Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 18 July 2013 [1]

Case C-285/12

Aboubacar Diakité
v
Commissaire général aux réfugiés et aux apatrides

(Request for a preliminary ruling from the Conseil d'État (Belgium))

(Right of asylum — Directive 2004/83/EC — Minimum standards on the conditions for granting refugee status and subsidiary protection status — Person eligible for subsidiary protection — Serious harm — Article 15(c) — Concept of 'internal armed conflict' — Interpretation by reference to international humanitarian law — Criteria for assessment)

1. The subject of this case is a request for a preliminary ruling from the Conseil d'État (Council of State) (Belgium) on the interpretation of Article 15(c) of Directive 2004/83/EC (the 'Qualifications Directive'). [2] That request was submitted in the context of an action brought by Mr Diakité, who is of Guinean nationality, against the Commissaire général aux réfugiés et aux apatrides (Commissioner General for Refugees and Stateless Persons) (the 'Commissaire général') concerning the latter's decision not to grant Mr Diakité subsidiary protection.

I – Legal context

A – *International law*

2. Common Article 3 of the four Geneva Conventions of 12 August 1949 [3] ('Common Article 3 of the Geneva Conventions') provides:

'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed "hors de combat" by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely …

1 — Original language: French.

2 — Council directive of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12, and corrigendum OJ 2005 L 204, p. 24).

3 — Respectively, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; and Convention (IV) relative to the Protection of Civilian Persons in Time of War.

To this end, the following acts are and shall remain prohibited … with respect to the above-mentioned persons:

(a) violence to life and person …

…

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court …

…'

3. Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977 ('Protocol II') provides:

'1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and 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.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.'

B – *EU law*

4. Under Article 2(e) of the Qualifications Directive:

'"person eligible for subsidiary protection" means a third-country national … who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, [4] …, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country'.

5. Under Chapter V headed 'Qualification for subsidiary protection', Article 15 of the Qualifications Directive, itself headed 'Serious harm', provides:

'Serious harm consists of:

(a) death penalty or execution; or

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

4 — Under the terms of Article 2(k) of the Qualifications Directive, 'country of origin' means the country or countries of nationality or, for stateless persons, of former habitual residence. The same definition is used for the purposes of this Opinion.

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.[5]

6. The Qualifications Directive was recast by Directive 2011/95/EU[6] (the 'new Qualifications Directive'), which does not modify the substance of either Article 2(e) of the Qualifications Directive (now Article 2(f)) or Article 15 thereof.

C – *Belgian law*

7. Article 48/4 of the loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Law of 15 December 1980 on access to the territory, residence, establishment and removal of foreign nationals)[7] (the 'Law of 15 December 1980'), which transposes Articles 2(e) and 15 of the Qualifications Directive, provides:

'Paragraph 1. Subsidiary protection status is granted to a foreign national who does not qualify as a refugee and who cannot benefit from Article 9b, and in relation to whom substantial grounds have been shown for believing that, if returned to his or her country of origin or, in the case of a stateless person, to his or her country of former habitual residence, he or she would face a real risk of suffering serious harm as referred to in paragraph 2, and who is unable, or, in view of such risk, unwilling to avail himself or herself of the protection of that country …

Paragraph 2. The following are regarded as constituting serious harm:

…

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.

II – The dispute in the main proceedings and the question referred for a preliminary ruling

8. On 21 February 2008, Mr Diakité made an initial application for asylum in Belgium, invoking the repression and violence that he had endured in his country of origin by reason of his participation in national demonstrations and protest movements against the ruling regime. On 25 April 2008, the Commissaire général took an initial decision to refuse to recognise the appellant as having refugee or subsidiary protection status. On 17 November 2009, that decision was withdrawn and, on 10 March 2010, the Commissaire général took a new decision to refuse refugee and subsidiary protection status. That decision was confirmed by the Conseil du contentieux des étrangers (Council for Asylum and Immigration Disputes) in its decision of 23 June 2010[8] finding that the facts relied on were not credible, nor, therefore, were the reasons given for the alleged fear and risk of serious harm.

9. Without having returned to his country of origin in the meantime, Mr Diakité submitted a second application for asylum to the Belgian authorities on 15 July 2010.

5 — See the corrigendum cited in footnote 2 to this Opinion.

6 — Directive of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

7 — *Moniteur belge* (Belgian Official Gazette) of 31 December 1980, p. 14584. Article 48/4 was inserted by an amending law of 15 September 2006 (*Moniteur belge* of 6 October 2006, p. 53533).

8 — Decision No 45.299.

10. On 22 October 2010, the Commissaire général took a new decision to refuse to recognise refugee or subsidiary protection status. That refusal to grant subsidiary protection, which alone is at issue in the main proceedings, was based on the finding that, at the time, there was not, in Guinea, a situation of indiscriminate violence or armed conflict within the meaning of Article 48/4(2) of the Law of 15 December 1980. An appeal was brought against that decision before the Conseil du contentieux des étrangers, which, by a decision of 6 May 2011,[9] confirmed the double refusal of the Commissaire général.

11. In his appeal in administrative cassation before the Conseil d'État against the above judgment of 6 May 2011, Mr Diakité puts forward a single ground of appeal alleging infringement of Article 48/4 of the Law of 15 December 1980, in particular paragraph 2(c) thereof, and of Article 15(c) of the Qualifications Directive, read in conjunction with Article 2(e) thereof.

12. Before the referring court, Mr Diakité criticises the decision of the Conseil du contentieux des étrangers in so far as, having noted that neither the Qualifications Directive nor the Belgian law which transposed it contained a definition of 'armed conflict', it held that it was appropriate to accept 'the definition … established by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadic* case'.[10] Mr Diakité submits that that definition is too restrictive and he advocates an independent and broader construction of the term 'internal armed conflict'.

13. The Conseil d'État points out that, in *Elgafaji*,[11] the Court, with reference to the term 'indiscriminate violence', emphasised the need for Article 15(c) of the Qualifications Directive to be interpreted independently of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (the 'ECHR').[12] According to the Conseil d'État, on the basis of that judgment, in which the Court did not rule on the specific concept of armed conflict, 'the possibility cannot be discounted, as [Mr Diakité] claims, that that concept, within the terms of Article 15(c) of [the Qualifications] Directive …, may also be given an independent interpretation and assume a specific meaning vis-à-vis that derived from the case-law of the [ICTY], in particular in the *Tadic* case'.

14. In those circumstances, the Conseil d'État decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 15(c) of [the Qualifications] Directive … be interpreted as meaning that that provision offers protection only in a situation of "internal armed conflict", as interpreted by international humanitarian law ["IHL"] and, in particular, by reference to Common Article 3 of the four Geneva Conventions …?

If the concept of "internal armed conflict" referred to in Article 15(c) of [the Qualifications] Directive … is to be given an interpretation independent of Common Article 3 of the four Geneva Conventions …, what, in that case, are the criteria for determining whether such an "internal armed conflict" exists?'

9 — Decision No 61.019.

10 — See decision of 2 October 1995, *Tadic*, concerning the defence motion for interlocutory appeal on jurisdiction. The ICTY, which was set up by the Security Council acting under Chapter VII of the United Nations Charter, in accordance with the provisions of Article 1 of its Statute, has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

11 — Case C-465/07 [2009] ECR I-921.

12 — Under the terms of that article, headed 'Prohibition of torture', '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

III – The procedure before the Court

15. Mr Diakité, the Belgian, German and United Kingdom Governments and the European Commission have submitted written observations. Their representatives and that of the French Government presented oral argument to the Court at the hearing on 29 May 2013.

IV – Analysis

16. The question referred for a preliminary ruling is divided into two parts, which will be examined separately below.

A – *The first part of the question referred*

17. By the first part of its question, the referring court wishes, in essence, to ascertain whether the concept of 'internal armed conflict' which appears in Article 15(c) of the Qualifications Directive is an independent concept of European Union (EU) law or must be interpreted in accordance with IHL.

18. With the exception of Mr Diakité and the United Kingdom Government, who argue unreservedly for an independent and broad interpretation of that concept,[13] the positions set out by the other interested parties that submitted observations to the Court remain fluid. The French Government and the Commission, while affirming the independent nature of the concept, consider that its scope should be determined on the basis of the definition given by IHL, particularly in order to ensure consistency between the various systems of protection at international and EU level. The Belgian and German Governments consider, by contrast, that the concept should be interpreted principally on the basis of IHL; they point out, however, that the Qualification Directive's objective of protection may, exceptionally, make it necessary to recognise the existence of an 'internal armed conflict' within the meaning of Article 15(c) thereof even where all the conditions required by IHL are not met. Thus, although starting from different premisses, those interested parties in practice arrive at largely convergent understandings of the term.

19. It must be stated that the concepts of 'internal armed conflict', 'armed conflict not of an international character' and 'non-international armed conflict' which appear, respectively, in Article 15(c) of the Qualifications Directive, Common Article 3 of the Geneva Conventions and Protocol II are semantically almost identical. This simple observation does not, however, in itself lead to the conclusion that those concepts must be given the same interpretation.

20. In that regard, I would point out that, as regards the interpretation of the provisions of the Qualifications Directive, the Court has already had occasion to warn against any mechanism resulting in the introduction to the context of that directive of concepts or definitions adopted in different contexts, even though they fall within the scope of EU law.[14] In the present case, that would mean using, for the interpretation of a provision of that directive, a concept which not only falls within the scope of a field which, as will be seen, is appreciably different but which, moreover, belongs to a different legal order.

13 — The Office of the United Nations High Commissioner for Refugees (UNHCR) took the same view in the document *Safe at last? Law and practice in selected EU Member States with respect to asylum-seekers fleeing indiscriminate violence*, July 2001, pp. 103 and 104, available on the UNHCR website at www.unhcr.org/refworld/docid/4e2ee0022.html, and in the note drawn up in the context of the present case that was produced as an annex to the observations submitted to the Court by Mr Diakité.

14 — See Joined Cases C-57/09 and C-101/09 *B and D* [2010] ECR I-10979, paragraphs 89 to 94.

21. In its observations submitted at the hearing, the French Government referred to the case-law of the Court that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the purpose of the relevant rules. [15] In the view of the French Government, the same criterion should apply in the present case.

22. It appears to me that this argument cannot prevail. First, as the German Government rightly points out, an interpretation consistent with that used in the context of an international convention that binds all the Member States responds to the principal concern of that case-law, which is to ensure uniform interpretation of EU law. Second, even assuming that a general principle may be inferred from that case-law which is valid beyond the relationship between EU law and the law of the Member States, such a principle would in any case be unsuited to governing relations between the EU legal order and the international legal order.

23. Under Article 3(5) TEU, the European Union 'shall contribute … to the strict observance and the development of international law'. As the Court has repeatedly held, the European Union must respect international law in the exercise of its powers. [16] A measure adopted by virtue of those powers must therefore be interpreted, and its scope limited, in the light of the relevant rules of international law, [17] among which, in addition to those derived from international agreements concluded by the European Union, [18] are the rules of customary international law, which are binding upon the EU institutions and form part of the EU legal order. [19] The primacy of those rules over provisions of secondary EU legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements. [20]

24. Therefore the principle of consistent interpretation applies to the Court when it is analysing the relationships between international law and EU law. [21]

25. Although the application of that principle cannot depend on the question whether the act of the institutions to be interpreted comprises an express reference to the rules of international law, two points must, however, be made clear.

15 — See, in particular, Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43; Case C-467/08 *Padawan* [2010] ECR I-10055, paragraph 32; and Case C-166/11 *González Alonso* [2012] ECR, paragraph 25. See also Case 51/76 *Verbond van Nederlandse Ondernemingen* [1977] ECR 113, paragraphs 10 and 11; Case 64/81 *Corman* [1982] ECR 13, paragraph 8; Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, paragraph 30; Case C-103/01 *Commission* v *Germany* [2003] ECR I-5369, paragraph 33; and Case C-314/06 Société *Pipeline Méditerranée et Rhône* [2007] ECR I-12273, paragraph 21.

16 — See Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraph 9; Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 45; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 291; and, to the same effect, Case C-366/10 *Air Transport Association of America and Others* [2011] ECR I-13755, paragraph 101.

17 — *Poulsen and Diva Navigation*, paragraph 9; *Kadi and Al Barakaat International Foundation* v *Council and Commission*, paragraph 291; and *Air Transport Association of America and Others*, paragraph 123.

18 — Article 216(2) TFEU provides that agreements concluded by the European Union are binding upon the institutions of the European Union and on its Member States.

19 — See *Poulsen and Diva Navigation*, paragraph 10, concerning the rules of customary international maritime law, and *Racke*, paragraph 46, which concerned rules, codified in Article 62 of the Vienna Convention on the Law of Treaties of 23 May 1969, concerning the termination and suspension of treaty relations by reason of a change of circumstances. The same statement is found, with a more general scope, in *Air Transport Association of America and Others*, paragraph 101.

20 — See, as regards agreements concluded by the European Union, Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 52; Case C-76/00 P *Petrotub and Republica* [2003] ECR I-79, paragraph 57; Case C-286/02 *Bellio F.lli* [2004] ECR I-3465, paragraph 33; Case C-311/04 *Algemene Scheeps Agentuur Dordrecht* [2006] ECR I-609, paragraph 25; Joined Cases C-447/05 and C-448/05 *Thomson and Vestel France* [2007] ECR I-2049, paragraph 30; Case C-335/05 *Řízení Letového Provozu* [2007] ECR I-4307, paragraph 16; and Case C-428/08 *Monsanto Technology* [2010] ECR I-6765, paragraph 72.

21 — See, to that effect, most recently, Simon, D., *La panacée de l'interprétation conforme: injection homéopathique ou thérapie palliative*?, *De Rome à Lisbonne: les juridictions de l'Union européenne à la croisée des chemins, Mélanges en l'honneur de P. Mengozzi*, Bruylant, 2013, pp. 279, 280 and 285.

26. First, the requirement of consistent interpretation has, in principle, been imposed only in relation to international commitments that bind the European Union.[22] In the present case, although it is common ground that the European Union is not party to the Geneva Conventions of 12 August 1949 and their Additional Protocols, the International Court of Justice (ICJ) has held that those acts express 'intransgressible principles of international customary law'.[23] As such, they bind the institutions, including the Court, which must guarantee a reading of EU law consistent with those principles.

27. Second, the alignment of EU law with international law by interpretative means can be imposed only where hermeneutic consistency between the different acts at issue is justified.

28. In my view, that is not so in the present case, bearing in mind in particular the differences in terms of objective, purposes and means that exist between IHL, on the one hand, and the subsidiary protection mechanism introduced by the Qualifications Directive, on the other, as will be explained below.

1. Objective, purposes and means of IHL

29. In its opinion entitled 'Legality of the Threat or Use of Nuclear Weapons', the ICJ defines IHL as one single 'complex system' into which flow the two branches of the law applicable in armed conflict, namely 'Hague law',[24] which codifies the 'laws and customs of war on land, fixes the rights and duties of belligerents in their conduct of operations and limits the choice of methods and means of injuring the enemy in an international armed conflict', and 'Geneva law', in particular the four Conventions of 12 August 1949 and the Additional Protocols of 1977,[25] 'which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities'.[26]

30. In keeping with the expression often used to describe it, IHL is therefore a 'law of war' (*jus in bello*), which, for humanitarian reasons, aims to limit the effects of armed conflict, both by laying down restrictions on the means and methods of warfare and by protecting certain categories of people and property.

31. Thus the four Geneva Conventions of 12 August 1949, which resulted from the revision of three conventions signed in 1929, provide that persons who do not take a direct part in hostilities, such as civilians and medical and religious personnel, and those who have ceased to take part in hostilities, such as wounded or sick combatants, the shipwrecked and prisoners of war, have the right to respect

22 — However, in Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, the Court set out the principle that, in view of the customary principle of good faith, which forms part of general international law, and the principle of sincere cooperation, it is incumbent upon the Court to interpret the provisions of a directive 'taking account' of a convention by which the European Union is not bound to which all Member States are party.

23 — ICJ, advisory opinion of 8 July 1996, 'Legality of the Threat or Use of Nuclear Weapons' (Reports 1996, p. 226, paragraph 79; see also paragraph 80).

24 — In particular the Conventions of 29 July 1899 and 18 October 1907.

25 — The birth of this branch of IHL is said to date from the appeal launched by Henry Dunant in his work entitled *Un souvenir de Solférino*, which bears witness to the atrocities he saw during the battle of Solferino. Its publication in 1862 was followed by the establishment of the International Committee for Relief to the Wounded, which was to become the International Committee of the Red Cross (ICRC), and by the signature of the first Geneva Convention in 1864.

26 — See ICJ, opinion cited in footnote 23, paragraph 75. The core of IHL identified by the ICJ is supplemented by other international treaties prohibiting the use of certain weapons and military tactics or protecting certain categories of people or property, such as the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict and its two protocols; the Biological Weapons Convention of 10 April 1972; the United Nations Convention of 1980 on Certain Conventional Weapons and its five protocols; the Chemical Weapons Convention of 13 January 1993; the Ottawa Convention of 1997 on Anti-Personnel Mines; and the Optional Protocol of 2000 to the Convention on the Rights of the Child on the involvement of children in armed conflict.

for their life and their physical and moral integrity, benefit from judicial safeguards and must in all circumstances be protected and treated humanely, without any adverse distinction. Each of these conventions contains a provision on 'grave breaches', setting out the breaches of the conventions in respect of which the contracting States have universal mandatory criminal jurisdiction. [27]

32. The principles established by the four Geneva Conventions of 1949, which were designed initially to be applied only in the case of international conflict, were subsequently extended to civil war situations.

a) Common Article 3 of the Geneva Conventions and the extension of their principles to non-international armed conflict

33. In 1949, on the initiative of the ICRC, the three Geneva Conventions of 1929 which were then in force were revised and a fourth convention, relating to the protection of civilians, was signed. One of the most important changes introduced at that time was the extension of the scope of the four conventions to cases of armed conflict 'not of an international character'. [28]

34. Twenty-five sessions of the Diplomatic Conference were devoted to discussing the text of Common Article 3 of the Geneva Conventions, which codifies that extension; the Diplomatic Conference ultimately reached agreement on a compromise text. Unlike the draft submitted to the 17th International Conference of the Red Cross in Stockholm, which had been the starting point for the discussions, the text finally approved merely provided for the application, in the event of internal armed conflict, of only the principles expressly set out in the wording of the article. Because it applies only to internal armed conflict and it lays down all the principles applicable to such conflicts, this provision has been described as a 'convention in miniature'. [29]

35. During the discussions on Article 3, the principal fear of the States taking part in the Diplomatic Conference was that the Geneva Conventions of 12 August 1949 might be applied to 'all forms of insurrection, rebellion, anarchy, and the break-up of States, and even plain brigandage', which would have allowed those responsible for those acts to claim the status of belligerents in order to gain legal recognition and escape the consequences of their actions. That fear was reflected in the proposals put forward during the conference that aimed to make the application of the conventions to internal conflict subject to a certain number of conditions, such as recognition, by the government of the contracting State, of the opposing party's status of belligerent, the fact that it has an organised military force and an authority responsible for its acts, that it has a civil authority exercising de facto authority over persons within a determinate territory or, further, that it has an organisation purporting to have the characteristics of a State, and finally, the fact that the government of the contracting State is obliged to have recourse to the regular military forces against the insurgents. [30]

36. None of these conditions was retained in the final text, and the wording of Common Article 3 of the Geneva Conventions confined itself to specifying that it applies '[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'. The objective of restricting the scope of the provision was pursued by limiting the application of the conventions solely to the principles expressly set out in them rather than by defining the situations in which the provision applies.

27 — Convention (I), Article 50; Convention (II), Article 51; Convention (III), Article 130; Convention (IV), Article 147; see also Protocol I, Articles 11(4), 85 and 86.

28 — For a reconstruction of the various stages that led to that extension and the discussions to which it gave rise at the 1949 Diplomatic Conference, see the commentary on Common Article 3 of the Geneva Conventions available on the ICRC website at http://www.icrc.org/applic/ihl/dih.nsf/vwTreaties1949.xsp.

29 — *Ibidem.*

30 — Idem.

37. The absence of a definition of the concept of armed conflict not of an international character in Common Article 3 of the Geneva Conventions means that it potentially applies to any type of internal armed conflict. For that reason, problems have arisen in practice when implementing the article which have often led to a refusal to apply it.

i) The definition of the concept of internal armed conflict in IHL

38. A definition of the concept of 'non-international armed conflict' was not introduced into the system of the Geneva Conventions until 1977, with Protocol II, which was concluded in order to develop and supplement Common Article 3 of the Conventions, 'without modifying its existing conditions of application'.

39. As is clear from Article 1[31] of Protocol II, its scope is more restricted than that of Common Article 3 of the Geneva Conventions. However, since the *acquis* of that provision has been expressly preserved, it continues to apply to conflicts that do not exhibit the characteristics described in Article 1 of Protocol II and that are not therefore covered by it. That is true, for example, of conflicts between a number of rival factions without the intervention of government armed forces, which, as follows from Article 1(1) of Protocol II, do not fall within the scope of that article, which applies only to conflicts between government armed forces and dissident armed forces or other organised armed groups.

40. In Protocol II, the concept of 'non-international armed conflict' is, first of all, defined in a negative manner. Thus, under the terms of Article 1 thereof, first, conflicts covered by Article 1 of Protocol I, which defines international armed conflicts, and, second, 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature' do not constitute non-international armed conflicts (see, respectively, paragraphs 1 and 2).

41. That article then sets out, in paragraph 1, a number of objective criteria to be used in identifying situations of non-international armed conflict. These criteria, of which there are three, require that the insurgents have, first, a responsible command, second, control over a part of the State's territory so as to enable them to carry out sustained and concerted military operations and, third, the capacity to implement the protocol.

42. Under the terms of both Article 1 of Protocol II and Common Article 3 of the Geneva Conventions, non-international armed conflict may exist only if two conditions are met, namely *a certain degree of intensity* of the conflict and *a certain degree of organisation* of those taking part in the hostilities.[32] To establish whether those two conditions have been met, account is normally taken of a series of indicators in the context of a full assessment conducted on a case-by-case basis.

43. Thus, as regards the condition relating to intensity, relevant factors may include the collective nature of the conflict and the means used by the government to re-establish order, in particular, the fact that it is obliged to use military force against the insurgents, instead of mere police forces.[33] The duration of the conflict, the frequency and intensity of violence, the extent of the geographical area concerned, the nature of the weapons used, the size of the forces deployed and the type of strategy used, the voluntary or forced displacement of civilian populations, control of the territory by the

31 — See point 3 of this Opinion. That article is 'the result of a delicate compromise, the product of lengthy negotiations, and the fate of the Protocol as a whole depended on it until it was finally adopted in the plenary meetings of the Conference', see Sandoz, Y. et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions*, ICRC, Geneva, 1986, available on the ICRC website at http://www.icrc.org/applic/ihl/dih.nsf/vwTreaties1949.xsp.

32 — The relevance of the objectives pursued by the belligerents was expressly excluded in the ICTY judgment in *The Prosecutor v. Fatmir Limaij*, 30 November 2005 (Case No IT-03-66-T, paragraph 170).

33 — See ICRC, *How is the Term 'Armed Conflict' Defined in International Humanitarian Law?*, opinion paper, March 2008, available on the ICRC website at http://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm.

armed groups involved, the situation of insecurity, the number of victims and the entirety of damage caused are also criteria which have been used to assess the degree of intensity of a conflict.[34] The need to take account of the special features of each situation implies that those criteria can neither be listed exhaustively nor be applied cumulatively.[35]

44. As regards the second condition, concerning the degree of organisation of the parties to the conflict, that is normally considered to have been met in the case of government armed forces. However, the application of Protocol II and that of Common Article 3 of the Geneva Conventions as regards the degree of organisation of the insurgents are subject to two different standards. The first of those instruments requires a particularly high level of organisation and introduces a condition of control of territory,[36] whereas, for the application of the second, it suffices that the parties to the conflict have a 'certain command structure'[37] and have the capacity to sustain military operations.[38]

45. In addition to the two conditions mentioned above, a third, temporal, condition appears in the definition of 'non-international armed conflict' given by the ICTY. In the judgment in *Tadic*, which the Conseil du contentieux des étrangers took as its basis in the main proceedings, the ICTY held that 'an armed conflict exists whenever there is a resort to armed force between States or *protracted armed violence* between governmental authorities and organised armed groups or between such groups within a State'.[39] The same condition appears in Article 8(2)(f) of the Statute of the International Criminal Court (ICC).[40] That provision, which is inspired by the case-law of the ICTY, states that, for the application of Article 8(2)(e)[41] of that Statute, 'armed conflicts not of an international character' means 'armed conflicts that take place in the territory of a State when there is *protracted* armed conflict between governmental authorities and organised armed groups or between such groups'.[42]

46. It should be pointed out that provision has been made for using such a criterion of duration in a fairly precise context, namely in order to define the violations of IHL that fall within the jurisdiction of the ICC and the other international criminal courts and that, even in that context, that criterion appears relevant, at least within the framework of the ICC Statute, only with a view to criminalising violations other than those of Common Article 3 of the Geneva Conventions.[43]

34 — ICTY, judgment in *The Prosecutor v. Fatmir Limaij* (in particular paragraphs 136 to 168).

35 — See Vité, S., 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situation', *International Review of the Red Cross*, Vol. 91, No 873, March 2009, pp. 69 to 94.

36 — According to Sandoz, Y. et al., op. cit., paragraph 4467, this condition requires 'some degree of stability in the control of even a modest area of land'.

37 — In its judgment in *The Prosecutor v. Fatmir Limaij*, the ICTY emphasises, in addition to the hierarchy of the Kosovo Liberation Army, the existence within it of bodies and means for communication with the public, the fact that it had rules establishing a chain of military hierarchy between the various levels of commanders and that it had established a military police responsible, in particular, for the discipline of the soldiers, its ability to recruit new soldiers and train them, the wearing of a uniform, and its role in the negotiations with representatives of the European Community and foreign missions based in Belgrade (see paragraphs 94 to 134).

38 — See ICRC, *How is the Term 'Armed Conflict' Defined in International Humanitarian Law?*, op. cit. (point II, 1, a)).

39 — Paragraph 70, emphasis added. This definition recurs constantly in the case-law of the ICTY; see, for example, the judgment in *The Prosecutor v. Fatmir Limaij* (in particular paragraph 84).

40 — Signed in Rome on 17 July 1998 and entered into force on 1 July 2002, United Nations, *United Nations Treaty Collection*, Vol. 2187, No 38544.

41 — That provision lists the serious violations of the laws and customs applicable in armed conflicts not of an international character *other* than serious violations of Common Article 3 of the Geneva Conventions referred to in Article 8(2)(c).

42 — Emphasis added.

43 — To that effect, see Vité, S., op. cit., pp. 81 to 83.

47. That being said, there is also a reference to the duration of the conflict in the opinion paper adopted by the ICRC in 2008 to present the 'prevailing legal opinion' on the definition of the concept of non-international armed conflict under humanitarian law.[44] Such conflict is defined there as 'protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State … The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation'.

48. As I have stated above, the conditions for non-international armed conflict are not fulfilled in situations of 'internal disturbances' and 'internal tensions'. These two concepts appear in Article 1(2) of Protocol II but are not defined there. Their meaning was described in the documents drawn up by the ICRC in preparation for the 1971 Diplomatic Conference.[45] 'Internal disturbances' are defined there as 'situations in which there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterised by a certain seriousness or duration and which involves acts of violence. The latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organised groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order. The high number of victims has made necessary the application of a minimum of 'humanitarian rules'. 'Internal tensions' are 'situations of serious tension (political, religious, racial, social, economic, etc.), but also the sequels of armed conflict or of internal disturbances. Such situations have one or more of the following characteristics, if not all at the same time: large-scale arrests; a large number of "political" prisoners; the probable existence of ill-treatment or inhumane conditions of detention; the suspension of fundamental judicial guarantees, either as part of the promulgation of a state of emergency or simply as a matter of fact; allegations of disappearances'.

49. The concepts of 'internal disturbances' and 'internal tensions' mark the lower threshold of the concept of non-international armed conflict for the purposes of the application of both Protocol II and Common Article 3 of the Geneva Conventions.[46] Such situations have not as yet been included within the scope of IHL.

ii) The function of the concept of non-international armed conflict in IHL

50. It follows from the above account that the concept of non-international armed conflict fulfils a number of functions in IHL and that the definition given to it in that context responds to the specific objectives of that branch of international law and of international criminal law.

51. Above all, it has the function of identifying a category of conflicts to which IHL applies. Within the function of marking out the scope of IHL, the definition of the concept of non-international armed conflict pursues the fundamental objective of ensuring that the protection of victims of such conflicts does not depend on an arbitrary decision by the authorities concerned. It therefore means establishing a certain number of objective material criteria with the principal function of as far as possible eliminating any subjective margin for discretion and reinforcing the foreseeability of IHL. In addition, the criteria of an organisational character pursue the objective of identifying situations in which it is actually possible to apply the standards of IHL, as the parties to the conflict have a minimum infrastructure that allows them to ensure compliance with those standards.

44 — The ICRC was acting under a mandate conferred on it by the States party to the Geneva Conventions of 12 August 1949 under the Statutes of the International Red Cross and Red Crescent Movement.

45 — These are documents presented by the ICRC at the first session of the Conference of Government Experts in 1971 (see Sandoz, Y. et al., op. cit.).

46 — See also Article 8(2)(d) and (f) of the Statute of the ICC.

52. Apart from marking out the scope of IHL, the concept in question also serves to determine the legal system applicable to the conflict. As I have mentioned above, that system varies not only according to the international or internal dimensional of the conflict [47] but also depending upon whether it satisfies the more restrictive definition laid down by Protocol II or the more extensive one provided by Common Article 3 of the Geneva Conventions. Outside a common core, concerning minimum conditions of intensity and organisation of the parties to the conflict, there does not appear to be any unified concept of 'non-international armed conflict' in IHL, since the criteria that define its meaning vary depending on the instrument to be applied.

53. Finally, as I have mentioned above, in certain circumstances acts committed in violation of IHL during an internal armed conflict are 'war crimes', which may be prosecuted under international criminal law. [48] The criminal responsibility that may arise from committing such acts requires that the meaning of the concepts that contribute to defining incrimination be specified in a sufficiently detailed manner. The criteria of an organisational character used in IHL to define the concept of non-international armed conflict are of particular importance in this context, where it is a matter of establishing the criminal responsibility of the persons placed at the different levels of the chain of hierarchy in the group concerned.

54. To sum up, I would point out, more generally, that the process of developing the concept of non-international armed conflict in IHL goes by stages, reflecting the current state of application and development of that branch of international law. In that context, at each stage the principal requirement is to reach agreement in order to maintain the effectiveness of the system, which, as shown by the work of the diplomatic conferences that led to the adoption of Common Article 3 of the Geneva Conventions and Protocol II, inevitably results in compromise solutions.

55. In conclusion, the definition of the concept of non-international armed conflict in IHL meets particular objectives specific to that branch of international law and, as will be shown below, unrelated to the system of subsidiary protection in EU law.

2. Objective, purposes and means of the subsidiary protection mechanism

56. The Qualifications Directive is the first stage in the process of harmonising political asylum in the European Union. That process is to lead to the establishment of a common European asylum regime as 'a constituent part of the European Union's objective of gradually creating an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the [European Union]' (recital 1 in the preamble to the Qualifications Directive). [49]

47 — In the first case, all the provisions of the four Geneva Conventions of 12 August 1949 and Protocol I apply whereas, in the second case, only Common Article 3 of those conventions and Protocol II will apply. However, the demarcation line between those two types of conflict is blurred to the point of disappearing in the recent case-law of the ICTY; see, to that effect, Sassòli, M. and Olson, L.M., 'The judgment of the ICTY Appeals Chamber on the merits in the Tadic case', *International Review of the Red Cross*, 2000, No 839, available on the ICRC website at http://www.icrc.org/eng/resources/documents/ article/other/57jqqc.htm.

48 — Neither Common Article 3 of the Geneva Conventions nor Protocol II lays down provisions aimed at criminalising infringements of those instruments. Moreover, the system for punishing grave breaches provided by the four Geneva Conventions, referred to in point 31 above, applies only to international armed conflicts. The principle of criminal responsibility for infringements of the law applicable to non-international armed conflicts was, however, set out by the ICTY in its decision in *Tadic* on the defence motion for interlocutory appeal on jurisdiction, cited in footnote 10 to this Opinion (in particular, paragraph 134). Contrary to the ICTY Statute, the Statute of the International Criminal Tribunal for Rwanda, set up by United Nations Council Resolution 955 (1994) of 8 November 1994, expressly establishes the jurisdiction of that tribunal with respect to serious violations of Common Article 3 of the Geneva Conventions and Protocol II (Article 4). The same is true, as I have mentioned above, of the Statute of the ICC (see point 45 above).

49 — Among the fundamental stages of this process of harmonising the asylum policies of the Member States of the European Union are the programmes adopted at the European Councils in Tampere on 15 and 16 October 1999, The Hague on 4 and 5 November 2004 and Stockholm on 10 and 11 December 2009, the last preceded by the European Pact on Immigration and Asylum of 24 September 2008.

57. The main objective of this first stage was, in particular, 'to ensure that Member States apply common criteria for the identification of *persons genuinely in need of international protection*',[50] reducing disparities between Member States' legislation and practice in this area.[51]

58. Paragraph 14 of the conclusions of the Tampere European Council of 15 and 16 October 1999, which the Qualifications Directive aims to implement, recommended, in particular, adopting 'measures on subsidiary forms of protection' which were intended to complement the rules on refugee status and offer an 'appropriate status' to any person who, despite not fulfilling the conditions to be considered as a refugee, none the less is in need of international protection.

59. In accordance with those conclusions, the Qualifications Directive points out that the measures adopted by way of subsidiary protection must be considered *complementary* to the protection regime enshrined in the Geneva Convention of 28 July 1951 relating to the Status of Refugees[52] and its Protocol relating to the Status of Refugees, concluded in New York on 31 January 1967.[53]

60. More specifically, in the system introduced by the Qualifications Directive, refugee status and subsidiary protection are considered to be *two distinct but closely linked components* of the concept of international protection.[54] Such an integrated approach allows interpretation of the provisions of that directive, supplemented by the regime introduced by Directive 2001/55/EC,[55] providing for temporary protection in the event of a mass influx of displaced persons (the 'Temporary Protection Directive'), as a *system of rules moving towards completion*, capable of covering any situation in which a third-country national or a stateless person who cannot obtain protection in his or her country of origin requests international protection in the territory of the European Union.

61. This is, moreover, supported by the wording of Article 78(1) TFEU, which replaced Article 63(1) EC and which is the legal basis for the new Qualifications Directive. Under paragraph 1 of that article, '[t]he Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement'.

62. Under that system of rules, the subsidiary protection mechanism aims, under the terms of Article 2(e) of the Qualifications Directive, to grant international protection to any person who does not qualify as a refugee but who, if returned to his or her country of origin, would face a real risk of a breach of his or her most fundamental rights.[56]

63. It is clear from the preparatory work for the Qualifications Directive that the concept of subsidiary protection is based principally on the *international human rights instruments* most pertinent to the subject, in particular, Article 3 of the ECHR, Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the United Nations General Assembly on 10 December 1984 and Article 7 of the International Covenant on Civil and Political

50 — See recital 6 in the preamble to the Qualifications Directive (emphasis added).

51 — See the Proposal for a Council directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection (COM(2001) 510 final, OJ 2002 C 51E, p. 325, Section 2).

52 — *United Nations Treaty Collection*, Vol. 189, p. 150, No 2545 (1954).

53 — See, in particular, recital 24 in the preamble to the Qualifications Directive.

54 — See, to that effect, recitals 1, 5, 6 and 24 in the preamble to the Qualifications Directive and Articles 1 and 2(a) and (e) thereof.

55 — Council directive of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ 2001 L 212, p. 12).

56 — See, to that effect, point 33 of the Opinion of Advocate General Poiares Maduro in *Elgafaji* .

Rights adopted by the United Nations General Assembly on 16 December 1966.[57] The choice of categories of beneficiary for this protection is, for its part, inspired not only by the ECHR and the case-law of the European Court of Human Rights as a 'legally binding framework', but also by 'subsidiary' or 'complementary' protection regimes established by the Member States.[58]

64. It is also clear from the preparatory work for the Qualifications Directive that there has always been some question of including among the categories of beneficiary of the subsidiary protection regime persons who cannot return to their country of origin because of the situation of generalised violence and insecurity that prevails there.

65. That inclusion, first, aimed to supplement the regime introduced by the Temporary Protection Directive, guaranteeing that such persons would be received even where there was no mass influx,[59] and, second, was a response to the case-law of the European Court of Human Rights, under which expulsion to a country where there was a high level of danger and insecurity and/or violence might be considered inhuman or degrading treatment within the meaning of the ECHR.[60]

3. Interim conclusions

66. The above examination leads to the conclusion that IHL and the subsidiary protection mechanism provided by the Qualifications Directive, although both founded on humanitarian considerations, have different objectives and pursue different aims.

67. Whereas IHL aims principally to reduce the impact of armed conflicts on the populations concerned, subsidiary protection is targeted at persons who have left the area where the conflict is taking place (whether because of it or for other reasons)[61] and cannot return there because of the prevailing situation of generalised violence.

68. IHL is addressed essentially to the State or States directly involved in the conflict, whereas subsidiary protection is a form of 'surrogate protection' granted by a third State not party to the conflict where there is no realistic possibility of the applicant gaining protection in his or her country of origin.

69. IHL operates on two levels, namely by regulating the conduct of the hostilities and by imposing on the belligerents compliance with a certain code of conduct vis-à-vis the victims of the conflict. It is a law of war which, as such, takes account not only of the need for protection of the victims of the conflict but also of the military character of the demands of the opposing parties. Subsidiary protection, for its part, is, above all, *protection based on the principle of non-refoulement*, the key trigger for which is the applicant's real need for international protection.

57 — See proposal for a directive COM(2001) 510 final (Section 3).

58 — *Ibidem*. See also recital 25 in the preamble to the Qualifications Directive.

59 — The text of Article 15(c) initially proposed by the Commission tended to align the definition of that category of beneficiary of subsidiary protection on that which appears in Article 2(c) of the Temporary Protection Directive and covered any person fearing 'a threat to his or her life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalised violations of their human rights'. That text was discussed at length during the process of adopting the directive and was the subject of many amendments, which finally resulted in retaining only the reference to situations characterised by 'indiscriminate violence in situations of international or internal armed conflict'.

60 — See, in particular, Eur. Court H. R., *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A. no. 215. See also the note of the Presidency of the Council of the European Union to the Strategical Committee on Immigration, Frontiers and Asylum of 25 September 2002, 12148/02, annexed to the Commission's observations.

61 — See Article 5 of the Qualifications Directive on the need for protection arising *sur place* .

70. Finally, infringements of IHL are criminalised at international level, resulting in individual criminal responsibility. Thus, IHL maintains very close links with international criminal law, with these two branches of international law exerting an influence on each other. Such a relationship is, by contrast, unknown in the subsidiary protection mechanism.

71. On account of these differences, there is no justification for hermeneutic consistency between the concepts of 'internal armed conflict' under Article 15(c) of the Qualifications Directive and 'non-international armed conflict' within the meaning of IHL. It follows that an obligation to interpret the first concept so as to ensure its consistency with the second may not be inferred from the relationship between the EU's legal order and the international legal order.

72. Nor does such an obligation follow from any reference to IHL in the Qualifications Directive.

4. Absence of reference to IHL in the Qualifications Directive

73. In accordance with the objectives it pursues, the Qualifications Directive contains several references to instruments of international law to which the Member States are party that define their obligations vis-à-vis applicants for international protection. As the Court has pointed out on a number of occasions, these references provide indications for how the provisions of that directive must be interpreted. [62]

74. In addition to the Geneva Convention of 1951 and the 1967 Protocol, which are defined in recital 3 in the preamble to the Qualifications Directive as 'the cornerstone of the international legal regime for the protection of refugees', that directive refers in general terms to the Member States' obligations under 'instruments of international law … which prohibit discrimination' (recital 11) and 'human rights instruments' (recital 25) and their obligations regarding non-refoulement (recital 36 and Article 21(1)). Recital 22 also contains a reference to the preamble and Articles 1 and 2 of the Charter of the United Nations and to the United Nations resolutions relating to measures combating terrorism.

75. By contrast, that directive contains no express reference to IHL. Neither its recitals nor any of its articles mention instruments under that branch of international law. [63]

76. Although it is true that, in the explanatory memorandum to its proposal for a directive, the Commission had referred to the Member States' obligations under IHL as underlying the 'subsidiary' or 'complementary' protection regimes adopted at national level, that reference — which was, moreover, in indirect and very general terms — was not ultimately retained. [64] A proposal from the Presidency of the Council of the European Union aiming to insert in Article 15(c) a reference to the Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War and, on the advice of the Council's Legal Service, to its annexes and protocols, was also not accepted.

77. It follows that no indication may be inferred from the Qualifications Directive in favour of aligning the concept of 'internal armed conflict' within the meaning of Article 15(c) thereof with that of 'non-international armed conflict' in IHL. By contrast, the absence of any express reference to IHL in the text of the directive and the process leading to its adoption provide some indications that argue against the interpretation of that provision in strict conformity with IHL.

62 — Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-1493, paragraphs 52, 53 and 54; Case C-31/09 *Bolbol* [2010] ECR I-5539, paragraphs 37 and 38; and *B and D*, paragraph 78.

63 — Articles 12(2)(a) and 17(1)(a) of the Qualifications Directive concerning the reasons for exclusion from refugee status and from being eligible for subsidiary protection refer, for the purpose of identifying acts considered to be crimes against peace, war crimes or crimes against humanity, to 'international instruments drawn up to make provision in respect of such crimes'.

64 — See proposal for a directive COM(2001) 510 final (Section 3).

5. Conclusion on the first part of the question referred

78. All the foregoing considerations lead me to conclude that the concept of 'internal armed conflict' within the meaning of Article 15(c) of the Qualifications Directive must be interpreted independently of the corresponding concept in IHL.

79. In *Elgafaji*, the Court has already had occasion to confirm that Article 15(c) of the Qualifications Directive is independent of Article 3 of the ECHR. In order to do so, it took as its basis the different content of those two provisions and arguments relating to their general scheme.

80. In the present case, I propose that the Court confirm that independence equally vis-à-vis IHL, in particular as regards Common Article 3 of the Geneva Conventions, taking as its basis the different fields to which the provisions of the Qualifications Directive and those of IHL apply.

B – *The second part of the question referred*

81. By the second part of its question, the referring court asks the Court, in the event that it replies to the first part of that question that the concept of 'internal armed conflict' referred to in Article 15(c) of the Qualifications Directive must be interpreted independently of IHL, what the criteria are that may be used to assess the existence of such an internal armed conflict.

82. The considerations set out above serve to identify a number of useful elements in replying to this part of the question.

83. First, the European Union's standards regarding international protection, including the provisions of the Qualifications Directive on subsidiary protection, fall within the EU system of protection of fundamental rights. They are based on the principal international human rights instruments developed at both European and international level and must be interpreted and applied taking account of the values that inspire them.

84. Second, those standards form a system that is moving towards completion, the objective of which is to create a 'common area of protection and solidarity'[65] for all those legitimately seeking international protection in the territory of the European Union. They must be interpreted and applied in a manner that guarantees the flexibility of that system.

85. Third, the aim of the subsidiary protection mechanism is to offer an appropriate status to any third-country national who, without gaining European asylum, is in need of international protection. The *applicant's need for protection* is therefore the principal criterion that must guide the competent national authorities that have received an application for subsidiary protection status or the courts of a Member State to which a decision refusing such an application has been referred.

86. In order to establish that there is a need for protection linked to the risk of suffering the harm defined in Article 15(c) of the Qualifications Directive which the person applying for subsidiary protection would face if he or she were returned to his or her country of origin, the competent national authorities and courts must, in accordance with the rules laid down in Article 4(3) of that directive, take account of all the relevant facts as they relate both to the situation in the applicant's country of origin at the time of taking a decision on the application and the applicant's personal circumstances.

65 — See point 6.2 of the Stockholm Programme mentioned in footnote 49.

87. Such an approach on a case-by-case basis, which alone permits an assessment of whether there is a real need for protection, runs counter to the determination of criteria which the situation in the applicant's country of origin must necessarily satisfy in order to be defined as 'internal armed conflict' within the meaning of Article 15(c) of the directive.

88. Accordingly, in order to provide a pertinent reply to the second part of the question referred, I shall confine myself to a few general indications of a methodological character.

89. In the context of Article 15(c) of the Qualifications Directive, the concepts of 'indiscriminate violence' and 'armed conflict' are closely linked, with the latter essentially serving to define the context of the former.

90. In addition, unlike in IHL, where the existence of internal or international armed conflict alone determines the application of the protection regime, the crucial factor in triggering the subsidiary protection mechanism under Article 15(c) of the Qualifications Directive, read in conjunction with Article 2(e) thereof, is the risk the applicant faces because of the situation of generalised violence that exists in his or her country of origin.

91. It follows that, in the context of those provisions, the examination of the intensity of the violence and the resulting risk to the applicant plays a central role, whereas the identification and description of the facts underlying that violence are of lesser importance.

92. Therefore the application of Article 15(c) of the Qualifications Directive, read in conjunction with Article 2(e) thereof, cannot be dismissed from the outset on the sole ground that the situation in the applicant's country of origin does not satisfy all the criteria used in IHL or in the Member State concerned to define the concept of internal armed conflict. Thus situations in which, for example, armed violence is used unilaterally, the belligerents do not have the degree of organisation required under IHL or do not exercise control over the territory, the government forces do not intervene in the conflict, there are no 'protracted armed confrontations' within the meaning of IHL, the conflict is in its final phase or, further, the situation falls under the concepts of 'internal disturbances' or 'internal tensions' in IHL, cannot be considered to be automatically excluded from the scope of those provisions. [66]

93. All these situations are capable of being covered by Article 15(c) of the Qualifications Directive where the degree of indiscriminate violence in the third country concerned at the time of taking a decision on the application for subsidiary protection reaches a level such that there is a real risk to the life or person of the applicant if he or she is returned to his or her country of origin. That assessment should be carried out taking account of the explanation provided by the Court in paragraph 39 of *Elgafaji*, namely that 'the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection'.

94. The interpretation proposed reflects the approach which, it appears, may be identified in *Elgafaji* where the Court, which is required to clarify the concept of 'individual threat' within the meaning of Article 15(c) of the Qualifications Directive, established an explicit, direct link between the risk that the applicant for subsidiary protection will be subject to the harm defined in that article, on the one hand, and the degree of indiscriminate violence that characterises the armed conflict taking place, on the other. [67] The same line of interpretation is followed by the competent authorities and courts of

66 — In this regard, I would point out that the Qualifications Directive itself identifies a minimum threshold for the application of Article 15(e) in recital 26 in its preamble, which provides that '[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm'.

67 — See, in particular, paragraphs 33 to 38 and the operative part of the judgment.

certain Member States (in particular the Netherlands and the United Kingdom, which altered their previous practice following the judgment in *Elgafaji*) [68] and appears to have been adopted by the Commission in the explanatory memorandum to its proposal for a recast of the Qualifications Directive. [69]

95. I shall conclude by observing that the fact, which was pointed out at the hearing, that the Qualifications Directive pursues an objective of minimum harmonisation must not lead the Court to give preference to a restrictive interpretation of its provisions, particularly where it is a matter of determining the import of the concepts used to define the scope of the subsidiary protection regime.

96. On the other hand, those concepts must be interpreted taking account of the humanitarian considerations which underlie that regime, an expression of the values of respect for human dignity and respect for human rights on which, under the terms of Article 2 TEU, the European Union is founded.

V – Conclusion

97. In the light of all the foregoing considerations, I propose that the Court reply to the question referred by the Conseil d'État as follows:

Article 15(c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, read in conjunction with Article 2(e) thereof, must be interpreted as meaning that:

— the existence of serious and individual threats to the life or person of the applicant for subsidiary protection is not subject to the condition that the situation in his or her country of origin or, in the case of a stateless person, in the country in which he or she had his or her habitual residence, may be described as internal armed conflict within the meaning of international humanitarian law and, in particular, Common Article 3 of the four Geneva Conventions of 12 August 1949, namely Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; and Convention (IV) relative to the Protection of Civilian Persons in Time of War;

— the existence of such threats must be assessed on the basis of the degree of indiscriminate violence that characterises the situation in the applicant's country of origin or, in the case of a stateless person, in the country in which he or she had his or her habitual residence, at the time of taking a decision on the application for subsidiary protection.

68 — See UNHCR, *Safe at last? Law and practice in selected EU Member States with respect to asylum-seekers fleeing indiscriminate violence*, op. cit., pp. 65 to 71.

69 — Proposal for a directive of the European Parliament and of the Council on minimum standards for the qualification and status of third-country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009) 551 final). In Section 2 of that proposal, the Commission refers to the Court's interpretation in *Elgafaji* in order to justify the absence of proposals intended to clarify the conditions under which Article 15(c) of the Qualifications Directive applies, despite the many requests received to that effect.