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International Human Rights Commitments to Protect Victims of Domestic Violence: Refugee recognition as the first step for an integrated approach under EU law in Case C-621/21, *Intervyuirasht organ na DAB pri MS (Women victims of domestic violence)*

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1. Introduction

The judgment by the Grand Chamber of the Court of Justice in the *Intervyuirasht organ na DAB pri MS* case has already attracted significant attention for the finding of the Court that women victims of domestic violence can be considered as members of particular social group for the purposes of recognition of refugee status.[1] The decision stands out both for the gender-sensitive interpretation of EU law that extends refugee protection to women victims of domestic violence, but also for the interpretation of EU asylum law in light of the constitutional commitments of the EU and the Member States to international human rights protection under specific international treaties. At times when EU asylum and migration policy is subject to intense criticism, with Member States trying to further curtail access to asylum and undermine the protective elements of the Common European Asylum System, the decision stands out for its human rights oriented outcome and it is undoubtedly important for the development of EU asylum law.[2] The judgment has already guided subsequent findings of the Court on the refugee status of women of Iraqi origin identifying with the values of the EU, while it is also expected to affect future case-law on Afghan women fleeing the Taliban regime.[3] On the latter case, the AG Opinion already issued points to the adoption of a gender-sensitive interpretation of EU asylum law.[4]

At the same time, however, some contentious points can be noted in the fragmented way in which international human rights obligations appear in the Court's case law. In the

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[1] Case C-621/21 *Intervyuirasht organ na DAB pri MS (Women victims of domestic violence),* ECLI:EU:C:2024:47. See G. Kübek and J. Bornemann, 'International Law as a Trailblazer for a Gender-Sensitive Refugee System in the EU. The Court of Justice's ruling in Case C-621/21, Women who are Victims of Domestic Violence' European Law Blogpost 6/2024, 29 January 2024; M. Möschel, 'The EU Court of Justice strengthens women's rights (Case C-621/21 WS)', EU Law Live, 24 January 2024; A. Kompatscher, 'Victims of Gender-Based Violence: Between Hope and Reality, The CJEU's First Application of the Istanbul Convention', Volkerrechtsblog, 11 February 2024; T.E Lagrand, 'Beyond Opuz v. Turkey: The CJEU's Judgment in WS and the Refugee Law Consequences of the State's Failure to Protect Victims of Domestic Violence', Strasbourg Observers, 20 February 2024.

[2] See the recently agreed revision of secondary law under the Asylum and Migration Pact presented as historic in Directorate General for Migration and Home Affairs, Historic agreement reached today by the European Parliament and Council on the Pact on Migration and Asylum, News Article, 20 December 2023. Steve Peers has analyzed the legislative instruments which form part of the Pact in 6 parts in EU Law Analysis Blog and has discussed their effects for migrants' rights.

[3] See C-646/21 *Staatssecretaris van Justitie en Veiligheid (Persons identifying with the values of the Union),* EU:C:2024:487 on Iraqi women and C-456/21, *Staatssecretaris van Justitie en Veiligheid* on young Afghan women which was withdrawn by Order of the President of the Court of 26 October 2021 [2021] OJ C 391.See also pending Joined Cases C-608/22 and C-609/22 *Bundesamt für Fremdenwesen und Asyl and Others (Femmes afghanes*) on women fleeing the Taliban regime with the preliminary questions focusing on the interpretation of acts of persecution under Article 9 of the Qualification Directive where the

[4] Opinion of Advocate General Richard de la Tour in Joined Cases C-608/22 and C-609/22 *Bundesamt für Fremdenwesen und Asyl and Others (Femmes afghanes*), EU:C:2023:856.

present judgment the Court underlined respect for international human rights obligations as an inherent part of the EU asylum system, thereby extending the protection offered to women victims of domestic violence. However, when similar interests were at stake in the past as regards residence rights for women victims of domestic violence in the area of regular migration, international human rights obligations did not play such a prominent role.[5] In this case note, the facts of the case will be presented in the section that follows, before examining in detail the reasoning of the Court in Section 3. Elements of the Advocate General (AG) opinion will also be briefly discussed in Section 3 on specific points where the AG and the Court followed different approaches. Finally, Section 4 will analyse the finding, it will present its ground-breaking elements and it will put forward some points of criticism before offering a brief conclusion in Section 5.

2. Relevant Facts

The reference for the preliminary ruling delivered by the Court in the *Intervyuirasht organ na DAB pri MS* case was made by the Administrative Court of Sofia and concerned a Turkish woman of Kurdish origin, WS, who sought recognition as a refugee in Bulgaria. WS left Türkiye in 2018 to travel to Bulgaria and then to Germany, where she submitted a first application for international protection, following which Bulgaria agreed to take charge of the request for the purpose of examining her application. WS based her claim for international protection on having been a victim of domestic violence in her country of origin and being at risk of exposure to further violence from her ex-husband, his family as well her biological family in case of return. During the interviews she had with DAB (Darzhavna Agentsia za Bezhantsite), the Bulgarian State Agency for Refugees, WS stated that she was forcibly married at the age of 16 with her husband with whom she had three children. During her marriage, she had suffered acts of domestic violence and had received no help from her biological family who was aware of the situation. She had also been placed in various violence prevention and monitoring centres in Türkiye, where she claimed to not feel safe. Furthermore, she had lodged a complaint against her husband, her biological family and her husband's family reporting episodes of violence. In 2017, she entered in a religious marriage with another person with whom she had a son, and the divorce with her first husband was officially pronounced in 2018 after she had already left the country. In the interviews, WS suggested that she feared for her life if she were to return to Türkiye.

In May 2020, DAB rejected her application considering that she did not fulfil the conditions for being recognized as a refugee. To be considered as a refugee under the Common European Asylum System (CEAS), a third-country national shall be found outside their country of nationality and unwilling or unable to return to it due to well-founded fear of persecution on the basis of their race, religion, nationality, political opinion or membership of a particular social group.[6] Upon examining WS's application, the DAB concluded that the acts of violence she had suffered were not connected to any of the aforementioned grounds of persecution. The next step was to examine whether the applicant fulfilled the conditions for receiving subsidiary protection. This status is regulated by EU asylum law and can be granted in case a person does

[5] See Case C-930/19 *Belgian State (Droit de séjour en cas de violence domestique)*, EU:C:2021:657 discussed in more detail in Section 4.2.

[6] That is race, religion, nationality, political opinion or membership of a particular social group. See Article 1A(2) Convention Relating to the Status of Refugees, UNTS vol. 189, p. 150, 28 July 1951 (Geneva Convention); Article 2(d) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9 transposed in Article 8(1) of the Bulgarian Law on Asylum and Refugees (Zakon za ubezhishteto i bezhantsite).

not qualify as a refugee, but is still facing a real risk of serious harm in case they are returned to their country of origin.[7] In the specific case the national authorities held that the conditions for granting subsidiary protection were not satisfied as the applicant had not suffered acts of persecution neither from the authorities nor from certain groups. WS appealed the decision without success.

Under the CEAS, an applicant can lodge a subsequent application for international protection after a final decision is made on their first application. In such cases, for the application to be considered admissible, new evidence must be presented by the applicant.[8] And indeed WS submitted a subsequent application for international protection in April 2021 where she invoked new evidence relating to her situation and the situation of women victims of domestic violence in Türkiye. In this second application, WS argued that she was the victim of acts of persecution because of her membership in a particular social group. She claimed that she was prosecuted as part of the group of women victims of domestic violence and women who are likely to be victims of honour crimes by non-state actors from which Türkiye cannot protect her. She further stated that in case of return to Türkiye she feared being killed by her ex-husband or becoming the victim of an honour crime or another forced marriage. As new evidence, WS adduced a decision of a Turkish court imposing a five-month custodial sentence on her ex-husband for committing the offence of threatening her, which was suspended, and he was placed on probation due to the absence of previous convictions. In addition, she adduced evidence in relation to gender-based violence crimes in Türkiye and she invoked the withdrawal of Türkiye from the Istanbul Convention in 2021 as a new circumstance.[9] In the alternative, WS suggested that she satisfied the conditions for granting subsidiary protection as a potential return to Türkiye would expose her to a violation of her fundamental rights under Articles 2 and 3 ECHR.

DAB refused to open a new procedure to examine her application stating that there was no new evidence on her personal situation and that Turkish authorities had already assisted her. Even though her second application was rejected as inadmissible, the Administrative Court of Sofia sent a series of preliminary questions to the Court of Justice asking for an interpretation of the substantive conditions for granting international protection under the Qualification Directive as a prerequisite for determining whether WS submitted new evidence or not. The referring court asked a total of five question on different provisions of the Qualification Directive. The first three questions concerned gender-based violence and refugee protection in relation to the interpretation of Article 10(1)(d) of the Qualification Directive. Specifically, the first question focused on the definition of gender-based violence for the purposes of application of EU asylum law. The Bulgarian Court asked whether the concept has an autonomous meaning under EU law or whether its interpretation should be guided by international human rights law by reference to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Istanbul Convention.[10] The second and third questions concerned the assessment of membership of a particular social group under Article 10(1)(d) of the Qualification Directive. Specifically, the Bulgarian Court asked whether women can be considered as a particular social group that can suffer prosecution exactly because of their gender or whether more conditions are required. The fourth question concerned the

[7] See Article 2(f) and Article 15 Directive 2011/95/EU.

[8] See Article 2(q) on the definition of subsequent application, see also Article 40 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60.

[9] Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No. 210,11 May 2011. The instrument is considered as the key international convention creating binding standards against gender-based violence in the state parties.

[10] Convention on the Elimination of All Forms of Discrimination Against Women, UNTS vol. 1249, p. 13, 18 December 1979.

establishment of a causal link between the reason for persecution and the acts of persecution, or the absence of protection under Article 9(3) of the Qualification Directive. The wording of the provision and the use of the term 'or' gave rise to the question of whether a link is demanded between the acts the applicant had suffered by her husband and the absence of protection by the Turkish authorities for her to be recognized as a refugee. Finally, the fifth question asked whether gender-based violence can be classified as serious harm for the purposes of granting subsidiary protection under Article 15 of the Qualification Directive with reference to Articles 2 and 3 ECHR.

The German and French Governments, as well as the European Commission, all lodged written observations. What is more Advocate General (AG) Richard de la Tour mentions in the Opinion that written observations were also submitted by the UN High Commissioner for Refugees (UNHCR), a fact which does not appear in the relevant excerpt of the judgment.[11] This divergence between the AG Opinion and the judgment on the actors that participated in the proceedings is unfortunate to say the least. At the same time the absence of any trace of the argumentation of the intervening actors in either the judgment or the Opinion significantly curtails our possibility to assess which types of arguments were accepted, and most importantly which alternative interpretations were dismissed by the Court.

3. The Reasoning of the Court

The Grand Chamber of the Court delivered this much awaited decision on January 16th, 2024. It grouped the first three questions together as revolving around a single issue, namely whether women in a country of origin can be considered as belonging to a 'particular social group' as a reason for persecution for the purposes of refugee recognition under Article 10(1)(d) of the Qualification Directive, or whether they need to share an additional common characteristic to belong to a particular group.[12] In order to provide an interpretation, the Court made a preliminary point in relation to the sources of interpretation relevant in the area of asylum. Specifically, the Court confirmed the central position of the Geneva Convention in the interpretation of Qualification Directive.[13] Moreover it recalled the relevance of UNHCR documents for the interpretation of EU law in a manner consistent with the Convention.[14]

Following, the Court went on to examine whether the conditions mentioned in Article 10(1)(d) of the Directive for the assessment of whether a group can be considered a 'particular social group' for the purposes of refugee recognition are cumulative or not. The provision of Article 10(1)(d) of the Directive refers to two conditions: first, the members of the group must share an immutable characteristic or a characteristic that is so fundamental to their identity that they cannot be forced to renounce it; second, they must be perceived as different by the surrounding society because of this characteristic. There have historically been different positions on whether these two conditions should be treated as cumulative or as alternative.[15] In the judgment, the Court confirmed that indeed the conditions mentioned in Article 10(1)(d)

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[11] Opinion of Advocate General Richard de la Tour in case C-621/21 *Intervyuirasht organ na DAB pri MS*, EU:C:2023:314, para 43.

[12] Case C-621/21 *Intervyuirasht organ na DAB pri MS* , para 35.

[13] Case C-621/21 *Intervyuirasht organ na DAB pri MS,* para 36-37 with reference to C-238/19 *Bundesamt für Migration und Flüchtlinge (Service militaire et asile)*, EU:C:2020:945, para 19 but also recitals 4 and 12 of the Qualification Directive. See also Article 78(1) TFEU.

[14] Case C-621/21 *Intervyuirasht organ na DAB pri MS,* para 38 and Case C-720/17 *Bilali*, EU:C:2019:448, para 57; Case C-280/21 *Migracijos departamentas (Reasons for persecution on the ground of political opinion)*, EU:C:2023:13, para 27; Case C-528/11, *Halaf*, EU:C:2013:342, para 44.

[15] See UN High Commissioner for Refugees (UNHCR) Guidelines on International Protection No. 2: Membership of a Particular Social Group within the Context of Article 1A(2) of the 1951 Convention and its 1967 Protocol Relating to the Status of Refugees, 7 May 2002. See also T. Spijkerboer, 'Asylum decision-making, gender and sexuality' in E. Tsourdi and P. De Bruycker, *Research Handbook on EU Migration and Asylum Law* (Edward Elgar 2022).

of the Directive are cumulative.[16] The members of a group must share the same common identifying features (innate characteristic, common background that cannot be changed, characteristic or belief that is so fundamental to the identity or conscience that a person should not be forced to renounce it) and they must, at the same time, have a distinct identity in the country of origin because they are perceived as being different by the surrounding society. The cumulative nature of the conditions provided in Article 10(1)(d) of the Directive had already been established in the case law of the Court as regards other social groups, whereas the new Qualification Regulation has slightly modified the text of the provision to reflect this more clearly.[17] Moreover, by drawing on recital 30 of the Qualification Directive and the UNHCR Guidelines on International Protection, the Court confirmed the relevance of gender and gender-related prosecution for the purposes of interpreting the concept of 'social group' in Article 10(1)(d) of the Directive.[18] After making these preliminary observations, the Court went on to address the questions raised by the Administrative Court of Sofia.

3.1 International Human Rights Obligations Guiding the Interpretation of EU Asylum Law

While the EU operates as an autonomous legal system, in the area of EU asylum law the relevant legal framework is to a large extend inspired and interrelated to international human rights law.[19] The development of the relevant legal area but also the evolution of various concepts should take places with due regard to the international human rights obligations of the Member States. Specifically, Article 78(1) TFEU which is the legal basis for the development of CEAS provides that the development of the EU asylum system should take place in accordance with the Refugee Convention and other relevant treaties.[20] Similarly, Recital 17 of the Qualification Directive provides that in the application of the Directive, Member States are bound by obligations under international law instruments to which they are parties, particularly those that prohibit discrimination.

In relation to the specific instruments relevant for the present case the following should be noted. The CEDAW is the central international instrument pertinent to forms of discrimination and violence faced by women. The EU is not a party to this Convention, but all Member States are. The Istanbul Convention on the other hand was signed by the EU in 2017 and ratified in October 2023, even though it is has not been ratified by all the Member States.[21] Most importantly for the purposes of the present case, Article 60 of Istanbul Convention provides that state parties shall take measures to ensure that gender-based violence may be recognized as a form of persecution for the purposes of applying the Geneva Convention and as a form of serious harm for the purposes of granting subsidiary protection. At the same time, Bulgaria is one of the Member States that has very publicly opposed the Istanbul Convention, a fact that creates a more complicated scenario. [22] Bulgaria is not directly bound by the Istanbul

[16] Case C-621/21 *Intervyuirasht organ na DAB pri MS,* para 40.

[17] See Joined Cases C-199/12 to C-201/12 *X and others*, EU:C:2013:720, para 45; Case C-652/16, *Ahmedbekova*, EU:C:2018:801, para 89. Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council [2024] OJ L 2024/1347.

[18] Case C-621/21 *Intervyuirasht organ na DAB pri MS*, paras 41-42, UNHCR, Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002 para 30.

[19] D. Thym, *European Migration Law* (OUP 2023), Section 13.2.2.

[20] Convention Relating to the Status of Refugees, UNTS vol. 189, p. 150, 28 July 1951.

[21] See also *Opinion 1/19 (Istanbul Convention)*, EU:C:2021:832.

[22] See M. Ilcheva, 'Bulgaria and the Istanbul Convention - Law, Politics and Propaganda vs. the Rights of Victims of Gender-Based Violence', 3(1) *Open Journal for Legal Studies* (2020), p. 49-68. See also A. Krizsan and C.

Convention in its domestic law, however, indirectly, it should respect the Convention by virtue of its obligations under EU law.

Against this background the Court had to assess the relevance of CEDAW and the Istanbul Convention on the definition of gender-based violence for the purposes of the Qualification Directive. In the judgment, the Court found that both these conventions should be considered as relevant treaties for the purpose of interpretation of the Qualification Directive. The Court reminded that even though the EU is not party to CEDAW, all Member States have ratified it and are thereby bound by it.[23] The Court also mentioned as a relevant point that the Committee on the Elimination of Discrimination against Women, which monitors the implementation of CEDAW, has suggested that the Convention complements the international protection regime applicable to women and girls.[24] As for the Istanbul Convention, the Court confirmed its relevance due to its recent ratification by the EU, but also due to its subject matter and the fact that it lays down obligations coming within the scope of Article 78(2) TFEU.[25] According to the Court, the fact that certain Member States, like Bulgaria, have not ratified it does not affect the fact that the Qualification Directive should be interpreted in accordance with the Convention. [26] This important finding goes against the Opinion of the AG who instead held that these international treaties were irrelevant due to the fact that the EU had not ratified CEDAW, and that the Istanbul Convention was signed, but not ratified, at the time the Opinion was issued.[27] Instead, the AG had exclusively focused on the Refugee Convention and the Charter as relevant instruments to guide an autonomous interpretation of gender based violence for the purposes of EU law.[28]

3.2. Women Victims of Domestic Violence as a Particular Social Group

Following the Court went on to examine whether women or women victims of domestic violence could be considered as members of a particular social group for the purpose of refugee status recognition. To contextualize this question, the reader should bear in mind that state practice has been very diverse on this matter. While some states have addressed gender on its own as a characteristic that can lead to persecution and thereby to protection of women as a particular social group, others have instead considered groups of women (for example women at risk of female genital mutilation) as a particular social group for gender-related asylum claims.[29] In order to clarify the matter for the purposes of EU asylum law and to respond to the question posed by the Bulgarian court, the Court took as a starting point Article 60 of the Istanbul Convention. According to Article 60(1), gender-based violence should be recognized as a form of persecution within the meaning of the Convention while article 60(2) requires a gender-sensitive interpretation to the reasons of persecution provided by the Convention.

Roggeband, *Politicizing Gender and Democracy in the Context of the Istanbul Convention* (Palgrave MacMillan 2021).

[23] Case C-621/21 *Intervyuirasht organ na DAB pri MS ,* para 44.

[24] Ibid para 45.

[25] Ibid para 46 with reference also to *Opinion 1/19 (Istanbul Convention)*, paras 294, 302 and 303.

[26] Case C-621/21 *Intervyuirasht organ na DAB pri MS,* para 45.

[27] AG Opinion in Case C-621/21, *Intervyuirasht organ na DAB pri MS*, paras 59-63.

[28] Ibid paras 63-64. See criticism in J. Silga, Op-Ed: "'The-Treaty-that-must-not-be-named': The relevance of international treaties for defining violence against women in the Opinion of Advocate General Richard de la Tour in WS (C-621/21)" EU Law Live, 05 June 2024. See also M. Grundler, 'AG de la Tour's Opinion in C-621/21: A Welcome Clarification on, or an Introduction of Unnecessary Obstacles to, Entitlement to International Protection for Women at Risk of Gender-based Violence?', EU Law Analysis Blog, 16 May 2023.

[29] For a more detailed analysis see C. Querton, 'Gender and the boundaries of international refugee law: Beyond the category of 'gender-related asylum claims', 37(4) *Netherlands Quarterly of Human Rights* (2019) p. 379; C. Querton, 'One step forward, two steps back? Interpreting 'particular social group' in the European Union', 71(2) *International and Comparative Law Quarterly* (2022), p. 425.

Drawing on these provisions and connecting them to Article 10(1)(d) of the Qualification Directive, the Court found that being female does constitute an innate characteristic which makes women part of a particular social group.[30] The Court further suggested that women who have escaped a forced marriage may be seen as having a common background that cannot be changed.[31] As to the second condition of membership of particular social group which relates to an externally perceived distinct identity, the Court suggested that women may be perceived as being different by the society surrounding them and thus having a distinct identity 'in particular because of social, moral or legal norms in their country of origin'.[32] This is even more so in relation to women who share an additional common characteristic, that is having escaped marriage.[33] What is more, the Court held that the determination of a membership of a particular social group within the meaning of the Directive is independent from the acts of prosecution which members of the group might suffer from under Article 9 of the Directive.[34] Essentially, the Court held that women as a whole, but also more specific groups of women who share additional characteristics (for example women victims of domestic violence, or women who refuse forced marriages) may be regarded as belonging to a particular social group as a reason for persecution that might lead to the recognition of a refugee status.[35] This particular finding established the foundation upon which the Court based its subsequent finding in *Staatssecretaris van Justitie en Veiligheid (Femmes s'identifiant à la valeur de l'égalité entre les sexes)* that women who identify with western values can also be a particular social group that is threatened with persecution for the purposes of refugee recognition. [36]

3.3 Persecution by Non-State Actors and Absence of Protection: a Necessary Link?

Moving to the next issue, which relates to persecution by non-state actors, the Court had to interpret the conditions of Article 9(3) of the Qualification Directive. Article 9(3) provides that there must be a link between the reasons why an asylum-seeker is persecuted and the acts of persecution or the absence of protection against such acts. The wording of the provision by the use of the term 'or' gave rise to the question of whether a link is demanded between the acts the applicant had suffered by her husband and the absence of protection by the Turkish authorities. To further unpack this, there are three different ways to read the provision of Article 9(3) with different causal links potentially demanded. First, the conditions of this article could be fulfilled in case the applicant WS was prosecuted because of her gender and the domestic violence she had suffered was committed because she is a woman. Second, the conditions of this article could be fulfilled in case the applicant W, was prosecuted because of her gender, and the Turkish authorities failed to protect her because they neglect complains submitted by women. Third, one could read the 'or' as creating a higher bar for causality. This line of reading would demand that WS was prosecuted because of her gender, the violence she suffered by her ex-husband was committed because she is a woman, and the failure of the Turkish authorities to protect her also related to her being a woman, meaning that she would be protected from such violence in case she was a man. By reading through these alternative lines of interpretation in the first and second scenario, a causal link is demanded between the reason for persecution and the act of persecution or between the reason for persecution and the absence of protection by the state authorities. On the contrary, in the third scenario, the bar for accessing protection is set higher, as the link is demanded between three conditions, that is the reason of persecution, the act of persecution and the absence of protection.

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[30] Case C-621/21 *Intervyuirasht organ na DAB pri MS,* paras 48-49.
[31] Ibid para 51.
[32] Ibid para 52.
[33] Ibid para 53.
[34] Ibid paras 55-56 also with reference to UNHCR Guidelines on International Protection No 2 para 14.
[35] Case C-621/21 *Intervyuirasht organ na DAB pri MS*, para 62.
[36] Case C-646/2 *Staatssecretaris van Justitie en Veiligheid* (*Persons identifying with the values of the Union*).

In the *Intervyuirasht organ na DAB pri MS* case, the Court opted for an interpretation that was more protective for the applicant, and which was also aligned with UNHCR Guidelines on International Protection.[37] Specifically, the Court first reminded that acts of persecution perpetrated by non-state actors can fall under Article 6(c) of the Qualification Directive only if the state is unwilling or unable to provide protection under Article 7 of the Directive.[38] What is more the protection must be effective and non-temporary.[39] Proceeding to the matter of causal link, the Court held that there needs to be a link between the reasons of persecution mentioned in Article 10(1) and the acts of persecution under Article 9 (1) and (2) or, alternatively, between the reasons of persecution and the absence of protection against acts by non-state actors.[40] By this finding the Court suggested that women victims of violence could be recognised as refugees in case there is a causal link between their gender and the violence they have suffered by non-state actors. This continues to be the case even if the absence of protection by the state authorities was not due to their gender, but for example due to deficits in the national system of judicial remedies.[41] Alternatively, women victims of domestic violence could be recognised as refugees in case there is a causal link between their gender and the absence of protection by the state authorities.[42] In this second alternative, even if the violence a woman has suffered is not due to her gender, the important element is that the absence of protection is due to her gender (for example violence suffered by women in the context of a crime and absence of protection by the authorities because of gender-based discrimination in access to justice). What is missing in the more abstract justification of the Court is the more detailed reference made by the AG both to the situation in Türkiye as regards victims of domestic violence and to the relevant case-law of the European Court of Human Rights (ECtHR) on the matter.[43]

3.4 Serious Harm by Non-State Actors

Finally, the Court addressed the fifth question submitted by the Administrative Court of Sofia on the concept of serious harm under Article 15(a) and (b) of the Qualification Directive and whether victims of domestic violence can fall thereunder.[44] This question was only answered in the alternative, that is in case the referring Court did not find that WS qualified for refugee status.[45] Under Article 2(f) of the Qualification Directive, individuals who do not qualify for refugee protection can be eligible for subsidiary protection if there are substantial grounds to believe that they would face a real risk of suffering a serious harm under Article 15 of the Directive. As serious harm, Article 15(a) refers to execution or death penalty and Article 15(b) refers to acts of torture or inhuman or degrading treatment or punishment, but the text of the provisions makes no distinction on whether the harm is caused by state or non-state actors.[46] The Court held that in light of the objective of protection of Article 15(a), the term execution should be interpreted to include harm that is caused by non-state actors.[47] Similarly when the acts of violence perpetrated by non-state actors are not likely to result to death, those acts must be classified as torture or inhuman or degrading treatment even if they are not committed by

[37] Case C-621/21 *Intervyuirasht organ na DAB pri MS,* paras 68-69, UNHCR Guidelines on International Protection no 1 para 21.
[38] Ibid, para 64 with reference to the AG Opinion in case C-621/21 *WS Intervyuirasht organ na DAB pri MS,* para 87.
[39] Case C-621/21 *Intervyuirasht organ na DAB pri MS,* para 65.
[40] Ibid para 66.
[41] Ibid para 67.
[42] Ibid para 67.
[43] See AG Opinion in case C-621/21 *Intervyuirasht organ na DAB pri MS*, paras 96-97.
[44] Case C-621/21 *Intervyuirasht organ na DAB pri MS,* para 71.
[45] Ibid para 72.
[46] Ibid para 75.
[47] Ibid para 76.

state actors.[48] On this matter, the Court found that the concept of serious harm does cover the circumstances of gender-based violence inflicted on women by non-state actors.[49] In this finding however, the Court made no reference to Articles 2 and 3 ECHR which were invoked by the referring Court in the relevant question in order to guide an interpretation of Article 15 of the Qualification Directive. Contrary to the Court, the AG, who took a similar position, referred to the relevant case law of the ECtHR which concerned specifically the positive obligation of states to take measures to secure the protection of the right to life under Article 2 ECHR and the prohibition of torture or other inhuman or degrading treatment under Article 3 ECHR for women victims of domestic violence.[50]

4. Comments

The judgment in the *Intervyuirasht organ na DAB pri MS case* was greatly anticipated and welcomed by most commentators thus far. The majority of commentaries produced on the case have already noted its effects for EU external relations and asylum law, they have praised the gender sensitive reading of the of the Court which advances women's right, while from an international human rights perspective authors have perceived this judgment as complementary to ECtHR case law on the matter of domestic violence.[51] In *Opuz v Turkey*, the ECtHR had found that there is a positive obligation of states to protect women from domestic violence. The case was filed by a woman whose mother was eventually killed after years of domestic violence. While state authorities were not directly involved in the violence inflicted, the ECtHR found a violation of Articles 2 and 3 ECHR due to the failure of the Turkish authorities to take adequate measures to protect the applicant and her mother even though they were aware of the long history of violence they had suffered.[52] Lagrand has related this ECtHR judgment to the CJEU one suggesting that consequences of state failure to protect the right to life in domestic violence cases could lead to the recognition of refugee protection.[53] At the same time the gendered nature of EU asylum law has also been mentioned by Steininger who has suggested that this judgment might be 'more of a catch-up with human rights standards than a feminist revolution'.[54] Indeed the judgment should not be seen as a feminist revolution. After all, there has already been state practice on recognition of refugee status due to gender-based violence.[55] Despite this, the Court provided a gender-sensitive interpretation of EU asylum law which has already set the tone for future judgments. In *Staatssecretaris van Justitie en Veiligheid*, issued

[48] Ibid para 77.
[49] Ibid para 80.
[50] AG Opinion in case C-621/21 *Intervyuirasht organ na DAB pri MS*, paras 107 and 113 and ECtHR cases *Opuz v. Turkey, N. v. Sweden*.
[51] On external relations and asylum law see G. Kübek and J. Bornemann, 'International Law as a Trailblazer for a Gender-Sensitive Refugee System in the EU. The Court of Justice's ruling in Case C-621/21, Women who are Victims of Domestic Violence' European Law Blogpost 6/2024, 29 January 2024; On international human rights perspective see A. Kompatscher, 'Victims of Gender-Based Violence: Between Hope and Reality, The CJEU's First Application of the Istanbul Convention', Volkerrechtsblog, 11 February 2024;T.E. Lagrand, 'Beyond Opuz v. Turkey: The CJEU's Judgment in WS and the Refugee Law Consequences of the State's Failure to Protect Victims of Domestic Violence, Strasbourg Observers', 20 February 2024
[52] The Court also found a violation of Article 14 ECHR for failure of the judicial system to adequately respond to the situation.
[53] T.E. Lagrand, Strasbourg Observers, 20 February 2024.
[54] S. Steininger, 'The CJEU's Feminist Turn?: Gender-based Persecution as a Ground for Protection', VerfassungsBlog, 20 February 2024. The author argues that the CEAS is characterized 'by an organizational structure, reflecting the male perspective, and a normative structure, which diminishes the experiences of women, particularly by relegating them to the private sphere'.
[55] Cf. S. Mullally, 'Domestic Violence Asylum Claims And Recent Developments In International Human Rights Law: A Progress Narrative?', 60(2) *The International and Comparative Law Quarterly* (2011), p. 459–484; L. Jakulevičienė and L. Biekša, 'Trends in the qualification of asylum claims related to gender-based violence under international and European Law', 26(5) *The International Journal of Human Rights*(2022), p. 833–855.

only five months after the case under analysis, the Court confirmed its finding and held that Iraqi women who identify with western values can also be considered as a particular social group for the purposes of refugee recognition. [56] It can be expected that a similar finding will also follow in pending cases on Afghan women fleeing the Taliban regime.[57] The straightforwardness of the Court is commendable for setting EU asylum law against the background of international human rights commitments as will be discussed next.[58] At the same time however, the Court is silent on the interaction of this decision with the ECtHR case-law. One might say that international human rights obligations appear as a shadow and guide the case law of the Court in a fragmented way as will be argued in section 4.2.

4.1 EU asylum law against the background of international human rights

The *Intervyuirasht organ na DAB pri MS* case frames the contours of refugee protection against a broader background of the external constitutional commitments of the EU legal order. Indeed, on this matter CEAS differs from other EU law areas, as Article 78(1) TFEU demands the development of the common asylum policy in accordance with the Geneva Convention and other relevant treaties. The finding on the relevance of both the CEDAW and the Istanbul Convention for the definition of concepts found in EU secondary law places the CEAS in the proper context of external commitments of both the EU and the Member States regarding human rights protection. As Bornemann and Kübek suggest, the decision 'sets the tone for reading EU refugee law in light of the international duty to combat gender-based violence and discrimination against women.'[59]

Instead of an interpretation of the CEAS in light of the Geneva Convention and the Charter, as suggested by the AG, the Court placed EU asylum law in a dynamic international context shaped by more recent instruments which can bind the EU or the Member States. The Court did not approach the case in view of developing an autonomous concept of EU law on gender-based violence and it did not proceed in a reading of EU asylum law in view of perfecting an independent legal order.[60] Rather, the Court employed the Qualification Directive and the ambiguity inherent in the concept of membership of a particular social group to provide an evolutionary interpretation and to integrate in EU law protection claims which are aligned with international human rights developments.[61]

This decision could be seen as another building block in the dignity-based approach followed by the Court on the CEAS case law, an approach which is cognizant of the vulnerability of refugees and aligned with the international protection obligations of the

[56] Case C-646/21 *Staatssecretaris van Justitie en Veiligheid*.
[57] Pending Joined Cases C-608/22 and C-609/22 *Bundesamt für Fremdenwesen und Asyl and Others (Femmes afghanes*). See Opinion of AG Richard de la Tour delivered on 9 November 2023 in these cases. See also N. Feith Tan and M. Ineli Ciger, 'Group-based protection of Afghan women and girls under the 1951 refugee convention' (2023) 72(3) *International and Comparative Law Quarterly* 793.
[58] See M. Möschel,'The EU Court of Justice strengthens women's rights (Case C-621/21 WS)', EU Law Live, 24 January 2024.
[59] G. Kübek and J. Bornemann, 'International Law as a Trailblazer for a Gender-Sensitive Refugee System in the EU. The Court of Justice's ruling in Case C-621/21, Women who are Victims of Domestic Violence' European Law Blogpost 6/2024, 29 January 2024.
[60] See previous criticism by R. Bank, 'The potential and limitations of the Court of Justice of the European Union in shaping international refugee law', 27(2) *International Journal of Refugee Law* (2015), p. 213; Cf N. Nic Shuibhne, 'What Is the Autonomy of EU Law, and Why Does That Matter' 88 *Nordic Journal of International Law* (2019), p. 9 who has argued that it is an existential principle of EU law.
[61] On this matter see D. Thym, *European Migration Law,* section 13.5.5.1 who argues that the ambiguity of the concept of membership of a particular social group grants the integration of novel protection claims as had been demonstrated already at drafting the Qualification Directive.

Member States.[62] This approach is of course not without limits. Various scholars have expressed valid critiques on the failure of EU asylum law to uphold fundamental rights and its focus towards institutional cooperation and informalization.[63] Scholars have also suggested that the Court has followed more formalist interpretations in this area, especially after the migration crisis.[64] While such criticisms have merit, the case under analysis brought about the development of EU asylum law with due regard to the pluralism of sources that characterises international protection. On this topic, it is important to remind that the Court has consistently drawn on the UNHCR soft law as relevant for the interpretation of various concepts in EU asylum law.[65] Finally, the finding of the Court as regards violent acts caused by non-state actors and their implications for international protection is aligned with the established case law of the ECtHR on the matter which has found that there exist positive obligations of state parties under Articles 2 and 3 ECHR to protect women victims of domestic violence.[66]

4.2 The shadow of international human rights in EU Law

In this final section, two contentious points raised by the *Intervyuirasht organ na DAB pri MS* case will be discussed. The first relates to the 'hiding' of the ECHR in the judgment and the second relates to the international human rights commitments to protect victims of domestic violence as they appear in EU law more generally.

On the first point of criticism, when reading the judgment, the utter absence of ECtHR case law from the justification of the Court is striking. In this regard it should be reminded that fundamental rights protection in EU law has historically developed with due regard to the obligations of Member States under the ECHR.[67] Today reference to the ECHR is made in Article 6(3) TEU, the Charter of Fundamental Rights includes a 'homogeneity' clause in Article 52(3) which demands that Charter rights which correspond to rights protected by the ECHR shall have the same meaning and scope, while Article 53 mentions that nothing in the Charter shall be construed as limiting the rights protected by, among others, the ECHR.[68] No

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[62] N. Bačić Selanec and D. Petrić, 'Migrating with Dignity: Conceptualising Human Dignity Through EU Migration Law', 17 *European Constitutional Law Review* (2021), p. 498. See also the example of family reunification, where more favourable treatment is reserved for refugees in secondary law.

[63] E. Tsourdi and C. Costello, 'The Evolution of EU Law on Refugees and Asylum' in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021); V. Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017); V. Moreno-Lax, 'The Informalisation of the External Dimension of EU Asylum Policy: The Hard Implications of SoftLaw' in E. Tsourdi and P. De Buycker (eds), *Research handbook on EU migration and asylum law.* (Edward Elgar Publishing 2022).

[64] See I. Goldner Lang, 'Towards "Judicial Passivism" in European Union Migration and Asylum Law?' in T. Ćapeta, I. Goldner Lang and T. Perišin (eds), *The Changing European Union: A Critical View on the Role of Law and the Courts* (Hart Publishing 2022).

[65] See Case C-720/17 *Bilali*, para 5; Case C-280/21 *Migracijos departamentas (Reasons for persecution on the ground of political opinion)*, para 27; Already in Case C-528/11 *Halaf*, para 44. The central position of the UNHCR is also pointed in Recital 22 of the Qualification Directive. See M. Garlick, 'International protection in Court: The asylum jurisprudence of the Court of Justice of the EU and UNHCR', 34(1) *Refugee Survey Quarterly* (2015) p. 107.

[66] *Opuz v. Turkey; N. v. Sweden*.

[67] See the development of general principles of EU law on fundamental rights by reference to the ECHR among the sources of inspiration already in Case 4/73 Nold, ECLI:EU:C:1974:51, though the path to convergence has not been linear. See G. De Búrca 'Convergence and Divergence in European Public Law: The Case of Human Rights' in P. Beaumont, C. Lyons and N. Walker (eds) *Convergence and Divergence in European Public Law* (Hart Publishing 2002) 131–150.

[68] See X. Groussot and E. Gill-Pedro, 'Old and new human rights in Europe – The scope of EU rights versus that of ECHR rights' in E. Brems and J. Gerards (eds), *Shaping the Rights in ECHR – The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2013) 247 who argue that Article 52(3) should also be understood cover to the ECtHR case-law as well. See also *Opinion 2/13*,

Charter rights were of relevance in the specific case, however the Administrative Court of Sofia did invoke ECHR rights as relevant for the interpretation of serious harm in the Qualification Directive. The finding of the Court in this matter was aligned in substance with the case law of the ECtHR. However, the Court evaded any mention to the relevant cases or to the ECHR in general. One might attempt to trace the potential influence of the ECtHR case law by reading the AG Opinion which analysed the relevant decisions both in relation to victims of domestic violence in Türkiye, but also in relation to the positive obligation of state authorities to protect victims of domestic violence from exposure to risk of persecution from non-state actors.[69] Even if the AG Opinion influenced the finding of the Court, there is no transparency on the matter, as the Court did not refer to the paragraphs of the AG Opinion, which present and analyse the relevant case-law. Such a 'hiding' of the relevant ECtHR case law would arguably be understandable if the Court ruled differently and presented the finding as a resulting from EU law autonomy. However, in a judgment which acknowledges the pluralist landscape of international human rights protection, and which is aligned with international case law on victims of domestic violence on a substantive level, the hiding of this cross-fertilization with the ECtHR cannot be easily explained. This is especially so since this cross-fertilization is demanded in primary law both as regards the specific convention and its interaction with human rights standards in EU law and in general, as a potentially relevant treaty in the CEAS.

The second and last point of criticism does not pertain to the reasoning followed by the Court, but rather to the protection of victims of domestic violence by virtue of international human rights commitments, as they appear in the case law. Specifically, a fragmentation appears in the way in which the Court is dealing with international human rights commitments and gender-sensitive interpretation in other fields of EU law and specifically in cases related to citizenship and migration. On this matter, it should be noted that Articles 59-61 of the Istanbul Convention provide obligations relating to the grant of autonomous residence permits to victims of domestic violence as well as the grand of subsidiary protection and the application of a gender-sensitive interpretation to the Geneva Convention. These demands of the Istanbul Convention attracted attention for having the potential to generate change as regards migrant women victims of domestic violence and their claims to residence rights.[70] However, this potential is up against the limitations of EU migration law which will be discussed in turn and which relate to the requirements for acquiring an autonomous residence permit as a migrant victim of domestic violence.

Already before the adoption of the Istanbul Convention, both the Citizens' Rights Directive and the Family Reunification Directive provided for the grant of autonomous residence permits for family members victims of domestic violence of EU and non-EU migrants respectively.[71] The reason for introducing both these provision was to protect migrant women victims of domestic violence, who should not be threatened with losing their residence

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EU:C:2014:2475, para 188 and Case C-399/11 *Melloni*, EU:C:2013:107 on the meaning of Article 53 of the Charter.

[69] AG Opinion in Case C-621/21 *Intervyuirasht organ na DAB pri MS,* paras 96-97 and 107 with reference to *M.G. v. Turkey*, *Durmaz v. Turkey*, *Opuz v. Turkey and N. v. Sweden*.

[70] See V. Stoyanova, 'A Stark Choice: Domestic Violence or Deportation? The Immigration Status of Victims of Domestic Violence under the Istanbul Convention', 20(1) *European Journal of Migration and Law* (2018), p. 53; C. Briddick, 'Combatting or Enabling Domestic Violence? Evaluating The Residence Rights of Migrant Victims of Domestic Violence in Europe', 69(4) *International and Comparative Law Quarterly* (2020), p. 1471.

[71] See Article 13(2)(c) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77 and Article 15 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents [2003] OJ L 16/ 44.

permit when trying to escape a vulnerable situation at home.[72] The Citizens' Rights Directive provides that the residence permit can only be provided if the family member victim of domestic violence has sufficient resources and sickness insurance, while the Family Reunification Directive provides that the conditions for attribution of the relevant residence permit should be provided in accordance with national law. After a first conservative ruling in *NA*, the Court was called to decide on the compatibility of the Citizens' Rights Directive with the Charter in case *X v État belge*.[73] This case was decided in September 2021 a bit over a month before the *Opinion 1/19* of the Court on the accession of the EU to the Istanbul Convention. Even though the Istanbul Convention was not binding the EU at the time, the Court was aware of its relevance for the purpose of safeguarding the rights of migrant women victim of domestic violence, while the Convention had already been ratified by Belgium.[74] Nevertheless, the Court confirmed the validity of the relevant provision of the Citizens' Rights Directive and its compliance with the Charter with no reference to international human rights obligations regarding victims of domestic violence.[75]

Relating the gender insensitive outcome of the Court in *X v État belge* with the gender sensitive reading in *Intervyuirasht organ na DAB pri MS*, the following point should be made. Indeed, the Court has produced ground-breaking rulings in the area of asylum which promote respect to human dignity and the internal and external human rights obligations of the EU and the Member States. The judgment in *WS* is representative in this regard. However, it is important that the internal and external commitments to human rights protection also guide the Court in the area of EU citizenship and migration. This is crucial not only in order to avoid fragmentation in the application of the Istanbul Convention and to promote the rights of victims of domestic violence in the future, but also in order to extend the constitutional commitment of the EU to fundamental rights protection under Article 2 TEU to all those who fall within the scope of EU law.

5. Conclusion

Overall, the decision in *Intervyuirasht organ na DAB pri MS* has left a mark in the development of EU asylum law that can already be attested by reading *Staatssecretaris van Justitie en Veiligheid* which was issued five months later and confirmed the relevant findings.[76] This case-note analysed the facts of the case and the reasoning of the Court. It highlighted the importance of the case both for its outcome, which will extend the protection of victims of domestic violence, but also for placing the international human rights commitments of both the EU and its Member States at the core of the reasoning.

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[72] Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member states COM(2001)0257 final [2001] OJ C 270E/150, Explanation to Article 13 para 2; Proposal for a Council Directive on the right to family reunification COM(99)0638 final, Explanatory Memorandum, Article 13(3).

[73] Case C-115/15 *Secretary of State for the Home Department v NA*, EU:C:2016:487; C-930/19 *Belgian State (Droit de séjour en cas de violence domestique)*. Equally insensitive from a women's rights perspective was the finding of the Court in Case C-267/83 *Diatta v Land Berlin*, EU:C:1985:67 where the it had held that rights of residence for TCN spouses end when the marriage dissolves.

[74] See Opinion of AG Szpunar in case C-930/19 *Belgian State (Droit de séjour en cas de violence domestique)* EU:C:2021:225 mentioning the Istanbul Convention as relevant international law in order to revisit the restrictive finding in C-115/15 *Secretary of State for the Home Department v NA*.

[75] On the malaise of the Court to review the Citizens' Rights Directive in view of the Charter see N. Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' 52(4) *Common Market Law Review* (2015), p.891. See also V. Stoyanova, 'On the Bride's Side? Victims of Domestic Violence and their Residence Rights under EU and Council of Europe Law', 37 *Netherlands Quarterly of Human Rights* (2019), p. 311.

[76] In Case C-646/21 *Staatssecretaris van Justitie en Veiligheid* (*Persons identifying with the values of the Union*) the case is referred to 11 times in total.

In *Intervyuirasht organ na DAB pri MS*, the self-sufficient understanding of EU law promoted by the Court in earlier years of its jurisprudence has arguably shifted to a more holistic approach taking into account the pluralist landscape of international protection.[77] At the same time, however, the case is striking for the utter absence of any reference to the ECtHR case law. In a judgment which is substantively aligned with the findings of the ECtHR on the obligations of state parties as regards victims of domestic violence, one is left wondering why the Court evades the slightest reference. Clarity and transparency on the underlying grounds informing the judicial reasoning would demand a more detailed elaboration on how the ECHR relates with the finding of the Court in this case.

Finally, taking the international human rights commitments of the EU and the Member States towards victims of domestic violence seriously will require more effort across various EU policy areas in the future. The demands of the Istanbul Convention should affect the interpretation of the Court in the areas of EU citizenship and migration in order to move away from a fragmented approach towards human rights obligations under EU law. Past judgments have failed to consider gender-sensitive readings of EU secondary law and the current framework risks entrenching the vulnerability migrant women in abusive relationships.[78] Despite this, the judgment is a first step towards the integration of international human rights commitments to victims of domestic violence in the case law. The extent to which this gender-sensitive approach will continue to guide the Court - also beyond EU asylum law - remains to be seen.

[77] See to the contrary the emphasis on autonomous interpretation of Article 15(c) Qualification Directive in Case C-465/07 *Elgafaji;* EU:C:2009:94, para 28 later confirmed in Case C-285/12, *Diakite*, EU:C:2013:500.
[78] See V. Stoyanova, *Netherlands Quarterly of Human Rights* (2019) 311.