

*Another parochial decision? The Common European Asylum
System at the crossroad between IHL and refugee law in Diakité*

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1. *Introduction*

The relationship between the EU legal order and the international one has been the focus of attention in recent years. Whilst triggered by the ‘insurrectionist’ attitude of the Court of Justice of the European Union (CJEU) in the *Kadi* saga,¹ the study of the relationship between EU law and the international legal order has covered a plurality of perspectives and approaches.² Without entering into such discussions here, it could be nonetheless concluded that such a relationship is based on the duty to respect international law and the principle of consistent interpretation³ and that the application of these two obligations is conditioned by sector-specific nuances and, ultimately, by the constitutional foundations of EU law.⁴

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¹ Cases T-315/01, *Kadi* and T-306/01, *Yusuf and Al Barakaat*, judgments of the European Court of First Instance of 21 September 2005, Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union, Commission of the European Communities, United Kingdom of Great Britain and Northern Ireland*, [2008] ECR I-6351, Case T-85/09, *Kadi v Commission* [2010] ECR II-05177, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council and United Kingdom v Kadi (Kadi II)*, Judgment 18 July 2013.

² See, for example, E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2012) 416 and S Blockmans and RA Wessel, *Between Autonomy and Dependence. The EU Legal Order Under the Influence of International Organizations* (Springer-T.M.C. Asser Press 2013) 304.

³ Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019 para 9.

⁴ This appears to be the significance of the 2008 *Kadi* judgement (n 1). See RA Wessel, ‘Reconsidering the relationship between international and EU Law: towards a content-based approach?’ in E Cannizzaro, P Palchetti and RA Wessel (n 2) 7-33. See also S Blockmans and RA Wessel, ‘The Influence of International organisations on the

The present contribution takes its cue from the decision of the CJEU in the *Diakité* case.⁵ In *Diakité*, the CJEU was asked to provide guidance to a national court on the interrelations between a provision of the Qualification Directive⁶ and the notion of ‘internal armed conflict’ stemming from international humanitarian law. The purpose of the request for a preliminary ruling was to assess whether Mr Diakité was entitled to benefit from subsidiary protection, a form of complementary protection that is granted under EU law to third country nationals who do not qualify as refugees.⁷

With its decision on the *Diakité* case, the CJEU seemingly delivered another judgment in which it disconnected the EU legal order from the international one, when it held that the definition of armed conflict provided in international humanitarian law is not designed to identify the situations in which international protection ex Articles 2(e) and 15 of the Qualification Directive are applicable.⁸ This contribution will assess the extent to which the decision of the CJEU can be interpreted as another example of the parochial attitude the CJEU has displayed when called upon to apply notions or rules stemming from international law for the purpose of clarifying the scope of an internal (EU) provision.

EU and its legal order: between autonomy and dependence’ in S Blockmans and RA Wessel (n 2) 297-312. For a critical analysis of the impact that the Kadi decision of 2008 had see G de Búrca, ‘The European Court of Justice and the International Legal Order after *Kadi*’ (2010) 51 Harvard Intl L J 1. For an analysis of the relationship between the EU legal order and the international one in relation to the development of the Common European Asylum System see V Moreno-Lax, ‘Of Autonomy, Autarky, Purposiveness and fragmentation: The relationship between EU Asylum law and International Humanitarian Law’ in D J Cantor and J-F Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill 2014) 295-344.

⁵ Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides*, Judgment 30 January 2014.

⁶ Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L304/12 30 September 2004. That Directive has now been repealed by 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, OJ 20 December 2011 L337/9. In this contribution references to the Qualification Directive regard the 2004 Directive.

⁷ Art 2 (f) of the Qualification Directive (n 6).

⁸ *Diakité* (n 5) para 23.



This contribution will offer a short overview of the positions that IHL and international refugee law have within the EU legal system (section 2), before turning to the analysis of the *Diakité* affair in which the CJEU found itself at the crossroad between IHL and international refugee law for the purpose of applying the Qualification Directive (section 3). Section 4 will then look into the institutional and substantive consequences of the CJEU decision in *Diakité* and with some conclusions being drawn in section 5.

2. *IHL and the Geneva Convention on the status of Refugees in the EU legal order*

The Geneva Convention of 1951 relating to the status of refugees holds a special position within the EU legal system. By adopting a technique similar to that used in the Maastricht Treaty in relation to the European Convention on Human Rights, Article 78 TFEU is a provision of EU primary law authorising the influence of an external source. More precisely, Article 78 TFEU affirms that for the purpose of developing a common policy on asylum, subsidiary protection and temporary protection to third country nationals the European Union is bound to abide by the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.⁹ This provision makes clear that any legislative instrument or international agreement concluded by the EU must be in accordance with the Geneva Convention and the latter thus emerges as a benchmark of legality, or a normative parameter, that can be invoked to challenge the legitimacy of EU secondary norms under Articles 263 and 267 (b) TFEU. Secondly, the Geneva Convention of 1951 is used as the source of a substantive individual right under Article 18 of the EU Charter of

⁹ Art 78 (1) TFEU: The 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*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

Fundamental Rights (EUCFR).¹⁰ Indeed, Article 18 EUCFR introduces the right to asylum within the EU legal order; however, this innovation must be read in conjunction with, and limited by, the scope of Article 78 TFEU and the existing legislative *acquis* in the field, with the result that the right contained in Article 18 cannot be interpreted as an absolute right independent from secondary legislative acts.¹¹ Yet, it must also be emphasised that Article 18 EUCFR goes beyond the equation between ‘the right to asylum’ and the status of refugee under the Geneva Convention of 1951 since it affirms that the said right ‘shall be guaranteed with due respect for’ the Geneva Convention. This means that the right to asylum ex Article 18 includes a plurality of protection mechanisms (national or international) in which the status of refugee is but one example.¹²

In addition to Article 78 TFEU and Article 18 EUCFR, secondary instruments also systematically refer to the Geneva Convention of 1951 either as a normative source or as a source of interpretation. This is reflected, for example, in the preamble of the Qualification Directive of 2004 and in its recast of 2011¹³ and, more specifically, in a number of provisions of the 2004 and 2011 Directives.¹⁴ As a consequence, the special status of the Geneva Convention of 1951 is also reflected in the case law of the CJEU,¹⁵ but the Court often refers to the Convention in rather general terms and does not renounce the autonomous develop-

¹⁰ Art 18 EUCFR: The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.

¹¹ See M den Heijer, ‘Article 18’ in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights* (Hart Publishing 2014) 519-541.

¹² *ibid* 533.

¹³ Paragraphs (2) and (3) of the two instruments are identical and affirm: (2) The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951 (Geneva Convention), as supplemented by the New York Protocol of 31 January 1967 (Protocol), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution. (3) The Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees.

¹⁴ See, for example, art 12 (1) (a) and art 20 (6) of the 2004 Directive.

¹⁵ See, for example, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Aydin Salabadin Abdulla and Others v Germany* [2010] ECR I-01493 para 53.

ment of the interpretation of the EU asylum instruments, thus preserving its 'hermeneutic monopoly'.¹⁶ At the same time, it must be borne in mind that the CJEU operates in a fragmented system since the Geneva Convention 'contains no centralized judicial or other enforcement mechanisms, with the exception of the potential interpretative role of the International Court of Justice (ICJ) and the supervisory role of the United Nations High Commissioner for Refugees (UNCHR)'.¹⁷ Therefore, the combination of the express references to the Geneva Convention of 1951 in the Treaties and in secondary provisions on the one hand, and the lack of a centralised system of enforcement and interpretation of the Geneva Convention on the other, characterize the special relationship that the Geneva Convention of 1951 has within the EU legal system and make the CJEU, at least potentially, a catalyst for uniform interpretation of asylum law in Europe. Yet, the recent decision of the CJEU in *Qurbani* casts some doubt on the implications arising from the express references to the Geneva Convention of 1951 in the Treaties, since the Court argued, albeit in a slightly tautological manner,¹⁸ that the combined reading of Article 78 TFEU and 18 EUCFR does not unequivocally confer on the CJEU the jurisdiction to interpret any provision of the 1951 convention.¹⁹

Inversely, the position of IHL within the EU legal order is not expressly qualified or defined by the Treaties or the EUCFR; yet, the Eu-

¹⁶ GF Mancini, 'The free movement of workers in the case law of the European Court of Justice' in D Curtin, TF O'Higgins, D O'Keefe (eds), *Constitutional Adjudication in European Community and national law* (Butterworths 1992) 67.

¹⁷ G de Baere, 'The Court of Justice of the EU as a European and International Asylum Court', Working Paper 118/2013, Leuven Centre for Global Governance Studies <https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp111-120/wp118-de-baere.pdf>. See also E Tsourdi, 'What Role for the Court of Justice of the EU in the Development of a European Asylum Policy? The Case of Loss and Denial of International Protection' in (2013) *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 212-228.

¹⁸ Case C-481/13 *Mohammad Ferooz Qurbani*, Judgment 17 July 2014, paras 24-25.

¹⁹ *ibid.* The decision, however, could be interpreted in the sense that the exclusion of jurisdiction only exists inasmuch as a given provision of the Geneva Convention of 1951 is not expressly mentioned in the relevant piece of EU secondary legislation (para 28); it remains to be seen the extent to which this decision will be consolidated in the future. For an analysis of the *Qurbani* decision see, Y Holiday, 'Penalising Refugees: when should the CJEU have jurisdiction to interpret Article 31 of the Refugee Convention?', EU Law Analysis, <<http://eulawanalysis.blogspot.co.uk/2014/07/penalising-refugees-when-should-cjeu.html>>.

ropean Union as a polity first and *qua* legal system second, is increasingly intertwined with the rules stemming from the *corpus iuris* of the Geneva system.²⁰ Indeed, the EU proactively contributes to the promotion of international humanitarian law (IHL) in a number of ways. First, the EU endorses and promotes the application of IHL with its partners at bilateral level²¹ as well as unilaterally²² and engages with a number of international actors and institutions in this regard.²³ Moreover, IHL influences the development and the implementation of the Union's Common Security and Defence Policy (CSDP). Even though, as observed by Naert, CSDP operations are unlikely to occur in situations that constitute an armed conflict and, as a consequence, IHL rules are unlikely to apply to EU forces, IHL rules may nonetheless be relevant for the parties involved in a crisis in which a CSDP mission operates.²⁴ The proactive role that the EU has carved for itself in the promotion of IHL, however, is not detached from any provision of primary law and, as

²⁰ See A Garrido-Muñoz, 'La Constitutionnalisation du ius in bello dans le droit de l'Union Européenne: vers l'"humanitarisation" progressive de l'action extérieure?' *Revue Suisse de Droit International et Européen* (forthcoming); A-S Millet-Devalle (ed), *L'Union Européenne et le droit international humanitaire* (Pedone 2010) 302.

²¹ See for instance IHL-related clauses in a number of recent agreements. For Association Agreements see art 12 of the EU-Georgia Association Agreement: '(...) 2. The Parties agree that the fight against terrorism must be conducted with full respect for the rule of law and in full conformity with international law including international human rights law, international refugee law and international humanitarian law, the principles of the Charter of the United Nations, and all relevant international counter-terrorism related instruments' OJ 30 August 2014 L261/4 and, in relation to Partnership And Cooperation Agreements, see art 86 (2) (c) of the EU – Iraq Agreement whereby the Parties agree to cooperate on the promotion of human rights and IHL.

²² See, for example, the 2009 Updated European Union Guidelines on promoting compliance with international humanitarian law, OJ 15 December 2009 C 303/12, the 2012 EU Strategic Framework on Human Rights and Democracy of 25 June 2012. (<www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf>) and the statements of the spokespersons of the High Representative of the European Union for Foreign Affairs and Security Policy and Vice President of the Commission and of the EU Commissioner for International Cooperation, Humanitarian Aid and Crisis Response on the on the killing of civilians in the Central African Republic of the 28 April 2014. <http://europa.eu/rapid/press-release_MEMO-14-324_en.htm>.

²³ See the volume edited by Millet-Devalle (n 20) for a detailed analysis of the different ways in which the EU interacts with international organisations, NGOs and institutions on IHL issues.

²⁴ F Naert, 'The Application of International Humanitarian Law and Human Rights Law in CSDP Operations' in E Cannizzaro, P Palchetti and RA Wessel (n 2) 198.

Garrido-Muñoz suggests, IHL is being constitutionalised within the EU legal order.²⁵ Indeed, there are a number of primary law provisions that can be interpreted not only to legitimise the initiatives of the EU in the field of IHL, but also to argue in favour of the existence of a constitutional obligation of the EU to respect IHL rules.²⁶ The constitutional tie between IHL and the EU legal order can be inferred from Articles 3(5) and 21 TEU, which require that the EU must ‘respect the principles of the United Nations Charter and international law’. Far from being a rhetorical exercise, the provisions mentioned above have a normative function and impose, so far as possible, the consistent interpretation of EU secondary norms to international law including, naturally, rules of customary law.²⁷ The constitutional significance of this interpretation of Articles 3 (5) and 21 TEU resides in the fact that, as noted by AG Mengozzi in his Opinion in the *Diakité* case, the application of the principle of consistent interpretation does not depend on the express provision of an act of the institution in that sense, but stems from the constitutional position that the Treaties attribute to international law in the hierarchy of the sources within the EU legal order.²⁸ As a consequence, because the ICJ has recognised the *corpus iuris* of the four conventions as ‘intransgressible principles of international customary law’²⁹, the EU is bound to respect those instruments independently from the fact that the EU is not party to the Geneva Conventions of 1949. As a result of this, it is clear that the EU, as well as national authorities applying EU norms have an obligation, under EU law to respect IHL and interpret, so far as possible, EU legislation in conformity with the four Geneva Conventions of 1949.

Lastly, the constitutional relevance of IHL also emerges in relation to the protection of the right to life under Article 2 EUCFR, Article 2 ECHR and Article 6 of the International Covenant on Civil and Political Rights (ICCPR). Again, without entering into the thorny issue con-

²⁵ Garrido-Muñoz (n 20).

²⁶ *ibid.*

²⁷ See *Poulsen and Diva Navigation* (n 3).

²⁸ See Opinion of Ag Mengozzi in *Diakité* (n 5), delivered on 18 July 2013, para 23.

²⁹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 para 79.

cerning the relationship between IHL and human rights,³⁰ suffice it to say that from an EU perspective, the right to life and other non-derogable fundamental rights, as recognised to be applicable also during an armed conflict by international or regional courts, will inevitably impact the EU, either under its activities under the Common Security and Defence Policy (CSDP) or by virtue of the obligation to respect international law and the ECHR.³¹ Moreover, and as argued by Naert, specific obligations pertaining to the protection of human rights during an armed conflict may derive, autonomously, through EU human rights law and with the consequence that these rules would also affect Member States when they execute CSDP operations.³²

The constitutional relevance that IHL and the Geneva Convention of 1951 have in the EU legal order as sketched out above reveals a legal system open to the influence of international sources and respectful of international obligations. However, taking into consideration the fact that IHL and the Geneva Convention of 1951 have an equal standing within the hierarchy of norms of the EU, the question concerning the relationship and the effects of these two international sources within the EU legal order remains open. In other words, the ways in which these two sources affect EU legislation and its application remains to be assessed, especially in relation to the application of the Common European Asylum System. The next section will analyse the *Diakité* case in which the CJEU was seemingly asked to rule, *inter alia*, on the relationship between IHL and the application of the Qualification Directive, a central instrument of the Common European Asylum System (CEAS).

³⁰ See, among others, N Ronzitti, *Diritto internazionale dei conflitti armati* (Giappicchelli 2011) 159-163.

³¹ In relation to the right to life see the ICJ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (n 29) para 25.

³² Naert (n 24) 208-209.



3. *On the relevance of IHL for the interpretation and application of the Qualification Directive in the Diakité case*

The EU's Qualification Directive establishes (minimum)³³ standards for the qualification and status of third country nationals as refugees or as persons who otherwise need international protection and establishes two mechanisms of protection. While the first is firmly anchored to the Geneva Convention of 1951, the second is specific to EU law and constitutes a subsidiary means of protection established for third country nationals that do not qualify as a refugee, but in respect of whom there are substantial grounds for believing that such persons would face a real risk of suffering serious harm if returned to their country of origin.³⁴ Mr Diakité, a Guinean national who took part in the protest movements against the ruling regime in his country, applied for asylum in Belgium at the beginning of 2008.³⁵ As his applications were rejected by Belgian authorities, Mr Diakité filed a last appeal for cassation before the Belgian *Conseil d'Etat*, in so far as the appealed decisions '*relied on the definition of "armed conflict" used by the International Criminal Tribunal for the Former Yugoslavia [ICTY]*' to assess his request for protection under national and EU law.³⁶

Article 15 (c) of the Qualification Directive provides a specific notion of 'serious harm' for the purposes of subsidiary protection under Article 2 (e) of the Qualification Directive.³⁷ In order to qualify for subsidiary protection a third country national needs to demonstrate substantial grounds for believing he or she would face a real risk of suffering *serious harm* if returned to his or her country of origin³⁸ and, more specifically, that he or she would face a serious harm consisting of: (a) the death penalty or execution, (b) torture or inhuman or degrading treatment or punishment, or (c) serious and individual threat to a civil-

³³ The 2004 Directive was expressly titled as establishing minimum standards for the qualification of refugees and persons entitled to international protection, the 2011 recast of the Directive has repealed such qualitative threshold.

³⁴ Art 2 (e) of the Qualification Directive of 2004, now art 2 (f) in the 2011 recast (n 6).

³⁵ *Diakité* (n 5) para 9.

³⁶ *ibid* para 14.

³⁷ Art 2 (e) of the 2004 Qualification Directive (n 6).

³⁸ *ibid*.

ian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.³⁹

In order to ascertain whether Mr Diakité could be granted subsidiary protection, the Belgian referring court asked the CJEU how subparagraph (c) of Article 15 of the Qualification Directive was to be interpreted. As paragraph 16 of the judgment reveals, the Belgian Conseil d'Etat expressly asked the CJEU to ascertain whether 'Article 15(c) of [Directive 2004/83] [must] be interpreted as meaning that that provision offers protection only in a situation of "internal armed conflict", as interpreted by international humanitarian law, and, in particular, by reference to Common Article 3 of the four Geneva Conventions'⁴⁰ or whether the notion of 'internal armed conflict' ex Article 15 (c) of the Qualification Directive had to be interpreted independently from the IHL definition.

The notion of armed conflict has a pivotal role in IHL insofar as, as Bauloz recently argued, not only do 'armed conflicts form the contextual background of this branch of international law, but more fundamentally armed conflicts trigger its application'.⁴¹ In the seminal decision on the *Tadić* case,⁴² the International Criminal Tribunal for the Former Yugoslavia (ICTY) ruled that 'an armed conflict exists whenever there is resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state'.⁴³ Consequently, to speak of an armed conflict not of an international character it is necessary that the conflict reaches a certain intensity and that the armed groups involved display a minimum of organisation.⁴⁴ Article 1 (2) of the Additional Protocol II of 1977 to the Geneva Conventions specifies further that 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature' cannot be considered as armed conflicts (not of an international nature). In the case of Mr Di-

³⁹ Art 15 of the Qualification Directive (n 6).

⁴⁰ *Diakité* (n 5) para 16.

⁴¹ C Bauloz, 'The Definition of Armed Conflict in Asylum Law' (2014) 12 *J Intl Criminal J* 836.

⁴² *Prosecutor v Tadić* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-A (Appeals Chamber, 2 October 1995) para 70.

⁴³ *ibid.*

⁴⁴ *ibid.* The ICTY speaks of 'protracted and large-scale violence'.

akité it was precisely the latter threshold that was key for the assessment of his claim for subsidiary protection. Indeed, because the turmoil characterising the last years of the presidency of Lansana Conté and the violence emerging after the coup d'Etat of Captian Moussa Dadis Camara in December of 2008 never reached the threshold required by the notion of armed conflict emerging from the *Tadic* decision, the context upon which Mr Diakité was applying for protection resembled a case of internal disturbances.

With its decision of the 30 January 2014 the CJEU held that the IHL definition of armed conflict was not designed to identify situations in which subsidiary protection ex Article 15 (c) of the Qualification Directive has to be granted and thus disconnected the application of the Qualification Directive from the notion of 'armed conflict not of an international character' used in IHL. The Court of Justice based its reasoning on two main points. Firstly the CJEU considered that the EU legislature used in Article 15 (c) the phrase 'international or internal armed conflict' as opposed to the existing distinction made by IHL between 'international armed conflict and armed conflict not of an international character'. On the basis of this distinction the CJEU concluded that the 'EU legislature wished to grant subsidiary protection not only to persons affected by "international armed conflicts" and by "armed conflict not of an international character", as defined in international humanitarian law, but also to persons affected by internal armed conflict, provided that such conflict involves indiscriminate violence'.⁴⁵ However, this semantic rationale is not very convincing. Indeed, national courts of EU Member States and scholars have used other expressions of Article 15 (c) to argue the opposite, i.e. the relevance of IHL for the interpretation and application of Article 15 (c) by virtue of the fact that the EU provision mirrors some of the IHL terminology.⁴⁶ Moreover, the semantic distinction established by the CJEU appears even less convincing if one takes into consideration that in the *Tadic* decision, the ICTY uses the expression 'international or internal armed conflict' and not the formula 'armed conflict not of an international character' codified in the Geneva system.⁴⁷

⁴⁵ *Diakité* (n 5) para 21.

⁴⁶ See Bauloz (n 41) 841.

⁴⁷ In the second indent of paragraph 70 of the *Tadic* decision the Tribunal affirms:

With its second point the CJEU developed a more convincing argument. The CJEU argued, similarly to Advocate General Mengozzi, that Article 15 (c) of the Qualification Directive should not be interpreted on the basis of IHL because the two notions ‘pursue different aims and establish quite distinct protection mechanisms’.⁴⁸ Two aspects of this argumentation can be further analysed, as emerges from the following paragraph:

‘While international humanitarian law is designed, *inter alia*, to provide protection for civilian populations in a conflict zone by restricting the effects of war on persons and property, it does not – by contrast with Article 2(e) of Directive 2004/83, read in conjunction with Article 15(c) of that directive – provide for international protection to be granted to certain civilians who are outside both the conflict zone and the territory of the conflicting parties. As a consequence, 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.’⁴⁹

In this paragraph the CJEU appears to develop and strengthen its distinction based on the different objectives of the IHL definition of ‘armed conflict not of an international character’ and the definition of ‘internal armed conflict’ under Article 15 (c) of the Qualification Directive. First, the CJEU operates its distinction *ratione materiae*: affirming that the disconnection between the notion applicable in IHL and the one applicable for the purpose of Article 15 (c) resides in the fact that the IHL definition governs the conduct of belligerents during an armed conflict with a view, *inter alia*, to protecting civilians and restricting the effects of war. The second distinction introduced by the CJEU is, on the other hand, *ratione territorii*: the CJEU affirms that whilst IHL regulates the conduct of national authorities and belligerent groups that are present in the territory where the armed conflict takes place with a view, *inter alia*, to protecting civilians residing within the conflict areas and other territories controlled by the parties to the con-

‘These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts’.

⁴⁸ *Diakité* (n 5) para 24.

⁴⁹ *ibid* para 23.

flict, the Qualification Directive seeks to provide assistance and protection to those individuals who are *outside* ‘both the conflict zone and the territory of the conflicting parties’.

On the basis of the aforementioned arguments the CJEU finally concluded that it was not possible, without disregarding the different objectives of IHL and the Qualification Directive, to ‘make eligibility for subsidiary protection conditional upon a finding that the conditions for applying international humanitarian law have been met’⁵⁰ and put forward the definition of internal armed conflict for the purpose of applying Article 15 (c) of the Qualification Directive, affirming that “‘internal armed conflict’ is a situation in which a State’s armed forces confront one or more armed groups or in which two or more armed groups confront each other’.”⁵¹ The next section will analyse the extent to which the disconnection established by the CJEU served the purpose of enhancing the scope of application of Article 15 (c) of the Qualification Directive and will also assess the extent to which this decision could be interpreted as another claim of autonomy by the CJEU.

4. *More than a parochial attitude: extending protection beyond the international legal framework*

The judgment of the CJEU in *Diakité* innovatively widens the scope of the application of Article 15 (c) of the Qualification Directive in two ways. In relation to the first aspect, the CJEU has signalled to all national authorities called upon to apply the Qualification Directive, that the reference to internal armed conflicts contained therein must be disconnected from the notion applicable according to IHL and provided an autonomous definition of internal armed conflict to be applied for the purpose of granting subsidiary protection to third country nationals. In the previous section it was argued that the semantic rationale used by the CJEU to depart from the notion of internal armed conflict was not convincing and, conversely, the arguments of the CJEU appeared more convincing when it anchored its reasoning to the different purposes of the two regimes in question.

⁵⁰ *ibid* para 26.

⁵¹ *ibid* para 28.

Looking into the definition provided by the CJEU, it could be argued that it borders on the obvious, since it does not provide parameters concerning the intensity or the duration of a given confrontation in order to qualify it as an internal conflict.⁵² Yet, as Carlier has recently observed, it is precisely in this simplicity that the importance of the decision resides.⁵³ Indeed, with its definition, the CJEU has stripped down the notion of internal armed conflict to its minimum, so as to exclude the necessity of having to assess the intensity of such confrontations, the level of organisation of the armed forces involved and whether the conflict has lasted for a specific length of time.⁵⁴ Conversely, the CJEU affirms that for the purpose of applying Article 15 (c) of the Qualification Directive the central element is constituted by another threshold contained therein: the notion of 'indiscriminate violence'. In this regard, and building upon its previous decision in the *Elgafaji* case,⁵⁵ the CJEU held that the protection mechanism of Article 15 (c) is triggered whenever the degree of indiscriminate violence of an internal armed conflict 'reaches such a high level that substantial grounds are shown for believing that a civilian, if returned to the relevant country or, as the case may be, to the relevant region, would – solely on account of his presence in the territory of that country or region – face a real risk of being subject to that threat'.⁵⁶ However, it remains to be seen how the CJEU and national courts will interpret, from a substantive perspective, the seemingly oxymoronic relationship between 'serious and individual threat' on the one side and a situation of 'indiscriminate violence' on the other. To date, the CJEU has shied away from clarifying this crucial aspect for the application of the subsidiary protection mechanism, with the result that

⁵² The CJEU defined an internal armed conflict as 'a situation in which a State's armed forces confront one or more armed groups or in which two or more armed groups confront each other' para 28.

⁵³ J-Y Carlier, 'Guerre et paix pour les demandeurs d'asile. A propos de l'arrêt Diakité de la Cour de Justice' (2014) *Journal des Tribunaux* 237-239. The author argues that: 'Si la définition paraît simple et évidente, c'est bien par son ombre qu'elle importe. Il faut y lire en creux les critères que la Cour n'impose pas pour qu'il y ait conflit armé interne, critères qu'elle exclut même expressément dans la suite de l'arrêt et dans son dispositif' (at 238).

⁵⁴ *Diakité* (n 5) paras 32 and 34.

⁵⁵ Case C-465/07 *M. Elgafaji, N. Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-00921.

⁵⁶ *Diakité* (n 5) para 30.

national authorities called to apply Article 15 (c) of the Qualification Directive have no guidance from the CJEU.

Paragraph 31 of the *Diakité* judgment, considers the relationship between individual threat and indiscriminate violence in the following manner: ‘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’.⁵⁷ The variable dynamic described by the CJEU, however, remains undefined since the CJEU does not provide the criteria to determine the level of indiscriminate violence nor the level to which a person seeking protection must be impacted in order to be recognised as a person in need of subsidiary protection.⁵⁸ As a result of this decision, the application of Article 15 (c) remains an equation with variables on both sides, for which the CJEU does not provide the concrete criteria to solve the jigsaw. And even though it could be inferred that when Article 15 (c) mentions a ‘civilian’s *life or person*’, it intends to refer to fundamental rights, such as those protected by the EUCFR, the types of rights covered by this provision and the level of threat to their enjoyment remain questions to be defined. It is on the other hand evident that the solution to these crucial issues cannot be left to the dispersed application of national jurisdictions without posing problems of consistency and legitimacy within the CEAS.⁵⁹

With the intention of maximising the scope of subsidiary protection, the disconnection established by the CJEU between Article 15 (c) of the Qualification Directive and IHL has been welcomed by scholars

⁵⁷ *ibid* para 31.

⁵⁸ For a critical analysis of these substantive aspects see V Moreno-Lax (n 4) and J -F Durieux, ‘Of War, Flows and Flaws: A reply to Hugo Storey’ (2012) 31 Refugee Survey Q 161–176.

⁵⁹ For an analysis of the different approaches emerged within two EU Member States see H Lambert and T Farrel, ‘The Changing Character of Armed Conflict and the Implications For Refugee Protection Jurisprudence’ (2010) 22 Intl J Refugee L 237. Already the 2007 UNHCR report showed that art 15 (c) of the Qualification Directive was being interpreted and applied divergently within the EU, also in relation to applicants coming from the same region. See UN High Commissioner for Refugees (UNHCR), *Asylum in the European Union. A Study of the Implementation of the Qualification Directive* (November 2007) 76 available at <www.refworld.org/docid/473050632.html>.

concerned with EU asylum law.⁶⁰ In this respect the *Diakité* decision contributes to the achievement of a higher level of approximation of the rules on the recognition and content of international protection on the one side,⁶¹ and harmonises a key notion for the purpose of applying Article 15 (c) amongst the Member States of the European Union on the other. Yet, one might wonder whether these two results could also have been achieved without operating such a disconnection. Whilst there is no doubt that the different purposes of IHL and the Qualification Directive were analysed and convincingly used as an argument to operate the said disconnection,⁶² the CJEU could have alternatively acknowledged the existing IHL rules and decisions of international tribunals on the definition of internal armed conflict as an ‘indicative framework’ from which the specific rules on the application of the Qualification Directive could be derived. However, by doing so the CJEU would have entered troubled waters and could have jeopardised the uniform application of the Qualification Directive internally, since with this solution, national authorities would have been empowered to condition the application of EU law on the basis of their interpretation of the different IHL rules; therefore, this solution would likely have blurred the relationship between IHL rules and the Qualification Directive in the long run. Finally, another possibility would have been to consider, for the purpose of defining when and where an internal armed conflict occurs, and at least as a reference, the determinations ex Article 39 of the UN Charter made by the UN Security Council. Since the latter case covers also and *inter alia*, internal armed conflicts the CJEU could have used this bridge to uphold its commitments towards the international community and the UN ex Articles 3(5) and 21 TEU. However, and again, using this path would also have posed greater challenges to the CJEU. Indeed, because of the level of discretion retained by the Security Council on the matter, choosing such a path would have been to the detriment of the effective and uniform application of EU law on the one hand, and the effective protection of individuals on the other. Possibly, then, by operating the disconnect between the Qualification Directive

⁶⁰ See C Bauloz (n 41), J-Y Carlier (n 53) and J Larik, ‘Protection from internal armed conflict in EU law: the *Diakité* case’ in European Law Blog, 12 February 2014 <<http://europeanlawblog.eu/?p=2191>>.

⁶¹ See recital (10) of the 2011 recast of the Qualification Directive (n 6).

⁶² Especially in the detailed Opinion of AG Mengozzi (n 28), paras 17-80.

and IHL the CJEU has opted for the simplest and most effective way to attain the objectives of the EU whilst avoiding any substantive future tension between the EU legal order and the international one in relation to the definition of ‘internal armed conflict’. In this sense, the decision of the CJEU to disconnect the Qualification Directive from IHL is to be welcomed for having preserved the proper functions of the two branches of law in question from undue influences rather than as a manifestation of the autonomy of the EU legal order against external influences.

5. *Conclusion: the ambiguous results of disconnecting the Qualification Directive from IHL*

This contribution took its cue from the growing scholarly attention given to the relationship between the EU legal order and the international one and sought to analyse the extent to which the *Diakité* decision could be interpreted as another parochial decision of the CJEU to the detriment of the principle of respect of international law as established by the EU Treaties. While it was argued that the EU legal order is open, in principle, to the influence of the Geneva Convention of 1951 and IHL, it was also argued that the *Diakité* case was less connected to these two external sources than what could be inferred *prima facie*. As a result of this, the disconnection established by the CJEU was convincingly anchored to the specific objective of helping national authorities in the application of Article 15 (c) of the Qualification Directive, and the Court chose to set aside the question on the relationship between IHL and subsidiary protection, in order to maximise the scope of protection offered by the Directive. Moreover, the decision of the CJEU should bring to an end the existing discrepancies on the application of Article 15 (c) of the Qualification Directive by the national authorities of the EU Member States.⁶³

However, it also emerged that the decision of the CJEU in *Diakité* and the disconnection established between IHL and EU asylum law leaves a number of questions unanswered. Firstly, in relation to the disconnection itself, the CJEU has not clarified what the autonomous notion of internal armed conflict entails for the purpose of applying Arti-

⁶³ See (n 59).

cle 15(c) of the Qualification Directive. Secondly, the CJEU also missed an opportunity to clarify the relationship between the notion of indiscriminate violence and the level to which a person seeking subsidiary protection within the EU, must prove that they are affected by it. Taking these two factors into account, one could argue that the CJEU actually lifted the only substantive, and relatively clear, point of reference that national authorities had to apply Article 15 (c) of the Qualification Directive, i.e. the notion of internal armed conflict as developed within the context of IHL. Indeed, whilst the disconnection offered the CJEU the opportunity to develop a holistic and EU-centred approach for the interpretation and application of Article 15 (c) of the Qualification Directive, the CJEU has actually failed to seize this opportunity. Instead, interpreters and practitioners of EU asylum law are left without any clear indication on the substantive conditions upon which Article 15 (c) can be applied.

In conclusion, the outcome of the *Diakité* decision raises mixed feelings. Far from being a parochial decision regarding the relationship between the EU legal order and the international one, *Diakité* emerges as an incautious one. Taking into consideration the existing gaps within the Common European Asylum System on the one hand, and the constitutional relevance that IHL, the Geneva Convention of 1951 and regional instruments on human rights protection have on the EU legal system on the other, European Union asylum law will undoubtedly need to integrate external norms to enhance its legitimacy in the future; from this point of view, *Diakité* stands out as a missed opportunity.