Leiden Journal of International Law (2016), 29, pp. 463–483
© Foundation of the Leiden Journal of International Law 2016 doi:10.1017/S0922156516000108

Disconnecting Humanitarian Law from EU Subsidiary Protection: A Hypothesis of Defragmentation of International Law

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Abstract

The development of the Common European Asylum System (CEAS) has often revealed the tight interrelation between refugee law, humanitarian law and international criminal law. It has been argued that the latter bodies of law have, in fact, played a major role in the development of most key concept of the European Union asylum *acquis*.

Drawing from the judgment issued by the Court of Justice of the European Union (CJEU) in *Diakité*, this article aims to prove that this assumption is not always true, especially with reference to the interpretation of specific concepts of international humanitarian law (IHL) and, in particular, the controversial notion of 'internal armed conflict'. In tackling the sensitive issue of clarifying the meaning of 'internal armed conflict' in order to investigate the grounds to warrant subsidiary protection under the Qualification Directive, the Court provided an autonomous interpretation that goes beyond IHL, thus offering another occasion to investigate the interrelation between international law and the EU legal order.

While contributing to the ongoing debate on the relationship between international law and the EU legal order, the article will consider the impact of the Court's reasoning on the EU asylum *acquis*, and will consider whether disconnecting the Qualification Directive from IHL, instead of producing further fragmentation of international law, may contribute to its defragmentation, conceived of as a harmonic co-ordination of different branches of law.

Key words

internal armed conflict; subsidiary protection; autonomous interpretation; hermeneutical coherence; defragmentation

1. Introduction and context

Scholars have been paying increasing attention to the relationship between international law and the EU legal system, covering a broad spectrum of areas.[1] The interaction between these two legal orders has been abundantly influenced by the approach developed by the Court of Justice of the European Union (CJEU).[2] A recent

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1 See generally S. Blockmans and R.A. Wessel (eds.), *Between Autonomy and Dependence. The EU Legal Order under the Influence of International Organizations* (2013); E. Cannizzaro, P. Palchetti and R.A. Wessel (eds.), *International law as law of the European Union* (2012); J. Wouters, A. Nollkamper, and E. de Wet (eds.), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (2008).

2 See especially Case C-286/90, *Poulsen et Diva Navigation*, [1990] ECR 6019; Case C-162/96, *Racke*, [1996] ECR 3655; Joint Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation/Conseil and Commission*, [2008] ECR 6351; Case C-366/10, *Air Transport Association of America e.a.*, [2011] ECR I-13755.

https://doi.org/10.1017/S0922156516000108 Published online by Cambridge University Press

pronouncement of the Court in the case of *Diakité*[3] has driven such relationship to the area of asylum, adding another piece to the thriving case law that the Luxembourg Court began to develop in the past few years in this specific field.

Even though the contours of the EU legal order have been progressively defined by the consistent jurisprudence of the Court of Justice, it must be noted that the 'communitarization' of the law governing asylum and immigration is a relatively recent phenomenon within EU law. In fact, prior to the 1997 Treaty of Amsterdam,[4] it would have seemed unrealistic to address these types of issues. Therefore, 'it is hardly surprising that there has been little in the way of jurisprudence in this area to date'.[5]

Nonetheless, in the past few years, this situation has been changing with the arrival at the Court of preliminary reference procedures on the legal instruments adopted under the former Title IV of the European Community Treaty (ECT), including two Regulations and four Directives, aimed at developing a Common European Asylum System (CEAS) and representing the core of the so-called 'asylum *acquis*'.[6]

Yet while this has remained rather limited until recently, the case law on asylum matters is currently experiencing great momentum, playing in different occasions a major role in interpreting the unclear provisions of the EU asylum legislation:[7] the judgment of 30 January 2014 in *Diakité* is one of these cases.

3 Case C-285/12, *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides*, Judgment of 30 January 2014, ('*Diakité*').

4 1999 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts, OJ 1997 C 340 (1997).

5 A. Collins, 'Recent Developments in Asylum and Immigration Law before the Court of Justice', (2009) 9 *ERA Forum* 581, at 582. As to the CJEU original approach to asylum and immigration law, see K. Lenaerts, 'The contribution of the European Court of Justice to the Area of Freedom, Security and Justice', (2010) 59 *International and Comparative Law Quarterly* 255; S. Peers, 'The jurisdiction of the Court of Justice over EC Immigration and Asylum Law: Time for a Change?', in A. Baldaccini, E. Guild and H. Toner (eds.), *Whose freedom, security and justice?: EU immigration and asylum law and policy* (2007), 85; E. Guild and S. Peers, 'Deference or Defiance? The Court of Justice's Jurisdiction over Immigration and Asylum', in E. Guild and C. Harlow (eds.), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (2001), 267; N. Fennelly, 'The Area of "Freedom, Security and Justice" and the European Court of Justice – a personal view', (2000) 49 *International and Comparative Law Quarterly* 1.

6 The early EU asylum *acquis* consisted of the following binding acts: Council Regulation 343/2003, OJ L 50/1, known as 'Dublin II Regulation'; Council Regulation 2725/2000, OJ L 316/1, known as 'Eurodac Regulation'; Council Directive 2003/9/EC, OJ L 31/18, known as 'Reception Directive'; Council Directive 2004/83/EC, OJ L 304/12, known as 'Qualification Directive'; Council Directive 2005/85/EC, in OJ L 326/13, known as 'Procedures Directive'; and Council Directive 2001/55/EC, OJ L 212/12, known as 'Temporary Protection Directive'. On the 'asylum *acquis*' see G. Noll, *Negotiating Asylum: the EU acquis, extraterritorial protection, and the common market of deflection* (2000); J. Van der Klaauw, 'The EU Asylum Acquis: History and Context', in P.J. Van Krieken (ed.), *The Asylum Acquis Handbook - The Foundation for a Common European Asylum Policy* (2000), 11.

7 For further references see G. De Baere, 'The Court of Justice of the EU as a European and International Asylum Court', *Leuven Centre for Global Governance Studies Working Paper* No. 118, August 2013, 1, available at: www.ghum.kuleuven.be/ggs/publications/working_papers.html; F. Ippolito, 'The contribution of the European Courts to the Common European Asylum System and its on-going recast process', (2013) 20 *Maastricht Journal of European and Comparative Law* 261; E. Tsourdi, 'What Role for the Court of Justice of the EU in the Development of a European Asylum Policy?: the Case of Loss and Denial of International Protection in the EU', (2013) 68 *Tijdschrift voor bestuurswetenschappen en publiek recht* 212; S. Boutruche Zarevac, 'The Court of Justice of the EU and the Common European Asylum System: Entering the Third Phase of Harmonisation?', (2010) 12 *Cambridge Yearbook of European Legal Studies* 53.

https://doi.org/10.1017/S0922156516000108 Published online by Cambridge University Press

This case concerns the interpretation of the 'Qualification Directive' (QD) 2004/83/EC, recently replaced by the recast Directive 2011/95/EU,[8] which defines the eligibility grounds for subsidiary protection, a legal status that complements refugee status as established by the 1951 United Nations Convention on the Status of Refugees.[9] In particular, in *Diakité*, the CJEU was asked for a preliminary ruling by the Belgian *Conseil d'État*, which referred the question of whether the notion of 'internal armed conflict', as referred to in Article 15(c) QD, had to be interpreted in the light of International Humanitarian Law (IHL) and, if not, what interpretation had to be given. The purpose of such request was, in fact, to assess if the person concerned was entitled to benefit from the protection envisaged by the aforementioned Directive.

Accordingly, the case offers another occasion to consider the interrelation between international law and the EU legal order. In this context, whether it is permissible to interpret differently the same notion of 'internal armed conflict' in two branches of law, namely IHL and EU asylum law, will be discussed. As normally happens with matters concerning the interaction between different bodies of law, the *Diakité* judgment has already given rise to various debates.[10] Nonetheless, in an attempt to continue this interesting discussion, the article aims to investigate further issues which are worth examining, namely the impact of this ruling on the whole system of international protection developed by EU law and its contribution to the interrelation between international law and the EU legal order.

While tackling the sensitive issue of clarifying the meaning of 'internal armed conflict' in the context of granting subsidiary protection under the Qualification Directive, the Court ultimately provided an autonomous interpretation that goes beyond IHL, overtaking the criteria that would not favour the main objective of the Directive to ease the identification of 'persons genuinely in need of international protection'.[11] This article will thus consider whether disconnecting the Qualification Directive from IHL by allowing autonomous interpretations of the same concepts in different contexts, instead of producing further fragmentation of international law as suggested by some scholars,[12] may contribute to its defragmentation conceived of as a harmonic co-ordination of different branches of law.[13]

In view of this twofold perspective, the article will initially put the case of *Diakité* into the EU asylum law context and analyze the system of qualification for 'subsidiary

8 Directive 2011/95/EU of the European Parliament and of the Council, OJ L 337/9.

9 1954 Convention relating to the Status of Refugees, 189 UNTS 137, (1951) ('Refugee Convention').

10 See, in particular, C. Matera, 'Another parochial decision? The Common European Asylum System at the crossroad between IHL and refugee law in Diakité', (2015) *Questions of International Law* 3; C. Bauloz, 'The Definition of Internal Armed Conflict in Asylum Law: the 2014 *Diakité* Judgment of the EU Court of Justice', (2014) 12 *Journal of International Criminal Justice* 835; J.-Y. Carlier, 'Guerre et paix pour les demandeurs d'asile. À propos de l'arrêt Diakité de la Cour de justice', (2014) 14 *Journal des tribunaux* 237.

11 Qualification Directive, *supra* note 6, at Recital 6.

12 See, e.g., Matera, *supra* note 10, at 20, who concluded that 'European Union asylum law will undoubtedly need to integrate external norms to enhance its legitimacy in the future'.

13 See A. Van Aaken, 'Defragmentation of Public International Law through Interpretation: A Methodological Proposal', (2009) 16 *Indiana Journal of Global Legal Studies* 483. For further references see also O.K. Fauchald and A. Nollkaemper (eds.), *The Practice of International and National Courts and the (De-) Fragmentation of International Law* (2012).

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protection' under the Qualification Directive and the differentiation of the notion of subsidiary protection from the system of the Refugee Convention (Section 2). Next, the research will focus on the notion of 'internal armed conflict' as defined in international law (Section 3) before exploring in greater detail the different interpretation elaborated upon by the CJEU in the case of *Diakité* (Section 4). Such analysis will eventually investigate how the pronouncement impacts on the EU asylum *acquis* and will offer another perspective to shed light on the interrelation between international law and the EU legal order, answering the question whether IHL is still an appropriate framework to interpret the provisions on subsidiary protection in the EU (Section 5).

2. The qualification for 'subsidiary protection' under EU asylum law

Since one of its early rulings in the field, the EU Court of Justice acknowledged that the objective of asylum is to preserve the integrity of the person and individual liberties, 'issues which relate to the fundamental values of the Union'.[14] To this end, since the Tampere Conclusions of 1999, the EU embarked on establishing the CEAS as a 'constituent part of an Area of Freedom, Security and Justice' that:

> emerged from the idea of making the European Union a single protection area for refugees, based on the full and inclusive application of the Geneva Convention [on the Status of Refugees] and on the common humanitarian values shared by all Member States.[15]

From this point of view, the Qualification Directive 'shows... the characteristic trait that the asylum phenomenon has assumed in recent years in Europe.'[16] EU member states have been called upon to cope with a flow of asylum seekers who do not seem to fall within the definition of refugee enshrined in Article 1(A)2 of the 1951 Refugee Convention. The latter codified a notion based upon the personal fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

The Qualification Directive is, therefore, considered by far one of the most innovative pieces of EU asylum law as it elaborates on the status associated with two different categories of asylum seekers: the refugee; and the person otherwise in need of international protection. It represents the first instrument whose aim

14 Joined Cases C-175/08, C-176/08, C-178/08 & C-179/08, *Salahadin Abdulla and Others v. Germany*, [2010] ECR I-1493, at para. 90.

15 COM (2007) 301 final, 6 June 2007. For a critical analysis of the CEAS, see H. O'Nions, *Asylum - A Right Denied. A Critical Analysis of European Asylum Policy* (2014).

16 R. La Rosa, 'European Asylum Policy: From an "Area of Common Interest" to an Integrated European System', in G. Guarino and I. D'Anna (eds.), *International Institutions and Cooperation: Terrorism, Migration, Asylum* (2011), Vol. 2, 1011, at 1030. See more extensively J. McAdam, *Complementary protection in international refugee law* (2007), 53, and D. Bouteillet-Paquet (ed.), *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (2002).

https://doi.org/10.1017/S0922156516000108 Published online by Cambridge University Press

is 'to harmonise complementary protection, in the Directive's terms "subsidiary protection"'.[17]

A person eligible for subsidiary protection is a third country national or a stateless person who, despite not qualifying as a refugee *stricto sensu*, '... if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm'.[18] Accordingly, subsidiary protection may be granted only to those persons who do not fulfill the criteria to obtain refugee status.

The concept of 'serious harm', as enshrined in Article 15 of the Directive, plays a quintessential role in legitimizing any grant of subsidiary protection. The provision highlights the following three grounds of 'serious harm': a) death penalty or execution; b) torture or inhuman or degrading treatment; and c) serious and individual threat to a civilian's life or person 'by reason of indiscriminate violence in situations of international or internal armed conflict'.[19]

While the first two hypotheses, which have been inspired by Protocols 6 and 13 and Article 3 of the European Convention on Human Rights (ECHR) respectively, did not foster particular interpretative concerns,[20] the latter situation has become highly problematic due to its ambiguous and even contradictory wording, which is the result of different preliminary versions and amendments.[21]

A preliminary version (the one originally proposed by the Commission) of Article 15(c) made reference to widespread human rights violations,[22] but it was harshly objected to by member states during the negotiations. As a consequence, the notion

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17 R. Plender, 'EU Immigration and Asylum Policy – The Hague Programme and the way forward', (2008) 9 *ERA Forum* 301, at 309. On the former 'Qualification Directive' see among others: H. Storey, 'EU Refugee Qualification Directive: a Brave New World?', (2008) 20 *International Journal of Refugee Law* 1; M-T. Gil-Bazo, 'Refugee Status and Subsidiary Protection under EC Law: The Qualification Directive and the Right to Be Granted Asylum', in Baldaccini, Guild and Toner, *supra* note 5, 229; J. McAdam, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime', (2005) 17 *International Journal of Refugee Law* 461.

18 Qualification Directive, *supra* note 6, Art. 2(e). By adopting Directive 2004/83/EC, the EU materialized what the drafters of the UN Geneva Convention addressed as:

> the hope that the Convention ... will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees, and who would not be covered by the terms of the Convention, the treatment for which it provides.

See Recommendation E, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Travaux préparatoires*, 25 July 1951, available at www.unhcr.org/40a8a7394.html.

19 Qualification Directive, *supra* note 6, Art. 15(c).

20 It must be mentioned that in a recent case decided on 18 December 2014, C-542/13, *M'Bodj*, the Court did not expand the scope of the provision under Art. 15(b) QD as to include the circumstance that a person who suffers from an illness occasioning a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment where there is no appropriate treatment in his country of origin or in the country in which he resides.

21 See extensively McAdam, *supra* note 16, at 53–67; see also C. Bauloz, 'The (Mis)Use of International Humanitarian Law under Article 15(c) of the EU Qualification Directive', in D.J. Cantor and J.-F. Durieux (eds.), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (2014), 247 at 247–53; F. Zorzi Giustiniani, 'Protezione sussidiaria ed esigenze di protezione in situazioni di violenza indiscriminata. La Corte di Giustizia si pronuncia sulla c.d. direttiva qualifiche', (2009) 4 *Studi sull'integrazione europea* 779, at 788.

22 See, e.g., European Commission, *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*, 12 September 2001, COM(2001) 510 final, Art. 15(c).

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of 'serious harm' eventually refers to situations of indiscriminate violence in armed conflicts.

It is worth mentioning that the CJEU decision in *Diakité* is the only ruling rendered on the provision under Article 15(c) of the Qualification Directive since the earlier *Elgafaji* case.[23] The latter is therefore a necessary reference to understand the reasoning developed by the Court in *Diakité*.

In *Elgafaji*, the Court for the first time delved into the particularities of the Qualification Directive. On that occasion, the CJEU specifically underscored that the 'serious and individual threat' required by Article 15(c) in order to obtain subsidiary protection can:

> exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict ... reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country ..., solely on account of his presence on the territory of that country or region, face[s] a real risk of being subject to that threat.[24]

In other words, asylum seekers do not have to advance a differentiated personal threat when the degree of violence is such that any person subject to it may face a real risk under Article 15(c).

In this regard, the Court, to address the question whether Article 15(c) had to be interpreted in line with Article 3 ECHR on the right not to be subject to torture or inhuman treatment, as interpreted in the case law of the European Court of Human Rights (ECtHR), pointed out that this provision had to be interpreted independently. The protection envisaged by Article 15(c) of the Qualification Directive is, in fact, not comparable to that stemming from the jurisprudential application of Article 3 ECHR.

Article 15 QD is a composite provision that defines 'serious harm' as in Article 3 ECHR only in situation under letter b). The reference to the hypothesis of 'serious and individual threat ... by reason of indiscriminate violence in situations of international or internal armed conflict' has to be interpreted differently from Article 15(a) and (b). Article 15(c) would, rather, build on the specific system of asylum seekers' protection, established within EC law and considered by the CJEU to be 'fully compatible with the ECHR, including the case law of the European Court of Human Rights relating to Article 3 of the ECHR'.[25]

Following this reasoning, in light of a comparison among the Refugee Convention, the ECHR and the QD, the CJEU concluded that the latter instrument not only incorporates the standard of protection envisaged by the Refugee Convention and the ECHR, but it also contains a special protection in a context of an armed conflict that is not provided for in other international instruments.

23 Case C-465/07, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, [2009] ECR I-921.

24 Ibid., at para. 43. Such extensive interpretation has been borrowed also by some domestic tribunals, see, for instance, Tribunale di Roma, judgment of 21 June 2011, No. 5944; Corte d'Appello di Napoli, judgment of 17 March 2010, No. 38. For references to other states' practice see R. Errera, 'The CJEU and Subsidiary Protection: Reflections on *Elgafaji* - and After', (2011) 23 *International Journal of Refugee Law* 93, at 102.

25 *Elgafaji*, *supra* note 23, at para. 44.

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Therefore, by ascertaining that the provision at issue 'has its own field of application',[26] the CJEU stressed the autonomy of the EU asylum *acquis*, which has been also underscored in the *Diakité* case. On this last occasion, Article 15(c) came again at issue as regards the notion of 'internal armed conflict.'

To thoroughly assess how the Court's interpretation differed from that provided by international law and what the potential repercussions are, the notion of 'internal armed conflict', as accepted in international law, will first be examined, before exploring the CJEU's rationale in the case at issue.

3. In search of a definition: the notion of 'internal armed conflict' in international law

Although representing the vast majority of armed conflicts throughout the international community, 'internal armed conflicts' ('armed conflict not of an international character', in IHL terms) have traditionally received scant regulation in international law, owing to the perception of states that this constitutes a violation of their sovereignty and interference in their internal affairs. In fact, it has been argued that 'for decades, an authoritative definition of a non-international armed conflict proved elusive'.[27]

Two bodies of law in particular have come to play a crucial role in defining and regulating internal armed conflict, namely international humanitarian law and international criminal law.[28] Nonetheless, only the latter eventually provided a neat definition, elaborated by the International Criminal Tribunal for the former Yugoslavia (ICTY), while IHL instruments, such as the 1949 Geneva Conventions and its 1977 Additional Protocol II, left the notion mostly undefined.[29] By and large, as highlighted by the UN High Commissioner for Refugees (UNHCR), there is no single authoritative definition of internal armed conflict in international law – international humanitarian law and international criminal law offer definitions for their own objects and purposes. [30]

Both contributions will be subsequently assessed to reach the preliminary conclusion that an unequivocal notion of internal armed conflict does not exist in

26 Ibid., at para. 36.

27 S. Sivakumaran, *The Law of Non-International Armed Conflict* (2012), 155. For further references see also S. Vité, 'Typologie des conflits armés en droit international humanitaire: concept juridiques et réalités', (2009) 91 *International Review of the Red Cross* 69.

28 For references see extensively A. Cullen, *The concept of non-international armed conflict in international humanitarian law* (2010). Cf. also E. David, 'Internal (Non-International) Armed Conflict', in A. Clapham and P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014), 353; D. Fleck, 'The Law of Non-International Armed Conflict', in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2013), 605; C. Gray, 'The Meaning of Armed Conflict: Non-international Armed Conflict', in M.E. O'Connell (ed.), *What is War?: an Investigation in the Wake of 9/11* (2012), 69; K. Watkin and A.J. Norris (eds.) *Non-International Armed Conflict in the Twenty-first Century* (2012); D. Ciobanu, 'The Concept and the Determination of the Existence of Armed Conflict not of an International Character', (1975) 48 *Rivista di diritto internazionale* 43; T. Farer, 'Humanitarian Law and Armed, Conflicts: Toward the Definition of "International Armed Conflict"', (1971) 71 *Columbia Law Review* 37.

29 Sivakumaran, *supra* note 27, at 164.

30 See UN High Commissioner for Refugees (UNHCR), Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence, 27 July 2011, available at www.refworld.org/docid/4e2ee0022.html, at 104.

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international law. By contrast, one may acknowledge that the accepted notion of 'internal armed conflict' in international humanitarian law has been refined by the jurisprudence of international criminal law tribunals, and notably by the ICTY.

3.1. Article 3 common to the Geneva Conventions on IHL and Additional Protocol II

Prior to the 1949 Geneva Conventions,[31] no substantive provision of IHL specifically applied to situations of non-international armed conflicts. Article 3 which is common to the four Geneva Conventions 'was the first provision of its kind to deal specifically with humanitarian protection in situation[s] of non-international armed conflict'.[32] Nonetheless, instead of defining a non-international armed conflict, it sets forth only 'minimum' provisions that each Party shall be bound to apply in case of armed conflict not of an international character.

The explanation of what is meant by 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'[33] was the 'burning question' which arose during the Diplomatic Conference:[34] 'the expression was so general, so vague, that many of the delegations feared that it might be taken to cover any act committed by force of arms - any form of anarchy, rebellion, or even plain banditry'.[35] Nonetheless, in the *travaux préparatoires* it is clear that the intention of the drafters that the expression had to be interpreted as having the same meaning as 'civil war' ultimately played a crucial role.[36]

A certain number of conditions, that have been suggested by Jean Pictet and build upon the discussions during the diplomatic conference before drafting Article 3, help qualify a conflict as of non-international character.[37] On the whole, an internal armed conflict normally entails three main elements, such as: an uprising against the *de jure* government;[38] the existence of a structure providing insurgents with an organized military force, an authority responsible for its acts, or even a *de facto* authority over persons within a determinate portion of the national territory;[39] and

31 The four Geneva Conventions of 12 August 1949, entered into force on 21 October 1950, include: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31; Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85; Convention (III) Relative to the Treatment of Prisoners of War, 75 UNTS 135; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287. The two Additional Protocols of 8 June 1977, entered into force on 7 December 1978 include: Additional Protocol (I), Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3; Additional Protocol (II) Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609. Full text of the core IHL instruments is available on line on the website of the International Committee of the Red Cross (ICRC): www.icrc.org/ihl.nsf/INTRO?OpenView.

32 Cullen, *supra* note 28, at 25.

33 Art. 3 common to the Geneva Conventions, *supra* note 31.

34 On the negotiations within the Diplomatic conference see extensively Sivakumaran, *supra* note 27, at 156.

35 J. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. IV, (1958), 35.

36 See references in Cullen, *supra* note 28, at 42–6.

37 See Pictet, *supra* note 35, at 35–6.

38 The classical types of non-international armed conflicts are fought between governmental armed forces and non-state armed groups within one state, without any international intervention by another state or the UN. See S. Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict', (2011) 22 *European Journal of International Law* 237.

39 Pictet, *supra* note 35, at 36, emphasized that 'they may have even an organization purporting to have the characteristics of a State'.

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the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression. The above criteria may largely be useful to distinguish an armed conflict from a mere act of violence or a fleeting insurrection.

Further attempts to clarify the scope of Article 3 led to the adoption of the 1977 Additional Protocol II to the Geneva Conventions which specifically addresses the protection of Victims of Non-International Armed Conflicts,[40] and, as it was emphasized, it 'goes a long way to putting flesh on the bare bones of common Article 3'.[41] As such, Article 1 clearly states that the Protocol is meant to develop and supplement Article 3 common to the Geneva Conventions.

In an attempt to provide further clarification, it is commonly accepted that Article 1 of the Additional Protocol II narrows down the scope of 'internal armed conflict'.

First, the Protocol addresses only the cases of internal conflicts waged by insurgents against the *de jure* government. The first paragraph of Article 1 confirms that the Protocol 'shall apply to all armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups',[42] the latter needing to control a part of the State's territory. However, such an element is not required under Common Article 3 to the Geneva Conventions.

Secondly, paragraph 2 specifically states that 'this Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.'[43]

As a result of this higher threshold, all conflicts that meet the Protocol's criteria also fall under the scope of Common Article 3, while the contrary does not hold true.

3.2. The contribution of the International Criminal Tribunal for the former Yugoslavia

In its ruling in *Diakité*, the EU Court of Justice did not only mention IHL provisions to describe the international law background of the case but also highlighted the relevant contribution to the definition of 'internal armed conflict' by international criminal law, notably the case law of the ICTY.[44]

In the context of the trial of *Dušco Tadić*, the ICTY Appeals Chamber set out a test for the existence of an armed conflict, observing that 'an armed conflict exists

40 Additional Protocol II, *supra* note 31.

41 C. Greenwood, 'A critique of the additional protocols to the Geneva conventions', in H. Durham, T.L.H. McCormack (eds.), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (1999), 14. See also G. Abi-Saab, 'Non-International Armed Conflicts', in UNESCO (ed.), *International Dimensions of Humanitarian Law* (1988), 236; H.S. Levie, *The Law of non-international armed conflict: Protocol II to the 1949 Geneva conventions* (1987).

42 As underscored in the relative Commentary, cf. Y. Sandoz and B. Zimmermann (eds.), *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (1987), 1351, only Common Article 3 will apply to such situations. On the relationship between Common Article 3 and Protocol II, see especially L. Moir, *The Law of Internal Armed Conflict* (2002), 101–3.

43 For references see T. Haeck, *Armed conflict, internal disturbances or something else?: the lower threshold of non-international armed conflict* (2012).

44 *Diakité*, *supra* note 3, at para. 14.

https://doi.org/10.1017/S0922156516000108 Published online by Cambridge University Press

whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[45]

In very concise wording, the '*Tadić* formula' encompasses a broad typology of internal armed conflict which is not limited only to the strife between governmental forces and armed insurgents. Through this definition, the ICTY Trial Chamber refined the succinct definition under Common Article 3 of the Geneva Conventions, and singled out two paramount conditions, relating to: (a) the intensity of the conflict; and (b) the level of organization of the actors involved respectively, in order for a situation to be considered an internal armed conflict.[46] Even though it has been argued that the '*Tadić* formula' relies on elements that are well steeped in the longstanding practice of armed conflicts,[47] it has to be stressed that the 'authoritative' application of the aforementioned twofold criterion to situations of internal armed conflicts by the ICTY could ultimately put flesh on the bones of Common Article 3, succeeding where Additional Protocol II failed.

The *Tadić* definition of 'internal armed conflict' has been constantly used not only by the ICTY case law but also in UN Special Rapporteurs' reports[48] and in the jurisprudence issued by other international criminal law tribunals,[49] it was eventually included into the Rome Statute of the International Criminal Court,[50] and it has been agreed in literature that 'it is arguably now the most authoritative formulation of the threshold associated with Article 3'[51] of the Geneva Conventions.

In sum, it is possible to conclude that there is no 'statutory definition' of internal armed conflict in international law, but 'different criteria need to be fulfilled for an armed conflict to exist'.[52] To this end, national decisions have relied either on the common Article 3 definition of internal armed conflict, as complemented by the *Tadić* formula or on the criteria set out by Additional Protocol II.[53] In contrast, in its

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45 *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, at para. 70, available at www.icty.org/x/cases/tadic/acdec/en/51002.htm.

46 Cf. *Prosecutor v. Tadić*, Opinion and Judgment, Case No. IT-94-1-T, T.Ch. II, 7 May 1997, at para. 562, available at www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf. For references see more extensively Cullen, *supra* note 28, at 122.

47 Sivakumaran, *supra* note 27, at 166.

48 See, for instance, Report of the Special Rapporteur on the Human Rights Situation in the Sudan, UN Doc. E/CN.4/2006/111, 11 January 2006, at 8; Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967, UN Doc. E/CN.4/2002/32, 6 March 2002, at 18. For further references see Cullen, *supra* note 28, at 121.

49 See International Criminal Tribunal for Rwanda (ICTR): *Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, Case No. ICTR-96-4-T, T.Ch. I, 2 September 1998, at para. 619; Special Court for Sierra Leone: *Prosecutor v. Fofana et al.*, Decision on appeal against "Decision on Prosecution's motion for judicial notice and admission of evidence", Case No. SCSL-04-14-T-398, Appeals Chamber, 16 May 2005, Separate Opinion of J. Robertson, at para. 32; International Criminal Court (ICC): *Prosecutor v. Lubanga*, Decision on the confirmation of charges, Case No. ICC-01/04-01/06, Pre-T.Ch. I, 29 January 2007, at para. 233.

50 1998 Rome Statute of the International Criminal Court (ICC), A/CONF.183/9 of 17 July 1998, Art. 8(2)f, defining as armed conflicts not of an international character those 'armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.' For an extensive commentary on the incorporation of the *Tadić* formula, see Cullen, *supra* note 28, at 174.

51 Ibid., at 122.

52 Bauloz, *supra* note 21, at 260.

53 Ibid.

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recent judgment the EU Court of Justice did not interpret the concept of 'internal armed conflict' in the light of international law.

4. The notion of 'internal armed conflict' through the lens of the EU Court of Justice

The short excursus on the definition of 'internal armed conflict' in international law underscores the significance of the interpretation recently provided by the EU Court of Justice in *Diakité*.

The notion at issue represented the key element of the proceeding at domestic level, where the applicant complained before the *Conseil d'État* that he was not granted subsidiary protection because the Belgian asylum authorities, namely, the *Commissaire general aux réfugiés et aux apatrides*, first, and the *Conseil du contentieux des étrangers*, on appeal, maintained that Guinea could not be considered as affected by indiscriminate violence in a situation of internal armed conflict as there were only internal disturbances and sporadic acts of violence, and stressing also that, after the Presidential elections of 7 November 2010, there has been no opposed armed group in the country.[54]

Accordingly, under Article 3(2) of the Geneva Conventions, as long as violence is limited to sporadic acts, and as long as a certain threshold of intensity is not reached, there is no armed conflict in the sense of IHL, as interpreted by the ICTY.

Nonetheless, the *Conseil d'État*, through its decision of 16 May 2012, relying on the former CJEU's judgment in *Elgafaji* on the autonomous interpretation of the notion of 'indiscriminate violence', did not exclude that on this new occasion the notion of 'internal armed conflict' could entail more autonomy from international law. Therefore, the *Conseil d'État* referred to the CJEU the question of whether to equate the concepts of 'internal armed conflict' from Directive 2004/83/EC (now replaced by Directive 2011/95/UE) and of 'non-international armed conflict' from IHL for the purpose of interpreting EU asylum law, and consequently for the application of the member states' legislation in conformity with EU law.[55]

In this regard, it is worth mentioning that, following the CJEU's interpretation of Article 15(c) QD in *Elgafaji* with reference to the notion of 'indiscriminate violence', the domestic jurisprudence of certain member states started elaborating even an

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54 See *Conseil du contentieux des étrangers*, arrêt n° 60 972, 6 May 2011, at 3, it was literally stated that: 'La Guinée a . . . été confrontée à des tensions internes, des troubles intérieurs, des actes isolés et sporadiques de violence et autre actes analogues . . . . Il n'existe pas actuellement . . . de conflit armé'.

55 Cf. Conseil d'État, section du contentieux administratif, arrêt n° 219.376, 16 May 2012, at 5, it is expressly stated that:

> il ne peut être exclu, comme le soutient le requérant, que cette notion, au sens de l'article 15, c), de la directive 2004/83/CE, puisse être également interprétée de façon autonome, et revêtir une signification spécifique au regard de celle issue de la jurisprudence du Tribunal pénal international sur l'ex-Yougoslavie.

For a specific reference on this decision see P. D'Huart, 'Le concept de conflit armé interne ou international de l'article 15, point c, de la directive 2004/83/CE: une référence au droit international humanitaire?', (2012) 168 *Revue de droit des étrangers* 238.

https://doi.org/10.1017/S0922156516000108 Published online by Cambridge University Press

autonomous interpretation of the concept of 'armed conflict' in general.[56] The Court of Appeal of the United Kingdom, for instance, started from a traditional approach aimed at defining 'indiscriminate violence' according to IHL[57] but swapped to an interpretation based upon an autonomous definition of armed conflict considered as 'any situation of indiscriminate violence, whether caused by one or more armed factions or by a state, which reaches the level described by the European Court of Justice in *Elgafaji*'.[58] Such reasoning was also echoed by the Federal Administrative Court of Germany which in turn held that the characteristics of an armed conflict under IHL are not decisive in assessing the existence of an internal armed conflict under the Qualification Directive.[59]

Therefore, in *Diakité*, the CJEU was called upon to tackle the challenging issue of interpreting the notion of 'internal armed conflict'. Two interpretative options deserve analysis in order to understand what might have influenced or did influence the Court's ruling.

4.1. The principle of interpretation in conformity with international law

To interpret the question at issue in *Diakité*, it must be noted that the CJEU was confronted with different interpretative methods that generally recall the intricate and highly debated question of how international law works within the EU legal order.[60]

Such a problem was especially addressed by the Advocate General, Paolo Mengozzi, in his Opinion of 18 July 2013.[61] On that occasion, the need for the EU to respect international law was emphasized, echoing the basic tenet under Article 3(5) TEU, which posits that the Union shall contribute 'to the strict observance and the development of international law'.[62] As mentioned by Advocate General Mengozzi, the CJEU itself reiterated such principle in several cases, highlighting that the EU competences shall be exercised in compliance with international law,[63] and, accordingly, an act adopted by virtue of such competences is to be interpreted in

56 See UNHCR, *supra* note 30, at 65–6.

57 *HH & Others (Mogadishu: Armed Conflict: Risk) Somalia v. Secretary of State for the Home Department*, CG [2008] UKAIT 00022, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 28 January 2008, at para. 255.

58 *QD (Iraq) v. Secretary of State for the Home Department; AH (Iraq) v. Secretary of State for the Home Department*, [2009] EWCA Civ 620, United Kingdom: Court of Appeal (England and Wales), 24 June 2009, at para. 35. For references see Errera, *supra* note 24, at 93–122; H. Lambert, 'The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence', (2013) 25 *International Journal of Refugee Law* 207; H. Lambert and T. Farrell, 'The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence', (2010) 22 *International Journal of Refugee Law* 237.

59 *Z.G. v. The Federal Republic of Germany*, [2010] BVerwG 10 C 4.09, Germany: Federal Administrative Court (*Bundesverwaltungsgericht*), 27 April 2010, at para. 24, see translation in English in (2011) 23 *International Journal of Refugee Law* 113.

60 Specifically on the relationship between EU Asylum Law and IHL, see extensively V. Moreno-Lax, 'Of Autonomy, Autarky, Purposiveness and Fragmentation', in Cantor and Durieux (eds.), *supra* note 21, 294.

61 *Diakité*, *supra* note 3, Advocate General's Conclusions, at para. 23.

62 As it has been argued with reference to Art. 3, para. 5, TEU, international law is a 'constitutional objective of the EU', cf. J. Larik, 'Shaping the International Order as an EU Objective', in D. Kochenov and F. Amtenbrink (eds.), *The European Union's shaping of the international legal order* (2013) 62.

63 See, *inter alia*, the judgments on the 'Kadi saga': *Kadi and Al Barakaat*, *supra* note 2; Case T-85/09, *Kadi v. Commission*, [2010] *ECR* II-05177; Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council and United Kingdom v. Kadi (Kadi II)*, Judgment of 18 July 2013. For references see Moreno-Lax, *supra* note 60, at

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light of international law rules. The primacy of the latter demands that EU secondary legislation be interpreted in conformity with them.[64]

The principle of interpretation in conformity with international law is relevant with reference to those international obligations which are binding for the EU,[65] including the Geneva Conventions of 12 August 1949 and their Additional Protocols which, as stated by the International Court of Justice, constitute 'intransgressible principles of international customary law'.[66] Consequently, these principles are binding upon the institutions, including the CJEU, which must ensure that the interpretation of European Union law is in conformity with these principles.[67]

Likewise, it may be argued that the need for the EU to interpret the notion of 'internal armed conflict' in conformity with international law stems from the traditional literal method of interpretation. In international law, a provision 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms'.[68] The substance of this acknowledgment has been re-elaborated in EU law through its consistent case law.

Over the years the CJEU has applied the '*van Gend en Loos* formulation,' namely that it is necessary to consider 'the spirit, the general scheme and the wording'.[69] In this regard, it is indicative that the Qualification Directive does not encompass any definition of armed conflict neither in Article 2, which includes the definition of the most relevant terms, nor in Article 15. Thus, the CJEU applied to the question at issue the settled principle that the meaning and scope of terms for which EU law provides no definition 'must be determined by considering their usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part'.[70] Nonetheless, everyday language suggests very broad definitions for the expression 'conflict', counting a number of synonyms,[71] such as 'dispute', 'friction', 'strife', and 'hostility' that in international law may describe different situations. Therefore, it would be difficult to deny that the wording of Article 15 is inspired by IHL,[72] the latter being the only relevant

312, see also C. Eckes, 'International law as law of the EU: the role of the Court of Justice', in Cannizzaro, Palchetti, Wessel (eds.), *supra* note 1, at 353.

64 *Diakité*, *supra* note 3, Advocate General's Conclusions, at para. 23.

65 Ibid., at para. 26.

66 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 225, at 257, para. 79.

67 *Diakité*, *supra* note 3, Advocate General's Conclusions, at para. 26.

68 Cf. 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, at Art. 31, para. 1, reading that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' For references, P.J. Kuijper, 'The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969', (1998) 25 *Legal Issues of Economic Integration* 1.

69 Case 26/62, *van Gend en Loos*, [1963] ECR 1, at para. 3.

70 *Diakité*, *supra* note 3, at para. 27. Cf. also Case C-549/07, *Friederike Wallentin-Hermann*, [2008] I-11061, para. 17; Case C-119/12, *Probst*, Judgment of 22 November 2012, at para. 20.

71 The *Oxford Dictionary of English* (2010) for the term conflict lists the following synonyms: dispute, quarrel, squabble, disagreement, difference of opinion, dissension; discord, friction, strife, antagonism, antipathy, ill will, bad blood, hostility, falling-out, disputation, contention; clash, altercation, shouting match, exchange, war of words; tussle, fracas, affray, wrangle, tangle, passage of/at arms, battle royal, feud, schism.

72 J. Périlleux, 'L'interprétation des notions de « conflit armé interne » et de « violence aveugle » dans le cadre de la protection subsidiaire: le droit international humanitaire est-il une référence obligatoire?', (2009) 42 *Revue Belge de Droit International* 113, at 122.

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body of law to define the matter at issue. As is known, the reference to a notion with a widely accepted meaning in international law has, among others, the great potential to favour the process of harmonization within the EU legal order, the principle of interpretation in conformity with international law being the most important method, followed by the Court of Justice of the EU, to ensure coherence among different domestic legislations.[73]

Still, according to the method of interpretation based on the intent of the drafters, it must be stressed that the *travaux préparatoires* of the QD 2004/83/EC reveal that an early draft proposal expressly mentioned a reference to the 1949 Convention relative to the Protection of Civilian Persons in time of War as regards the wording of Article 15(c),[74] and the Council Legal Service even suggested to add a reference to the Annexes and Protocols related to this Convention, but the drafters expressly rejected it.[75]

Nevertheless, the combination of other methods of interpretations, namely the systematic and teleological interpretation of the text,[76] led Advocate General Mengozzi to elaborate a cautious approach to the principle of interpretation in conformity with international law. In this regard, he purported that the need to abide by such principle is contingent on a '*cohérence herméneutique*' between the different legal acts at issue.[77]

This interpretative reasoning represented the backbone of the CJEU concise judgment of 30 January 2014 that paved the way to an '*interpretation independent*' of IHL.

4.2. The '*interpretation independent*' of International Humanitarian Law

Following the Advocate General's reasoning, the CJEU in its judgment stressed that a teleological method of interpretation sheds light on the different aims pursued by the 'complex system'[78] of IHL and the EU special subsidiary protection regime respectively.[79] As emphasized, the Court 'takes account not only of the object and purpose of single norms, but also of the *telos* of the instruments in which they appear'.[80]

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73 For references see generally A. Alì, 'Some Reflections on the Principle of Consistent Interpretation Through the Case Law of the European Court of Justice', in N. Boschiero, T. Scovazzi, C. Pitea and C. Ragni (eds.), *International Courts and the Developtment of International Law* (2013) 881–95; F. Casolari, 'Giving Indirect Effect to International Law within the EU Legal Order', in Cannizzaro, Palchetti and Wessel (eds.), *supra* note 1, at 395.

74 See Council of the European Union, 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, Doc. 12620/02 ASILE 54, 23 October 2002. Art. 15(c) of the proposal read as follows: '[in accordance with the 1949 Convention relative to the Protection of Civilian Persons in time of War,] serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.

75 Ibid., at footnote 1.

76 See N. Fennelly, 'Legal Interpretation at the European Court of Justice', (1996) 20 *Fordham International Law Journal* 655, at 662.

77 *Diakité*, *supra* note 3, Advocate General's Conclusions, at para. 26.

78 *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 66, at para. 75.

79 *Diakité*, *supra* note 3, at para. 24.

80 Moreno-Lax, *supra* note 60, at 311, see also the cited case law therein, including Case C-84/12, *Koushkaki*, Judgment of 19 December 2013, at para. 21.

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Despite the fact that, as argued by the Advocate General, IHL and the EU subsidiary protection regime are based on reasons that are essentially humanitarian,[81] IHL especially aims to mitigate the effects of armed conflicts on civilians and other persons or objects that should be protected by regulating the behaviour of belligerents but military needs in the conduct of hostilities are taken into account.[82] The latter, in fact, 'governs the conduct both of international armed conflicts and of armed conflict not of an international character, which means that the existence of either type of conflict acts as a trigger for applying the rules established by such law'.[83] In this regard, the Advocate General in his Conclusions highlighted that IHL also addresses the need for protection of the civil population in the context of an armed conflict.[84] To the contrary, Article 2(e) and Article 15(c) QD provide international protection within the EU to individuals that fled a conflict zone.[85]

Consequently, IHL essentially refers to states directly involved in a conflict, while, as discussed before, subsidiary protection is a '*protection de substitution*'[86] that an EU member State grants to a person fleeing a situation of indiscriminate violence that constitutes a threat to his or her life and personal integrity in his or her country of origin. Therefore, subsidiary protection is especially founded on the principle of *non-refoulement* of a person in need for protection and appears intimately linked to the protection of basic human rights. It must be noted in this regard that, prior to the adoption of the QD, EU Member States had previously established some forms of subsidiary protection based on the principle of *non-refoulement* and were also bound by the case law developed since the 1989 *Soering* case[87] by the ECtHR in its jurisprudence on Article 3 ECHR concerning the right not to be subjected to torture or to inhuman or degrading treatment.

In light of the aforementioned differences between IHL and the EU special subsidiary protection regime, the CJEU in *Diakité* stated that it is not possible 'to make eligibility for subsidiary protection conditional upon a finding that the conditions for applying international humanitarian law have been met'.[88]

Such distinction between the two set of rules, namely IHL and QD, impacted on the core question of interpreting the notion of 'internal armed conflict'. The CJEU, in fact, followed the Advocate General's thesis that a 'hermeneutical coherence'

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81 *Diakité*, *supra* note 3, Advocate General's Conclusions, at para. 66.

82 Périlleux, *supra* note 72, at 132.

83 *Diakité* case, *supra* note 3, at para. 22.

84 Ibid., Advocate General's Conclusions, at para. 69, pointed out that IHL operates on two levels: regulating the conduct of hostilities, on the on hand, and protecting civil population from the effects of war, on the other hand. Likewise, Y. Dinstein, *The conduct of hostilities under the law of international armed conflict* (2004), 16, argued that IHL 'in its entirety is predicated on a subtle equilibrium between two diametrically opposed impulses: military necessity and humanitarian considerations.'

85 *Diakité*, *supra* note 3, Advocate General's Conclusions, at para. 67.

86 Ibid., at para. 68.

87 Cf. *Soering v. United Kingdom*, Judgment of 7 July 1989, [1989] ECHR (Ser. A), at 91. This is the first case in which the Strasbourg Court decided that deportation will engage the responsibility of the deporting state. For references, see H. Battjes, 'The Soering Treshold: Why Only Fundamental Values Prohibit Refoulement in ECHR Case Law', (2009) 11 *European Journal of Migration and Law* 205.

88 *Diakité* case, *supra* note 3, at para. 26.

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between the notion of 'internal armed conflict' under the QD and the concept of 'armed conflict of non-international character' under IHL may not be justified.[89]

The need for protection of the individual being the main focus of the QD, it may be argued that the aim of scrupulously construing the notion of 'armed conflict' is not a primary factor for granting protection, as it is in IHL that also pursues the goal of punishing those accused of violating rules that may apply, depending on the characterization of the conflict.[90] To this extent, the CJEU did not fail to emphasize that '[b]ecause of this, international humanitarian law is very closely linked to international criminal law, whereas no such relationship exists in the case of the subsidiary protection mechanism'.[91]

The analogical interpretation of the notion of 'internal armed conflict' was not considered appropriate by the CJEU in order to meet the need for protection of the claimant. Hence, instead of using IHL criteria, the Court carved out an 'independent' interpretation, regardless of the overall level of intensity, the duration of the conflict or the involvement of the government's armed forces. From this viewpoint, the CJEU defined the notion of internal armed conflict as 'a situation in which a state's armed forces confront one or more armed groups or in which two or more armed groups confront each other'.[92]

Furthermore, the Court complemented its teleological interpretation on the concept of 'internal armed conflict' with the existence of a causal link with the notion of 'indiscriminate violence' as formerly interpreted in *Elgafaji*. Moreover, the CJEU pointed out that for the purpose of the QD not all 'internal armed conflicts' are relevant as a cause for granting subsidiary protection. Only where the degree of indiscriminate violence reaches such a high level that there are 'substantial grounds' for believing that the applicant if returned would face a 'real risk' of being subjected to 'a serious and individual threat' to life, would the violence constitute a ground for providing subsidiary protection.[93]

5. The CJEU's autonomous interpretation and its internal and external repercussions

The Court's reasoning in *Diakité* and its attempt to provide a definition of internal armed conflict in EU asylum law is likely to feed into the ongoing debates concerning, from an internal perspective, the development of a Common European Asylum System and the interpretation of its relevant provisions, and, externally, the overall relationship between the EU legal system and international law.

The internal and external repercussions of eroding the 'IHL monopoly over the notion of armed conflict'[94] must therefore be addressed to answer the question

89 Ibid., Advocate General's Conclusions, at para. 72.

90 See, e.g., SC Res. 1214 (1998), Preamble. For references see J. McAdam, 'Individual risk, armed conflict and the standard of proof in complementary protection claims: the European Union and Canada compared', in J.C. Simenon (ed.), *Critical Issues in International Refugee Law Strategies toward Interpretative Harmony* (2010), 59.

91 *Diakité*, *supra* note 3, at para. 25.

92 Ibid., at para. 28.

93 Ibid., at para. 30. See also *Elgafaji*, *supra* note 23, at para. 43.

94 Bauloz, *supra* note 10, at 837.

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of whether IHL may be an appropriate framework to interpret the provisions on subsidiary protection in the EU.

5.1. The impact of the Court's autonomous interpretation on EU asylum law

From an internal perspective, the rudimentary definition provided by the Court undoubtedly constitutes a breakthrough for the standards of protection of asylum seekers, as it lessens the threshold to assess the existence of an internal armed conflict: the notion is, in fact, disconnected from the traditional fulfilment of the criteria required by IHL.

Accordingly, the autonomous interpretation of internal armed conflict provided by the CJEU in *Diakité* strengthens the scope of protection of the Common European Asylum System, as it will impact on the tendency by domestic asylum courts to use IHL as an instrument to limit access to subsidiary protection in the EU.[95]

Furthermore, while disconnecting the EU subsidiary protection regime from IHL, in *Diakité* the Court quite naturally found in the earlier *Elgafaji* judgment that hermeneutical coherence could not be justified in relation to IHL. Both judgments interpret, in fact, two complementary concepts of Article 15(c) QD: the concept of 'internal armed conflict' may be thoroughly appraised if the notion of 'indiscriminate violence' is clarified. As a result, the Court settled the issue of discarding the IHL-based interpretation of the terms of the provision in subject. Such approach, on the one hand, was expected to align the CJEU position to that of domestic case law which, as a consequence of the *Elgafaji* judgment, started interpreting the notion of internal armed conflict as independent from IHL.[96] On the other hand, the ruling in *Diakité* will contribute to the reduction of the existing divergences on the interpretation of Article 15(c) QD at the national level.[97] However, while asserting the complementarity between the notion of indiscriminate violence and internal armed conflict, the judgment missed the opportunity to define the criteria to determine the level of violence, thus leaving national authorities without useful guidance on such specific point.[98] The ruling thus confirms the importance of the dialogue between national judges and Luxembourg through the instrument of the reference for preliminary ruling to solve the ambiguities existing in the EU asylum legislation and to foster further harmonization.[99]

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95 With reference to the qualification of the conflict in Iraq, for instance, Sweden seems to have set the threshold higher than the one of the 1977 Additional Protocol II by requiring the fulfilment of the additional criterion of 'affected civilian population'. As emphasized by J. Magnusson, 'A Question of Definition - The Concept of Internal Conflict in the Swedish Alien Act', (2010) 10 *European Journal of Migration and Law*, at 396, such a restrictive definition stems from a policy of avoiding the 'continuous influx of Iraqis'. For further references, see also European Council on Refugees and Exiles (ECRE), *The Impact of the EU Qualification Directive on International Protection*, Report available at www.ecre.org/topics/areas-of-work/protection-in-europe/150.html, and the comments in Bauloz, *supra* note 21, at 262.

96 The *Elgafaji* case, *supra* note 23, prompted recognition by some member states' courts that IHL might not be the right interpretative framework for Article 15(c) QD, thought the judgment did not directly touch upon that specific issue.

97 Lambert and Farrell, *supra* note 58, at 237.

98 See Matera, *supra* note 10, at 20.

99 Carlier, *supra* note 10, at 239.

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Ultimately, the interpretative approach pursued in *Diakité* instead reflects the EU's great attempt to establish an effective system of international protection, avoiding the paradoxical situation of individuals fleeing their country owing to threats to their lives due to indiscriminate violence, but failing to receive protection as the level of violence is not considered serious enough to constitute an armed conflict as defined by IHL.[100] To this extent, the Court even used the not very convincing and artificial argument of the semantic difference between the notion of internal armed conflict and the one of 'armed conflict not of an international character', characteristic of IHL,[101] in order to stress the broader scope of Article 15(c) QD than IHL.

Overall, whether, as purported by Steve Peers, 'the effective application in practice of any set of legal rules depends to a large degree on the judicial system established ... to rule on the interpretation, validity, legal effect of those rules',[102] despite the still existing gaps in the interpretation of Article 15(c) QD, the Court reasoning has established a significant benchmark for the protection for asylum seekers fleeing situations of indiscriminate violence other than armed conflict as defined under IHL.

5.2. The Court's autonomous interpretation as a contribution to the defragmentation of international law

In discarding IHL as the appropriate interpretative framework for the purpose of the EU subsidiary protection, in *Diakité* the Luxembourg judges seemed to raise concerns as to the fragmentation of international law. The UN International Law Commission stressed that this phenomenon has attained legal significance, 'especially as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice'.[103] As a result:

> what once appeared to be governed by "general international law" has become the field of operation for such specialist systems as "trade law", "human rights law", "environmental law", "law of the sea", "European law", ... each possessing their own principles and institutions.[104]

The UN International Law Commission warned that the fragmentation of international law should be avoided, since no body of international rules can be allowed to become a self-contained regime,[105] and, as emphasized by Anne Van Aaken, it constitutes an alarming problem for most scholars.[106]

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100 Bauloz, *supra* note 10, at 845, makes reference for instance to 'drug wars' in Latin America that could be regarded as internal armed conflicts under the interpretation of Art. 15(c) QD, but many other situations, such as in Afghanistan, Pakistan, Yemen, are comparable.

101 *Diakité*, *supra* note 3, at para. 21.

102 Peers, *supra* note 5, at 85.

103 See Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, Fragmentation of International Law: Difficulties Arising from the diversification and expansion of International law, Un Doc. A/CN.4/l.682 (2006), at para. 8.

104 Ibid.

105 Ibid. See also M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', (2002) 15 *Leiden Journal of International Law* 553.

106 Van Aaken, *supra* note 13, at 485. See also A.C. Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law', (2009) 22 *Leiden Journal of International Law* 1.

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Against this background, before the judgment in *Diakité*, scholars had insisted that the concepts of 'armed conflict' or 'indiscriminate violence' as they exist in European asylum law 'ought not to be "autonomous" from the meaning given to these terms within the mainstream of the international humanitarian law discourse'.[107]

Nevertheless, attention must be paid to the fact that not any autonomous interpretation is likely to determine further fragmentation of international law. International legal scholars struggle for the unity and coherence of international law, overlooking the fact that the different branches of international law have their own special rules that can make it difficult to achieve a rigid unity.[108] Instead, and from a different perspective, a harmonious integration of different regimes is feasible, taking into account that 'the same object can fulfil different functions depending on the context in which it is being applied.'[109] Since different legal regimes pursue different aims, the problem of fragmentation could be mitigated by allowing autonomous interpretations, such as the one used by the EU Court of Justice in *Diakité* with regard to the notion of internal armed conflict.

As stressed by Advocate General Mengozzi, although pursuing a different aim, both IHL and subsidiary protection are based on humanitarian reasons.[110] The CJEU's decision interpreted the notion of internal armed conflict outside the limited scope of IHL and with the aim of increasing the opportunity to grant protection. Furthermore, Violeta Moreno-Lax emphasized that the absence of uniformity ('*cohérence herméneutique*' in the Advocate General's words) between EU asylum law and IHL has to be seen as an opportunity for 'constructive heteronomy';[111] it is rather a contribution to the defragmentation of international law by means of autonomous interpretations, a phenomenon that with reference to the EU legal order corresponds with what has been described by doctrine as 'Europeanization of international law'.[112]

Pursuing the goal of maximizing the protective function of subsidiary protection, the Court has disconnected the Qualification Directive from IHL, yet without fostering further fragmentation of international law. The Court has instead provided a coherent pattern between IHL and EU asylum law, based on the applicability of the common constitutional principle of humanity, grounded on the need to enhance human rights protection, to adjoining systems of law. Such method of interpretation is not completely new, as it was especially developed by other judicial or quasi-judicial bodies, including the ECtHR in its case law on Chechnya, where the Court followed 'an approach that may prove both more protective of victims and more politically

107 C. Smith, 'International Humanitarian Law in Subsidiary Protection Applications', (2010) 5 *The Researcher* 1, at 12.

108 See in this regard, A. Fisher-Lescano and G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', (2004) 25 *Michigan Journal of International Law* 999.

109 See Bauloz, *supra* note 10, at 845.

110 *Diakité*, *supra* note 3, Advocate General's Conclusions, at para. 66.

111 See Moreno-Lax, *supra* note 60, at 341.

112 Wouters, Nollkamper and de Wet (eds.), *supra* note 1, at 3, argued that 'the process through which an ever increasing body of international law becomes binding on the EU and through which distinct qualities and features are given to such international law within the EU, constitute core facets of the phenomenon of 'Europeanization of international law'.

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viable than that of humanitarian law',[113] and the UN Human Rights Committee that recently stressed the mutual complementarity of IHL and international human rights law.[114]

The same approach has been largely supported by UNHCR as, in its submission for the case of *QD (Iraq)* v. *Secretary of State for the Home Department* before the Court of Appeal in the United Kingdom, it recommended that the term 'international or internal armed conflict' in Article 15(c) QD 'must be given a broad autonomous meaning', reflecting the object and purpose of the subsidiary protection regime to protect persons from a risk of serious harm if returned to their country of origin or residence.[115] Thus, the UNHCR urges caution in drawing upon international humanitarian law and international criminal law to interpret the scope of Article 15(c) as they constitute 'separate and different spheres of law with their own object and purpose'.[116] Admittedly, it would not be surprising that the same or similar terms should be given a different meaning under Article 15(c) than in IHL.[117]

6. Concluding remarks: a more protective regime within a pluralist legal system

In an attempt to continue the ongoing debate on the relationship between the EU legal order and international law, reinvigorated by the EU Court of Justice's ruling in *Diakité*, the analysis has discussed the peculiarities of the subsidiary protection regime in EU asylum law and dwelt on the mixed feelings that the interpretation of the notion of internal armed conflict independent of international law has raised and highlighted its possible repercussions. While providing more consistency to the EU asylum *acquis*, the Court's autonomous and rudimentary definition of 'internal armed conflict' has triggered the debate on the further fragmentation of international law.

However, while stressing the fact that IHL and EU subsidiary protection pursue different goals, the reasoning of the Court can be read as an input to a harmonic co-ordination of the two legal regimes, which ultimately result in a contribution to the defragmentation of international law. The judgment in *Diakité* reflects, in fact, the CJEU's tendency to broaden the scope of protection within EU law and, by reiterating the reasoning in *Elgafaji*, it can be used as the evidence of the fact

113 Cf. *Isayeva, Yusupova and Bazayeva v. Russia*, Judgment of 24 February 2005, App. Nos. 57947/00, 57948/00, 57949/00; *Isayeva v. Russia*, Judgment of 24 February 2005, App. No. 57950/00. For references see W. Abresh, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya', (2005) 16 *European Journal of International Law* 741, at 743.

114 UN Human Rights Committee, *General Comment No. 31*, CCPR/C/21/Rev.1/Add.13 (26 May 2004), at 11. For further references see generally, V. Chetail, 'Armed Conflict and Forced Migration: A Systemic Approach to International Humanitarian Law, Refugee Law, and Human Rights Law', in Clapham and Gaeta (eds.), *supra* note 28, 700; see also G. Gaggioli, *L'influence mutuelle entre les droits de l'homme et le droit international humanitaire à la lumière du droit à la vie* (2013); K. Bennoune, 'Toward a Human Rights Approach to Armed Conflict: Iraq 2003', (2004) 11 *UC Davis Journal of International Law & Policy* 171, at 216–19.

115 See UNHCR Intervention before the Court of Appeal of England and Wales in the case of QD (*Iraq) v. Secretary of State for the Home Department*, 31 May 2009, C5/2008/1706, available at www.refworld.org/docid/4a6464e72.html, at 38.

116 See UNHCR, *supra* note 30, Recommendation 3, at 103.

117 See UNHCR, *supra* note 115, at 20.3.

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that the Qualification Directive is a comprehensive instrument which integrates and strengthen the standards of protection established by its external sources, *inter alia* the Geneva Convention, the ECHR, and the principle of humanity that is also common to IHL.

This article thus suggests shifting from the struggle for a rigid unity of the international legal system to the acceptance of a pluralist system based upon the harmonious co-existence of different legal orders, whose interaction can be a source of consistency for international law.[118] The analysis has offered an example of how an approach, which is more specifically tailored to the needs for protection, characteristic of the EU Qualification Directive, may allow an autonomous definition of 'internal armed conflict', independent from IHL, without depriving the latter body of law of its constitutional relevance within the international legal system. Ultimately and more comprehensively, the autonomous interpretation of internal armed conflict that has been elaborated by the EU Court of Justice can be framed within the hermeneutical paradigm, recently outlined by Anthony D'Amato,[119] according to which, international law is a general system and as such it is articulated in different elements that inside this system interact with each other to ensure its harmonious development.

118 In this regard, W.W. Burke-White, 'International Legal Pluralism', (2004) 25 *Michigan Journal of International Law* 963, at 978, argued that 'the respect of legitimate difference inherent in such a pluralist conception may actually enhance the effectiveness of international law by increasing the legitimacy and political acceptability of international legal rules.' For further references see also, M.A. Young, 'Regime interaction in creating, implementing and enforcing international law', in M.A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (2015), 85; G. Orellana Zabalza, *The Principle of Systemic Integration: Towards a Coherent International Legal Order* (2012).

119 A. D'Amato, 'Groundwork for International Law', (2014) 108 *American Journal of International Law* 650.

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