

QD (Iraq) v Secretary of State for the Home Department

SUBMISSIONS BY
UNHCR

1. These submissions address the following issues,
 - UNHCR mandate and position in relation to international protection;
 - the object and purpose of Subsidiary Protection Status (“SPS”) under the Qualification Directive, 2004/83/EC, 29 April 2004;
 - the context and object of Article 15(c);
 - the meaning of “individual threat”;
 - the meaning of “internal armed conflict”;
 - the meaning of “indiscriminate violence”;
 - the meaning of a real risk of a threat to life or person;
 - country condition update: Iraq.

2. UNHCR has previously intervened in a number of cases before the English courts: e.g. *Fornah/K* [2006] UKHL 46 and *Asfaw* [2008] UKHL 31. UNHCR also intervenes in important cases in other countries and before the European Court of Human Rights (“ECtHR”), including in *Mir Isfahani v. Netherlands*, App. No. 31252/03, 31 January 2008 and *Saadi v. United Kingdom* (2008) 47 EHRR 17. UNHCR also issued Statements on specific issues in the context of preliminary ruling references to the Court of Justice

of the European Communities, in particular in *Elgafaji v The Netherlands* C-465/07, 17 February 2009.¹

3. When intervening in court cases it is UNHCR's practice to address its submissions to issues of international refugee law and doctrine. References are to tabs in UNHCR's bundle of documents, submitted with these written submissions.

UNHCR mandate and position in relation to international protection

4. The Office of the United Nations Commission for Refugees ("UNHCR") has a direct interest in this matter, as the agency entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees, and for seeking permanent solutions for the problem of refugees.²
5. According to its Statute, UNHCR fulfils its mandate *inter alia* by, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto".³ UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention relating to the Status of Refugees ("1951 Convention") and Article II of the 1967 Protocol relating to the Status of Refugees.⁴
6. In the years following the adoption of UNHCR's Statute, the UN General Assembly and Economic and Social Committee extended UNHCR's competence *ratione personae*.⁵ This was done not by amending the statutory

¹ See UNHCR Statement on Subsidiary Protection Under the EC Qualification Directive for People Threatened by Indiscriminate Violence, January 2008 [Tab 11].

² Statute of the Office of the UNHCR, GA Res. 428(V), Annex, UN Doc A/1775, at [1] (1950) [Tab 1].

³ *Ibid.*, at [8(a)].

⁴ UNTS No. 2545, Vol. 189, p.137 and UNTS No. 8791, Vol. 606, p.267.

⁵ See UNHCR Note on International Protection, submitted to the 45th session of the Executive Committee of the High Commissioner's Programme, UN Doc. A/AC.96/830, 7. Sept. 1994 [Tab 3].

definition of “refugee” but by empowering UNHCR to protect and assist particular groups of people whose circumstances did not necessarily meet the definition in the Statute.⁶

7. In practical terms, this has extended UNHCR’s mandate to a variety of situations of forced displacement resulting from conflict, indiscriminate violence or disorder even in relation to persons who are not refugees within the 1951 Convention. In the light of this evolution, UNHCR considers that serious (including indiscriminate) threats to life, physical integrity or freedom resulting from generalised violence or events seriously disturbing public order are valid reasons for international protection under its mandate.⁷
8. UNHCR’s function under its Statute and under the 1951 Convention is also reflected in EC law. Article 21.1(c) of the Asylum Procedures Directive (2005/85/EC) states that Member States shall allow UNHCR to “*present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.*”
9. UNHCR has issued three position papers containing its views on complementary protection.⁸ These documents examine the position of complementary protection within the broader international protection regime; its beneficiaries and appropriate standards of treatment and procedural questions. As stated above, in UNHCR’s view, persons benefitting from complementary protection include those persons who are

⁶ In such cases, the institutional competence of UNHCR is based on paragraph 9 of its Statute: “The High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal.”

⁷ UNHCR, *Providing International Protection Including Through Complementary Forms of Protection*, Executive Committee of the High Commissioner’s Programme, Standing Committee, UN Doc. EC/55/SC/CRP.16, 2 June 2005, at [26] [Tab 8].

⁸ (1) UNHCR, *Complementary Forms of Protection: Their Nature and Relationship to the International Protection Regime*, UN Doc. EC/50/SC/CRP.18, 9 June 2000 [Tab 4]; (2) UNHCR, *Providing International Protection Including through Complementary Forms of Protection* (supra) [Tab 8]; (3) UNHCR, *Complementary Forms of Protection, Global Consultations on International Protection*, EC/GC/01/18, 4 September 2001 [Tab 5].

outside their country of origin because there is a serious threat to life, to physical integrity, liberty, and security of the person in the country of origin as a result of an armed conflict or serious public disorder. These documents examine the position of complementary protection within the broader international protection regime its beneficiaries and appropriate standards of treatment and procedural questions.

10. In 2005 UNHCR's Executive Committee (ExCom), currently made up of 72 States, including United Kingdom, adopted a "Conclusion on the Provision of International Protection including through Complementary Forms of Protection".⁹ This conclusion *inter alia*:

10.1. affirmed that complementary protection should be resorted to only after full use has been made of the 1951 Convention;

10.2. underlined the importance of developing the international protection system in a way which avoids protection gaps, and enables all those in need of international protection to find and enjoy it.

Subsidiary Protection Status

11. The four EC Directives and the EC Regulation making up the Common European Asylum System ("CEAS") as it currently stands,¹⁰ pursue the basic objectives set out by the European Council at its meeting in Tampere in October 1999. The Council agreed to work towards the CEAS based on the full and inclusive application of the 1951 Convention. The Presidency Conclusions adopted in Tampere in 1999 record the determination of the

⁹ UNHCR's Executive Committee of the High Commissioner's Programme, *Conclusions on the Provision of International Protection Including through Complementary Forms of Protection*, No. 103 (LVI) 2005, 7 October 2005 [Tab 9].

¹⁰ Temporary Protection Directive 2001/55/EC, 20 July 2001; Reception Directive 2003/9/EC, 27 January 2003; Qualification Directive 2004/83/EC, 29 April 2004; Asylum Procedures Directive 2005/85, 1 December 2005; Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for examining asylum applications.

European Council to develop the Union as an area of freedom security and justice under Articles 61 and 63 of the EC Treaty (inserted by the Treaty of Amsterdam (1997)). The Conclusions further state:

“4. The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity. A common approach must also be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union.”

12. The Conclusions explicitly recognise that in addition to clear and efficient procedures for determining asylum claims, and common criteria to determine refugee status, the CEAS “should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection.” (at [14]; emphasis supplied)
13. Pursuant to this goal, the Qualification Directive has as its “main objective” ensuring common criteria for the identification of those in need of international protection and ensuring such people a minimum level of benefits (Recital (6)).
14. The Qualification Directive establishes two forms of protection: “Refugee Status”, which essentially corresponds to the criteria for recognising individuals as refugees under the 1951 Convention, and “Subsidiary Protection Status” (“SPS”). A person only qualifies for SPS if they do not qualify for Refugee Status but where they are at risk of suffering serious harm if returned to their country of origin: Article 2(e).
15. UNHCR wishes to ensure that subsidiary protection complements and does not undermine refugee status under the 1951 Convention. UNHCR thus has an interest in seeing that EC law on subsidiary protection adequately reflects international standards, and helps to avoid protection gaps. But importantly, if a person does fall through a “protection gap” in the Qualification Directive this does not relieve States of their obligations

towards such individuals under international law, including under the European Convention on Human Rights (“ECHR”).

16. SPS draws in particular on international and regional human rights law and State practice prior to its adoption¹¹ as set out in Recital 25 of the Qualification Directive:

16.1. **State practice:** At the time of the Tampere Conclusions there was consistent State practice in European States recognising that persons may be in need of international protection even if none of the 1951 Convention grounds is the cause of the feared harm. However, the precise scope of the protection offered varied across European States.¹² (see the ECRE Report, April 1999,¹³ summarised at Annexure 1 to these submissions.) The Qualification Directive provided an opportunity to harmonise State practice in this respect.

16.2. **International human rights law:** most importantly,

(1) the obligation not to return a person to a country where they face a risk of suffering the death penalty or execution (Article 15(a)) reflecting Member State’s obligations under Protocol 6 of the ECHR and the principle in *Soering v UK* (1989) 11 EHRR 439 (death row phenomenon);

(2) the obligation not to return a person to a country where they are substantial grounds to believe that he/she will face a real risk of inhuman or degrading treatment or torture, reflecting the *non-refoulement* obligation arising under Article 3 of the

¹¹ For State practice following the adoption of the Qualification Directive, see UNHCR, *Asylum in the European Union, A Study of the Implementation of the Qualification Directive*, November 2007 [Tab 10].

¹² See UNHCR, *Some Additional Observations and Recommendations on the European Commission Proposal*, Geneva, July 2002, p.6 [Tab 6].

¹³ European Council on Refugees and Exiles, *Complementary / Subsidiary Forms of Protection in the EU States – An Overview*, ELENA National Coordinators, April 1999 [Tab 17].

ECHR (Article 15(b)). This was extended to Article 2 in *Gonzalez v Spain*, App. No. 43544/98, 29 June 1999;

(3) the *non-refoulement* obligation under Article 3 of the Convention Against Torture. This *non-refoulement* obligation has attained the status of jus cogens.

(4) the *non-refoulement* obligation arising under Articles 6 and 7 of the International Covenant on Civil and Political Rights. See Human Rights Committee in its General Comments No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant.¹⁴

17. In particular, Article 3 of the ECHR and related jurisprudence of the ECtHR played an important role in the drafting of Articles 2(e) and 15 of the Qualification Directive. The objective risk assessment of the term “substantial grounds for believing” in Article 2 (e) was taken from the case law of the ECtHR, as were the criteria for serious harm set out in Article 15 (a) and (b). Accordingly, ECHR law provides an important source for interpretation of Article 15. However, the subsidiary protection regime of the Qualification Directive is not a mere copy of Article 3 or the ECtHR’s interpretation of that provision.

18. More caution and a flexible approach is required when relying on **International Humanitarian Law** (“IHL”) and international criminal law to interpret the scope of the Qualification Directive, and specifically Article 15(c) which introduces terminology associated with IHL.

19. The evolution of the law of armed conflict and, related thereto, of international criminal law, most notably the Statute of the International Criminal Court and its adoption by the EU Member States, offer an

¹⁴ U.N. Doc. CCPR/C/21/Rev.1/Add.13, 21 April 2004, at [12]; also General Comment No. 6 (2005) on the Treatment of unaccompanied and separate children outside their country of origin.

important legal rationale for extending the scope of international protection beyond Convention refugees. The jurisprudence of the International Tribunal for the former Yugoslavia as well as the Statute of the International Criminal Court have reinforced the norms of international humanitarian law, especially for the protection of civilians. It would be incongruent if refugee law and *non-refoulement* law did not protect persons against being returned to places where they would be at risk of harm caused by breaches of IHL.

20. However, whilst IHL law is a source of law that can inform the interpretation of Article 15(c), caution is warranted in seeking to draw too heavily on IHL,

20.1. the Qualification Directive itself states that the criteria for SPS “should be drawn from international obligations under human rights instruments and practices in Member States” – it does not mention IHL (Recital 25);

20.2. the ECJ in *Elgafaji* stated that the Qualification Directive, and Article 15(c) in particular, must be interpreted with “due regard for fundamental rights, as they are guaranteed under the ECHR” (at [28]), but did not refer to IHL.

20.3. IHL and SPS are two separate legal regimes. IHL imposes responsibilities on the protagonists to an armed conflict or on States within whose territory armed conflict is occurring or who are occupying powers.¹⁵ IHL is interpreted in the light of its object and purpose, which is not necessarily the same as the object and purpose of SPS. It would not therefore be surprising if the same or similar term were to be given a different meaning in IHL and

¹⁵ There is no obligation under the Geneva Conventions that is directly analogous to the *non-refoulement* obligation imposed on non-parties to an armed conflict under the 1951 Convention and international human rights law, but obligations under IHL do impose rules in relation to displacement and displaced persons. See Jean-Marie Henckaerts and Louise Doswald-Beck, ICRC, *Customary International Humanitarian Law*, Cambridge University Press 2005, Chapter 38, pp.457-474 [Tab 19].

under Article 15(c). By way of example, in *Prosecutor v Tadic*¹⁶ the Appeal Chamber of the International Criminal Court (“ICC”) explained that the reference to “armed conflict” under the Geneva Conventions must be given a very broad temporal scope, extending States obligations up until a general conclusion of peace (in international conflict) or a peaceful settlement (in internal conflict) (at [70]). This interpretation of “armed conflict” is obviously necessary to ensure that IHL continues to apply until such a formal cessation of a conflict and to lend clarity to the temporal application of IHL;¹⁷ but different considerations will be relevant when interpreting Article 15(c).

21. It is submitted that the following principles should therefore guide the interpretation of SPS,
 - 21.1. The criteria for recognising SPS must be interpreted broadly, in order to achieve the objective of securing protection to persons in need of international protection who do not meet the criteria of the 1951 Convention.
 - 21.2. Regional and international and regional human rights instruments inform –but do not limit– the scope and meaning of SPS;
 - 21.3. IHL and international criminal law inform –but do not limit– the scope and meaning of Article 15 (c), and some caution is warranted when drawing on IHL in the context of complementary protection against *non-refoulement*.

¹⁶ International Criminal Tribunal for the Former Yugoslavia Appeals Chamber, *Prosecutor v Dusko Tadic*, Case No. IT-94-1-A, Judgment of the Appeal Chamber 15 July 1999, 38 ILM, 1518 (1999) [Tab 22].

¹⁷ Likewise, the Appeal Chamber stated that the notion of armed conflict in IHL had to be given a very broad geographical scope because the obligations arising from an armed conflict, such as those relating to treatment of POWs and civilians, are clearly intended to apply outside the area of hostilities (at [68]-[69]).

22. The Qualification Directive must also be interpreted harmoniously with the other EC Directives forming the CEAS as it currently stands.

The object and context of Article 15(c)

Background to Article 15(c)

23. Article 15(c) was formulated to address the need to protect individuals who have fled indiscriminate violence, owing to which they have a justified fear for their safety if they return to their country of origin. It has long been recognised that people fleeing indiscriminate violence are a category of persons deserving international protection but who may fall outside the protection of the 1951 Convention where no grounds for persecution can be shown.¹⁸

24. A number of countries have addressed the need to protect persons who have fled indiscriminate violence by broadening the concept of refugee:

- 24.1. The Organization of African Unity agreed the Convention Governing the Specific Aspects of the Refugee Problems in Africa, 1969 [Tab 13], also included Article 1.2 in the following terms:

“The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”

- 24.2. The Cartagena Declaration on Refugees¹⁹, adopted by Latin American Countries in November 1984 [Tab 14], included the following conclusion at III.3:

¹⁸ The Qualification Directive follows the 1951 Convention by requiring a well founded fear of persecution before a person will qualify for Refugee Status under the Directive (Article 2(c)).

¹⁹ Adopted at a Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia, 22 November 1984 [Tab 14]. The work of the Colloquium was

“...in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”

25. The need to harmonize EU rules on all “de facto refugees” was acknowledged in the European Commission’s 1991 Communication on the Right to Asylum.²⁰ The Communication referred to an important category of refugee who is a person “who flees his country not in order to escape political persecution ... but because his or her life is threatened, say, by civil war...” (pp.2, 6-7).
26. As the Cartagena Declaration on Refugees makes clear, the need to offer protection to persons fleeing indiscriminate violence is closely associated with the problem of “mass influx”. Soon after the 1991 Communication was issued, the attention of Member States was focused on the problem of indiscriminate violence by the mass influx of asylum seekers caused by the break-up of the former Yugoslavia.²¹ This ultimately led to the adoption of the Temporary Protection Directive, which sets out minimum standards for giving protection to asylum seekers in the event of a mass influx of displaced persons.

attended by representatives from the UNHCR and United Nations Development Program (“UNDP”); human rights experts from throughout Latin America; and representatives from the governments of Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Venezuela.

²⁰ *Communication from the Commission to the Council and the European Parliament on the right to asylum of 11 October 1991*, SEC (91) 1857 fin [Tab 15].

²¹ European Council in Edinburgh, 11-12 December 1992, *Conclusions of the Presidency; Declaration on the Former Yugoslavia*, 12 December 1992 [Tab 16].

27. Article 2(c) of the Temporary Protection Directive defines displaced persons as persons who are:
- “unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:
- (i) persons who have fled areas of armed conflict or endemic violence;
- (ii) persons at serious risk of, or who have been the victims of, systemic or generalised violations of their human rights;...”
28. The acknowledgement in the Tampere Conclusions, even as negotiations on the Temporary Protection Directive were still underway, that the CEAS should include permanent “measures of subsidiary forms of protection” where the criteria of refugee status were not met, encompassed the need to protect persons who have fled indiscriminate violence.²²
29. The Commission’s Proposal for the Qualification Directive, presented in September 2001, included proposals for a subsidiary protection status. The Proposal made clear that draft Article 15(c) was directed at the issue of indiscriminate violence. The Explanatory Memorandum stated that Article 15(c) was “drawn from Article 2(c) of the Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons” (COM(2001) 510 final, 12 Sept. 2001).²³
30. Similarly, the Recommendation of the Committee of Ministers of the Council of Europe on 27 November 2001 recommended that subsidiary

²² *Presidency Conclusions*, Tampere European Council, 15-16 October 1999, at [14] [Tab 18].

²³ The Commission’s Draft stated,

“...Member States shall grant subsidiary protection status to an applicant for international protection who is outside his or her country of origin, and cannot return there owing to a well-founded fear of being subject to the following serious and unjustified harm:

... (c) 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.”

protection should be granted where a person is in need of international protection after being forced to flee “indiscriminate violence” giving rise to a threat to life, security or liberty from situations “such as” armed conflict.²⁴

31. An important dimension to the protection afforded by Article 15(c) is therefore its ability to afford protection that is situational rather than individually targeted. Its basic purpose is to cover persons in need of international protection from indiscriminate violence occurring in their country of origin who do not qualify as refugees. This was affirmed by the ECJ’s decision in *Elgafaji*, considered below.

The context of Article 15(c)

32. In *Elgafaji* the ECJ emphasised that Article 15(b) of the Qualification Directive is the *lex specialis* in cases engaging Article 3 of the ECHR: at [28]. Following the jurisprudence of the ECtHR, in exceptional cases, persons fleeing indiscriminate violence, even if they do not give rise to valid claims for refugee status, will also fall under Article 15(b) (if a person would face a real risk of suffering inhuman or degrading treatment or torture if returned to their country of origin).
33. It is not necessary for a person to show that the “real risk” arises from personal circumstances in order for them to have a valid claim to protection under Article 3, and thus under Article 15(c). Whilst some ECtHR cases had suggested that an applicant had to show special distinguishing features (*Viloarajah v United Kingdom* (1991) 14 EHRR 248, at [111]; *Muslim v Turkey* (2006) 42 EHRR 16, at [68]-[69] *Kaldik v Germany* Application 28526/05, p.8; *Salah Sheekh v The Netherlands* (2007) 45 EHRR 50) this was expressly

²⁴ The Committee’s Recommendation stated,

“Subsidiary protection should be granted by members to a person who, on the basis of a decision taken individually by the competent authorities, does not fulfil the criteria for refugee status under the 1951 Convention and its 1967 Protocol but is found to be in need of international protection:

.... [c]-- because that person has been forced to flee or remain outside his/her country or origin as a result of a threat to his/her life, security or liberty, for reasons of indiscriminate violence, arising from situations such as armed conflict, ...” (Recommendation Rec (2001)18, 27 Nov. 2001)

disproved in *NA v United Kingdom*, App. No. 25904/07, 17 July 2008, where the Court held that Article 3 protection applies where the general situation of violence is such that the applicant is systemically exposed to ill-treatment (at [116]).

34. Article 15(c) must be regarded as having distinct, and in certain respects a wider, application than both Article 15(b) and Article 3 of the ECHR. In *Elgafaji*, the ECJ stated that it is, “a provision, the content of which is different from that of Article 3 ECHR” and it has to be interpreted “independently” with “its own field of application” (at [28] and [36]).

Individual threat

35. Article 15(c) refers to “an individual threat to an individual’s life or person”. In *Elgafaji* the ECJ held that the words “individual threat” should be interpreted to mean only that each individual must establish that their return would give rise to a real risk to their life or person: it does not require that the risk to them is any greater than that to which other people are exposed, nor does it impose any requirement that the risk be related to their personal circumstances (at [34]-[36]). The ECJ explained that Recital 26, which anticipates that risks to which an entire population is exposed will not “normally” in themselves qualify as serious harm, is consistent with this interpretation of Article 15(c) (at [37]).

Internal Armed Conflict

36. Article 15(c) states that SPS status is limited to persons fleeing internal or external “armed conflict”. We understand that the existence of an armed conflict is not in dispute on this appeal. The decision in this case that the situation is one of internal armed conflict is consistent with the position taken by the ICRC and UNHCR,²⁵ French Courts²⁶ and by the German FedOff.²⁷

²⁵ The ICRC continues to qualify Iraq as an armed conflict situation. See the documents referred to in UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*,

37. However certain observations on the requirement of internal “armed conflict” are warranted given the potential importance of this term in other cases and given the fact that the IAT in *KH (Article 15(c) Qualification Directive) Iraq CG* [2008] UKIAT 0002 considered that Article 15(c) should be interpreted through the lens of IHL,

37.1. Article 15(c) has to be read in light of the object and purpose of SPS, namely, to protect from a risk of serious harm if returned to their country of origin in circumstances that fall outside the 1951 Convention. Persons who face a real risk of serious harm due to indiscriminate violence are in need of international protection regardless of whether the context is classified in international law as one of “armed conflict”.²⁸

37.2. International protection needs arising from indiscriminate violence are not limited to situations of declared war or internationally recognized conflicts. It is therefore of importance that the requirements for an “internal armed conflict” are not set too high.

37.3. The Temporary Protection Directive applies to persons who have fled “armed conflict or endemic violence” and persons at serious risk of “systemic and generalised violations” of their human rights.

Geneva, April 2009, fn. 23 [Tab 12]. UNHCR considers that the degree of violence in the central Governorates continues to qualify asylum seekers in the EU for protection under Article 15(c): *ibid.* fn. 13 and paragraph 59 below.

²⁶ The French CRR stated, “the situation prevailing in Iraq is characterised in particular by the perpetration of attacks, extortion and threats targeting certain groups, which conduct continuous and concerted military operations in certain parts of the territory. Therefore, this situation should be considered as a situation of generalized violence resulting from a situation of internal armed conflict”: cited in UNHCR, *Study of the Implementation of the Qualification Directive* [Tab 10] *supra*, p.76. The study found a divergent approach in the national law of Member States.

²⁷ *Ibid.*, pp.76-7, although not the Bavarian higher administrative court.

²⁸ *Ibid.* p.78: UNHCR therefore asked, “what added value this term brings to a legal provision on subsidiary protection?”

- 37.4. State practice in 1999 showed that a majority of EU states offered complementary protection from a risk of suffering serious human rights abuses beyond cases of IHL “armed conflict”: see Annexure 1.
- 37.5. A UNHCR study in 2007 reported that of the three States covered by the Study on which data was then available, there was already a divergence as to the meaning given to “armed conflict”.²⁹ In one, Sweden, SPS is granted where there is a “severe conflict”.³⁰ The German Administrative Court has subsequently held that only internal disturbances and tensions, such as riots and sporadic acts of violence and other acts of a similar nature are clearly not armed conflicts.³¹
- 37.6. The European Court of Human Rights recognises that, exceptionally, a “general situation of violence” is capable of giving rise to a breach of Article 3: *NA v United Kingdom*, App. No. 25904/07, 17 July 2008.
- 37.7. IHL is of limited (although some) assistance interpreting the meaning of Article 15(c), not least because,

²⁹ Ibid. p.79. Data was available on France, German and Swedish practice, but not Greece or the Slovak Republic (the five countries surveyed). A Report by ELENA, dated October 2008, also found a variation in approaches amongst Member States to the notion of “armed conflict”: *The Impact of the EU Qualification Directive on International Protection*, ECRE, European Legal Network on Asylum, p.28 [Tab 21].

³⁰ UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, November 2007, p.78 [Tab 10].

³¹ BVerwG 10 C 43.07, 24 June 2008 [Tab 24]. After citing the Second Additional Protocol to the Geneva Conventions, 12 August 1949 (“APII”), Arts. 1 and 2, the Court stated: “thus there are only internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, which are [query: clearly] not armed conflicts. In internal crises falling in between [such situations and APII, Art.1(1)] it is this Court’s opinion that the presumption of an armed conflict within the meaning of Article 15 Letter c of the Directive is not automatically excluded. But in any event, to satisfy the conditions the conflict must present a certain degree of intensity and permanence....The concept of “armed conflict” under international law was chosen to show clearly that only conflicts of a certain magnitude fall within the purview of this provision....The orientation toward the criteria of international humanitarian law runs up against its limits in any case where it is contradicted under Art. 15 Letter c of the Directive by the purpose of granting protection to persons seeking refuge in third countries...” (at [22]).

37.7.1. the absence of a settled definition in IHL: see Annexure 2 to these submissions.

37.7.2. the different object and purpose of IHL: see paragraph 17 above, and Annexure 2.

37.8. In *Elgafaji* the ECJ referred to an armed conflict under Article 15(c) being “characterised” by the presence of indiscriminate violence. It stated that there would be a sufficient individual threat where the indiscriminate violence “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 face a real risk of being subject to a serious threat (at [35]).

38. In the light of the above, it is submitted that “armed conflict” must be given a broad autonomous meaning, reflecting the object and purpose of Article 15(c) and the SPS regime.³² IHL is informative but Article 15(c) is not tied to IHL definitions.

39. It is submitted that a persistent violent conflict or insurgency which is of unpredictable duration and is of an intensity which gives rise to a real risk of a threat of serious harm should be within Article 15(c).³³

Indiscriminate violence

³² See e.g. UNHCR, *Annotated Comments on the EC Council Directive*, January 2005 [Tab 7], p.33: “Persons fleeing indiscriminate violence and gross human rights violations more generally would, however, similarly be in need of international protection. [UNHCR therefore] hopes that States will recognize the need to grant protection broadly in transposing and applying this provision.”

³³ See UNHCR, *Study of the Implementation of the Qualification Directive*, supra, [Tab 10] p.77. Likewise, it is submitted that the reference to “a civilian” in Article 15(c) should not exclude a former combatant from protection where they can show that they have renounced military activities. Such a person should not be at risk of being returned because of their former combatant status, and there is nothing in ECHR jurisprudence that would permit such a removal.

40. UNHCR understands the term “indiscriminate” or “generalised” violence to mean the exercise of force not targeted at a specific object or individual.
41. It is vital that the object and purpose of Article 15(c) is not undermined by confusing the notion of “indiscriminate violence” with the IHL concept of “indiscriminate attack”, as the IAT did in KH (Article 15(c) Qualification Directive) Iraq CG [2008] UKIAT 0002 (at [85]-[94]).
42. Under Additional Protocol I to the Geneva Convention (“API”) “Indiscriminate attacks are prohibited” (Article 51(4)). As explained above, the objects of IHL differ in important respects from refugee law and *non-refoulement* obligations. Neither the definition of “indiscriminate” nor the definition of “attack” under API are apt to apply to Article 15(c).
43. Under API an attack is defined as an “act of violence against the adversary” (Article 49(1)). This is very different from the ordinary meaning of “violence”, which does not connote adversarial conflict. Indeed, if “indiscriminate violence” under Article 15(c) were to be equated with “indiscriminate attack” under IHL, the object and purpose of Article 15(c) would be entirely undermined, since a non-combatant could not be described as an adversary and so could not be in fear of violence (=attack) if returned to his or her country of origin. This would run against the very wording of Article 15(c), which refers to a serious threat to a civilian. This underscores the inappropriateness of seeking to interpret Article 15(c) through the lens of IHL in the manner attempted by the IAT.
44. API defines “indiscriminate” attack as an attack which is not directed at a military target (Article 51). The IAT in KH relied on this provision in holding that “indiscriminate violence” is violence inflicted in breach of IHL against civilians (at [93]). The effect is essentially to import API into Article 15(c). It means that in determining whether violence is indiscriminate, a court will first have to determine whether a combatant in an armed conflict is in breach of IHL. An important consequence of this approach is that a

person cannot claim SPS on the basis of a risk of violence unless it derives from a combatant that is bound by API.

45. The following criticisms can be made of the IAT approach,
 - 45.1. The IAT adopts a special meaning of “indiscriminate” which is unnecessary and contrary to the object and purpose of the Qualification Directive.
 - 45.2. From the perspective of refugee / human rights law, the distinction between violence employed against military targets and civilians is a false one. The correct distinction is between violence giving rise to a well-founded fear of persecution and violence that does not but which nonetheless gives rise to the need for international protection outside the regime of the 1951 Convention. It is in the latter sense that violence is “indiscriminate” within the meaning of Article 15(c).
 - 45.3. Moreover, the approach taken by the IAT—as it acknowledged (at [97])—gives rise to a protection gap. For instance, it means that where armed conflict leads to a break down in law and order leading to endemic criminal violence, those fleeing would be unable to claim SP because the violence would not be committed against civilians in breach of the Geneva Conventions.
 - 45.4. This protection gap is not only contrary to the object and purpose of the Qualification Directive in general, but is contrary to Article 6, which makes clear that actors of serious harm include “non-State actors”.
 - 45.5. Indeed, there is nothing in Article 15(c) that refers to or limits the source of the violence to which a person is entitled to claim protection from, as long as it arises in the context of an armed

conflict. From the perspective of the individual, and following the object and purpose of SPS, it does not matter whether the risk of serious harm arises from acts of the state, insurgents or others.

- 45.6. The fact that IHL does not address violence arising from criminal gangs and non-combatants is a product of the fact that the purpose of IHL is to protect human rights by imposing obligations on the parties to armed conflict. By contrast, refugee / *non-refoulement* obligations impose obligations on host States and therefore do not address precisely the same type of harm.
- 45.7. There is also a practical objection to the approach taken by the IAT. It is frequently difficult to distinguish between threats of violence emanating from combatants and those deriving from mere criminals. In Iraq, for instance, the distinction between insurgent groups and criminal gangs has never been clear and has fluctuated over time. As the UNHCR has stated in a recent report,

“Due to the complex situation of a high number of actors involved in providing security and actors involved in violence, where the lines are often blurred, an asylum-seeker’s failure to identify the perpetrator of violence should not be considered as detrimental to his/her credibility.”³⁴

Likewise, the complexity of a situation should not prejudice the substance of a person’s asylum claim. It is submitted that it would be contrary to the object and purpose of SPS for a person’s status to turn on the classification and motivation of actors committing violence at any particular time.

Real risk of a threat of harm to life or person

³⁴ *Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April 2009 [Tab 12], pp.23-4, at [27].

46. Article 15(c) read with Article 2(e) makes clear that in order for a person to benefit from SPS under Article 15(c) the court must be satisfied that there is a “real risk” of a “serious.... threat to an individual’s life or person”. UNHCR submits that the courts should adopt a pragmatic approach, but that the following should guide the courts’ consideration.
47. First, the notion of “real risk” is taken from the case law on the ECHR under Article 3 and should not be interpreted as imposing any higher test or burden on individuals claiming SPS under Article 15. The requirement that the risk of harm must be “real” makes clear that the responsibility of the States will not be engaged by risks that are fanciful or implausible or so remote as to be unreal. The ECtHR has spoken of “tenuous” risks of ill-treatment as insufficient to satisfy the test: *F v United Kingdom*, 22 June 2004, App. No. 17341/03.
48. It is also relevant to note that UNCAT has stated that under Article 3 of the Convention Against Torture,³⁵ “the risk of torture must be assessed on grounds that go beyond mere theory and suspicion” and does not have to meet the threshold of being highly probable.³⁶
49. Secondly, the threat must be to life or person. The reference to “person” obviously contemplates that serious harm can be a threat which is not a threat to life. It must also contemplate threats different from threats of torture or inhuman and degrading treatment, otherwise Article 15(c) would not have “its own field of application” from Article 15(b): *Elgafaji*, at [36]. This was expressly endorsed by the ECJ in *Elgafaji*, which stated that

³⁵ Article 3 provides, “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” No difference arises from the use of the word “danger” rather than “risk”: see *Soering v United Kingdom* (1989) 11 EHRR 439, at [88]: “substantial grounds for believing that he would be in danger of being subjected to torture...” (emphasis supplied).

³⁶ Germany - CAT/C/32/D/214/2002 [2004] UNCAT 7 (17 May 2004), at [13.5]. The Office of High Commissioner on Human Rights’ General Comment No. 1 on the CAT, states that: “the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable” (at [6]).

whereas Article 15(a) and (b) refer to “particular type[s] of harm”, Article 15(c), “covers a more general risk of harm” (at [33]).

50. It is submitted that all forms of physical and psychological harm are capable of falling within the definition if they are sufficiently serious. This includes a person’s mental health (see by analogy, *R (Razgar) v SSHD* [2004] 2 AC 368 - effect on psychological well-being can prevent removal under Article 8 ECHR).
51. The Commission and the Council recommended a wider notion of harm, including “security”/“safety” and “freedom”/“liberty” (see paragraphs 29 and 30 above). In one sense, “person” is more inclusive than “security” and “safety”, most notably in that it would encompass mental harm (which security and safety would less clearly do). On the other hand the reference to “person” excludes risk to material or legal safety.³⁷
52. Threats to “freedom” and “liberty” would also be apt to include a wider range of threats than threats to the “person”. However, it is submitted that a risk of arbitrary detention would amount to a threat to the “person” in certain situations (such as kidnapping, disappearances and incommunicado detention). In part this is because such denials of liberty also give rise to grave risks of physical and psychological harm. As the Strasbourg Court has said in the context of Article 5,
- “What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection” (*Kurt v Turkey* (1998) 27 EHRR 373, at [123]).
53. But a threat of indefinite arbitrary detention would, it is submitted, in itself constitute a serious threat to an asylum-seeker’s “person”. In *R (Ullah) v*

³⁷ UNHCR, *Some Additional Observations and Recommendations*, supra, July 2002 [Tab 6], p. 7.

Special Adjudicator [2004] 2 AC 323 Lord Steyn gave the following example of when a person would be deserving of international protection:

“Imagine a case of intended expulsion to a country in which the rule of law is flagrantly flouted, habeas corpus is unavailable and there is a real risk that the individual may face arbitrary detention for many years. I could, of course, make this example more realistic by citing the actualities of the world of today. It is not necessary to do so. The point is clear enough. Assuming that there is no evidence of the risk of torture or inhuman or degrading treatment, is the applicant for relief to be told that the ECHR offers in principle no possibility of protection in such extreme cases?” (at [43])

54. It is submitted that in light of its object and purpose, and the need for it to be informed by the requirements of the ECHR, Article 15(c) should extend to protect against such a risk.
55. The House of Lords in *Ullah* also refused to rule out the potential application of Articles 9 (Freedom of thought, conscience and religion), Article 10 (Freedom of expression), Article 11 (Freedom of assembly and association) and Article 14 (Freedom from discrimination), to prevent the removal of a person to their country of origin (esp. [48] (Lord Steyn) and [67] (Baroness Hale)). Likewise it is submitted that the potential for Article 15(c) to apply to flagrant breaches of such rights, as well as other freedoms, should not be ruled out but should be addressed on a case-by-case basis. For example, where a person’s livelihood has been completely destroyed and prevented, such that his economic existence and survival is threatened, a person should benefit from protection under Article 15(c).³⁸
56. Third, the requirement that the threats of harm are “serious” serves to ensure that the harm at risk of being suffered is of a severity deserving of international protection.³⁹ It should not be read as adding an additional probabilistic element to the “real risk” test.

³⁸ See UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, Geneva [Tab 2], at [63].

³⁹ UNHCR, *Some Additional Observations and Recommendations*, supra [Tab 6], p. 7.

57. Fourth, Article 15(c) read with Article 2(e) requires the recognition of SPS where there is a “real risk” of a “threat” to a person’s life or person. The reference to “threat” makes clear that the risk that must be assessed is not a risk of actual harm but a risk of a sufficiently serious threat if the person is returned. The focus of assessment must be on the future not the severity of indiscriminate violence in the past. Furthermore, the reference to a “threat” makes clear that where a community is genuinely terrorized by indiscriminate violence, the actual probability of being physically harmed will be of limited relevance.
58. Fifth, when considering whether or not there is a real risk that removal of a person would give rise to threat to their life or person it will be open to the court to have regard to a wide variety of considerations. These may include, (1) the general situation in the country, (2) the number of casualties, (3) whether the situation is improving or degenerating, (4) foreseeable worsening of the situation, (5) whether the conflict is country wide or regional, (6) whether other Member States have refrained from deportation.

Country condition update: Iraq

59. UNHCR’s analysis of the current situation in Iraq is set out in detail in recently published Eligibility Guidelines.⁴⁰ In view of the serious human rights violations and ongoing security incidents which are continuing predominantly in the five Central Governorates of Baghdad, Diyala, Kirkuk, Ninewa and Salah Din (capital: Samarra), the UNHCR continues to assess that all Iraqi asylum-seekers from these five Governorates are in need of international protection.⁴¹ UNHCR considers that asylum-seekers from these Governorates qualify for protection under Article 15(c) of the

⁴⁰ UNHCR, *Eligibility Guidelines*, April 2009 [Tab 12].

⁴¹ Ibid. p.18, at [12]-[13]. In these Governorates there remains a prevalence of instability, violence and human rights violations by various actors. Armed groups remain lethal and suicide attacks and car bombs directed against the MNF-I/ISF, Awakening Movements and civilians, in addition to targeted assassinations and kidnappings, continue to occur on a regular basis. These methods of violence are usually targeted at chosen areas where civilians of specific religious or ethnic groups gather, including places of worship, market places, bus stations, and neighbourhoods. The overall situation is that there is a likelihood of persons being subjected to serious harm: *ibid.* p.23, at [27].

Qualification Directive if they do not qualify as refugees or qualify for protection under Article 15(a) or (b).⁴²

MICHAEL FORDHAM QC

TOM HICKMAN

Blackstone Chambers
(acting pro bono)

ELIZABETH WILLIAMS

ALEXIS MARTINEZ

SAM PARR

Baker & McKenzie LLP
(acting pro bono)

UNHCR London

31 May 2009

⁴² Ibid. p.19, fn.24.

QD (Iraq) v Secretary of State for the Home Department

SUBMISSIONS BY
UNHCR
ANNEXURE 1: STATE PRACTICE IN 1999

1. This table summarises some of the findings of the ECRE Report, *Complimentary/Subsidiary protection in the EU states, April 1999* [Tab 17].

2. Other grounds of complimentary/subsidiary protection offered by the countries listed are set out in the report. This table includes those most relevant to the present case.

PAGES	COUNTRY	COMPLIMENTARY/SUBSIDIARY PROTECTION AFFORDED
5-6	AUSTRIA	Persons at risk of serious human rights violations ⁴³
7-9	BELGIUM	1. Persons at risk of serious human rights violations 2. Persons who have fled civil war or generalised violence
10-15	DENMARK	Persons who ought not to be returned (but: persons who flee situations of civil war or generalised violence not generally protected)
16-17	FINLAND	1. Persons at risk of serious human rights violations 2. Persons who have fled civil war or

⁴³ Reference in this table to “serious human rights violations” means violations such as inhuman and degrading treatment or torture.

		generalised violence
18-19	FRANCE	Persons at risk of treatment contrary to Article 3 ECHR
20-23	GERMANY	1. Persons who have fled situations of war and civil war 2. Tolerated: persons at risk of inhuman or degrading treatment, torture, death or physical harm
24-25	GREECE	1. Persons who have fled war and civil war 2. Cases of civil conflict accompanied by mass violations of human rights
26-27	IRELAND	Persons who have fled war or civil war
28-30	ITALY	Persons who due to humanitarian reasons or international/constitutional obligations cannot be returned
31	LUXEMBOURG	Persons at risk of serious human rights violations
34-38	THE NETHERLANDS	Persons who have fled situations of civil war and generalised violence
39-40	PORTUGAL	Persons who have fled situations of civil war or generalised violence
41-45	SPAIN	Persons who have fled situations of civil war or generalised violence
46	SWEDEN	1. Persons who need protection from internal or external armed conflict 2. Persons who have a well-founded fear of being subjected to torture or inhuman and degrading treatment.
48	UNITED KINGDOM	1. Persons at risk of serious human rights violations 2. Persons who have fled situations of civil war or generalised violence

QD (Iraq) v Secretary of State for the Home Department

SUBMISSIONS BY
UNHCR
ANNEXURE 2: "ARMED CONFLICT" IN IHL

1. At least the following references to, and definitions of, internal "armed conflict" can be found in IHL⁴⁴: (1) Common Article 3, (2) Additional Protocol II, Article 1(2), (3) Additional Protocol II, Article 1(1), and (4) Statute of the International Criminal Court, Article 8(2), (5) Case law of the ICC. These are briefly considered in Annexure 2 to these submissions.

Common Article 3

2. Common Articles 3 of the Geneva Conventions, which constitutes customary international law, refers to the obligations of States during an "armed conflict" but does not provide any definition of that term. According to the ICRC it has generally been accepted that the lower threshold found in Article 1(2) of Additional Protocol II ("APII"), which excludes internal disturbances and tensions from the definition of NIAC, also applies to common Article 3.⁴⁵

⁴⁴ We set out here the various definition of armed conflict under IHL but it is not part of UNHCR's mandate to interpret IHL.

⁴⁵ ICRC Opinion Paper, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* March 2008 [Tab 20], p.3.

Additional Protocol II

3. Additional Protocol II (“APII”) which “develops and supplements” Common Article 3 states in Article 1(2) that APII, “*shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts*”. The concluding words of this sentence make clear that it is seeking to clarify the meaning of the concept of armed conflict under Common Article 3.
4. APII also sets out additional qualifications to its field of application in Article 1(1). The ICRC regards these as restricting the definition of armed conflict.⁴⁶ Article 1(1) states that APII,

“shall apply to all armed conflicts which are not covered by the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of the High Contracting Party between its armed forces and dissident armed forces or other organised 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.”
5. These words make clear that APII applies only to certain situations of armed conflict. The purpose of the restricted field of application of APII is to ensure that the protagonists to the conflict continue to apply the principles of the Protocol. Common Article 3 applies only to conflicts within the territory of a contracting parties.
6. In respect of Article 1(2), the ICRC has stated that,

“Two criteria are usually used in this regard:¹⁰

- First, the hostilities must reach a minimum level of intensity. This may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces.

⁴⁶ Ibid., p.4.

· Second, non-governmental groups involved in the conflict must be considered as "parties to the conflict", meaning that they possess organized armed forces. This means for example that these forces have to be under a certain command structure and have the capacity to sustain military operations."⁴⁷

Statute of the ICC

7. The Statute of the International Criminal Court contains a further definition of non-international "armed conflict". Article 8(1) confers jurisdiction on the Court in respect of war crimes. The definition of war crimes in Article 8(2) includes in paragraph 2(e): "Other serious violations of the laws and customs applicable in armed conflicts not of an international character", as specified. Paragraph 2(f) then states:

"Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups."

8. In addition to the findings set out in paragraph 20.3 of the submissions, the Appeal Chamber of the International Criminal Tribunal on the Former Yugoslavia confirmed in *Prosecutor v Tadić* held that,

"an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."⁴⁸

9. The ICRC has stated,⁴⁹

⁴⁷ Ibid. p.3, footnotes omitted.

⁴⁸ International Criminal Tribunal for the Former Yugoslavia Appeals Chamber, *Prosecutor v Dusko Tadić*, Case No. IT-94-1-A, Judgment of the Appeal Chamber 15 July 1999, 38 ILM, 1518 (1999), at [70] [Tab 22]. *Tadić* was applied in Pre-Trial Chamber of the International Criminal Court, *Prosecutor v Thomas Lubanga Dyilo*, the Situation in the Democratic Republic of Congo, ICC-01/04-01/06-803, 26 January 2009 [Tab 23].

⁴⁹ ICRC Opinion Paper, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* March 2008, p.4 [Tab 20].

“Case law has brought important elements for a definition of an armed conflict, in particular regarding the non-international armed conflicts in the meaning of common Article 3 which are not expressly defined in the Conventions concerned.

Judgments and decisions of the ICTY throw also some light on the definition of NIAC. ... the ICTY [in *Tadić*] went on to determine the existence of a NIAC "whenever there is [...] protracted armed violence between governmental authorities and organised armed groups or between such groups within a State". The ICTY thus confirmed that the definition of NIAC in the sense of common Article 3 encompasses situations where "several factions [confront] each other without involvement of the government's armed forces". Since that first ruling, each judgment of the ICTY has taken this definition as a starting point.." (references omitted)

Relevance to the Qualification Directive

10. A number of features of an “armed conflict” important under IHL (and to the scope of application of Common Article 3) are of much less relevance to the scope of the protection offered by Article 15(c) of the Qualification Directive, given its different object and purpose and the fact that it applies non-combatants in the armed conflict. These include, (1) the length of the conflict, (2) the degree of organisation and command structure within armed groups, and (3) the territorial control of armed groups. However, the guidance on the necessary intensity of violence is more relevant.