

**An autonomous notion of non-international
armed conflict in EU Asylum Law:
Is there any role for International Humanitarian Law?**

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1. *Introduction*

Under the law of the European Union, establishing the scope and extent of the concept of non-international armed conflict is essential in determining the limits and the extension of the subsidiary protection granted to those people fleeing their country, who are not protected by the Geneva Convention on the status of refugees. In the application of the EU Qualification Directive of 29 April 2004¹ which sets out the standards for granting that protection for asylum seekers, domestic jurisdictions have often fluctuated between a notion of internal armed conflict which reflects the definition existing in international humanitarian law and a wider interpretation which would allow a more extensive application of the European Directive. Negative consequences in terms of equal treatment of persons eligible for subsidiary protection are self-evident. To face these incoherencies, the Recast Qualification Directive of 13 December 2011 underlines as a main objective of European legislation that of ‘ensur[ing] that Member States apply common criteria for

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¹ Directive 2004/83/EC of the Council 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.



the identification of persons genuinely in need of international protection'.²

Departing from the concept existing under international humanitarian law, the Court of Justice of the European Union (CJEU) has recently spelt out an autonomous notion of internal armed conflict.³ The purpose of the present contribution is to show in which measure the case law of the CJUE and that of international criminal tribunals adopt a differing definition of non-international armed conflict. After examining these different interpretations of the notion of "conflict not of an international character", attention will be given to the potential fragilities and drawbacks in terms of legal certainty in adopting a definition that diverges from the concept that has already acquired a precise meaning in international humanitarian law. From a more general perspective, notwithstanding the fundamental goal of granting wider protection for asylum seekers in light of the object and purpose of the Qualification Directive, the legal reasoning underlying the adoption of an autonomous concept raises some concerns and possible criticisms as regards the relationship between international and EU law.

2. *The definition of non-international armed conflict in international humanitarian law*

In determining the notion of armed conflict not of an international character, the thorniest issue has traditionally been related to the assessment of the threshold of violence required. As is well-known, the distinction focuses on whether the situation of violence is merely one of internal strife or civil disturbance or rather whether it should be classified as a non-international armed conflict, leading to the application of international humanitarian law.

² 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 L337/9 20 December 2011.

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

Common Article 3 to all four 1949 Geneva Conventions does not contain a precise notion of armed conflict not of an international character. Like many other concepts, the specific meaning has been elaborated upon by the judicial activity of international criminal tribunals.

According to the International Tribunal for the Former Yugoslavia in its seminal *Tadic* decision of 2 October 1995, a non-international armed conflict is ‘a situation of protracted armed violence between governmental authorities and organized armed groups or between such groups within a state’. In other words, the armed conflict has to exceed a certain threshold of intensity and an organised armed group has to be engaged.⁴ These are the criteria to determine whether an internal armed conflict is taking place and, as a consequence, whether Common Article 3 to all four 1949 Geneva Conventions applies.

The elements of the notion have since then been refined through further judicial decisions. In particular, a great number of factors have been identified to meet the two criteria. Among many others, the duration of the confrontation, the type of weapons and the number of casualties are relevant elements in assessing the intensity of the armed conflict. Other elements concerning the organisational requirement include a command structure, the control of certain territories or the capacity to plan and coordinate military operations.⁵

As noted by the Pre-Trial Chamber I of the International Criminal Court in the *Lubanga* case, the threshold for the application of Common Article 3 which emerged from the ICTY jurisprudence, partly echoes the notion set forth in Additional Protocol II to the Geneva Convention of 8 June 1977 as regards the two fundamental criteria, the intensity of the conflict and the organization of the parties. However, in the definition fleshed out by the ICTY, ‘the ability to carry out sustained and concerted military operations is no longer linked to territorial control’.⁶ Nor, ac-

⁴ In fact, as regards the Former Yugoslavia, ‘[T]here has been *protracted, large-scale* violence between the armed forces of different States and between governmental forces and *organized* insurgent groups’ (italics added), *Prosecutor v Tadic* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-A (Appeals Chamber, 2 October 1995) para 70.

⁵ *Prosecutor v Ramush Haradinaj, Idriz Blaj & Lahi Brahimaj* (Judgment) IT-04-84-T (Trial Chamber I, 3 April 2008) paras 49 and 60.

⁶ *Prosecutor v Lubanga Dyilo* (Decision on the Confirmation of Charges) ICC-01/04-01/06 (29 January 2007) paras 229–237.

cording to the Pre-Trial Chamber, is territorial control part of the definition contained in the Rome Statute.⁷ In addition, from the Pre-Trial Chamber's perspective, this statutory provision does not include the requirement that the organised armed groups are 'under responsible command', as set out in Article 1(1) of Additional Protocol II.⁸

Indeed, the definition set forth in Additional Protocol II was already narrower than the one provided for in Common Article 3 to the Geneva Conventions of 1949. The difference was based not only on the territorial control requirement and the command structure of the organised armed group, but also, and in particular, on the scope of the notion contained in the Geneva Conventions which – as reflected in Article 8(2)(f) of the Rome Statute – can be applied to conflicts between non-State armed groups and not necessarily imply the involvement of State armed forces. Apart from some criticisms on the ambiguous drafting of the Rome Statute, the prevailing doctrine recognizes that the notions of non-international armed conflict in the Rome Statute and the one emerging from the case law of the international criminal tribunals specifying the scope of application of Common Article 3 are 'substantially the same'.⁹

⁷ *ibid*: 'the lack of a necessary link with the control of a certain territory in relation to the requirement of an organizational structure of the parties is also confirmed in the interpretation of art 8(2)(f) of the Rome Statute which broadly defines the notion of conflicts not of an international character'.

⁸ *Prosecutor v Lubanga Dyilo* (Judgment Pursuant to Article 74) ICC-01/04-01/06-2842 (Trial Chamber I, 14 March 2012) para 536. The material field of application of the Additional Protocol II relates to a conflict 'which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized 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' (art 1, para 1). Para 2 – reflected in art 8 (d) ICC Statute – specifies that '[T]his 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'.

⁹ D Fleck, *The Handbook of International Humanitarian Law* (OUP 2013) 589; C Kress, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' (2001) 30 *Israel YB Human Rights* 175; for a detailed analysis of this approach see A Cullen, 'The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8 (2)(f)' (2008) 12 *J Conflict Security* L 419 and D Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in E Wilmshurst, *International Law and the Classification of Conflicts* (OUP 2012).

As regards the definition of non-international armed conflict in international humanitarian law, it is therefore possible to assert that the notion contained in Common Article 3, as significantly clarified and specified by the case law of international criminal tribunals, undoubtedly includes prolonged armed confrontations between governmental authorities and organised armed group or between such groups.¹⁰ The notion instead has a different and narrower meaning according to Additional Protocol II, limiting its scope of application.

3. *The notion of internal armed conflict in EU Asylum Law and its application by Domestic Courts*

The European Union grants asylum-seekers more extensive protection than the one provided for in the 1951 Refugee Convention. Whereas the latter is notoriously focused on the discriminatory character of the persecution suffered by the people fleeing their country, the wider protection offered by the European Union directives is grounded on more general and inclusive humanitarian principles and the idea of *de facto* refugees.¹¹ In particular, the Qualification Directive of 29 April 2004 introduced a form of complementary and subsidiary protection for people who face a real risk of suffering serious harm, irrespective of the discriminatory character of the threat (Article 2(e)).

The definition of serious harm relevant for our purposes is contained in Article 15 (c). According to this provision, serious harm could arise from a ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’.

The first decision related to the interpretation of the scope of the subsidiary protection granted under Article 15(c) resulted from the *El-gafaji* case. In this ruling, the ECJ clarified and importantly interpreted crucial terms of Article 15(c) such as those of ‘individual threat’ and

¹⁰ In this sense, International Committee of the Red Cross, ‘How is the Term “Armed Conflict” Defined in International Humanitarian Law’, Opinion Paper, March 2008, available at <www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

¹¹ H Lambert, ‘The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence’ (2013) 25 Intl J Refugee L 208.

‘indiscriminate violence’. Even though the Court did not directly deal with the notion of internal armed conflict, it paid crucial attention to ‘the degree of indiscriminate violence characterizing the armed conflict’ in order to test ‘the existence of a serious and individual threat’ for the civilian returning to his country.¹² From this perspective, the relevance of the intensity of violence seems to prevail over other elements which could determine the existence of an armed conflict.

In the same case, the ECJ insisted on the nature of Article 15(c) as an ‘autonomous concept’.¹³ It might be a consequence of this conceptual autonomy that the Court did not make any reference to the notion of armed conflict in international humanitarian law or to other possibly relevant concepts stemming from international criminal law. For instance, as regards the applicable definition of armed conflict, no relevance was given to the parties involved in the conflict, nor to the elements identified by the ICTY in order to test the degree of intensity of the armed confrontations.

Among EU Member States, various domestic jurisdictions have been confronted with the application of the Qualification Directive and as a consequence with the relevant interpretation of the notion of internal armed conflict.

In 2009, the United Kingdom Asylum and Immigration Tribunal offered further confirmation of the importance given to the intensity of the violence rather than to the peculiar nature and origins of the armed conflict or the structure and organisation of the parties involved. In denying the humanitarian protection granted under the Qualification Directive in relation to the situation in Afghanistan, the Tribunal held that ‘the real focus of attention is on the intensity of the indiscriminate violence, rather than on the nature of the conflict giving rise to the situation in which such violence exists’.¹⁴

¹² Case C-465/07 *M. Elgafaji, N. Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-00921 para 43. For an accurate analysis of the case and further considerations on national jurisprudence see R Errera, ‘The CJEU and Subsidiary Protection: Reflections on Elgafaji – and After’ (2011) 23 *Intl J Refugee L* 93 and H Lambert, T Farrell, ‘The Changing Character of Armed Conflict and the Implication for Refugee Protection Jurisprudence’ (2010) 22 *Intl J Refugee L* 237.

¹³ *Elgafaji* (n 12) para 28.

¹⁴ *GS (Article 8 – public interest not a fixity) Serbia and Montenegro* [2005] UKAIT 121 para 56, available at <https://moj-tribunals-documents-prod.s3.amazonaws.com/decision/pdf_file/38081/2005_ukait_00121_gs_serbiaandmontenegro.pdf>.

More clearly, this approach was followed by the Court of Appeal of the United Kingdom¹⁵ and then elaborated upon by the Asylum and Immigration Chamber, which stated that ‘armed conflict and indiscriminate violence are not terms of art governed by IHL, but are terms to be generously applied according to the objects and purpose of the Directive to extend protection as a matter of obligation in cases where it had been extended to those seeking to avoid war conflict zones as a matter of humanitarian practice’.¹⁶ In this case, the pivotal elements to determine the outline of the notion of internal armed conflict are the purpose and the objective that the Directive is meant to fulfil.

In a subsequent proceeding, the Federal Administrative Court of Germany had a similar but more nuanced approach. In fact, it deemed it incorrect to determine ‘the characteristic of an armed conflict entirely in isolation from the previous understanding of this concept in international humanitarian law’.¹⁷ However, even though these characteristics can ‘be of significance as an indicator of the intensity and constancy of the conflict’, they are not decisive in assessing the existence of an internal armed conflict under the Qualification Directive.¹⁸ For instance, the parties do not need to have ‘such a high level of organisation as is necessary to satisfy the requirements under the Geneva Conventions of 1949 and for the intervention of the International Red Cross’, nor ‘must [they] exercise effective control over a portion of the state’s territory’.¹⁹

Conversely, other national tribunals consider the notion of internal armed conflict under the Qualification Directive as reflecting the characteristics of the existing definition in international humanitarian law. As regards the situation in Darfur, for example, the former French *Commission des recours des réfugiés* (now succeeded by the *Cour nationale du droit d’asile*) has recognised the application of the Qualification Directive on the grounds that the conflict matched the ‘critères de conflit armé interne énoncés à l’article 3 de la convention de Genève du 12

¹⁵ *QD (Iraq) v Secretary of State for Home Department* [2009] EWCA Civ 620.

¹⁶ Upper Chamber (Immigration and Asylum Chamber), *HM et al (Article 15(c) Iraq* GC 2010 UKUT 331(IAC) para 89.

¹⁷ *Z.G. v The Federal Republic of Germany*, Federal Administrative Court, Judgment of the Tenth Division of 27 April 2010 – BVerwG 10 C 4.09 para 24, see translation in ‘Case Law, Z.G. v The Federal Republic of Germany’ (2011) 23 Intl J Refugee L 113.

¹⁸ *ibid* para 23.

¹⁹ *ibid*.

août 1949’.²⁰ Also the Dutch Supreme Court in Asylum Law, denying the existence of an internal armed conflict in Kosovo in November 2006, ruled that ‘on the basis of Common Article 3 of the 1949 Geneva Conventions and Article 1 of the Second Protocol, it must be concluded that there is an internal armed conflict as meant in Article 15(c) if an organised armed group under responsible commanding order is capable of executing, on the territory of a country or a part thereof, military operations against the armed forces of the authorities of that country’.²¹

In the same vein, the Swedish Migration Court of Appeal adopted a similar restrictive definition of internal armed conflict requiring, in addition to a certain level of intensity of the violence against the civilian population, the involvement of an organized group which, as envisaged by the Additional Protocol II, must also have territorial control.²²

This brief overview of a few domestic interpretations of the meaning of internal armed conflict reveals the lack of clarity in the definition contained in the Qualification Directive and the need to ascertain whether the notion has to be intended as reflecting the concept emerging from the case law of the international criminal tribunals (or an even a narrower one stemming from Additional Protocol II) or rather a different and possibly wider definition.

On 30 January 2014, the Court of Justice of the European Union answered this question. In the *Diakité* case, in fact, the Court had specifically been asked to clarify the exact meaning of the expression ‘internal armed conflict’. The Court, following its previous line of reasoning grounded on the autonomy of the concept of armed conflict, held it unnecessary that the conflict ‘be categorised as “armed conflict not of an international character” under international humanitarian law’.²³ Ac-

²⁰ CRR, Case 538807, *Azine Ahmed* (22 November 2005) 54, summary available at <www.refworld.org/docid/4dad9c022.html>.

²¹ Dutch Council of State, Case 200608939 *ABRvS* (20 July 2007) 1 Administratieve-frechtelijke Beslissingen 271, reported in the Study on the ‘Conformity Checking of the Transposition by Member States of 10 EC Directives in the sector of asylum and immigration’ done for DG JLS of the European Commission (contract JLS/B4/2006/03).

²² Swedish Migration Court of Appeal, 22 February 2011, UM 10061-09, available and referred to at <www.asylumlawdatabase.eu/en/case-law/sweden-migration-court-appeal-22-february-2011-um-10061-09#content>.

²³ *Diakité* (n 3) para 26. The reference to the use of an autonomous notion has been explicitly affirmed in Advocate General’s Opinion, delivered on the 18 July 2013, para 81.

cording to the ruling of the Court, quite basic conditions have to be ascertained in order to state the existence of an armed conflict under the Qualification Directive, that is ‘if a State’s armed forces confront one or more armed groups or if two or more armed groups confront each other’.²⁴ In addition, as has already emerged, important attention has to be paid to the intensity of the generalized violence existing in the country, more so than to the level of gravity of the armed conflict. From the Court’s perspective, in fact, it is not essential ‘to carry out, in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organization of the armed forces involved or the duration of the conflict’.²⁵ In other words, the Court’s idea of the existence of an internal armed conflict solely focuses on the level of generalized and indiscriminate violence to which the individual would be exposed. Any assessment concerning the nature or the intensity of the armed conflict, the parties involved or their organizational structure is irrelevant. Comparing the ‘European’ definition of internal armed conflict with the notion stemming from international humanitarian law, differences might thus be summarized into three main elements. The threshold identified to assess the existence of an internal armed conflict is lower inasmuch as it does not require an organised group, an assessment of the intensity of the armed violence and, strictly related to this second parameter, a particular duration of the conflict. The first element is probably the most relevant since it allows the inclusion of cases of protest movements in the notion. As regards the second criterion, it is not easy to concretely distinguish the intensity of the armed violence from the more general level of violence existing in the country due to confrontations among armed groups. In this regard, recourse to the indicators already spelt out in the case law of the international criminal tribunals might be necessary. Admittedly, and in contrast to the Court’s perspective, the third element is not considered a constitutive element of the existence of a non-international armed conflict in international humanitarian law, even though it could be a relevant criterion when assessing the intensity of the conflict. On the contrary, it has to be observed that the temporal factor could be decisive in light of the aims of

²⁴ *Diakité* (n 3) para 28.

²⁵ *Diakité* (n 3) para 35.

the subsidiary protection which can be granted only on condition that the individual is threatened by the risk of serious harm.

Although the final result of this approach aimed at expanding the notion of internal armed conflict and, consequently, the protective scope of the European legislation is appreciable, not all the arguments supporting the line of reasoning of the Court are convincing. In particular, it is difficult to share the insistence of the Court on the particular wording of the Qualification Directive which would induce the interpreting body to consider the reference to the notion of internal armed conflict as neatly separate from the international humanitarian law concept of armed conflict not of an international character. For the sake of clarity, let us consider the relevant part of the judgment. According to the Court, ‘the EU legislature has used the phrase “international or internal armed conflict”, as opposed to the concepts on which international humanitarian law is based (international humanitarian law distinguishes between “international armed conflict” and “armed conflict not of an international character”)’. Considering the different wording of Article 15(c) as a departure from the notion of armed conflict not of an international character appears to be a specious and unfounded argument, particularly bearing in mind that international criminal tribunals have frequently employed the expression ‘internal armed conflict’ as equivalent to that of conflict not of an international character normally used in drafting the relevant treaties.²⁶ Moreover, since the common understanding of a conflict not of an international character is basically an internal conflict, and since this meaning has always been intended, it is sufficient to visit the website of the International Committee of the Red Cross to see how these terms can be used interchangeably.²⁷ The drafting of Article 15(c) should have been clearer in underlining the reasons for the linguistic choice, if the real aim of such a different wording was to depart from the commonly intended meaning of internal armed conflict, i.e. conflict not of an international character. The ‘textual’ argument seems thus to be unpersuasive, whereas a particular element emerging from the *travaux préparatoires* could have been empha-

²⁶ For example, in *Tadić* (n 4) para 30 or in *Prosecutor v Furundzija* (Decision on the Defendant’s Motion to Dismiss Counts 13 and 14 of the Indictment, Lack of Subject Matter Jurisdiction) IT-95-17/1 (29 May 1998) paras 5-6.

²⁷ For example at <www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm>.

sized more. The Court, in fact, could instead have insisted on the deletion of an explicit *renvoi* to the 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in time of War contained in a previous draft of Article 15(c).²⁸

Despite the weaknesses of the first argument offered by the Court, the final result of the decision appears to be convincingly supported by the second rationale which basically focuses on the distinct functions of the two areas of international law.²⁹ From this perspective, international humanitarian law and the subsidiary protection mechanism provided for under Directive 2004/83 ‘pursue different aims and establish quite distinct protection mechanisms’.³⁰ According to the Court, therefore, in determining the extent of the notion of internal armed conflict it is crucial to take into account ‘the context in which it occurs and the purposes of the rules of which it is part’.³¹

It should be noted that this ‘sectorial’ approach as to the meaning of terms used in different contexts is not new. The International Court of Justice had a similar approach in determining the required degree of intensity of the State’s control over a non-official organ. In fact, the Court held that the test to be satisfied could vary according to the particular legal framework in which the notion has to be applied – the determination of the international or non-international character of a conflict or the attribution of State responsibility – as they ‘are very different in nature’.³² The conclusion of the Court was aimed at justifying its refusal to depart from its settled jurisprudence on the application of the ‘effective control’ standard.

²⁸ In this sense also C Bauloz, ‘The Definition of Internal Armed Conflict in Asylum Law’ (2014) 12 J Intl Criminal J 841.

²⁹ A similar approach had already been hoped for by some scholars, see C Bauloz, ‘The (Mis)use of International Humanitarian Law Under Article 15(c) of the EU Qualification Directive’ in D J Cantor and J -F Durieux (eds.), *Refuge From Inhumanity? War Refugees and International Humanitarian Law* (Martinus Nijhoff 2014) 265. However, according to this author, ‘it cannot but be regretted that the CJEU did not take the opportunity of this preliminary ruling to discard the utility of IHL-based interpretation of any of the terms of Article 15(c)’, at 269.

³⁰ *Diakité* (n 3) para 24.

³¹ *ibid* para 27.

³² *Case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 405.



As affirmed in the 2011 Recast Qualification Directive, the objective of the subsidiary protection is to ‘achieve a higher level of approximation of the rules on the recognition and content of international protection on the basis of higher standards’.³³ In light of the general purpose of the normative framework in which Article 15(c) has to be applied, it is reasonable to adapt the notion of internal armed conflict to the exigencies of protection ‘on the basis of higher standards’ that the Directive aims to comply with.

4. *The Relationship between International and EU Law: Finding the Proper Balance between Autonomous Notions and Consistent Interpretation*

While the application of a wider definition of internal armed conflict appears to be reasonable in light of the specific function it has to cope with, the fact that this notion is deemed to be unrelated to the concept stemming from international humanitarian law demands some reflections on the intricate relationship between international law and EU law.

Traditionally, the use of autonomous notions at the European Union level aims to create a common interpretation of a given concept among the diverging notions deriving from national laws of member States. At the same time, and in more general terms, the autonomy of EU law intends to grant it prevalence over these possibly conflicting rules of domestic law.³⁴ In other words, in this ‘internal’ perspective – i.e. in the relationship between EU law and the law of its member states – the rationale of autonomy would be harmonisation of EU law and its primacy over national laws.

In its ‘external’ dimension, i.e. in the relationship with international law, however, this autonomy does not pursue the same goals. It is difficult to maintain that a departure from international law could guarantee greater harmonisation in the domestic law of EU Member States; nor could the autonomy of EU law vis-à-vis international law be appraised

³³ Recital 10 of the 2011 EU Recast Directive (n 3).

³⁴ B De Witte, ‘European Union Law: How Autonomous Is Its Legal Order’ (2010) 65 *Zeitschrift für Öffentliches Recht* 142.

in terms of hierarchical relations.³⁵ However, as already stated in light of the jurisprudence of the International Court of Justice, the use of autonomous notions can be justified by the different normative contexts in which these concepts are intended to be applied. At the same time, it is worth observing that an independent and autonomous interpretation of a notion is not always unavoidable or automatically legitimised by the specificity of the normative aims at issue. On the contrary, there could be valid reasons to construe EU law in conformity with public international law.

It is undeniable that the reference to a notion which has already acquired a specific and determined meaning in international law could lead to a greater degree of certainty of law, granting it uniform and coherent application. In this perspective, harmonisation among national systems could result from the consistent interpretation of EU law in light of international law. After all, the principle of consistent interpretation represents the most important method for granting coherence and removing divergences among different legal systems and, as it is well-known, the CJEU has widely resorted to it in relation to national law.³⁶

In its case law, the Court has already explicitly referred to customary international law as a relevant tool in construing European legislation. For example, in *Poulsen and Diva Corporation*, it was stated that a regulation adopted in the context of the conservation of fishery resources ‘must be interpreted, and its scope limited, in the light of the relevant rules of the law of the sea’ and, more interestingly, the jurisprudence of the International Court of Justice was taken into account in order to determine the content and the scope of the applicable law.³⁷

³⁵ It is certainly true that claiming the autonomy of the EU legal order has been recently aimed at maintaining EU law as the legal framework of reference in order to assess the validity of EU acts (cf. Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat v Council* [2008] ECR I-6351. However, the general independent and self-governing character of a normative system is not strictly related to the possibility of independently and autonomously interpreting the meaning of a legal notion.

³⁶ See, for instance, Joined Cases C-397/01 *Pfeiffer and Others v Deutsches Rotes Kreuz, Kresiverband Waldshut eV* [2004] ECR I-8835 and F Casolari, ‘Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation’ in E Cannizzaro, P Palchetti and R A Wessel (eds) *International Law as Law of the European Union* (Martinus Nijhoff 2012) 395.

³⁷ Case C-286-90, *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.* (1992) ECR I-601924 November 1992, para 10. O Elias, ‘General International Law in the European Court of Justice: From Hypothesis to Reality?’ (2000) 31

An interpretation of EU law in light of international law could have some advantages even in cases – such as the one in question, related to the notion of armed conflict – where reference to international law is not particularly required because of the similarity of the normative context. Construing the meaning of a concept in light of international law has, in fact, been done independently of the overlapping nature of the normative context or of the legal aims of the rules implied.³⁸ In order to establish the meaning of the term ‘damage’ referred to in the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, for instance, the European Court of Justice invoked Article 31(2) of the Articles on Responsibility of States for Internationally Wrongful Acts as ‘expressing the ordinary meaning to be given to the concept of damage in international law’ which ‘is common to all the international law sub-systems’.³⁹ In a different case, the notion of ‘international organization’ has been deemed relevant in order to ascertain whether EU competition law was applicable to certain entities.⁴⁰

From a different perspective, the Court of Justice of the European Union may influence the content of international law through its interpretive activity. In particular, European jurisprudence could confirm the existence of a certain rule of customary international law or clarify the meaning of its constitutive elements. It is in fact generally admitted that the duty to respect international law goes together with the EU role in determining and contributing to its development as reflected in the terms expressly employed in Article 3 (5) of the Treaty on European Union.⁴¹ In the *Racke* case, for example, the Court applied the *rebus sic*

Netherlands YB Intl L 11-13. See also, more generally, A Gianelli, ‘Customary International Law in the European Union’ in E Cannizzaro, P Palchetti and R A Wessel (n 36) 93.

³⁸ According to Advocate General Mengozzi, the duty to interpret EU law in accordance with customary international law would cease when not required by a hermeneutical exigency (n 23) para 27.

³⁹ Case C-63/09 *A Walz v Clickair SA* [2010] ECR I-4239 paras 27-28.

⁴⁰ Case C-113/07 *P Selex Sistemi Integrati v Commission* [2009] ECR I-2207 para 110.

⁴¹ Art 3 (5) TUE: ‘In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the *strict observance and the development of international law*, including respect for the principles

stantibus rule both upholding its existence as a norm of customary international law and importantly clarifying its scope of application.⁴²

Coming back to the notion of internal armed conflict, it is unquestionable that international humanitarian law remains the legal framework of reference when the existence of an armed conflict or the content of many other notions related to the law of armed conflict have to be assessed. More generally, it is a field of law where judicial developments have already led to an appreciable degree of specification and determination of complex concepts on which European law could also possibly rely.⁴³

It is thus possible to argue that the same attempt at harmonizing domestic jurisprudence and establishing common criteria in the application of the European directives⁴⁴ – and, as a main consequence, granting wider protection to asylum seekers – could have been reached through a more ‘dialogical’ and open attitude towards international humanitarian law. This attitude should have been aimed at finding a proper balance between the use of an autonomous notion of armed conflict and the consistent interpretation of EU law in light of international law. International law, in fact, may provide interpretive directions and useful instruments to the application of EU law. Furthermore, applying the notion of armed conflict in the different normative framework of refugee law does not automatically put aside the opportunity to construe its meaning in relation to international law.

of the United Nations Charter’ (italics added). See also, for example, *Poulsen* (n 32) para 9 and Case T-115/94 *Opel Austria GmbH v Council* [1997] ECR II-39 para 90.

⁴² Case C162/96, *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECR I-3655. For a commentary and some criticisms of the Court’s analysis of the *rebus sic stantibus* doctrine see J Klabbers, ‘Case C162/96, A. Racke GmbH & Co. v. Hauptzollamt Mainz, judgment of 16 June 1998’ (1999) 36 CMLR 179.

⁴³ As regards the relevance of customary international humanitarian law in construing the notion of persecution see V Holzer, ‘Persecution and the Nexus to a Refugee Convention Ground in Non-International Armed Conflict: Insight from Customary International Humanitarian Law’, in D J Cantor and J -F Durieux (n 29) 101 and E Fripp, ‘International Humanitarian Law and the Interpretation of “Persecution” in Article 1A(2) CSR51’ (2014) 26 Intl J Refugee L 382.

⁴⁴ A notion of armed conflict completely disconnected from international humanitarian law would not favour harmonisation among Member States, nor would it prevent asylum shopping, see H Storey, ‘Armed Conflict in Asylum Law: The “War-Flaw”’ (2012) 31 Refugee Survey Q 27-30.



At the end of the day, justifying the application of a different notion of armed conflict could have hinged on various aspects that could maintain the European concept of internal armed conflict that was not completely disconnected from international law. In other words, the line of reasoning could have been partly different and aimed at establishing a form of integrated relationship with the law of armed conflict. Firstly, given that international humanitarian law does not have a unitary notion of non-international armed conflict and sets forth different thresholds for assessing the existence of an armed conflict, it is not untenable that EU asylum-law might also be primarily built on lower and looser criteria. Secondly, as the Court has stated, the reason for lowering this threshold is explicable in light of the specific purposes that the European directive pursues compared to international humanitarian law. Finally, the 'European' notion of internal armed conflict could have been framed in the broad realm of international humanitarian law. In fact, in its essential meaning, i.e. violent confrontation between armed groups, this basic definition of internal armed conflict is certainly encompassed in the notion detected in the *Tadic* decision.

Maintaining the notion in the broader context of international humanitarian law has the advantage of allowing future references and possibly finding common indicators to concretely define the vague contours of the concept. In order to assess the intensity of generalised violence, for example, the elements detected by the ICTY jurisprudence as regards the required threshold of armed conflict could be of some relevance. From this perspective, indicative factors might be, among others, 'the number and intensity of individual confrontations, the type of weapons used, the extent of material destruction or the number of civilians fleeing combat zones'.⁴⁵ For its part, perceiving the two normative systems as completely separate, the CJEU renounces the gradual refinement of the changing constitutive elements and defining factors of such a fundamental notion of international law.

⁴⁵ All these elements have been spelt out in *Haradinaj* (n 5) para 49.