PART 2

Interpretive Guidance from IHL: Cross-Cutting Issues

CHAPTER 2

The 'War Flaw' and Why it Matters

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This chapter will deal with what, in prior writings,[2] this author has called the 'war-flaw' – i.e., 'the failure of international protection to analyse claims by persons fleeing armed conflict by reference to the correct international law framework'.[3] Following adoption of the 1951 Convention relating to the Status of Refugees (Refugee Convention),[4] the rise of the international human rights regime offered a sound structural framework to interpret concepts such as persecution, national and international protection, and the grounds (race, nationality, religion, membership of a particular social group or political opinion) which, when acting as the reason for persecution, would lead to refugee status. However, this framework has turned out to be, both in practice and in theory, unable to offer an equally sound response to the needs of individuals fleeing armed conflict and other forms of widespread armed violence.

The main issues can be grouped into three categories. First, the reference to international human rights norms and reasoning when analysing the impact of armed conflict entails its own difficulties, as the expectation and reality of 'normal circumstances' and national protection vary significantly in times of war. Therefore, when considering the elements of the refugee definition, applying only international human rights standards to such exceptional situations leads to lacunae. Secondly, although it is clear that not *every* individual who flees armed conflict should be granted asylum, there is no consensus about whether only select cases should be granted, or conversely every claimant should in principle receive protection *unless* there are special circumstances militating against it – in other words, should one adopt an 'exceptionality' or a 'normalcy' approach? It is also not clear whether the individual requesting protection should demonstrate that she is at greater risk than the general population (the 'differential risk' approach), or whether being targeted for attack

1 The views expressed herein do not necessarily reflect those of either the United Kingdom Upper Tribunal or the International Association of Refugee Law Judges.

2 H. Storey, 'Armed Conflict in Asylum Law: The "War-Flaw"' (2012) 31 RSQ 1. See also H. Storey and R. Wallace, 'War and Peace in Refugee Law Jurisprudence' (2001) 95 AJIL 349.

3 Storey (n 2) 1.

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

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in the context of conflict suffices to establish the required threshold of well-founded fear of persecution (the 'non-comparative' approach). Applying one approach or the other leads to different conclusions in like cases, for example where warring factions carry out ethnic cleansing on a large scale, or where combatants regularly conduct indiscriminate attacks against the civilian population.

Lastly, these conflicting standards, and the many variations on them used by national jurisdictions across the globe, have created a rift in the approach to so-called 'war refugees'. Some regions have opted to expand the refugee definition to include these situations as stand-alone motives for receiving refugee protection (the approach of both the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa[5] and the 1984 Cartagena Declaration on Refugees[6]), while others have chosen to establish subsidiary forms of international protection (such as the European Union under the Qualification Directive),[7] and others still offer no formal status to those fleeing war. These differences are not merely cosmetic: interpreting and applying human rights instruments in national and regional settings without common criteria inevitably entails varying standards of protection, and the outcome is fragmentation of international law.

This author has argued, therefore, that whenever armed conflict is at issue the correct starting point within the overall framework of international law is international humanitarian law (IHL), as this area of the law is capable of responding to the three main shortcomings of traditional approaches. Indeed, this perspective fills the above mentioned gaps by deferring to *ius in bello* as the *lex specialis* that addresses situations for which international human rights law has no clear answer, while relying on the latter when the opposite is true. It also provides a clear framework to solve issues that are common to different approaches to risk and exceptionality. Last but not least, it allows decision-makers across jurisdictions to rely on a common and well-developed area of

5 Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974).

6 Cartagena Declaration on Refugees (adopted 2 November 1984). Text of the Declaration can be found in – *La Protección internacional de los refugiados en América Central, México y Panamá: Problemas jurídicos y humanitarios – Memorias del Coloquio en Cartagena de Indias 1983* (UNHCR/Centro Regional de Estudios del Tercer Mundo/UNAC 1984) 332–339.

7 European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJEU 20.12.2011 L337/9-23.

law rather than depend on a patchwork of individual regulations, thus strengthening international law as an interrelated and internally coherent system. Interpretative advocacy cautioning against the use of IHL in the adjudication of asylum claims remains, nonetheless, strong – and it is not entirely without foundation.

Given that the author's prior writings have been the subject of some academic comment,[8] this chapter introduces a set of twelve basic propositions, designed to summarise this author's position and to respond briefly to some of the recent comments and developments. These propositions cover four distinct issue-areas, namely: the international law context of refugee law; difficulties refugee law has with armed conflict cases; attempts to solve these using international human rights law (IHRL); and attempts to solve these using international humanitarian law (IHL). After dealing with the twelve basic propositions in the next section, the chapter will venture some further reflections to address criticisms and other recent developments.

1 The Twelve basic 'War-Flaw' Propositions

1.1 *The International Law Context of Refugee Law*

Before trying to tackle the problems posed for refugee law by armed conflict cases, it is important to recall two basic principles of refugee law and one basic postulate of international law.

Proposition 1: Refugee decision-making should be based on objective criteria. As far as possible, the norms decision-makers apply when deciding whether persons qualify for international protection should not be based on the subjective values of the decision-maker.

Proposition 2: The Refugee Convention and related international/regional instruments must be interpreted in the light of general rules or norms of international law. This is not just because interpretation of treaties like the Refugee Convention is governed by the 1969 Vienna Convention on the Law of Treaties. It is also because the alternative approach of basing decision-making on national or regional norms is a recipe for eclectic, variable, state-specific jurisprudence. When tasked with interpreting an international treaty decision-makers must strive to achieve a universal definition of key terms.

8 J.F. Durieux, 'Of War, Flows, Laws and Flaws: A Reply to Hugo Storey' (2012) 31 RSQ 161; S.S. Juss, 'Problematizing the Protection of "War Refugees": A Rejoinder to Hugo Storey and Jean-François Durieux' (2013) 32 RSQ 122. See also chapters in this volume by Bauloz, Holzer, Lambert, Jaquemet and Fripp.

Proposition 3: Relevant international law norms governing armed conflict are not only to be found in IHRL, but also in IHL and international criminal law (ICL). According to the International Court of Justice, in situations of armed conflict, IHL is the *lex specialis*.[9]

2.2 *Difficulties Refugee Law has with Armed Conflict Cases*

Proposition 4: The office of the United Nations High Commissioner for Refugees (UNHCR) has struggled to provide clear guidance on armed conflict cases ever since apparently adopting an 'exceptionality' approach in its 1979 UNHCR Handbook.[10]

Proposition 5: Following apparent adoption early on by leading authors (including Hathaway)[11] of a similar 'exceptionality approach', the academic and research community has struggled to develop a clear analytical approach to armed conflict cases.

Proposition 6: Very much in line with UNHCR and academic opinion of the time, judiciaries around the world began with an 'exceptionality' approach. Although in a second wave of judicial decisions leading court decisions have rejected key aspects of such an approach,[12] they have struggled to reconcile competing considerations, adopting neither an 'exceptionality' approach nor a 'normalcy' approach.

2.3 *Attempts to Solve Difficulties by Using International Human Rights Law*

Proposition 7: The gradual ascendancy of a human rights approach to interpretation of key terms of the Refugee Convention (persecution, protection etc) has meant that decision-makers seek more often to analyse the problems posed by armed conflict cases by applying IHRL norms.

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9 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 36; *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) [2005] ICJ Rep 116, 168.

10 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR 1979, reprinted December 2011) para 164 begins: 'Persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol', although it goes on to accept that there are 'special cases'.

11 J. Hathaway, *The Law of Refugee Status* (Butterworths 1991) 186–187.

12 Most notably in *Minister for Immigration and Multicultural Affairs v Abdi* [1999] 87 FCR 280.

Proposition 8: Such an approach has not really resolved the main difficulties, not least because of the limited tools IHRL contains (e.g. in applying the 'right to life' to situations of armed conflict).

Proposition 9: Curiously, whilst refugee decision-makers continue to apply a pure human rights paradigm to armed conflict cases, IHRL has been taking steps to recognise the complementarity of IHL and IHRL, although it cannot be said that this has as yet been acted upon with any consistency by international human rights courts.[13] Despite regarding the European Convention of Human Rights (ECHR) as part of a broader corpus of international law, the European Court of Human Rights (ECtHR) has virtually never used IHL to analyse issues involving armed conflict.

2.4 *Attempts to Solve Difficulties by Using International Humanitarian Law*

Proposition 10: Some criticisms made of the attempt to use IHL in dealing with armed conflict cases appear misplaced or exaggerated. One has in mind, in particular, the criticism that IHL and refugee law have different purposes; that there is no agreed definition in IHL of armed conflict; and that IHL necessitates focus on intentionality. These are addressed in the next section of this chapter.

Proposition 11: However, even accepting IHL as *lex specialis* when it comes to assessing armed conflict cases, there are several reasons why, in an asylum-related context, it can never be used on its own: (i) most cases concern situations of generalised violence falling short of the IHL armed conflict threshold; (ii) even where the fighting crosses this threshold, most cases concern non-international armed conflicts (NIACs) to which fewer IHL norms apply than they do to international armed conflicts; (iii) the need to focus on fear of persecution/serious harm inevitably requires consideration of the situation in the country as a whole including aspects not necessarily related to the armed conflict.

Proposition 12: Given the subject-matter of refugee law and the imperative of protection, the correct approach should be to apply IHL or IHRL norms, whichever ensures more protection.

13 Although the Inter-American Court of Human Rights has been prepared from its early days to apply IHL as *lex specialis* in (*non-refoulement*) cases concerned with armed conflict, it has been observed to have resiled somewhat from that position more recently in certain cases (see A. Gioia, 'The Role of the ECtHR' in O. Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011) 215).

2 Further Reflections

The *Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence*, emanating from an Expert Roundtable convened in Cape Town by UNHCR, reflect that the debate over the role of IHL in asylum law has moved on somewhat.[14] There now appears to be a more nuanced understanding of the strengths and weaknesses of IHL as a source for interpreting and applying asylum law when making decisions on persons basing their claims on flight from armed conflict. UNHCR appears to have rowed back from the rather polarised anti-IHL view it took in 2011.[15] On the other hand, proponents of an IHL-led approach appear more ready to accept that, in certain contexts, IHL can distort proper application of international protection norms. Recent publications have advanced understanding of the interrelationship between IHRL, IHL and ICL.[16] The question thus seems to be moving resolutely towards an appreciation of the extent to which it is possible to synthesise from all three bodies of law better practical tools for handling asylum claims brought by persons whose countries of origin are embroiled in armed conflict. When dealing with asylum cases, decision-makers increasingly have to apply more than one distinct legal regime (e.g. in Europe the Refugee Convention, Article 15 of the EU Qualification Directive and Article 3 ECHR). Hence it helps to examine all of them to see the extent to which they apply or draw on IHL norms, if at all, and what the answer to that question tells us about the efficacy of the decision-making involved: that indeed was one of the purposes of the recent Expert Roundtable convened by UNHCR. Further, one major problem brought into sharp relief by attempts by decision-makers operating either the African, Cartagena or EU Qualification Directive regional systems when dealing with armed conflict cases is that of 'displacing' the Refugee Convention: valid claims for refugee eligibility are overlooked in favour of granting a supplementary or subsidiary status, seen as an easier option. This phenomenon in the European context was noted by UNHCR in *Safe At Last*? and has also been commented on by Holzer.[17]

14 UNHCR, 'Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence; Roundtable 13 and 14 September 2012, Cape Town, South Africa' (UNHCR December 2012).

15 UNHCR, *Safe at Last? Law and Practice in Selected EU Member States with respect to Asylum-Seekers Fleeing Indiscriminate Violence* (UNHCR July 2011).

16 See, for example, O. Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011).

17 V. Holzer, 'The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence' (2012) UNHCR Legal and Protection Policy

In the analysis of 'conflict-based' claims, should IHL necessarily be treated as a 'starting-point'?[18] The answer will depend on the context. It is clear that in certain situations, e.g. where the level of violence falls below the IHL threshold for armed conflict, IHL cannot be any sort of starting point. However, as the example of the English Court of Appeal case of *BE* (*Iran*) [2009] EWCA Civ 540 sought to highlight, even where formally inapplicable, IHL may have at least an analogical bearing: in *BE* the Court deployed IHL norms to justify allowance of an asylum claim brought by a soldier facing orders to plant landmines in civilian areas.[19] Durieux questions whether it is consistent with the *lex specialis* principle to advocate an approach of applying IHL or IHRL norms, whichever ensures more protection. Granted, this approach does entail regarding the *lex specialis* principle as a supplementary rather than an exclusionary one and doing that is not without its problems.[20] There are respects in which IHL is less exacting than IHRL and vice versa.[21] However, this approach is justified by the humanitarian objects and purposes of the Refugee Convention (and indeed of the other regional instruments dealing with protection from *refoulement* of persons fleeing armed conflict). It is hard not to concur with Holzer's argument that the Convention's humanitarian object and purpose requires an inclusive interpretation, so that 'IHL can provide interpretative guidance only if it enables an inclusive interpretation of the refugee definition and thereby strengthens refugee protection'.[22]

Is IHL up to this task? Lambert suggests that IHL in its current form cannot inform asylum law because it is too mechanistic.[23] IHL, she argues, directs our attention to concrete observables that are divorced of social context, such as,

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Research Series <http://www.unhcr.org/refworld/docid/50474f062.html> accessed 1 March 2014. See also Holzer's chapter in this volume.

18 Durieux (n 8) took issue with the statement in the 'War-Flaw' article (n 2) that IHL should be the starting-point.

19 *BE* (*Iran*) *v Secretary of State for the Home Department* [2008] EWCA Civ 540.

20 See International Law Commission (ILC) *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalised by M. Koskenniemi* (13 April 2006) paras 56–57. See also M. Milanovic, 'Norm Conflicts, IHL, and IHRL' in O. Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011) 113ff.

21 See Milanovic (n 20) and O. Ben-Naftali, 'International Humanitarian Law and International Human Rights Law – Pas de Deux' in O. Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011) 6. Hence the argument, sometimes raised, that refugee law does not need IHL because IHL standards are always weaker than IHRL standards, is simply wrong.

22 See the contribution by Holzer to this volume.

23 See contribution by Lambert in the present volume.

> the number, duration and intensity of individual confrontations, the type of weapons and other military equipment used, the number and calibre of munitions fired, the number of persons and types of forces partaking in the fighting, the number of casualties, the extent of material destruction, and the number of civilians fleeing combat zones.[24]

In part, this reflects her concern that use of IHL will encourage decision-makers to elevate quantitative over qualitative criteria and will deter them from taking a more holistic approach to causation.

However, so far as the quantitative/qualitative issue is concerned, if the experience of the United Kingdom (UK) Upper Tribunal and the concomitant approach taken by the ECtHR in *Sufi and Elmi v UK*[25] and in *K.A.B. v Sweden*[26] is anything to go by, the developing jurisprudence insists on an inclusive approach that takes into account multiple factors in a rounded, albeit structured way. Indeed, it could be argued, drawing on this developing body of jurisprudence, that IHL has helped privilege qualitative over quantitative data, since it has led these judicial bodies to find that the high threshold for regarding mere civilians as at real risk of indiscriminate violence is capable of being met by virtue of the evidence that the conflict, even though perhaps not at quantitatively high levels, involves serious violations of IHL.

In the context of Somalia, this was foreshadowed by the Asylum and Immigration Tribunal (predecessor of the current Upper Tribunal) in *AM & AM* [27] and endorsed by the ECtHR (albeit without express reference to IHL) in *Sufi and Elmi v UK*. In this last case, the Court stated:

> However, the Court recalls that the Asylum and Immigration Tribunal had to conduct a similar assessment in *AM and AM* (*Somalia*) (cited above), and in doing so it identified the following criteria: first, whether the parties to the conflict were either employing methods and tactics of warfare which increased the risk of civilian casualties or directly targeting civilians; secondly, whether the use of such methods and/or tactics was widespread among the parties to the conflict; thirdly, whether the fighting was localised or widespread; and finally, the number of civilians killed, injured and displaced as a result of the fighting. While these criteria are not to be seen as an exhaustive list to be applied in all future cases,

24 Ibid.

25 *Sufi and Elmi v United Kingdom* [2011] ECHR 1045, para 241.

26 *KAB v Sweden* App no 886/11 (ECtHR, 5 September 2013) paras 77–79.

27 *AM & AM* (*armed conflict: risk categories*) Rev 1 Somalia CG [2008] UKAIT 00091.

> in the context of the present case the Court considers that they form an appropriate yardstick by which to assess the level of violence in Mogadishu.[28]

Significantly, this approach also reflects the apparent stance taken by UNHCR in its *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia*.[29] In its 2012 treatment of Article 15(c) of the EU Qualification Directive, in *HM and others* the UK Upper Tribunal returned to the same theme, observing that:

> [W]hilst the inclusive approach is an indispensable safeguard against any artificial exclusion of relevant types of violence, it must not lead the decision-maker to run everything together and to overlook or blur important features of the ongoing conflict, for it is only by a careful delineation and understanding of these features that a proper assessment can be made about the levels of indiscriminate violence for Article 15(c) purposes. Ours must be a qualitative as well as a quantitative analysis. Thus, for example, in *AMM* [*AMM and others* (*conflict; humanitarian crisis; returnees; FGM*) *Somalia* CG [2011] UKUT 445 (IAC) (28 November 2011] at para 339 the Tribunal considered that, in addition to the level of civilian casualties, another factor leading them to conclude that in Mogadishu the Article 15(c) threshold had been crossed related to the 'conduct of the parties' by reference to the highlighting in background evidence of widespread violations of international humanitarian law.[30]

Notwithstanding the above, Bauloz argues in this volume that IHL can have no constructive role because it has a quintessentially different purpose from IRL. But that is not to compare like with like. Obviously IHL and IRL have some common, some different purposes. The key question, however, is what norms are to be used when interpreting and applying IRL. IRL cannot supply them all itself. Certainly IRL has become a body of law with its own distinct identity and principles and thus, in common parlance an autonomous body of law, but such autonomy can only ever be relative autonomy. IRL is part of a wider body of public international law and draws on that body for its underlying norms. If that is correct, then how is it that IHL norms have no part to play? If the

28 *Sufi and Elmi* (n 23) para 241.

29 UNHCR, 'Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia' (UNHCR 2010) and 'Addendum' (UNHCR 2012).

30 *HM and others* (*Article 15(c)*) Iraq CG [2012] UKUT 00409 (IAC) (hereafter 'HM2') para 271.

Convention on the Rights of the Child, 1985 saw fit to specify at Article 38(1) that 'State parties undertake to respect and ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child', then how is it that we should not apply this body of law to cases of children fleeing armed conflicts? Bauloz scarcely mentions even IHRL, which would seem to make her position even more isolationist.

It is interesting to note that in the area of the law of internally displaced persons, there has been very little *a priori* rejection of IHL as a source for the development of more coherent legal standards. If the same kind of rejectionism advocated by Bauloz had been employed in this field, we would never have got the widely acclaimed *Guiding Principles on Internal Displacement*, which seek to develop a coherent body of relevant principles drawing on IHRL, IHL and other relevant sources.[31]

IHL is also said to be an unacceptable tool because it would leave a 'protection gap' under the EU regime of subsidiary protection. That presupposes, however, that that regime was designed to eliminate all protection gaps, which is extremely dubious and certainly difficult to square with the preparatory documents,[32] which record that Member States saw Article 15(c) of the EU Qualification Directive as essentially codifying the position of the Strasbourg Court in *Vilvirajah v UK*.[33] That is not to say there is not an international need to fill existing protection gaps nor that courts cannot apply dynamic interpretation to partially fill some of these gaps (as the Court of Justice did in *Elgafaji* and the English Court of Appeal did in *QD* (*Iraq*)). But it is not necessarily the case that existing regional instruments completely fill the protection gaps or that they can or should be stretched as if they did.

Bauloz states that IRL must surely protect civilians fleeing collateral damage, even if committed in accordance with IHL. It is questioned whether the IHL principle of military necessity should have any application. Yet even IHRL does not proscribe all uses of violence in armed conflict. Is pacifism necessarily a correct jurisprudential premise of either IHRL or IRL? She also observes critically that in IHL there is no generic definition of armed conflict, but she fails to explain what judges deciding real cases are supposed to do when faced with issues about the meaning of the term and why they should not look to

31 *Guiding Principles on Internal Displacement* (1998) UN Doc E/CN.4/1998/53/Add.2.

32 See, for example, European Union (Council) *Presidency Note to Council: 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* (30 September 2002) Doc 12382/02 ASILE 47, 4 fn 3.

33 *Vilvarajah v United Kingdom* (1991) 14 EHRR 248.

international criminal tribunals and the working definition they apply. Lack of a generic definition of ill-treatment has not prevented refugee jurisprudence from developing interpretation of that term drawing variously on the jurisprudence of the Committee against Torture and international human rights courts such as the ECtHR.

It may seem that strong support for an autonomous approach to interpreting IHL-related terms such as 'armed conflict' and 'civilian' has recently been shown by the Court of Justice of the European Union (CJEU). In *Elgafaji* the Court had already indicated that the term 'indiscriminate violence' within Article 15(c) required a strongly autonomous definition.[34] In the recent case *C-285/12, Aboubacar Diakite v Commissaire General aux réfugiés et aux apatrides*,[35] the questions referred by the Belgian Conseil d'Etat were summarised by the Court as follows:

> Whether, on a proper construction of Article 15(c) of the QD the assessment as to whether an internal armed conflict exists is to be carried out on the basis of the criteria established by international humanitarian law, and, if not, which criteria should be used in order to assess whether such a conflict exists for the purposes of determining whether a third country national or stateless person is eligible for subsidiary protection.[36]

The Court's conclusion was:

> Consequently, the answer to the question referred is that, on a proper construction of Article 15(c) of Directive 2004/83, it must be acknowledged that an internal armed conflict exists, for the purposes of applying that provision, if a State's armed forces confront one or more armed groups or if two or more armed groups confront each other. It is not necessary for that conflict to be categorised as 'armed conflict not of an international character' under international humanitarian law; nor is it necessary to carry out, in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organisation of the armed forces involved or the duration of the conflict.[37]

34 Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921.

35 Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* [2013].

36 Ibid, para 17.

37 Ibid., para 35.

It is evident from its judgment that the Court draws an important distinction between (i) assessment of the existence of an armed conflict; and (ii) assessment of whether the armed conflict is characterised by indiscriminate violence at such a level that civilians as such face a real risk of serious harm. Thus at paragraph 30 it observes:

> Furthermore, it should be borne in mind that the existence of an internal armed conflict can be a cause for granting subsidiary protection only where confrontations between a State's armed forces and one or more armed groups or between two or more armed groups are exceptionally considered to create a serious and individual threat to the life or person of an applicant for subsidiary protection for the purposes of Article 15(c) of Directive 2004/83 because the degree of indiscriminate violence which characterises those confrontations 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 (see, to that effect, *Elgafaji*, paragraph 43).[38]

In relation to (i) – assessment of whether an internal armed conflict exists – the Court rejects the idea that it should be determined by application of IHL criteria. It gives as its reasons: the difference between the phraseology in Article 15(c) ('international or internal armed conflict') as opposed to the concepts on which IHL is based ('international armed conflict' and 'armed conflict not of an international character');[39] the difference in purpose (IHL providing protection for civilian populations in a conflict zone; the latter providing protection for certain civilians who are outside both the conflict zone and the territory of the conflicting parties);[40] the very close linkage between IHL and international criminal law 'whereas no such relationship exists in the case of the subsidiary protection mechanisms'.[41] Given that the Court appears to endorse Advocate General Mengozzi's more detailed elaboration of the difference in aims and protection mechanisms between IHL and subsidiary protection,[42] mention should also be made of two further reasons of his for rejecting

38 Ibid, para 30.
39 Ibid, para 20.
40 Ibid, para 23.
41 Ibid, para 25.
42 Ibid, para 24.

an IHL framework: because it does not address the issue of 'real risk' and because it applies fixed criteria that distract decision-makers from focusing on protection needs.[43]

The Court instead espouses an autonomous interpretation on internal armed conflict based on 'its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part'. This yields the following definition: 'The usual meaning in everyday language of "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'.[44]

It is not difficult to pick fault with the Court's reasons. Given that the jurisprudence of international tribunals dealing with the meaning of the IHL terms 'international armed conflict' and 'armed conflict not of an international character' has seen no difficulty in characterizing them as international and internal armed conflicts, the first reason given is almost purely semantic.[45] In terms of the reasons based on differences in purpose between IHL and the subsidiary protection mechanism, the notion that a key difference lies in the fact that the latter relates to people outside the conflict zone and the territory of the conflicting parties is especially hard to fathom. International protection law is about hypothesising risk on return, which in this context means return to a conflict zone. It is not about considering real risk facing applicants within their host Member States. There may be a linkage between IHL and international criminal law but the latter does not define the former. Contrary to what the Court asserts,[46] there is also a linkage between international protection law and international criminal law in the context of exclusion, but no one suggests that is illicit. Indeed, there is also an express link between Article 9(2)(e) of the EU Qualification Directive (defining acts of persecution) and international criminal law, and no one has suggested that is illicit either. Difference of purposes and protection mechanisms is a reason for not treating IHL as determinative of the meaning of key terms in Article 15(c), but it is not a reason for rejecting IHL as a source.

It is equally easy to range criticism against Advocate General Mengozzi's two further reasons for rejecting an IHL framework: because the latter does not

43 Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* [2013] Opinion of AG Paolo Mengozzi, delivered on 18 July 2013.

44 *Diakité* (n 35) para 28.

45 Neither, pre-*Elgafaji*, did the national courts and tribunals dealing with Article 15(c) consider this difference in terminology significant.

46 *Diakité* (n 35) para 275

address the issue of 'real risk' and because it applies fixed criteria that distract decision-makers from focusing on protection needs. First, it has never been suggested by proponents of an IHL approach that this body of law addresses issues of real risk. Second, to say that IHL is irrelevant because it applies fixed criteria in assessing the existence of an internal armed conflict in a restrictive fashion and somehow distracts decision-makers from establishing the existence of protection needs, by reference to the COI evidence and the evidence relevant to the claimant's personal situation, suffers from a similar difficulty. It furnishes a valid reason not to treat IHL criteria as determinative of whether there exists an internal armed conflict for Article 15c purposes. It may also furnish a valid reason not to draw on IHL criteria where these afford less protection than IHLR norms. But it does not constitute a valid reason for rejecting IHL criteria as building-blocks when seeking to give content to Article 15(c) terms such as 'armed conflict' or 'civilian' to ensure Article 15(c) adequately provides for 'international protection'. Nor does it explain why IHL criteria cannot inform an assessment which takes account of the COI evidence and the evidence relevant to the claimant's situation. In other words, like the Court, Advocate General Mengozzi appears to throw the baby out with the bathwater and to reason illogically that since IHL criteria are not determinative they cannot be informative.

But even assuming the Court's (and Advocate General Mengozzi's) reasons for rejecting IHL as being determinative of whether there exists an internal armed conflict were cogent, one has to ask how helpful is that which the Court offers in its stead. In the first place, what the Court offers amounts to a non-reply to the very question it said it would address: it stated that if the assessment of whether an internal armed conflict exists was not established by IHL then the question was 'which criteria should be used in order to assess whether such a conflict exists…'.[47] The Court gives no answer. It does proceed to offer its own definition but without explaining what criteria it uses to formulate it other than by way of saying that its definition is based on everyday meaning taking into account context and purpose.

Second, the short definition offered – which is that the term denotes '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' – is so brief as to be of very limited help. What is meant by 'armed groups'? Can one say that there is armed confrontation if an area is affected by riots and insurrections? Is it enough in such a situation if just a few rioters are armed? What about a situation where the armed violence is 'unilateral'? Advocate General Mengozzi

47 Ibid, para 17.

(like the English Court of Appeal in *QD (Iraq)*[48] had wanted to include unilateral armed conflict in the definition, but the Court's definition excludes it. The point about such questions is to illustrate that the Court's minimalistic definition leads on to a need for more interpretation, which on the Court's logic must once again apply an autonomous approach based on everyday language taking into account context and purposes. Unless and until the CJEU offers more definitional detail, decision-makers throughout the EU will each have to fashion their own understanding based on this approach against the background that the principal body of international jurisprudence dealing with armed conflict – IHL – is seemingly off limits. Further (as I shall explain below), in contrast to Advocate General Mengozzi who identified IHRL criteria as a valuable source, the Court has confined everything to its own autonomous definition shorn of reference to international norms of any kind.

The only positive discernible in this anomic approach is that many European decision-makers deciding cases under the subsidiary protection mechanism do so in tandem with deciding them under Article 3 of the ECHR and, unlike the CJEU, the Strasbourg Court in *Sufi and Elmi* and *KAB v Sweden* has recently begun to delineate some common criteria for use in assessing the nature and extent of the violence.[49] Given the close overlap between Article 15(c) and Article 3 ECHR, it is likely that such national decision-makers when seeking to fill out the Court's definitions of 'indiscriminate violence' and 'internal armed conflict' will prefer to draw on norms found in international law and/or international human rights law rather than simply attempt to supply their own national definitions.

Having noted the importance the Court attaches to the distinction between (i) assessment of whether there exists an internal armed conflict; and (ii) whether the degree of indiscriminate violence characterising the armed conflict reaches a sufficiently high level to endanger all civilians, it must also be asked what light the Court sheds on how decision-makers should go about assessing (ii). The answer it would seem is that decision-makers are left none the wiser than they were after the *Elgafaji* judgment.

Curiously, although the Court in several places appears to endorse the approach taken by Advocate General Mengozzi,[50] its reasoning is in clear conflict with the latter in relation to several matters. Thus, when examining the meaning of internal armed conflict,[51] Advocate General Mengozzi considered the issue of

48 *QD (Iraq) v Secretary of State for the Home Department* [2009] EWCA Civ 620, para 35.

49 See above (n 25–26) for references to these judgments.

50 See *Diakité* (n 35) at, for example, paras 24, 25 and 34.

51 *Diakité*, Opinion of AG Paolo Mengozzi (n 43) paras 77–78.

the intensity of violence and the risk which stemmed from it to be more central to the issue of protection needs than identifying the acts which had given rise to the situation of generalised violence in the claimant's country of origin. The Court by contrast saw the issue of intensity of the violence to be irrelevant to the assessment of (i).[52] Further, whereas the Court's judgment appears to see no role for international law norms of any kind, Advocate General Mengozzi, whilst rejecting IHL, states that in interpreting the notion of 'armed conflict' the relevant norms are those found in IHRL. He saw the principal criterion to be the need of the claimant for protection, having regard to the fact that the system of international protection was based on the concept of protection of fundamental rights and the fact that the Common European Asylum System requirement of the creation of a 'common area of protection and solidarity' required an interpretation and application which preserved the flexibility of the system.[53]

Tracing the reaction of the Court to the Belgian reference, it would seem that its concern to reject IHL was premised on its belief that, in Advocate General Mengozzi's words, IHL is too 'restrictive'.[54] Yet as we have seen, and even leaving to one side that that is not true in certain respects, considering IHL as too restrictive is not a valid reason to discount use of its norms entirely. At the risk of overbeating the drum, it is a reason for concluding that IHL norms should not be determinative, it is not a reason for discounting them as informative.

It remains to consider whether, despite the Court's silence on the matter, there is any scope left by its judgment for Advocate General Mengozzi's apparent endorsement of IHRL as a source for interpreting Article 15(c).[55] It is certainly an improvement on the anomic position the Court appeared to take in *Elgafaji* where the term 'indiscriminate violence' was seemingly given a purely autonomous interpretation. He observes, by contrast, that the system of international protection (which encompasses refugee and subsidiary protection) is 'based on the concept of protection of fundamental rights'.[56] Elsewhere he observes that it is clear from the *travaux preparatoires* that 'the notion of subsidiary protection is derived from the international instruments concerned with human rights'.[57] But by so doing Advocate General Mengozzi appears oblivious to the fact that IHRL increasingly recognises IHL as *lex specialis*. It is

52 *Diakité* (n 35) para 32.

53 *Diakité*, Opinion of AG Paolo Mengozzi (n 43) paras 81–85.

54 Ibid, para 95.

55 'For an example of one writer who thinks there is, see contribution to this volume by Violeta Moreno-Lax.'

56 Ibid, para 83.

57 Ibid, para 64.

highly questionable, had he understood this point, that he would have been able to justify his outright dismissal of IHL. For reasons given earlier, when it comes to protection of persons fleeing armed conflict you can't have one without the other. In terms of the protective purpose of Article 15(c) his analysis would also appear to entail, contrary to his expressed concern to avoid 'restrictive' approaches, that where IHL norms are more protective than IHRL norms, they cannot assist.

By having gone beyond Advocate General Mengozzi and opted for a purely autonomous interpretation of the term 'armed conflict' that rejects not only IHL but even IHRL as sources, the Court has only thrown into sharp relief that when it comes to international protection law it is prepared to forget its own jurisprudence situating EU law within the broader framework of customary and treaty-governed international law. Its approach not only fails to enhance harmonisation within the EU (because of the very limited nature of its answers), but it has likely increased fragmentation and divergence globally. The *Elgafaji* and *Diakite* judgments do not inspire confidence that Luxembourg has a proper understanding of international refugee law and its strong roots in public international law. But more fundamentally, the Court's analysis, by failing to answer the question raised about what criteria should be used, if not IHL ones, and offering its own autonomous definition, has left national decision-makers with no methodology or tools for going about the task of assessing Article 15(c) claims. The only positive aspect of this failure might be that, in accordance with the principle of subsidiarity, it gives national courts and tribunals through dialogue with each other and building on Strasbourg case law and other attempts by bodies such as UNHCR to furnish guidelines, an opportunity to supply the missing elements.

3 Conclusions

It will be apparent that whilst the debate reflected in the contributions made to this volume demonstrates greater understanding of the arguments on both sides, there is as yet no synthesis. Further progress will depend to a great extent on the answer to be given to the wider question: 'To what extent can IRL operate as a self-contained body of law?' In this respect the contribution by Bauloz poses the dilemma most starkly. I read her contribution as urging IRL to face up to the need (as she sees it) to cut itself off from IHL as a source, to develop its own body of case law giving autonomous legal content to terms such as indiscriminate violence, civilians and internal armed conflict. In my 'War-flaw' article, I rather ridiculed this notion of a purely autonomous interpretation,

but I have to face up to the fact that there appears to be more support for it than I would have guessed and than I think is consistent with decision-making based on objective norms grounded in international law: see, for example, Gilbert's closing call for 'an autonomous, more humanitarian in goal, understanding of Article 1F' in his contribution to this volume; and see, of course, the judgment of the CJEU in *Diakite*.[58]

Given that IHRL increasingly adopts the position that IHL is a necessary complement to its own protection regime, there seem to be two emerging models for the way forward. One is for IRL to reject IHL as a source of any significance and to promote the idea of IRL as an autonomous almost self-sufficient legal system, applying IHRL norms narrowly construed as exclusive of any IHL content. The other, exemplified by the *Guiding Principles on Internal Displacement* and Wood,[59] is to try and develop an approach which works within the wider framework of international law broadly conceived so as to encompass not only IHRL but IHL and ICL, and which makes use of IHL as a set of indiciae, mindful of its inherent limits when applied to the diverse subject-matter of asylum law.

It may be that the best hope for synthesis lies with scholars adopting the model of the *Guiding Principles* and seeking to enumerate in similar fashion a number of propositions addressing the international protection needs(using this term here in a broad sense) of those who have suffered '*external* displacement'. The theoretical debate is a fascinating one but the focus in the future has surely to be on the needs of the decision-makers who are confronted daily with having to decide whether someone facing return to a situation of armed conflict or generalised violence is entitled to international protection. The need of decision-makers is for practical guidelines to help analyse such situations. It is to be hoped that the forthcoming UNHCR guidelines will go a long way to answering this need, but if they do not, then that will only make it more urgent that others undertake the task.

58 See the contribution by Gilbert to this volume.

59 See Wood's contribution to this volume.