ZOOM IN

The Question:

Towards an Asylum Law of armed conflicts? The Diakité judgment of the Court of Justice of the European Union and its implications

Introduced by Marco Pertile

On 30 January 2014, in the *Diakité* judgment, the Court of Justice of the European Union clearly took position on an issue that lies at the intersection between Asylum Law and International Humanitarian Law. The case concerned the definition of the concept of 'internal armed conflict' for the purposes of the granting of subsidiary protection under Council Directive 2004/83/EC of 29 April 2004 (the so-called Qualification Directive).

As is well known, under this directive the recognition of refugee status for nationals of third countries and stateless persons is complemented by measures of subsidiary protection, which are conditioned on the existence of a specific situation of risk for the concerned person. More precisely, a person who does not qualify for refugee status can still be the beneficiary of subsidiary protection if 'substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm' (Article 2(e)). The concept of serious harm is then defined by Article 15 of the Qualification Directive which mentions three hypotheses: the death penalty or execution; torture and inhuman treatment; and a final circumstance described as 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.

In the case at hand, Aboubakar Diakité, a national of Ghana, had unsuccessfully sought the recognition of his status as a refugee and, alternatively, the granting of subsidiary protection by the Belgian authorities. In the proceedings at the national level, Mr Diakité claimed that

'by reason of his participation in protest movements against the ruling regime' he had endured repression and violence in his country. On a point of law, he argued, *inter alia*, that the situation in Ghana amounted to an internal armed conflict in the sense of Article 15. He also maintained that the concept of internal armed conflict in the Qualification Directive should be interpreted independently of its meaning under International Humanitarian Law.

Faced with the problem of defining the concept of armed conflict in EU Asylum Law, the Belgian *Conseil d'Etat* referred the case to the European Court of Justice. As will be clarified below, the Court did not shy away from dealing with the question and took a bold step affirming the existence of an autonomous concept of 'internal armed conflict' under EU Law. In a nutshell, according to the decision in *Diakité*, the qualification of the concept mentioned by Article 15 needs to be looked for in EU Law rather than in the international law of armed conflict, the very body of rules which finds in the regulation of armed conflicts its raison d'être and in the concept of armed conflict its threshold of applicability. The European Judges took the view that the letter of the text of the directive and its teleological interpretation militated in favour of the existence of a concept of armed conflict detached from IHL.

As so often happens with issues related to the interaction between different bodies of rules, the *Diakité* judgment has quickly given rise to an interesting debate on blogs and in legal journals. However, QIL editors are persuaded that there is room to investigate the issue further and that a number of aspects are worth outlining and discussing. What are the precise legal bases of the reasoning of the Court? Is such reasoning persuasive? What are the criteria set out by the Court to identify the existence of an armed conflict? Are they meaningful? What are the consequences of the decision of the Court in terms of protection for asylum seekers? What are the consequences of such a decision for IHL and the interaction between IHL and EU Law?

With a view to answering these questions and stimulating the continuation of a debate on the *Diakité* judgment, QIL asked Alessandro Bufalini (University of Milan-Bicocca) and Claudio Matera (Asser Institute) to take a position on (some of) these questions.

As the reader will see, our Authors have different – but not irreconcilable – views on this judgment.