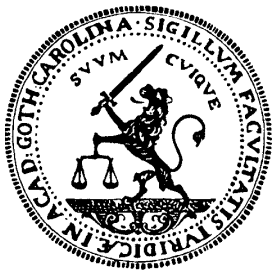

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Protection from Internal Armed Conflict in European and Swedish Asylum Law

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Contents

Summary

Protection from internal armed conflict is an integral part of the Common European Asylum System, as it has developed since the 1980s. The common European provisions governing such protection are found in the EU Qualification Directive, where they form part of what is labelled subsidiary protection. These provisions have been transposed into Swedish legislation by way of amendments to the Aliens Act in January 2010. Protection from internal armed conflict thus came to be governed by two different provisions in the Aliens Act, as the previous provision on persons otherwise in need of protection was kept.

The question of how an internal armed conflict is to be defined is of great importance in applying the provisions on subsidiary protection in the Qualifications Directive and the Aliens Act, and it has been the subject of judicial review in both the Court of Justice of the European Union (CJEU) and the Swedish Migration Court of Appeal. In a number of judgements, the Migration Court of Appeal has applied a definition inspired by international humanitarian law (IHL). The influence of IHL on the definition of internal armed conflict in asylum law has however been criticized because it results in a definition that is considered to be too narrow, and because it leaves too much margin of appreciation to the deciding authorities and courts.

In the *Diakité*-judgement, delivered in January 2014, the CJEU establishes that, for the purpose of applying the relevant provisions of the Qualification Directive, it is not necessary for an internal armed conflict to characterised as such under IHL. Instead, the CJEU applies a less strict definition of the concept and establishes that the decisive factor is whether the conflict can be found to give rise to a serious and individual threat by reason of the indiscriminate violence stemming from the conflict in question.

The *Diakité*-judgement is yet to be commented on by the Migration Court of Appeal in a precedent-setting decision. The Migration Court of Appeal is however bound by the *Diakité*-judgement in applying the transposed provision on subsidiary protection. Whether the Migration Court of Appeal will also use the wider definition of internal armed conflict in applying the provision on persons otherwise in need of protection remains to be seen. Hence, it is still not entirely clear how the Diakité-judgement will affect the interrelation between the different provisions governing protection from internal armed conflict in the Aliens Act.

Sammanfattning

Skydd på grund av en inre väpnad konflikt är en del av det gemensamma europeiska asylsystem som varit under utveckling sedan 1980-talet. De EU-rättsliga bestämmelser som idag reglerar sådant skydd återfinns i Skyddsgrundsdirektivets artiklar rörande alternativt skyddsbehövande. Skyddsgrundsdirektivets bestämmelser om skydd på grund av inre väpnad konflikt införlivades i svensk rätt genom lagändringar i Utlänningslagen (2005:716) som trädde i kraft i januari 2010. Skydd undan inre väpnad konflikt regleras sedan dess i två skilda bestämmelser i utlänningslagen, förutom den transponerade bestämmelsen om alternativt skyddsbehövande omfattar även utlänningslagens bestämmelse om skyddsbehövande i övrigt de som flyr inre väpnad konflikt.

Frågan om hur en inre väpnad konflikt ska definieras är av stor betydelse vid prövning av vem som ska beredas alternativt skydd enligt Skyddsgrundsdirektivet och Utlänningslagen, och den har varit föremål för domstolsprövning i såväl EU-domstolen som Migrationsöverdomstolen. Migrationsöverdomstolen har i ett antal avgöranden begagnat sig av en definition som bär tydliga tecknen på att ha inspirerats av den internationella humanitära rätten. Humanitärrättens inflytande på hur begreppet inre väpnad konflikt definieras inom asylrätten har dock kritiserats på grund av att den anses leda till en för snäv definition, som därutöver lämnar stort tolkningsutrymme till de tillämpande myndigheterna och domstolarna.

I *Diakité*-domen, som meddelades i januari 2014, fastslog EU-domstolen att det vid tillämpningen Skyddsgrundsdirektivet inte är nödvändigt att en inre väpnad konflikt definieras som en sådan enligt humanitärrätten för att direktivets skyddsbestämmelser ska vara tillämpliga. EU-domstolen begagnar sig istället av en mindre strikt definition och fastslår att det väsentliga i bedömningen är huruvida konflikten kan anses ge upphov till ett allvarligt och personligt hot på grund av det urskiljningslösa våld som konflikten ger upphov till.

Diakité-domen har ännu inte aktualiserats i något praxisgrundande rättsfall i Migrationsöverdomstolen. I bedömningen av alternativt skyddsbehov är Migrationsöverdomstolen emellertid bunden av EU-domstolens avgörande i *Diakité*. Huruvida Migrationsöverdomstolen också kommer att tillämpa den vidare definitionen av inre väpnad konflikt vid prövning enligt bestämmelsen om övrigt skyddsbehövande återstår att se. Därmed kvarstår också frågan vilka effekter EU-domstolens avgörande kommer att ha på den inbördes relationen mellan utlänningslagens olika bestämmelser om skydd på grund av inre väpnad konflikt.

Abbreviations

CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union (prior to the entry into force of the Treaty of Lisbon on December 1st 2009, the court was known as ECJ)
CSR51	The Geneva Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967
ECHR	European Convention on Human Rights, formally: Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950
ECtHR	European Court of Human Rights
ECJ	European Court of Justice (after the entry into force of the Treaty of Lisbon on December 1st 2009, the court is known as CJEU)
ECRE	European Council on Refugees and Exiles
EU	European Union
ICRC	International Committee of the Red Cross
Prop.	*Proposition* (Government proposal)
QD-04	Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304/12)
QD-11	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 2011 L 337/9)
SFS	*Svensk författningssamling* (Swedish Code of Statutes)
SOU	*Statens offentliga utredningar* (Swedish Government Official Reports)
UNHCR	United Nations High Commissioner for Refugees
UtlL	*Utlänningslag (2005:716)*, Swedish Aliens Act (Swedish Code of Statues no. 2005:716)

1 Introduction

In the early stages of the development of what was to be known as the Common European Asylum System (CEAS), the Member States and the institutions of the European Union saw the need of harmonisation in the field of asylum law. It was argued that this harmonisation needed to encompass not only the eligibility criteria for protection pursuant to the Geneva Convention relating to the Status of Refugees[1] (the CSR51), but also the laws and practices through which Member States applied forms of protection that complemented the CSR51.

Among these complementary forms of protection is the practice of offering protection to those fleeing the hardship of internal armed conflict, which thus was made an express part of the protection regime of the European Union through the adoption of the Qualification Directive in 2004[2] (the QD-04). In the ambit of what was labelled "subsidiary protection"[3], the Member States of the Union was presented with binding provisions on who was to be granted protection by reason of internal armed conflict.

The concept of internal armed conflict, and precisely what characterises such a conflict, is however not readily defined. Neither the QD-04 nor the Recast Qualification Directive of 2011[4] (the QD-11) defines what is to constitute an internal armed conflict, and no reference is made to any other source of law containing a definition. In Sweden, as in a number of other Member States of the European Union, guidance has been sought within the realm of international humanitarian law (IHL). When applying the national provisions relevant to the protection of those fleeing internal armed conflict, the Swedish Migration Board and the competent courts have relied on a definition of the concept heavily influenced by IHL. Even though guidance in defining the concept can be found in IHL, the legal discipline might not

[1] The Geneva Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967

[2] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304/12)

[3] The term "subsidiary protection" itself is not defined in the QD-04, a "person eligible for subsidiary protection" is however defined as "a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned […] would face a real risk of suffering serious harm [consisting of] death penalty or execution; or torture or inhumane or degrading treatment or punishment […];or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict" (QD-04, articles 2(e) and 15).

[4] 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 2011 L 337/9)

be capable of presenting a clear-cut, univocal definition for the purpose of application in other fields of law. Consequently, studies on the implementation of the QD-04 have shown diverging practices among Member States in applying the provision on protection from internal armed conflict.

Against this backdrop, the influence of IHL over refugee and asylum law has been the subject of debate in recent years, both internationally and in Sweden[5]. It has been questioned whether the adoption of an IHL-based definition of the concept of internal armed conflict is at all appropriate, and the content of the definition adopted has also been the subject of critical scrutiny.

The issue came to a decisive turning point in January 2014, when the Court of Justice of the European Union (the CJEU) delivered its judgement in the *Diakité*-case. In its judgement, the court establishes that, for the purpose of applying the relevant provisions of the Qualification Directive, it is not decisive whether an internal armed conflict would be defined as such in IHL.

The impact of the *Diakité*-judgment on Swedish asylum law is potentially transforming, as the concerned authorities have previously relied on an IHL-oriented approach to the concept of internal armed conflict. At the time of writing, the outcome of the *Diakité*-judgement is still to be applied by the Swedish Migration Court of Appeal. The Swedish Migration Board, however, has concluded that the national sources of law previously used to determine the existence of an internal armed conflict now have to give way to the ruling of the CJEU. Against this backdrop, it appears relevant to approach the subject of how the protection from an internal armed conflicts, and the definition of such a conflict, has been shaped within European and Swedish asylum law.

1.1 Subject and Purpose

The subject of this thesis is the legal provisions and the case law governing eligibility for subsidiary and complementary[6] protection by reason of internal armed conflict. The subject will be approached from a Swedish perspective. Thus, the material subject is the relevant Swedish legislation and case law, as well as the relevant provisions of the Qualification Directives and the related case law of the CJEU, which, through the legal hierarchy of the European Union, affect the Swedish sources of law.

[5] See: Storey (2012); Durieux (2012); Magnusson (2008); Stern (2010)

[6] The term ”subsidiary protection” is used to denote both such protection as it is framed within EU law, as well as the corresponding protection forms introduced in national legislation. In contrast, the term “complementary protection” is used to denote any form of protection, complementary to that afforded to refugees pursuant to the CSR51.

The purpose of this thesis is therefore twofold; the main purpose is to map out the process through which the regime of subsidiary protection and protection from armed conflict has evolved in the European Union and in Sweden respectively. In doing so, this thesis analyses the impact of the European process on Swedish legislation and case law, and brings the matter to the present point at which Swedish case law is potentially in clinch with the CJEU's judgment in the *Diakité*-case.

In the concluding section of this thesis, the further purpose is to discuss the possible grounds and incentives behind the CJEUs recent departure from an IHL-based interpretation of the concept of internal armed conflict in asylum law, and the implications and possible benefits or drawbacks of such an approach. Further, the more immediate impact of the *Diakité*-judgement, especially in Swedish asylum law and practice will be discussed.

1.2 Method

The first three sections of this thesis will largely rely on a legal, dogmatic method in that they aim to describe the relevant parts of international humanitarian law, EU law and Swedish law *de lege lata*. In doing so, focus will mainly be on primary sources of law, in the form of the EU Qualification Directives and the Swedish Aliens Act and the corresponding preparatory work or *travaux préparatoires*, as well as the case law of CJEU and the supreme instance in Swedish asylum law. However, legal doctrine will also be consulted, and at times dissenting opinions of scholars will be given expression in the first sections of the thesis.

The concluding section of the thesis will deviate from the dogmatic method, partly because of the fact that not much is yet written in regards of protection from internal armed conflict post-*Diakité*, and partly because said section will approach the subject through a wider perspective, in analysing the possible effects of the *Diakité*-judgement and reflecting on the future concept of internal armed conflict, and the related forms of protection, in the field of asylum law.

1.3 Delimitations

This thesis will focus on protection from armed conflict as it has been framed within European Union law and Swedish Law. It lacks any comparative ambitions in regards of contrasting Swedish legislation and case law to that of other Member States. Such national legislation and case law will not be addressed in detail, but is occasionally mentioned where it has had an impact on the drafting process of EU legislation, or on the reasoning of the CJEU.

It should be noted that basic knowledge on EU law and its hierarchical relation to the national legislation of the Member States is presupposed, as this thesis will neither address the rules establishing the superiority of EU norms, nor the binding effects of CJEU's preliminary rulings.

2 Some initial remarks on the concept of internal armed conflict

As has already been implied, and as will be apparent in the coming sections of this thesis, the concept of internal armed conflict, and how it is defined, is of great importance when interpreting and applying national as well as international legislation relevant to subsidiary and complementary protection. This section will therefore present a brief presentation of the concept and how it is generally approached.

As an outline, there seem to be a widespread view among scholars that no unequivocal interpretation of the concept of internal armed conflict exists within international law as a whole[7]. And, of greater importance to the material scope of this thesis, comparative studies have shown that the definition of internal armed conflict as applied within the framework of asylum law differs between Member States of the European Union[8].

It is within the field of international humanitarian law that the concept of internal armed conflict has its original abode, and it is also within this legal discipline that the need to define the concept first arose. To what extent it is purposive and adequate to apply that definition when assessing the need for international protection of those fleeing armed conflicts will be discussed below.

Nevertheless, Common Article 3 of the 1949 Geneva Conventions[9] was the first regulation of non-international armed conflicts in black letter law[10]. The explicit purpose of the article is to regulate the conduct of the parties to conflicts not of an international character. According to an Opinion Paper published by the ICRC in 2008, article 3 is applicable to conflicts between governmental armed forces and non-governmental armed forces, as well as to conflicts involving only non-governmental armed forces, where the hostilities reach a minimum level of intensity[11]. In order for a conflict to exist in accordance with article 3, it needs to involve at least two distinguishable parties. For a non-governmental force to define as a party, it needs to show at least some level of organisation[12].

[7] Bauloz (2014), p. 835; Magnusson (2008), p. 394.
[8] See e.g. UNHCR (2007), p. 76f.
[9] Convention (I), (II), (III) and (IV) adopted at Geneva, 12 of August 1949
[10] Magnusson (2008), p. 385.
[11] ICRC (2008), p. 3.
[12] Magnusson (2008), p. 385.

The 1977 Additional Protocol II to the 1949 Geneva Conventions[13] (Protocol II) explicitly aims to regulate non-international armed conflicts. According to its article 1, it "develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application" and applies to:

all armed conflicts [..] 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.

Situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, are explicitly excluded from the application of Protocol II.

The definition of a "non-international armed conflict" in article 1 of Protocol II is thus more detailed and narrower than the definition of an "armed conflict not of an international character", which can be deduced from the common article 3 of the 1949 Geneva Conventions. In this context, the ICRC suggests that the restrictive definition of Protocol II is only relevant for the application of the protocol itself, and does not extend to the law of non-international armed conflicts in general[14]. In other words, article 3 of the 1949 Geneva Conventions is applicable in most any internal armed conflict (including those covered by Protocol II), while Protocol II is only applicable in internal armed conflicts as defined in the Protocol.

In its Opinion Paper, the ICRC concludes by proposing a definition of "Non-international armed conflicts" as:

[…] protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups, arising on the territory of a State (party to the Geneva Conventions). The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation.[15]

Whether this, in the view of the ICRC, is to be regarded as a definition of customary status is not entirely clear, it simply states that the definition proposed "reflect the strong prevailing legal option"[16].

Nevertheless, the concluding proposal offered by the ICRC is an indication of the evolving nature of IHL and its notion on what is to be regarded as an internal armed conflict. It should also be noted that, while states have

[13] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
[14] ICRC (2008), p. 4.
[15] ICRC (2008), p. 5.
[16] ICRC (2008), p. 5.

traditionally been unwilling to limit their sovereignty by regarding internal conflicts as subject of international law instead of as matters regarded strictly as domestic affairs[17], the ICRC and the academic world have long made arguments for a uniform law of all armed conflicts[18].

However, without the support of states or the evidence of a changed state practice, such an evolution would appear distant. Nevertheless, with the nature of armed conflicts changing - from wars between sovereign states or clearly delimited liberation wars between government forces and uprising groups, to internal conflicts showing no distinguishable lines between state and non-state actors or conflict zones and safe zones - the discrepancy between law and reality is obvious[19]. Thus, although a "modern" definition of the concept of internal armed conflict is yet to be established in a universally accepted international norm or custom, the growing discrepancy might well prove to be a hotbed for a continuing evolution.

In summary, no univocal notion of what is to be regarded as an internal armed conflict exists within international law. Within the field of IHL, which (as will be apparent in the later sections of this thesis) has most often been the source of inspiration when attempting to define the concept for the purpose of application within asylum law, the concept is ambiguous and in a potential process of evolution. The implications this might have on IHL or any other field of international law lies outside the scope of this thesis. For now, it suffices to establish that the concept of internal armed conflict is not easily defined, and that this, of course, has repercussions in the field of asylum law.

[17] Magnusson (2008), p. 403.
[18] Crawford (2007), p. 462.
[19] Magnusson (2008), p. 406.

3 Subsidiary Protection and protection from internal armed conflict in the European Union

This section aims to describe how the European Union deals with subsidiary protection, including protection from internal armed conflict. It will give a brief historical overview of the emergence of the Common European Asylum System (CEAS), in order to put the current provisions on subsidiary protection in a larger context. This section further seeks to map out the drafting process and the material provisions on subsidiary protection of the Qualification Directive and the Recast Qualification directive. Before presenting a brief summary, this section concludes by analysing two important judgements from the ECJ/CJEU.

3.1 The early stages of the Common European Asylum System

The adoption of the Treaty of Amsterdam[20] in 1997 meant that the institutions of the European Union was, for the first time, bestowed clear legal competences to adopt specific measures in relation to asylum[21].

However, intergovernmental cooperation amongst European states in the field of asylum and immigration predates the Treaty of Amsterdam by decades, and the middle of the 1980s saw the emergence of a common European policy on asylum and immigrations[22]. Behind the dismissal of the notion of asylum as subject only to national legislation and policy-making was the emerging project of abolishing the internal EC boarders as well as the rising number of asylum seekers in Europe[23].

In 1990, intergovernmental cooperation led to the adoption of the Dublin Convention[24], which entered into force in 1997. The Dublin Convention was subsequently turned into Community legislation in form of the so-called

[20] Treaty of Amsterdam amending the treaty on European Union, the treaties establishing the European Communities and certain related acts, OJ 1997 C 340/1.
[21] Ippolito & Velluti (2011), p. 28.
[22] Juss (2005), p. 750.
[23] Juss (2005), p. 750.
[24] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, OJ 1997 C 254/1.

Dublin II Regulation[25]. The Dublin system was put in place in order to prevent multiple asylum applications, lodged in different Member States by third-country nationals seeking protection in Europe. In order to do so, the Dublin Convention and later the Dublin Regulation allocates responsibility to a single Member State to process asylum seekers entering the common territory, and installs mechanisms to transfer asylum seekers to the Member State deemed responsible.

The Dublin system did not infringe on the signatory states' sovereignty in interpreting or applying the CSR51 or any other international instruments relating to how the lodged asylum application was to be assessed. The fact that the interpretation of the CSR51 differed somewhat from state to state, led to a situation where an asylum seeker might not be recognized as a refugee in the state to which a Dublin transfer was intended, while the transferring state was bound by the non-refoulement obligation of the CSR51. Faced with a risk of such a potential breach, the courts of the United Kingdom initially refused to make Dublin transfers unless the asylum seekers did not risk refoulement in the state responsible under the Dublin system as well[26].

Hence, the Dublin system was suffering from the lack of harmonisation in the Member States' national legislation on matters concerning the processing of asylum applications, the reception conditions for asylum seekers and the assessment of protection claims. This situation served as an impetus for further harmonisation and, eventually, a "communitarization" of matters relating to refugees and asylum seekers[27].

The impetus for a harmonised subsidiary protection policy for the EU was a note from the Danish delegation to the Council's migration and asylum working parties in March 1997[28]. According to the Danish note, the foreseen entry into force of the Dublin Convention meant that it was important that asylum applicants were ensured a uniform possibility of protection regardless of which Member State would eventually be considered responsible for examining the application. The Danish delegation further noted that the overall assessment of an asylum application will rarely be concluded by a decision on the applicant's possibility of obtaining protection pursuant to the CSR51 and therefore, it will often be necessary to consider the need for protection on another basis. Hence, the conclusion was that differences in the national schemes as concerns subsidiary protection could constitute an essential motivation for "asylum shopping"[29].

[25] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2003 L 50/1.
[26] Goudappel & Raulus (2011), p. 4.
[27] Goudappel & Raulus (2011) p. 4 f.
[28] McAdam (2007), p. 53f., referring to Council document 6764/97 ASIM 52.
[29] 6764/97 ASIM 52.

In February 1999, the presidency of the Council noted that while there was no coordinated application of the international legal instruments governing subsidiary protection, those forms of protection were in practice growing in importance and in some Member States the number of third-country nationals permitted to stay on the basis of subsidiary protection clearly exceeded those to whom refugee status had been granted in accordance with the CSR51[30]. The efforts of the Member States to harmonise their asylum systems was therefore at risk of coming to nothing, with the diminishing importance of the CSR51 as the base for protection claims[31].

Thus, when meeting in Tampere in October 1999, the European Council manifested its determination to "develop the Union as an area of freedom, security and justice by making full use of the possibilities offered by the Treaty of Amsterdam"[32]. In doing so, the European Council agreed to work towards establishing a Common European Asylum System (CEAS), which should include, inter alia, an approximation of rules on the recognition and content of the refugee status, as well as measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection[33].

3.2 The Treaty of Amsterdam and the Qualification Directive of 2004

The adoption of the Treaty of Amsterdam set the legal framework for a further communitarization of asylum matters. Article 63 of the post-Amsterdam EC Treaty stipulated that the Council, within a period of five years after the entry into force of the Treaty of Amsterdam, should adopt measures on asylum in regards of criteria and mechanisms for determining which Member State is responsible for considering an application for asylum by a national of a third country, minimum standards on the reception of asylum seekers, minimum standards with respect to the qualification of nationals of third countries as refugees, and minimum standards on procedures in Member States for granting and withdrawing refugee status.

[30] 6246/99 ASILE 7.
[31] Ibid.
[32] Tampere European Council 15 and 16 October 1999 Presidency Conclusions, http://www.europarl.europa.eu/summits/tam_en.htm (Accessed 2014-10-05)
[33] Ibid.

3.2.1 The Qualification Directive of 2004

The Commission presented a proposal for a qualification directive on 12 September 2001[34]. According to the original proposal, subsidiary protection should "be granted to any third country national or stateless person who does not qualify as a refugee […] and who, owing to a well-founded fear of suffering serious and unjustified harm […], has been forced to flee or to remain outside his or her country of origin and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country"[35]. "Serious and unjustified harm" was defined as torture or inhuman or degrading treatment[36], violation of a human right, sufficiently severe to engage the Member State's international obligations[37], or a threat to his or her life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalised violations of their human rights[38].

In the final directive, as adopted 29 April 2004[39], a person eligible for subsidiary protection is defined in article 2(e) as:

[…] a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15 […], and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country

Serious harm, in turn, is defined in article 15 as consisting of:

(a) death penalty or execution
(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

[34] Proposal for a Council directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM(2001) 510 final.
[35] COM(2001) 510 final, article 5(2).
[36] COM(2001) 510 final, article 15(a).
[37] COM(2001) 510 final, article 15(b).
[38] COM(2001) 510 final, article 15(c).
[39] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ 2004 L 304/12.

Of importance to the provision in article 15(c) is the directive's recital 26, which reads:

Risk to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.

Consequently, during the drafting process the prerequisites of the threat faced in light of indiscriminate violence evolved from an unqualified threat to someone's life, safety or freedom into a threat that needs to be both serious and individual[40]. Most Member States supported the individual requirement, as it would avoid an undesired opening of the scope of article 15(c) to entire populations fleeing generalized violence[41]. However, the explicit prerequisite of an individual threat raised concerns that recital 26 and article 15(c) might prove difficult to interpret precisely because the indicated protection need would typically arise in situations of generalized violence. The UNHCR therefore urged the Member States not to adopt a minimalist interpretation of these provisions[42].

Nevertheless, as Teitgen-Colly notes, to understand the individual prerequisite as requiring a strictly individualized threat in a situation of armed conflict would be contrary to the concept of indiscriminate violence. Instead, it should be understood as a personal or individual threat in the sense that it is likely to give rise to a subjective fear in each person exposed to it[43]. In the view of the UNHCR, an interpretation that would withhold protection from someone merely because s/he belongs to a larger segment of a population would conflict with both the wording and the spirit of article 15(c). Instead, the individual aspect of a threat should serve to remove persons from the scope of article 15(c) in cases where the risk of suffering harm by way of indiscriminate violence is merely a remote possibility, either because the violence is limited to a specific region in the designated destination country, or because the risk faced is below the real risk threshold in article 2(e)[44].

The individual prerequisite would eventually come under scrutiny in the *Elgafaji*-case[45] before the ECJ. The judgement will be analysed in subsection 3.5.1.

Another prerequisite of Article 15(c) that caused some concern is that the risk of harm caused by indiscriminate violence must originate in a situation "of international or internal armed conflict". Since defining an international armed conflict rarely raises any issues, the problematic part of the

[40] McAdam (2007), p. 71.
[41] McAdam (2007), p. 72, 74.
[42] UNHCR (2008), p. 4f.
[43] Teitgen-Colly (2006), p. 1536.
[44] UNHCR (2008), p. 6.
[45] Case C-465/07, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, [2009] ECR I-921.

prerequisite is "internal armed conflict". In studies on the implementation of the QD-04, both UNHCR and ECRE noted that the prerequisite of an internal armed conflict was interpreted differently in the national jurisdictions of the Member States[46]. At the time of the UNHCR's research, these judicial disparities meant, for instance, that the French authorities assessed the then ongoing situation in Iraq as an internal armed conflict, while the Swedish authorities did not[47]. In part, the differences might be explained by the fact that the QD-04 does not itself contain a definition of internal armed conflict, nor does it provide explicit reference to a definition in any external source. However, while some Member States relied on IHL in applying the prerequisite of an internal armed conflict, others did not[48].

In the second CJEU[49] -judgement that will be analysed in detail below, the *Diakité*-judgement[50], the court made clear its view on how the notion of internal armed conflict is to be interpreted within the frame of EU asylum law.

With the aforementioned uncertainty concerning some of the key concepts in the European Union's subsidiary protection regime in mind, it could have come as no surprise that the Commission, in its Policy Plan on Asylum, acknowledged that the recognition of protection needs of applicants from the same countries varied significantly from one Member State to another and that this, to some extent, was due to the wording of certain provisions of the QD-04[51]. The Commission therefor expressed its ambition to amend the criteria for qualifying for international protection and stated that it, to that extent, might be necessary *inter alia* to clarify further the eligibility conditions for subsidiary protection.

3.3 The Hague Programme

During the first phase of the CEAS, all of the legal instruments envisaged by the Treaty of Amsterdam and the Tampere Council were adopted. Apart from the QD-04, the EU adopted the Temporary Protection Directive[52], the Reception Conditions Directive[53], the Dublin II Regulation[54] and the

[46] ECRE (2008), p. 27; UNHCR (2007), p. 76f.
[47] UNHCR (2007), p. 76.
[48] Bauloz (2014), p. 837.
[49] After the entry into force of the Treaty of Lisbon on December 1st 2009, the European Court of Justice (ECJ) is known as the Court of Justice of the European Union (CJEU)
[50] Case C-285/12, *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides*
[51] COM(2008) 360 final, p. 5.
[52] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of amass influx of displaced persons and on the measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 2001 L 212/12.
[53] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ 2003 L 31/18.

Asylum Procedures Directive[55], all laying down minimum standards in their respective fields, from which the Member States cannot derogate.

With all the first-phase legal instruments of the CEAS in place, the next multi-annual programme, the Hague Programme[56], was adopted in 2004. Under the Hague Programme, the aims of the CEAS in its second phase were the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection. Hence, the ambition to go beyond minimum standards in developing the CEAS was stressed. Further, the Commission was invited to conclude the evaluation of the first-phase legal instruments and to submit the second-phase instruments and measures to the Council and the European Parliament with a view to their adoption before the end of 2010.

Based in part on the responses to the public consultation launched by the Green Paper on the future Common European Asylum System[57], the Commission presented a Policy Plan on Asylum[58] in June 2008. The Policy Plan notes that the first phase legislative instruments of the CEAS can be considered as an important achievement and form the basis on which the second phase must be built. It further establishes that shortcomings have been identified and that "it is clear that the agreed common minimum standards have not created the desired level playing field"[59].

The concerns expressed by the Commission were reiterated by the Council in the "European Pact on Immigration and Asylum"[60] of September 2008. The Council observed that considerable disparities remained between the Member States concerning the grant of protection and the forms the protection takes, and considered the time right to take new initiatives to complete the establishment of the CEAS, and thus to offer a higher degree of protections.

In 2008, the Commission presented proposals to recast the Dublin II Regulation[61] and the Reception Conditions Directive[62] and in 2009, it presented proposals to recast the Qualification Directive[63] and the Asylum Procedures Directive[64].

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[54] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2003 L 50/1.
[55] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ 2005 L 326/13.
[56] OJ 2005 C 53/01.
[57] COM(2007) 301 final.
[58] COM(2008) 360 final.
[59] Ibid.
[60] 13440/08 ASIM 72.
[61] COM(2008) 820 final.
[62] COM(2008) 815 final.
[63] COM(2009) 551 final.
[64] COM(2009) 554 final.

3.4 The Treaty of Lisbon and the Recast Qualification Directive

The Treaty of Lisbon[65] entered into force on 1 December 2009. It introduced the new article 78 of the Treaty on the Functioning of the European Union (TFEU), according to which 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. In order to do so, the European Parliament and the Council, according to article 78 TFEU, shall adopt measures for a common European asylum system comprising, inter alia, a uniform status of asylum for nationals of third countries and a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection.

Shortly after the entry into force of the Treaty of Lisbon, the Council adopted the third multi-annual programme dedicated to the development of an area of freedom, security and justice, called the Stockholm Programme[66]. The Council noted that there were still significant differences between national provisions and their application and upheld that, in order to achieve a higher degree of harmonisation, the establishment of CEAS should remain a key policy objective for the Union. The Council further anticipated that common rules and a better and more coherent application of them should prevent or reduce secondary movement within the Union.

3.4.1 The Qualification Directive of 2011

The proposal for a recast Qualification Directive was presented on 21 October 2009[67]. In the Explanatory Memorandum of the proposal, the Commission recalled that the need for clarification of article 15(c) had previously been stressed. However, in view of the interpretative guidance provided by the ECJ's judgement in *Elgafaji* the Commission did not consider it necessary to amend article 15(c), with regards to the individual requirement[68]. In the Commission's proposal, nothing is said about the

[65] Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community, OJ 2007 C 306/01.
[66] OJ 2010 C 115/01.
[67] Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as benificiaries of international protection and the content of the protection granted, COM(2009) 551 final.
[68] COM(2009) 551 final, p. 5f.

possible ambiguities that may arise in interpreting and applying the prerequisite of an internal armed conflict.

Noting that the Commission deemed any amendments to article 15(c) unnecessary, ECRE concludes that issues surrounding its application remain, and urges Member States to refrain from applying the words "and individual" in article 15(c)[69]. ECRE also notes that the scope of article 15(c) is limited in that it is only applicable in situations of international or internal armed conflict, and argues that it should also cover situations of generalized violence and systematic human rights violations, which do not equate to armed conflict under IHL. In the same vein, the Red Cross EU Office, in its position paper on the recast Qualification Directive, stresses that the requirement of the existence of an armed conflict remains problematic, as the failure of national courts to interpret it correctly has resulted in a protection gap[70]. Hence, the Red Cross EU Office proposes that the phrase "in situations of international or internal armed conflict" should be deleted or, if kept, accompanied by an amendment to safeguard that the requirement is implemented and applied in conformity with relevant international law[71].

In line with the Commission's proposal, the final version of the QD-11[72] contains no amendments to the substantive provisions governing subsidiary protection. The definition of a person eligible for subsidiary protection is now found in article 2(f) and the reservation in recital 26 has been moved to recital 35. The wording of these provisions, as well as the wording of article 15, has stayed the same as in the QD-04. With regard to the new recital 10, which expresses an intention to "confirm the principles underlying" the QD-04, the conclusion must be that the QD-11 should be interpreted in consistency with the QD-04, except where there have been amendments to the text[73]. Equally, the existing case law on the concept of subsidiary protection is still fully valid[74]. Hence, the QD-11 did not bring about any substantive changes to the criteria governing the qualification for subsidiary protection.

3.5 Relevant case law of the ECJ/CJEU

The ECJ/CJEU has, to date, decided on two cases of importance to the interpretation of article 15(c) of the Qualification Directive, namely the

[69] ECRE (2010), p. 16.
[70] Red Cross EU Office (2010), p. 3.
[71] Red Cross EU Office (2010), p. 3, referring to Additional Protocol II of 1977 to the 1949 Geneva Conventions
[72] 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 2011 L 337/9.
[73] Peers (2012), p. 207f.
[74] Peers (2012), p. 214.

aforementioned *Elgafaji*- and *Diakité*-cases. While the former mainly deals with the prerequisite of an *individual* threat, the latter elaborates on what is to be understood by the notion of an *armed conflict* under EU asylum law. The aim of this subsection is to analyse the two cases in more detail.

3.5.1 The *Elgafaji*-case

Following a referral of the Dutch Council of State for a preliminary ruling, the ECJ was presented with the following two questions:

- *Is article 15(c) of [the Directive] to be interpreted as offering protection only in a situation in which article 3 of the [ECHR], as interpreted in the case law of the [ECtHR], also has a bearing, or does article 15(c), in comparison with article 3 of the [ECHR], offer supplementary or other protection?*

- *If article 15(c) of the Directive, in comparison with article 3 of the [ECHR], offers supplementary or other protection, what are the criteria in that case for determining whether a person who claims to be eligible for subsidiary protection status runs a real risk of serious and individual threat by reason of indiscriminate violence, within the terms of article 15(c) of the directive, read in conjunction 2(e) thereof?*

In addition to the Dutch referral, a number of other Member States presented submissions to the Court. While France and the UK held that the scope of article 15(c) was the same as article 3 ECHR and that the aim of the article was to codify the case law of the ECtHR on said article, Belgium, Greece and Sweden advocated a broader interpretation of article 15(c), as a new and autonomous instrument[75].

After establishing that article 15(c) differs in content from article 3 ECHR[76] and therefore must be interpreted independently[77], the ECJ somewhat reformulates the question of the case at hand, and deduces that:

[…] *the referring court asks, in essence, whether Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, must be interpreted as*

[75] Errera (2010), p. 96f.
[76] Article 3 ECHR reads: *No one shall be subject to torture or to inhuman or degrading treatment or punishment*. Through the case law of the ECtHR, this prohibition has been expanded to cover situations in which a person is deported to another State in which s/he is at risk of being subject to treatment covered by article 3 ECHR (see i.e. ECtHR, *Soering v. UK*, Application no. 14038/88, 7 July 1989). The prohibition enshrined in article 3 has further been extended so as to apply to situations of intended deportation to States in a situation of armed conflict (see i.e. ECtHR, *Salah Sheekh v. Netherlands*, Application no. 1948/04, 11 January 2007 and ECtHR, *NA v. United Kindom*, Application no. 25904/07, 17 July 2008).
[77] Case C-465/07, para 28.

meaning that the existence of a serious and individual threat to the life or person of the applicant for subsidiary protection is subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his circumstances. If not, the referring court wishes to know the criterion on the basis of which the existence of such a threat can be considered to be established.[78]

Moving on, the Court then notes that article 15(c) refers to a general *"threat […] to a civilian's life or person"*, rather than to specific acts of violence, and that this threat is inherent in a general situation of armed conflict where the violence is characterised as indiscriminate. Therefore, according to the ECJ:

[…] *the term individual must be understood as covering harm to civilians irrespective of their identity, where the degree of violence characterising the armed conflict taking place - assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred - reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or […] region, would, solely on account of his presence […] face a real risk of being subject to the serious threat referred in article 15(c)*[79].

With regards to the interaction of recital 26 and article 15(c), the ECJ establishes that the recital implies that the objective finding alone of a risk linked to the general situation in a country is not, as a rule, sufficient to satisfy the prerequisites of article 15(c), but that the wording of the recital allows for the possibility of an exceptional situation which would be characterised by such a high degree of risk that substantial grounds would be shown for believing that a person would be subject to the risk in question[80]. Further, the Court states that:

[…] *the more an 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*[81].

Hence, the ECJ, in the *Elgafaji*-case, establishes a sliding-scale-approach to the two terms "individual threat" and "indiscriminate violence", where, in exceptional cases, the intensity of violence in the designated destination country or region would in and of itself give rise to a need for subsidiary protection, while, in cases of less intense violence, an applicant would have to show an increasing level of circumstances putting him or her specifically at risk in order to be eligible for subsidiary protection. In that sense, the

[78] Case C-465/07, para 30.
[79] Case C-465/07, paras 34-35.
[80] Case C-465/07, para 37.
[81] Case C-465/07, para 39.

protection provided by article 15(c) can be said to cover risks, which are situational rather than individual[82].

3.5.2 The *Diakité*-case

As mentioned above, the view on whether or not to apply an IHL-based definition when interpreting article 15(c) was, at the time of *Diakité*'s commencement, incoherent among the Member States. This incoherency is reflected in the Member States' submissions as noted in the Opinion of the Advocate General. The Government of the UK submits the opinion that the concept of an internal armed conflict should be given a wide and independent interpretation. Belgium and Germany are of the opinion that the concept should primarily be interpreted in accordance with IHL, but that the objective of protection of the QD, in exceptional cases, might render it necessary to admit the existence of an internal armed conflict, for the purpose of applying article 15(c), even if all conditions would not be fulfilled according to IHL[83].

In the *Diakité*-case, the questions posed to the CJEU by the referring Court (the Belgian Council of State) were:

- *Must Article 15(c) of [the Directive] 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 […]?*

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

By first noting that the phrase applied in the QD-11 ("internal armed conflict") differs from that used in IHL ("armed conflict not of an international character")[84], the CJEU proceeds by establishing:

that the EU legislature wished to grant subsidiary protection not only to persons affected by "international armed conflict" and by "armed conflicts not of an international character", as defined in [IHL], but also to persons affected by internal armed conflicts, provided that such conflicts involves indiscriminate violence.[85]

[82] Lambert (2013), p. 214.
[83] *Opinion of Mr Advocate General Mengozzi delivered on 18 July 2013*, CELEX number 62012CC0285, para. 18.
[84] Case C-285/12, para 20.
[85] Case C-285/12, para 21.

Further, the CJEU points out that IHL, in its use of the term "armed conflict not of an international character", pursues different aims and establishes distinct protection mechanisms in comparison with the subsidiary protection regime of the EU[86]. Consequently, the Court finds that: *it is not possible […] to make subsidiary protection conditional upon finding that the conditions for applying [IHL] have been met*[87].

Regarding the second question posed by the referring court, the CJEU establishes that the term internal armed conflict, for the purpose of applying article 15(c), must be determined by considering its usual meaning in everyday language, which, according to the Court, 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[88].

Since the decisive element of article 15(c) is the existence of a serious and individual threat by reason of indiscriminate violence[89], the application of the article must not be made conditional upon the level of organisation of the armed forces involved in the conflict or the duration of the conflict, as long as the confrontations evoke such a threat[90].

In sum, the CJEU rules:

On a proper construction of Article 15(c) of [QD-11], 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[91].

3.6 Summarising protection from internal armed conflict under the Qualification Directive

Before moving on to the section mapping out the evolution of Swedish legislation and case law relevant to protection from armed conflict, a brief conclusion of the protection regime of the EU is in place.

[86] Case C-285/12, para 24.
[87] Case C-285/12, para 26.
[88] Case C-285/12, paras 27-28.
[89] Bauloz (2014), p. 839.
[90] Case C-285/12, para 34.
[91] Case C-285/12, para 35.

As described above, the institutions and the Member States of the EU saw the need to harmonise legislation on the assessment of asylum applications in the wake of the creation of the Dublin system. Seeing that considerable numbers of those seeking asylum within the Union did not qualify for, or did not expressly apply for, protection as refugees under the CSR51, the harmonisation needed to include legislation addressing subsidiary forms of protection.

In response, the Qualification Directive was drafted and adopted, as the first supranational instrument to deal with protection complementary, or subsidiary, to that afforded by the CSR51[92]. The QD comprises criteria for assessing the protection needs of those risking harm consisting of serious and individual threat by reason of indiscriminate violence in situations of international or internal armed conflict. These provisions, governing protection from armed conflict, has been subject of interpretation by the ECJ/CJEU, whereby the Court has established that the level of individualisation required for a protection need to exist is to be assessed by ways of a sliding-scale-approach comprising an estimation of the intensity of the indiscriminate violence taking place in the designated destination country or region. The Court has further established that, in order for subsidiary protection need to exist in accordance with the QD, it is not necessary to establish that the internal armed conflict, in which the indiscriminate violence is taking place, would be recognised as an "armed conflict not of an international character" under IHL.

[92] McAdam (2005), p. 462.

4 Protection from internal armed conflict in Swedish legislation

This section will analyse Swedish legislation and case law governing protection from internal armed conflict. It will first seek the legislative origins of said protection and trace the provisions into the current Aliens Act and in subsequent amendments. In doing so, it will inevitably touch upon the impact of article 15(c) of the QD in Swedish legislation. Further, this section will analyse Swedish case law of relevance to the protection afforded those fleeing internal armed conflict, and also highlight the impact of the aforementioned judgements from the CJEU. Finally, it will comment on the impact of the *Diakité*-judgement on the application of the national provisions on protection from internal armed conflict.

4.1 Legislation and case law prior to the transposition of the Qualification Directive

Up until 1997, when the concept of internal armed conflict was introduced as an explicit ground for protection in the Swedish Aliens Act through an amendment to the former Aliens Act of 1989[93], those forced to leave their country of origin due to ongoing armed conflicts were granted residence permits on politico-humanitarian grounds. According to the *travaux préparatoires* to the Aliens Act of 1989, the politico-humanitarian grounds for residence permit were applicable inter alia to persons to whom the provisions on asylum did not apply, but where the conditions in the designated destination country, e.g. because of an ongoing war, were such that it appeared inhumane to force someone to return[94].

In the *travaux préparatoires* to the amendments of 1997, the Government notes that the incomparably largest category of persons permitted to stay in Sweden on any kind of refugee related grounds was, at the time, made up of those fleeing war and civil war[95]. The Government held that the protection need in such cases was strong, and that it was urgent that this category was explicitly incorporated in a new provision on protection[96]. Thus, the concept of "persons otherwise in need of protection" was introduced in the Aliens

[93] Act amending the Aliens Act (1989:529), SFS 1996:1379.
[94] Prop. 1988/89:86, p. 147.
[95] Prop. 1996/97:25, p. 99.
[96] Prop. 1996/97:25, p. 99.

Act, comprising, inter alia, aliens who, without qualifying for protection as refugees, were in need of protection because of an external or internal armed conflict. The provision on protection from armed conflict was said to essentially constitute a codification of a very firm and clear case law[97]. However, neither the *travaux préparatoires* nor the provisions themselves provided any definition on what is to constitute an internal armed conflict, nor did they refer to any relevant international instrument[98].

In 2004, the Government, acting as the supreme instance of appeals under the Aliens Act of 1989, when deciding upon an application for protection by two Russian citizens of Chechnyan origin, came to the following conclusion on what was to be understood by the concept of internal armed conflict in the Aliens Act:

In international law, an internal armed conflict is characterised by strife between a state's armed forces and other organised armed groups. This strife must be of such a character that it goes beyond what can be classified as internal disturbances or sporadic and isolated acts of violence. Furthermore, the armed groups must have some level of territorial control, which allows them to perform military operations. The current provision on protection in the Aliens Act was enacted against the backdrop of the influx of refugees from conflict areas during the first half of the 1990s. In applying the current provision, there is a margin for both a narrower and a wider interpretation of the concept of internal armed conflict than the one stipulated by international law. A decisive factor in interpreting the concept when applying the provision of the Aliens Act must be, inter alia, how the civilian population is affected. The conflict might be of such intensity that a return to the part of the country in which the applicant formerly resided appears unthinkable, while at the same time, a return to any other part of the country is impossible[99].

The impact on the provision on protection from internal armed conflict by the introduction of the current Aliens Act[100] was mainly editorial. The section on persons otherwise in need of protection was moved to a new chapter titled "Refugees and persons otherwise in need of protection" and was amended to also encompass aliens who, due to "other severe conflicts" in the country of origin, have a well-founded fear of serious abuse. The concept of severe conflicts was to be understood as, inter alia, political instability in the country of origin, where the power structures are such that the legal system does not impartially protect the fundamental human rights of the population. The provision encompasses conflicts between different groups in the population, between one group in the population and the government, or between the government or a group in the population on the one hand and another government on the other, where the conflict has not

[97] Prop. 1996/97:25, p. 100.
[98] Magnusson (2008), p. 393.
[99] Reg. 99-04 (2004-02-19) [as translated by the author]
[100] Aliens Act (2005:716)

reached such a level that it could be said to constitute an armed conflict[101]. The term serious abuse was, in the *travaux préparatoires*, exemplified as encompassing reprisals, abuse of law and harassments[102]. Thus, the provision on other severe conflicts set a lower standard in regard of the intensity of the conflict. Protection under the provision is however made conditional on a *well-founded fear* and on *serious abuses* as well as the existence of a nexus between the conflict and the possible abuse. The definition of what constitutes serious abuse is interpreted to be broader than how the QD defines serious threat in regard to the type of human rights violation and the level of seriousness of the violation[103].

In a precedent-setting decision by the Migration Court of Appeal (which by then had replaced the Government as the supreme instance of appeals) in 2007, the aforementioned definition of the concept of internal armed conflict set out in Reg. 99-04 was reaffirmed, with the exception of the phrase "*In applying the current provision, there is a margin for both a narrower and a wider interpretation of the concept of internal armed conflict than the one stipulated by international law*"[104].

Just like the definition of an internal armed conflict applied in Reg. 99-04, the definition in MIG 2007:9 seem to draw guidance from the 1977 Additional Protocol II to the 1949 Geneva Conventions[105], in that it requires governmental involvement as well as territorial control on behalf of the opposing armed groups. Furthermore, it combines these requirements with an estimation of the effect on the civilian population, thus adoption a domestic interpretation of the concept of internal armed conflict that is even narrower than the one found in Protocol II[106]. This approach has been criticised in the sense that the estimation of the effects on the civil population should rightly form part of the assessment of alleged protection needs, and not in determining whether an internal armed conflict is in occurrence[107]. Further, the decision was criticised in that it drew guidance from the narrow definition of the concept of internal armed conflict in Protocol II, leaving the common article 3[108] uncommented[109].

In a judgement adjudicated on October 6th 2009, only two days before the Government proposal regarding the transposition of the Qualification Directive into Swedish legislation was presented to the Swedish *Riksdag*[110], the Migration Court of Appeal saw reason to once more return to the concept of internal armed conflict and its application in Swedish

[101] Prop. 2004/05:170, p. 274.
[102] Prop. 2004/05:170, p. 274.
[103] Feijen (2014), p. 193.
[104] MIG 2007:9 (2007-02-27).
[105] Supra note 13.
[106] Feijen (2014), p. 194; Magnusson (2008), p. 396.
[107] Stern (2010), p. 370.
[108] Supra note 9.
[109] Stern (2010), p. 370.
[110] Prop. 2009/10:31, p. 1.

legislation[111]. The impetus for the renewed judicial review in the Migration Court of Appeal was three judgements concerning single male asylum seekers from the Somali capital Mogadishu, two adjudicated by the Migration Court in Stockholm and the third by the Migration Court in Gothenburg. Whereas the court in Gothenburg found that the situation in Mogadishu at the time amounted to an internal armed conflict, the court in Stockholm did not[112].

After initially establishing, in stark contrast with its previous judgement in MIG 2007:9, that a univocal definition of the concept of internal armed conflict is hardly to be found in international law, the Migration Court of Appeal, in light of reports on the lack of a functioning government structure in parts of Somalia and the severe hardship that had befallen the civilian population during nearly two decades, found reason to reconsider the previous interpretation presented by the same court. It further held it possible that the concept ought to be given a different and wider meaning.

After a brief review of the relevant international instruments, as well as case law and doctrine, the court concluded that the requirement of territorial control, as expressed in Protocol II, could not be decisive in determining whether an internal armed conflict is at hand. The court further concluded that neither could the involvement of governmental armed forces be seen as a prerequisite for the existence of an internal armed conflict.

It is instead the opinion of the Migration Court of Appeal, that an internal armed conflict exists, for the purpose of applying the Aliens Act, when the following conditions are met:

The severe conflicts encompasses prolonged and ongoing strife between a state's armed forces and one or more organised armed groups, or between two or more such groups fighting each other. The strife is of such a character that it goes beyond what can be classified as internal disturbances or sporadic and isolated acts of violence. It is characteristic for the situation of the civilian population, that the violence caused by the conflict is indiscriminate and so severe that substantial grounds are shown for believing that a civilian would, solely on account his or her presence, face a serious and individual threat to life or person.

As indicated above, the Qualification Directive had not been formally transposed into Swedish legislation at the time of the judgement in MIG 2009:27. Nevertheless, by the wording of the court, it is obvious that it drew inspiration from articles 2(e) and 15(c) of QD-04, as well as from common article 3 of the Geneva Conventions of 1949 in defining the concept of internal armed conflict. The result is a broader and more inclusive interpretation than the one found in MIG 2007:9[113]. However, by the wording of the judgement it cannot be entirely ascertained whether the

[111] MIG 2009:27 (2009-10-06).
[112] Stern (2010), p. 371.
[113] Feijen (2014), p. 194.

confusion between the assessment of what is to be considered an internal armed conflict and the assessment of who is to be considered in need of protection *because* of that conflict, as manifested in MIG 2007:9, persists or not[114].

No precedent-setting judgement of later date has hence altered the definition contained in MIG 2009:27, which thus still holds precedence, at least in terms of domestic sources of law. The impact of the aforementioned *Diakité*-judgement will be discussed below.

4.2 The transposition of the Qualification Directive and the Recast Qualification Directive

The QD-04 was transposed into Swedish legislation on January 1st 2010[115]. Through the amendments made, the Aliens Act adopted the concept of "subsidiary protection" and the corresponding ground for protection was introduced in UtlL 4:2§ (chapter 4, section 2), which had previously contained the provisions governing the protection ground for persons "otherwise in need of protection". The latter protection ground was however retained, but moved to a new section and is now to be found in UtlL 4:2a§.

The government held that the criteria for determining who is to be recognised as a person eligible for subsidiary protection had to be uniform in every Member State of the EU, since those criteria form part of the concept "beneficiaries of international protection", which is a generic term within Union Law[116]. Since the domestic concept of "person otherwise in need of protection" was deemed to be wider than the Directives concept of "person eligible for subsidiary protection", the Government ruled out the possibility of transposing article 15 of the QD by simply relabeling UtlL 4:2§ and adding to that provision the prerequisites it lacked to be in conformity with article 15[117], as had been suggested by the Commission of Inquiry assessing the transposition[118].

The conclusion that the concept a "person eligible for subsidiary protection" is narrower that of a "person otherwise in need of protection" is reached with reference to the way in which the protection need of those fleeing armed conflict is framed. While the QD sets out to protect a civilian who would face a real risk of suffering serious and individual threat to life or person by reason of indiscriminate violence, the thus far applicable

[114] Stern (2010), p. 373, 375.
[115] Act amending the Aliens Act (2005:716), SFS 2009:1542
[116] Prop. 2009/10:31, p. 96f.
[117] Prop. 2009/10:31, p. 118.
[118] SOU 2006:6, p. 44.

provision of the Aliens Act plainly protected those in need of protection by reason of an armed conflict, without any individualised risk assessment[119].

However, recalling the *Elgafaji*-judgement, one could probably argue that the sliding scale-approach introduced by the CJEU nullifies the added value of UtlL 4:2a §, at least in terms of risk assessment, since it was established by the court that there is no absolute requirement of an individualised risk for a subsidiary protection need to exist, thus diminishing that prerequisite in the application of UtlL 4:2 §[120]. Still, differences remain in that the provision on subsidiary protection explicitly requires that the threat to life of person emanates from a situation of indiscriminate violence (though this requirement is also subject to the sliding scale-approach introduced by the *Elgafaji*-judgement), and in that it only offers protection to civilians.

The QD-11 has not yet been transposed into Swedish legislation, although this should have been done by December 21st 2013[121]. A Government proposal was presented to the Swedish *Riksdag* on August 28th 2014, with amendments proposed to take effect by January 1st 2015[122].

As noted above, the QD-11 did not bring about any substantive changes on the provisions relevant for determining who is eligible for subsidiary protection because of flight from internal armed conflicts. Consequently, the amendments proposed to UtlL 4:2 § and 4:2a § relate to the actors of serious harm and the actors of protection, and do not otherwise alter the provisions on what is to be considered an internal armed conflict or who is to be considered in need of protection because of said conflict[123].

4.3 Relating Swedish legislation and practice to the *Diakité*-judgement

As already established above, the definition of the concept internal armed conflict set by the Migration Court of Appeal in its judgement MIG 2009:27, is to date the most recent definition construed by the court, and it was, at least up until the *Diakité*-judgement, given authoritative meaning in applying the relevant provisions of the Aliens Act[124].

However, the definition enshrined in MIG 2009:27 cannot be said to be in conformity with the judgement of the CJEU in the *Diakité*-case. In a Judicial Position published on April 24th 2014 by the Swedish Migration

[119] Feijen (2014), p. 192, referring to prop. 2009/10:31, p. 118f.
[120] Feijen (2014), p. 195.
[121] QD-11, art. 39.
[122] Prop. 2013/14:248.
[123] Prop.2013/14:248, p. 6f.
[124] See e.g. judgement of the Migration Court of Appeal in MIG 2011:4, where the Court refers to MIG 2009:27 in determining that the southern and central parts of Somalia are in a state of internal armed conflict.

Board[125], the acting Director of Legal Affairs states that, although the provisions in and the wording of UtlL 4:2 § is not in breach of article 15 (c) of the Qualification Directive, the statements of the *travaux préparatoires* and the previous case law of the Migration Court of Appeal must give way to the case law of the CJEU in applying the domestic provision.

The impact of the *Diakité*-judgement will be further discussed in the final section of this thesis.

4.4 Summarising protection from internal armed conflict in Swedish legislation

The practise of granting residence permits to persons fleeing armed conflict was well established prior to the introduction of the concept of internal armed conflict in Swedish legislation. However, up until amendments were made in the Aliens Act in 1997, this was done without reference to any legal right to protection. Instead, residence permits was granted on politico-humanitarian grounds.

The year 1997 saw the introduction of the concept "persons otherwise in need of protection", which constituted a protection ground for, inter alia, persons in need of such because of an external or internal armed conflict. Neither the provisions themselves nor the *travaux préparatoires* did however offer any definition of the concept of internal armed conflict to be applied.

Such definition has instead evolved within the case law of the supreme instance in Swedish asylum law. In a precedence-setting judgement from 2004, reiterated in 2007, a narrow and IHL-oriented definition was set, requiring both governmental involvement and territorial control on behalf of the opposing armed groups. These judgements has been criticised in that they lean excessively on the definition of a non-international conflict in the 1977 Additional Protocol II to the 1949 Geneva Conventions, and in that they further restrict that definition by incorporating an estimation of the effect on the civilian population in determining whether a situation is to be defined as an internal armed conflict. By doing so, the court has been said to mix the assessment of the situation at hand with the assessment of the protection needs of those fleeing.

In a judgement from 2009, the Migration Court of Appeal altered the definition previously set by the same court, and established that the requirement of territorial control and the involvement of governmental armed forces should not be regarded as decisive in determining whether an armed conflict is at hand, for the purpose of applying the relevant provisions

[125] RCI 12/2014.

of the Aliens Act. Thus, the court widened the definition but maintained an IHL-oriented approach in that it drew inspiration from the Common Article 3 of the 1949 Geneva Conventions. The alleged confusion between the assessment of the conflict at hand, and the protection needs of those affected appears to remain in the reasoning of the court.

Through the transposition of the Qualification Directive and the introduction of the concept of subsidiary protection, two separate provisions on protection from internal armed conflict came to coexist in the Aliens Act. Although the scope of the strictly domestic provision on persons otherwise in need of protection has been said to be wider, the judgements of the CJEU in the *Elgafaji*- and *Diakité*-cases have broadened the scope of article 15(c) of the Qualification Directive, and thus the scope of the provision on subsidiary protection in the Aliens Act.

5 Reflections on the impact of *Diakité*, and the future protection from internal armed conflict

The purpose of this section, as set out in the introduction of the thesis, is to analyse and discuss the consequences of the *Diakité*-judgement, and the clear departure from an IHL-based definition of the concept of internal armed conflict, which it manifests. The immediate impact on Swedish asylum law and practice will be given specific attention.

5.1 Opinions on the departure from an IHL-based approach

The wording of the *Diakité*-judgement clearly marks the CJEU's ambition to guide the national authorities and courts applying the transposed provision of QD-11 away from an IHL-based definition. At the same time, it presents a definition of internal armed conflict that does not intertwine the assessment of the conflict with its effects. Instead, the further characteristics of the conflict and its effects would form part of the sliding-scale approach to the prerequisites of indiscriminate violence and individual risk, as set out in the *Elgafaji*-judgement[126].

However, in regards of how an internal armed conflict is to be defined, arguments have also been raised in favour of an IHL-oriented approach. For instance, Storey has argued that, in interpreting the QD, IHL should be applied as *lex specialis*, or at least as a starting point, whenever the subject-matter is armed conflict[127]. The reason behind this argument seems to be that, in lacking a common, basic outline of a definition, and with nothing to put in its place, national decision-makers and courts would be encouraged to make up their own definitions[128]. This would, it was further argued, counteract the objective of preventing asylum-shopping as set out in the QD and in the CEAS as a whole[129].

After the judgement in the *Diakité*-case, the CJEU has attracted critique in that it, by creating an autonomous definition of the concept of internal

[126] Bauloz (2014), p. 839.
[127] Storey (2012), p. 25.
[128] Storey (2012), p. 28.
[129] Storey (2012), p. 30.

armed conflict, will impinge on the coherence and cohesion of the international legal order[130].

However, in contestation of the critique against an autonomous definition, it could be worthwhile to recall parts of the court's reasoning in the *Diakité*-judgement and that of the *Advocate General* in his Opinion, wherein it is argued that IHL, on the one hand, and the subsidiary protection regime introduced by the QD, on the other, pursue different aims and establish distinct protection mechanisms[131]. While IHL is designed, inter alia, to provide for protection for civilian populations in a conflict zone by restricting the effects of war, it does not provide for international protection to be granted to certain civilians who are outside both the conflict zone and the territory of the conflicting parties[132]. Consequently, the definition of an "armed conflict not of an international character" and of a "non-international armed conflict" found within IHL have not been chiselled with the purpose of identifying situations which may give rise to the need of protection under asylum law.

In essence then, it could be said that two opposing interests, or objectives, has been advocated as to whether or not to apply an IHL-based definition of the concept of internal armed conflict for the purpose of establish the protection need of those fleeing such conflict. On the one hand is the interest of coherency within the field of international law, and the predictability expected to come from a definition rooted in common international legal norms and customs. On the other hand is the emphasising of a purposive application of the QD, with the overarching ambition to offer protection to those in need.

However, as has been mentioned in a previous section of this thesis, the concept of internal armed conflict, as framed within IHL, is not univocal or permanently defined. The implications of this can be exemplified by the shifting definition of the concept as manifested by the aforementioned judgements from the Swedish Migration Court of Appeal. It would therefore appear somewhat precipitous to expect an IHL-based definition to offer predictability as to the application of the concept within asylum law.

It could further be argued that, within the realm of asylum law, the concept of internal armed conflict should essentially be considered as a term used to describe a situation, which may give rise to a protection need among those affected by it. If the purpose of the protection regime put in place by the CEAS, the Qualification Directives, and the Swedish Aliens Act, is in fact the offering of protection to those genuinely in need of it, the pragmatic approach to the concept of internal armed conflict applied in the *Diakité*-judgement would seem like a reasonable step towards achieving that purpose.

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[130] Bauloz (2014), p. 844.
[131] Case C-285/12, para. 24; *Opinion of Mr Advocate General Mengozzi delivered on 18 July 2013*, CELEX number 62012CC0285, para. 66.
[132] Case C-285/12, para. 23.

5.2 Internal armed conflict in Swedish law and practice in light of the jurisprucence of the CJEU

From a Swedish perspective, the *Diakité*-judgement marks a clear shift in the application of the domestic provisions on subsidiary protection and on persons otherwise in need of protection. The competent authorities have previously relied on a definition of internal armed conflict, established in the Migration Court of Appeal judgement MIG 2009:27, which clearly drew inspiration from IHL.

The Migration Court of Appeal has yet to apply the criteria set out in *Diakité*, but for some commentators, the prospect of the diminishing importance of the previous precedent in MIG 2009:27 would clearly be regarded as a welcome development. While Magnusson has argued that the definition of internal armed conflict as interpreted by the Migration Court of Appeal is incoherent and inadequate because it is based on the unclear and anachronistic concept of internal armed conflict in IHL[133], Stern has expressed concerns in regards of the way the Migration Court of Appeals appears to confuse the assessment of the conflict at hand, and the protection needs of those affected[134]. Whatever the core of the critique, it is obvious that the definition established in MIG 2009:27 has lost a great deal of its former authority as precedent.

Since the outcome of the *Diakité*-judgement has not yet been part of the reasoning in any precedent-setting judgement of the Migration Court of Appeal, it is however unclear how, in detail, the court will relate to the definition of internal armed conflict set in *Diakité*. It is obvious that the Migration Court of Appeal will no longer be able resort to an IHL-based definition, at least not in applying the provisions on subsidiary protection. Whether the *Diakité*-judgement will also remedy the alleged confusion as pointed out by Stern, remains to be seen. The wording of the judgement does however seem to pave way for a less confused definition, in that it only explicitly requires an appraisal of the level of violence present in the concerned territory and dismisses any further assessments of the intensity of the armed confrontations or the duration of the conflict. The appraisal of the level of violence is presumably expressly mentioned in the judgement with reference to the prerequisite of indiscriminate violence. In theory then, the Migration Court of Appeal would, in order to assess an alleged need for subsidiary protection, only need to establish the existence of armed confrontations and a level of violence that meets the criteria set out in *Elgafaji*.

[133] Magnusson (2008), p. 383.
[134] Stern (2010), p. 373.

The immediate influence of the *Diakité*-judgement on the application of the transposed provision on subsidiary protection in UtlL 4:2 § is obvious. Whether the definition of an internal armed conflict established in *Diakité* will also be adopted in applying the provision in UtlL 4:2a §, on persons otherwise in need of protection, remains to been seen. However, as there is nothing in the *travaux préparatoires* of the Aliens Act indicating an intention on behalf of the legislator to apply different definitions to the concept of internal armed conflict in the two provisions, it could probably be assumed that the definition set in the *Diakité*-judgement will also be considered relevant when applying the domestic protection ground. The aforementioned Judicial Position implies that the Swedish Migration Board is of the opinion that the definition of the *Diakité*-judgement should also be applied when assessing the protection needs of persons otherwise in need of protection[135].

It is obvious that the recent jurisprudence from the CJEU on the application of article 15(c) of the QD has somewhat blurred the lines between the provisions on protection from internal armed conflict in the Aliens Act. Following the *Elgafaji*-judgment, Feijen questioned whether it was necessary to maintain the protection ground on internal armed conflict as enshrined in the provision on persons otherwise in need of protection, since the *Elgafaji*- judgment established that there is no requirement for a strictly individualised threat in the assessment of a subsidiary protection need[136]. Thus, one of the main differences, as identified in the *travaux préparatoires*, between protection from internal armed conflict under UtlL 4:2 § and UtlL 4:2a § was made largely irrelevant. However, other differences do remain and are hitherto unaffected by the case law of the CJEU. The burden of proof must still be considered to be lower in the domestic provision on protection from internal armed conflict in UtlL 4:2a §. Further, the protection enshrined in the provision on persons otherwise in need of protection is not restricted to civilians, as is the transposed provision on subsidiary protection in UtlL 4:2 §. Hence, there would still appear to be some added value in the protection from internal armed conflict as provided by the provision on persons otherwise in need of protection.

The *Diakité*-judgement will most likely have the additional effect of narrowing the gap between what, according to the Aliens Act, is to be considered internal armed conflicts on the one hand, and other severe conflicts on the other. Through the extended scope of the provisions on protection from internal armed conflict, the importance of the provision on protection by reason of other severe conflicts in UtlL 4:2a § would seem to wither, as an increasing number of asylum seekers could be expected to qualify for subsidiary protection.

[135] RCI 12/2014, p. 5.
[136] Feijen (2014), p. 195.

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