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Article

Protection from Indiscriminate Violence in Armed Conflict: The Scope of Subsidiary Protection in the European Union

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ABSTRACT

This article discusses the relationship between subsidiary protection status granted to persons fleeing indiscriminate violence in armed conflicts under article 15(c) of the European Union (EU) Qualification Directive (soon to be Qualification Regulation) and international humanitarian law. This is done by assessing jurisprudential developments at the supranational and national levels through a comparative empirical study of State practice in the EU and by providing an autonomous understanding of the provision. The article enquires into how the different elements of article 15(c) have been interpreted historically (following the first Court of Justice of the European Union (CJEU) judgment in *Elgafaji*), and in response to its decision in *Diakité*. It thereby delineates the scope of the provision in principle, but also in practice by tracking the implementation of CJEU jurisprudence in the field of subsidiary protection. The empirical study demonstrates that whereas judicial enquiry initially focused on determining the existence of an armed conflict in the relevant country of origin using international humanitarian law, since the CJEU's judgment in *Diakité*, judicial determinations centre on the element of 'indiscriminate violence'. However, although appellate authorities no longer explicitly refer to international humanitarian law norms as the legal framework through which to interpret article 15(c), judicial interpretation of the various elements of article 15(c) is still based on corresponding norms. The article demonstrates how the norms of international humanitarian law, including the location and intensity of armed confrontations between fighting parties, the control of territory by armed groups, and their capacity to undertake sustained and concerted military operations, continued to inform judicial approaches to the definition and assessment of indiscriminate violence following *Diakité*. The article contends that interpreting article 15(c) entirely, or even merely, by reference to principles of international humanitarian law is inconsistent with the purpose of the international protection regime in the EU and fails to reflect the nature of violence in contemporary armed conflicts.

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1. INTRODUCTION

Most forcibly displaced people in the world today are fleeing violence in armed conflicts.[1] By the end of 2023, there were more than 117 million forcibly displaced people in the world, including 37 million refugees, which is the highest number ever recorded.[2] Almost three-quarters of all refugees came from just five countries, namely Afghanistan, Syria, Venezuela, Ukraine, and Sudan.[3] The Refugee Convention is the main international treaty creating obligations on States to provide refugee protection when persons fleeing persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion cross an international border.[4] However, the European Union (EU) is the only region in the world to create a distinct subsidiary protection status[5] leading to shorter residence permits[6] and fewer social welfare rights than those attached to refugee status.[7]

Article 15(c) of the EU Qualification Directive provides for the grant of subsidiary protection to a person 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 or former habitual residence, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country'.[8] Serious harm is defined as 'a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.[9] Article 15(c) is the provision of the Qualification Directive that has attracted the most attention from EU Member States and ensuing national jurisprudence.[10] The interpretation of article 15(c) has proven to be problematic because its terms are not defined in the Qualification Directive itself and appear inherently irreconcilable.[11]

Following the adoption of the Qualification Directive in 2004, questions relating to how the individual elements of the provision should be interpreted and with regard to which legal frameworks were the subject of academic debates. Scholars who first raised these questions, including McAdam and Storey, pointed to the fact that the terms of article 15(c), such as 'civilian', 'indiscriminate violence', and 'international or internal armed conflict', reflect provisions of international humanitarian law (IHL).[12] Storey coined the term 'war-flaw' in describing the failure of refugee law to determine the claims of persons fleeing armed conflicts by reference to

1 Volker Türk, Alice Edwards, and Cornelis Wouters, 'Introduction' in Volker Türk, Alice Edwards, and Cornelis Wouters (eds), *In Flight from Conflict and Violence: UNHCR's Consultations on Refugee Status and Other Forms of International Protection* (Cambridge University Press 2017) 1.

2 UNHCR, 'Global Trends: Forced Displacement in 2023' (13 June 2024) 2, 15 <https://www.unhcr.org/global-trends-report-2023> accessed 13 June 2024.

3 73%; ibid 18.

4 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

5 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 (Qualification Directive). On 14 May 2024, Regulation (EU) 2024/1347 of the European Parliament and of the Council 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 [2024] OJ L2024/1347 (Qualification Regulation) was adopted. It will repeal the recast Qualification Directive by 2026. However, the subsidiary protection provisions were not amended in the Regulation, so this article refers mostly to the Directive as the legislative instrument in force at the relevant time.

6 Qualification Directive (n 5) art 24; Qualification Regulation (n 5) art 24.

7 Qualification Directive (n 5) art 29(2); Qualification Regulation (n 5) art 31(2).

8 Qualification Directive (n 5) art 2(f); Qualification Regulation (n 5) art 3(6).

9 Qualification Directive (n 5) art 15(c); Qualification Regulation (n 5) art 15(c).

10 Paul Tiedemann, 'Subsidiary Protection and the Function of Article 15(c) of the Qualification Directive' (2012) 31(1) Refugee Survey Quarterly 123, 124.

11 Case C–465/07 *Elgafaji v Staatssecretaris van Justitie* [2009] ECR I–921, Opinion of AG Poiares Maduro, para 31.

12 Jane McAdam, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime' (2005) 17 International Journal of Refugee Law 461; Hugo Storey, 'EU Refugee Qualification Directive: A Brave New World?' (2008) 20 International Journal of Refugee Law 1.

the appropriate legal regime.[13] Consequently, scholars explored how international legal frameworks, other than international refugee law, such as IHL or international criminal law might provide insight and guidance for the interpretation of those terms.[14] After wide-ranging consultations on the international protection of persons fleeing armed conflicts, the United Nations High Commissioner for Refugees (UNHCR) concluded that there were conflicting views regarding the usefulness of looking to IHL as an aid to the interpretation of article 15(c).[15] Other debates within refugee law scholarship concerning the interpretation of article 15(c) include the required threshold or intensity of indiscriminate violence and how to assess levels of violence in countries experiencing armed conflict, although these issues are beyond the scope of this article.[16]

To date, there have only been four judgments by the Court of Justice of the European Union (CJEU) relevant to the interpretation of the legal terms contained in article 15(c) of the Qualification Directive, concerned with the interpretation of 'a serious and individual threat' of 'indiscriminate violence',[17] determining the existence of an 'armed conflict',[18] how to measure the level of 'indiscriminate violence',[19] and the scope of and relevant factors for the assessment of article 15(c) claims.[20] The CJEU first set out the relevant test in *Elgafaji*, namely that there is:

> a serious and individual threat to the life or person of an applicant for subsidiary protection … where the degree of indiscriminate violence characterising the armed conflict taking place … reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.[21]

The case was described as 'the first important contribution of the [CJEU] to building-up the EU *acquis* in the field of asylum'.[22] Yet, at the time, the CJEU was also described as 'inexpert and inexperienced' and was criticized for leaving many questions unanswered.[23] In reviewing its effectiveness, Baumgärtel concluded *Elgafaji* was 'not a very remarkable case',[24] although Lambert opined that the ruling created room for broadening the scope of article 15(c).[25] *Diakité*, on the other hand, the second case concerning the interpretation of article 15(c) before the CJEU, was ground-breaking because it established that the meaning of 'international or internal armed

13 Hugo Storey, 'Armed Conflict in Asylum Law: The "War-Flaw"' (2012) 31(2) Refugee Survey Quarterly 1.
14 See eg the various contributions in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2014).
15 UNHCR, 'Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence (Roundtable, Cape Town, 13–14 September 2012)' (20 December 2012) para 10.
16 See eg Hélène Lambert and Theo Farrell, 'The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence' (2010) 22 International Journal of Refugee Law 237; Hélène Lambert, 'The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence' (2013) 25 International Journal of Refugee Law 207.
17 Case C–465/07 *Elgafaji v Staatssecretaris van Justitie* [2009] ECR I–921.
18 Case C–285/12 *Diakité v Commissaire général aux réfugiés et aux apatrides* [2014] 1 WLR 2477.
19 Case C–901/19 *CF, DN v Bundesrepublik Deutschland* [2022] 1 CMLR 1.
20 Case C–125/22 *X, Y, their six minor children v Staatssecretaris van Justitie en Veiligheid* [2024] OJ C/2024/466.
21 *Elgafaji* (n 17) para 43.
22 Koen Lenaerts, 'The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice' (2010) 59 International & Comparative Law Quarterly 255, 292.
23 Satvinder Juss, 'Problematizing the Protection of "War Refugees": A Rejoinder to Hugo Storey and Jean-François Durieux' (2013) 32(1) Refugee Survey Quarterly 122, 124. However, it seems unjustified to criticize the court for failing to answer questions it was not asked in the preliminary reference procedure. See Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU) art 267.
24 Moritz Baumgärtel, *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability* (Cambridge University Press 2019) 24.
25 Lambert 2013 (n 16) 215.

conflict' should be given an autonomous interpretation separate from the norms of IHL,[26] even though many EU Member States were relying on those norms to a greater or lesser extent.[27]

Following this decision, however, little academic attention has been paid to the interpretation of article 15(c) in EU Member States[28] and no larger-scale comparative studies of domestic practice have been published.[29] This article therefore seeks to add to earlier debates regarding the relationship between article 15(c) and IHL by assessing jurisprudential developments at the supranational and national levels through a comparative empirical study of State practice in the EU and by providing an autonomous understanding of the provision. The article enquires into how the different elements of article 15(c) have been interpreted historically (following the first CJEU judgment in *Elgafaji*), and in response to the decision in *Diakité*. It thereby delineates the scope of the provision in principle, but also in practice by tracking the implementation of CJEU jurisprudence in the field of subsidiary protection.

The analysis is based on a sample of 224 Afghan, Iraqi, and Syrian appeal judgments decided between 1 January 2013 and 31 December 2016 by first instance courts in Belgium, France, the Netherlands, and the United Kingdom (UK).[30] The sample was collected using a stratified and systematic probability sampling method, whereby any judgment from each population group, defined by the appellants' nationality and country of appeal (for example, Afghan appeals in Belgium determined between 2013 and 2016), has an equal and random chance of being selected for the study. This method is associated with the lowest level of bias and therefore enables conclusions to be drawn regarding general trends.[31] It is only recently that legal scholars have adopted social science methods to increase the application of their research results.[32] The author is not aware of any studies within refugee law scholarship having utilized this empirical method of case law selection; scholars in this field tend to use purposive sampling to collect case law.[33] The question of sampling is rarely addressed in doctrinal research and using a probability sampling method seeks to address the criticism that the methods of doctrinal research are often assumed.[34]

Appeals from Afghanistan, Iraq, and Syria were selected because 30 per cent of all first-time asylum applicants in the EU originated from those three countries in 2017 and 2018, and also more recently between 2021 and 2023.[35] In 2021 and between 2015 and 2018, Syria, Afghanistan, and Iraq constituted the main countries of origin of asylum applicants in the EU. Furthermore, these countries are characterized by protracted armed conflicts. The sample was

26 *Diakité* (n 18) para 35.

27 UNHCR, 'Safe at Last? Law and Practice in Selected EU Member States with respect to Asylum-Seekers Fleeing Indiscriminate Violence' (July 2011) <https://www.refworld.org/reference/regionalreport/unhcr/2011/en/80324> accessed 28 February 2024.

28 Madeline Garlick, 'Protection in the European Union for People Fleeing Indiscriminate Violence in Armed Conflict' in Türk, Edwards, and Wouters (eds) (n 1), although the analysis relies on an earlier UNHCR study of State practice. See UNHCR, 'Safe at Last?' (n 27).

29 Before *Diakité* (n 18), see eg UNHCR, 'Safe at Last?' (n 27).

30 The sample division is as follows: BE: 60 (Afghanistan: 20, Iraq: 20, Syria: 20); FR: 58 (Afghanistan: 18, Iraq: 20, Syria: 20); NL: 46 (Afghanistan: 16, Iraq: 18, Syria: 12); UK: 60 (Afghanistan: 20, Iraq: 20, Syria: 20). Although the UK left the EU on 31 January 2020, it was still a Member State during the relevant reference period of the sample. This sample is part of a larger dataset analysed for its interpretation of the Refugee Convention in Christel Querton, *Conflict Refugees: European Union Law and Practice* (Cambridge University Press 2023).

31 Graham Kalton, *Introduction to Survey Sampling* (SAGE Publications 2021).

32 Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 3 Erasmus Law Review 130, 133.

33 See eg the dataset (120) collected and discussed in Catherine Dauvergne and Jenni Millbank, 'Forced Marriage as a Harm in Domestic and International Law' (2010) 73 Modern Law Review 57, 67.

34 Hutchinson (n 32) 131.

35 In 2021, the figure was as high as 39%. See 'Asylum Applicants by Type of Applicant, Citizenship, Age and Sex: Annual Aggregated Data' (*Eurostat*, updated 18 April 2024) <https://ec.europa.eu/eurostat/databrowser/view/MIGR_ASYAPPCTZA__custom_1616346/default/bar?lang=en> accessed 13 June 2024.

also supplemented by a small number of higher court judgments, in particular where the lower courts must follow their pronouncements.

The case law of the Belgian Council for Alien Law Litigation (*Raad voor Vreemdelingenbetwistingen*) was accessed through its public database,[36] the case law of the Dutch District Courts was accessed through the public database,[37] supplemented by two private databases,[38] the case law of the French National Asylum Court (*Cour nationale du droit d'asile*, CNDA) was accessed at the court's Centre for Research and Documentation in Paris; and access to the case law of the UK First-tier Tribunal (Immigration and Asylum Chamber) was granted by the Data Access Panel of Her Majesty's Courts and Tribunals Service at a secure location. As most refugee law scholarship tends to evaluate judicial practice by an analysis of decisions by the higher courts because those are promulgated publicly, the sampling of first instance judicial determinations is innovative in providing bias-free empirical data containing judicial considerations of questions of law and facts and develops our understanding of judicial practice at the level where most appellate decisions are made.

The creation of distinct protection statuses at the regional level has important repercussions for persons fleeing armed conflicts. Whereas the Netherlands and the UK provide five-year residence permits to both refugees and beneficiaries of subsidiary protection,[39] there is a significant disparity in the length of residence permits in Belgium and France according to protection status. Hence, France grants 10-year residence permits to refugees and four-year permits to beneficiaries of subsidiary protection.[40] In a further differentiation, Belgium provides refugees with five-year residence permits, and beneficiaries of subsidiary protection with only one-year permits.[41] Differences in the length of residence permits are permitted by the Qualification Directive (and the Regulation that will follow it), whereby EU Member States are merely required to grant three-year permits to refugees and one year to beneficiaries of subsidiary protection.[42] The Directive (and future Regulation) also allows EU Member States to limit social assistance to core benefits for those granted subsidiary protection.[43] Moreover, whereas refugees are entitled to Refugee Convention travel documents,[44] beneficiaries of subsidiary protection in Belgium and the UK are often expected to first obtain a passport from the relevant national authorities,[45] failing which they may be entitled to a travel document from the host country.[46] These differences create an unjustified hierarchy of protection based merely on the reasons for flight and impact prospects of integration; accordingly, some scholars have called for equal treatment of refugees and those protected by complementary mechanisms.[47]

The research is timely in light of the increasing number of persons displaced by conflict, the overreliance by judicial authorities on subsidiary protection under article 15(c) in the appeals

36 'Arrêts' (*Conseil du Contentieux des Etrangers*) <https://www.rvv-cce.be/fr/arr>.
37 'Uitspraken' (*De Rechtspraak*) <https://uitspraken.rechtspraak.nl/>.
38 Migratieweb and VluchtWeb. As drawing up complete 'populations' of all asylum judgments for Afghan, Iraqi, and Syrian nationals decided in the Netherlands between 2013 and 2016 was not feasible, the Dutch sample may be less representative than those of the other countries surveyed.
39 AIDA, *Country Report: Netherlands (2023)* 154 <https://asylumineurope.org/wp-content/uploads/2024/04/AIDA-NL_2023-Update.pdf> accessed 26 September 2024; AIDA, *Country Report: United Kingdom (2023)* 109 <https://asylumineurope.org/wp-content/uploads/2024/04/AIDA-UK_2023-Update.pdf> accessed 26 September 2024.
40 AIDA, *Country Report: France (2023)* 157 <https://asylumineurope.org/wp-content/uploads/2024/05/AIDA-FR_2023-Update.pdf> accessed 26 September 2024.
41 AIDA, *Country Report: Belgium (2023)* 172 <https://asylumineurope.org/wp-content/uploads/2024/05/AIDA-BE_2023-Update.pdf> accessed 26 September 2024.
42 Qualification Directive (n 5) art 24; Qualification Regulation (n 5) art 24(4).
43 Qualification Directive (n 5) art 29(2); Qualification Regulation (n 5) art 31(2).
44 Refugee Convention (n 4) art 28.
45 AIDA, *Country Report: Belgium* (n 41) 192; AIDA, *Country Report: UK* (n 39) 115–16.
46 Qualification Directive/Regulation (n 5) art 25(2).
47 Colin Harvey, 'Time for Reform? Refugees, Asylum-Seekers, and Protection under International Human Rights Law' (2015) 34 Refugee Survey Quarterly 43, 60.

of persons fleeing conflicts,[48] disparities in the grant of subsidiary protection,[49] difficulties in interpreting article 15(c), and the scarcity of (CJEU) guidance available to EU Member States. Analysis of the sample leads to the finding that, whereas judicial enquiry initially focused on determining the existence of an armed conflict in the relevant country of origin using IHL, since the CJEU's judgment in *Diakité*, judicial determinations centre on the element of 'indiscriminate violence', in accordance with the ruling. However, although appellate authorities no longer explicitly refer to IHL norms as the legal framework through which to interpret article 15(c), judicial interpretation of the various elements of article 15(c) is still based on corresponding norms. The article demonstrates how the norms of IHL, including the location and intensity of armed confrontations between fighting parties, the control of territory by armed groups, and their capacity to undertake sustained and concerted military operations, continued to inform judicial approaches to the definition and assessment of indiscriminate violence following *Diakité*. The article contends that interpreting article 15(c) entirely, or even merely, by reference to principles of IHL is inconsistent with the purpose of the international protection regime in the EU and fails to reflect the nature of violence in contemporary armed conflicts. Indeed, IHL has been criticized for its failure to reflect contemporary armed conflicts due to its focus on conventional warfare and territory.[50] Most conflicts today are characterized by an asymmetrical power balance between the parties as armed groups are unable to match conventional military tactics employed by State forces.[51] Further, as most violence in contemporary armed conflicts is directed at civilians on the basis of identity politics,[52] the article also queries the added value of article 15(c) within the EU international protection regime. This highlights the continued relevance of the Refugee Convention for the protection of persons fleeing armed conflicts as violence in armed conflicts can be understood as being exercised for reasons of (imputed) political opinion.[53]

Following this introduction, the second part of the article begins by setting out the definitions of 'international armed conflict' and 'non-international armed conflict' in IHL, and then examines how the term 'internal armed conflict' in article 15(c) has been defined by the CJEU. This provides the context for an analysis of how judicial authorities in the EU have interpreted the concept over time. In the third part of the article, the definition of 'indiscriminate attacks' in IHL is explained, before discussing how judicial authorities interpret the notion of 'indiscriminate violence' in article 15(c). Then, a definition of 'indiscriminate violence' in accordance with the CJEU's interpretative approach is proposed that takes into account the EU international protection regime as a whole. An autonomous interpretation is thus proposed in light of the CJEU's ruling that the elements of article 15(c) should be interpreted independently from other legal regimes because they 'pursue different aims and establish quite distinct protection

48 Querton (n 30) 101.

49 In 2017, for example, France and Italy granted subsidiary protection to about 70% of Afghans, whereas the Netherlands recognized 14.5% of Afghan asylum applicants as beneficiaries of subsidiary protection. 'First Instance Decisions on Applications by Type of Decision, Citizenship, Age and Sex: Annual Aggregated Data' (*Eurostat*, updated 2 October 2024) <https://ec.europa.eu/eurostat/databrowser/view/migr_asydcfsta/default/table?lang=en&category=migr.migr_asy.migr_asydec> accessed 16 October 2024.

50 Christine Chinkin and Mary Kaldor, *International Law and New Wars* (Cambridge University Press 2017) ch 6; Michael N Schmitt, '21st Century Conflict: Can the Law Survive?' (2007) 8 Melbourne Journal of International Law 443.

51 Stathis N Kalyvas and Laia Balcells, 'International System and Technologies of Rebellion: How the End of the Cold War Shaped Internal Conflict' (2010) 104 The American Political Science Review 415; William Banks, 'Toward an Adaptive International Humanitarian Law: New Norms for New Battlefields' in William Banks (ed), *New Battlefields/Old Laws: Critical Debates on Asymmetric Warfare* (Columbia University Press 2011) 3.

52 Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (3rd edn, Polity Press 2012).

53 See in particular Querton (n 30) chs 3, 6. The Refugee Convention defines a refugee as a 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'. Refugee Convention (n 4) art 1A(2).

mechanisms'.[54] Accordingly, article 15(c) should be given a meaning independent from IHL informed by its broad purpose of identifying those in need of international protection given the context of contemporary armed conflicts. Rather than looking at IHL, the appropriate frame of reference is the international protection regime, of which the Refugee Convention remains the cornerstone. In light of judicial practice that continues to rely on IHL norms, the conclusion suggests a revised understanding of article 15(c) that takes account of the CJEU's guidance and the characteristics of violence in situations of armed conflict to better reflect the international protection needs of the increasing number of persons fleeing armed conflicts.

2. THE DEFINITION AND INTERPRETATION OF 'INTERNATIONAL OR INTERNAL ARMED CONFLICT'

The precise definition of the terms 'international or internal armed conflict' and the issue of how to determine whether a situation amounts to an 'international or internal armed conflict' as contained in article 15(c) of the Qualification Directive was originally the subject of much judicial and academic debate after the Qualification Directive was adopted. Until 2014, this element of article 15(c) was central to judicial interpretation of the provision. As McAdam noted, disagreement about the character of a conflict would jeopardize the application of the provision.[55] The absence of definition in the Directive itself led to divergent State practice in the EU. In some EU Member States, decision makers began applying the norms of IHL, as the framework of international law which governs armed conflict, and the jurisprudence of the international criminal courts in order to determine whether an armed conflict existed in asylum claimants' countries of origin and consequently to determine whether article 15(c) was applicable in a given case. Yet, decision makers in other EU Member States were using those norms merely as a starting point for an independent definition of the terms, and others made no reference to those norms at all.[56] Overall, however, reliance on IHL norms was relatively widespread with the following countries all previously applying those norms to a certain extent: Belgium,[57] Czech Republic,[58] France,[59] Germany,[60] the Netherlands,[61] Poland, Portugal, Sweden,[62] and the UK.[63] In 2011, the question whether an armed conflict amounted to an 'international or internal armed conflict' under article 15(c) continued to be of central importance to Belgium, France, and Sweden, whereas Germany, the Netherlands, and the UK began instead to focus on the

54 *Diakité* (n 18) para 24.
55 Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007) 78.
56 Céline 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, 837. See also Case C–285/12 *Diakité v Commissaire général aux réfugiés et aux apatrides* [2014] 1 WLR 2477, Opinion of AG Mengozzi, para 18; UNHCR, 'Safe at Last?' (n 27).
57 See eg BE: n° 1244 (Iraq) (RvV 17 August 2007) para 6.4 (regarding the interpretation of 'civilian' and 'internal armed conflict'); n° 17 522 (Burundi) (CCE 23 October 2008) paras 4.10–4.12 (regarding the interpretation of 'internal armed conflict').
58 Lambert 2013 (n 16) 226–27.
59 FR: CNDA, 27 June 2008, n° 581505 (Sri Lanka) (regarding violations of international humanitarian law on civilians), which was upheld by the Council of State in FR: CE, 3 July 2009, n° 320295 (Sri Lanka). Lambert 2013 (n 16) 225.
60 Lambert 2013 (n 16) 221–24.
61 NL: Council of State, 3 April 2008, 200701108/1 (DRC); Council of State, 20 July 2007, 200608939/1 (Kosovo).
62 Jennie Magnusson, 'A Question of Definition: The Concept of Internal Armed Conflict in the Swedish Aliens Act' (2008) 10 European Journal of Migration and Law 381.
63 Céline Bauloz, 'The (Mis)Use of International Humanitarian Law under Article 15(c) of the EU Qualification Directive' in Cantor and Durieux (eds) (n 14) 260, fn 54; Jane McAdam, 'Examining Flight from Generalized Violence in Situations of Conflict: An Annotated Bibliography on Article 15(c) of the Qualification Directive' (*International Association of Refugee Law Judges*, September 2011) <https://www.iarmj.org/images/stories/BLED_conference/papers/WP_1951_Conv_-_J_McAdam.pdf> accessed 28 February 2024. See also comparative national practice in ECRE/ELENA, 'The Impact of the EU Qualification Directive on International Protection' (October 2008) 28 <https://ecre.org/wp-content/uploads/2016/07/ECRE-The-Impact-of-the-EU-Qualification-Directive-on-International-Protection_October-2008.pdf> accessed 28 February 2024; cited in UK: *KH (Article 15(c) Qualification Directive) Iraq* CG [2008] UKAIT 00023, para 34.

intensity of indiscriminate violence.[64] Nevertheless, although judicial practice evolved somewhat after the *Elgafaji* decision,[65] UNHCR concluded in 2011 that IHL remained central to the interpretation of the terms 'international or internal armed conflict', or at least served to provide an aid to the assessment of the threshold of internal armed conflicts in EU Member States.[66]

As noted in the introduction, refugee law scholars have adopted different views regarding the value of relying on IHL as an aid to interpretation of article 15(c). Whereas Storey argued that IHL norms should provide the standards to interpret the provisions of article 15(c) because this legal regime is the *lex specialis* of armed conflict,[67] Bauloz highlighted the different purposes of these distinct legal regimes and warned against reliance on IHL because of its restricted scope in comparison to the aims of international protection.[68] Offering an alternative perspective, Durieux suggested that IHL and international criminal law could provide supplemental interpretative guidance but should not be a starting point for refugee status determination in the claims of persons fleeing armed conflict because this would reduce the scope of international protection.[69] Similarly, Ziegler argues IHL should not be the primary norm, nor even a decisive factor, when assessing asylum claims.[70] In yet another view, Juss argued that the interpretation of the terms of article 15(c) could be reduced to a question of fact.[71] In rejecting the use of IHL norms to interpret the constitutive elements of article 15(c), Bauloz suggested that, instead of using these principles, the assessment by asylum decision makers as to whether there is a situation of international or internal armed conflict should be a factual one.[72] She claimed that an armed conflict is merely the context in which the indiscriminate violence takes place and, though it should not be entirely ignored, indiscriminate violence affecting civilians creates a presumption of a *de facto* situation of armed conflict.[73]

This part assesses judicial interpretation of article 15(c) following *Diakité*, which established that the meaning of 'international or internal armed conflict' should be given an autonomous interpretation, separate from the norms of IHL.[74] The analysis of the sample of 224 asylum determinations thus evaluates whether, and to what extent, judicial authorities continue to draw on norms of IHL and the impact of this on the international protection of persons fleeing contemporary armed conflicts. The following sections begin by providing a brief overview of the definitions of 'international armed conflict' and 'non-international armed conflict' in IHL and jurisprudence of the international criminal tribunals. This is followed by an analysis of the CJEU reasoning in *Diakité*, which set out that the definition of 'armed conflict' in article 15(c) should be given an autonomous interpretation independent of IHL.[75] Those two sections set the context for the analysis of judicial practice in EU Member States in respect of the interpretation of 'internal armed conflict' and finally a conclusion is drawn regarding the impact on international

64 UNHCR, 'Safe at Last?' (n 27) 65.
65 Nicolosi points to a change in practice in interpretation from IHL norms to a more autonomous approach following *Elgafaji* in the UK and Germany. Fabio Nicolosi, 'Disconnecting Humanitarian Law from EU Subsidiary Protection: A Hypothesis of Defragmentation of International Law' (2016) 29 Leiden Journal of International Law 463, 473–74.
66 UNHCR, 'Safe at Last?' (n 27) 67.
67 Storey (n 13).
68 Bauloz (n 63).
69 Jean-François Durieux, 'Of War, Flows, Laws and Flaws: A Reply to Hugo Storey' (2012) 31(3) Refugee Survey Quarterly 161, 166. See also Tsourdi who argues that international humanitarian law principles could usefully provide some non-exhaustive benchmarks to assess the level of indiscriminate violence in order to retain the relevance of article 15(c). Evangelia (Lilian) Tsourdi, 'What Protection for Persons Fleeing Indiscriminate Violence? The Impact of the European Courts on the EU Subsidiary Protection Regime' in Cantor and Durieux (eds) (n 14) 293–94.
70 Reuven (Ruvi) Ziegler, 'International Humanitarian Law and Refugee Protection' in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 226.
71 More specifically, Juss argues that art 15(c) is not 'situation specific' but a provision of international protection that applies to anyone whose life, liberty, and security is at risk 'on account of the situation of armed conflict'. Juss (n 23) 145.
72 Bauloz (n 63) 265.
73 ibid.
74 *Diakité* (n 18) para 35.
75 The conclusion of the judgment is now included in the Qualification Regulation (n 5) recital 51.

protection in the EU of an approach to interpretation of article 15(c) that continues to draw on norms of IHL.

2.1 'International armed conflict' and 'non-international armed conflict' in international humanitarian law

IHL distinguishes between two types of armed conflicts, namely 'international armed conflicts' between two opposing States and 'non-international armed conflicts' between State forces and non-State armed forces or between armed groups. 'International armed conflict' is defined in common article 2 of the Geneva Conventions as an 'armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'.[76] The International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic* case provided a definition of 'international armed conflict' as 'whenever there is a resort to armed force between States'.[77]

There are two different definitions of 'non-international armed conflict' in international humanitarian treaty law. Common article 3 of the Geneva Conventions merely defines internal armed conflicts as 'armed conflict not of an international character'. The other definition is set out in article 1 of the Protocol Additional to the Geneva Conventions … and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) as 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 which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[78]

The definition of armed conflict in article 1 of Protocol II implies a degree of severity by explicitly excluding from its scope 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'.[79]

The International Committee of the Red Cross (ICRC) highlights that Protocol II contains a more stringent definition of 'non-international armed conflict' which also requires territorial control such that organized armed groups are able to carry out sustained and concerted military operations.[80] This requirement, however, is relevant for the application of Protocol II only, and does not apply to the law governing non-international armed conflicts in general.[81] This means that, even if a non-international armed conflict does not meet the requirements of article 1 of Protocol II because armed groups do not control part of the territory, IHL as set out in common article 3 still applies. Consequently, the definition of 'non-international armed conflict' in Protocol II is limited to its own field of application rather than to the entire body of IHL. Notwithstanding the less stringent definition of 'non-international armed conflict' in common

76 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Convention (IV) relative to the Protection of Civilian Persons in time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Conventions).

77 *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995) para 70.

78 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Protocol II) art 1(1).

79 ibid art 1(2).

80 ICRC, 'Opinion Paper: How Is the Term "Armed Conflict" Defined in International Humanitarian Law?' (March 2008) <https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/opinion-paper-armed-conflict.pdf> accessed 28 February 2024.

81 ibid 4. See also *Diakité*, Opinion of AG Mengozzi (n 56) para 41.

article 3 of the Geneva Conventions, there are circumstances that may fall below its threshold. It is generally agreed therefore that in order to differentiate an armed conflict under common article 3 from less severe types of violence, the circumstances must nonetheless 'reach a certain threshold of confrontation'.[82] The ICRC has noted that the exclusion of 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature' explicit in Protocol II[83] also applies to common article 3.[84]

Accordingly, the ICRC considers that the broader definition of 'non-international armed conflict' in common article 3 includes two principal criteria to determine its threshold.[85] First, non-State armed groups must be characterized as 'parties to the conflict', meaning that they must have organized armed forces by, for example, having a certain command structure and must have the 'capacity to sustain military operations'.[86] The ICTY asserted the principle in the case of *Haradinaj* that 'an armed conflict can exist only between parties that are sufficiently organized to confront each other with military means'.[87] The requirement of organization includes internal aspects, such as command structure and internal hierarchy, but also external aspects, such as the parties' ability to carry out an organized military operation and the extent of their military equipment.[88] Secondly, the fighting must be characterized by a minimum level of intensity. This would entail, for example, when the hostilities are of a collective character or when the State is required to use military force rather than merely police forces.[89] There is thus a requirement of intensity of fighting which threshold is met in the case of regular or frequent attacks but not if the attacks are merely 'temporally sporadic'.[90] Dinstein outlines the relevant indicators as including 'the numbers of casualties; the diffusion of violence over territory; the deployment of military units against the insurgents; the types of weapons used; the siege of towns; and the closure of roads'.[91] The two elements of organization and intensity are reflected in the definition of a 'non-international armed conflict' given by the ICTY in the *Tadic* case, namely 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[92] The *Tadic* definition is considered the most authoritative formulation of the term[93] and has been adopted by the ICTY in every judgment since.[94]

The above demonstrates that the criterion of armed groups being 'organized' is linked with their capacity to exercise sustained military operations. For IHL to apply, armed groups' military capacity need not match that of the State's armed forces, but they must be sufficiently organized to resemble it. These situations of armed conflict have been described as conventional warfare in contradistinction to asymmetric conflicts, where armed groups do not have the technological

82 ICRC (n 80) 3. This was recognized by AG Mengozzi in his opinion in the *Diakité* case (n 56) para 39.
83 Protocol II (n 78) art 1(2).
84 ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War* (Cambridge University Press 2021) paras 420, 465.
85 ICRC (n 80) 3.
86 *Prosecutor v Limaj* (Judgment) ICTY-03-66 (30 November 2005) paras 94–134. See also the discussion in Claudio Matera, 'Another Parochial Decision? The Common European Asylum System at the Crossroad between IHL and Refugee Law in Diakité' (2015) 12 Questions of International Law 3, 12.
87 *Prosecutor v Haradinaj* (Judgment) ICTY-04-84 (3 April 2008) para 60.
88 Yutaka Arai-Takahashi, 'Thresholds in Flux: The Standard for Ascertaining the Requirement of Organization for Armed Groups under International Humanitarian Law' (2021) 26 Journal of Conflict & Security Law 79, 84–85.
89 *Limaj* (n 86) paras 135–70.
90 ibid para 168.
91 Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2021) para 121.
92 *Tadic* (n 77) para 70. Although the literal meaning of protraction pertains to duration, the ICTY in *Tadic* and subsequent jurisprudence referred to the intensity of the conflict. Miloš Hrnjaz and Janja Simentić Popović, 'Protracted Armed Violence as a Criterion for the Existence of Non-International Armed Conflict: International Humanitarian Law, International Criminal Law and Beyond' (2020) 25 Journal of Conflict & Security Law 473, 477–80.
93 Martha M Bradley, 'Revisiting the Notion of "Intensity" Inherent in Common Article 3: An Examination of the Minimum Threshold which Satisfies the Notion of "Intensity" and a Discussion of the Possibility of Applying a Method of Cumulative Assessment' (2017) 17 International & Comparative Law Review 7, 27.
94 ICRC (n 80) 4. See also ICRC (n 84) paras 456–78.

capacity to engage States' armed forces by using sophisticated weaponry.[95] The second criterion of intensity of fighting also reflects a conventional warfare perspective. Dinstein highlights the significance of the types of weapons used and notes that 'when tanks, artillery or attack helicopters are in operation, the intensity bar is crossed'.[96] Sporadic attacks by armed groups do not meet even the lower requirements of a non-international armed conflict under the Geneva Conventions. This is perhaps unsurprising as IHL was originally intended to regulate conflicts between States.[97] Broadly, the criteria of organization and intensity centre on armed confrontations between parties to the conflict, yet armed confrontations are not necessarily the most widespread type of violence in contemporary armed conflict. Indeed, where armed groups lack conventional military technology to engage State armed forces in armed confrontations to achieve control of territory, they adapt by resorting to terror and highly visible forms of human rights violations against civilians.[98]

Despite the shortcomings of the IHL definition of 'non-international armed conflict' in reflecting violence in contemporary armed conflicts, in *Diakité* Advocate General Mengozzi pointed to the non-exhaustive objective factors generally used to determine the intensity of the conflict in IHL, including the collective nature of the conflict, the use of military force by the State, the duration of the conflict, the frequency and intensity of violence, the extent of the geographical area at stake, the nature of the weapons used, the size of the forces and type of strategy used, the displacement of civilian populations, the control of territory by the armed groups, the number of victims, and the damage caused.[99] These factors, as we will see, continue to inform the determination of article 15(c) appeals in the EU.

2.2 'International or internal armed conflict' in European Union law

The CJEU defined the term 'international or internal armed conflict' found in article 15(c) in the case of *Diakité* in 2014. The case originated in a decision by the Belgian Council for Alien Law Litigation that Guinea could not be defined as a situation of armed conflict and which was subsequently appealed to the Belgian Council of State (*Raad van State*) on the basis that the Council's approach was too restrictive.[100] Consequently, a preliminary reference was made to the CJEU, which asked whether under article 15(c):

> the assessment as to whether an internal armed conflict exists is to be carried out on the basis of the criteria established by international humanitarian law and, if not, which criteria should be used in order to assess whether such a conflict exists for the purposes of determining whether a third country national or a stateless person is eligible for subsidiary protection.[101]

The CJEU noted that the terms used in the Qualification Directive were not identical to provisions in IHL[102] and therefore the EU legislature intended to create a protection status not only for persons fleeing situations of 'international armed conflicts' and 'armed conflicts not of an international character' as defined in IHL, but also for persons fleeing indiscriminate violence in situations of 'internal armed conflict'.[103] Although the CJEU's reasoning with respect to terminology has been described as not very convincing because the ICTY in the *Tadic* case

95 Kalyvas and Balcells (n 51).
96 Dinstein (n 91) para 122.
97 Nicolas Lamp, 'Conceptions of War and Paradigms of Compliance: The "New War" Challenge to International Humanitarian Law' (2011) 16 Journal of Conflict & Security Law 225, 230.
98 Martha Thompson, 'Women, Gender and Conflict: Making the Connections' (2006) 16 Development in Practice 342, 344.
99 *Diakité*, Opinion of AG Mengozzi (n 56) para 43.
100 ibid paras 10–12.
101 *Diakité* (n 18) para 17.
102 ibid para 20.
103 ibid para 21.

used the term 'international or internal armed conflict' rather than the specific provisions of treaty law, the predominant reason for reaching its conclusion was concerned with the different purposes served by IHL and international refugee law respectively.[104] Indeed, as initially highlighted by Bauloz, the central purpose of the definition of 'non-international armed conflict' in IHL is to determine which legal frameworks within this regime apply, if any.[105] Thus, the CJEU highlighted the different aims of IHL and the subsidiary protection regime in EU law and noted that they were two distinct legal frameworks. It stated that 'the definitions of "armed conflict" provided in international humanitarian law are not designed to identify situations in which such international protection would be necessary and would thus have to be granted by the competent authorities of the Member States'.[106]

The CJEU concluded that the meaning and scope of the term 'internal armed conflict' under article 15(c) must 'be determined by considering its 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'.[107] Applying this approach to interpretation, the CJEU concluded that:

> an internal armed conflict exists, for the purposes of applying that provision, if a State's armed forces confront one or more armed groups or if two or more armed groups confront each other. It is not necessary for that conflict to be categorised as 'armed conflict not of an international character' under international humanitarian law; nor is it necessary to carry out, in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organisation of the armed forces involved or the duration of the conflict.[108]

As suggested by Juss, the question is a factual assessment rather than a legal threshold.[109]

Consequently, the application of article 15(c) in EU law is not dependent on the requirement that all the criteria referred to in common article 3 of the Geneva Conventions and article 1 of Protocol II are met.[110] The CJEU defined an 'armed conflict' as confrontations between fighting parties, whether State forces or non-State armed groups, without the additional requirements established under IHL pertaining to the minimum level of intensity of the armed conflict, the responsible command of fighting parties, their control over a part of the territory such as to enable them to carry out sustained and concerted military operations, and the minimum duration of the armed conflict. These elements do not constitute the threshold for the application of article 15(c) of the Qualification Directive because they do not determine the need for international protection of persons fleeing contemporary armed conflicts. In effect, as several scholars such as Bauloz and Nicolosi have highlighted, an independent interpretation of 'armed conflict' in EU law lessens the threshold dictated by the criteria set out in IHL.[111] Importantly, it also avoids the difficulties of non-specialist entities like the CJEU, national asylum courts, and immigration authorities grappling with complex, nuanced, and ambiguous terms of IHL, further contributing to the fragmentation of international law.[112]

104 Matera (n 86) 13.
105 Bauloz (n 63) 257. See also Chinkin and Kaldor (n 50) 234–37; Matera (n 86) 12. The CJEU also pointed this out in *Diakité* (n 18) para 22.
106 *Diakité* (n 18) paras 23–24.
107 ibid para 27.
108 ibid para 35. For a critique of the AG and the CJEU's understanding of IHL, including treating the duration of the conflict as a separate and additional criterion, see Hrnjaz and Simentić Popović (n 92) 496–97.
109 Juss (n 23) 145.
110 *Diakité* (n 18) para 21.
111 Nicolosi (n 65) 479; Bauloz (n 63).
112 Hrnjaz and Simentić Popović (n 92) 497, 500.

Furthermore, the norms of IHL with their foundation in notions of conventional warfare and territoriality are inadequate as an aid to interpretation because they fail to reflect the characteristics of contemporary armed conflicts.[113] As Moreno-Lax claimed, it can be argued generally that the application of those norms as the criteria to determine entitlement to subsidiary protection under article 15(c) is contrary to the object and purpose of international protection in EU law.[114] Ziegler also notes that, although the International Law Commission has called for the harmonization of norms across legal regimes, if treaty norms clearly pursue different aims 'relying on an external norm risks undermining the treaty's object and purpose'.[115] Finally, the CJEU in *Diakité* made an important distinction between violence, as the central element in article 15(c), and conflict, defined by the level of armed confrontations and organization of the parties. Nonetheless, the next section demonstrates how judicial authorities in the EU have historically applied the IHL concept of 'non-international armed conflict', including at times the higher threshold of article 1 of Protocol II, by focusing on the level of armed confrontation between the parties, thereby ignoring violence outside the battlefield, and requiring armed groups to have the capacity to sustain military operations via control of territory, thereby downplaying the impact of serious but sporadic attacks on civilians.

2.3 'International or internal armed conflict': judicial practice in European Union Member States

Prior to the CJEU decision in *Diakité*, the Belgian,[116] Dutch,[117] French,[118] and UK[119] courts explicitly relied on IHL when assessing situations of armed conflict under article 15(c) of the Qualification Directive.[120] Moreover, judicial authorities in Belgium, France, and the Netherlands opted to apply the more stringent definition of 'armed conflict' found in article 1 of Protocol II, which requires that armed groups partially control territory in such a way that they are capable of sustained and concerted military operations.[121] Accordingly, these judicial authorities did not appear to appreciate that IHL in common article 3 of the Geneva Conventions 1949 still applies in situations of non-international armed conflict less intense than those defined in Protocol II. By applying IHL thresholds, judicial authorities gave precedence to factors such as the capacity of armed groups to sustain military operations, understood as the ability to undertake sustained and concerted military attacks and the territorial control of parties to the conflict when determining the asylum appeals of persons fleeing armed conflict under article 15(c) of the Qualification Directive. The Belgian Council for Alien Law Litigation and the Dutch Council of State thus noted that military operations needed to be sustained and concerted in nature as an essential requirement for the existence of an armed conflict.[122] The UK Upper Tribunal had also established that the main criteria evidencing the existence of an internal armed conflict included parties to the conflict, the degree of organization, the level of intensity, protraction, and other relevant factors.[123] The ability to engage in sustained confrontations against the other side to the conflict was linked to the control of territory.

113 Chinkin and Kaldor (n 50) ch 6; Querton (n 30) 24–25.
114 Violeta Moreno-Lax, 'Of Autonomy, Autarky, Purposiveness and Fragmentation' in Cantor and Durieux (eds) (n 14). See in particular TFEU (n 23) art 78(1), 78(2)(b).
115 Ziegler (n 70) 225.
116 BE: n° 114 377 (Afghanistan) (RvV 25 November 2013); n° 17 522 (Burundi) (n 57); n° 1244 (Iraq) (n 57) para 6.4.
117 NL: 200608939/1 (Kosovo) (n 61) para 2.11.
118 FR: CNDA, 3 May 2013, n° 12033689 (Syria).
119 UK: *GS (Existence of Internal Armed Conflict) Afghanistan* CG [2009] UKAIT 00010; *KH (Article 15(c) Qualification Directive) Iraq* (n 63).
120 Bauloz also identified this practice in Germany and Sweden. See Bauloz (n 63) 260, fn 54.
121 BE: n° 114 377 (Afghanistan) (n 116) para 2.2.12; n° 1244 (Iraq) (n 57); FR: CNDA, 7 March 2014, n° 13019800 (Afghanistan); NL: 200608939/1 (Kosovo) (n 61) para 2.11; UK: *KH (Article 15(c) Qualification Directive) Iraq* (n 63) paras 79–81.
122 BE: n° 1244 (Iraq) (n 57) para 6.4; NL: 200608939/1 (Kosovo) (n 61) para 2.12.
123 UK: *KH (Article 15(c) Qualification Directive) Iraq* (n 63) paras 81, 154.

By applying the norms of IHL to analyse the conflicts in Afghanistan and Iraq, judicial authorities conceptualized a dichotomy between situations of armed confrontations between the various parties to the conflict enabled by occupation of nearby territory which were considered to meet the required threshold of intensity of the conflict and other situations characterized by severe attacks, but which were not sufficiently sustained. Thus, in Belgian jurisprudence, a distinction emerged between 'open combat' zones and 'asymmetrical attacks', in Dutch jurisprudence between 'all-out fighting' and sporadic attacks, and in UK jurisprudence between 'all-out fighting' and asymmetrical warfare or sporadic attacks.

Applying the relevant factors to assess whether there exists a situation of 'armed conflict' and, in particular, to measure the intensity of military operations, the Belgian Council for Alien Law Litigation concluded that there was no 'open war' and thus no 'armed conflict' as required by article 15(c) of the Qualification Directive in the city of Kabul because the violence was localized, non-sustained, and took the form of asymmetrical attacks.[124] With respect to this latter element, the Council regularly enquired into the Taliban's operational capacity in order to assess their degree of organization and ability to plan and carry out sustained and concerted military operations against State forces.[125] In addition, there was a requirement of violence, and continuous and uninterrupted battles between insurgents and State forces.[126] Accordingly, the Belgian Council determined that Taliban violence merely consisting of 'asymmetrical attacks' and 'complex attacks' did not reach the IHL-required threshold of an 'internal armed conflict'.[127] On the contrary, the Sunni militia, Shia militia, and Al-Qaida were able to conduct uninterrupted and orchestrated military operations and also controlled parts of large cities and thus the situation in Iraq in August 2007 amounted to an 'armed conflict' in accordance with Protocol II.[128]

Similarly, regions in Iraq characterized by 'ongoing fighting' were described by the UK First-tier Tribunal as 'contested areas'.[129] The First-tier Tribunal's determinations followed the Upper Tribunal's Iraq Country Guidance, which contrasted contested areas involving 'all-out fighting' with violence, such as sporadic terrorist attacks, that characterize asymmetrical conflicts.[130] Accordingly, return to the 'contested areas' of Anbar, Diyala, Kirkuk, Ninewah, and Salah Al-din would meet the article 15(c) threshold,[131] whereas return to the north of the Babil governorate, characterized by the lack of evidence of 'very recent conflict between ISIL and state authorities' would not.[132] The Dutch District Court, in a clear example of transnational judicial dialogue, endorsed the UK Upper Tribunal's approach. While judges have cited foreign jurisprudence in striving for uniformity of international and regional refugee legal standards,[133] and many scholars have welcomed exchanges between asylum judges in different jurisdictions in order to improve human rights-based protection standards,[134] others have noted that

124 BE: n° 114 377 (Afghanistan) (n 116) para 2.2.12; n° 101386 (Afghanistan) (RvV 22 April 2014) para 2.2.3.
125 BE: n° 114 377 (Afghanistan) (n 116).
126 BE: n° 108 480 (Afghanistan) (RvV 22 August 2013).
127 BE: n° 114 377 (Afghanistan) (n 116).
128 BE: n° 1244 (Iraq) (n 57) para 6.4.
129 UK: [2015] UKUT *AA/08467/2014 (IAC) (Iraq)* (based on findings of facts made in an earlier decision by the First-tier Tribunal on 25 Feburary 2015).
130 UK: *AA (Article 15(c)) Iraq* CG [2015] UKUT 00544 (IAC) para 130.
131 ibid paras 101–06.
132 ibid para 111.
133 *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 (Lord Hope); Colin Yeo, *Refugee Law* (Bristol University Press 2022) 39.
134 Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 University of Richmond Law Review 99, 118; Hélène Lambert, 'Transnational Judicial Dialogue, Harmonization and the Common European Asylum System' (2009) 58 International & Comparative Law Quarterly 519, 530.

transnational judicial dialogue is 'far more of a double-edged sword', particularly in relation to subsidiary protection.[135] The present analysis confirms this trend as Dutch District Courts on several occasions described violence in Baghdad city as characterized by sporadic terrorist attacks rather than by 'all-out fighting' and thus not of sufficient intensity to engage article 15(c).[136] Significantly, the study identified a rare and impactful transnational judicial reference in the lower courts, and across legal systems and languages, rather than between higher courts within the Commonwealth, where the practice is common and more evident.[137] Although the practice of the CNDA in France was not as focused on conventional armed confrontations between fighting parties, the court nonetheless examined the conflicts from the perspective of territory as a strategic target and the establishment of physical and daily administrative control over territory.[138]

Overall, the particular factors cited by judicial authorities in Belgium, the Netherlands, and the UK as drawn from IHL concerned features associated with conventional warfare, namely the parties to the conflict consisting of the armed forces of the State and dissident forces, with the dissident forces having the capacity to match the State's military forces by carrying out planned, persistent, and continuous military operations, this capacity being dependent on the control of a sufficient part of the territory.[139]

These findings corroborate the conclusions drawn by Bauloz,[140] the European Council on Refugees and Exiles (ECRE),[141] and UNHCR[142] that a significant number of EU Member States were applying the rules of IHL in order to define the term 'internal armed conflict' in article 15(c). More specifically, the study demonstrates that, until the CJEU decision in *Diakité*, judicial authorities in Belgium, France, the Netherlands, and the UK expressly applied international humanitarian treaty provisions and some limited jurisprudence from international criminal law. Although express reliance on IHL ended shortly after *Diakité*, judicial authorities continued to determine article 15(c) appeals by reference to norms derived from IHL, by focusing on the location and intensity of armed confrontations between fighting parties and the capacity of armed groups to undertake sustained and concerted military operations, generally enabled by having control of nearby territory. By relying on criteria originally concerned with defining the existence of 'non-international armed conflicts' in IHL to define the other terms of article 15(c), judicial authorities now tend to equate the intensity of conventional armed confrontations between parties with levels of indiscriminate violence. In brief, this ignores or downplays violence resulting from asymmetrical warfare and armed groups' strategies of fighting, even though these characteristics are more prevalent in contemporary armed conflicts.[143]

135 Naomi Hart, 'Complementary Protection and Transjudicial Dialogue: Global Best Practice or Race to the Bottom?' (2016) 28 International Journal of Refugee Law 171, 172.

136 NL: District Court, 31 March 2016, 15/22446 (Iraq). See also NL: District Court, 11 July 2016, 16/13425 (Iraq); District Court, 3 March 2016, 16/2368 (Iraq) (making similar findings by relying on the judgment of the UKUT (IAC)).

137 Hélène Lambert, 'Transnational Law, Judges and Refugees in the European Union' in Guy S Goodwin-Gill and Hélène Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press 2010) 4, 8–9.

138 FR: CNDA, 15 December 2016, n° 16024450/16024449 (Iraq); CNDA, 26 October 2016, n° 16024864 (Afghanistan); CNDA, 18 February 2016, n° 150018199 (Iraq); CNDA, 25 November 2014, n° 13034393/13034396 (Iraq); CNDA, 5 July 2013, n° 12026005 (Afghanistan); CNDA, 22 May 2013, n° 12001368 (Afghanistan). See further analysis in Querton (n 30) 77–79.

139 FR: CNDA, 4 May 2015, n° 14033725 (Afghanistan); n° 13034393/13034396 (Iraq) (n 138); n° 12026005 (Afghanistan) (n 138). See ICRC, 'Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 8 June 1977: Commentary of 1987' (1987) paras 4460–69 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=15781C741BA1D4DCC12563CD00439E89> accessed 28 February 2024.

140 Bauloz (n 63) 260.

141 ECRE/ELENA (n 63).

142 UNHCR, 'Safe at Last?' (n 27).

143 Querton (n 30) ch 3.

Thus, whereas a number of commentators such as Tsourdi,[144] Jaquemet,[145] and Moreno-Lax[146] argue that benchmarks drawn from IHL could still serve a function in informing the interpretation of article 15(c), an IHL-inspired approach, which focuses on conventional warfare and territoriality, results in a restrictive interpretative scope of subsidiary protection in EU law. As suggested by Bauloz, even the factors contained in the less stringent definition of 'non-international armed conflict' under common article 3 do not align themselves comfortably with situations of violence in places characterized by weak States such as Somalia, well-organized armed groups such as Mexico, or organized terror groups such as Afghanistan (before the Taliban's return to power in 2021).[147] Although IHL has adapted to a certain extent to new forms of armed conflicts,[148] it is ill-suited to provide interpretative guidance or to identify relevant factors for a coherent and effective application of article 15(c).

Giving an autonomous meaning to the term 'internal armed conflict' in EU law means asylum decision makers are not required to wrestle with a complex panoply of IHL norms to determine a (high) legal threshold of application. Although a limited number of disputes regarding whether particular situations amount to armed conflicts may still arise, the mere existence of the use of armed force involving a State's armed forces and/or one or more armed groups should satisfy this element of article 15(c) of the Qualification Directive. In other words, it is necessary to show only the existence of one or more armed groups using force in the asylum applicant's country of origin against another armed group or the State's armed forces. Overall, this is a factual test to satisfy and not a legal assessment *per se*. As proposed by Durieux, this 'contextual' approach means that whether there is an armed conflict in the applicant's country of origin is a matter of fact, rendering this element of article 15(c) 'neutral'.[149]

3. THE DEFINITION AND INTERPRETATION OF 'INDISCRIMINATE VIOLENCE'

The judgment of the CJEU in *Diakité* effectively displaced the focus of enquiry from whether there exists a situation of 'international or internal armed conflict' to 'indiscriminate violence' as 'the central eligibility criterion of article 15 (c)'.[150] Indeed, the study demonstrates that the interpretation of 'indiscriminate violence' has become the principal matter of contention for asylum judicial authorities in the EU. Scholarly debates concerning the interpretation of 'indiscriminate violence' in article 15(c) reflect the questions related to the application and interpretation of the terms 'international or internal armed conflict' discussed above. More specifically, the existing literature has been concerned with whether norms of IHL should serve as an aid to interpretation, to a lesser or greater extent, in light of the similar terminology used.[151] This part first provides a brief overview of the principles of IHL regarding the prohibition of 'indiscriminate attacks' to provide context for the analysis and discussion that follow. The practice of judicial authorities in the EU is then described and analysed. The study demonstrates that judicial interpretation continues to rely on norms of IHL as described above in respect of the intensity

144 Tsourdi (n 69) 294.
145 Stéphane Jaquemet, 'Expanding Refugee Protection through International Humanitarian Law: Driving on a Highway or Walking near the Edge of the Abyss?' in Cantor and Durieux (eds) (n 14) 89.
146 Moreno-Lax (n 114) 335.
147 Bauloz (n 63) 261.
148 ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions' (2019) 101 International Review of the Red Cross 869. For a more critical perspective of the ability of IHL to reflect contemporary armed conflicts, see Chinkin and Kaldor (n 50).
149 Durieux (n 69) 163–64.
150 Bauloz (n 56) 839. See also *Diakité*, Opinion of AG Mengozzi (n 56) para 91.
151 See eg Bauloz (n 63) (rejecting an IHL understanding of indiscriminate violence).

of violence, but also drawing on the notion of 'indiscriminate attacks' to define 'indiscriminate violence' in article 15(c). More specifically, some judicial authorities use the IHL principle of distinction, arising from the prohibition of indiscriminate attacks, as a guiding principle for defining the concept of 'indiscriminate violence' rather than the autonomous meaning to be given to the term as established by the CJEU. Significantly, the approaches of judicial authorities vary and disclose inconsistent interpretations of the term, resulting in divergent outcomes in appeals brought by asylum applicants from the same countries of origin. Thus, contrary to scholarly expectations, the CJEU judgment in *Diakité* did not bring to an end discrepancies in the application of article 15(c).[152]

3.1 The concept of 'indiscriminate attacks' in international humanitarian law

'Indiscriminate attacks' are prohibited under IHL as its purpose is the protection of civilians during armed conflicts.[153] State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.[154] The concept of indiscriminate attacks is based on the principles of distinction and proportionality, which require parties to armed conflicts to distinguish between lawful military objectives and protected persons, such as civilians, who do not participate in the hostilities.[155] Parties to international conflicts must 'take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects',[156] while parties are prevented from targeting civilians in non-international armed conflicts.[157] In addition to the prohibition of purposefully killing civilians, parties must also ensure that any civilian casualties caused by lawful military targeting is proportionate to the military advantage gained.[158]

In practice, there are several ways an attack may be classed as indiscriminate. In the most straightforward manner, an attack is indiscriminate if its target is a non-military object. Alternatively, an attack that relies on methods or means of combat that cannot be directed solely at a specific military object, such as barrel bombs for example, is indiscriminate *per se*.[159] Finally, some methods and means of combat that are initially lawful under IHL become indiscriminate if they result in a disproportionate loss of civilian lives.[160] The corollary of the principle of distinction in IHL is that the loss of civilian lives may be justified if civilians were not targeted in the first place and any deaths are proportionate to the military benefit achieved. Interpreting the notion of 'indiscriminate violence' in article 15(c) in this manner would result in the disregard of violence that is directed at military targets and whose impact on civilians is proportionate in the assessment of subsidiary protection needs. Moreover, as Bauloz highlighted, an IHL interpretation of indiscriminate violence excludes from the scope of article 15(c) violence

152 Matera (n 86) 19.

153 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Protocol I) art 51(4). See also Protocol II (n 78) art 13(2): 'The civilian population as such, as well as individual civilians, shall not be the object of attack'; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II, as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (adopted 3 May 1996, adopted 3 December 1998) 2048 UNTS 93, art 3(8): 'The indiscriminate use of weapons to which this Article applies is prohibited'.

154 ICRC, *Study on Customary International Humanitarian Law*, vol I (Cambridge University Press 2005).

155 For further analysis, see Nils Melzer, 'The Principle of Distinction between Civilians and Combatants' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014).

156 Protocol I (n 153) art 51(4).

157 Protocol II (n 78) art 13(2).

158 Roland Otto, *Targeted Killings and International Law: With Special Regard to Human Rights and International Humanitarian Law* (Springer 2012) 267, 270.

159 Stephen Townley, 'Indiscriminate Attacks and the Past, Present, and Future of the Rules/Standards and Objective/Subjective Debates in International Humanitarian Law' (2017) 50 Vanderbilt Journal of Transnational Law 1223, 1258.

160 Otto (n 158) 306.

that is exercised by persons without any nexus to the armed conflict.[161] As can be seen from previous practice in the UK, the result of this approach would be to exclude 'any other type of non-military violence'.[162] Referring to UNHCR's views, Bauloz concluded that this approach ignores the realities of contemporary armed conflicts where military and criminal violence is increasingly difficult to distinguish.[163]

Accordingly, delineating the scope of article 15(c) by reference to IHL norms would be contrary to the aims of the international protection regime, which is designed to protect individuals from persecution or serious harm on return to their country of origin.[164] The notion of indiscriminate violence in article 15(c) should encompass within its scope persons who may be at risk of serious harm from violence considered proportionate under IHL.[165] It should also include violence exercised outside armed confrontations between the parties, in particular as civilians are mostly exposed to violence outside those sites.[166] Using IHL concepts, such as indiscriminate attacks, to interpret the provisions of subsidiary protection in the EU would fail to achieve the realization of the latter's object and purpose in light of their significantly different scopes of application.

3.2 'Indiscriminate violence': judicial practice in European Union Member States

Judicial practice in EU Member States shows divergent practice in understanding the concept of 'indiscriminate violence'. Whereas practice in Belgium, the Netherlands, and the UK showed a similar trend in attempting to determine the targets of attacks, practice in France showed less concern to differentiate between targeted and 'indiscriminate' violence. The jurisprudence of the Belgian Council for Alien Law Litigation demonstrates that judges equate the term 'indiscriminate violence' with violence targeted at civilians or violence that fails to distinguish between military and civilian targets – in other words, violence aimed at State forces or armed opposition groups that are a legitimate target of attack but resulting in a disproportionate number of civilian casualties, reflecting the notion of indiscriminate attacks under IHL. Although the Belgian court recognized the increase in attacks by armed groups and a shift towards complex attacks that included a combination of improvised explosive devices, bombs, and suicide attacks in Afghanistan and Iraq, it concluded that violence by armed groups was targeted against high-profile individuals, institutions, and buildings, in other words, lawful military objects. In Afghanistan, these included the international and Afghan troops, security forces, and authorities.[167] In Iraq, they included Kurdish security forces; government and security services and personnel; political, religious and tribal leaders; army; police; judges; and certain professionals.[168] Thus, the Belgian court consistently found that patterns of violence in Afghanistan and Iraq were characterized by non-State actors targeting 'high-profile' institutions or persons, whereas ordinary civilians were not targeted. In these cases, the court concluded that the number of civilian casualties resulting from high-profile attacks was low or 'limited'. In the rare cases where the court acknowledged reports of civilians being directly targeted, it still

161 Bauloz (n 63) 252–53.
162 UK: *KH (Article 15(c) Qualification Directive) Iraq* (n 63) para 95.
163 Bauloz (n 63) 253.
164 ibid 249–52.
165 ibid 251. Although the UK Upper Tribunal excluded lawful violence under IHL in *KH (Article 15(c) Qualification Directive) Iraq* (n 63), it has since departed from this interpretation. See *AK (Article 15(c)) Afghanistan* CG [2012] UKUT 00163 (IAC).
166 Stathis N Kalyvas, *The Logic of Violence in Civil War* (Cambridge University Press 2006) 20.
167 BE: n° 165 409 (Afghanistan) (RvV 8 April 2016); n° 154 649 (Afghanistan) (RvV 15 October 2015); n° 122 391 (Afghanistan) (RvV 11 April 2014); n° 116 849 (Afghanistan) (RvV 14 January 2014); n° 114 377 (Afghanistan) (n 116); n° 111 940 (Afghanistan) (RvV 14 October 2013); n° 108 480 (Afghanistan) (n 126); n° 105 426 (Afghanistan) (RvV 20 June 2013).
168 BE: n° 177 180 (Iraq) (RvV 27 October 2016); n° 167 526 (Iraq) (RvV 12 May 2016); n° 97 614 (Iraq) (RvV 21 February 2013); n° 96 041 (Iraq) (RvV 29 January 2013); n° 94 655 (Iraq) (RvV 9 January 2013).

concluded that the numbers were low.[169] In the Syrian appeals, the Belgian court considered that the government was acting indiscriminately because it made insufficient distinction between civilians and armed groups.[170] It concluded that the province of Aleppo experienced permanent violence due to heavy striking by an extremely repressive government acting indiscriminately.[171]

Thus, in general, the Belgian court concluded that civilians in Afghanistan and Iraq were not directly targeted, nor were they the subject of indiscriminate attacks as the impact of the violence on them was not disproportionate. In setting out its approach, the court explicitly listed the elements relevant to the assessment of article 15(c) as including the targets of the parties to the conflict and the extent to which civilians are the victims of targeted or indiscriminate violence.[172] The court noted the regrettable instances of civilian casualties, but nonetheless concluded that there was no or very low levels of indiscriminate violence, such that none of the Afghan or Iraqi appellants were at risk on return and entitled to subsidiary protection under article 15(c).[173]

The jurisprudence of the UK Upper Tribunal displayed a similar trend in its conclusion that armed groups in Afghanistan target persons perceived to support Afghan or international forces without routinely causing widespread harm to other civilians.[174] The Upper Tribunal considered that violence in the contested areas of Iraq was indiscriminate because the number of civilian casualties was disproportionate, yet violence against civilians in other areas was low.[175] Accordingly, the court also considered that, in certain areas, civilians were collateral damage (because they were not the target of attacks) but not on a sufficient scale to engage article 15(c). The Dutch Council of State also appeared to make a distinction between indiscriminate violence, in the IHL sense of the term, and violence motivated by political and sectarian tensions that results in violent attacks against sectarian targets. In an Iraqi appeal, the Dutch Council of State found that, although the means of violence chosen by armed groups increased the indiscriminate nature of violence and thereby increased civilians' risk of being subjected to this violence, the evidence demonstrated that the violence was motivated by political and sectarian tensions and thus that violent incidents and attacks were mainly directed at sectarian targets. In addition, although the number of civilian casualties had increased in the first half of 2013, the deterioration in the situation was not sufficiently 'long-term and structural'.[176]

The practice discussed above demonstrates that the judiciary uses the term 'indiscriminate' in the IHL sense of the term, to mean either attacks that target civilians without any specific profiles and thus constitute non-military objects, or attacks that fail to distinguish between civilians and military forces or high-profile individuals, such as political leaders, government officials, judges, or religious leaders. The approach of judicial authorities in Belgium, the Netherlands, and the UK to determining the level of indiscriminate violence is to subtract targeted violence against those whom they consider to be 'high-profile' targets from the violence experienced by 'ordinary' civilians. On this basis, the remaining violence is considered insufficiently high to meet the article 15(c) threshold.

169 BE: n° 160 102 (Afghanistan) (RvV 15 January 2016); n° 122 391 (Afghanistan) (n 167).
170 BE: n° 100 618 (Syria) (RvV 9 April 2013). Most of these appellants had already been granted subsidiary protection by the national authority.
171 ibid.
172 BE: n° 175 087 (Iraq) (RvV 21 September 2016).
173 BE: n° 177 180 (Iraq) (n 168); n° 175 087 (Iraq) (n 172); n° 165 409 (Afghanistan) (n 167); n° 160 102 (Afghanistan) (n 169); n° 154 649 (Afghanistan) (n 167); n° 122 391 (Afghanistan) (n 167); n° 96 041 (Iraq) (n 168). In the Afghan sample, one out of 20 appeals was remitted to the administrative authority on the basis of disputed nationality; in the Iraqi sample, three out of 20 appeals were remitted, one due to disputed nationality and two due to the failure to adequately consider documentary evidence and/or recent country of origin information.
174 UK: *AK (Article 15(c)) Afghanistan* (n 165) para 204.
175 UK: *AA (Article 15(c)) Iraq* (n 130).
176 NL: Council of State, 19 February 2014, 201307429/1/V2 (Iraq) para 2.9.

With respect to the concept of 'indiscriminate violence', the French CNDA jurisprudence indicated a different approach that did not rely on a distinction between 'ordinary' civilians and 'high-profile' targets as seen in the practice of the Belgian, Dutch, and UK judiciary. Accordingly, by assessing the intensity of violence in aggregate and the subsequent number of civilian casualties, the CNDA concluded that the indiscriminate violence was sufficiently high to meet the article 15(c) threshold in several Afghan provinces,[177] including Kabul,[178] and in Iraqi regions,[179] including Baghdad[180] and Kirkuk.[181] In Syria, the CNDA found that the threshold was met due to intense State violence by aerial bombings.[182] Overall, the CNDA did not interpret violence through the IHL principle of distinction compared to judicial practice in Belgium, the Netherlands, and the UK. The resultant diverging conclusions regarding the application of article 15(c) in these areas compared to the findings reached by the Belgian, Dutch, and UK courts is due to the French court adopting a different approach to the concept of indiscriminate violence and a different assessment of the relevant threshold. Although this approach should be welcomed for its wider conceptualization of violence in conflict, it is accompanied by a disproportionate award of subsidiary protection for persons fleeing conflicts in France,[183] in contrast to the earlier and pre-*Diakité* practice of granting refugee protection more widely.[184] The analysis of article 15(c) appeals in Belgium, France, the Netherlands, and the UK illustrates the continued disparities in recognition rates and types of protection granted in the EU.[185] The next section therefore provides some guidance on the autonomous concept of 'indiscriminate violence' in EU law to begin to address these divergences.

3.3 An autonomous interpretation of 'indiscriminate violence' under European Union law

The restrictive judicial practice described above emphasizes the need for clarity regarding the term 'indiscriminate violence' in EU law. In addition, this is required because the terms 'indiscriminate violence'/'incidents'/'attacks' are used regularly by various international bodies, whose outputs are utilized as 'objective' evidence in refugee status determination procedures. The United Nations Assistance Mission to Afghanistan (UNAMA), for example, uses the term throughout its reporting work and, in turn, its reports serve as a source of country of origin information for EU Member States.[186] Thus, UNAMA describes attacks by non-State actors as 'either deliberately targeting civilians or of an indiscriminate and/or disproportionate nature against security forces in densely populated areas'.[187] When the data provided by various bodies and their findings are adopted without attention as to how they interpret such terms, asylum decision makers' analysis of violence in conflict may be distorted and contribute to the failure to give 'indiscriminate violence' in EU law an autonomous meaning.

177 FR: CNDA, 17 November 2016, n° 16026746 (Afghanistan); n° 16024864 (Afghanistan) (n 138).
178 FR: CNDA, 19 November 2015, n° 15017231 (Afghanistan).
179 FR: n° 13034393/13034396 (Iraq) (n 138).
180 Iraqi appellants from Baghdad had already been granted subsidiary protection by the national authorities. See FR: CNDA, 11 April 2016, n° 15027724 (Iraq).
181 FR: CNDA, 18 February 2016, n° 15018199 (Iraq); CNDA, 30 September 2014, n° 13004222 (Iraq).
182 FR: CNDA, 19 December 2016, n° 16024907/16024782/16024908 (Syria).
183 Between 2017 and 2022, in the cases of persons fleeing Somalia and Afghanistan. See Chloé Viel, 'La Protection des Exilés de Guerre en Droit International, Européen et Français' (PhD thesis, Université de Reims Champagne-Ardenne 2024) 522–24. On file with the author.
184 Lambert 2013 (n 16) 226.
185 As most recently emphasized in Qualification Regulation (n 5) recital 3.
186 See eg the first European Asylum Support Office (EASO) Guidance Note and Common Analysis aiming to provide a joint EU analysis of country of origin information: EASO, *Country Guidance: Afghanistan* (2018) <https://reliefweb.int/report/afghanistan/european-asylum-support-office-country-guidance-afghanistan-june-2018> accessed 28 February 2024; UK: *AK (Article 15(c)) Afghanistan* (n 165).
187 UNAMA Human Rights Service, *Afghanistan: Protection of Civilians in Armed Conflict – Annual Report 2017*, 26 <https://unama.unmissions.org/sites/default/files/afghanistan_protection_of_civilians_annual_report_2017_final_6_march.pdf> accessed 28 February 2024.

In *Diakité*, the CJEU made clear that the term 'internal armed conflict' in EU law requires interpretation independent from the norms and principles codified in IHL. The CJEU based its decision principally on the facts that the terms of the subsidiary protection regime were not identical to those of IHL and the two legal frameworks served fundamentally different purposes. Bauloz has commented that it is regrettable the CJEU did not explicitly reject the use of IHL for all the terms in article 15(c).[188] This limitation is ultimately due to the nature of the preliminary ruling procedure by which EU Member States can ask questions of interpretation of EU law to the CJEU under article 267 of the Treaty on the Functioning of the European Union.[189] Thus, the CJEU in *Diakité* was concerned solely with the interpretation of the term 'internal armed conflict' in light of the specific question asked by the referring national court. Moreover, some have argued that the CJEU has treated asylum cases as technical matters by adopting a formal and deferential method of interpretation.[190] However, although the CJEU in *Elgafaji* was assessing the relationship between article 15(c) and article 15(b) which corresponds to article 3 of the European Convention on Human Rights,[191] it noted that article 15(c) has its own field of application,[192] and its interpretation should be carried out independently.[193] This further supports the view that the reasons underpinning the CJEU's judgment in *Diakité* imply that the remaining terms of article 15(c) also require autonomous interpretation.

Moreover, the CJEU has already provided some guidance on the definition of 'indiscriminate violence' under article 15(c) of the Qualification Directive in the earlier case of *Elgafaji*. In an attempt to reconcile the apparently contradictory terms of 'individual threat' and 'indiscriminate violence', the CJEU noted that 'indiscriminate violence' is 'a term which implies that it may extend to people irrespective of their personal circumstances'[194] or 'of their identity'.[195] In other words, the notion of (in)discrimination is connected to the individual characteristics and circumstances of persons who experience that violence, rather than to the disproportionate impact of violence on civilians, following lawful military attacks under IHL. Thus, it can be seen that the CJEU had already provided the contours of a definition of 'indiscriminate violence' in accordance with its usual meaning in everyday language. However, the CJEU in *Elgafaji* did not provide any further clarification as to the meaning of the term. As noted, the CJEU's approach in the preliminary ruling procedure is limited to legal interpretation without application to the facts of the case before the court or tribunal of a Member State making the referral. Had the mechanism entitled the CJEU to engage with the facts of Mr Elgafaji or Mr Diakité's cases, in particular with the specific risks and the nature of violence they faced on return to Iraq and Guinea respectively, greater clarity on the meaning of the relevant provisions of EU law might have been provided.

To determine the precise meaning and scope of 'indiscriminate violence', it is necessary to consider 'its 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'.[196] This suggests interpretation

188 Bauloz (n 63) 269.
189 TFEU (n 23).
190 Martin Westlund, 'The Road Less Travelled in EU Asylum Law: The CJEU's Restrictive Way of Reasoning and How a Different Approach Could Strengthen Human Rights' (2023) 6 Nordic Journal of European Law 34, 35.
191 See both Qualification Directive (n 5) art 15(b) and Qualification Regulation (n 5) art 15(b): 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin'; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5 (European Convention on Human Rights, as amended) art 3: 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'.
192 *Elgafaji* (n 17) para 36.
193 ibid para 28.
194 ibid para 34.
195 ibid para 35.
196 *Diakité* (n 18) para 27; Case C–549/07 *Wallentin-Hermann v Alitalia - Linee Aeree Italiane SpA* [2008] ECR I–11061, para 17; Case C–119/12 *Probst v mr.nexnet GmbH* [2012] 11 WLUK 679, para 20.

of the term should be informed by the wider framework of international protection in the EU, including the Refugee Convention. The adoption of a subsidiary protection regime in the EU aims to harmonize the practice of EU Member States in respect of persons who do not fall within the definition of a refugee but who nonetheless are at risk on return to situations of armed conflict. The aim is to provide complementary protection to the Refugee Convention for 'persons genuinely in need of international protection and through such persons being offered an appropriate status'.[197] The purpose of subsidiary protection in EU law is to ensure the protection of individuals originating from situations of armed conflict against serious and individual threats to life or person who do not meet the Refugee Convention definition. Accordingly, it is proposed that indiscriminate violence is to be viewed in contrast to discriminatory violence, which is at the heart of the Refugee Convention. Lord Hoffmann, in the UK House of Lords, distilled the principle of discrimination in the Refugee Convention as follows:

> The concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination.[198]

Goodwin-Gill and McAdam have also noted the non-discrimination principle at the centre of the Refugee Convention.[199] Further, this approach is supported by Durieux's proposal to rely on the concept of discrimination to interpret the Refugee Convention definition and, by extension, understand violence in the context of armed conflicts.[200] Juss has also claimed that subsidiary protection under article 15(c) should be interpreted by reference to international refugee law as both aim to grant protection.[201] The nexus requirement in the Refugee Convention definition, namely that a person has a well-founded fear of being persecuted *for reasons of* race, religion, nationality, membership of a particular social group or political opinion is mirrored in article 15(c) where a civilian is at risk of suffering serious and individual threat to their life or person *by reason of* indiscriminate violence in situations of international or internal armed conflict. Thus, under article 15(c), a civilian must demonstrate a threat *caused by* indiscriminate violence[202] in the same way as a refugee has a well-founded fear of persecution caused by one or more of the Refugee Convention grounds. Hence, situations catered for in article 15(c) and falling outside the framework of discriminatory harm include violations of human rights without distinction as to the bearers of those rights.[203] This interpretation of indiscriminate violence is in line with 'its usual meaning in everyday language'[204] as an adjective referring to something done without distinction of any kind.

197 *Diakité* (n 18) para 33; Qualification Directive (n 5) recitals 6, 12, 33.
198 *Islam v Secretary of State for the Home Department and R v Immigration Appeal Tribunal, ex parte Shah* [1999] 2 AC 629 (HL).
199 Guy S Goodwin-Gill and Jane McAdam (with Emma Dunlop), *The Refugee in International Law* (4th edn, Oxford University Press 2021) 95.
200 Durieux (n 69) 165. Durieux also suggested using the discriminatory element of persecution inherent in the Refugee Convention definition to distinguish refugee protection from complementary forms of protection. Jean-François Durieux, 'Salah Sheekh Is a Refugee: New Insights into Primary and Subsidiary Forms of Protection' (2008) 49 Refugee Studies Centre Working Paper Series, 17 <https://www.rsc.ox.ac.uk/files/files-1/wp49-salah-sheekh-refugee-2008.pdf> accessed 16 October 2024.
201 Juss (n 23) 135.
202 Lambert suggests that the art 15(c) nexus should be interpreted as 'constitutive cause' beyond the 'cause and effect' approach. Hélène Lambert, 'Causation in International Protection from Armed Conflict' in Cantor and Durieux (eds) (n 14) 76.
203 See also UNHCR, 'Guidelines on International Protection No 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions', HCR/GIP/16/12 (2 December 2016) para 10.
204 *Diakité* (n 18) para 27.

The notion of distinction in international refugee law thus relates to persons being subjected to serious harm (as a form of violence) on account of their personal characteristics and circumstances as defined in the Refugee Convention grounds. Accordingly, indiscriminate violence in the subsidiary protection regime is the inverse of this concept, namely violence that affects persons irrespective of their personal circumstances. This dual conception of the reasons for and the discriminatory nature of violence or serious harm stands in contrast to the principle of distinction in IHL, which is defined as the use of force by one of the parties to the conflict against combatants of the opposing party, without regard to the impact on civilians. It is thus readily apparent that the concepts of distinction in these two legal frameworks have widely different scope of application and inherent limitations. The IHL notion of the term is significantly restricted in comparison with the broad protective purpose of the international protection regime in the EU. However, if an autonomous meaning is given to the term 'indiscriminate violence', independent of IHL in accordance with the CJEU judgment in *Diakité* and by contrast to the concept of discrimination, the notion of 'indiscriminate violence' in article 15(c) should be given a wider scope of application than the approach currently adopted by some judicial authorities in the EU, as revealed above.

4. CONCLUSION

Despite the CJEU's guidance that the term 'armed conflict' in article 15(c) of the Qualification Directive should be interpreted independently from IHL, and 'nor is it necessary to carry out, in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organization of the armed forces involved or the duration of the conflict',[205] empirical research shows that some judicial authorities continue to draw on principles of IHL, with its emphasis on territoriality and conventional warfare, to determine whether persons fleeing armed conflicts may be at risk of indiscriminate violence. In a handful of cases, explicit references to IHL continued until shortly after the judgment in *Diakité* had been published.[206] With the passage of time since the *Diakité* judgment, courts no longer use the criteria of IHL, including control of territory and capacity to sustain military operations, for the purposes of defining and assessing the intensity of armed conflicts. Although this was described at the time as a positive development for international protection as it lessened the threshold of application for article 15(c),[207] this article demonstrates that those norms are instead utilized to define 'indiscriminate violence' in Belgium, the Netherlands, and the UK. In consequence, article 15(c) assessments are conducted with a focus on the parties to the conflict, the level of armed confrontations between the parties, and the parties' operational capacities to engage in sustained military combat. This approach is not in accordance with the CJEU's jurisprudence and imports a stricter interpretation of article 15(c) to the detriment of persons fleeing armed conflicts. The trend of using IHL norms and concepts is paralleled by the European Union Agency for Asylum's use of indiscriminate violence 'indicators' in its Country Guidance to EU Member States.[208] It lends credence to the suggestion that there is a cyclical reinforcement of approaches among various actors in the field of asylum protection, including legal representatives, administrative authorities, judicial bodies, and European agencies and institutions.[209]

205 ibid para 35.
206 See eg FR: CNDA, 7 March 2014, n° 130019800 (Afghanistan).
207 Nicolosi (n 65) 479.
208 Christel Querton, 'Country Guidance, Country of Origin Information, and the International Protection Needs of Persons Fleeing Armed Conflicts' (2023) 42 Refugee Survey Quarterly 204, 238–39.
209 ibid 243–44.

Overall, this approach is contrary to the requirement to give the individual provisions of article 15(c) an autonomous interpretation as required by EU law. Put simply, if the norms of IHL are not the benchmarks to determine the existence of an armed conflict, neither do they amount to the standards by which to define and assess the level of indiscriminate violence under article 15(c). Furthermore, from a conceptual perspective, there should be an analytical distinction between armed conflicts and the exercise of violence taking place in situations of armed conflicts. Kalyvas claims this distinction is necessary because a significant amount of violence in situations of conflict occurs outside the battlefield and there is an inverse relationship between the severity of the conflict (measured by conventional means of warfare, such as the size of forces and the sophistication of weapons) and the intensity of violence.[210]

Notwithstanding hopes that *Diakité* would reduce disparities in decision making, this study demonstrated continued divergence in judicial practice. This led to differing outcomes in the appeals of persons fleeing conflicts from the same countries of origin, in particular from the CNDA that was more likely to allow appeals under article 15(c).

Accordingly, an autonomous interpretation of 'indiscriminate violence' was proposed, which is independent of IHL principles, reflects its usual meaning in everyday language, and takes into account the context and purpose of the EU international protection regime as a whole. Significantly, the concept of 'indiscriminate violence' in the context of international protection and the concept of 'indiscriminate attacks' in the context of IHL must have different meanings. While they can both be understood under the principle of distinction, that distinction is inherently of a different nature. In the context of international protection, violence is indiscriminate simply because it is not exercised for reasons of race, religion, nationality, membership of a particular social group or political opinion.

Ultimately as most violence in situations of armed conflict is justified by reference to identity politics,[211] if 'indiscriminate violence' in article 15(c) is given an autonomous meaning in EU law, in the sense that the violence is exercised for reasons other than the Refugee Convention grounds for persecution, this would imply that there is very little 'indiscriminate violence' in situations of contemporary armed conflicts.[212] In practice, therefore, were asylum decision makers to give indiscriminate violence its appropriate meaning and scope, there may not be many cases of persons fleeing armed conflicts that fall within the protective scope of article 15(c) overall. Subsidiary protection in the EU should thus be treated as a residual protection mechanism, namely a mere 'safety net' to protect the minority of persons fleeing armed conflicts who do not meet the Refugee Convention definition.

210 Kalyvas (n 166) 20.
211 Kaldor (n 52).
212 Querton (n 30).