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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*

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Is gender-based violence against women a ground for granting refugee protection under international and EU law? The European Court of Justice (ECJ) essentially addressed this question last week in [Case C-621/21, *Women who are Victims of Domestic Violence*](#). The case was brought by a Turkish woman who was a victim of domestic violence and feared for her life if she had to return to Turkey. She legally arrived in Bulgaria in June 2018 and travelled to a family member in Berlin, where she lodged an application for international protection. In 2019, following a request from the German authorities, the applicant was taken back to Bulgaria where her application for international protection was rejected. In a groundbreaking judgment, the ECJ concluded that women who are exposed to physical and mental violence on account of their gender qualify for refugee status if the conditions set out in the [Qualification Directive](#) are fulfilled. This conclusion was reached through an interpretation of EU refugee law in the light of standards of international law, which facilitated qualifying women, as a whole, as belonging to 'a particular social group' within the meaning of that Directive.

The issues addressed in *Women who are Victims of Domestic Violence* are vital for answering one of the most topical and vital questions in refugee law to date: can women be recognized as refugees on the ground that they are women? This is the [underlying question](#) of the currently pending case in [Joined Cases C-608/22 and C-609/22, *Women Fleeing Taliban*](#). Hence, the *Women who are Victims of Domestic Violence* case is an important prelude to the *Women Fleeing Taliban* case. It sets the tone for reading EU

refugee law in light of the international duty to combat gender-based violence and discrimination against women.

The *Women who are Victims of Domestic Violence* case breaks new ground in two legal fields. First, in the field of EU external relations law, it confirmed the binding reach of an international agreement concluded by all Member States but not the EU and, vice versa, an international agreement concluded by the EU but not all of the Member States. Second, in the field of EU refugee law, it confirmed a gender-sensitive reading of the Qualification Directive. In doing so, it sets important guidelines for the application of the Qualification Directive to gender-based protection claims in the Member States.

This blog post seeks to highlight the theoretical and practical relevance of the *Women who are Victims of Domestic Violence* case in the fields of EU external relations and EU refugee law, respectively. In doing so, it will illustrate how the EU's external actions, even if conducted against the will of some Member States, can have a profound impact on how EU refugee law is read and applied in practice.

Relevance for EU External Relations Law

In its first question, the referring court asked the ECJ if the concept of 'gender-based violence against women', as a ground for granting international protection under the Qualification Directive, must be defined in light of the [Geneva Convention](#), the [Convention on the Elimination of All Forms of Discrimination against Women](#) (CEDAW) and the [Istanbul Convention](#). That question originates from the fact that the Geneva Convention does not clarify whether gender may be a relevant factor for defining a person's membership of a particular social group. While the Qualification Directive, for its part, mentions that gender related aspects, including gender identity, should be given 'due consideration' in this regard, it does not expressly address the situation of women. Conversely, ([supplementary instruments](#) to) the CEDAW and the Istanbul Convention contain express provisions on gender-based violence against women. In particular, Art. 60(1) Istanbul Convention requires its parties to 'take the necessary legislative or other measures to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of Article 1, A (2) [of the Geneva Convention]'.

Pursuant to Article 78(1) TFEU, EU refugee law must indeed be interpreted 'in accordance with' the Geneva Convention. In [Case C-238/19, Bundesamt für Migration und Flüchtlinge \(Military service and asylum\)](#), the ECJ emphasized that 'the Geneva Convention is the cornerstone of the international legal regime for the protection of refugees and that that directive was adopted in order, inter alia, to ensure that all Member States apply common criteria for the identification of persons genuinely in need of international protection' (para

19). In [Case C-720/17, Bilali](#), it further underlined that ‘documents from the United Nations High Commissioner for Refugees (UNHCR) are particularly relevant’ for interpreting EU refugee law in accordance with the Geneva Convention ‘in the light of the role conferred on the UNHCR by the Geneva Convention’ (para 57). Against this background, it was not surprising that the ECJ, in *Women who are Victims of Domestic Violence*, re-confirmed the legal obligation to interpret the Qualification Directive in a manner consistent with the Geneva Convention in general, and the documents from the UNHCR in particular (see [here](#), paras. 36-37).

Yet, Article 78(1) TFEU further stipulates that EU refugee law must also be applied ‘in accordance with (...) *other relevant treaties*’ (emphasis added). Hence, the ECJ was asked to determine whether the CEDAW and the Istanbul Convention qualify as ‘other relevant treaties’ within the meaning of Art. 78(1) TFEU. This would imply that the Qualification Directive must be interpreted in a manner consistent with the CEDAW and the Istanbul Convention as well. From an EU external relations perspective, this is a very intricate question, both legally and politically. The CEDAW is only open to states and has therefore not been concluded by the EU itself. Yet, all EU Member States are party to the CEDAW. By contrast, the Istanbul Convention has been concluded by the EU but not by all of the Member States. Bulgaria has been a very vocal opponent of the Istanbul Convention, as its [Constitutional Court held that the Convention is incompatible with the Bulgarian Constitution](#).

The [Advocate General](#) held in the present case that neither the CEDAW nor the Istanbul Convention (which had been signed but not concluded by the EU at the time of the reference) could be regarded as ‘relevant treaties’ within the meaning of Article 78(1) TFEU (paras. 59-60). He merely considered the CEDAW and the Istanbul Convention relevant for the implementation of the Qualification Directive by the Member States who are party to these treaties, but not for the interpretation of the Directive under EU law generally (para. 62).

The Advocate General’s conclusions on the CEDAW are particularly surprising and seemingly inconsistent with the EU’s values on the one side, and recital 17 of the Qualification Directive, on the other. Article 3(5) TEU obliges the EU to strictly observe international law and Article 21(1) TEU places particular emphasis on UN instruments in this context. Recital 17 of the Qualification Directive further specifies that ‘[w]ith respect to the treatment of persons falling within the scope of this Directive, *Member States are bound by obligations under instruments of international law to which they are party, including in particular those that prohibit discrimination*’ (emphasis added). The CEDAW, which is often referred to as [an international bill of rights for women](#), is the key international law instrument on the prohibition of discrimination against women to which all the Member States are party. A reading of recital 17 of the Qualifications Directive in

light of Articles 3(5) and 21(1) TEU suggests that the CEDAW rather evidently qualifies as a 'relevant treaty' within the meaning of Article 78(1) TFEU. The ECJ indeed brushed off the Advocate General's conclusion in a couple of sentences. It concluded that 'while the European Union is not a member to [that] convention, all the Member States have ratified it. The CEDAW is thus one of the relevant treaties referred to in Article 78(1) TFEU (...)' ([here](#), para. 44).

The situation is trickier for the Istanbul Convention. As Bulgaria is not a member of the Istanbul Convention, recital 17 of the Qualification Directive does not aid qualifying the Convention as 'relevant' under Article 78(1) TFEU. Against that background, [the question](#) arises to what extent the EU's accession to the Istanbul Convention legally binds Bulgaria to apply EU law in accordance with the Convention, even though Bulgaria is not a member to the Convention in its own right. Pursuant to Article 216(2) TFEU, the Member States are legally bound by agreements concluded by the EU. In [Opinion 1/19](#), the ECJ confirmed that the EU may conclude the Istanbul Convention without the consent of some Member States, to the extent that the Istanbul Convention falls within EU competence. The Council decisions on the conclusion of the Istanbul Convention on behalf of the EU were carefully crafted, confining the EU's accession to [matters related to](#) judicial cooperation in criminal matters, asylum and non-refoulement. For all [other matters](#), the EU merely acceded 'with regard to institutions and public administration of the Union.' However, as the Council itself argued in the *Opinion 1/19* proceedings ([here](#), paras. 119-120), Article 60 of the Istanbul Convention, which is of particular relevance for the case at hand, falls within the EU's implied exclusive competence, and hence within the part of the Convention that has been ratified by the EU. In view of the legal obligation incumbent on Bulgaria to recognize the part of the Istanbul Convention the EU has acceded to (Article 216(2) TFEU), the latter is seemingly also 'relevant' within the meaning of Article 78(1) TFEU. Indeed, the ECJ confirmed that the Istanbul Convention is legally binding on the EU and lays down obligations for EU actions coming within the scope of Article 78(2) TFEU, such as the Qualification Directive. Thus, it concluded that the Istanbul Convention, 'in so far as it relates to asylum and non-refoulement, is also one of the relevant treaties referred to in Article 78(1) TFEU' ([here](#), para. 46).

The ECJ's finding that both the CEDAW and the Istanbul Convention are 'relevant treaties' within the meaning of Article 78(1) TFEU are of utmost importance for a gender-sensitive interpretation of EU refugee law. Article 78(1) TFEU contains a strict legal obligation to read and apply EU refugee law *in conformity with* relevant international law instruments. The legally binding standards on the elimination of discrimination and the combatting of domestic violence against women set out in the CEDAW and the Istanbul Convention, respectively, must hence be reflected in and protected by the application of EU refugee law. As the following shows, the ECJ's reading of the Qualification Directive in conformity

with international law facilitated the finding that women who are victims of domestic violence may qualify for refugee status.

Towards a gender-sensitive interpretation of EU refugee law

The *Women who are Victims of Domestic Violence* case is not the first in which the situation of women in Turkey was brought to the attention of European courts. The ECtHR, for instance, had [ruled](#) already in 2009 that the insufficiencies of the Turkish justice system and authorities' negligence in this regard amounted to violations of Convention rights. While judgments of this nature allude to a growing awareness for gender-based violence in human rights law, its relevance in relation to refugee law has [remained unexplored by European courts](#) for quite some time. Indeed, [gender-sensitive interpretations of refugee law in Europe](#) emerged with a delay only, following developments at international law and most notably the [2002 UNHCR guidelines](#). The *Women who are Victims of Domestic Violence* case marks a significant leap forward in the evolutionary emergence of a gender-sensitive interpretation of EU refugee law. Two aspects of the judgment are key in this regard: (1) the finding that women, as a whole, may be members of a particular social group; (2) the recognition of gender-based acts of persecution by non-state actors.

Women as members of a particular social group

The Geneva Convention stipulates that an individual may only qualify as refugee where the persecution (s)he faces is motivated by one of several exhaustively listed reasons. Specifically, persecution must be based on 'reasons of race, religion, nationality, political opinion or membership of particular social group'. In the *Women who are Victims of Domestic Violence* case, one of the ECJ's most remarkable findings concerned the statement that women 'as a whole' may be regarded as belonging to a 'particular social group' in this sense (para. 57). This interpretation was strongly inspired by Article 60 of the Istanbul Convention, which stipulates that parties are to ensure a gender-sensitive interpretation to the reasons for persecution ([here](#), para. 48). In this light, the ECJ considered the two conditions spelled out in the Qualification Directive that guide the assessment whether a person may be a member of a particular social group. Similar to several national courts ([here](#), para. 44 and [here](#), para. 35), it found that women may, first, share an innate characteristic that is, second, viewed by the surrounding society as distinct ([here](#), paras. 49-52).

This conclusion applies sweepingly to situations in which women are, in their country of origin, exposed to physical or mental violence, including sexualized and domestic violence.

In which concrete situations such forms of violence may be said to exist, however, is not clear from the outset and will likely keep national courts on their toes. A country like Afghanistan, for instance, will easily qualify as a society in which gender-based violence is rampant. In this sense, the *Women who are Victims to Domestic Violence* case [sets the scene](#) for the currently pending *Women Fleeing Taliban* case. Nonetheless, it should be borne in mind that the situation of women in other countries may be less evident and that this factual prerequisite can be expected to give rise to further preliminary reference questions in the future.

The finding that women belong to a particular social group does not mean that they automatically qualify for refugee status. Membership of a particular social group does not, in itself, establish whether an individual may have a well-founded fear of being persecuted. Rather, such a finding must be the result of an individualised assessment, carried out with vigilance and care. In the *Women who are Victims of Domestic Violence* case, the ECJ used the opportunity to reiterate that Member States are not just obliged to gather all the relevant information regarding the countries of origins of asylum seekers more generally, but that this information must equally contain information on the situation of women and the violence to which they might be exposed ([here](#), paras. 60 et seq.). In line with the 2002 UNCHR guidelines, the ECJ highlighted that this information should include details on the situation of women, both in legal terms, but also in practice.

Protection from gender-based persecution by non-state actors

It has often been acknowledged that the Geneva Convention, while being couched in neutral terms, [fails to duly account for gendered experiences of persecution](#). In its 2002 guidelines, for instance, the UNCHR noted that 'historically, the refugee definition has been interpreted through a framework of male experiences, which has meant that many claims of women [...] have gone unrecognised.' Against this backdrop, it is not surprising that women often face difficulties in presenting their claims as relevant for international protection. One of the reasons for these difficulties lies in the fact that gender-based violence often occurs 'within personal relationships or closed circuits', as the ECtHR put it (see [here](#), at para. 132). In two respects, the *Women who are Victims of Domestic Violence* case provides guidance regarding the protection needs of victims of gender-based violence committed by non-state actors.

First, it clarified that women need not always demonstrate that the violence they experienced through the hands of non-state actors was motivated by one of the reasons for persecution. Doctrinally, refugee protection presupposes the existence of such a link. In principle, applicants therefore need to show that acts of violence were committed

against them on account of their perceived membership of a particular social group. In line with the UNHCR guidelines ([here](#), para. 21), however, the ECJ adopted an interpretation that is conscious of the difficulties that women may face in this regard. Where acts of violence were committed by non-state actors, the ECJ ruled that a link between acts and reasons of persecution may be said to exist whenever the absence of state protection was motivated by one of the reasons for persecution. For asylum seekers, this simplifies matters significantly. Instead of having to show that the violence committed against them by members of their family or community was motivated by one of the reasons for persecution, they may now refer to the negligence or inaction of state organs to motivate their application.

In the *Women who are Victims of Domestic Violence* case, the ECJ was secondly asked to clarify the implications that such forms of violence could have for subsidiary protection. To be sure, following *inter alia* the ECJ's reasoning in this case, women facing domestic violence may often qualify as refugees and not, therefore, as beneficiaries of subsidiary protection. Where national authorities (including courts) would find that women having experienced gender-based violence by non-state actors do not qualify as refugees, however, the question arises in how far forms of non-state gender-based violence may be of relevance to the examination of subsidiary protection needs. In this regard, the ECJ provided another helpful clarification. It defined the term 'serious harm' expansively, to the effect that a threat of execution should be read to include threats posed by non-state actors (see [here](#), paras. 73 et seq.). Death threats or threats of serious harm will therefore qualify as 'serious harm' for the purposes of subsidiary persecution.

Conclusion

The *Women who are Victims of Domestic Violence* case breaks new ground for the protection needs of persons fleeing gender-based violence. By clarifying that both the CEDAW and the Istanbul Convention constitute 'relevant treaties' for the purposes of Article 78(1) TFEU, the ECJ put forward an interpretation of the Qualification Directive in conformity with the international obligations to eliminate discrimination and to combat gender-based violence against women set out in the CEDAW and the Istanbul Convention, respectively. In doing so, it consolidates a gender-sensitive interpretation of EU refugee law that creates significant advantages for women protection seekers. Specifically, the ECJ confirmed that women, as a whole, may qualify as a particular social group for the purposes of refugee protection. Moreover, it recognized that gender-based violence against women is often committed by non-state actors, and further elaborated on the protection needs of victims in this context. These conclusions will be of high relevance for

currently [pending](#) and future cases concerning the protection needs of persons fleeing gender-based violence, including those of [women fleeing Afghanistan](#).