Articles

The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence

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Abstract

This article examines the protection currently afforded in Europe to victims of armed conflict and indiscriminate violence in the context of article 15c of the EC Qualification Directive (QD) and article 3 of the ECHR. It analyses the recent case law of the Court of Justice of the European Union (CJEU), the European Court of Human Rights, and five member states (the UK, Germany, France, the Czech Republic and the Netherlands) with a view to identifying current legislation and state practice within Europe. It builds on an article by Lambert and Farrell to show how article 15c, as interpreted by the CJEU in Elgafaji, provides scope for broadening protection. It also discusses the relationship between article 3 ECHR and article 15c QD and human dignity as a core value in international protection. Finally, it considers the recent case law of European courts (both regional and national) and argues that this shows practical reasoning about the range of threats facing people fleeing conflict and violence and an awareness of a wider range of problems than previously recognized in protection cases. Nonetheless, there continues to be uncertainty regarding the threshold of indiscriminate violence required to satisfy article 15c.

1. Introduction: the limited reach of refugee law for victims of armed conflict and indiscriminate violence

The 1951 Refugee Convention1 has limited reach when it comes to victims of armed conflict and indiscriminate violence because the definition of a refugee in article 1A(2) of the Convention is primarily individualistic and focuses on discriminatory acts of persecution based on specific grounds.2 To borrow a phrase from Goodwin-Gill and McAdam, the criteria for refugee status ‘have the individual asylum seeker very much in mind’.3 The
UNHCR itself has long held the view that ‘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’. Nevertheless, in 2011, the 60th anniversary year of the 1951 Refugee Convention, the UNHCR recognized the need to update this position in order to bring it in line with current developments in law and practice. In its study ‘Safe At Last?’, the UNHCR reminded us that if the 1951 Refugee Convention and its 1967 Protocol were to be properly applied, they would address most international protection needs, including those arising in the context of armed conflict and serious public disorder.

The limitations of international refugee law in regard to persons fleeing armed conflict and indiscriminate violence lie in the word ‘if’.

In practice, states have long afforded protection against refoulement to persons fleeing from indiscriminate violence (or more accurately the indiscriminate effects of generalized violence) who fall outside the 1951 Refugee Convention framework. Based on general humanitarian principles, they became known as de facto refugees. For many years, the Council of Europe remained the main forum to tackle this issue, and for improving the situation of de facto refugees in Europe through the work of the Parliamentary Assembly and of the Committee of Ministers of the Council of Europe. The European Court of Human Rights also expanded its protection role against refoulement to a country where ‘substantial grounds’ exist for believing that a person would face a ‘real risk’ of treatment contrary to article 3 of the European Convention on Human Rights (ECHR). Their example was soon followed by UNHCR.

However, it was the war in the former Yugoslavia that led to key changes in how states dealt with victims of armed conflict and indiscriminate violence.

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4 UNHCR Handbook (1979; 2nd edn, 1992; reissued 2011) para164. Although the Handbook has not been updated since 1979, the position of UNHCR has been reflected in its annual notes on international protection and various EXCOM positions and conclusions. Thus, Notes on International Protection 1994, 1995 and 1998, as well as EXCOM Conclusion No 85 (1984), recognize war refugees as possible refugees. Storey and Wallace have referred to this state of affairs as the ‘exceptionality approach’, namely, refugee jurisprudence has tended to exclude these claims from the scope of protection under the Refugee Convention, save in exceptional circumstances. See, H Storey and R Wallace, ‘War and Peace in Refugee Law Jurisprudence’ (2001) 95 AJIL 349; and, H Storey, ‘Armed Conflict in Asylum Law: The “War-Flaw”’ (2012) 31 RSQ 1–32.


6 UNHCR, ‘Safe At Last? Law and practice in selected EU Member States with respect to asylum-seekers fleeing indiscriminate violence’ (Geneva, July 2011) at 9.

7 The terminology varies from country to country: B-status, Duldung, war refugees, victims of violence, de facto refugees, etc. See, H Lambert, Seeking Asylum – Comparative Law and Practice in Selected European Countries (Martinus Nijhoff Publishers, 1995).


The war ‘resulted in the largest displacement of refugees into western Europe since the Second World War’.

Many of the displaced did not qualify for refugee status, yet they could not be sent back because of ‘compelling humanitarian reasons’. Despite overwhelming evidence of ethnically-based persecution, many Bosnians were considered to be fleeing a generalized threat of violence, and to comprise a “mixed” population of refugees and other vulnerable migrants. Hence, a political compromise had to be found; a policy of ‘temporary protection’ was developed and was implemented in most European states as a way to suspend or by-pass normal asylum procedures.

It has been argued that ‘state interests, rather than a broader international responsibility, have largely determined the response to Bosnians in the EU’. Temporary Protection may not therefore be ‘a useful benchmark against which to measure the acknowledgement of [European states] humanitarian obligations’ in the post-cold war. Indeed, beyond Bosnia, Temporary Protection did extend to Kosovo (albeit on a smaller scale) but that is all. Temporary Protection therefore appears to have been a specific response arising out of specific circumstances. It has not been generally extended to asylum seekers who arrived with Bosnians, or who have arrived from other countries since. The only exceptions to this have been very specific populations arriving in France, for example, Algerians fleeing attacks by Islamic fundamentalists, or individuals from Rwanda arriving after the genocide in 1994.

On 20 July 2001, EU member states formally adopted the EC Directive on Temporary Protection; the first of five key Directives to be adopted that form the EU acquis on asylum law. The Temporary Protection Directive enables the Council of Ministers of the EU to act, by qualified majority, in situations involving a mass influx of displaced people by triggering an exceptional yet immediate protection mechanism. As of today, the Directive on Temporary Protection has never been used.

Subsidiary protection, introduced in the EU by the Qualification Directive in 2004, is therefore a key tool for victims of conflict and

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11 ibid, 522.

12 ibid, 526.

13 ibid, 532.

14 ibid, 533.


16 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 (OJEU, 30 Sept 2004, L304/12). This Directive has recently been amended to provide for higher and common standards (as opposed to minimum standards): see now, 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) (OJEU, 20 Dec 2011, L337/9).
violence seeking refuge in the EU. Its distinguishing feature, in comparison to Temporary Protection, is that it is granted following individual status determination, rather than in a mass influx situation. At first, subsidiary protection was intended to benefit persons from countries outside the EU who did not fall within the scope of the Refugee Convention\textsuperscript{17} but who still had need of international protection, namely, under article 3 ECHR/article 3 Convention Against Torture (CAT), the 1949 Geneva Conventions and 1977 Protocols, and under certain other environmental and compassionate reasons. As McAdam puts it, the QD was ‘not intended as a radical overhaul of protection, but as a codification [and clarification] of existing State practice’.\textsuperscript{18} However, due to a climate of restrictive interpretation of existing practices, the scope of beneficiaries of subsidiary protection was subsequently narrowed down,\textsuperscript{19} casting doubt as to whether the QD would lead to more people being granted protection in the EU.\textsuperscript{20}

According to the QD, article 2(e) (now article 2(f)), subsidiary protection is to be granted to ‘a third country national or 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 … would face a real risk of suffering serious harm as defined in article 15 …’.\textsuperscript{21} ‘Serious harm’ is defined in article 15 as: (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.

Looking more closely at article 15c, ‘serious harm’ in this context is defined in terms of ‘threat’. The ‘threat’ in question must be ‘serious and individual’ in nature, it must focus on a ‘civilian’s life or person’, and it must be caused by ‘indiscriminate violence’ in circumstances ‘arising in situations of armed conflict’.

This article examines the protection currently afforded in Europe to victims of conflict and violence in the context of article 15c QD as applied by decision makers. It analyses recent case law from the Court of Justice

\textsuperscript{17} For instance, because their fear of being persecuted was unrelated to one of the five grounds listed in art 1A(2) of the Refugee Convention, as evident from the Explanatory Memorandum to the original Commission’s Proposal on a qualification directive, COM(2001)510 final, Brussels, 12 Sept 2001, art 11(2)(c) on the nature of persecution (‘it is immaterial whether the applicant comes from a country in which many or all persons face the risk of generalized oppression’), at 21.

\textsuperscript{18} McAdam, Complementary Protection, above n 9, 56. See also, Explanatory Memorandum, original Commission’s Proposal for a qualification directive, COM(2001) 510 final, Brussels, 12 Sept 2001, 5–6.

\textsuperscript{19} Member states notably have retained much discretion in their treatment of persons allowed to remain for compassionate or humanitarian reasons (QD, Recital 9; recital 15 recast); see also, art 11(2) (c) in the original Commission’s proposal COM(2001) 510 final, relating to persecution (see, above n 15), which disappeared entirely from the text of the Directive adopted in 2004.

\textsuperscript{20} McAdam, Complementary Protection, above n 9, 56.

\textsuperscript{21} Both art 2(e) and art 15 remain untouched by the Recast Directive 2011/95/EU, except that art 2(e) has now become art 2(f).
of the European Union (CJEU) and from five member states with a view to identifying current legislation and state practice. The UK, Germany, France and the Netherlands have been selected as case studies because each has well-developed case law on article 15c. The Czech Republic appears to be developing embryonic case law on article 15c and this case study is added as a comparison. In the case of the UK, Germany and France, discussions with senior decision makers were also held during the last three years to broaden an understanding of the cases and legal reasoning. This article builds on an article by Lambert and Farrell to show how article 15c, as interpreted by the CJEU in *Elgafaji*, provides scope for broadening protection. It also discusses the relationship between article 3 ECHR and article 15c QD.

This article is not arguing that victims of conflict and violence seeking protection in Europe should be considered for subsidiary protection under article 15c QD instead of refugee protection under article 1A(2) of the 1951 Refugee Convention, since the latter has and should continue to have primacy over the former. Rather, it tackles a true reality: in the many cases where victims of conflict and indiscriminate violence find themselves falling outside the scope of article 1A(2), the automatic default option is that offered by article 15c, at least in the twenty-six EU member states that have implemented article 15c. It matters greatly how the EU member states and the CJEU interpret legal provisions relating to the protection of victims of conflict and violence, not least because of recent evidence of the emulation of European refugee law and practice in countries around the world. Whereas in Europe, the ECHR offers very real added protection to victims of conflict and violence who meet neither the requirement of the refugee definition (article 1A(2) Refugee Convention) nor of article 15c QD, this is not the case in other regions.

The article is divided into a further four parts. Part 2 starts by asking the question: Is there room for broadening protection under article 15c QD and, if so, where? Part 3 considers current strategies for providing protection to victims of conflict and violence based on existing courts’ and
tribunals’ decisions in five EU member states. This case law shows both similarities and differences in the assessment of indiscriminate violence and the nature of an armed conflict. Having examined the position of the Luxembourg Court and its application by domestic courts in parts 2 and 3, part 4 examines the view of Strasbourg on article 3 ECHR protection and its linkage with article 15c protection. Finally, the article concludes by arguing that current thinking on conflict, based on an expanding understanding of violence and security, finds some representation in the British, French and Dutch case law (less so perhaps in that of the German courts, and it is too early to say in the case of the Czech Republic). This current thinking is also reflected in the recent jurisprudence of the European Court of Human Rights relating to article 3 ECHR.

2. Is there room for broadening protection under article 15c and if so where?

In the first (and so far only) preliminary ruling reference to have been made to the European Court of Justice (ECJ)26 on the interpretation of article 15c QD,27 the Court was asked to consider the apparent contradiction28 of two terms: that of ‘serious and individual threat’, on the one hand, and ‘indiscriminate violence’, on the other. More specifically, the Court was asked to answer two questions referred by the Dutch Council of State relating to the scope of subsidiary protection granted by article 15c: does article 15c offer supplementary or merely equivalent protection to article 3 ECHR? If supplementary, what are the criteria for eligibility for protection under article 15c?

The Court first ruled that article 15c has something more to offer than article 15b (which in essence corresponds to article 3 ECHR) or article 15a (on death penalty or execution); ‘Article 15c is an autonomous concept whose interpretation must be carried out independently and without prejudice to fundamental rights as guaranteed by the ECHR’.29 Secondly, the Court ruled that the harm defined in article 15c, namely a serious and individual threat to a civilian’s life or person, ‘covers a more general risk of harm’ than the harm defined in article 15b, for instance, which refers to more specific acts of violence, namely torture, inhuman or degrading treatment or punishment in

26 Note that following the entry into force of the Lisbon Treaty (1 Dec 2009), the ECJ has been renamed the Court of Justice of the European Union (CJEU).
27 Elgafaji, above n 22.
the country of origin. Finally, the Court sought to explain the link between ‘individual threat’ and ‘indiscriminate violence’. ‘Individual’, the ECJ held, must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterizing the armed conflict taking place, as assessed by the competent national authorities, ‘reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive’. The Court nonetheless recognized ‘the exceptional nature of that situation’ (emphasis added). That said, the Court linked ‘individual threat’ and ‘indiscriminate violence’ together with regard to the standard of proof. The Court ruled that ‘the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection’. It follows that ‘the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances’. Finally, in the individual assessment of an application for subsidiary protection, account may be taken of ‘the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he is returned to the relevant country’ and of any past persecution or serious harm or direct threats of such persecution or harm.

In sum, the interpretation of the word ‘individual’ in article 15c by the ECJ means that there is no need for the applicant to demonstrate that s/he is individually or ‘specifically’ targeted in order to enjoy the protection of article 15c. Rather, the importance of article 15c as interpreted by the

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30 Elgafaji, ibid, paras 32–4.
31 ibid, paras 35 and 43.
32 ibid, paras 37–8.
33 ibid, para 39.
34 ibid, para 43. This is in stark contrast with some domestic courts’ restrictive interpretation of art 1A(2) of the Refugee Convention, according to which persons fleeing armed conflicts or civil wars or situations of generalized violence must demonstrate that they are specifically targeted or differentially at risk. E.g., R v Secretary of State for the Home Department, ex parte Adan and Aitseguer, House of Lords, judgment of 19 Dec 2000, [2001] 1 All ER 593.
35 Elgafaji, ibid, para 40.
36 This is also the current position of the European Court of Human Rights since Salah Sheekh v The Netherlands, application no 1948/07, judgment of 11 Jan 2007, see, in particular, Nil v United Kingdom, application no 25904/07, judgment of 17 July 2008, and Sufi and Elmi v United Kingdom (applications nos 8319/07 and 11449/07, judgment of 28 June 2011), even though, for a number of years, the Strasbourg Court required the showing of ‘special distinguishing factors’ (see, Vilvarajah and others v United Kingdom, application nos 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, judgment of 26 Sept 1991, and Sultani v France, application no 45223/05, judgment of 20 Sept 2007). This position is discussed fully in part 4 below.
ECJ is its ability to provide protection from serious risks, which are situational rather than individual. Yet, not every armed conflict or violent situation will attract the protection of article 15c; only those where the degree or level of violence is sufficiently high for any civilians to face a real risk to their life or personal safety simply by being there (the ‘exceptional situation’). The ECJ made it clear in this case that the key element in article 15c is the degree or level of indiscriminate violence characterizing the armed conflict – it is not the existence in International Humanitarian Law (IHL) of an armed conflict. Crucially, the ECJ failed to clarify what this level should be, instead, leaving it to the discretion of the national judge to assess ‘the turning point at which indiscriminate violence becomes an exceptional situation’. This suggests there is room for broadening (or narrowing) the scope of protection under article 15c. It also raises two key issues of procedure: how to assess conflict severity and the seriousness of risks to individuals.

Going back to the debates during the drafting of article 15c provision, McAdam notes that the words ‘indiscriminate violence’ came to be inserted to reflect state practice of granting some form of complementary protection to persons fleeing the indiscriminate effects of armed conflict or generalized violence without a specific link to the Refugee Convention grounds. The words ‘indiscriminate violence’ in article 15c also reflect ‘in part Member States’ obligations under the Temporary Protection Directive and the Council of Europe’s Recommendation (2001) 18 of the Committee of Ministers on Subsidiary Protection [...] as well as EU Member States’ repeated support for UNHCR’s mandate activities for victims of indiscriminate violence (linked to other regional agreements such as the OAU Convention and the Cartagena Declaration).

However, the expression ‘arising in situations of armed conflict’ in article 15c is not reflected in Recommendation (2001) 18 on Subsidiary

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37 In 2010, the UNHCR submitted to the UK Court of Appeal in QD and AH (Iraq) v Secretary of State for the Home Department, [2009] EWCA Civ 620, 24 June 2009, that within the context of art 15c, the ‘more general risk of harm’ to a civilian’s life or person should include: (1) all forms of physical and psychological harm, if they are sufficiently serious; (2) threats of indefinite arbitrary detention; and potentially (3) threats of flagrant breaches of human rights as protected by arts 9, 10, 11 and 14 ECHR (UNHCR written submissions, annexed to the CA judgment, paras 49–55).

38 IHL requires a minimum level of intensity of violence, before a conflict can be classified as a non-international armed conflict (NIAC) (Common art 3); it does not generally require this element for international armed conflicts (IAC). In both cases, however, the parties involved in the conflict are essential elements under IHL: these must demonstrate a certain level of organization (NIAC) or must be states (IAC). ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, Paper 31IC/11/5.1.2, October 2011, 6–7. A preliminary ruling has been requested by the Belgian Council of State on the interpretation of ‘internal armed conflict’ in art 15c QD, particularly as to whether or not this interpretation should be independent of Common art 3 of the four Geneva Conventions of 12 August 1949 (Case C-285/12, Aboubacar Diakite v commissaire général aux réfugiés et aux apatrides, 7 June 2012).


40 McAdam, Complementary Protection, above n 9, at 71.
Protection, which lists armed conflicts as just one example of indiscriminate violence posing a threat to ‘life, security or liberty’. It can also be contrasted with the EC Temporary Protection Directive which protects: (a) persons who have fled areas of armed conflict or endemic violence; and, (b) persons at serious risk of, or who have been the victims of, systematic or generalized violations of their human rights.

The scope of article 15c QD is therefore narrower than the practice of states enshrined in Recommendation 18 and in the Temporary Protection Directive.

This part has argued that the Elgafaji ruling creates room for broadening protection under article 15c. Part 3 evaluates the extent to which the domestic courts in the five EU case study states have followed this lead.

3. Current strategies to provide protection to victims of conflict and violence: the United Kingdom, Germany, France, the Czech Republic and the Netherlands compared

Since the ECJ gave its ruling in the Elgafaji case, the domestic courts have grappled with the question: when does indiscriminate violence reach such a ‘high level’ that the article 15c requirement is met solely by a civilian being present in that territory? In doing so, national courts have vacillated between the character of armed conflict and the related concept of ‘indiscriminate violence’ and the nature of armed conflict in IHL. In a previous article, four metrics for assessing conflict severity and the resulting violence were examined: battle deaths, civilian casualties, population displacements, and state failure. Asylum courts have generally referred to battle deaths and civilian casualties as traditional measures. The changing character of war, with the blurring of military and civilian actors and spaces, implies that civilian casualties will be a more significant element than battle deaths in measuring war severity. Yet, the last two elements are equally important in a ‘new wars’ context: population displacement and state failure. Indeed, these seem more appropriate metrics as a guide for

41 ibid, 77.
42 ibid.
43 Lambert and Farrell, above n 22, at 256–66. See also, ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, Paper 31IC/11/5.1.2, Oct 2011, 7–8, referring to the following factors for assessing violence in the context of common art 3: ‘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’ (emphasis added).
applying article 15c than the traditional ones, given that the interpretation of article 15c is to be driven by objectives in the Preamble, such as, Recital 16 Directive 2011/95/EU, which stresses human dignity (also a fundamental Charter right – article 1). Furthermore, ‘Human dignity is one of the core values underpinning the Refugee Convention and international protection’. These two metrics are particularly relevant to this article in that they draw attention precisely to the need to engage in practical reasoning about the range of threats faced by victims of indiscriminate violence and conflict as victims of violations of human dignity.

3.1 Testing the threshold of ‘indiscriminate violence’ in the United Kingdom

The QD has been incorporated in the UK by the Refugee or Person in Need of International Protection (Qualification) Regulations SI 2006/2525 and the Statement of Changes in Immigration Rules, Cm6918.

The UK Immigration Rules, paragraph 339C, provide a slightly different wording of ‘serious harm’ compared to article 15: (i) the death penalty or execution; (ii) unlawful killing; (iii) torture or inhuman or degrading treatment or punishment of a person in the country of return; or (iv) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

According to the original Asylum Policy Instruction (API) on ‘Humanitarian Protection’ (which is ‘Subsidiary Protection’ in the UK), article 15c was described as a ‘narrow category’ and humanitarian protection as only likely to be granted on this basis in exceptional circumstances. However, a new API – three pages long – was released in September 2010 specifically dealing with article 15c, suggesting that this ground is growing in application and therefore in interest amongst case workers and courts.

According to this API, a Border Agency case worker dealing with an asylum applicant must first consider whether the applicant qualifies for refugee status. If the applicant does not, consideration must be given to whether s/he qualifies for humanitarian protection (first on ECHR grounds, namely, death penalty, execution, and torture, inhuman or degrading treatment or punishment; and second on the ground of indiscriminate violence). If s/he does not, consideration must last be given to whether s/he qualifies for discretionary leave.
The test for the ‘indiscriminate violence’ ground is based on the ECJ ruling in *Elgafaji* and the UKCA judgment in *QD and AH (Iraq)*,\(^{49}\) and is as follows:\(^{20}\)

Is there in [Country X] or a material part of it such a high level of indiscriminate violence that substantial grounds exist for believing that an applicant would, solely by being present there, face a real risk which threatens his life or person?

The test comprises several elements (based on the case law discussed below). The test applies only to civilians, who ‘must be genuine non-combatants’. ‘The reference to a “material part” is a reference to the applicant’s home area or, if appropriate, any potential place of internal relocation’ (therefore the normal rules on internal relocation should be applied). There must be ‘a serious threat of real harm’ (fear alone is not sufficient to fall within this test). With regard to the life or person element, and for the purpose of the test, ‘the level of harm that must be demonstrated may be considered to be equivalent to the level of harm that would be necessary to establish a breach of article 3 ECHR [therefore degrading treatment or punishment as a minimum threshold], although the type of harm may be different’. Armed conflict has an autonomous meaning broad enough to cover any situation of indiscriminate violence, whether caused by one or more factions or by a state, so long as the threshold of violence is met. The focus is on the level of violence that characterizes the armed conflict (not on the nature of the conflict). Indiscriminate violence is considered to be ‘the converse of consistency; it carries the risk of random death or injury’ (for example, a car bombing in a market place, or snipers firing at people in the street).

It is envisaged that indirect consequences of indiscriminate violence (for example, criminal violence/activities or food shortage) could come within the scope of indiscriminate violence, provided they are ‘an effective cause’, that is, they are more closely connected than remotely. In addition, any such indirect consequences would still need to meet the threshold of the level of violence (and not all criminal activities would meet that threshold). Finally, the test just described may also be applied on a sliding scale for ‘enhanced risk categories’ of individuals. Thus, the more the applicant is able to show that he is specifically affected by factors particular to his personal circumstances (for example, age, disability, gender, ethnicity or by virtue of being a perceived collaborator, teacher or government official), the lower the level of indiscriminate violence required for him to be eligible. In applying the test on a sliding scale, the caseworker may in fact decide to grant refugee status rather than humanitarian protection (that is, subsidiary protection).\(^{51}\)

\(^{49}\) *QD and AH (Iraq)*, above n 37. See discussion below.


\(^{51}\) The API explicitly provides for, amongst others, claims based on the sliding scale and/or claims based on the indirect consequences of indiscriminate violence to be referred to Senior Caseworkers and/or their senior management.
Looking more explicitly at the case law, the Court of Appeal in *QD and AH (Iraq)*\(^{52}\) clarified the following five points. One, IHL does not apply to the meaning of serious harm in article 15c, accordingly ‘situations of international or internal armed conflict’ has an autonomous meaning\(^{53}\) – this is because of the differences in the object and purpose of international refugee law and IHL. Two, article 15c is concerned with ‘serious threats of real harm’, however, there is no requirement that there be any ‘consistent pattern’ of mistreatment since “[t]he risk of random injury or death which indiscriminate violence carries is the converse of consistency”.\(^{54}\) Three, for the purpose of article 15c, it is possible to have an armed conflict in one area of a country, when other parts of the country are free of it, and, even in an area of internal armed conflict, there may be parts within that area where the high levels of indiscriminate violence needed to obtain protection are not achieved.\(^{55}\) Four, it does not matter whether the source of the violence is two or more warring factions or a single entity or faction.\(^{56}\) Five, in cases of armed conflict, the key, determining element should be the intensity of indiscriminate violence – which is not the same thing as the requirement that the armed conflict be exceptional. Such intensity may be evidenced by a worsening of the security situation or a deterioration of the humanitarian situation as characterized by mass displacement.

Following *QD and AH (Iraq)*, the UK Asylum and Immigration Tribunal (as it was then called) considered the case of *GS Afghanistan*,\(^{57}\) and held that the difference between discriminate and indiscriminate violence is an issue of fact to be considered on a case by case basis.\(^{58}\) It explained that, in principle, there is no reason why criminal acts should not be included in the scope of indiscriminate violence, and, subject to there being a sufficient causal link between the threat to life or person and the indiscriminate violence, there is no need for the indiscriminate violence to be caused by one or more armed factions or by the state.\(^{59}\) Whether indirect consequences of indiscriminate violence can be sufficient to bring a person within article 15c will be a question of fact in each case.\(^{60}\) In this case, the AIT, with reference to Preamble 26 of the QD, considered that food supply problems in Afghanistan generally were too remote from the indiscriminate violence to be causally linked, but that arguably if a village population had to flee, owing to indiscriminate bombing, to an area

\(^{52}\) *QD and AH (Iraq)*, above n 37.
\(^{53}\) Ibid, para 18.
\(^{54}\) Ibid, paras 31–2.
\(^{55}\) Ibid, para 36.
\(^{56}\) Ibid, para 35.
\(^{57}\) *GS Afghanistan*, above n 45.
\(^{58}\) Ibid, para 62.
\(^{59}\) Ibid, para 65.
\(^{60}\) Ibid, para 67.
where they could not access food, there could be a sufficient causal nexus between the harm and the indiscriminate violence, bringing the person within the scope of article 15c.\(^{61}\)

The Court of Appeal dealt again with article 15c, and specifically danger arising from generalized or indiscriminate violence, in \(\text{HH (Somalia)}\).\(^{62}\) It applied the ECJ ruling in \(\text{Elgafaji}\) to the extent that article 15c protection is not to be equated to article 3 ECHR protection and that it is not necessary for an applicant ‘to demonstrate “differentiation” between her situation and that of the population at large’.\(^{63}\) It explained that the expression ‘a sufficient differentiator’ or ‘differentiation’ is too ‘redolent of the language used in the refugees and article 3 ECHR cases where the applicant must show personalized or targeted risk factors’\(^{64}\) and thus may not be appropriate in article 15c cases.\(^{65}\) Yet, the Court of Appeal recognized that when examining the increased risk of indiscriminate violence, which follows from being a woman, ‘it may still be said that the process is one of “differentiation”’. Henceforth, the expression may not be appropriate but it does not invalidate the tribunal’s reasoning. The UK Court of Appeal also considered the issue of justiciability of the route of return and held that ‘where the route and manner of return are known or can be implied, the first tier tribunal must consider whether the applicant would be put at risk if returned by that route’.\(^{66}\) It further held obiter dicta that ‘the tribunal must always consider that question whenever the applicant puts it in issue’.\(^{67}\)

Finally, in its latest Country Guidance, \(\text{HM and Others (Iraq)}\),\(^{68}\) the Upper Tribunal, Immigration and Asylum Chamber (as it is now called) decided the following eight points. One, seeking to distinguish between a real risk of targeted and incidental killing of civilians during armed conflict (as in \(\text{GS Afghanistan}\)) is not a helpful exercise in the context of article 15c.

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\(^{61}\) ibid, paras 69–70. Note that this scenario was recently the subject of a ruling by the European Court of Human Rights on the basis of art 3 ECHR. In \(\text{Sufi and Elmi}\), above n 36, the European Court of Human Rights found the living conditions in the main refugee camps in Somalia and neighbouring Kenya to be so dire that for the UK to return a person to these camps (indirectly, by application of the internal flight alternative) would breach art 3 ECHR (see, part 4 below). On the issue of responsibility sharing between the host state and the UNHCR for the treatment of refugees and IDPs in camps, see, G Verdirame, \(\text{The UN and Human Rights: Who Guards the Guardians?}\) (CUP, 2011); and, M Janmyr, ‘Protecting Civilians in Refugee Camps – Issues of Responsibility and Lessons from Uganda’, PhD Thesis, University of Bergen, June 2012.

\(^{62}\) \(\text{HH (Somalia) and Others v SSHD}\) [2010] EWCA Civ 426 (23 Apr 2010).

\(^{63}\) ibid, para 31.

\(^{64}\) This may still be so in the domestic courts, but not in the European Court of Human Rights since the \(\text{Salah Sheekh}\) and \(\text{NA}\) cases, see above n 36.

\(^{65}\) \(\text{HH (Somalia)},\) above n 62, para 38.

\(^{66}\) ibid, para 122.

\(^{67}\) ibid, para 122.

\(^{68}\) \(\text{HM and Others (Iraq) v SSHD CG (UNHCR Intervener)}\) [2010] UKUT 331 (IAC) (10 June 2010). Note that this determination has since been confirmed in \(\text{HM and Others (Iraq) CG v SSHD}\) [2012] UKUT 409 (IAC) [HM2].
nor does it reflect the purposes of the Directive.\footnote{ibid, para 73. See also, UNHCR Submission in the \textit{QD and AH (Iraq)} case, above n 37, before the \textit{UKCA}, Annexure 1, para 45.2.} Two, a non-inclusive approach to the assessment of violence must be regarded as flawed; civilians can be adversely affected by violence whatever its source, for instance, there can be a significant overlap between criminal and military violence.\footnote{ibid, para 75.} Three, the term ‘life or person’ must extend to significant physical injuries, serious mental traumas and serious threats to bodily integrity.\footnote{ibid, para 76.} Four, it agreed with \textit{GS Afghanistan} (following \textit{AM and AM (Somalia)})\footnote{\textit{AM and AM (Somalia)} CG [2008] UKAIT 00091 (27 Jan 2009).} that the nexus between the generalized armed conflict and the indiscriminate violence posing a real risk to life and person is met when the intensity of the conflict involves means of combat (whether permissible under IHL or not) that seriously endanger non-combatants as well as resulting in such a general breakdown of law and order as to permit anarchy and criminality occasioning the serious harm referred to in the Directive. Such violence is indiscriminate in effect even if not necessarily in aim; endorsing the finding of the French \textit{Conseil d’Etat} in \textit{Baskarathas} that it is not necessary for the threat to life or person to derive from protagonists in the armed conflict in question: it can simply be a product of the breakdown of law and order.\footnote{ibid, para 80. See also \textit{HH and Others (Somalia)} v SSHD, AIT decision.} Five, a clear prediction of when a particular individual will become the victim of indiscriminate harm is not required; all that is necessary is that there are substantial grounds for considering that there exists a serious threat of real harm, which is equivalent to assessing whether the scale of the harm is substantial because of the intensity of the conflict as it is waged at the relevant time.\footnote{ibid, para 82.} Six, the starting point of article 15c is indiscriminate violence in a situation of armed conflict;\footnote{ibid, para 88.} armed conflict and indiscriminate violence are not terms of art governed by IHL, but are terms generously applied according to the objects and purpose of the Directive to extend protection as a matter of obligation in cases where it had been extended to those seeking to avoid war conflict zones as a matter of humanitarian practice.\footnote{ibid, para 89.} Seven, the rules of IHL may nonetheless be of assistance as to when violence goes beyond casual criminality and becomes armed conflict.\footnote{ibid, para 90.} Eight, population displacement and state failure may be factored into the overall assessment of the intensity of a conflict, in addition to battlefield death and civilian casualties, provided there is a sufficient, although not necessarily exclusive, causal nexus between the violence arising from the
conflict and the harm suffered, for example, exposure to criminal violence, or destruction of the necessary means of living.78

It may be recalled that the UK incorporated a slightly different version of article 15 by providing humanitarian protection (that is, subsidiary protection) to anyone who can show a real risk of ‘unlawful killing’ if returned to their country of origin (Immigration Rules 339C). This has been described as ‘an example of the UK retaining, rather than introducing, a more favourable standard for determining who qualifies as a person eligible for subsidiary protection’ based on ‘pre-Directive UK’ practice of granting humanitarian protection.79 Protection against ‘unlawful killing’ refers to protection from a real risk of targeted deprivation of life in breach of article 2 ECHR; it excludes ‘the deprivation of life resulting from the use of force which is more than absolutely necessary in defence of any person from unlawful violence …’.80 As noted by Symes and Jorro, ‘Interestingly … a person is eligible for humanitarian protection under this heading of serious harm if at real risk of being killed if returned to a war or conflict zone’.81 Hence, there is a clear overlap between ‘unlawful killing’ and ‘threats’ for reason of ‘indiscriminate violence in situations of international or internal armed conflict’ as grounds for humanitarian protection (or subsidiary protection) in the UK.

3.2 Testing the threshold of ‘indiscriminate violence’ in Germany

The Federal Administrative Court of Germany recently confirmed its previously held view that in examining whether an internal armed conflict exists, within the meaning of article 15c, as transposed in German law, IHL shall be taken into account on the ground that Recitals 11 and 25 of the Preamble to the QD refer to international law when interpreting provisions of the Directive.82 The Federal Court explained that it ‘adheres to this approach even in light of the judgment issued in the meantime by the European Court of Justice’ in Case C-465/07 (Elgafaji).83 It also took note of the position of the UK courts vis à vis article 15c, namely, the UKCA judgment in QD and AH (Iraq).84

79 Symes and Jorro, Asylum Law and Practice, above n 47, 523.
80 ibid, 522.
81 ibid.
82 BV erwG 10 C 4.09, judgment of the Tenth Division of 27 Apr 2010, para 22. Particularly the four Geneva Conventions of 12 Aug 1949, including Additional Protocols I and II of 8 June 1977. This confirms the view held in BV erwG 10 C 9.08, judgment of the Tenth Division of 14 July 2009.
83 BV erwG 10 C 4.09, ibid, para 22.
The Federal Court then proceeded to qualify its adoption of the requirements of article 1 Protocol II as ‘by no means … unconditional’, referring to International Criminal Law as equally relevant in the interpretation of the concept of an internal armed conflict. It recognized that a reading of article 15c through the lens of IHL would mean that, ‘at the lower end of the scale’, cases of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, cannot be considered as internal armed conflict (article 1(2) Protocol II). However, ‘at the other end of the scale’, such a conflict would most definitely exist if the criteria of article 1(2) Protocol II were satisfied (namely, a conflict between a state’s armed forces and dissident armed forces or other organized armed groups that, under responsible command, exercise control over a part of the territory enabling them to carry out sustained and concerted military operations).

According to the Federal Court, conflicts falling between these two ends of the scale are not automatically excluded from the scope of article 15c of the Directive, such as, for example, civil-war disputes and guerilla warfare. However, in such cases, the conflict must demonstrate a certain degree of intensity and constancy. Thus, the requirements of IHL (for example, that the parties be organized, effective control, etc.) do not necessarily have to be met. It may suffice ‘if the parties to the conflict are able to carry out sustained and concerted acts of combat of such intensity and constancy that the civilian population is thereby typically also caused to suffer significantly’. The existence of one of these characteristics may nonetheless be a significant indicator of the intensity and constancy of the conflict. In this context, the Federal Administrative Court made a point of referring to the recent British case law on this subject that allows for the different objectives of IHL and international protection under the QD to be preserved without making IHL entirely superfluous.

Hence the Federal Court found the fact that the lower court (Higher Administrative Court) had made no explicit findings as to the degree of organization of the Taliban not to have an adverse effect; ‘the established military strength and “successes” of the Taliban in parts of Afghanistan’ raised ‘no doubt of the existence of a sufficiently intense and sustained armed conflict’.

85 ibid, para 23.
86 Rutinwa has argued that since forced displacement of individuals/population is a serious crime under ICL and IHL, no doubt amounting to persecution, anyone fleeing an armed conflict should be granted refugee protection under art 1A(2) of the Refugee Convention. This reasoning can be extending to art 15c protection since such crimes would also constitute ‘serious harm’ under art 15. B Rutinwa, ‘Refugee Claims Based on Violation of International Humanitarian Law: The “Victim’s” Perspective’ (2000–2001) 15 Georgetown Immigration Law Journal 497–517.
87 BV erwG 10 C 4.09, above n 82, para 23.
88 ibid.
89 ibid, para 24.
90 ibid, para 25.
However, the Federal Court found a lack of sufficient proof that upon his return to Afghanistan the applicant would be subject, as a civilian, to a serious individual threat to his life or person by reason of indiscriminate violence. Following *Elgafaji*, if personal circumstances increasing risk are present, a lower level of indiscriminate violence will suffice. These factors that increase risk include mainly those personal circumstances that make the applicant appear more severely affected by general, non-selective violence, for example, a person who is forced by reason of his profession (for example, a physician or a journalist) to spend time near the source of danger. However, they also include (according to the Federal Administrative Court) personal circumstances by reason of which the applicant, as a civilian, is also subject to the danger of selective acts of violence (for example, religious or ethnic affiliation) if s/he is not already recognized for refugee status on these grounds.

In a statement that appears to contradict *Elgafaji*, the Federal Court then held: ‘even in the case of personal circumstances that increase danger, a high level of indiscriminate violence or a high density of danger to the civilian population must be found in the region in question’. Such a level of violence may be evidenced by quantitative determination, such as the number of civilians living in the area concerned, the number of acts of indiscriminate violence committed by the parties to the conflict against the life or person of civilians in the region, and the number of victims and the severity of casualties (death and injuries) among the civilian population. However, a limitation to the acts of violence that violate IHL (meaning that unforeseeable collateral damage, for example, would not count among such acts) cannot be deduced from article 15c; ‘other acts of violence’ (which implicitly would include criminal activities) may also be relevant. It is nonetheless clear from a previous judgment that the minimum threshold for the severity of indiscriminate violence is not met in cases of threats deriving from the destruction of the necessary means of survival, even if due to an armed conflict, even though consideration of access to minimum livelihood are relevant in the context of an internal flight alternative.

The Federal Court therefore sent the case back to the lower court for a full finding of the level of indiscriminate violence or density of danger required, which was found to be missing in the appealed decision.

91 Ibid, para 33.
92 See, for an application of these quantitative elements in assessing a sufficient level of violence, High Administrative Court Bayern 13a B 10.30934, 3 Feb 2011.
93 See also, UKCA in *QD and AH (Iraq)*, above n 37.
94 BVerwG 10 C 4.09, above n 82, para 34.
95 BVerwG 10 C 43.07, 24 June 2008. See also Manheim Higher Administrative Court, 8 Aug 2007, A2S 229/07, NVwZ 2008, 447–9 (‘At the same time, this court remarks that from its viewpoint the general threats to life that are purely a consequence of an armed conflict – for example, through a resulting deterioration in supply conditions – cannot be included in the assessment of the density of danger’ – cited in BVerwG, 20).
96 BVerwG 10 C 43.07, ibid. BVerwG 10 B 7.10, 14 July 2010.
The Federal Administrative Court returned to this issue concerning evidence of the level (or ‘density’) of violence in a case on Afghanistan. In this case, the Court explicitly stated in its reasoning that it is not sufficient to determine quantitatively the number of victims in the conflict. An assessment under article 15c requires an overview evaluation of the situation. Such an ‘evaluating overview’ should not only include the number of victims, but also the severity of harm caused by factors such as the condition of the health system and access to medical care. Thus, a quantitative determination of the number of victims in the conflict remains the starting point for measuring the level of violence, but this is to be followed by a qualitative determination. This qualitative assessment seeks to assess the extent to which the harm caused to the victims is increased by the lack of access to medical care and by the lack of a functioning health system.

3.3 Testing the threshold of ‘generalized violence’ in France

‘Subsidiary protection’ was introduced in France following the transposition of the provisions of the QD in the Act of 10 December 2003, incorporated into the Immigration and Asylum Code (Code de l’entrée et du séjour des étrangers et du droit d’asile, or Ceseda 2003). Article L.712-1 Ceseda provides that OFPRA shall grant subsidiary protection to asylum seekers who do not meet the requirements laid down by the refugee definition but who have proved that they could be exposed to one of the following serious threats (menaces graves):

[…] (c) serious, direct and individual threat to a civilian’s life or persons by reason of generalized violence (violence généralisée) in situations of international or internal armed conflict.

According to the decisions of the Cour Nationale du Droit d’Asile (CNDA), ‘generalized violence’ constitutes a necessary, defining element of internal armed conflict; it characterizes it. ‘Generalized violence’ is used to indicate the existence of an armed conflict of a sufficient level of intensity to meet the Elgafaji threshold. Other elements, such as forced displacement and other violations of IHL against civilians, and/or the organization of a
conflict and occupation of the territory, are used more by stealth (sometimes implicitly) as evidence of the intensity of ‘generalized violence’. 101

Of the decisions of the CNDA that refer explicitly to IHL, the majority do so in support of an armed conflict, that is, of a high intensity of violence. However, on occasion, the CNDA has rejected the existence of an armed conflict based on IHL. For instance, in a decision on Iraq, the CNDA considered the actions of groups of radical Kurds and of extremist Sunnites as ‘real’ (hence, it found the Mossoul region to be generally insecure), however, ‘the degree of organisation or the objectives did not meet the criteria of the definition of armed conflict’, as provided in IHL. 102

In sum, decisions from the CNDA generally refer to the existence of generalized violence, and sometimes also to the forced displacement of the population and IHL, when assessing whether or not the situation in a particular country can be characterized as an internal or international armed conflict of a sufficient intensity to warrant protection under article 15c.

On cassation, the Conseil d’Etat is limited to consider only those issues to be reviewed and so rarely checks the CNDA’s legal reasoning on the characterization of an armed conflict. 103 However, it does check whether or not a situation of generalized violence is the result of an armed conflict (that is, causation). 104 In Baskarathas, 105 one of the leading cases on the concept of ‘individual’ in article 15c, the Conseil d’Etat noted that the different parties to the conflict (LTTE members and national army forces) were all guilty of grave breaches of IHL towards civilians. The decision of the Conseil d’Etat also made it clear that the threat to a person’s life or person need not arise from the actions of a combatant of the armed conflict, and that the violence from which protection is granted need not be limited to areas where the armed conflict is concentrated. It follows that the French Conseil d’Etat accepts that the threat to life or person can simply be the product of the breakdown of law and order (as long as this is the result of an armed conflict, that is, causation) and that there does not have to be active military or armed combat taking place in that precise area at that precise time. As noted above, this interpretation was recently embraced by the UK UT (IAC) in HM and Others. IHL was explicitly referred to by the Conseil d’Etat

101 Eg, CNDA No 09005066, on Sri Lanka; CNDA No 09016633, on Sudan; on Sri Lanka: CNDA, Sections Réunies, 27 June 2008, 614422, K, and No 09005066 – see also, No 09005447; on the Sudan: decision No 09016633; all these decisions refer to the three elements.

102 Decision No 613430/07016562, 18 Feb 2010.

103 It may only do so in cases of ‘erreur manifeste d’appréciation’ (or grave error), eg, when subsidiary protection is granted to an individual despite her fear of persecution on religious grounds, which should have entitled her to refugee status – Conseil d’Etat, Mlle Kona, 15 May 2009, req no 292564; or when subsidiary protection is granted without consideration as to whether the threats of serious harm from armed bands arose as a result of an armed conflict – Conseil d’Etat, MB (Haiti), 9 Dec 2009, req no 322375, and Conseil d’Etat, Mlle A (Congo), 15 Dec 2010, req no 328420.

104 It has been noted that the Conseil d’Etat is more aware of the link between these two concepts, than the CNDA; the latter being more preoccupied with the analysis of a concrete situation.

105 Conseil d’Etat, 3 July 2009.
in *Baskarathas*.\(^\text{106}\) In the *Baskarathas* case, the *Conseil d’État* also recognized forced displacement as constituting evidence of generalized violence.

As a final remark, persons fleeing armed conflict and seeking refuge in France are often granted refugee status based on the Refugee Convention.\(^\text{107}\) This practice reflects the fact that many armed conflicts are based on ethnic or religious grounds, and that it is not always easy to show ‘individual’ threat under article 15c without having recourse to a Refugee Convention ground.\(^\text{108}\) Subsidiary protection has nonetheless been recognized for persons fleeing armed conflicts in Afghanistan, Iraq, Sri Lanka, Colombia and Sudan, but only in atypical cases (that is, where people were victims of cross-fire or looting). The figures attest to this: the first instance decisions by outcome (2011) clearly show a preference for refugee status (3,340) over subsidiary protection (1,275); the same is true in final decisions (4,930 were granted refugee status; 1,195 were granted subsidiary protection).\(^\text{109}\)

### 3.4 Testing the nature of ‘armed conflict’ in the Czech Republic

The Supreme Administrative Court (SAC) of the Czech Republic has also had to grapple with interpreting article 15c in a case involving an Iraqi national of Kurdish origin who claimed that his brother was working as a bodyguard to senior officials of the Baath Party during the Saddam Hussein regime.\(^\text{110}\) The applicant claimed to fear retaliation by the Kurdish community after the fall of Saddam Hussein because his brother had collaborated with Saddam’s regime. His application for subsidiary protection was rejected on the ground of lack of credibility. The SAC described the test used in cases involving article 15c as a three-step test to be carried out in the following order: (1) whether the country of origin is in a situation of ‘international or internal armed conflict’; (2) whether the person concerned is a ‘civilian’; and (3) whether there is a ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence’.

(1) To meet the requirements of 15c: ‘Internal armed conflict’ should be defined by reference to IHL, in particular, it should fall within the scope of article 1(1) but outside the scope of article 1(2), Additional Protocol II of 1977; a conflict should satisfy the *Tadić* test (protracted armed violence and organization of armed groups) as elaborated by the ICTY.\(^\text{111}\) (2) The term ‘civilian’ must also be defined by reference to IHL, particularly article 50 of Additional Protocol I of 1977. (3) Finally, the expression ‘serious and individual threat

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106 In contrast, it was only implicitly referred to in *Kona*.
107 According to the *Conseil d’État* (10 Dec 2008, *OPFRA c/Pogossyan*, req no 278227), subsidiary protection may only be granted following a full investigation on refugee status.
108 Generally on this issue, see, Rutinwa, above n 86, at 513–14.
to a life or person by reason of indiscriminate violence’ contains several elements to be read together. The ECJ judgment in Elgafaji suggests two alternative scenarios: (a) ‘total conflict’ in the country of origin: every civilian ‘would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to threat to his life or person by reason of indiscriminate violence’;\(^{112}\) (b) the armed conflict does not reach the ‘total conflict’ threshold: the applicant must show further distinguishing features.\(^{113}\)

In sum, the approach of the SAC, so far, seems to incline towards establishing the existence (or nature) of an armed conflict in IHL, as well as distinguishing between ‘total’ conflict and conflict that is less severe. Both the concept of ‘indiscriminate violence’ and that of severity (or intensity) have yet to be tested fully.

### 3.5 Testing the threshold of ‘exceptionality’ of an armed conflict in the Netherlands

Perhaps one of the clearest examples of the use of a combination of metrics, when measuring the severity of an armed conflict under article 15c, comes from the Dutch Council of State and district courts.

In a decision of 26 January 2010,\(^{114}\) the Dutch Council of State considered a decision of the Secretary of State for Justice denying a resident permit to an applicant from Mogadishu, South Somalia. It ruled that the assessment by the Minister of Justice of what constitutes an exceptional situation (within the meaning of article 15c as interpreted by the ECJ in Elgafaji) requires looking beyond the number of deaths and injuries in the area in question, that is, Mogadishu, to other factors, such as displacement/refugees and the randomness of the violence.

Following this decision, district courts have considered that in such cases the situation across Central and Southern Somalia should be considered as the geographical area. Furthermore, when measuring the severity of indiscriminate violence, not only civilian deaths and casualty figures should be considered, but also the number of IDPs, many of whom will experience serious food and water shortages, as well as lack of protection and impunity, which often signal state failure, and can result in the targeting of displaced women and girls by gangs; and arbitrary detention. These indicators were confirmed by the Council of State in a decision of 9 April 2010.\(^{115}\)

### 3.6 Comparative analysis

The analysis above indicates some consistency between the approaches of the highest courts of the UK, Germany, France and the Netherlands

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\(^{112}\) Elgafaji, above n 22, para 43, second indent.

\(^{113}\) ibid, para 38, in conjunction with paras 39 and 40.

\(^{114}\) 200905017/1/V2.

\(^{115}\) 200908661/1/V2.
to the interpretation of article 15c; a meaningful dialogue between these courts has begun, leading to an exchange of case law and cross citations.\textsuperscript{116} This dialogue is resulting in greater similarity in approaches to article 15c for victims of conflict and violence. Following the lead of the ECJ’s ruling in \textit{Elgafaji}, recent decisions from the UK, Germany, France and the Netherlands show a determination to test the threshold of ‘indiscriminate violence’ characterizing an armed conflict under article 15c. The existence in IHL of an armed conflict is not determinant\textsuperscript{117} – rather, armed conflict is said to have an autonomous meaning in EU law (that focuses less on the parties involved in the conflict and more on the intensity of violence). The Czech Republic stands out as an exception, since, so far, the Supreme Court appears to have concentrated almost exclusively on the classification of an armed conflict in IHL (including a certain level of organization for the parties involved), less so on assessing its determinant threats to civilians.

In assessing or measuring the intensity of a conflict or the level of violence, UKUT has expressly endorsed looking at battlefield deaths, civilian casualties, forced displacement and state failure. Both France and the Netherlands also recognize forced displacement and the breakdown of law and order as important indicators of the existence of threats to life or person. Hence, France, the UK and the Netherlands explicitly recognize serious criminal acts/activities (indirect consequences of an armed conflict) to be relevant indicators when measuring the intensity of indiscriminate violence. Food supply problems (indirect consequences of an armed conflict) are also relevant to the Dutch courts, and may also be covered by article 15c in exceptional situations in the UK, as decided by UKUT. Germany requires first and foremost quantitative determination, such as the number of civilians living in the area concerned, the number of acts of indiscriminate violence committed by the parties to the conflict against the life or person of civilians in the region, and the number of victims and severity of casualties (deaths and injuries) among the civilian population. Germany also recognizes ‘other acts of violence’ (such as criminal activities, as well as, in principle, the denial of access to medical care, but not the lack of food supply) as additional elements.

4. What about Strasbourg?

The domestic courts and the Luxembourg Court (ECJ/CJEU) are not the only courts to have considered claims from victims of indiscriminate violence...
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violence resulting from an armed conflict. The European Court of Human Rights has also played a key role in guaranteeing protection against refoulement under article 3 ECHR. It may be useful to recall that the view of the Luxembourg Court concerning the relationship between article 15c QD and article 3 ECHR is that protection under the latter provision is squarely provided by article 15b QD,\(^{118}\) article 15c has something more to offer than article 15b (article 3 ECHR) in terms of protection.\(^{119}\) We now have the view from Strasbourg.

For many years, the position of the European Court of Human Rights was that normally a situation of armed conflict or indiscriminate violence does not in itself entail a violation of article 3 ECHR: one needed to show ‘special distinguishing features’.\(^{120}\) However, in 2007, in the landmark case of *Salah Sheekh v The Netherlands*, the European Court of Human Rights recognized that members of a vulnerable minority clan, all of whom were at risk from another warring clan, did not have to show that they were more at risk than other clan members.\(^{121}\) In its response to the Council of Europe’s Committee of Ministers, the organ responsible for supervising the execution of the judgment, the Dutch Government did not describe this turn-around as a ‘change’ in the Strasbourg Court’s case law but rather as an ‘adaptation’.\(^{122}\) It further conceded that in cases involving specific groups of asylum seekers (‘vulnerable minority groups’), a presumption of risk existed (rather than having to show actual risk) and ‘assessment is no longer based solely on the country reports of the Ministry of Foreign Affairs but also increasingly on other sources’.\(^{123}\) The case of *Salah Sheekh* was followed, a year later, by *Saadi v Italy* in which the European Court of Human Rights stated that all terrorist suspects, of whom the applicant was one, were consistently subjected to abuse and torture and that this put them at risk.\(^{124}\)

The next important step in the Strasbourg Court’s evolving approach was the case of *NA v United Kingdom*,\(^{125}\) where the Court was asked to consider, for the first time, the relationship between article 3 ECHR and

\(^{118}\) Art 15b, QD, defines serious harm as ‘torture or inhuman or degrading treatment or punishment of an applicant in the country of origin’; this provision should be interpreted with due regard to the ECHR (ECJ, *Elgafaji*, above n 22, para 28).

\(^{119}\) *Elgafaji*, ibid.

\(^{120}\) Eg, *Vilvarajah and others* and *Sultani*, see above n 36.

\(^{121}\) *Salah Sheekh*, above n 36, at para 148.

\(^{122}\) ‘Dutch Government’s response, “Changes in non-refoulement/expulsion policy regarding the assessment of an alleged risk of treatment contrary to Article 3: … the assessment of an alleged risk of treatment contrary to Article 3 in asylum procedure was adapted”’. Quoted in Nuala Mole’s presentation on the case law of the ECHR, ELENA Advanced Course, ‘Generalised Violence, Armed Conflict and the Need for International Protection’, 4–6 May 2012, Bologna, Italy.

\(^{123}\) ibid.

\(^{124}\) *Saadi v Italy*, Application no 37201/06, judgment of 28 Feb 2008, at paras 143–6. The author is grateful to Nuala Mole for drawing her attention to this point.

\(^{125}\) *NA v United Kingdom*, above n 36.
article 15 QD. A year before the CJEU gave its ruling in the Elgafaji case, the European Court of Human Rights, not too surprisingly, considered the issue to fall outside the scope of its examination.

On the substance, the Strasbourg Court accepted the argument that a general situation of violence in a country of destination [may] be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.126

Although such a situation did not exist in Sri Lanka at the time, the Court did not exclude the possibility that such a situation could arise in future cases. Three years later, this finding of principle enabled the European Court of Human Rights to recognize, in Sufi and Elmi v United Kingdom, that article 3 ECHR offers ‘comparable protection’ to that afforded under article 15c QD. The Court noted, in particular, that ‘the threshold set by both provisions may, in exceptional circumstances, be attained in consequence of a situation of general violence of such intensity that any person being returned to the region in question would be at risk simply on account of their presence there’.127 It found the situation of general violence in Mogadishu to be sufficiently intense to conclude that (almost) anyone returned there would be at real risk of being subjected to treatment contrary to article 3 ECHR. To assess this level of violence, it relied on the criteria identified by the UK AIT in AM and AM (Somalia),128 namely, methods and tactics of warfare and the number of civilians killed, injured and displaced.129

The Court then went on to consider the human rights conditions in other parts of Somalia, and whether the applicants could be returned safely to another such part (internal relocation or internal flight alternative). Quite astonishingly, it found the living conditions in the main refugee camps in Somalia and neighbouring Kenya to be so dire that for the UK to return a person to these camps would also breach article 3 ECHR on account of the human rights situation.

In order to reach its decision, the Court drew a distinction between: dire humanitarian situations, which are attributable to poverty or to a lack of resources to deal with natural phenomena such as drought; and a

126 ibid, para 115. This paragraph, particularly the language used (eg, ‘sufficient level of intensity’ and ‘extreme’), is redolent of the language used by the ECJ on the interpretation of art 15c, in Elgafaji, above n 22 (eg, ‘high level’ of violence and ‘exceptionally’).
127 Sufi and Elmi, above n 36, para 226.
128 AM and AM (Somalia), above n 72.
129 ibid, para 241.
humanitarian crisis that is mainly due to ‘the direct and indirect actions of the parties to the conflict’.  

In the case of the former, states parties to the ECHR have no obligation to protect asylum seekers present in their territory from economic destitution in their home country. Examples would include, for instance, lack of adequate HIV/AIDS health care facilities in Uganda, or lack of adequate treatment for severe mental illness (schizophrenia) in Algeria. Such claims will continue to be unsuccessful, unless truly exceptional (with D v United Kingdom still the only successful case so far).

However, in the case of the latter, the Court asserted a new positive, protective function for states, inherent in article 3 ECHR. In discussing this scenario, the Court referred to the test that it presented in the case MSS v Belgium and Greece (in an EU context). According to this test, in order to determine whether the humanitarian conditions reach the threshold of inhuman or degrading treatment under article 3, the states parties to the ECHR must assess: an applicant’s ability to cater for his most basic needs, such as food, hygiene and shelter; his vulnerability to ill-treatment; and the prospects of his situation improving within a reasonable timeframe.

In this case, since the applicants could not be returned to Mogadishu (which was their home) because of the situation of extreme violence there, and the only alternative for them was to live in dire humanitarian conditions in camps for displaced persons, the Court found the UK would be in violation of article 3 if it were to go ahead with deporting Sufi and Elmi to Somalia.

This approach, which is based on the approach adopted in the MSS case, is clearly driven by human dignity in the sense of ‘worthiness’ (as opposed to ‘compelling humanitarian considerations’). Nonetheless, the judgment in Sufi and Elmi has already been described by some as a high-water mark – it may indeed become, in practice, another ‘D’ case.

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130 ibid, para 282. Note that the Upper Tribunal, Immigration and Asylum Chamber, expressed a real concern with this finding on the ground that ‘even on the evidence available to the Court in that case, it is, with respect, difficult to see how the actions of the “parties to the conflict” (which must mean the TFG/AMISOM and Al-Shabab) can be said, by their indiscriminate methods of warfare over a comparatively short period of time, to have caused a breakdown of “social, political and economic infrastructures”’, in AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia v Secretary of State for the Home Department, CG [2011] UKUT 00445 (IAC), at para 131.

131 D v United Kingdom (application no 30240/96, judgment of 2 May 1997); Bensaid v United Kingdom (application no 44599/98, judgment of 6 May 2001); and N v United Kingdom (application no 26555/05, judgment of 27 May 2008). It may nonetheless be noted that in Yoh-Ekale Mwanje v Belgium (2nd section), judgment of 20 Dec 2011, concerning the detention of an HIV woman from Cameroon, although her art 3 complaint was dismissed, 6 out of 7 judges called for the Grand Chamber to revise its ruling in N v UK.

132 MSS v Belgium and Greece, application no 30696/09, GC judgment of 21 Jan 2011.

133 Sufi and Elmi, above n 36, para 283.


135 UKUT, AMM (Somalia) CG 2011, para 132. See also, Nuala Mole, Q&A, ELENA Advanced Course, above n 122.
with its requirement of a truly exceptional threshold. Nevertheless, in principle, the implications of the Court’s finding are not to be underestimated. For the first time, a Court in Europe accepted that armed conflict and violence can have a devastating impact on the humanitarian situation in a country. This means that these socio-economic considerations (or considerations of human dignity) are relevant in a legal assessment of whether or not it is reasonable to return a person to a particular part of a country (internal relocation). With the *MSS v Belgium and Greece* case, the Strasbourg Court had already recognized that the concept of degrading treatment could include being homeless or the denial of basic socio-economic rights in a *refoulement* case in a EU context (namely, a situation of transfer under the Dublin II Regulation). The Court justified its findings in *MSS* based on a ‘broad consensus’ (as evidenced by the 1951 Refugee Convention, the activities of the UNHCR, and EU law, such as, the Reception Directive) that asylum seekers are persons in need of special protection. The Court is therefore suggesting an enhanced responsibility for states to protect the human dignity of asylum seekers, responsibility that may not necessarily apply to other third-country nationals. The *Sufi* and *Elmi* judgment confirms this finding and extends it to the assessment of an internal flight alternative or internal relocation in a country outside Europe. Finally, in *Hirsi et al v Italy*, the European Court of Human Rights referred to the refugee camps described in *Sufi and Elmi*. This could be read to mean that the ‘appalling living conditions’ referred to in *Sufi and Elmi* may not be limited to situations concerning whether there is a reasonable internal flight alternative but may extend to all situations of indirect *non-refoulement*.

Whilst population displacement is explicitly referred to by the Strasbourg Court in its assessment of the intensity of a situation of general violence, consideration of state failure appears to be guiding the Strasbourg Court in its assessment of the human rights conditions in a country under article 3 ECHR. This makes absolute sense, since both these considerations are clear manifestations of situations of armed conflict. When considering the effect of such violence on an individual, the Court is clearly being drawn to considerations of a person’s dignity and not just their physical integrity.

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136 The House of Lords, in *R v Secretary of State for the Home Department ex parte Adam, Limbuela, Tesema*[2005] UKHL 66, has found that the Secretary of State for the Home Office’s practice of refusing accommodation or food to those asylum seekers who fail to claim asylum promptly on arrival in the country – and who are still in the UK, is inhuman and degrading and as such a breach of art 3 ECHR.

137 *MSS v Belgium and Greece*, above n 132.

138 ibid, para 251.

139 *Hirsi Jamaa and others v Italy*, application no 27765/09, GC judgment of 23 Feb 2012, paras 150–2.

140 The author is grateful to John Panofsky for this insight.
5. Conclusion: the next frontier

There is clear room for broadening protection under article 15c QD when assessing conflict severity and the seriousness of threats to individuals. The examples discussed above show a certain readiness on the part of the courts, particularly in the UK, France and the Netherlands (and to some extent also in Germany), towards recognition, at least in principle, of subsidiary protection for victims of both direct and indirect violence provided a certain level of violence is reached. In assessing this degree of violence, in an armed conflict, the courts in the UK, France and the Netherlands have been using a broad range of factors, such as, civilian casualties, destruction of infrastructure and goods indispensable to their survival (state failure), and forcible displacement of the civilian population. These, it may be noted, are also factors used under IHL for assessing the level of violence involved on the ground in non-international armed conflicts.

The next frontier of protection is this broader concept of violence or threats captured in some of the case law. The recent approach of the European Courts (ECJ/CJEU, UKCA, UKUT, German Federal Administrative Court, Dutch Council of State and district courts, and the French CNDA and Conseil d’État – but not so much the Supreme Court in the Czech Republic) shows practical reasoning about the range of threats facing people fleeing violence and conflict when applying article 15c QD. Thus, forced displacement and the breakdown of law and order in a situation of armed conflict resulting in criminal activities and food shortages have become relevant indicators in measuring the intensity of indiscriminate violence. The European Court of Human Rights too shows a definite awareness of a wider range of threat to civilians than previously recognized under article 3 ECHR in cases of refoulement (including, homelessness and the denial of basic socio-economic rights). Such an approach is consistent with current thinking on conflict, namely, the humanitarian consequences of contemporary armed conflicts, and the recognition of human dignity as a core value in international protection.

Nonetheless, uncertainty continues to surround the threshold of indiscriminate violence required to satisfy article 15c. Is this threshold lower to that required under article 3 ECHR? Both the Luxembourg Court and the Strasbourg Court require ‘exceptionality’ but is one requirement more ‘exceptional’ than the other? And, if so, what does this tell us about the usefulness of article 15c vis à vis article 3 ECHR?

It is useful to recall that, according to the Luxembourg Court (CJEU), article 15c has something more to offer than article 15b (article 3 ECHR) in terms of protection.\(^{141}\) The Strasbourg Court, however, is of the view

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\(^{141}\) ECJ, Elgafaji, above n 22, para 28. This view is shared by the UK Upper Tribunal, see, AMM and others, above n 130.
that article 3 ECHR offers ‘comparable protection’ to that afforded under article 15c QD.\textsuperscript{142} For the time being, it is fair to say that \textit{Sufi and Elmi} may be viewed as a high-water mark.\textsuperscript{143} It is not improbable that it may even be another ‘\textit{D}’ case, that is, one setting the threshold of ‘exceptionality’ so very high that no future cases will ever reach that level again. In the light of such uncertainty, article 15c has much to offer – unless, like in the UK, the level of harm is linked to article 3 ECHR,\textsuperscript{144} and its scope and content matter considerably.

\textsuperscript{142} \textit{Sufi and Elmi}, above n 36, para 226.
\textsuperscript{143} See, for instance, the position of the UK Upper Tribunal in \textit{AMM and others}, above n 130, at para 132.
\textsuperscript{144} Home Office, UKBA, Case Instruction, ‘Humanitarian protection: Article 15(c) of the Qualification Directive’, 13 Sept 2010.