrined in the ECHR. In the most severe cases, intrafamilial violence can have fatal consequences, thus violating the right to life enshrined in Art 2 ECHR.¹²⁵ This fundamental right forms the basis for the exercise of all other rights and has therefore paramount importance within the ECHR. As domestic violence is characterised by harmful practices between private individuals, the Court applies the doctrine of positive obligations to hold States accountable.¹²⁶ States are not only required to enact appropriate legislation, but also to ensure its effective enforcement in order to protect the rights enshrined in the ECHR. The ECtHR employs the concept of positive obligations to encourage States to take proactive measures to prevent domestic violence and to protect victims, including from non-State actors.¹²⁷ This is particularly important for cases where children are the primary victims of domestic abuse. Minors are particularly vulnerable and

¹²³ McQuigg, *The Istanbul Convention, Domestic Violence and Human Rights*, 2.

¹²⁴ Aalabers and Vilcu, *Positive Obligations of the State in the Domestic Violence Caselaw of the European Court of Human Rights*, 7–8.

¹²⁵ Mujuzi, 'Preventing and Combating Domestic Violence in Europe: The Jurisprudence of the European Court of Human Rights', 183.

¹²⁶ McQuigg, *International Human Rights Law and Domestic Violence*, 43–46.

¹²⁷ Aalabers and Vilcu, *Positive Obligations of the State in the Domestic Violence Caselaw of the European Court of Human Rights*, 8.

depend on adults for their survival and well-being. If parents are unable to provide this protection, children are dependent on the help of third parties, especially the State. Otherwise, the perpetration of domestic violence can have serious and irreversible consequences for children, as they are unable to escape abusive situations themselves.¹²⁸

The ECtHR assesses compliance with positive obligations under Art 2 using the Osman test, which was originally developed in the case of *Osman v. The United Kingdom*.¹²⁹ Although this case did not involve a crime of domestic violence, the Court began to apply the Osman test in cases of intra-family violence from the year 2007 onwards.¹³⁰ The aim of this chapter is to examine the development and application of the Osman test in the Court's jurisprudence on child maltreatment in the domestic context. The chapter begins by examining the positive obligations set out in Art 2 ECHR. It then analyses the development of the Osman test, from its origins in *Osman v. The United Kingdom* to the landmark case *Kurt v. Austria*¹³¹ and beyond. It will demonstrate how the Osman test has been adapted and used to address the complex problem of domestic violence.

3.1 Positive Obligations under Art 2 ECHR

Art 2 ECHR enshrines the right to life and is regarded as one of the most fundamental human rights. As one of the core provisions of the Convention, it constitutes an absolute right which does not permit any derogation in peacetime. However, the right to life does not provide a complete and unconditional protection of life under all circumstances. Provided that the force used to cause death was no more than absolutely necessary, certain exceptions to the protection of life may be applied by States. The exceptions cover the use of force in cases of lawful arrest, to suppress a riot or insurrection, or to defend against violence. While the protection of the right to life is limited by three exceptions, the intentional deprivation of life is still strictly prohibited.¹³² In cases of domestic violence, this broadened scope is particularly important to enhance protection from all forms of violence.¹³³ State parties also have a duty to protect by law the right of a person to life. The latter two duties constitute two substantive

¹²⁸ Obreja, 'Intimate Partner Violence in Childhood', 99–102.

¹²⁹ ECtHR, *Osman v. The United Kingdom*.

¹³⁰ ECtHR, *Kontrová v. Slovakia*.

¹³¹ ECtHR, *Kurt v. Austria* [GC].

¹³² CoE and ECtHR, 'Guide on Article 2 of the European Convention on Human Rights - Right to Life', 6.

¹³³ Aalabers and Vilcu, *Positive Obligations of the State in the Domestic Violence Caselaw of the European Court of Human Rights*, 8.

State obligations under Art 2 ECHR and are complemented by an additional positive obligation of a procedural nature. The procedural limb includes the duty to investigate effectively into alleged violations of the substantive limb of Art 2 ECHR.¹³⁴

Many State parties have fulfilled their obligation under Art 2 ECHR to establish a comprehensive legislative framework designed to address intrafamilial violence and to protect victims. Nevertheless, the State parties have not been successful in implementing these legal provisions effectively in practice.¹³⁵ The unwillingness of State authorities to intervene has resulted in severe human rights violations that, in the worst-case scenarios, have fatal consequences. An integral part of law enforcement agencies constitutes the police. The police is the first to enter the domestic crime scene in emergency cases and they do play a decisive role for both punitive and preventive measures.¹³⁶ Due to the multifaceted nature of domestic violence, which makes it challenging for victims to seek help and for authorities to intervene effectively, the ECtHR has developed detailed jurisprudence outlining the precise duties of State parties. The Court has held that State parties must enact robust criminal laws to deter unlawful behaviour. In addition, these laws must be supported by an effective law enforcement system to prevent, control and punish violations. Most importantly, to back up purely legislative measures, preventive operational measures must be adopted to protect individuals at risk of harm. These positive State obligations are subject to extremely strict scrutiny by the Strasbourg Court. It is important to note, however, that not all failures are the responsibility of the State. The obligation to avert danger to life is therefore to be interpreted as requiring the use of best endeavours.¹³⁷

3.1.1 Procedural Limb

The procedural limb of Art 2 ECHR requires State parties to conduct effective investigations into alleged violations of the right to life.¹³⁸ The duty to investigate is separate and does not rely on the existence of substantive violations of Art 2 ECHR. Consequently, it is unnecessary for the victims to first prove that the violation was caused by State action or omission.¹³⁹ The procedural duty to conduct a criminal investigation is triggered as soon as the authorities have

¹³⁴ Stoyanova, *Positive Obligations under the European Convention on Human Rights*, 171.

¹³⁵ McQuigg, *International Human Rights Law and Domestic Violence*, 44.

¹³⁶ Aalabers and Vilcu, *Positive Obligations of the State in the Domestic Violence Caselaw of the European Court of Human Rights*, 30.

¹³⁷ Aalabers and Vilcu, 23–24.

¹³⁸ O'Mahony, 'Child Protection and the Echr', 674.

¹³⁹ Stoyanova, *Positive Obligations under the European Convention on Human Rights*, 127.

been informed of the death in question. In the context of domestic violence, where the perpetrators are typically not State actors, the victim is only required to demonstrate life-threatening injuries. This implies that State authorities themselves must initiate investigations. The mere suspicion of violations of Art 2 ECHR suffices to carry out an investigation.¹⁴⁰ In addition, State authorities are obliged to comply with certain procedural criteria to ensure that the investigation itself aligns with the ECHR. The law enforcement agencies are responsible for conducting an effective and non-biased investigation. It is their duty to ascertain the relevant facts and collect sufficient evidence, which may include consulting with experts where necessary. In the case of any failures or inadequacies in the investigative process, State authorities must provide a rationale and explanation for such shortcomings.¹⁴¹

In addition to the obligation to initiate proceedings, the ECtHR considers five further criteria important when evaluating the effectiveness of national proceedings. Firstly, the Court assesses whether the proceedings are conducted by individuals who are independent of the parties involved.¹⁴² This independence is particularly crucial in cases where a police officer is involved in a domestic violence incident.¹⁴³ Furthermore, preliminary proceedings must be conducted promptly, without undue delays, and any foreseeable difficulties that could impede the smooth running of the proceedings must be anticipated and addressed. In terms of content, preliminary proceedings must be designed to identify the perpetrator and the specific circumstances that led to the offence. This requires a certain degree of thoroughness, which is one of the most important criteria. State authorities are under duty to conduct a thorough investigation and take all reasonable steps to secure evidence of the respective incident. In the case of non-State actors, the context of how the offence occurred will play a particularly important role in the thoroughness of the proceedings. Determining the direct cause would be insufficient in these cases. Furthermore, the Strasbourg Court also scrutinises the involvement of the victims in the investigation procedure. It is imperative that they are included in the proceedings in a manner that ensures that their interests are safeguarded and taken into account. In addition to this, public scrutiny must be sufficiently guaranteed to ensure both the theoretical and practical accountability of the authorities. The extent of public scrutiny,

¹⁴⁰ Stoyanova, 131-33.

¹⁴¹ Stoyanova, 148-49.

¹⁴² Stoyanova, 150-51.

¹⁴³ ECtHR, *A and B v. Georgia*.

however, varies from case to case and can only be assessed regarding the specific circumstances.¹⁴⁴

The criteria are generally applicable to each individual case, regardless of the source of the violation or the type of procedure. They are interrelated and, taken together, can assess the effectiveness of a national procedure. Failure to comply with these criteria may indicate that the State has not fulfilled its procedural obligation in the respective case. However, the Court does not examine whether the national procedure formally complies with each of the detailed criteria. The key consideration is whether the procedure can be regarded as effective in practice.¹⁴⁵

3.1.2 Substantive Limb

Art 2 ECHR enjoins the State not only to investigate effectively but also to establish a legal framework that effectively protects the right to life. This substantive obligation serves to ensure that individuals can fully enjoy their rights within their domestic legal system. In particular, with regard to the power relations between State institutions and individuals, but also with regard to interpersonal relations, the adoption of effective legal rules provides everyone with the necessary legal protection.¹⁴⁶ The ECtHR thus determined that Art 2 ECHR imposes “*a primary duty to have in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life, and applies in the context of any activity, public or not, in which the right to life may be at stake.*”¹⁴⁷ Although the Court explicitly mentioned both legislative and administrative frameworks, there are some situations where administrative or civil law provisions are not sufficient to fulfil this substantive obligation. In the case of severe forms of violence, which unfortunately is regularly the case in the context of domestic violence, the State must regulate the harmful behaviour by adopting appropriate criminal laws.¹⁴⁸ Otherwise, the State risks failing to fulfil its substantive obligation under Art 2 ECHR. In the context of domestic violence, the Court has also stated that the harmful practice must either constitute a separate offence under national criminal law or at least constitute an aggravating factor in relation to other unlawful

¹⁴⁴ Stoyanova, *Positive Obligations under the European Convention on Human Rights*, 150–55.

¹⁴⁵ CoE and ECtHR, ‘Guide on Article 2 of the European Convention on Human Rights - Right to Life’, 33–34.

¹⁴⁶ CoE and ECtHR, 8–9.

¹⁴⁷ ECtHR, *Nicolae Virgiliu Tănase v. Romania* paragraph 135.

¹⁴⁸ ECtHR, *Kurt v. Austria* [GC] paragraph 157.

acts.¹⁴⁹ The jurisprudence of the Strasbourg Court thus implies that criminal law is the only effective means of providing sufficient protection from serious harmful practices and of acting as a deterrent.¹⁵⁰

Throughout the years, the Court has established an additional, far-reaching substantive obligation for State parties, namely the duty to prevent violations of Art 2 ECHR by non-State actors. It requires States to take operational measures to prevent harm against an identified individual. Compared with the aforementioned substantive obligation, the duty to take preventive operational measures is distinct, yet related to the former.¹⁵¹ It finds its origin in the case *Osman v. The United Kingdom* from the year 1998. In this case, the Court developed its now-called Osman test to review the compliance of the State with its obligation to take preventive measures. Since the test has been subsequently applied in a number of cases dealing with different scenarios from the *Osman* case, it has undergone several transformations which have led to considerable confusion. The Court modified the criteria of the test and departed from its original form in various cases. As a consequence, various sub-tests and new interpretations emerged which will be discussed in detail in the forthcoming chapter.¹⁵²

3.2 Development of the Osman Test

As the principal tool for assessing compliance with the core obligation to take protective operational measures, the Osman test holds substantial relevance within the Court's jurisprudence. As previously established, the Court has invoked the Osman test in diverse contexts beyond its initial conception over the past few years. Since it is thus difficult to observe its coherent logic, the purpose of this chapter is to analyse selected cases of Art 2 ECHR in the context of domestic violence in order to demonstrate the transformation of the Osman test from its original conception to the most recent one.¹⁵³ With the exception of the original case of *Osman v. The United Kingdom*, the following analysis will be strictly limited to cases dealing with domestic violence where children have been directly or indirectly affected by harmful practices. The landmark case of *Kurt v. Austria* will be examined in detail

¹⁴⁹ ECtHR, *Tunikova and Others v. Russia* paragraph 86.

¹⁵⁰ Stoyanova, *Positive Obligations under the European Convention on Human Rights*, 176.

¹⁵¹ Stoyanova, 203-4.

¹⁵² Ebert and Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems', 343-45.

¹⁵³ Stoyanova, *Positive Obligations under the European Convention on Human Rights*, 203-4.

in this and the following chapter, as it represents a pioneering contribution to the jurisprudence on this subject.

3.2.1 *Osman v. The United Kingdom*

The case of *Osman v. The United Kingdom* concerned the Osman family and the teacher, Mr. Paul Paget-Lewis, who developed an unusual and disturbing obsession with his pupil, Ahmet Osman. This obsession led to a series of serious and troubling incidents, resulting in the teacher shooting dead the pupil's father, Ali Osman, and seriously wounding Ahmet himself.¹⁵⁴

In 1986, the teacher Paget-Lewis began to develop an unusual interest in his 14-year-old pupil Ahmet Osman. He wrote him letters, gave him presents and followed him to his house. The school authorities became aware of these incidents through the family of another classmate named Leslie Green, who was also being stalked and threatened by the teacher. Leslie Green was a close friend of Ahmet and caused the teacher to become jealous, as he was going to jeopardise the special bond between them.¹⁵⁵ After learning of these incidents, Ahmet's mother requested that her son should be transferred to another school.¹⁵⁶ However, this attempt failed because all relevant documents relating to the school transfer were stolen and several walls around the school were sprayed with graffiti, spreading rumours of sexual nature relating to Ahmet. The teacher denied any connection with the incidents to the school authorities.¹⁵⁷ Upon changing his name to Paul Ahmet Yildirim Osman shortly afterwards, the school's headmaster, Mr Prince, alerted the school authorities and called for the teacher to be urgently suspended.¹⁵⁸ The latter was questioned several times by a psychiatrist from the education authority about the incidents and his condition. The psychiatrist initially believed that the teacher could remain at the school if he underwent psychotherapy. However, following several incidents on the Osman family's private property and further sessions, the teacher was categorised as unfit for work by the psychotherapist. During the attacks on the Osman's property, the windows were damaged, the car tyres were slashed, and the entrance area was littered with dog excrement.¹⁵⁹

¹⁵⁴ ECtHR, *Osman v. The United Kingdom* paragraph 10.

¹⁵⁵ ECtHR, paragraph 15.

¹⁵⁶ ECtHR, paragraph 20.

¹⁵⁷ ECtHR, paragraph 24.

¹⁵⁸ ECtHR, paragraph 26.

¹⁵⁹ ECtHR, paragraphs 29-32.

The teacher, who was teaching at two other schools at that time, was only questioned about the attacks of Osman's property when he deliberately caused an accident with another car in which Leslie Green was sitting.¹⁶⁰ In interviews with school officials, the perpetrator claimed to have self-destructive thoughts and warned of committing a massacre.¹⁶¹ He then went into hiding, which prevented the police from arresting him.¹⁶² When the teacher was spotted again weeks later at the Osman house with a stolen gun, it was already too late. Paul Paget-Lewis shot dead Ali Osman and seriously injured Ahmet. Additionally, he proceeded to Mr. Perkins' property, where he wounded the deputy head teacher and shot his son. Subsequent to these heinous acts, the perpetrator was committed to a mental hospital for unlimited time and was convicted of two charges of manslaughter.¹⁶³

The ECtHR first reiterates the positive obligation of the State to take preventive operational measures to protect an identified person whose life is threatened by another person.¹⁶⁴ However, it emphasises that the unpredictability of human behaviour and the availability of resources pose significant difficulties for the police in modern societies. It is thus necessary to interpret the obligation in a manner that does not place an undue burden on the authorities.¹⁶⁵ Furthermore, it must be established "*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.*"¹⁶⁶ The Osman test therefore consists of a three-step analysis to determine a State's preventive duties with regard to Art 2 ECHR. First, it must be ascertained whether the State had a preventive duty in the specific case. This involves establishing that there is a real and imminent threat to life, and that this threat affects a particular individual or identifiable group. In addition, it must be indicated that the State knew or should have known of this risk. The next step is to determine the scope and nature of the State's obligation to prevent the risk, thereby identifying the reasonable measures the State should have taken. The focus lies here on what actions could have been expected rather than the actual outcome. This step requires

¹⁶⁰ ECtHR, paragraph 38.

¹⁶¹ ECtHR, paragraph 46.

¹⁶² ECtHR, paragraphs 49-50.

¹⁶³ ECtHR, paragraphs 55-59.

¹⁶⁴ Stoyanova, *Positive Obligations under the European Convention on Human Rights*, 204.

¹⁶⁵ ECtHR, *Osman v. The United Kingdom* paragraph 116.

¹⁶⁶ ECtHR, paragraph 116.

balancing the individual's right to protection against the broader interests of society and the process rights of offenders. Finally, it is necessary to assess whether the State has fulfilled its obligation by implementing the necessary measures.¹⁶⁷

The Strasbourg Court assumes, based on Mr Prince's communication with the police, that the State authorities were aware of the incidents at the school and of the attack on the Osman family's property. In view of the nature and scale of these crimes, the Court is unable to identify any life-threatening scenario which would have led the police to recognise the real threat to the lives of the Osman family. The result of the psychiatrist's examination poses an important indication to the Court that the police could not have predicted Paget-Lewis's violent behaviour since the professional himself did not regard the teacher as a highly dangerous individual. Furthermore, the Court considers that the announcement of his murderous intentions was directed at Mr Perkins, as the teacher blamed him for losing his job at the school. The Osman family was therefore never the direct target of the teacher's violent threats. In conclusion, the Court finds that there has been no violation of Art 2 ECHR by the State authorities, given that the applicants have failed to specify a decisive stage during the incidents where the police were aware or should have been aware that the teacher posed a real and immediate risk to the lives of the Osman family.¹⁶⁸ Unfortunately, the Court does not specify in its reasoning which Osman test criteria have not been fulfilled in the present case, thus contributing to their vagueness.¹⁶⁹

3.2.2 *Kontrová v. Slovakia*

Although domestic violence has been a long-standing issue, the ECtHR only began to address it substantively in 2007. This shift was marked by the landmark case of *Kontrová v. Slovakia*, in which the Court found Slovakia in breach of the ECHR for failing to protect the children of the applicant from domestic violence. Prior to this case, the Court had not substantively considered domestic violence, highlighting a delayed judicial response to a pervasive and persistent problem.¹⁷⁰

¹⁶⁷ Ebert and Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems', 347–48.

¹⁶⁸ ECtHR, *Osman v. The United Kingdom* paragraphs 117–122.

¹⁶⁹ Ebert and Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems', 348.

¹⁷⁰ McQuigg, *The Istanbul Convention, Domestic Violence and Human Rights*, 60.

The case of *Kontrová v. Slovakia* concerns a married woman with two children who has suffered from her husband's abusive behaviour for a long time. In 2002, the applicant reacted to the long history of domestic violence and filed a complaint against her husband, accusing him of beating her with an electric cord. She submitted a medical report to the district police station declaring that she would be unable to work for at least 7 days. She also informed the police that she continued to be subjected to psychological and physical violence by her husband. A few days later, the applicant returned to the police station with her husband to withdraw her complaint. On the advice of a police officer, the applicant amended her report to the effect that the alleged acts could be treated as a minor offence requiring no further action. The following month, the police received two emergency calls indicating that the husband was threatening to kill his children and himself. By the time the police officers arrived at the scene, the husband had already left the family home. The officers invited the applicant to come to the police station the following day to formally report the incident. The applicant complied and went to the police station the next morning with her brother. Despite Kontrová's detailed account of the incident and the amended complaint, the police took no further action.¹⁷¹ Neither a new criminal complaint was registered, nor a criminal investigation launched.¹⁷² On the same day the applicant went to the police station, the husband carried out his threats by shooting their two children and himself with the shotgun.¹⁷³

In its judgment, the ECtHR first reaffirms the obligation of States to take all reasonable measures to protect the lives of individuals from harmful acts by non-State actors. It explicitly refers to the *Osman* judgment, which clarified the duty to take preventive operational measures, and emphasised the fact, that this obligation should not impose a disproportionate burden on the State authorities.¹⁷⁴ Following the criteria of the *Osman* test, the Strasbourg Court finds that in the present case, the police department was aware of the occurrence of domestic violence within the family. The applicant informed various police officers about the long history of domestic abuse, filed a complaint and contacted them in an emergency. Under Slovak law, such allegations normally trigger several obligations for the police authorities, including registering a criminal complaint, conducting a criminal investigation and taking action against violent threats. Instead of complying with national law, the police officers failed to act and even helped to avoid any legal action against the husband by amending the

¹⁷¹ ECtHR, *Kontrová v. Slovakia* paragraphs 7–13.

¹⁷² McQuigg, *International Human Rights Law and Domestic Violence*, 50.

¹⁷³ ECtHR, *Kontrová v. Slovakia* paragraph 14.

¹⁷⁴ O'Mahony, 'Child Protection and the ECHR', 666.

complaint.¹⁷⁵ Since these unlawful omissions are directly linked with the fatal consequences, the Court concludes that there has been a violation of Art 2 ECHR regarding the right to life of the two children.¹⁷⁶

3.2.3 *Opuz v. Turkey*

The case of *Opuz v. Turkey* represents a significant step forward in addressing domestic violence, with broad implications for both gender-based violence and children's rights. In particular, the ECtHR considered children to be victims in the present case, since they are psychologically affected by the intra-familial harm.¹⁷⁷ The Court also highlighted the need for authorities to take into account any impact on children in domestic violence households when deciding whether to prosecute.¹⁷⁸ This critical emphasis signals a recognition of the profound effects domestic violence can have on children's well-being. Secondly, the ruling reaffirmed that State authorities have a duty to protect the right to life with due diligence, ensuring adequate protection for victims.¹⁷⁹ The rights of perpetrators cannot take precedence over the fundamental human rights to life and the victim's integrity.¹⁸⁰ In addition, the Court stressed that known patterns of domestic abuse must not be dismissed as private family issues. State authorities are required to pursue criminal proceedings more rigorously and to intervene effectively to prevent further violence.¹⁸¹ This decision therefore urges states to implement comprehensive and proactive measures to combat domestic violence and safeguard all victims, particularly children.¹⁸²

The applicant N.O., a Turkish national, lived with her husband H.O. and their three children. The husband repeatedly threatened the applicant and her mother to kill them and the children. After being subjected to several physical assaults, the applicant and her mother filed complaints with the Public Prosecutor's Office to report his crimes but withdrew them shortly thereafter due to their increased fear of repercussions. In doing so, they discontinued the cases by removing the jurisdictional basis for the proceedings under the Turkish Penal Code.¹⁸³ In

¹⁷⁵ ECtHR, *Kontrová v. Slovakia* paragraphs 52–55.

¹⁷⁶ McQuigg, *International Human Rights Law and Domestic Violence*, 50.

¹⁷⁷ ECtHR, *Opuz v. Turkey* paragraph 142.

¹⁷⁸ ECtHR, paragraph 138.

¹⁷⁹ ECtHR, paragraph 131.

¹⁸⁰ ECtHR, paragraph 147.

¹⁸¹ ECtHR, paragraph 144.

¹⁸² Abdel-Monem, 'Opuz v. Turkey: Europe's Landmark Judgment on Violence against Women', 32.

¹⁸³ Meyersfeld and Koh, *Domestic Violence and International Law*, 136–37.

February 1998, H.O. attacked N.O. and her mother with a knife during an argument, leaving them incapacitated for several days. Due to a lack of evidence, the local prosecutor did not prosecute anyone and denied the public interest in pursuing the matter.¹⁸⁴ One month later, H.O. struck the applicant and her mother with his vehicle, resulting in life-threatening injuries to the latter. The applicant requested police protection and filed for divorce. In both cases the victims withdrew their due to threats and pressure from H.O.. The responsible Turkish Court nevertheless convicted the husband and sentenced him to three months' imprisonment, which was later commuted to a mere fine.¹⁸⁵

Over time, the attacks perpetrated by H.O. became increasingly violent, resulting in the knife attack against the applicant in 2001 which was sanctioned with a mere fine. Consequently, her mother filed a petition with the Public Prosecutors Office, admitting that the original reason for withdrawing their previous complaints was fear of retaliation and requesting that H.O. be detained on remand. The law enforcement agencies remained inactive and continued to dismiss her case for lack of evidence. In March 2002, H.O. shot the applicant's mother in order to protect his family and his wife from an immoral life. The offender was convicted of murder and sentenced to life imprisonment. However, the sentence was reduced to 15 years, reflecting the mitigating circumstances of provocation and his good conduct during his trial. Pending appeal, the local court released the husband in view of the time he had already spent in pre-trial detention.¹⁸⁶

In 2002, after his death threats continued, N.O. brought her case to the ECtHR, alleging that the Turkish government had failed to respond adequately to his violent attacks, thereby contributing to the death of her mother and her life-threatening injuries.¹⁸⁷ Referring to the criteria of the Osman test, the Court examines whether the national authorities could have been aware of the real and immediate danger to the mother's life resulting from the unlawful actions of H.O. at the time.¹⁸⁸ In this context, the Court identifies a novel element in its assessment: the necessity for national authorities to exercise due diligence to prevent violence from occurring. Despite the withdrawal of complaints by the applicant and her mother, the Court considers that the local authorities could have foreseen the fatal assault of H.O. due to

¹⁸⁴ ECtHR, *Opuz v. Turkey* paragraphs 20–22.

¹⁸⁵ ECtHR, paragraphs 23–36.

¹⁸⁶ Meyersfeld and Koh, *Domestic Violence and International Law*, 138–39.

¹⁸⁷ Abdel-Monem, 'Opuz v. Turkey: Europe's Landmark Judgment on Violence against Women', 30.

¹⁸⁸ Blaker Strand, 'Interpreting the ECHR in Its Normative Environment', 983–84.

the long history of violent attacks against the victims for over ten years. The record of his violent behaviour constituted a continuing threat to the safety and health of the victims, and thus required the implementation of preventive measures to adequately respond to the risk of further violence by the perpetrator. The failure to undertake the latter, which “*could have had a real prospect of altering the outcome or mitigating the harm*”,¹⁸⁹ would be sufficient for the Court to hold the State responsible.¹⁹⁰

In its judgment, the ECtHR has identified important considerations for governments when balancing the rights under Art 2 and Art 8 ECHR. In deciding whether to prosecute in the public interest, the authorities must take into account objective facts such as the seriousness of the offence, the nature of the injuries, the use of weapons, the degree of threat and whether the attack was premeditated. On the subjective side, the history and current state of the relationship, the defendant’s criminal record and the impact of pursuing the case should be considered.¹⁹¹ The specific context of domestic violence may therefore require basic risk assessment by local authorities. Depending on the severity of the harmful practices and the risk of recidivism, criminal proceedings may have to be continued in the public interest. The withdrawal of the victim's complaint therefore does not diminish the duty to protect individuals.¹⁹²

In the present case, the Court determines that the interference with the victim’s private life was necessary to ensure her safety. Despite the victims’ continuous reports of imminent danger, the authorities failed to assess the risk of further violence. In the Court’s view, it would have been reasonable for the local authorities to take measures such as a banning order to prevent further violence. By remaining passive despite having sufficient information for an appropriate response, the Turkish authorities did not fulfil their positive substantive obligation to protect the right to life of N.O.’s mother.¹⁹³

¹⁸⁹ ECtHR, *Opuz v. Turkey* paragraph 136.

¹⁹⁰ ECtHR, paragraphs 131-36.

¹⁹¹ Abdel-Monem, ‘*Opuz v. Turkey: Europe’s Landmark Judgment on Violence against Women*’, 31.

¹⁹² Aalabers and Vilcu, *Positive Obligations of the State in the Domestic Violence Caselaw of the European Court of Human Rights*, 25.

¹⁹³ ECtHR, *Opuz v. Turkey* paragraphs 141–149.

3.2.4 *Talpis v. Italy*

In assessing the development of the Osman test, the *Talpis v. Italy* case is particularly significant, as the Court adapted the ‘real and immediate risk’ criterion specifically to the context of domestic violence.¹⁹⁴ Furthermore, the Court reiterated its due diligence requirement in domestic violence cases and explicitly referred to the Preamble and the relevant provisions of the Istanbul Convention in this context.¹⁹⁵ In the *Talpis* case, the applicant E.T. alleged that the Italian authorities had failed to protect her and her children from her husband’s violent attacks, which resulted in the murder of her son and the attempted murder of her.¹⁹⁶

Born in Moldova, the applicant E.T. moved together with her husband A.T. and their two children to Italy in 2011. The family experienced several episodes of violence perpetrated by A.T. against the applicant and her children.¹⁹⁷ After the applicant and her daughter had been assaulted by the alcoholic A.T. in June and August 2012, she filed a complaint against her husband for bodily harm, threats of violence and ill-treatment. The applicant also requested immediate protection measures for herself and her children.¹⁹⁸ As a result of the continued harassment of A.T., the applicant refused to return to her home and found refuge in a shelter. According to the applicant, this did not stop her husband from harassing her by telephone. Although the public prosecutor ordered the police to carry out an urgent investigation, E.T. was not interviewed by the police until seven months later.¹⁹⁹ Due to the continued psychological pressure from A.T., the applicant mitigated the seriousness of her original statements and praised him as a very good father and husband. She declared that she had been misunderstood and altered her allegations.²⁰⁰ Nevertheless, the prosecuting authorities continued their investigation which ended in a mere fine the perpetrator.²⁰¹

In the meantime, the applicant and her children were subjected to another violent attack by the father of the family, only this time with fatal consequences. On 18 November 2013, the police received a call from the applicant regarding another dispute within the family. Upon arrival,

¹⁹⁴ ECtHR and Council of Europe, ‘Key Theme - Article 2 Domestic Violence’, 2.

¹⁹⁵ ECtHR, *Talpis v. Italy* paragraphs 58 and 129.

¹⁹⁶ ECtHR, paragraph 3.

¹⁹⁷ ECtHR, paragraphs 7-8.

¹⁹⁸ ECtHR, paragraph 21.

¹⁹⁹ De Vido, ‘The ECtHR *Talpis v. Italy* Judgment. Challenging the Osman Test through the Council of Europe Istanbul Convention?’, 204.

²⁰⁰ Peroni, ‘*Talpis v. Italy*’.

²⁰¹ ECtHR, *Talpis v. Italy* paragraph 43.

the police discovered a broken bedroom door and multiple bottles of alcohol on the floor. The applicant informed the officers of her altered complaint and his previous assaults. In a state of intoxication, the husband was transported to the hospital where he checked himself out a few hours later. The same night, A.T. got drunk again and was stopped by the police for an identity check in the street. After imposing a fine, the police let the man go home. Early in the morning, A.T. returned home with a 12 cm kitchen knife in his hand. Intending to attack the applicant, the husband was stopped by his son, who wanted to protect his mother. A.T. did not hesitate and stabbed his own son three times, resulting in his death. Meanwhile, E.T. ran out of the house trying to escape but the husband caught up with her and stabbed her several times in her chest.²⁰² The applicant survived and A.T. was sentenced to life imprisonment for his crimes.²⁰³

The ECtHR states at the beginning of its judgment that Art 2 ECHR applied not only to the son, but also to the applicant herself, as she had suffered injuries that were inherently life-threatening. The application of Art 2 ECHR does therefore not require the occurrence of death in all cases.²⁰⁴ With regard to the first two episodes of violence, the Court notes that the State authorities did not issue a protection order despite the applicant's immediate request for protection measures. Moreover, the victim was not heard until seven months later and continued to suffer harassment and live in fear. Consequently, the State authorities failed to act promptly on the complaint lodged. In addition, the Court emphasises that the competent authorities never carried out an assessment of the risk of renewed attacks on the applicant or took into account the victim's physical or psychological condition. Even on the night of the murder, when the police had to intervene twice, they failed to take any protective measures, even though the criminal investigation for grievous bodily harm was still pending.²⁰⁵

In their defence, the Government argued that the risk to the victims was at no time of real and immediate nature.²⁰⁶ The Court took this as an opportunity to look more closely at the criteria of the Osman test and to refine the 'real' and 'immediate' elements. The latter cannot be assessed without taking into account the specific context of domestic violence.²⁰⁷ In such

²⁰² ECtHR, paragraphs 36–42.

²⁰³ ECtHR, paragraphs 46–48.

²⁰⁴ ECtHR, paragraph 110.

²⁰⁵ ECtHR, paragraphs 113–122.

²⁰⁶ ECtHR, paragraph 88.

²⁰⁷ De Vido, 'The ECtHR Talpis v. Italy Judgment. Challenging the Osman Test through the Council of Europe Istanbul Convention?', 207.

context, the obligation goes beyond the general protection of the public. It requires specific consideration of the recurrence of violent attacks within the domestic environment. In the present case, the police should have known that A.T.'s behaviour posed a real and immediate risk to the applicant's life. As previously mentioned, the police checked the perpetrator twice in the night of the murder. In particular, during the identity check on the street, the police would have had the opportunity to check the offender's criminal record in real time and conduct a risk assessment. Instead, they remained inactive.²⁰⁸ While the Court does not speculate whether a different approach might have changed the outcome, it reiterates that the failure to take reasonable measures which could have mitigated the materialisation of a real risk to the victim's life is sufficient to hold the State responsible.²⁰⁹ The Court concludes that the authorities failed to act with due diligence and thus violated Article 2 ECHR.²¹⁰

3.2.5 *Kurt v. Austria*

The case of *Kurt v. Austria* represents a pivotal development in the jurisprudence of the ECtHR, as it is the first domestic abuse case to be heard by its Grand Chamber. In this groundbreaking judgment, the Grand Chamber set out key principles of the Osman test in detail, with particular focus on the positive obligations under Art 2 ECHR.²¹¹

The case *Kurt v. Austria* was decided by the Grand Chamber of the ECtHR in June 2021 and involves the killing of an eight-year-old boy by his father E., who had a long history of violence and had been reported by his wife for rape and serious threats just prior to the murder.²¹² His wife, who is also the mother of their two children A. and B., filed the complaint with the ECtHR, accusing the Austrian authorities of having violated Art 2 ECHR in its substantive limb by failing to provide her and her two children with adequate protection.²¹³ In July 2010 the applicant contacted the police for the first time after her husband had severely beaten her. She informed them that she and her children had been repeatedly beaten by him over the last few years. As the husband had recently lost his job, started gambling and was heavily in debt, the episodes of violence had worsened. The police issued a 14-day barring and protection order against E. for fourteen days and sent the report to

²⁰⁸ ECtHR, *Talpis v. Italy* paragraph 122.

²⁰⁹ ECtHR, paragraph 121.

²¹⁰ Blaker Strand, 'Interpreting the ECHR in Its Normative Environment', 984–85.

²¹¹ McQuigg, 'Domestic Abuse and Article 2 of the European Convention on Human Rights: Applying the Grand Chamber Judgment in *Kurt v. Austria*', 565.

²¹² ECtHR, *Kurt v. Austria* [GC] paragraphs 22–26.

²¹³ ECtHR, paragraph 48.

the public prosecutor. In January 2011, E. was convicted of inflicting grievous bodily harm to her and for his dangerous threatening behaviour towards his family.²¹⁴

Due to the continued threats and violence against her and her children, the applicant filed for divorce in May 2012. On the same day, she reported her husband to the police for raping and choking her. The applicant had been subjected to daily threats by her husband to kill either the children and her or himself since March 2012. For fear that her husband would carry out his threats, she had not been able to inform the police earlier. She specifically mentioned her children, who had been directly affected by his episodes of violence. The husband had slapped his children over a period of several years, once resulting in a haematoma on the child's cheek. The applicant noted that she and her children lived in great fear of E. and requested protection by the police.²¹⁵ While the husband denied these accusations, the children confirmed the allegations and informed the police officers about the regular violent attacks perpetrated by their father against them and their mother. Consequently, the police issued a new barring and protection order against E., requiring him to leave the family house and prohibiting him from approaching the shared apartment as well as the apartment of the husband's parents-in-law.²¹⁶ Furthermore, criminal proceedings were initiated against him by the public prosecutor.

Three days after the report, E. went to his children's school and asked the teacher if he could speak to his son A. privately. Not knowing of the long history of violence in the family, the teacher agreed. When the child did not return, the teacher went looking for him and found him with gunshot wounds in the basement.²¹⁷ While his sister, who had witnessed the atrocity, was unharmed, E. committed suicide and was found dead in his car. The son was immediately taken to hospital where he succumbed to his injuries and passed away two days later.²¹⁸

Given that the present case is yet another instance of domestic violence with fatal consequences for a minor, it is crucial to highlight the Court's emphasis on the particular

²¹⁴ ECtHR, paragraphs 12–15.

²¹⁵ McQuigg, 'Kurt v Austria: Applying the Osman Test to Cases of Domestic Violence', 3.

²¹⁶ ECtHR, Kurt v. Austria [GC] paragraphs 23–25.

²¹⁷ McQuigg, 'Domestic Abuse and Article 2 of the European Convention on Human Rights: Applying the Grand Chamber Judgment in Kurt v. Austria', 569.

²¹⁸ ECtHR, Kurt v. Austria [GC] paragraphs 38–39.

vulnerability of children who are victims of such abuse.²¹⁹ These children are entitled to State protection in order to protect their personal integrity effectively. This obligation arises from the positive duties of States under Art 2 of the Convention. The Court also recognises that perpetrators may use violence against children in the domestic environment, including lethal violence, as an ultimate form of punishment against their intimate partner. The State authorities must therefore assess the risk of real and immediate threats to life in the specific context of domestic violence. To ensure a standardised approach among the Member States in this regard, the Court clarified the key principles under the framework of the Osman test.²²⁰

As established in previous case law,²²¹ the authorities are required to respond promptly to allegations of domestic violence, otherwise the complaint is rendered ineffective.²²² By carrying out an autonomous, proactive and comprehensive risk assessment, the authorities must first examine the existence of a real and immediate threat to life of an identified individual.²²³ The necessity for a risk assessment was initially established in Art 51 of the Istanbul Convention and subsequently adopted by the ECtHR given its pivotal role in the prevention of domestic violence. It requires State authorities to assess the lethality risk and the risk of further violence by the perpetrator. The terms ‘autonomous’ and ‘proactive’ indicate that the risk assessment cannot be solely dependent on the victim’s perception. Law enforcement agencies must therefore proactively gather all relevant information and investigate allegations on their own initiative.²²⁴ Risk assessment can be considered ‘comprehensive’ if it involves the use of standardised checklists of risk factors developed on the basis of criminological research and best practice in the field of domestic violence. It further implies that the risk of all individuals, who are directly or indirectly affected by the domestic abuse, must be assessed. All potential victims need to be identified and appropriately addressed, regardless of the different levels of risk they face. The relevant documented information should then be shared between all relevant authorities to ensure co-ordinated support for the victim(s) and to enable urgent intervention by law enforcement

²¹⁹ Mujuzi, ‘Preventing and Combating Domestic Violence in Europe: The Jurisprudence of the European Court of Human Rights’, 167.

²²⁰ ECtHR, Kurt v. Austria [GC] paragraphs 163–164.

²²¹ See Chapter 3.2.1.

²²² ECtHR, Talpis v. Italy paragraph 117.

²²³ ECtHR and Council of Europe, ‘Key Theme - Article 2 Domestic Violence’, 1.

²²⁴ ECtHR, Kurt v. Austria [GC] paragraphs 167–169.

agencies. In order to understand these requirements and the dynamics of domestic violence, relevant authorities need to receive regular training in this area.²²⁵

Referring to its clarifications in the *Talpis* judgment, the Court emphasises that the elements ‘real’ and ‘immediate’ must be interpreted in the light of the particular context of domestic violence.²²⁶ In contrast to the incident-based situation in *Osman*, the Court has adopted a more flexible approach to the concept of immediate risk in domestic violence cases.²²⁷ While the Court does not provide a precise definition of the term, it recognises the common pattern of escalation in such situations. Even without knowing the exact time and place of an attack, the increasing frequency and severity of the violence makes the perpetrator’s behaviour more predictable. It is therefore the responsibility of the authorities to consider the significant risk posed by individuals with a history of domestic violence and to use available research to assess the potential for lethal violence, even after issuing protection orders. Nevertheless, it is not reasonable to expect that the authorities will be able to meet standards that are either impossible or disproportionate.²²⁸

Once a real and immediate threat to an individual is identified, the obligation to take preventive operational measures is triggered, constituting the second limb of the *Osman* test. At this stage, the Court assesses whether the national legal framework is adequate, meaning that “*the toolbox of legal and operational measures available must give the authorities involved a range of sufficient measures to choose from, which are adequate and proportionate to the level of (lethal) risk that has been assessed.*”²²⁹ According to the Court, ensuring the victim’s safety inevitably may require interference with the offender’s private and family life in order to prevent further violence. The severity and nature of the risk are crucial factors in determining the proportionality of the protective measures. The adequacy of the measures implies that they can afford effective protection against violence by private individuals, irrespective of the specific circumstances.²³⁰

²²⁵ ECtHR, paragraphs 171–174.

²²⁶ See Chapter 3.2.4.

²²⁷ Ebert and Sijniensky, ‘Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems’, 360.

²²⁸ ECtHR, *Kurt v. Austria* [GC] paragraphs 175-176.

²²⁹ ECtHR, paragraph 179.

²³⁰ ECtHR, ‘Information Note on the Court’s Case-Law (252): *Kurt v. Austria* [GC]’, 3.

As previously established, this obligation also requires State authorities to share information among all relevant stakeholders. In instances where children are directly affected by domestic abuse or identified as being at risk, it is of paramount importance to inform child protection services and/or childcare facilities. Furthermore, it encompasses all individuals who have regular contact with the child, such as teachers.²³¹

Having set out these principles of the Osman test in domestic violence cases, the Grand Chamber then proceeds to apply them to the specific facts of the case at hand.²³² While examining the first limb of the Osman test, the Court notes that the Austrian authorities reacted immediately to both of applicant's allegations concerning domestic violence in the years 2010 and 2012. In each case, the police took evidence, followed a checklist of specific risk factors and issued barring and protection orders. Two officers also accompanied the applicant to her home to ensure her safety, informed her about the possibility of further legal actions, questioned E. at the police station and confiscated his keys. The involvement of a police officer with significant experience in domestic violence cases, together with the comprehensive range of measures taken, demonstrates to the Court that the authorities acted with due diligence.²³³

With regard to the quality of the risk assessment the Grand Chamber finds that it met the criteria of being autonomous, proactive, and comprehensive, despite of the lack of a standardised procedure.²³⁴ In particular, the police's assessment took into account various factors beyond the applicant's account, including statements from involved parties, photographic evidence of the applicant's injuries and the results of medical examinations.²³⁵ In addition, the police reviewed records of previous legal action against the perpetrator, checked for registered weapons and identified key risk factors in the context of domestic violence. Furthermore, the authorities took seriously the death threats made by the perpetrator and promptly initiated criminal proceedings against him on the basis of the information available at the material time.²³⁶

²³¹ ECtHR, 3.

²³² McQuigg, 'Domestic Abuse and Article 2 of the European Convention on Human Rights: Applying the Grand Chamber Judgment in Kurt v. Austria', 570.

²³³ ECtHR, 'Information Note on the Court's Case-Law (252): Kurt v. Austria [GC]', 3.

²³⁴ Sara De Vido, 'Verso un «test» di dovuta diligenza sensibile al genere nei casi di violenza domestica?', 623.

²³⁵ ECtHR, Kurt v. Austria [GC] paragraphs 195–196.

²³⁶ ECtHR, paragraphs 197–202.

While no separate risk assessment was conducted specifically for the children, the decision is deemed reasonable by the Grand Chamber due to several factors. Despite experiencing physical violence from their father and witnessing domestic abuse against their mother, the children were not considered as the primary targets of E's violence or threats. The applicant's decision to inform the police was predominately motivated by allegations of sexual violence and strangulation, in addition to a history of domestic abuse. Although the police report did not specifically identify the children as being at risk, they were referred to as 'victims' in the criminal investigation report.²³⁷ In addition, the Court considers that the restraining order provided adequate protection for the children as there was no evidence of risk beyond the specified areas.²³⁸ Given the calm demeanour of the offender towards the police officers, there was no immediate lethal threat to the children's lives at the time. Similarly, while it would have been preferable in hindsight, it was not considered necessary to contact the school authorities at the time to prevent harm to the applicant's son.²³⁹ Consequently, the Grand Chamber finds no violation of Art 2 ECHR in its substantive limb since Austrian authorities complied with their duty of special diligence under the Osman test.²⁴⁰

Notwithstanding the significance of this ruling, challenges remain in applying the Osman test to domestic abuse cases. While the judges unanimously agreed on the key principles for domestic violence cases, there was a divergence of opinion on their application to the facts. This is reflected in the final vote, where only ten of the seventeen judges conclude that the Austrian authorities fulfilled their substantive duty under Art 2 ECHR. The remaining judges express their criticism in a joint dissenting opinion, highlighting significant flaws in the risk assessment.²⁴¹ These deficiencies, along with the difficulties in applying the Osman test, will be thoroughly examined in the subsequent main chapter through the lens of children's rights. However, before delving into this analysis, it is essential to explore how this landmark decision has influenced post-Kurt jurisprudence.

²³⁷ ECtHR, paragraphs 205-206.

²³⁸ Stoyanova, *Positive Obligations under the European Convention on Human Rights*, 214.

²³⁹ ECtHR, Kurt v. Austria [GC] paragraphs 208–209.

²⁴⁰ ECtHR, paragraphs 211–212.

²⁴¹ McQuigg, 'Domestic Abuse and Article 2 of the European Convention on Human Rights: Applying the Grand Chamber Judgment in Kurt v. Austria', 570.

3.2.6 *Y and Others v. Bulgaria*

In the post-*Kurt* era, the case of *Y and Others v. Bulgaria* exemplifies the profound impact of the Grand Chamber's judgment. It demonstrates how its key principles are being integrated into subsequent judicial decisions and potentially influence their outcome. The case *Y and Others v. Bulgaria* deals with another instance of fatal domestic violence as the Bulgarian authorities failed to fulfil their substantive obligations under Art 2 ECHR.²⁴² However, as the failures of the Bulgarian authorities were less extreme than in other cases, it can be argued that the Court would have reached the opposite conclusion if the case had been dealt with before *Kurt*.²⁴³

The victim Mrs V, who was the daughter of the first applicant and the mother of the second and third applicants, was shot dead by her husband Mr V in August 2017. Prior to the fatal outcome, Mrs V had separated her husband and was living with her two children at the first applicant's house.²⁴⁴ She had reported her husband's harassment and threatening behaviour to the authorities on several occasions. In November 2016, she contacted the police for the first time after her husband slashed the tyres of her car. In her written complaint, the victim stated that the couple had recently had an argument in which Mr V had threatened to kill her. As her husband had a gun, she feared for her life. Mr V was interviewed a month later about the car incident and denied the allegations. In the absence of further evidence or CCTV footage, both the police and the prosecutor refused to open criminal proceedings.²⁴⁵ In January 2017, the first applicant called the emergency number to inform the authorities that Mr V was behaving aggressively at her home, trying to take his children for a walk. By the time the police officers arrived at the scene, the argument was already over. Consequently, they merely issued a caution to the parties involved, reminding them of acting lawfully.²⁴⁶

In February 2017, Mrs V applied for a protection order after her husband followed her by car and on foot.²⁴⁷ The following day, the District Court issued an interim order prohibiting Mr V from approaching the victim within 100 metres. In June 2017, another protection order was issued, extending the prohibition for one year and ordering him to refrain from harmful

²⁴² ECtHR, *Y and Others v. Bulgaria* paragraph 111.

²⁴³ McQuigg, 'Domestic Abuse and Article 2 of the European Convention on Human Rights: Applying the Grand Chamber Judgment in *Kurt v. Austria*', 574.

²⁴⁴ ECtHR, *Y and Others v. Bulgaria* paragraphs 4–5.

²⁴⁵ ECtHR, paragraphs 7–12.

²⁴⁶ ECtHR, paragraph 13.

²⁴⁷ ECtHR, paragraph 14.

practices against Ms V.²⁴⁸ On 17 August 2017, the police received an emergency call from the victim complaining that her husband had breached the protection order and followed her. During the call, Mr V. disappeared and Mrs V. was asked to file a written complaint, which she did the same day. In her complaint, she requested immediate preventive measures as she was in immediate fear for her life. The next day, Mrs V. filed another complaint with the District Prosecutor's Office expressing her fears. She repeatedly informed the authorities that her husband was in possession of a gun.²⁴⁹ She then went to a nearby café, where her husband approached her. As Mrs V. was about to make an emergency call, Mr V. pulled out his gun and shot her five times in the head and body. The victim died instantly. Mr. V was convicted of aggravated murder and sentenced to thirteen years' imprisonment. As his firearm licence had expired, he was also charged with illegal possession of a firearm.²⁵⁰

Prior to examining whether there has been a breach of Art 2 ECHR by the Bulgarian authorities, the Court reiterates the State's duty of special diligence under the Osman test.²⁵¹ The first limb of this test requires the State authorities to respond promptly to allegations of domestic violence. In the present case, the authorities received a total of three written complaints and one emergency call. Of these four occasions, there was only one prompt response, when the victim first contacted the police about her slashed car tyres. However, even in that case, it took the authorities over a month to obtain further evidence, which resulted in the offender simply being questioned.²⁵² Under the Osman test, the Court would normally assess the quality of the risk assessment as a next step, but there was no evidence that the Bulgarian authorities had made any assessment of the risk of further (potentially lethal) violence. The specific context of domestic violence or the dynamics in this matter were never taken into account by the police or the prosecutor when investigating the victim's allegations. The Court also condemns further the police's failure to act on the applicant's numerous warnings about the perpetrator's firearm. The requirement for a proactive, comprehensive and independent risk assessment was therefore not met.²⁵³ By 17 August at the latest, the authorities should have had a proper risk assessment carried out by police officers with significant experience of domestic violence. At that time, the authorities could have

²⁴⁸ ECtHR, paragraphs 20-22.

²⁴⁹ ECtHR, paragraphs 28-34.

²⁵⁰ ECtHR, paragraphs 35-37.

²⁵¹ McQuigg, 'Domestic Abuse and Article 2 of the European Convention on Human Rights: Applying the Grand Chamber Judgment in Kurt v. Austria', 575.

²⁵² ECtHR, *Y and Others v. Bulgaria* paragraphs 90-97.

²⁵³ ECtHR, paragraphs 98-104.

known that there was a real and immediate threat to the victim's life, given the aggressive and obsessive behaviour of her husband, who was also in possession of a firearm. The ECtHR therefore concludes that there has been a violation of Art 2 ECHR in the present case.²⁵⁴

Given the structure of the present judgement and its referred case law, one can observe the profound impact of the Grand Chamber judgment *Kurt in Y and Others*. The ECtHR reiterated its key principles for domestic abuse as previously set out by the Grand Chamber judgement and applied them to the facts of the present case. It is debatable whether the Bulgarian authorities would have been found in violation of their duties had the Court applied the Osman test in its traditional form. Prior to the murder, the perpetrator had not engaged in physical violence, which could have led to the conclusion that the authorities were not aware of a real and immediate risk. However, by considering the expanded understanding of domestic violence as outlined in the *Kurt* judgment, the Court acknowledged the multiple facets of domestic violence, including coercive control and psychological harm. The present judgment thus demonstrates the advancement in the field of domestic violence jurisprudence, underscoring the continued significance of contextual and dynamic analysis within the Osman framework.²⁵⁵

²⁵⁴ ECtHR, paragraphs 109-111.

²⁵⁵ McQuigg, 'Domestic Abuse and Article 2 of the European Convention on Human Rights: Applying the Grand Chamber Judgment in *Kurt v. Austria*', 576-77.

4. Beyond Immediacy: Revising the Osman Test

Since 2007, the ECtHR has addressed cases involving domestic violence in a substantial manner,²⁵⁶ resulting in a considerable body of jurisprudence. Of particular significance is the Osman test, which has become a fundamental element in the interpretation of the State's positive obligations under Art 2 ECHR concerning the right to life.²⁵⁷ The preceding analysis demonstrated that the Osman test has evolved over time, with its criteria being refined and applied in various contexts, resulting in multiple sub-tests and diverse interpretations. In the Grand Chamber judgment of *Kurt v. Austria*, the ECtHR set out key principles of the Osman test, thereby giving it new meaning and impacting the outcomes of subsequent cases. However, the Court's approach to domestic violence, particularly its application of the Osman test, is not without flaws.²⁵⁸

In several judgments, the ECtHR has underlined the vulnerability of children who are victims of domestic violence and their right to state protection. According to the Court, children should be effectively deterred from such serious violations of their personal integrity.²⁵⁹ Despite the emphasis on the vulnerability of children in this context, the Court rigorously applies the Osman test to any case involving domestic violence, irrespective of the specific circumstances. Thereby, the Court fails to recognise the unique nature of domestic violence as a distinct social phenomenon and the particular vulnerability of children in such situations. The Osman test requires a real and immediate risk for an identified individual as a trigger for the State authorities to take preventive operational measures.²⁶⁰ However, children exposed to domestic violence are subjected to ongoing harm that does not always present as immediate danger but has profound long-term effects on their physical, mental, and emotional health. By virtue of being a child, minors have significantly fewer opportunities to seek help and protect themselves from domestic violence.²⁶¹

²⁵⁶ ECtHR, *Kontrová v. Slovakia*.

²⁵⁷ McQuigg, 'Domestic Abuse and Article 2 of the European Convention on Human Rights: Applying the Grand Chamber Judgment in *Kurt v. Austria*', 565.

²⁵⁸ Ebert and Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems', 345.

²⁵⁹ ECtHR, *Talpis v. Italy* paragraph 99; ECtHR, *Kurt v. Austria* [GC] paragraph 163; ECtHR, *Opuz v. Turkey* paragraph 159.

²⁶⁰ McQuigg, 'Kurt v Austria: Applying the Osman Test to Cases of Domestic Violence', 10–11.

²⁶¹ Morrison and Houghton, 'Children's Human Rights in the Contexts of Domestic Abuse and COVID-19', 1355.

After highlighting the Court's case law prior to the Grand Chamber judgment, this chapter will critically examine the deficiencies of the Osman test in addressing domestic violence cases involving children. One significant limitation of the test is its focus on the immediate risk to life, which frequently overlooks the persistent and ongoing nature of domestic violence, as well as the specific vulnerabilities of children.²⁶² Furthermore, this criterion raises concerns about its alignment with the obligation to exercise due diligence in order to safeguard individuals from harm.²⁶³ As the case of *Kurt v. Austria* exemplifies these shortcomings of the Osman test, this chapter will then continue with a thorough analysis of both the Chamber and Grand Chamber judgments of *Kurt*. This analysis will identify the key deficiencies of the case in question, paving the way for a critical examination of the Osman test's criteria and the proposal of a revised framework that aligns with the protective standards of the CRC and the Istanbul Convention.

4.1 The Osman Test prior to Kurt v. Austria

Prior to *Kurt v. Austria*, the ECtHR applied the Osman test to numerous cases of domestic violence, such as to *Kontrová v. Slovakia* in 2007, *Opuz v. Turkey* in 2009 and *Talpis v. Italy* in 2017. As established in the preceding chapter, the Court identified a violation of Art 2 ECHR in all these cases due to the national authorities' failure of taking sufficient operational measures to protect the life of identified individual.²⁶⁴

In all three cases, the authorities were aware or should have been aware of a real and immediate threat to the victims' lives. In *Kontrová v. Slovakia*, the police were repeatedly informed by the applicant about the domestic violence threats from her husband.²⁶⁵ In *Opuz v. Turkey*, the ongoing abuse and threats against Mrs. Opuz and her mother were well-documented.²⁶⁶ Similarly, in *Talpis v. Italy*, the authorities were aware of the severe violence the applicant and her children faced from her husband.²⁶⁷ Since the authorities had sufficient information to recognise the real and imminent danger in all three cases, the Court held each

²⁶² McQuigg, 'Kurt v Austria: Applying the Osman Test to Cases of Domestic Violence', 26.

²⁶³ De Vido, 'The ECtHR Talpis v. Italy Judgment. Challenging the Osman Test through the Council of Europe Istanbul Convention?', 210.

²⁶⁴ McQuigg, 'Domestic Abuse and Article 2 of the European Convention on Human Rights: Applying the Grand Chamber Judgment in Kurt v. Austria', 566.

²⁶⁵ ECtHR, *Kontrová v. Slovakia* paragraph 52.

²⁶⁶ ECtHR, *Opuz v. Turkey* paragraphs 134–136.

²⁶⁷ ECtHR, *Talpis v. Italy* paragraph 120.

State responsible for failing to take appropriate preventive measures, resulting in fatal outcomes.²⁶⁸ The Court demonstrated a direct link between the authorities' inaction and the lethal violence.²⁶⁹ In contrast to the *Osman* case, the Court applied a lower threshold for what constitutes a 'real and immediate' risk in these cases. The differences in the threshold for recognising imminent danger are indicative of the complexity and evolving nature of the application of the *Osman* test in different contexts.²⁷⁰

At first glance, the application of the *Osman* test in Art 2 cases involving domestic violence seems unproblematic, as it has generally led to findings of a violation of the right to life in each analysed case. However, there is growing concern among scholars and ECtHR's judges that its use may not be entirely appropriate in this particular context.²⁷¹ The main difficulty with the *Osman* test lies in the fact that this test was not originally intended to be applied to cases of domestic violence.²⁷² As noted in the previous chapter, the *Osman* test originated in the *Osman* case, which involved a teacher who had developed an unhealthy attachment to a student, culminating in the student's serious injury and the murder of the student's father.²⁷³ The test was therefore never designed to encompass the complexities of domestic violence.

As Ebert and Sijniensky note, this would not have been a problem "*if the different scenarios followed the inherent logic of the Osman case or if the Test was able to accommodate these scenarios in a satisfactory manner.*"²⁷⁴ However, as evidenced by the jurisprudence of the ECtHR, this was not always the case. In particular, the judgment in the *Osman* case lacks conceptual clarity and legal certainty.²⁷⁵ In 2007, the Court applied the *Osman* test in its *Kontrová* case, the first instance in which domestic violence was addressed in a substantial manner.²⁷⁶ Since then, the *Osman* test has become the predominant legal criterion to establish whether State parties fulfil their obligation to prevent violation of Art 2 ECHR by non-State

²⁶⁸ ECtHR and Council of Europe, 'Key Theme - Article 2 Domestic Violence', 4.

²⁶⁹ ECtHR, *Kontrová v. Slovakia* paragraph 54.

²⁷⁰ McQuigg, 'Domestic Abuse and Article 2 of the European Convention on Human Rights: Applying the Grand Chamber Judgment in *Kurt v. Austria*', 567–68.

²⁷¹ McQuigg, 567.

²⁷² Ebert and Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems', 345.

²⁷³ ECtHR, *Osman v. The United Kingdom*. See also Chapter 3.2.1.

²⁷⁴ Ebert and Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems', 345.

²⁷⁵ Ebert and Sijniensky, 347.

²⁷⁶ McQuigg, 'Domestic Abuse and Article 2 of the European Convention on Human Rights: Applying the Grand Chamber Judgment in *Kurt v. Austria*', 565.

actors.²⁷⁷ The Court spent over a decade adapting the Osman test from its traditional form to the complexities inherent in domestic violence situations. In 2021, the Grand Chamber developed a more coherent doctrine of risk prevention regarding domestic violence, emphasising that the duty to prevent must be assessed with due consideration of this particular context.²⁷⁸

4.2 Critical Examination of the Osman Test through Kurt v. Austria

As established in the previous chapter, the Grand Chamber of the ECtHR found no violation of Art 2 ECHR in the case of *Kurt v. Austria*. In a highly divisive ten to seven decision, the majority of the Grand Chamber rejected the applicant's claim, ruling that the authorities had not failed to protect her son's life from his violent father.²⁷⁹ The Grand Chamber thus upheld the Chamber's assessment, denying a real and imminent danger to the child's life at the time.²⁸⁰

Contrary to the Grand Chamber, the Chamber unanimously concludes that the Austrian authorities have complied with their obligation under Art 2 ECHR.²⁸¹ After recalling the general principles in the context of domestic violence, the Chamber applies the Osman test to the facts of the case. It finds that the Austrian authorities had reacted promptly to the applicant's allegations of domestic violence in both years, 2010 and 2012, by issuing a barring order against the perpetrator E. Prior to assessing whether the risk posed by E would have required more severe measures than a barring order in 2012, the Court emphasises that the case must be assessed based on the information the authorities had at the time, without the benefit of hindsight.²⁸² At the time, the authorities knew about E's history of violence which included a previous conviction for causing bodily harm and threatening his family. The allegations of the applicant, coupled with her injuries, strongly indicated that E had relapsed. However, the Court notes that the applicant accused her husband of raping her, even though she could not demonstrate any physical injuries as evidence. In relation to the allegation of rape, the Court further emphasises that the applicant reported the crime three days after it

²⁷⁷ Ebert and Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems', 343.

²⁷⁸ Weinberger, 'Kurt v Austria'.

²⁷⁹ See Chapter 3.2.5.

²⁸⁰ Weinberger, 'Kurt v Austria'.

²⁸¹ ECtHR, *Kurt v. Austria* paragraph 80.

²⁸² ECtHR, paragraphs 67–69.

occurred. During this period, she remained in the common apartment. Furthermore, there were no indications for the police that E would pose an immediate threat to anyone. As the applicant never mentioned the possession of a firearm or other weapons, there was also no specific risk assumed by the police. The perpetrator had always behaved in a calm manner towards the police and his violent assaults had been confined to the family home.²⁸³ His violent threats against his wife and children are considered by the Court to be partly ambiguous and not decisive for an imminent danger, as they “*were issued on a daily basis over a period of two months without being acted upon.*”²⁸⁴

Prior to concluding, the Chamber dedicates an entire paragraph to the applicant’s apparent failure of taking prompt action against her husband. Regarding the allegation of rape, the applicant remained in the common apartment for three days before seeking authorities’ assistance. According to the Chamber, there were no evident reasons that would justify her delayed report. Furthermore, the applicant is criticised for not seeking police protection earlier, suggesting she may not have perceived an immediate danger to her children.²⁸⁵ The Chamber therefore concluded unanimously that the Austrian authorities could not have been aware of the real and immediate risk to her son’s life.²⁸⁶

In September 2019, the applicant requested that her case be referred to the Grand Chamber of the ECtHR, which subsequently accepted the request.²⁸⁷ The Grand Chamber endorsed the Chamber’s analysis regarding the immediate reaction to the allegations of domestic violence.²⁸⁸ With regard to the quality of the risk assessment, the Grand Chamber notes that the Austrian authorities considered a number of key factors in the context of domestic violence, including the history of violence, the perpetrator’s unemployment and tendency to trivialise violence, as well as the couple’s divorce. However, the Court did not comment on these factors that increase the vulnerability of the victims.²⁸⁹ Although the Court emphasises the need to take death threats seriously in this context and the need to assess their credibility, it merely states that E’s death threats were all directed at the applicant and not at the

²⁸³ ECtHR, paragraph 70.

²⁸⁴ ECtHR, paragraph 72.

²⁸⁵ ECtHR, paragraph 79.

²⁸⁶ ECtHR, paragraph 80.

²⁸⁷ ECtHR, Kurt v. Austria [GC] paragraph 6.

²⁸⁸ ECtHR, paragraph 192.

²⁸⁹ ECtHR, paragraph 198.

children.²⁹⁰ For the same reason, the Court does not consider it relevant that no separate risk assessment was conducted in relation to the children. Since the applicant was the main target of E's violence, a separate risk assessment would not have affected the outcome. It was sufficient for the Court that the children were reported as victims by the police, but not included in their list of endangered persons which was sent to the prosecutor. The barring and protection order against E provided the children with the necessary and sufficient protection from the unlawful behaviour of their father. Since the applicant never requested a complete ban of contact between her children and their father, the Court assumes that she did not consider the level of threat to be high enough to warrant such action.²⁹¹

Finally, the Grand Chamber emphasises the importance placed by the Austrian authorities on E's calm behaviour towards the police. While this does not constitute a determining factor in the risk assessment, the Court does not consider that this factor alone undermines the conclusion that there was no apparent lethal risk to the children at the time.²⁹² Consequently, the Court concludes that the obligation to take preventive operational measures was not triggered, as the risk to the child's life was not real and immediate.²⁹³

While the Grand Chamber judgement of the Court has clarified essential principles regarding domestic violence, the application of these general principles to the specific case seems to lack sensitivity to the particularities of domestic violence. This appears particularly contradictory in light of the Court's own remarks regarding the necessity of a context-sensitive risk assessment. Prior to applying the general considerations to the case at hand, the Court emphasises that in cases of domestic violence, all relevant factors must be taken into account to effectively determine the risk to all potential victims and the necessity of specific measures. The Court further stresses the particular vulnerability of children but fails to consider and address this important factor in the merits of the case. Additionally, while the Strasbourg Court refers to the submissions of GREVIO, which intervened as a third party, it fails to recognise the inadequate risk assessment in the present case. With regard to the determination of a violation of Art 2 ECHR in its substantive limb, it appears that the Court is more inclined to find a violation when the individual steps of the Osman test have clearly not been followed. Measures such as the authorities' response to allegations of domestic violence,

²⁹⁰ ECtHR, paragraph 200.

²⁹¹ ECtHR, Kurt v. Austria [GC] paragraphs 205–206.

²⁹² ECtHR, paragraph 208.

²⁹³ ECtHR, paragraph 211.

the provision of risk assessment tools, and the implementation of protective measures for victims could be relevant. However, in the case of *Kurt*, the Court appears to have difficulty establishing a violation when the State's failure is not immediately apparent but only becomes evident in the context of domestic violence. This discrepancy between the Court's general principles and their application in the case of *Kurt* raises questions about the consistency and effectiveness of the Osman test as legal framework for the protection of victims of domestic violence.²⁹⁴

4.2.1 Context Sensitive Assessment of the Osman Test

The Osman test requires State authorities to determine whether there exists a real and immediate risk to an individual's life from the criminal acts of a non-State actor. In cases of domestic violence, the authorities need to conduct this evaluation with special consideration of the specific context of intra-familial harm. In *Talpis v. Italy*, the Court already established that this entails taking into account the consecutive cycles of violence within the family unit.²⁹⁵ In the present case, the Grand Chamber additionally observed that domestic violence cases frequently follow a pattern. Over time, the assaults become more frequent, more intense and more dangerous for the victim. The risk of further (potentially lethal) violence also increases in cases where the perpetrator has a history of violence. Given the well-documented dynamics of domestic violence, it is reasonable to assume that a perpetrator's behaviour becomes more predictable as the violence escalates.²⁹⁶ It is therefore essential that authorities consider this knowledge and extensive research when assessing the immediacy of the risk.²⁹⁷

In the present case, the Austrian authorities were aware of the ongoing domestic violence perpetrated by E against his children.²⁹⁸ The applicant and the children themselves informed the police that the family's father regularly slapped them.²⁹⁹ One incident involved A sustaining a haematoma on his face as a result of a violent outburst by his father. The applicant informed the police that they were afraid of him.³⁰⁰ The situation deteriorated

²⁹⁴ Sosa, 'Kurt t. Oostenrijk (EHRM, 62903/15) – Accounting for the Particular Context of Domestic Violence', para. 22.

²⁹⁵ ECtHR, *Talpis v. Italy* paragraph 122.

²⁹⁶ ECtHR, *Kurt v. Austria* [GC] paragraph 175.

²⁹⁷ Sosa, 'Kurt t. Oostenrijk (EHRM, 62903/15) – Accounting for the Particular Context of Domestic Violence', para. 15.

²⁹⁸ ECtHR, *Kurt v. Austria* [GC] paragraph 27.

²⁹⁹ ECtHR, paragraph 23.

³⁰⁰ ECtHR, paragraph 20.

further in March 2012 when the perpetrator started to utter deadly threats towards the applicant. On a daily basis, he was threatening to kill the applicant, but also to kill the children in front of her.³⁰¹ However, the Grand Chamber downplayed the seriousness of these deadly threats on the simple ground that children were not the primary targets of these threats.³⁰² The Chamber even goes step further and emphasises that these threats were not acted upon over a period of two months. The Court therefore concludes that there was no immediate risk for the son's life outside the family home.³⁰³

In light of the previously established key principles of domestic violence, the reasoning of the ECtHR is particularly worrisome.³⁰⁴ Instead of taking due account of the particular context of domestic violence, the Court trivialises the danger posed by the perpetrator and completely disregards the consecutive cycle of domestic violence, which the children suffered from for over two years. In his concurring opinion to the Chamber's judgment, Judge Hüseyinov argues that the Court has thus "*overlooked the peculiarity of domestic violence as a distinctive social phenomenon.*"³⁰⁵ Hüseyinov expresses reservations about the applicability of the Osman test in cases of domestic violence resulting in fatalities.³⁰⁶ According to him, the Court needs to move away from an incident-based understanding of domestic violence, since it is widely acknowledged that this social phenomenon constitutes a persistent pattern of intimidation and abuse. Consequently, State authorities are obliged to respond promptly and effectively to every instance of domestic violence, and to take all necessary measures to prevent such incidents from escalating. This implies that the obligation to prevent harm and protect individuals arises when there is a present risk to life, even if the danger is not immediate. According to Hüseyinov, the State's duty to safeguard life in domestic violence cases can thus be breached even when the threat to life is not imminent.³⁰⁷

While the Court continuously evolves the legal framework to better protect victims of domestic violence, it has not yet undertaken a comprehensive revision of the Osman test. Instead of revising the test to systematically incorporate the specific needs and dynamics of domestic violence cases, the Court has opted to interpret the existing criteria, such as the

³⁰¹ ECtHR, Kurt v. Austria [GC] paragraph 19.

³⁰² ECtHR, paragraph 206.

³⁰³ ECtHR, Kurt v. Austria paragraph 72.

³⁰⁴ Weinberger, 'Kurt v Austria'.

³⁰⁵ ECtHR, Kurt v. Austria Concurring Opinion of Judge Hüseyinov, para 1.

³⁰⁶ ECtHR Concurring Opinion of Judge Hüseyinov, para 3.

³⁰⁷ ECtHR Concurring Opinion of Judge Hüseyinov, para 4.

immediacy criterion, in a more flexible manner.³⁰⁸ As can be seen from the *Kurt* case, this approach has led to significant disagreements among the judges and inconsistency, as different interpretations can result in varying levels of protection and accountability.³⁰⁹ However, this does not mean that the *Osman* test should be entirely abandoned in domestic abuse cases. Rather, it would be more constructive to abolish the immediacy criterion.³¹⁰

The immediacy criterion is incompatible with the nature of domestic violence, as it fails to recognise its particular characteristics. Domestic violence has constitutive elements that are not present in other forms of harm and thus requires to be distinguished from other crimes in society.³¹¹ This form of violence is marked by its systemic nature and predominantly harms specific groups in society, namely women and children.³¹² According to Meyersfeld, systemic intimate violence is characterised by the infliction of serious physical or emotional harm or the threat of such harm, and results in a continuum of violence rather than a single incident.³¹³ This form of violence is predominantly a manifestation of male violence against women within intimate relationships and occurs in societies where the State has failed to eliminate such violence.³¹⁴ Victims often belong to socially discriminated or inherently vulnerable groups, such as children. Taking into account the specific nature of domestic violence therefore means recognising the notion of women's inferiority and the heightened risks for children.³¹⁵ Although the ECtHR formally recognises the latter as particularly vulnerable persons entitled to State protection, it does not take them sufficiently into account in the merits of the case.³¹⁶

Domestic violence manifests itself in ongoing cycles of violence, involving physical, psychological, emotional and/or sexual harm.³¹⁷ As the psychologist and pioneer in the field of domestic violence Walker already established in 1979, one cycle can be further divided into three distinct phases.³¹⁸ The first phase is called 'accumulation of tension' and describes the period of threats and verbal aggression by the perpetrator. In this phase, emotional tension

³⁰⁸ ECtHR, *Kurt v. Austria* [GC] paragraph 176.

³⁰⁹ Weinberger, 'Kurt v Austria'.

³¹⁰ ECtHR, *Kurt v. Austria* Concurring Opinion of Judge Hüseynov, para 4.

³¹¹ Meyersfeld and Koh, *Domestic Violence and International Law*, 108.

³¹² Mujuzi, 'Preventing and Combating Domestic Violence in Europe: The Jurisprudence of the European Court of Human Rights', 166–67.

³¹³ Meyersfeld and Koh, *Domestic Violence and International Law*, 111.

³¹⁴ Meyersfeld and Koh, 111.

³¹⁵ GREVIO, 'Third Party Intervention - Application No. 62903/15 Kurt v. Austria', 3.

³¹⁶ ECtHR, *Kurt v. Austria* [GC] paragraph 163.

³¹⁷ Sharma and Schroff, 'Domestic Violence: Child Abuse and Elder Abuse', 75.

³¹⁸ Walker, *The Battered Woman*, 55–70.

builds to a high level.³¹⁹ The second phase is defined by the most significant outburst of violence. It is therefore called ‘explosion’ or simply ‘violent attack’. Following the occurrence of maltreatment, the ‘honeymoon’ phase begins, during which the perpetrator expresses regret, asks for forgiveness and promises not to repeat the violence. This phase involves the reconciliation between the offender and the victim.³²⁰ In most cases, this phase is also the reason for the withdrawal of complaints by the victim, as can be seen from the *Kurt v. Austria* case. The specific circumstances determine the duration of each cycle of violence and the likelihood of a separation.³²¹ Overall, these recurring cycles of violence are characterised by an increase in intensity and danger over time with a tendency to escalate. Hence, if the victim is subjected to violence over an extended period of time, it is important to classify these episodes of violence as systemic intimate violence, regardless of their severity.³²² Even if the episodes of violence may not appear alarming or severe individually, they create a persistent environment of fear and control for the victim. The severity of violence results from the repetition and the frequency of the harm.³²³ In this specific context, it is therefore necessary to consider the notion of a continuum of harm when assessing the threat to life. The scope and the level of violence cannot be determined from a single incident.³²⁴

Due to the cyclical nature of abusive relationships, the decision to leave an abusive relationship should not be seen as an isolated event but as a process.³²⁵ In most cases of domestic violence, women return to the abusive relationship at least once before ultimately deciding to separate or divorce.³²⁶ Often women fear retaliation against them or their children because of the power and control exercised by the perpetrator. Depending on the circumstances, this reluctance may also be due to economic dependency or lack of support services.³²⁷ Social expectations about the welfare of children and the fear of losing custody are other factors that may cause second thoughts.³²⁸ In general, the process is characterised by fear, blame, denial and suffering on the part of the victim.³²⁹ Unfortunately, even if the victim chooses to divorce, this does not always guarantee safety. Research shows that filing for

³¹⁹ Sangeetha et al., ‘Strategic Analysis of Intimate Partner Violence (IPV) and Cycle of Violence in the Autobiographical Text –When I Hit You’, 4–5.

³²⁰ Sangeetha et al., 5.

³²¹ GREVIO, ‘Third Party Intervention - Application No. 62903/15 Kurt v. Austria’, 3.

³²² Meyersfeld and Koh, *Domestic Violence and International Law*, 119.

³²³ Meyersfeld and Koh, 118–19.

³²⁴ Meyersfeld and Koh, 120.

³²⁵ Organisation Mondiale de la Santé, *Rapport Mondial sur la Violence et la Santé*, 107.

³²⁶ GREVIO, ‘Third Party Intervention - Application No. 62903/15 Kurt v. Austria’, 3.

³²⁷ Organisation Mondiale de la Santé, *Rapport Mondial sur la Violence et la Santé*, 107.

³²⁸ Women’s Aid, ‘Why Don’t Women Leave?’.

³²⁹ GREVIO, ‘Third Party Intervention - Application No. 62903/15 Kurt v. Austria’, 3.

divorce or separation often leads to an escalation of domestic violence, with serious consequences for women and children.³³⁰ For the same reasons, victims often do not immediately report incidents of violence to the police. The authorities are usually contacted at the very end of the relationship, after severe violence has occurred and the victim is in potential danger of death.³³¹ In the *Kurt* case, the Austrian authorities failed to recognise this specificity of domestic violence and blamed the victim for not seeking protection immediately after the incidents.³³²

In light of the aforementioned reasons, it is crucial for State authorities to understand the nature and dynamics of domestic violence. In order to protect victims effectively and prevent further violence by perpetrators, it is crucial for authorities to take into account the distinctly cyclical nature of domestic violence.³³³ However, it is important to note that this distinction between domestic violence and other crimes should not be interpreted as a qualitative hierarchy between harmful practices.³³⁴ Rather, it should point out the necessity to revise the Osman test criteria. As Judge Pinto de Albuquerque rightfully points out in his concurring opinion to the case *Valiuliené v. Lithuania*, “at the stage of an ‘immediate risk’ to the victim it is often too late for the State to intervene. In addition, the recurrence and escalation inherent in most cases of domestic violence makes it somehow artificial, even deleterious, to require an immediacy of the risk. Even though the risk might not be imminent, it is already a serious risk when it is present.”³³⁵ Judge Pinto de Albuquerque therefore considers that the inherent nature of domestic violence creates a substantial possibility that the situation could escalate at any time.³³⁶ In his separate opinion to the case of *Volodina v. Russia*, the Judge further notes that the Osman test fails to achieve its purpose if interpreted literally.³³⁷ The concept of a ‘real and immediate risk’ in the context of domestic violence implies that the perpetrator of violence is in close proximity to the victim and about to strike. If this test was applied as such, two issues would arise: Protective actions by the State would be too late in any case and the State would have a valid reason for not acting promptly, as it is unrealistic to expect constant

³³⁰ Organisation Mondiale de la Santé, *Rapport Mondial sur la Violence et la Santé*, 107.

³³¹ GREVIO, ‘Third Party Intervention - Application No. 62903/15 Kurt v. Austria’, 4.

³³² ECtHR, *Kurt v. Austria* [GC] paragraph 206.

³³³ GREVIO, ‘Third Party Intervention - Application No. 62903/15 Kurt v. Austria’, 4.

³³⁴ Meyersfeld and Koh, *Domestic Violence and International Law*, 110.

³³⁵ ECtHR, *Valiuliené v. Lithuania* Concurring Opinion of Judge Pinto de Albuquerque, 31.

³³⁶ McQuigg, ‘Kurt v Austria: Applying the Osman Test to Cases of Domestic Violence’, 14.

³³⁷ ECtHR, *Volodina v. Russia* Separate Opinion of Judge Pinto de Albuquerque, para 12.

presence of a state agent to intervene. Hence, the criterion of ‘immediacy’ of the Osman test is not appropriate for cases of domestic violence.³³⁸

It is arguable that the ECtHR would have found a violation of Art 2 ECHR in the present *Kurt* case, if the amended test was applied.³³⁹ There are several aspects of the Court’s reasoning that are questionable in the specific context. In May 2012, the applicant reported her husband’s violent attacks and death threats against her and her children to the police.³⁴⁰ By this time, the police already knew that E had been convicted for bodily harm in the past and already received a protection order in 2010.³⁴¹ The complainant explicitly stated that the situation had escalated since she filed for divorce and E’s gambling addiction had resumed.³⁴² Given the dynamics of this particular form of violence, the police must have known that filing for divorce usually increases the risk of further (potentially intensified) violence. By the time of the complaint at the latest, the authorities were aware that these episodes of violence were not isolated incidents, but part of consecutive cycles of violence that were now increasing in frequency and severity.³⁴³ Furthermore, the police was further aware that the perpetrator’s violent attacks and death threats directly affected the children. In light of these facts, there is no doubt that a real risk to the lives of the children existed at the time, thus satisfying the knowledge criteria of the Osman test.³⁴⁴

4.2.2 Lack of Recognising Children's Vulnerability

In the context of domestic violence, the risk assessment constitutes a fundamental element of the Osman test.³⁴⁵ The primary purpose of conducting a risk assessment is to identify potential risks which trigger the State’s obligation to take preventive operational measures to protect the victim from further violence.³⁴⁶ In the present landmark case of *Kurt*, the Grand Chamber sets out clear guidelines which require State authorities to undertake an autonomous, proactive and comprehensive risk assessment.³⁴⁷ Regarding cases “*where*

³³⁸ ECtHR, Separate Opinion of Judge Pinto de Albuquerque, para 12.

³³⁹ McQuigg, ‘Kurt v Austria: Applying the Osman Test to Cases of Domestic Violence’, 15.

³⁴⁰ ECtHR, *Kurt v. Austria* [GC] paragraph 16.

³⁴¹ ECtHR, paragraphs 12–15.

³⁴² ECtHR, paragraphs 19–20.

³⁴³ McQuigg, ‘Kurt v Austria: Applying the Osman Test to Cases of Domestic Violence’, 15–16.

³⁴⁴ McQuigg, 15–16.

³⁴⁵ ECtHR and Council of Europe, ‘Key Theme - Article 2 Domestic Violence’, 1.

³⁴⁶ Sosa, ‘Kurt t. Oostenrijk (EHRM, 62903/15) – Accounting for the Particular Context of Domestic Violence’, para. 15.

³⁴⁷ ECtHR, *Kurt v. Austria* [GC] paragraph 168.

several persons are affected by domestic violence, be it directly or indirectly, any risk assessment must be apt to systematically identify and address all the potential victims".³⁴⁸ If this process reveals different levels of risk among those affected, the respective State institutions need to adjust their measures accordingly to ensure appropriate protection for each victim.³⁴⁹

Despite these clear directives, the case of *Kurt v. Austria* reveals a critical failure to adhere to these principles.³⁵⁰ The Austrian authorities neglected to conduct an adequate risk assessment concerning the children involved, although they were directly and indirectly affected by the protracted nature of E's abusive and threatening behaviour.³⁵¹ The Court's acceptance of this omission and its assessment that the children were sufficiently protected in the domestic sphere is concerning. It disregards the particular vulnerability of children in this specific context and contradicts the principles of comprehensive risk assessment. Furthermore, the fact that the children were not considered as being at risk, but only as victims in the police report, highlights another critical omission in recognising their vulnerability and ensuring their protection.³⁵²

These deficiencies in the Court's reasoning ultimately led to the dissent of seven judges who raised significant criticism and concern regarding the decision. Due to several flaws in the risk assessment procedure, the dissenters think that the State authorities were unable to determine whether a real and immediate risk to the child's life existed at the relevant time.³⁵³ Relevant risk factors, such as E's gambling addiction, his economic dependence on the applicant and his previous mental health problems were not taken into account by the authorities.³⁵⁴ Furthermore, the lack of a lethality risk assessment in relation to the children who were directly affected by the domestic violence, was strongly criticised by the dissenters. The majority of the Grand Chamber and the Austrian authorities did not identify the sudden prospect of separation as an alarming risk factor for violent attacks against the children,

³⁴⁸ ECtHR, paragraph 173.

³⁴⁹ Sosa, 'Kurt t. Oostenrijk (EHRM, 62903/15) – Accounting for the Particular Context of Domestic Violence', para. 15.

³⁵⁰ McQuigg, 'Kurt v Austria: Applying the Osman Test to Cases of Domestic Violence', 15.

³⁵¹ McQuigg, 'Domestic Abuse and Article 2 of the European Convention on Human Rights: Applying the Grand Chamber Judgment in Kurt v. Austria', 570–71.

³⁵² McQuigg, 'Kurt v Austria: Applying the Osman Test to Cases of Domestic Violence', 15–16.

³⁵³ ECtHR, *Kurt v. Austria* [GC] Joint Dissenting Opinion of Judges Turković, Lemmens, Harutyunyan, Elósegui, Felici, Pavli and Yüksel, para 8.

³⁵⁴ ECtHR Joint Dissenting Opinion of Judges Turković, Lemmens, Harutyunyan, Elósegui, Felici, Pavli and Yüksel, para 11.

despite of the well-known fact that this regularly constitutes the ultimate form of punishment for the ex-partner.³⁵⁵ At the very least, the authorities should have realised that the violent attacks and threats against the applicant implied a higher risk of harm for the children as well.³⁵⁶ An appropriate and comprehensive risk assessment of the lethal risk to the children would therefore have been inevitable.³⁵⁷

With regard to the substantive quality of the risk assessment, the dissenting judges have highlighted that relevant risk factors were not duly taken into account by the State. The pattern of escalating violence, the death threats against the children and the attempted strangulation were significant triggers of domestic homicide.³⁵⁸ Instead of investigating the credibility of the threats, the authorities downplayed their seriousness and ignored the deterioration of the family unit over recent years.³⁵⁹ The fact that the complainant's credibility was questioned because she did not report the incidents immediately to the police demonstrates that neither the authorities nor the Court fully understood the dynamics of domestic violence and its psychological components. This can also be seen from the highly questionable assumption that the lack of aggressiveness towards police and strangers was indicative of the absence of domestic violence against spouses and children.³⁶⁰ Furthermore, the Court placed undue emphasis on the fact that the perpetrator had never harmed his wife or children outside the domestic setting. This assumption fails to recognise that violent behaviour is dependent on the individual and not solely on certain locations. As a result, the protective measures taken were based on this critical misjudgment.³⁶¹ There were sufficient lethality factors discernible in relation to the children's life that have triggered the State's duty to take preventive measures to protect them from their mentally unstable and estranged father.³⁶²

³⁵⁵ ECtHR Joint Dissenting Opinion of Judges Turković, Lemmens, Harutyunyan, Elósegui, Felici, Pavli and Yüksel, para 13.

³⁵⁶ ECtHR Joint Dissenting Opinion of Judges Turković, Lemmens, Harutyunyan, Elósegui, Felici, Pavli and Yüksel, para 14.

³⁵⁷ ECtHR Joint Dissenting Opinion of Judges Turković, Lemmens, Harutyunyan, Elósegui, Felici, Pavli and Yüksel, para 12.

³⁵⁸ ECtHR Joint Dissenting Opinion of Judges Turković, Lemmens, Harutyunyan, Elósegui, Felici, Pavli and Yüksel, para 18.

³⁵⁹ ECtHR Joint Dissenting Opinion of Judges Turković, Lemmens, Harutyunyan, Elósegui, Felici, Pavli and Yüksel, para 21.

³⁶⁰ ECtHR, Kurt v. Austria [GC] paragraph 208.

³⁶¹ ECtHR, Kurt v. Austria [GC] Joint Dissenting Opinion of Judges Turković, Lemmens, Harutyunyan, Elósegui, Felici, Pavli and Yüksel, para 25.

³⁶² ECtHR Joint Dissenting Opinion of Judges Turković, Lemmens, Harutyunyan, Elósegui, Felici, Pavli and Yüksel, para 28.

It can be concluded that the judgment does not implement the general principles laid out in relation to risk assessment and the vulnerability of children in the context of domestic violence. It is well established through studies and statistics that domestic violence poses a significant risk to children.³⁶³ Those who perpetrate violence against their female partners often extend this violence to their children, who then suffer direct abuse or are traumatised by witnessing violence.³⁶⁴ Domestic violence must therefore be seen as a dual form of abuse, a combined attack on women and children.³⁶⁵ Even after an abusive relationship ends, children remain at risk, as abusers may direct their aggression towards them, using neglect, psychological and physical violence as forms of retaliation.³⁶⁶ Furthermore, research indicates that the warning signs preceding homicides of both adults and children within domestic violence situations are often similar.³⁶⁷ It is therefore essential to gain a full understanding of these indicators and to conduct comprehensive risk assessments, which must be specifically tailored to children.³⁶⁸

By virtue of being a child, children are particularly vulnerable in the context of domestic violence.³⁶⁹ Notwithstanding the inherent challenges adults face in seeking help and safety in this context, children face even greater barriers due to their age and dependency. Children generally have fewer psychological and physical coping skills than adults, rendering them especially vulnerable and in need of heightened protection.³⁷⁰ Unlike adults, the majority of children cannot access shelters or legal representation on their own. The minors rely on adults to facilitate these critical services.³⁷¹ Given that the crime is mostly hidden from the society, this dependency on third parties further complicates their access to protection. The inherent nature of these complex circumstances mean that children often suffer in silence, unable to articulate their needs or seek refuge on their own.³⁷²

³⁶³ Saunders, 'Twenty-Nine Child Homicides: Lessons Still to Be Learnt on Domestic Violence and Child Protection', 8.

³⁶⁴ GREVIO, 'Third Party Intervention - Application No. 62903/15 Kurt v. Austria', 4.

³⁶⁵ Morrison and Houghton, 'Children's Human Rights in the Contexts of Domestic Abuse and COVID-19', 1355.

³⁶⁶ Romito and Crisma, 'Les Violences Masculines Occultées', 33.

³⁶⁷ Jaffe et al., 'Children Killed in the Context of Domestic Violence: International Perspectives from Death Review Committees'.

³⁶⁸ GREVIO, 'Third Party Intervention - Application No. 62903/15 Kurt v. Austria', 4.

³⁶⁹ Morrison and Houghton, 'Children's Human Rights in the Contexts of Domestic Abuse and COVID-19', 1355.

³⁷⁰ Obreja, 'Intimate Partner Violence in Childhood', 108.

³⁷¹ Morrison and Houghton, 'Children's Human Rights in the Contexts of Domestic Abuse and COVID-19', 1355.

³⁷² Save the Children, 'Children Witnesses of Gender Violence in the Domestic Context', 22.

The aforementioned facts provide compelling evidence in favour of the abolition of the immediacy criterion of the Osman test. The particular vulnerability of children and the complexity of domestic violence underline the need for proactive measures to identify and protect children at risk of domestic violence. The rigid application of the immediacy criterion fails to consider the sustained and cumulative impact of domestic violence on children.³⁷³ As established in the beginning of this thesis, the impact of such experiences can be profound and long-lasting, depending on various factors.³⁷⁴ The latter include the form, intensity and frequency of the violence, as well as the age, gender, level of exposure and development of the child.³⁷⁵ Children who are directly or indirectly exposed to violence on a regular basis are at increased risk of a range of emotional, behavioural and psychological disorders, including anxiety, depression, traumata, low self-esteem, disobedience and physical health problems.³⁷⁶ In addition, the power dynamics in abusive households often create an environment where the child feels powerless and trapped.³⁷⁷ Without proactive and preventive measures, States further risk perpetuating cycles of violence for future generations. The probability of children becoming either perpetrators or victims themselves is highly dependent on whether they experienced domestic abuse in their childhood.³⁷⁸

Additionally, the immediacy criterion of the Osman test poses a significant challenge to the effective protection of children's rights as set out in the CRC. This conflict becomes apparent when the implications of the criterion are examined in the context of the norms of the CRC. As noted in the second chapter of this thesis, Art 19 CRC stipulates that States must take all appropriate measures to protect children from all forms of violence, including domestic violence.³⁷⁹ There is no threshold of immediacy or severity in cases of intra-familial harm against children. Any instance of such violence thus requires immediate action of State authorities to prevent further harm.³⁸⁰ Art 19 CRC further constitutes a due diligence State obligation that requires both anticipatory and risk mitigation actions. The due diligence standard obliges States to actively engage in the protection of individual rights, thereby increasing the State's responsibility to prevent violations between private individuals.³⁸¹ Any

³⁷³ McQuigg, 'Kurt v Austria: Applying the Osman Test to Cases of Domestic Violence', 26.

³⁷⁴ See Chapter 2.2.

³⁷⁵ Save the Children, 'Children Witnesses of Gender Violence in the Domestic Context', 25.

³⁷⁶ Organisation Mondiale de la Santé, *Rapport Mondial sur la Violence et la Santé*, 115.

³⁷⁷ Mahfooz, 'Psychological Consequences of Domestic Violence on Children', 430.

³⁷⁸ Harrison, 'Statistically Speaking: The Long-Term Effects of Domestic Violence on Children', 64.

³⁷⁹ Pinheiro, *World Report on Violence against Children*, 33.

³⁸⁰ Grans, 'The Istanbul Convention and the Positive Obligation to Prevent Violence', 142.

³⁸¹ Obreja, 'Intimate Partner Violence in Childhood', 103.

sign of actual maltreatment must be identified in order to enable appropriate intervention as early as possible.³⁸² This implies that States have a duty to act even in the absence of an immediate threat to prevent long-term harm and to fulfil their obligation under Art 19 CRC.

In cases of domestic violence, the vulnerability of children is a primary concern due to their experiences of physical, emotional and psychological harm.³⁸³ Their developmental needs and well-being are profoundly affected by the direct and indirect exposure to violence.³⁸⁴ Recognition of this vulnerability underscores the urgency of intervention and support to mitigate immediate harm and address their ongoing needs.³⁸⁵ At the same time, it is of paramount importance to recognise children as autonomous rights holders, emphasising their inherent dignity and entitlement to protection under international human rights law.³⁸⁶ If States treat children merely as objects in need of assistance or passive beneficiaries, their right to be heard in all matters involving them is undermined. State authorities must give due weight to children's views in all decision-making processes affecting them.³⁸⁷ The suggested revision of the Osman test is in accordance with this perspective, as it prioritises the continuous protection of children as right holders, rather than waiting for an immediate threat to materialise.

The argument for abolishing the criterion of imminence is further based on the principle of the best interests of the child, as enshrined in Art 3 CRC. This principle states that in all actions concerning children, their best interests must be a primary consideration.³⁸⁸ Art 3 para 2 CRC emphasises the pivotal role of States regarding the protection of children.³⁸⁹ When applied to cases of child maltreatment in the domestic setting, this principle emphasises the paramount importance of State interventions. Given the far-reaching impact of maltreatment, it is evident that neither witnessing nor experiencing domestic violence would be in the best interests of the child.³⁹⁰ The paramount principle of the CRC involves prioritising the safety, well-being, and development of the child above other competing interests.³⁹¹ By maintaining

³⁸² CRC Committee, 'General Comment No. 13 (2011)', para. 48.

³⁸³ Mujuzi, 'Preventing and Combating Domestic Violence in Europe: The Jurisprudence of the European Court of Human Rights', 167.

³⁸⁴ Pinheiro, *World Report on Violence against Children*, 47.

³⁸⁵ Phillips, 'How to End the Cycle of Domestic Violence', 63.

³⁸⁶ Obreja, 'Intimate Partner Violence in Childhood', 102.

³⁸⁷ CRC Committee, 'General Comment No. 13 (2011)', para. 3.

³⁸⁸ Schmahl, *United Nations Convention on the Rights of the Child*, 71.

³⁸⁹ Schmahl, 83–85.

³⁹⁰ Phillips, 'How to End the Cycle of Domestic Violence', 68.

³⁹¹ CRC Committee, 'General Comment No. 14 (2013)', para. 12.

the immediacy criterion, States run the risk of prioritising reactive responses over proactive measures to protect children from harm. This approach fails to address the preventive aspect of State responsibility and does not align with the child-centred approach mandated by the best interests principle.³⁹² Rather than waiting for an immediate threat to materialise, States should focus on the existence of a ‘present’ risk. Otherwise, the positive duty of authorities to protect children would be triggered too late, leaving them vulnerable to continued harm.³⁹³

4.2.3 *Lack of Due Diligence Compliance*

In the case of *Opuz v. Turkey*, the ECtHR has established for the first time that Art 2 of the Convention requires domestic authorities to exercise due diligence.³⁹⁴ This means that they must take the necessary preventive measures to protect persons whose lives are at risk.³⁹⁵ Several years later, the ECtHR further elaborated on the due diligence requirement in its case of *Taplis v. Italy* by explicitly referring to the relevant provisions in the Istanbul Convention.³⁹⁶ In this case, the Court has emphasised that “*special diligence is required in dealing with domestic violence cases and considers that the specific nature of domestic violence as recognised in the Preamble to the Istanbul Convention [...] must be taken into account in the context of domestic proceedings.*”³⁹⁷ The *Talpis* decision thus set a new benchmark in the Court’s jurisprudence. The Strasbourg Court systematically integrated the due diligence requirement and aligned it closely with the standards set out in the Istanbul Convention.³⁹⁸ This approach has been reinforced in subsequent cases, notably in *Kurt v. Austria*, where the Court not only reaffirmed the need of special diligence,³⁹⁹ but also emphasised it with substantial reference to Chapter I and VI of the Istanbul Convention.⁴⁰⁰

As noted in the second chapter of this thesis,⁴⁰¹ Art 5 para 2 of the Istanbul Convention requires States to exercise due diligence in their obligations to prevent, investigate and punish

³⁹² Obreja, ‘Intimate Partner Violence in Childhood’, 107.

³⁹³ ECtHR, *Volodina v. Russia* Separate Opinion of Judge Pinto de Albuquerque, para 12.

³⁹⁴ ECtHR, *Opuz v. Turkey* paragraph 131.

³⁹⁵ Ollino, ‘State Obligations and Due Diligence’, 141.

³⁹⁶ De Vido, ‘The ECtHR *Talpis v. Italy* Judgment. Challenging the Osman Test through the Council of Europe Istanbul Convention?’, 209–10.

³⁹⁷ ECtHR, *Talpis v. Italy* paragraph 129.

³⁹⁸ De Vido, ‘The Istanbul Convention as an Interpretative Tool at the European and National Levels’, 63.

³⁹⁹ ECtHR, *Kurt v. Austria* [GC] paragraph 166.

⁴⁰⁰ ECtHR, paragraphs 75–85.

⁴⁰¹ See Chapter 2.4.2.

acts of violence committed by non-State actors.⁴⁰² The concept of due diligence in relation to the duty to investigate and prosecute becomes clearer when interpreted in conjunction with other relevant provisions of the Convention.⁴⁰³ As set out in Chapter IV of the Convention, authorities are required to ensure an immediate response to potential risks and to conduct judicial proceedings without undue delay.⁴⁰⁴ Art 50 of the Convention further seeks to ensure that all State authorities respond promptly to any act of violence and provide immediate protection to victims.⁴⁰⁵ The State's obligation to provide immediate protection to individuals from violence entails necessary interventions that may interfere with the private and family life of the victim. In order to avoid inadequate protection or unintended intensification of violence, Art 51 requires the implementation of risk assessment and management strategies to reduce further harm and increase the effectiveness of protection measures.⁴⁰⁶ It specifies that interventions must take into account three critical factors: the risk of lethal consequences, the severity of the situation and the likelihood of repeated violence.⁴⁰⁷

These standards of the Istanbul Convention have been particularly relevant for the ECtHR in assessing whether the threshold of 'imminent danger' was met in the cases at hand. The explicit reference to these provisions in the ECtHR's case law necessitates that the Osman test and the implied due diligence requirement are interpreted in a manner that is consistent with the Istanbul Convention.⁴⁰⁸ State authorities must therefore take into account the particular vulnerability of children. Providing immediate protection to the victims further implies that national authorities have to undertake adequate preventive measures even if the threat to life is not imminent.⁴⁰⁹ The Istanbul Convention's standards for prompt and comprehensive protection thus provide another strong rationale for revising the Osman test.⁴¹⁰ Rather than requiring proof of a real and imminent threat, the focus should be on whether the State knew or should have known of the existence of a real risk, thus eliminating the immediacy criterion in such cases.⁴¹¹

⁴⁰² Ollino, 'State Obligations and Due Diligence', 140.

⁴⁰³ Ollino, 142.

⁴⁰⁴ Niemi, 'General Obligations', 577.

⁴⁰⁵ Niemi, 'Immediate Response, Prevention and Protection', 586.

⁴⁰⁶ CoE, 'Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence', 44.

⁴⁰⁷ Parisi, 'Risk Assessment and Risk Management', 590.

⁴⁰⁸ De Vido, 'The Istanbul Convention as an Interpretative Tool at the European and National Levels', 64.

⁴⁰⁹ McQuigg, 'Kurt v Austria: Applying the Osman Test to Cases of Domestic Violence', 14–15.

⁴¹⁰ De Vido, 'The ECtHR Talpis v. Italy Judgment. Challenging the Osman Test through the Council of Europe Istanbul Convention?', 210.

⁴¹¹ McQuigg, 'Kurt v Austria: Applying the Osman Test to Cases of Domestic Violence', 15.

In its jurisprudence on domestic violence, the ECtHR has not explicitly questioned the Osman test. Nevertheless, it can be argued that the Court has effectively done so, particularly its requirement for immediacy of harm, by integrating provisions from the Istanbul Convention into its case law as relevant international law.⁴¹² This aligns with the view expressed by Judge Hüseyinov who claimed that requiring an imminent risk to life to establish a violation of Art 2 ECHR “*would not be consonant with the scope of the due-diligence obligations of States in the field of preventing and combating domestic violence, particularly in the light of the Council of Europe’s Convention on Preventing and Combating Violence against Women and Domestic Violence*”.⁴¹³ Judge Hüseyinov therefore followed the pioneering position of Judge De Albuquerque, who criticised the immediacy criteria of the Osman test in his concurring opinion to the *Valiulienė* case.⁴¹⁴ According to the Judge, the “*due diligence standard in domestic violence cases is stricter than the classical Osman test, in as much as the duty to act arises for public authorities when the risk is already present, although not imminent.*”⁴¹⁵ The Court’s emphasis on the vulnerability of children who are victims of domestic violence and their entitlement to state protection implies adherence to a stricter standard of protection.⁴¹⁶

In addition to references to the Istanbul Convention, the ECtHR frequently cites decisions and guidelines of the CEDAW Committee.⁴¹⁷ In its case of *Volodina v. Russia*, the Court refers to a specific decision of the Committee which explicitly state that gender-based violence does not always “*require a direct and immediate threat to the life or health of the victim.*”⁴¹⁸ While the majority of the Court has agreed with this approach, it nevertheless continued to apply the Osman test to this specific case. This lack of a consistent approach raises concerns that victims of domestic violence are not adequately protected in a timely manner and that authorities intervene too late to effectively prevent harm.⁴¹⁹ In the view of the Committee, the State authorities should act with due diligence in domestic violence cases, with a particular focus on the best interests of the child and their right to be heard in all decisions made.⁴²⁰ Consequently, by taking into account the relevant international law, the ECtHR appears to advocate for a broader and more proactive approach to protecting victims of domestic

⁴¹² De Vido, ‘The Istanbul Convention as an Interpretative Tool at the European and National Levels’, 65.

⁴¹³ ECtHR, *Kurt v. Austria* Concurring Opinion of Judge Hüseyinov, para 4.

⁴¹⁴ De Vido, ‘The Istanbul Convention as an Interpretative Tool at the European and National Levels’, 65.

⁴¹⁵ ECtHR, *Valiulienė v. Lithuania* Concurring Opinion of Judge Pinto de Albuquerque, 31.

⁴¹⁶ ECtHR, *Kurt v. Austria* [GC] paragraph 163.

⁴¹⁷ ECtHR, paragraphs 91-93; ECtHR, *Volodina v. Russia* paragraphs 51-56; ECtHR, *Talpis v. Italy* paragraphs 56-58.

⁴¹⁸ ECtHR, *Volodina v. Russia* paragraph 56.

⁴¹⁹ ECtHR, *Volodina v. Russia* Separate Opinion of Judge Pinto de Albuquerque, para 12.

⁴²⁰ McQuigg, ‘*Kurt v Austria: Applying the Osman Test to Cases of Domestic Violence*’, 18.

violence, implying the need for the revision of the narrow immediacy requirement imposed by the Osman test.⁴²¹

⁴²¹ De Vido, 'The Istanbul Convention as an Interpretative Tool at the European and National Levels', 65.

5. Conclusion

In the context of safeguarding minors from domestic violence, the jurisprudence of the European Court of Human Rights has undergone a significant evolution, shifting from a narrow perspective on domestic abuse as a private matter to a more proactive stance that acknowledges the State's responsibility to protect individuals, including children, from violence perpetrated by non-State actors.⁴²² This thesis has examined the pivotal role of the ECtHR in expanding the scope of the ECHR to encompass domestic violence, a shift that has profound implications for the protection of minors.

At heart of the Court's jurisprudence on domestic violence lies the *Osman* test, which constitutes the fundamental element in the interpretation of the State's positive obligations under Art 2 ECHR concerning the right to life. This test traditionally evaluates whether the national authorities were aware of, or should have been aware of, a real and immediate risk to the life of an identified individual from the criminal acts of non-State actors and failed to take reasonable measures to avert that risk. Even though this test was not originally conceived for this particular context, the Court applies it rigorously to cases involving domestic abuse, resulting in a range of sub-tests and interpretations.⁴²³ This evolution has not been without flaws, as illustrated in the landmark case of *Kurt v. Austria*. The case underscored the limitations of the *Osman* test, particularly the risk that victims of domestic violence might remain unprotected due to the strict requirement of an immediate threat to life to trigger State action.

This thesis argues that the traditional *Osman* test fails to account for the specific nature of domestic violence and children's vulnerability in its current form. Unlike other types of criminality, domestic violence does not consist of a single incident, but rather constitutes a continuous pattern of intimidation and abuse. It comprises an ongoing cycle of physical, emotional or psychological harm with the tendency to increase in frequency and severity.⁴²⁴ Due to their age and dependency, children are particularly vulnerable and less capable of seeking protection. As direct victims or witnesses of domestic violence, children are at increased risk of suffering from emotional, behavioural and psychological disorders,

⁴²² McQuigg, 'Domestic Violence as a Human Rights Issue: *Rumor v. Italy*', 1009–10.

⁴²³ Ebert and Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems', 344–47.

⁴²⁴ United Nations, 'What Is Domestic Abuse?'

including anxiety, depression, traumata, low self-esteem, disobedience and physical health problems.⁴²⁵

By requiring an immediate threat to life, the Osman test fails to comply with the relevant international law provisions of the CRC and the Istanbul Convention, which are regularly cited in the Court's jurisprudence. These Conventions require State authorities to exercise due diligence in protecting children from domestic violence, emphasising proactive measures even in the absence of an immediate threat to life. Given the unpredictable and escalating nature of domestic violence, it constitutes already a serious risk for children when it is present. It is therefore of the utmost importance to revise the traditional form of the Osman test through the abolition of the immediacy criterion to appropriately protect minors from the (potentially lethal) violence perpetrated by private individuals. This proactive approach takes into account the best interests of the child in this particular context and ensures the alignment with relevant international law.

Ultimately, it is not sufficient for the ECtHR to merely acknowledge the vulnerability of children in domestic violence cases. It is essential to ensure that State authorities provide immediate protection which effectively mitigates the risk of potential lethal harm for minors. Demanding that national law enforcement agencies comprehend the cyclical nature and dynamics of domestic violence and to act in a proactive manner to protect children does not impose an unrealistic burden. Rather, it fulfils a fundamental duty to safeguard the most vulnerable members of society. The right to life must therefore be proactively protected, because:

*“Once life is lost, what does there remain to protect?”*⁴²⁶

⁴²⁵ WHO, ‘Child Maltreatment’.

⁴²⁶ Trechsel, ‘Spotlights on Article 2 ECHR: The Right to Life’, 674.

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