Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 20 April 2023[1]

Case C-621/21

WS
v
Intervyuirasht organ na Darzhavna agentsia za bezhantsite pri Ministerskia savet
third party:
Predstavitelstvo na Varhovnia komisar na Organizatsiyata na obedinenite natsii za bezhantsite v Bulgaria

(Request for a preliminary ruling from the Administrativen sad Sofia-grad (Administrative Court, Sofia, Bulgaria))

(Reference for a preliminary ruling – Area of freedom, security and justice – Directive 2011/95/EU – Standards for the granting of international protection and for the content of such protection – Third-country national facing the risk of being a victim of an honour crime, a forced marriage or domestic violence by non-State actors if she is returned to her country of origin – Conditions for granting refugee status – Article 9(3) – Establishment of a causal link between the reasons for the persecution and the absence of protection in the country of origin – Article 10(1)(d) – Establishment of membership of a 'particular social group' by reason of the applicant's gender – Conditions for granting subsidiary protection – Concept of 'serious harm' – Convention on preventing and combating violence against women and domestic violence (Istanbul Convention))

I. Introduction

1. The issue of acts of violence against women in the family context has become a major concern of our societies after the gravity and the consequences of such acts had long been underestimated by the authorities. Killings of women in the family circle, now called 'femicide' in everyday language, have been publicly denounced. The public authorities have become aware of the need to provide better protection for women victims of violence in their family setting and to take a stricter approach towards the authors of such violence. Must that protection which must be guaranteed within a State also be afforded to women who have fled their countries and who cannot or do not wish to return because they fear that they will suffer violence in the family circle? More precisely, may women faced with such a situation be recognised as having refugee

[1] Original language: French.

status, within the meaning of Article 2(e) of Directive 2011/95/EU?[2] If they are not recognised as having such status, to what extent may acts of gender-based violence, committed against a third-country national within the restricted circle of her family life, justify granting subsidiary protection within the meaning of Article 2(g) of that directive?

2. In the case which has been referred to the Court, the Administrativen sad Sofia-grad (Administrative Court, Sofia, Bulgaria) is uncertain as to whether and, if so, what type of international protection should be granted to a Turkish national, of Kurdish origin, in view, first, of the nature of the acts of violence to which she faces the risk of being exposed if she returns to her country of origin. Those acts might consist of violence in the family circle, indeed an honour crime, or of a forced marriage. Second, it is also necessary to take account of the circumstances in which those acts are committed, namely the fact that they are committed by non-State actors.[3]

3. That question reflects the concerns – which, moreover, are to be found expressed in the observations lodged in the present case – of those who consider that refugee status cannot be granted to all women who are victims of domestic violence, since it is a problem common to all States, and those who, on the other hand, deplore the fact that subsidiary protection is only protection granted ‘by default’ to those women, thus leading to non-recognition of the reasons for gender-related persecution, including those based on sexual orientation and gender identity.

4. In his Opinion in *État belge (Right of residence in the event of domestic violence)*,[4] Advocate General Szpunar emphasised the pressing need not to underestimate the legal, political and social importance of recognising the seriousness of the problem of domestic violence and the recent developments in EU rules on the protection of victims.[5] Virtually simultaneously, however, Advocate General Hogan stated in his Opinion in Opinion 1/19 (*Istanbul Convention*)[6] that, as matters stand, EU law does not generally provide that there is an ‘obligation to take account of violence against women as one of the forms of persecution that may give rise to refugee status’.[7]

5. The question arises today from a different aspect, since it arises in the context of an individual situation.

[2] Directive 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 (OJ 2011 L 337, p. 9).

[3] In the light of the facts of the case in the main proceedings, this Opinion addresses the issue of domestic violence against women. It should be borne in mind, however, that, as the European Court of Human Rights held in its leading judgment of 9 June 2009, *Opuz v. Turkey* (CE:ECHR:2009:0609JUD003340102, § 132), ‘it is not only women who are affected’ by domestic violence, and that ‘men may also be the victims of domestic violence and, indeed, … children, too, are often casualties of the phenomenon, whether directly or indirectly’.

[4] C-930/19, EU:C:2021:225.

[5] Point 94 et seq. of that Opinion.

[6] EU:C:2021:198. The Convention on preventing and combating violence against women and domestic violence (‘the Istanbul Convention’), adopted by the Committee of Ministers of the Council of Europe on 7 April 2011, entered into force on 1 August 2014 (*Council of Europe Treaty Series* – No 210). All the Member States of the European Union have signed and ratified the convention apart from the Republic of Bulgaria, the Czech Republic, the Republic of Latvia, the Republic of Lithuania, Hungary and the Slovak Republic, which have not ratified it. The Republic of Türkiye ratified that convention on 14 March 2012 and announced its withdrawal by an act dated 22 March 2021; its withdrawal entered into force on 1 July 2021.

[7] Point 161 of that Opinion.

6. In the first place, the Court will be required to determine the conditions in which a third-country national, who faces the risk of being the victim of an honour crime or a forced marriage and of being exposed to acts of domestic violence if she returns to her country of origin, might be considered to have a well-founded fear of being persecuted by reason of her membership of a 'particular social group' and be granted refugee status (Article 10(1)(d) of Directive 2011/95).

7. In the second place, the Court will be required to clarify the conditions in which the competent national authority must ascertain, in a case where the violence is committed by a non-State actor, that there is a causal link between the reasons for the persecution, namely membership of a particular social group, and the absence of protection in the country of origin (Article 9(3) of that directive).

8. In the third and last place, the Court will be required to examine the extent to which subsidiary protection status might be granted to such a person. In that context, it will have to determine the conditions in which the acts of violence described above might be classified as 'serious harm' within the meaning of Article 15 of that directive, either in so far as they constitute a serious threat against that person's life or in so far as they constitute inhuman or degrading treatment.

II. Legal framework

A. International law

1. The Geneva Convention

9. The first subparagraph of Article 1A(2) of the Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951,[8] provides that the term 'refugee' is to apply to any person who, 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'.

2. The CEDAW

10. The Convention on the Elimination of All Forms of Discrimination against Women ('the CEDAW'),[9] to which the European Union is not a party, provides, in Article 1:

'The term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'

[8] The Convention entered into force on 22 April 1954 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)) ('the Geneva Convention'), as supplemented by the Protocol relating to the Status of Refugees, concluded in New York on 31 January 1967 and entered into force on 4 October 1967.

[9] Convention adopted by the General Assembly of the United Nations on 18 December 1979 and entered into force on 3 September 1981 (*United Nations Treaty Collection*, Vol. 1249, p. 13, No 20378 (1981)).

11. Article 5(a) of that convention states:

‘States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women’.

12. That convention was supplemented by General Recommendation No. 19 of the Committee on the Elimination of Discrimination against Women,[10] entitled ‘Violence against women’, which provides, in paragraph 6:

‘The [CEDAW] in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty …’

13. That recommendation was updated in 2017 by General recommendation No. 35 on gender-based violence against women,[11] which provides, in paragraphs 10 and 16:

‘10. The Committee [on the Elimination of Discrimination against Women] considers that gender-based violence against women is one of the fundamental social, political and economic means by which the subordinate position of women with respect to men and their stereotyped roles are perpetuated …

…

16. Gender-based violence against women may amount to torture or cruel, inhuman or degrading treatment in certain circumstances, including in cases of rape, domestic violence or harmful practices …’

14. In addition, the CEDAW was supplemented by the Declaration on the Elimination of Violence against Women,[12] Article 2 of which provides:

‘Violence against women shall be understood to encompass, but not be limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

[10] Recommendation adopted at the 11th session (1992).

[11] Recommendation adopted on 26 July 2017.

[12] Declaration adopted on 20 December 1993 by the United Nations General Assembly in Resolution 48/104.

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.'

3. The Istanbul Convention

15. The preamble to the Istanbul Convention provides, in the 10th to the 12th paragraphs:

'Recognising that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women;

Recognising the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men;

Recognising, with grave concern, that women and girls are often exposed to serious forms of violence such as domestic violence, sexual harassment, rape, forced marriage, crimes committed in the name of so-called "honour" and genital mutilation, which constitute a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men'.

16. In the words of Article 1 in Chapter I, entitled 'Purposes, definitions, equality and non-discrimination, general obligations', the purposes of the Istanbul Convention are, inter alia, to protect women against all forms of violence, including domestic violence, and to prevent, prosecute and eliminate such violence, to contribute to the elimination of all forms of discrimination against women and to design a comprehensive framework, policies and measures for protection and assistance.

17. In accordance with Article 2(1), the Istanbul Convention is to 'apply to all forms of violence against women, including domestic violence, which affects women disproportionately'.

18. Article 3 of that convention provides:

'For the purpose of this Convention:

(a) "violence against women" is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life;

(b) "domestic violence" shall mean 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;

(c) "gender" shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men;

(d) "gender-based violence against women" shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately;

…

(f) "women" includes girls under the age of 18.'

19. Article 60 of that convention, entitled 'Gender-based asylum claims', is worded as follows:

'(1) Parties shall 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 1A(2), of the [Geneva Convention] and as a form of serious harm giving rise to complementary/subsidiary protection.

(2) Parties shall ensure that a gender-sensitive interpretation is given to each of the Convention grounds and that where it is established that the persecution feared is for one or more of these grounds, applicants shall be granted refugee status according to the applicable relevant instruments.

(3) Parties shall take the necessary or other measures to develop gender-sensitive reception procedures and support services for asylum-seekers as well as gender guidelines and gender-sensitive asylum procedures, including refugee status determination and application for international protection.'

B. European Union law

20. In accordance with Article 78(1) TFEU and Article 18 of the Charter of Fundamental Rights of the European Union ('the Charter'), the Common European Asylum System, of which Directive 2011/95 forms part, is based on the full and inclusive application of the Geneva Convention.

21. Recitals 17 and 30 of that directive state:

'(17) With 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.

…

(30) It is … necessary to introduce a common concept of the persecution ground "membership of a particular social group". For the purposes of defining a particular social group, issues arising from an applicant's gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation or forced abortion, should be given due consideration in so far as they are related to the applicant's well-founded fear of persecution.'

22. Article 2(d) and (f) of that directive provides:

'For the purposes of this Directive the following definitions shall apply:

…

(d) “refugee” means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country … and to whom Article 12 does not apply;

…

(f) “person eligible for subsidiary protection” means a third-country national … who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin …, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country’.

23. In Chapter II of Directive 2011/95, on the ‘assessment of applications for international protection’, Article 6, entitled ‘Actors of persecution or serious harm’, provides:

‘Actors of persecution or serious harm include:

(a) the State;

(b) parties or organisations controlling the State or a substantial part of the territory of the State;

(c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.’

24. Article 7 of that directive, entitled ‘Actors of protection’, is worded as follows:

‘1. Protection against persecution or serious harm can only be provided by:

(a) the State; or

(b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State;

provided they are willing and able to offer protection in accordance with paragraph 2.

2. Protection against persecution or serious harm must be effective and of a non-temporary nature. Such protection is generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.

…’

25. Chapter III of that directive, entitled 'Qualification for being a refugee', includes Article 9, which provides:

'1. In order to be regarded as an act of persecution within the meaning of Article 1A of the Geneva Convention, an act must:

(a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; [[13]] or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).

2. Acts of persecution as qualified in paragraph 1 can, inter alia, take the form of:

(a) acts of physical or mental violence, including acts of sexual violence;

…

(f) acts of a gender-specific or child-specific nature.

3. In accordance with point (d) of Article 2, there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1 of this Article or the absence of protection against such acts.'

26. Article 10 of Directive 2011/95, entitled 'Reasons for persecution', is worded as follows:

'1. Member States shall take the following elements into account when assessing the reasons for persecution:

…

(d) a group shall be considered to form a particular social group where in particular:

– members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

– that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group;

[13] Signed in Rome on 4 November 1950; 'the ECHR'.

…

2. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.’

27. Chapter V of that directive, on ‘qualification for subsidiary protection’, includes Article 15, entitled ‘Serious harm’, which provides:

‘Serious harm consists of:

(a) the death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

…’

C. Bulgarian law

28. In Bulgaria, examination of applications for international protection is governed by the Zakon za ubezhishteto i bezhantsite (Law on asylum and refugees),[14] in the version published in DV No 103 of 27 December 2016 (‘the ZUB’). Directives 2011/95 and 2013/32/EU[15] were transposed into Bulgarian law by two laws amending and supplementing the ZUB, published, respectively, in DV No 80 of 16 October 2015 and DV No 101 of 22 December 2015.

29. In the words of Article 6(1) of the ZUB:

‘The powers laid down in this Law shall be exercised by the officers of the Darzhavna agentsia za bezhantsite [(State Agency for Refugees; “the DAB”)]. Those officers shall establish all the relevant facts and circumstances for the purposes of the procedure for granting international protection and shall afford assistance to aliens who have filed such an application for protection.’

30. The ZUB provides for two forms of international protection.

31. Article 8 of the ZUB concerns the substantive conditions which the applicant must meet in order to be eligible for refugee status. That article incorporates, in similar terms, the provisions laid down in Articles 6 and 9 of Directive 2011/95.

32. Article 9 of the ZUB concerns the substantive conditions which the applicant must meet in order to be eligible for ‘humanitarian status’, which corresponds to subsidiary protection, those conditions corresponding to ‘serious harm’ as defined in Article 15 of Directive 2011/95.

[14] DV No 54 of 31 May 2002.

[15] Directive of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60).

III. The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

33. WS, the applicant in the main proceedings, is a Turkish national, of Kurdish origin, a (Sunni) Muslim and divorced. In June 2018, she left Türkiye in order to travel to Bulgaria, and then to Germany, where she submitted a first application for international protection. By a decision of 28 February 2019 of the DAB, Bulgaria agreed to take charge of her for the purposes of examining her application for international protection.

34. In the three interviews conducted in October 2019, WS stated that she had experienced problems with her ex-husband, BS, in Türkiye, to whom she was forcibly married in 2010 and with whom she had three daughters. After numerous episodes of violence and threats by her husband as well as by her biological family and by her husband's family, she was repeatedly placed in 'violence prevention and monitoring centres' and left home in September 2016. In that regard, WS produced, inter alia, a complaint lodged with the prosecutor's office of Torbalı (Türkiye) reporting those episodes of violence. WS stated that she entered into a religious marriage with another man in 2017, with whom she had a son in May 2018. The divorce between WS and BS was pronounced by a decision of the Civil Court No 1, Diyarbakır (Türkiye), on September 2018, when she had already left Türkiye. WS emphasised, moreover, that she had received no support from her biological family and that contacts had been forbidden by the family head on the ground that she had left the marital home. WS also maintained that she feared for her life if she were to return to Türkiye.

35. By a decision of 21 May 2020, the DAB dismissed WS's application for international protection on the basis of both Article 8 of the ZUB (refugee status) and Article 9 of that law (humanitarian/subsidiary protection status).

36. The DAB considered that the conditions required for granting refugee status were not satisfied on the ground that the violence of which she was the victim on the part of her husband and family members and also the death threats made against her could not be linked to any of the grounds of persecution referred to in Article 8(1) of the ZUB, namely race, religion, nationality, political opinion or membership of a particular social group. Nor did WS claim to be persecuted on the ground of her gender.

37. In addition, the DAB considered that the conditions required for granting humanitarian status (subsidiary protection) were not satisfied either, on the ground that neither the official authorities nor certain groups had taken action against WS. Last, the DAB observed that WS, who did not inform the police of the criminal assault against her, had also not lodged a complaint and that she had left Türkiye lawfully.

38. WS lodged an appeal against that decision, which was dismissed by decision of 15 October 2020. That decision became final by decision of 9 March 2021 of the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria).

39. WS submitted a subsequent action for international protection on 13 April 2021, producing nine pieces of written evidence relating to her personal situation and her State of origin. First, she maintains that she satisfies the conditions for granting refugee status set out in Article 8 of the ZUB, as she is the victim of acts of persecution because of her membership of a particular social group, that of women who have suffered domestic violence and women likely to be victims of honour crimes by non-State actors from which the Turkish State cannot protect her. She also

states that she objects to being returned to Türkiye as she fears being killed by her ex-husband or being the victim of an honour crime and being forced to marry again. She emphasises that her situation is even more difficult because she has had a child with a man to whom she is not civilly married. By way of new circumstances, WS also relies on the withdrawal of the Republic of Türkiye from the Istanbul Convention and in that respect produces, in particular, two reports drawn up in March 2021, one by the US Department of State on human rights practices in Türkiye and the other by the Turkish platform 'We will stop femicide'.

40. Second, WS maintains that she satisfies the conditions for granting humanitarian status (subsidiary protection) laid down in Article 9 of the ZUB, in so far as her return to Türkiye would expose her to a violation of her fundamental rights recognised in Articles 2 and 3 ECHR.

41. By decision of 5 May 2021, the DAB refused to open a new procedure to examine the application for international protection on the ground that WS did not submit new evidence concerning her personal situation or her State of origin, observing, moreover, that the Turkish authorities helped her on several occasions and had stated that they were prepared to help her by all legal means.

42. In those circumstances, the Administrativen sad Sofia-grad (Administrative Court, Sofia) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) For the purpose of classifying gender-based violence against women as a ground for granting international protection under the [Geneva Convention] and under [Directive 2011/95], do the definitions of terms and concepts in [the CEDAW] and the [Istanbul Convention] apply in accordance with recital 17 of [Directive 2011/95], or does gender-based violence against women, as a ground for granting international protection under Directive 2011/95, have an autonomous meaning which differs from that in the abovementioned instruments of international law?

(2) In the case where gender-based violence against women is alleged, must membership of a particular social group as a reason for persecution pursuant to Article 10(1)(d) of Directive 2011/95 be established by taking account solely of the biologically defined sex or socially constructed gender of the victim of persecution (violence against a woman merely because she is a woman), can the specific forms/acts/actions of persecution referred to in the non-exhaustive list in recital 30 be a relevant factor in determining the "visibility of the group in society" – that is to say, can they be its distinguishing feature – depending on the circumstances in the country of origin, or can those acts relate only to the acts of persecution under Article 9(2)(a) [and] (f) of Directive 2011/95?

(3) In the case where the person applying for protection alleges gender-based violence in the form of domestic violence, does that person's biologically defined sex or socially constructed gender constitute a sufficient ground for determining membership of a particular social group under Article 10(1)(d) of Directive 2011/95, or must an additional distinguishing characteristic be established, on a literal interpretation, to the letter, of Article 10(1)(d) of Directive 2011/95, which provides for the conditions as cumulative in nature and the gender-related aspects as alternative in nature?

(4) In the case where the applicant alleges gender-based violence in the form of domestic violence by a non-State actor of persecution within the meaning of Article 6(c) of Directive 2011/95, is Article 9(3) of Directive 2011/95 to be interpreted as meaning that it is sufficient for the purpose of establishing a causal link that there is a link between the reasons for persecution set out in Article 10 [of that directive] and the acts of persecution referred to in [Article 9(1) of that directive], or is it mandatory to establish absence of protection from the alleged persecution; does the link exist in cases where the non-State actors of persecution do not perceive the individual acts of persecution/violence as such as being gender-based?

(5) Can the real threat of an honour killing in the event that the person concerned is returned to the country of origin justify – if the other conditions for this are met – the granting of subsidiary protection under Article 15(a) of Directive 2011/95, read in conjunction with Article 2 … ECHR (no one is to be deprived of his or her life intentionally), or is that threat to be classified as "[serious] harm" under Article 15(b) of Directive 2011/95, read in conjunction with Article 3 … ECHR, as interpreted in the case-law of the European Court of Human Rights, in an overall assessment of the risk of further acts of gender-based violence; is it sufficient for the granting of such protection that the applicant has stated that he or she is subjectively unwilling to avail himself or herself of the protection of the country of origin?'

43. WS, the German and French Governments, and also the European Commission and the United Nations High Commissioner for Refugees (HCR) have lodged written observations.

IV. Analysis

44. By its reference for a preliminary ruling, the referring court seeks, in essence, to determine the extent to which a third-country national who claims that she will face the risk of being a victim of an honour crime or a forced marriage and of being exposed to acts of domestic violence committed within her household if she returns to her country of origin may benefit from international protection within the meaning of Article 2(a) of Directive 2011/95.

45. In accordance with the assessment procedure laid down in Article 10(2) of Directive 2013/32, the first to the fourth questions concern the conditions under which such a person might be eligible for refugee status, within the meaning of Article 2(d) of Directive 2011/95.[16] While the referring court has no doubts as to the classification as 'acts of persecution' of the acts to which WS fears being exposed,[17] it does, however, wonder about the numerous uncertainties as to the way in which that person's gender is to be taken into account for the purpose of establishing,

[16] Under Article 10(2) of Directive 2013/32, the competent national authority is to determine whether the applicant qualifies as a refugee before considering whether he or she is eligible for subsidiary protection. See, in that respect, judgment of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraph 89).

[17] Depending on the particular circumstances of each individual case, I think that those acts of violence may, by their nature or repetition, constitute a 'severe violation of basic human rights' within the meaning of Article 9(1)(a) of Directive 2011/95, or be 'sufficiently serious' within the meaning of the judgment of 19 November 2020, *Bundesamt für Migration und Flüchtlinge (Military service and asylum)* (C-238/19, EU:C:2020:945, paragraph 22 and the case-law cited). On that point, the HCR observes, in its 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 ('the Guidelines on gender-related persecution') of 7 May 2002 that there is no doubt that 'rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking, … are acts which inflict severe pain and suffering – both mental and physical – and which have been used as forms of persecution, whether perpetrated by State or private actors' (paragraph 9). See also, to the same effect, paragraph 310 of the Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (*Council of Europe Treaty Series* – No. 210; 'the Explanatory Report on the Istanbul Convention').

first, the reasons for the persecution (Article 10 of Directive 2011/95) and, second, the causal link between those reasons and the absence of protection afforded by the country of origin (Article 9(3) of that directive).

46. The fifth question concerns the circumstances in which WS might be granted subsidiary protection within the meaning of Article 2(f) of Directive 2011/95 if she cannot be considered to be a refugee. The referring court asks the Court, in particular, about the classification as 'serious harm', within the meaning of Article 15 of that directive, of the acts which she faces the risk of suffering if she is returned to her country of origin.

A. The conditions for granting refugee status, within the meaning of Article 2(d) of Directive 2011/95

1. The first question referred, relating to the meaning and the scope of the concept of 'gender-based violence against women'

47. By its first question, the referring court, relying on recital 17 of Directive 2011/95, asks the Court whether the concept of 'gender-based violence against women', if it must constitute a ground for granting refugee status, has an autonomous meaning in EU law or whether it must be defined in the light of the Geneva Convention, the CEDAW and the Istanbul Convention.

48. That question has its origin in the fact that, like Article 1A of the Geneva Convention, Article 2(d) of Directive 2011/95 merely mentions 'membership of a particular social group' but makes no reference to the 'gender' of the applicant for international protection in the definition of the concept of 'refugee', nor does it provide that gender-based violence against women may in itself constitute a reason for international protection. By contrast, the Istanbul Convention and the CEDAW, adopted under the aegis of the Council of Europe and the United Nations, respectively, devote express provisions to this.

49. The purpose of the Istanbul Convention is, in accordance with Article 1 thereof, to protect women against all forms of violence, including domestic violence, while strengthening the prevention of violence and assistance to victims, and also prosecutions of and penalties against the authors of the violence, by adopting comprehensive and coordinated policies.

50. The concept of 'gender' is defined in Article 3(c) of the Istanbul Convention as covering 'the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men'. The concept of 'violence against women' is defined in Article 3(a) of that Convention as meaning 'all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'. Last, the concept of 'gender-based violence against women' is defined in Article 3(d) of that convention as designating 'violence that is directed against a woman because she is a woman or that affects women disproportionately'.[18]

[18] Paragraph 44 of the Explanatory Report on the Istanbul Convention states that the term 'gender-based violence against women' differs from other types of violence in that 'the victim's gender is the primary motive for the acts of violence described under lit.a. [(violence against women)]. In other words, gender-based violence refers to any harm that is perpetrated against a woman and that is both the cause and the result of unequal power relations based on perceived differences between women and men that lead to women's subordinate status in both the private and public spheres'.

51. Article 60(1) of the Istanbul Convention thus requires the States Parties to take the necessary measures to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of Article 1A(2) of the Geneva Convention and as a form of serious harm giving rise to subsidiary protection. The Explanatory Report on the Istanbul Convention states that that article is intended to be read so that it is compatible with the Geneva Convention and Article 3 ECHR as interpreted by the European Court of Human Rights.[19]

52. The purpose of the CEDAW and, in particular, of General recommendations Nos 19 and 35 of the Committee on the Elimination of Discrimination against Women, is to strengthen the fight against all forms of discrimination against women, by requiring the States Parties to ensure the full enjoyment and the full exercise by women of the rights that they enjoy in all fields. Those general recommendations supplement the CEDAW by incorporating a gender-based approach, defining gender-based violence and requiring the States Parties to adopt general measures inspired by those adopted in the context of the Istanbul Convention.

53. Having outlined those points, I shall now examine the extent to which the terms laid down by those two conventions must be taken into account for the purposes of the implementation of Directive 2011/95.

54. In the first place, I recall that, under Article 78(1) TFEU, the Common European Asylum System, to which Directive 2011/95 belongs, must be in accordance with the Geneva Convention and the 1967 Protocol relating to the Status of Refugees, and with 'other relevant treaties'.[20]

55. Thus, the main purpose of Directive 2011/95, as stated in Article 1 thereof and in the Court's case-law, is to establish a system of rules including concepts and criteria common to the Member States for the identification of persons in need of international protection which are therefore specific to the European Union, while ensuring that Article 1 of the Geneva Convention is complied with in full.[21] In the judgment of 19 November 2020, *Bundesamt für Migration und Flüchtlinge (Military service and asylum)*,[22] the Court thus refused to extend the scope of that directive beyond that covered by that convention, in order to respect the clear intention of the EU legislature to harmonise within the European Union the implementation of refugee status within the meaning of that convention.[23]

56. As I have pointed out, Article 1A of the Geneva Convention makes no reference to 'gender' in the definition of the concept of 'refugee', nor does it provide that 'gender-based violence against women' may constitute in itself a reason for granting international protection. In its Guidelines on gender-related persecution, the HRC considered that there was no need to add an additional ground to the definition of 'refugee' in Article 1 of that convention, since it was widely accepted

[19] Paragraph 300 of that explanatory report.

[20] See also Article 18 of the Charter, and recitals 3, 4, 12, 23 and 24 of Directive 2011/95 (judgments of 14 May 2019, *M and Others (Revocation of refugee status)*, C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 80 and the case-law cited, and of 19 November 2020, *Bundesamt für Migration und Flüchtlinge (Military service and asylum)* C-238/19, EU:C:2020:945, paragraph 20).

[21] See recitals 23 and 24 of Directive 2011/95. See also judgments of 14 May 2019, *M and Others (Revocation of refugee status)* (C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraphs 81 and 83 and the case-law cited), and of 19 November 2020, *Bundesamt für Migration und Flüchtlinge (Military service and asylum)* (C-238/19, EU:C:2020:945, paragraph 19).

[22] C-238/19, EU:C:2020:945.

[23] Paragraph 49 of that judgment. See also judgment of 24 April 2018, *MP (Subsidiary protection of a person previously a victim of torture)* (C-353/16, EU:C:2018:276, paragraphs 54 to 56), where the Court distinguished the mechanisms implemented by Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12) from those established by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York by the United Nations General Assembly on 10 December 1984 (*United Nations Treaty Series*, Vol. 1465, p. 85, No. 24841 (1987)).

by the States Parties that gender can influence, or dictate, the type of persecution or harm suffered and the reasons for that treatment.[24] In the context of Directive 2011/95, the applicant's gender is therefore taken into consideration in the assessment of the nature of the acts of persecution to which he or she is or could be exposed in his or her country of origin (Article 9(2)(f) of that directive)[25] and when the reasons for persecution are examined, in particular when determining the applicant's membership of a particular social group (second indent, *in fine*, of Article 10(1)(d) of that directive).

57. Admittedly, Directive 2011/95 does not define the concept of 'gender'. Reference may however be made to the documents issued by the HCR, which, in accordance with the Court's settled case-law, are particularly relevant in the light of the role conferred on the HRC by the Geneva Convention.[26] Thus, in its Guidelines on gender-related persecution, the HCR states that '"gender" refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while "sex" is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time.'[27]

58. Furthermore, although Article 9(2)(f) of Directive 2011/95 does not specify the scope of 'acts of a gender-specific or child-specific nature', it may be of interest to refer, for that purpose, to another instrument of secondary law, namely Directive 2012/29/EU.[28] Recital 17 of that directive defines 'gender-based violence' as covering 'violence that is directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately … It may result in physical, sexual, emotional or psychological harm, or economic loss, to the victim. Gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking in human beings, slavery, and different forms of harmful practices, such as forced marriages, female genital mutilation and so-called "honour crimes". Women victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence'.

[24] Paragraph 6 of those guidelines. The HCR observes, in paragraph 5 of those guidelines, that, 'historically, the refugee definition has been interpreted through a framework of male experiences, which has meant that many claims of women and of homosexuals, have gone unrecognised. In the past decade, however, the analysis and understanding of sex and gender in the refugee context have advanced substantially in case-law, in State practice generally and in academic writing. These developments have run parallel to, and have been assisted by, developments in international human rights law and standards, … as well as in related areas of international law, including through jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the Rome Statute of the International Criminal Court.'

[25] As witnessed by the words of recital 30 of Directive 2011/95, the aspects arising from the concept of 'gender' were introduced when Directive 2004/83 was recast, replacing the previously used concept of 'sex'.

[26] See, in that respect, judgment of 23 May 2019, *Bilali* (C-720/17, EU:C:2019:448, paragraph 57 and the case-law cited), and recital 22 of Directive 2011/95.

[27] Paragraph 3 of those guidelines.

[28] Directive of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ 2012 L 315, p. 57).

59. As regards, in the second place, the words used in the Istanbul Convention and the CEDAW, it is common ground that the European Union has not ratified the CEDAW and that, while it signed the Istanbul Convention on 13 June 2017, it has not yet acceded to it.[29] Nor has that convention been ratified by all Member States.[30] Pending such accession or ratification, the Istanbul Convention constitutes above all a multidisciplinary convention to ensure, holistically and on the basis of an integrated approach involving all members of society, the prevention of violence against women,[31] the protection and support of victims and the prosecution of the actors of violence.

60. It must be concluded that, as matters stand, neither the Istanbul Convention nor the CEDAW is a 'relevant treaty', within the meaning of Article 78(1) TFEU, by reference to which Directive 2011/95 must be interpreted.

61. As regards, in the third and last place, recital 17 of Directive 2011/95, on which the referring court relies, that recital does not seem to me to be relevant for the purposes of the interpretation of the meaning and scope, in EU law, of the concept of 'gender-based violence against women'.

62. Recital 17 states that 'with respect to the treatment of persons falling within the scope of [that] Directive, Member States are bound by obligations under instruments of international law to which they are party, including in particular those that prohibit discrimination'. In referring to the 'treatment of persons falling within the scope of [that] Directive', the EU legislature did not refer to the procedures for examining an application for international protection, that is to say, the criteria necessary for the purposes of granting such protection, but rather to the rights and benefits which applicants for or beneficiaries of international protection enjoy on the territory of the Member State in which they applied for and, where appropriate, obtained international protection. Recital 17 of Directive 2011/95 finds expression in Chapter VII of that directive, on the 'content of international protection'. By way of illustration, the EU legislature laid down the requirement that Member States are to ensure equal treatment between the beneficiaries of international protection and their nationals with regard to access to procedures for recognition of qualifications (Article 28(1)) and, also, access to healthcare (Article 30). It is in that context that the Member States are required to comply with the obligations arising under the international instruments to which they are party, such as the CEDAW and the Istanbul Convention.

63. It follows from all of those factors that Article 2(d) of Directive 2011/95 must be interpreted as meaning that the conditions for granting refugee status to a person who fears being the victim of acts of gender-based violence in the event of being returned to their country of origin must be examined by reference to the provisions laid down for that purpose by that directive, provisions which must be interpreted in the light of the general scheme and the purpose of that directive, in

[29] See, in that respect, Opinion 1/19 (*Istanbul Convention*) of 6 October 2021 (ECLI:EU:C:2021:832). The next step, namely the official accession of the European Union to the Istanbul Convention, requires the adoption of a decision of the Council of the European Union following the approval of the European Parliament. The conclusion of the European Union's accession to that convention is a priority in the European Union's strategy towards gender equality for the period 2020 to 2025: see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, entitled 'A Union of Equality: Gender Equality Strategy 2020-2025' (COM(2020) 152 final) (p. 4).

[30] At present all the Member States have signed the Istanbul Convention and 21 of them have ratified it (see footnote 6 to this Opinion), although the Republic of Poland announced on 25 July 2020 its intention to withdraw from that convention, which the European Union and the Council of Europe have condemned (see Europe Daily Bulletin No. 12536, *Agence Europe*, 28 July 2020, pp. 7 and 8).

[31] For example, Article 12(1) of the Istanbul Convention asks the States Parties to 'take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men'.

conformity with the Geneva Convention, in accordance with Article 78(1) TFEU, and not in reliance on the definitions set out in the CEDAW and the Istanbul Convention, which are not ‘relevant treaties’ for the purposes of that article.

64. However, in accordance with recital 16 of Directive 2011/95, that interpretation must also have regard to the rights recognised by the Charter. [32]

2. The second and third questions referred, relating to the assessment of the third-country national’s membership of a ‘particular social group’ (Article 10(1)(d) of Directive 2011/95)

65. By its second and third questions, the referring court asks the Court, in essence, to clarify the circumstances in which a third-country national who claims that she will face the risk of being a victim of an honour crime or a forced marriage and of being exposed to acts of domestic violence if she is returned to her country of origin may be considered to be a member of a ‘particular social group’ within the meaning of Article 10(1)(d) of Directive 2011/95.

66. In the first place, the referring court asks the Court whether the applicant’s biologically defined sex may determine in itself her membership of a particular social group within the meaning of Article 10(1)(d) of that directive.

67. Article 10(1)(d) of that directive lays down two conditions that must be satisfied in order to determine an applicant’s membership of a ‘particular social group’. Those two conditions are cumulative. [33]

68. First, the members of the group must share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it. In that regard, the second subparagraph of Article 10(1)(d) of Directive 2011/95 makes clear that, depending on the circumstances in the country of origin, gender-related aspects, including gender identity, are to be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group. [34]

69. Second, that group must have a distinct identity in the third country in question because it is perceived as being different by the surrounding society.

70. Furthermore, it follows from Article 10(2) of Directive 2011/95 that it is immaterial, when assessing if an applicant has a well-founded fear of being persecuted, whether the applicant actually possesses the social characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution. [35]

[32] See judgment of 19 November 2020, *Bundesamt für Migration und Flüchtlinge (Military service and asylum)* (C-238/19, EU:C:2020:945, paragraph 20 and the case-law cited).

[33] See, in that respect, judgment of 4 October 2018, *Ahmedbekova* (C-652/16, EU:C:2018:801, paragraph 89 and the case-law cited).

[34] See also recital 30 of Directive 2011/95.

[35] It follows from the Court’s case-law that Article 10(1) of Directive 2011/95 must be read in conjunction with Article 10(2) of that directive. In the judgment of 4 October 2018, *Ahmedbekova* (C-652/16, EU:C:2018:801, paragraph 86), the Court held that, ‘regardless of whether an Azerbaijani national’s involvement in bringing a complaint against the European Court of Human Rights, for the purposes of supporting a finding that the governing regime disregards fundamental rights, conveys a “political opinion” on the part of that national, it should be ascertained, in the course of the assessment of the reasons for persecution invoked in the application for international protection lodged by that national, whether there are valid grounds for fearing that that involvement would be perceived by the regime as an act of political dissent against which it might consider taking retaliatory action’.

71. As regards the first of those conditions, it is common ground that the applicant's gender may be associated with an innate characteristic – namely her biological sex – 'that cannot be changed', within the meaning of Article 10(1)(d) of Directive 2011/95. In that regard, I note that the Commission's initial proposal relating to Directive 2004/83 referred expressly to the 'fundamental characteristics' of the group, 'such as sexual orientation, age or gender', [36] while the Court has held, moreover, in the judgment of 7 November 2013, *X and Others*, [37] that 'it is common ground that a person's sexual orientation is a characteristic so fundamental to [that person's] identity that he [or she] should not be forced to renounce it'. [38]

72. As regards the second condition, it assumes that, in the country of origin, the social group whose members share the same gender has a distinct identity because it is perceived by the surrounding society as constituting a different group. According to the HCR, the group must be visible. [39] That perception varies not only according to the countries, the ethnic or religious communities, or the political context, but also according to the conduct of the person concerned. [40] Gender is a sociological concept which is used in such a way as to take into account, beyond the biological sex, the values and representations associated with it. Thus, gender is a concept which serves to make it apparent that relationships between men and women, in a given society, and the inequalities that may follow owing to the male and female roles assigned on the basis of biological differences, are acquired and constructed by societies and may therefore evolve differently over time and according to societies and communities. [41] In that context, I think that women, solely on account of their condition as women, are an example of a social group defined by innate and immutable characteristics liable to be perceived differently by society, according to their country of origin, by reason of the social, legal or religious norms of that country or the customs of the community to which they belong. [42] The fact that that social group is made up of women in a given society (and not by 'women' in general) [43] does not in my view constitute in itself a barrier to recognition of the distinct identity of that group solely because of its size. The concept of 'distinct identity' of a group, in that it is perceived differently by the surrounding society, cannot be interpreted as entailing a quantitative assessment. [44]

[36] See Article 12(d) of the Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (COM(2001) 510 final).

[37] C-199/12 to C-201/12, EU:C:2013:720.

[38] Paragraph 46 of that judgment. The Court added, in the same paragraph, that 'that interpretation is supported by the second subparagraph of Article 10(1)(d) of the Directive, from which it appears that, according to the conditions prevailing in the country of origin, a specific social group may be a group whose members have sexual orientation as the shared characteristic'.

[39] See Guidelines on International Protection No. 2: 'Membership of a particular social group' within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees ('the Guidelines on membership of a particular social group') of 7 May 2002 (paragraphs 2 and 14). That does not mean, however, as the Commission emphasises in its observations, that all those who fear being exposed to acts of persecution in their country of origin might be considered to belong to a particular social group within the meaning of Article 10(1)(d) of Directive 2011/95, since such an interpretation would render the other reasons referred to in Article 10(1) of that directive superfluous. That is also the opinion expressed by the HCR, which considers, in its Guidelines on membership of a particular social group, that the social group must be capable of being identified independently of the persecution, but that an act of persecution against a group may be a relevant factor in determining the visibility of that group in a particular society (paragraphs 2 and 14).

[40] In its Guidelines on membership of a particular social group, the HCR notes that 'membership of a particular social group' should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms (paragraph 3).

[41] The Explanatory Report on the Istanbul Convention makes clear that 'the term "gender", based on the two sexes, male and female, explains that there are also socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men' (paragraph 43).

[42] It is interesting to note that Article 12(d) of the Commission proposal cited in footnote 36 to this Opinion expressly stated that the concept of 'social group' included 'also … groups of individuals who are treated as "inferior" … in the eyes of the law'. See also the Guidelines on gender-related persecution (paragraph 30).

[43] See the Guidelines on gender-related persecution (paragraph 31).

[44] As the HCR observes in its Guidelines on gender-related persecution, adopting a gender-sensitive interpretation of the Geneva Convention does not mean that all women are automatically entitled to refugee status (paragraph 4).

73. In the light of those factors, I think that a competent national authority may, following the assessment of the facts and circumstances which it must carry out in accordance with Article 4(3)(a) to (c) of Directive 2011/95, consider that, because of her gender, the applicant is a member of a 'particular social group', within the meaning of Article 10(1)(d) of that directive.

74. In the second place, the referring court asks the Court to clarify whether acts of persecution such as those referred to in recital 30 of Directive 2011/95 and to which the applicant may be exposed in her country of origin may be taken into account for the purpose of determining whether a group in that country has a distinct identity or, rather, whether such acts are solely those set out in Article 9(2)(a) and (f) of that directive.

75. Recital 30 of that directive states that, 'for the purposes of defining a particular social group, issues arising from an applicant's gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation or forced abortion, should be given due consideration in so far as they are related to the applicant's well-founded fear of persecution'.

76. Recital 30 provides clarification to permit an improved definition of the reason for persecution that is membership of a 'particular social group'. It lists a number of acts of persecution that may be applied for the purposes of defining such a group. It is the nature of the acts of persecution, which refer to particular victims, that allows the 'distinct identity' of a social group to be characterised. The acts referred to in recital 30 are not only acts of persecution, thus supplementing the non-exhaustive list set out in Article 9(2) of Directive 2011/95, but also permit the identification of a 'particular social group'. Thus, it follows clearly from recital 30 of that directive that the nature of the acts to which a woman fears being exposed in her country of origin, by reason of her gender, may be a relevant element for the purpose of determining her membership of a particular social group and, in particular, the 'distinct identity' of that group in the country of origin. Although, as I have already mentioned,[45] an act of persecution against a group may be a relevant element when assessing the visibility of that group in a given society,[46] that does not mean that all persons who fear being exposed to acts of persecution in their country of origin might be regarded as belonging to a particular social group. That, to my mind, is why the EU legislature, in that recital, imposed a number of limits. First of all, it refers to acts which are particularly representative of acts of gender-based violence, in that they are directed against a person because of his or her sex or identity or in that they disproportionately affect persons of a particular sex. Next, it covers acts that entail a serious breach of that person's fundamental rights. Last, it refers to acts that are in general and repeated use and the authority of which is recognised either by law or by custom. It follows that, as provided in that recital, a female child or adolescent might be considered to be a member of a group that is visible or identifiable in society in so far as she would be exposed, in the event of being returned to her country of origin, to a tradition or a custom such as excision.[47]

[45] See footnote 39 to this Opinion.

[46] See Guidelines on the membership of a particular social group (paragraphs 2 and 14).

[47] See, for example, in the French case-law, Denis-Linton, M. and Malvasio, F., *Trente ans de jurisprudence de la Cour nationale du droit d'asile et du Conseil d'État sur l'asile, Principales décisions de 1982 au 31 décembre 2011*, March 2012. See also judgments of the Conseil d'État (Council of State, France) of 21 December 2012, *Mrs A … B …* (No 332491), and of the Cour nationale du droit d'asile (National Court of Asylum Law, France; the CNDA) of 25 March 2021, *Ms S.* (No 20006893 and No 20006894 C), in which the CNDA recognised that a female Senegalese child of Soninke ethnicity born in France had refugee status, as the rate of prevalence of excision remained very high within that ethnic group.

77. Furthermore, by using the expression ‘for example’, the EU legislature showed that it did not mean to limit the acts of gender-based violence taken into account to genital mutilation, forced sterilisation or forced abortion. Consequently, there is in my view nothing to prevent a competent national authority from considering that a female child or adolescent, or even a woman, is a member of a particular social group on the ground that she would be exposed, if she were to return to her country of origin, to a risk of forced marriage, that act being accompanied by mental cruelty and physical abuse giving rise to ‘odious breaches of the fundamental rights of the individual, in particular of women’, in the words of Advocate General Mengozzi.[48] That is particularly so because forced marriages give rise, inter alia, to rape and other forms of sexual violence.

78. As for acts of domestic violence, I shall draw the same conclusion in so far as domestic violence may be reflected in acts of extreme seriousness and in repeated violence capable of leading to a serious breach of the fundamental rights of the person.[49] I therefore see no reason why a competent national authority should not consider, after assessing the facts and circumstances specific to each particular case, that a woman who would be forced to return to her country of origin belongs to a group having its distinct identity in that country on the ground that, by her return, she would be exposed in that country to acts of serious marital violence (beatings, rape and other sexual harm, etc.) that are traditional in certain communities. In the context of that individual assessment, the applicant must clearly provide all the detailed evidence, including family, geographical and sociological evidence, relating to the risks that she will personally face. The competent national authority must take account not only of her personality, her age, her level of education, her origin, her background and her social status, but also of general information about the country of origin and, in particular, of the social or customary norms in force which are prevalent in that country, the region, the group or the ethnicity, and also the state of the legislation in force and its implementation.

79. Last, I think that the words of recital 30 of Directive 2011/95 also make it possible to take account of the particular risks to which women who do not conform to the social norms of their country of origin, or who try to oppose them, are exposed. Although there is no exhaustive list of the various social groups which the competent national authorities have been able to identify on that basis, a study of the national case-law and the information reports on countries of origin published by the European Union Agency for Asylum (EUAA)[50] allows some of them to be identified. Thus, in countries and societies in which excision is the social norm, female children and adolescents who avoid such a practice are considered to be identifiable and to belong to a

[48] Opinion in *Noorzia* (C-338/13, EU:C:2014:288, point 3). In that Opinion, Advocate General Mengozzi adds that, in the context of forced marriages, at least one of the spouses is married without giving his or her free and full consent and that ‘he or [especially] she is subjected to forms of physical or mental coercion of his or her will such as, for example, threats or other forms of emotional or, in the most serious cases, physical abuse’ (point 2). See also Opinion of Advocate General Szpunar in *Belgische Staat (Married refugee minor)* (C-230/21, EU:C:2022:477, point 2).

[49] See, on the concept of ‘domestic violence’, Article 3(b) of the Istanbul Convention. As the Explanatory Report on that convention explains, domestic violence includes mainly two types of violence: violence between intimate partners, whether the relationship is current or has come to an end, and inter-generational violence, typically between parents and children.

[50] Formerly the European Asylum Support Office (EASO). To allow the competent national authorities to meet the requirements laid down in Article 4(3)(a) of Directive 2011/95 on a daily basis and to harmonise the procedures for examining claims for international protection in the Member States, the EUAA was given the task of preparing information reports containing an examination, by theme, of the situation in the country or region of origin of the applicant for international protection. Those reports are drawn up on the basis of the gathering of ‘relevant, reliable, objective, accurate and up-to-date’ information on the countries of origin, making use of all relevant sources of information, including information gathered from international organisations, in particular the HCR and other relevant organisations, including members of the EU institutions, bodies, offices and agencies and the European External Action Service (EAAS) (see Article 9(1) and (2)(a) of Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (OJ 2021 L 468, p. 1)).

group having a distinct identity[51] since they are exposed to acts of humiliation, measures of exclusion and retaliation if they are returned to their country of origin.[52] Likewise, women who refuse forced marriages, in a population in which such a practice is current to the extent of being a social norm,[53] have been considered to form part of a group having a distinct identity within the meaning of Directive 2011/95[54] since they are regarded with disapproval by their community and exposed to acts of violence capable of threatening their physical integrity.[55]

80. The HCR considers, in a similar vein, that Afghan women who return from exile in Europe, where they may have adopted western standards and values, contrary to the roles attributed to them by society, tradition, indeed the legal system of their country of origin, may be considered to belong to a particular social group.[56] The EUAA information report on Afghanistan (2023) thus clearly shows that an Afghan woman or young woman who has adopted a western lifestyle, owing to her behaviour, her personal relationships, her appearance, her activities, her opinions, her occupation and/or her residence abroad, is likely to be regarded as transgressing the established social and religious norms and to be exposed to domestic violence, corporal punishment and other forms of punishment ranging from isolation or stigmatisation to honour crimes for those accused of bringing disgrace to their family, their community or their tribe.[57]

81. The Court is currently dealing with that very specific issue in the context of the request for a preliminary ruling submitted in *Staatssecretaris van Justitie en Veiligheid (Persons identifying with the values of the Union)* (C-646/21), concerning the situation of young Iraqi women, after an essentially identical question in *Staatssecretaris van Justitie en Veiligheid* (C-456/21) – concerning, for its part, young Afghan women – was withdrawn.[58]

82. In the light of those considerations, I consider that Article 10(1)(d) of Directive 2011/95 must be interpreted as meaning that a third-country national may be considered to belong to a ‘particular social group’ by reason of her gender provided that it is established, on the basis of an

51 See, for example, in the French case-law, judgment of the Commission des recours des réfugiés (Refugees Appeals Board, France; the CRR, which became the CNDA on 1 January 2009) of 16 June 2005, *Ms S.* (No 492440), concerning a Malian national who had undergone excision in her childhood and had expressed her refusal to submit to a new, total excision demanded by her future husband, following which she was subjected to pressure and threats from the family circle and the local customary authorities. The CRR considered that the fears of persecution by reason of her membership of the social group of women intending to avoid female genital mutilation were well founded, as the applicant was not afforded any protection by the authorities.

52 EUAA, *Report on Female Genital Mutilation/Cutting in Ethiopia*, 12 May 2022, in particular point 4.2: ‘Consequences for refusing to undergo FGM’, p. 32. See also EUAA, fact sheet entitled ‘Protecting women and girls in the asylum procedure’, December 2021, in particular p. 2, and also Middelburg, A. and Balta, A., ‘Female Genital Mutilation/Cutting as a Ground for Asylum in Europe’, *International Journal of Refugee Law*, Vol. 28, No 3, Oxford University Press, Oxford, 2016, pp. 416 to 452.

53 See, for example, judgment of the CNDA of 29 March 2021, *Mrs T.* (No 20024823 C+), which recognises that an Ivorian national has refugee status on the ground that she had avoided a forced marriage together with a threat of genital mutilation.

54 See, in that respect, in the French case-law, judgment of the CRR of 15 October 2004, *Ms NN.* (No 444000).

55 In that context, the HCR considers, in its Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees of 23 October 2012 that ‘where family or community disapproval, for example, manifests itself in threats of serious physical violence or even murder by family members or the wider community, committed in the name of “honour”, it would clearly be classed as persecution’ (paragraph 23).

56 See HCR document entitled ‘Submission by the Office of the United Nations High Commissioner for Refugees in case numbers 201701423/1/V2, 201704575/1/V2 and 201700575/1/V2 before the Council of State’ (paragraph 16).

57 Country Guidance: Afghanistan, January 2023. In point 3.12, that report refers specifically to the crime of morality ‘zina’, which covers all conduct contrary to sharia, such as illicit sexual relations, pre-marital sex, adultery, punishable by death or violence committed in the name of honour, including honour crime, and applied in particular against women (p. 74).

58 See order of the President of the Court of 26 October 2021, *Staatssecretaris van Justitie en Veiligheid* (C-456/21, not published, EU:C:2021:901). Case C-646/21 raises, in particular, the question whether the values and lifestyle which a young woman has acquired during her long-term stay on the territory of a Member State, during a significant period of her life when she forms her identity, and the conduct which she adopted during her stay may be regarded as a ‘common background that cannot be changed’, within the meaning of Article 10(1)(d) of Directive 2011/95, or rather as a ‘characteristic … so fundamental to identity or conscience that a person should not be forced to renounce it’, within the meaning of that article.

assessment of the facts and circumstances, that, in addition to her gender alone, that is to say, her identity and her status as a woman, she has a distinct identity in her country of origin because she is perceived differently by the surrounding society by reason of the social, legal or religious norms or the rites or customs of her country or of the community to which she belongs. In the context of that assessment, the nature of the acts to which that national fears being exposed if she is returned to her country of origin is a relevant element which the competent national authority must take into consideration.

3. The fourth question referred, relating to the establishment of a causal link between the reason for the persecution and the absence of protection against the act of persecution (Article 9(3) of Directive 2011/95)

83. By its fourth question, the referring court asks the Court, in essence, whether Article 9(3) of Directive 2011/95 must be interpreted as meaning that, in the event of domestic violence carried out by a non-State actor, the competent national authority is required to ascertain that there is a causal link between the reason for the persecution and the absence of protection on the part of the State or the parties or organisations which control it.

84. As a preliminary point, it must be stated that, in order for acts of domestic violence committed, by definition, by non-State actors to be regarded as acts of persecution within the meaning of Article 9(1) of Directive 2011/95, the competent national authority must take into account, in accordance with Article 6(c) of that directive, the fact that the State or the party or organisation controlling it is unable or unwilling to provide protection to the victim.

85. That position must be demonstrated, as the inability or, conversely, the ability of the country of origin to provide protection from acts of persecution constitutes a crucial element in the assessment of the circumstances leading to the grant or, where appropriate, the cessation of refugee status.[59] As I observed in my Opinion in *Bundesrepublik Deutschland (Maintaining family unity)*,[60] international protection is a surrogate protection which is granted to an applicant where, and so long as, his or her country of origin is not in a position to protect him or her against the risk of persecution or serious harm to which he or she is exposed, or is unwilling to do so,[61] the applicant's fear then being considered to be well founded.

86. That assessment of the existence or absence of protection from persecution or serious harm must be carried out in accordance with the requirements laid down in Article 7 of Directive 2011/95.[62]

[59] Judgment of 20 January 2021, *Secretary of State for the Home Department* (C-255/19, EU:C:2021:36, paragraph 36 and the case-law cited). As acknowledged by the Court, the fear of persecution and protection against acts of persecution are conditions that are intrinsically linked (paragraph 56 of that judgment).

[60] C-91/20, EU:C:2021:384, paragraph 82.

[61] I recall that, like Article 1 of the Geneva Convention, Directive 2011/95 incorporates the principle of the subsidiarity of international protection in the context of both the grant of refugee status and the cessation thereof (Article 11 of Directive 2011/95) or the exclusion therefrom (Article 12(1) of Directive 2011/95). See, in that respect, paragraph 90 of the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR, Geneva, 1992. In the literature, see, in particular, Hathaway, J.C. and Foster, M., *The law of refugee status*, 2nd ed., Cambridge University Press, Cambridge, 2014, p. 55: 'It is an underlying assumption of refugee law that, wherever available, national protection takes precedence over surrogate international protection', and also p. 462: 'the purpose of refugee law is to afford surrogate protection pending the resumption or establishment of meaningful national protection', and pp. 494 and 495. See also Goodwin-Gill, G.S. and McAdam, J., *The refugee in international law*, 3rd ed., Oxford University Press, Oxford, 2007, p. 421: 'The lack or denial of protection is a principal feature of refugee character, and it is for international law, in turn, to substitute its own protection for that which the country of origin cannot or will not provide'. See my Opinion in *Bundesrepublik Deutschland (Maintaining family unity)* (C-91/20, EU:C:2021:384, point 82 and footnote 52).

[62] See also recital 26 of Directive 2011/95.

87. First, Article 7(1) of that directive defines the actors of that protection. That protection must be provided either by the State or by parties or organisations controlling the State or a substantial part of the territory of the State. In order to assess the existence of that protection, the competent national authority must then ensure that the actors of persecution are not only able but also willing to protect the applicant from the persecution or serious harm to which he or she is exposed. That aspect is especially important when the applicant for international protection is a woman who fears being the victim of acts of domestic violence committed in the family circle if she returns to her country of origin.

88. Second, in the words of Article 7(2) of Directive 2011/95, protection against persecution or serious harm must be effective and of a non-temporary nature. That means that the actors of that protection adopt reasonable measures to prevent the persecution or serious harm,[63] and that the applicant has access to that protection. That provision refers to the ability of the State of which the applicant is a national to prevent or punish acts of persecution within the meaning of that directive.

89. Under Article 9(3) of Directive 2011/95, moreover, the competent national authority is required to ascertain that there is a connection between the reasons for the persecution referred to in Article 10 of that directive and the acts of persecution within the meaning of Article 9(1) of the directive or the absence of protection against such acts.

90. In a situation such as that at issue in the main proceedings, the competent national authority is therefore required to assess whether a causal link can be established between, on the one hand, the reasons underlying the acts of domestic violence committed within the household or the family circle, namely membership of a particular social group, and, on the other hand, the absence of protection on the part of the authorities of the country of origin, within the meaning of Article 7 of Directive 2011/95, against those acts.

91. That assessment is essential for the purpose of establishing that it is impossible for the third-country national to avail herself of the protection of that country, and that she is justified in refusing to do so, for the purposes of Article 2(d) of Directive 2011/95, because that country is unable or unwilling to prevent those acts, to prosecute them and to punish them.

92. That assessment may be particularly difficult to carry out.

93. As regards the motivation of the non-State actors that leads to violence, the applicant's statements contain elements that are necessarily subjective and are not always supported by direct or documentary evidence. In that regard, it is apparent from the order for reference that the DAB considered that 'the applicant is of full age and has not reported having been persecuted because of her gender' when setting out the facts relied on in support of her application for international protection. However, such an application cannot be rejected on the ground that the third-country national concerned did not state that the acts of violence to which he or she is exposed in his or her country of origin are connected with one of the reasons set out in Article 2(d) of Directive 2011/95. It follows from settled case-law that the statements made by an applicant for international protection constitute merely the starting point in the process of assessment of the facts and circumstances carried out by the competent authorities. While that

[63] Article 7(2) refers to steps taken to prevent acts of persecution and the existence of an effective legal system for the detection, prosecution and punishment of such acts (see, concerning Article 7(2) of Directive 2004/83, which is identical to the second sentence of Article 7(2) of Directive 2011/95, judgment of 20 January 2021, *Secretary of State for the Home Department*, C-255/19, EU:C:2021:36, paragraph 44).

directive provides, in Article 4(1), that Member States may consider it the duty of the applicant for international protection to submit as soon as possible all the elements needed to substantiate the application for international protection, Article 4(1) also provides that it is the duty of the Member State, in cooperation with the applicant, to assess the relevant elements of his or her application.[64] Among the relevant elements submitted for assessment by the competent national authorities, Article 4(2) of that directive mentions 'the reasons for applying for international protection', which necessarily include the reason for the acts of persecution to which the applicant claims to be exposed.[65]

94. As regards the protection against persecution or serious harm provided by the country of origin, the competent national authority must determine the extent to which that protection satisfies the requirements of Article 7 of Directive 2011/95 and, in particular, whether that protection is effective.

95. Thus, in accordance with Article 4(3)(a) of Directive 2011/95, the competent national authority must carry out an assessment, on an individual basis, of the application for international protection, taking into account all relevant facts as they relate to the country of origin, including laws and regulations of that country and the manner in which they are applied. Furthermore, in application of Article 4(5)(c) of that directive, the plausibility and the coherence of the applicant's statements must be assessed in the light of available specific and general information relevant to his or her case.[66]

96. In that context, the EUAA states, in its information report on the situation in Türkiye for November 2016,[67] that, in spite of the legislative reforms introduced in the country to guarantee gender equality and to prohibit the various forms of violence against women, including domestic violence,[68] the efforts put in place by the State authorities to combat violence remain inadequate and ineffective concerning victims' access to information, to legal aid, to the registration of complaints and to justice, as protection orders or injunctions are rarely applied by the police. As regards support services, such as shelters or women's reception centres, the number of which is insufficient, they are inadequate. As regards 'honour killing' and domestic violence, the report states that the conviction rate is particularly low, with the majority of killings occurring in conservative families in the south-east of Türkiye. I note that that report does not take account of the Republic of Türkiye's withdrawal from the Istanbul Convention in 2021.[69]

[64] See judgment of 19 November 2020, *Bundesamt für Migration und Flüchtlinge (Military service and asylum)* (C-238/19, EU:C:2020:945, paragraph 52 and the case-law cited).

[65] See judgment of 19 November 2020, *Bundesamt für Migration und Flüchtlinge (Military service and asylum)* (C-238/19, EU:C:2020:945, paragraph 53).

[66] In the words of Article 4(5)(c) of Directive 2011/95, 'where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when … the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case'.

[67] Country of Origin Information Report: Turkey, Country Focus, available at the following internet address: https://coi.euaa.europa.eu/administration/easo/PLib/EASOCOI_Turkey_Nov2016.pdf (point 5.4.4).

[68] Although various legal instruments refer directly or indirectly to violence against women, such as the Constitution, the civil code and the criminal code, and provisions of employment law and municipal law, the main instrument is Law No 6284 on the protection of the family and the prevention of violence against women, of 8 March 2012.

[69] See footnote 6 to this Opinion.

97. In the same vein, I would emphasise that the European Court of Human Rights made the same finding, in its judgment in *M.G. v. Turkey,*[70] as it had made in 2009 in its judgment in *Opuz v. Turkey*[71] and in 2014 in its judgment in *Durmaz v. Turkey,*[72] namely that of the general and discriminatory judicial passivity already found in domestic violence cases against Türkiye and the inaccessibility of the protective measures afforded to unmarried or divorced women.

98. In the light of those factors, I think that Article 9(3) of Directive 2011/95 must be interpreted as meaning that, in the event of acts of persecution committed by a non-State actor, the competent national authority is required to determine, following an assessment of the application for international protection carried out on an individual basis that takes into account all relevant facts as they relate to the country of origin, including laws and regulations of that country and the manner in which they are applied, whether there is a causal link between, on the one hand, the reasons on which those acts of violence are based, namely the third-country national's membership of a particular social group, and, on the other hand, the absence of protection on the part of the authorities of the country of origin, for the purposes of Article 7 of that directive.

B. The conditions for granting the status conferred by subsidiary protection, within the meaning of Article 2(f) of Directive 2011/95

99. By its fifth question, the referring court seeks clarification of the conditions for granting subsidiary protection, as defined in Article 2(f) of Directive 2011/95, to a third-country national to whom refugee status cannot be granted but who would face the risk of being the victim of an honour crime and of acts of domestic violence, a forced marriage and measures of stigmatisation if she is returned to her country of origin.

100. The referring court focuses its question on two aspects, which I shall examine in turn.

101. The first aspect relates to the extent to which the acts of violence to which that national may be subjected can be classified as 'serious harm', within the meaning of Article 15 of Directive 2011/95, in that they either constitute a serious threat to her life, or constitute inhuman or degrading treatment.

102. The second aspect relates to the requirement that the third-country national must be exposed to a real risk of suffering the serious harm referred to in Article 15 of Directive 2011/95, as she is unable or unwilling to avail herself of the protection of her country of origin.

1. The classification as 'serious harm' of the acts of violence which the third-country national faces the risk of suffering, within the meaning of Article 15 of Directive 2011/95

103. The referring court asks the Court, in essence, whether Article 2(f) of Directive 2011/95 must be interpreted as meaning that, in a situation in which a third-country national maintains that she will face the risk of being the victim of an honour crime and of suffering acts of gender-based violence if she is returned to her country of origin, it is sufficient to establish the existence of a real risk of suffering 'the death penalty or execution', within the meaning of

[70] ECtHR, 22 March 2016 (CE:ECHR:2016:0322JUD000064610, §§ 96, 97 and 116).

[71] ECtHR, 9 June 2009 (CE:ECHR:2009:0609JUD003340102, § 198).

[72] ECtHR, 13 November 2014 (CE:ECHR:2014:1113JUD000362107, § 65).

Article 15(a) of that directive, or whether it is necessary to establish, in the context of a global assessment, the existence of a risk of 'inhuman or degrading treatment or punishment', within the meaning of Article 15(b) of that directive.

104. Article 15 of Directive 2011/95 defines three types of 'serious harm' which, when substantiated, entitle the person subject to them to the grant of subsidiary protection. They include, inter alia, the serious harm defined in Article 15(a) of that directive (which corresponds, in essence, to Article 2 ECHR and to Article 1 of Protocol No. 6 to that convention)[73] as 'the death penalty or execution', and that defined in Article 15(b) of that directive (which corresponds, in essence, to Article 3 ECHR)[74] as 'torture or inhuman or degrading treatment or punishment'. As the Court has acknowledged, that 'serious harm' covers situations in which the applicant for international protection is 'specifically exposed to the risk of a particular type of harm' or to 'specific acts of violence'.[75]

105. I note that the types of 'serious harm' to which the applicant for international protection faces the risk of being exposed are set out in Article 15(a) and (b) of Directive 2011/95 as alternatives: '(a) the death penalty *or* execution; *or* (b) torture *or* inhuman *or* degrading treatment *or* punishment'.[76] That list shows that the EU legislature intended to cover as widely as possible the situations in which the third-country national must benefit from international protection, even though he or she is refused refugee status.

106. As regards the concept of 'honour crime', it is apparent from research carried out by the Council of Europe that that concept covers any act whereby a family or community member kills, maims, burns or injures a woman with the aim of restoring family honour, on the ground that, by her life choices, her desire for emancipation, her refusal of marriage or her sexual orientation, she has transgressed from the cultural, religious or traditional norms.[77] In so far as it consists in a family or community member killing a person, that act may be viewed from the aspect of Article 15(a) of Directive 2011/95, since it is an 'execution'.

107. To my mind, the concept of 'execution' must not be confined solely to an act carried out by the State authorities. If that 'honour crime' consists in putting a person to death, it cannot be characterised solely as 'torture or inhuman or degrading treatment or punishment', within the meaning of Article 15(b) of Directive 2011/95, solely because it was committed by a non-State actor. In addition, Article 6 of that directive provides that actors of serious harm may be non-State actors, if it can be demonstrated that the State or parties or organisations controlling the State are unable or unwilling to provide protection against serious harm. Furthermore, in accordance with the case-law of the European Court of Human Rights, Article 2 ECHR covers situations in which the State has failed in its duty to protect a person's life, although it was

[73] See, in the context of the *travaux préparatoires* of Directive 2004/83, Note 12148/02 from the Presidency of the Council of the European Union to the Strategic Committee on Immigration, Frontiers and Asylum of 25 September 2002, available at the following internet address: https://data.consilium.europa.eu/doc/document/ST-12148-2002-INIT/en/pdf (p. 5). Although Directive 2011/95 repealed and replaced Directive 2004/83, that change in the legal rules did not give rise to any change in the legal regime for granting subsidiary protection or in the numbering of the provisions concerned. Thus, the wording of Article 15 of Directive 2011/95 is the same as the wording of Article 15 of Directive 2004/83 and the case-law concerning the latter provision is also relevant for the purpose of interpreting the former.

[74] See judgment of 17 February 2009, *Elgafaji* (C-465/07, EU:C:2009:94, paragraph 28).

[75] See judgment of 10 June 2021, *Bundesrepublik Deutschland (Concept of 'serious and individual threat')* (C-901/19, EU:C:2021:472, paragraphs 25 and 26 and the case-law cited).

[76] Emphasis added.

[77] See Council of Europe, *Istanbul Convention – Crimes committed in the name of so-called 'honour'*, 2019, and Resolution 2395 (2021), entitled 'Strengthening the fight against so-called "honour" crimes', adopted by the Parliamentary Assembly of the Council of Europe on 28 September 2021.

informed of the existence of a real and immediate threat to his or her life because of the criminal acts of a third party. Thus, in the judgment in *Opuz v. Turkey*,[78] that court held that the State was under a duty to take preventive operational measures to protect an individual who was the victim of domestic violence and who could be identified in advance as a potential target for a murderous action aimed at defending honour. According to that court, Article 2 ECHR therefore places a duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.[79]

108. In those circumstances, from the time when the competent national authority establishes, following a global assessment of the specific circumstances of the particular case, that the person concerned faces the risk of being executed in the name of the honour of her family or community and that that risk is genuine and *well founded*, owing to the absence of protection from the authorities of her country of origin, such an act must be classified as an 'execution', within the meaning of Article 15(a) of Directive 2011/95, and may in itself entail the grant of the status conferred by subsidiary protection if the other conditions laid down for that purpose are satisfied.

109. In order for that status to be granted, there is no requirement for it to be established that the person concerned would, in addition, be exposed to the risk of being a victim of acts of torture or of inhuman or degrading treatment or punishment, within the meaning of Article 15(b) of that directive.

110. I would observe, however, that the competent national authority must carry out a full classification of the serious harm which the person concerned will face the risk of suffering if she is returned to her country of origin.[80] First, that follows from the requirements laid down in Article 4 of Directive 2011/95, under which the competent national authority is required to carry out an appropriate and effective examination of the application for international protection in order to ensure a comprehensive assessment of the needs for protection of the person concerned. In that regard, I recall that that authority has already assessed the nature and the scope of the acts to which the person concerned is exposed in her country of origin when it examined the conditions laid down for the purposes of granting refugee status. Second, this is to avoid the delicate situations in which the person concerned would be regarded, in application of Article 16(1) of Directive 2011/95, as ceasing to be a person eligible for subsidiary protection because of a change in circumstances in the country of origin and would therefore have her status withdrawn prematurely following an inadequate classification of the risks.[81]

111. It follows from those factors that Article 2(f) and Article 15 of Directive 2011/95 must be interpreted as meaning that, in a situation in which the competent national authority establishes, following a global assessment of the specific circumstances of the particular case, that, if she is returned to her country of origin, that national will face the risk not only of being executed in the name of the honour of her family or her community, but also of being the victim of acts of torture

[78] ECtHR, 9 June 2009 (CE:ECHR:2009:0609JUD003340102).

[79] See §§ 128 and 129 of that judgment. See also, concerning domestic violence, judgments of the ECtHR of 15 January 2009, *Branko Tomašić and Others v. Croatia* (CE:ECHR:2009:0115JUD004659806, §§ 52 and 53), and of 8 July 2021, *Tkhelidze v. Georgia* (CE:ECHR:2021:0708JUD003305617, § 57).

[80] I recall that gender-based violence is a proteiform phenomenon. Honour crimes may, inter alia, take the form of false imprisonment, kidnapping, torture, mutilation or indeed forced marriage, which may be accompanied by excision, and domestic violence is a phenomenon which reveals itself not only through physical and sexual assault, but also through psychological violence liable to cause physical or mental injury, emotional suffering or economic loss (see Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted on 29 November 1985 by the United Nations General Assembly in Resolution 40/34).

[81] Although Article 16(2) of Directive 2011/95 requires that Member States are to 'have regard to whether the change in circumstances is of such a significant and non-temporary nature that the person eligible for subsidiary protection no longer faces a real risk of serious harm'.

or of inhuman or degrading treatment or punishment resulting from acts of domestic violence or from any other act of gender-based violence, that authority is required to classify those acts as constituting 'serious harm'.

2. The establishment of a real risk of suffering serious harm, within the meaning of Article 2(f) of Directive 2011/95

112. The referring court asks the Court, in essence, whether Article 2(f) of Directive 2011/95 must be interpreted as meaning that, in a situation in which a third-country national claims that she will face the risk of being the victim of an honour crime and of suffering gender-based acts of violence if she is returned to her country of origin, it is sufficient to establish that she is unwilling to avail herself of the protection of that country, or whether it is necessary to establish the reasons why she is unwilling to avail herself of that protection.

113. In that regard, the referring court refers to the findings of the European Court of Human Rights in the judgment in *N. v. Sweden*[82] concerning the violation of Article 3 ECHR in a situation in which an Afghan national, who is separated from her husband and who does not conform to the roles attributed to her by society, tradition and indeed the legal system, is exposed to a risk of ill-treatment if she is returned to her country of origin, as the conditions of reception and life in women's shelters force women to return home, where they are the victims of abuse or honour crimes.

114. In the context of the Common European Asylum System, subsidiary protection supplements the rules on refugee status laid down in the Geneva Convention.

115. In accordance with Article 2(f) of Directive 2011/95, a 'person eligible for subsidiary protection' is a person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person, if returned to his or her country of origin, would face a real risk of suffering serious harm as defined in Article 15 of that directive, and is unwilling to avail himself or herself of the protection of that country.

116. Thus, as for the definition of 'refugee', in Article 2(d) of Directive 2011/95, which requires that it be established that the applicant for international protection has a well-founded fear of being persecuted in the event of being returned to their country of origin, the definition of 'person eligible for subsidiary protection', in Article 2(f) of that directive, likewise requires that it be established that there is a real risk to which the applicant would be exposed of suffering serious harm upon being returned to that country. I recall that this is necessary for the purpose of establishing that that person is unable to avail himself or herself of the protection of his or her country of origin or is justified in refusing to do so, and it requires the competent national authority to assess, on the basis of Article 7 of that directive, the ability and the willingness of that country to prevent those acts, to prosecute them and to punish them.

117. I would make clear, in that regard, that the requirements laid down in that article as regards the nature and the scope of the protection required relate both to the persecution to which the applicant faces the risk of being exposed and to the serious harm which he or she will face the risk of suffering if he or she is returned to the country of origin. When the competent national authority examines whether the applicant satisfies the conditions for eligibility for subsidiary

[82] ECtHR, 20 July 2010 (CE:ECHR:2010:0720JUD002350509, § 60).

protection, it has already established the ability or inability and the willingness or unwillingness of the country of origin to ensure the protection required in Article 7 of Directive 2011/95, when it examined the conditions for granting refugee status.

118. It follows from those considerations that Article 2(f) of Directive 2011/95 must be interpreted as meaning that, in a situation in which a third-country national claims that she will face the risk of being the victim of an honour crime and of suffering gender-based acts of violence if she is returned to her country of origin, the competent national authority is required to establish whether the State or parties or organisations controlling it offer protection against that serious harm that meets the requirements set out in Article 7 of that directive in order to determine whether that risk is well founded.

V. Conclusion

119. Having regard to all of the foregoing considerations, I propose that the Court answer the questions for a preliminary ruling referred by the Administrativen sad Sofia-grad (Administrative Court, Sofia, Bulgaria) as follows:

In the situation in which a third-country national submits an application for international protection on the ground that she fears, if she is returned to her country of origin, being the victim of an honour crime or a forced marriage and being exposed to acts of domestic violence within her household:

(1) Article 2(d) of 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

must be interpreted as meaning that the conditions for granting refugee status to a person who fears being the victim of acts of gender-based violence in the event of being returned to their country of origin must be examined by reference to the provisions laid down for that purpose by that directive, provisions which must be interpreted in the light of the general scheme and the purpose of that directive, in conformity with the United Nations Convention relating to the Status of Refugees, in accordance with Article 78(1) TFEU, and not in reliance on the definitions set out in the United Nations Convention on the Elimination of All Forms of Discrimination against Women and in the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), which are not ‘relevant treaties’ for the purposes of that article.

That interpretation must also have regard to the rights recognised by the Charter of Fundamental Rights of the European Union.

(2) Article 10(1)(d) of Directive 2011/95

must be interpreted as meaning that a third-country national may be considered to belong to a ‘particular social group’ by reason of her gender provided that it is established, on the basis of an assessment of the facts and circumstances, that, in addition to her gender alone, that is to say, her identity and her status as a woman, she has a distinct identity in her country of origin because she is perceived differently by the surrounding society by reason of the social, legal or religious norms or the rites or customs of her country or of the community to which she

belongs. In the context of that assessment, the nature of the acts to which that national fears being exposed if she is returned to her country of origin is a relevant element which the competent national authority must take into consideration.

(3) Article 9(3) of Directive 2011/95

must be interpreted as meaning that in the event of acts of persecution committed by a non-State actor, the competent national authority is required to determine, following an assessment of the application for international protection carried out on an individual basis that takes into account all relevant facts as they relate to the country of origin, including laws and regulations of that country and the manner in which they are applied, whether there is a causal link between, on the one hand, the reasons on which those acts of violence are based, namely the third-country national's membership of a particular social group, and, on the other hand, the absence of protection on the part of the authorities of the country of origin, for the purposes of Article 7 of that directive.

(4) In the context of the assessment of the conditions for granting the status conferred by subsidiary protection, Article 2(f) and Article 15 of Directive 2011/95

must be interpreted as meaning that in a situation in which the competent national authority establishes, following a global assessment of the specific circumstances of the particular case, that, if she is returned to her country of origin, that national will face the risk not only of being executed in the name of the honour of her family or her community, but also of being the victim of acts of torture or of inhuman or degrading treatment or punishment resulting from acts of domestic violence or from any other act of gender-based violence, that authority is required to classify those acts as constituting 'serious harm'.

In order to determine whether that risk is well founded, the competent national authority is required to establish whether the State or parties or organisations controlling it offer protection against that serious harm that meets the requirements set out in Article 7 of that directive.