

FOURTH SECTION

CASE OF SUFI and ELMI v. THE UNITED KINGDOM

(Applications nos. 8319/07 and 11449/07)

JUDGMENT

STRASBOURG

28 June 2011

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

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In the case of *Sufi and Elmi v. the United Kingdom*,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Lech Garlicki, *President*,

Nicolas Bratza,

Ljiljana Mijović,

Sverre Erik Jebens,

Päivi Hirvelä,

Ledi Bianku,

Vincent A. De Gaetano, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 14 June 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 8319/07 and 11449/07) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Somali nationals, Mr Abdisamad Adow **Sufi** and Mr Abdiaziz Ibrahim **Elmi** (“the applicants”), on 21 February 2007 and 14 March 2007 respectively.

2. The applicants, who had been granted legal aid, were represented by Ms N. Mole of the Aire Centre, a lawyer practising in London. The United Kingdom Government (“the Government”) were represented by their Agent, Mr D. Walton of the Foreign and Commonwealth Office.

3. The applicants alleged that if returned to Somalia they would be at real risk of ill-treatment contrary to Article 3 and/or a violation of Article 2 of the Convention. They also complained that their removal would disproportionately interfere with their rights under Article 8 of the Convention.

4. On 23 February 2007 and 14 March 2007 the Acting President of the Chamber to which the cases were allocated decided to apply Rule 39 of the Rules of Court, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings that the applicants should not be expelled to Somalia pending the Court’s decision. The Court also decided to grant priority to the applications under Rule 41 of the Rules of Court.

5. On 23 February 2007 and 26 March 2007 the Acting President of the Fourth Section decided to give notice of the applications to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

6. The applicants and the Government each filed observations on the admissibility and merits of the case (Rule 59 § 1).

7. At the Government’s request the cases were adjourned on 7 October 2008 pending the decision of the Court of Appeal in *HH (Somalia), AM (Somalia), J (Somalia) and MA (Somalia) v Secretary of State for the Home Department* [2010] EWCA Civ 426. The adjournment was lifted when the Court of Appeal delivered its judgment on 23 April 2010.

8. The applicants and the Government each filed further observations in October 2010.

9. The Chamber decided to join the applications (Rule 42 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The facts of the case, as submitted by the applicants, may be summarised as follows.

A. The first applicant

11. The first applicant, Mr Abdisamad Adow **Sufi**, is a Somali national who was born in 1987

and is currently in detention in an Immigration Detention Centre in West Drayton.

12. On 30 September 2003 he entered the United Kingdom clandestinely using false travel documents. On 3 October 2003 he claimed asylum on the ground that as a member of the Reer-Hamar, a sub-clan of the minority Ahansi clan, he had been subjected to persecution by Hawiye militia, who had killed his father and sister and seriously injured him. As a consequence, he had no surviving relatives in Somalia.

13. On 15 April 2005 the Secretary of State for the Home Department refused the first applicant's asylum application, finding, *inter alia*, that the fact he had remained in Somalia until 2003 undermined his claim to be a member of a minority clan. On 16 May 2005 he appealed against the refusal of the application on both asylum and human rights grounds, namely Articles 2 and 3 of the Convention. On 29 June 2005 both the asylum appeal and the human rights appeal were dismissed by an Adjudicator who found that his account of what had happened to him in Somalia was not credible.

14. On 7 October 2005 the first applicant pleaded guilty to two offences of burglary, five offences of dishonestly obtaining goods by deception and one offence of attempting to dishonestly obtain goods by deception. On 29 November 2005 he was sentenced to 18 months' imprisonment. On 14 February 2006 he was convicted, *inter alia*, of threats to kill and was sentenced to a further six months' detention at a Young Offender Institution. He was later sentenced to three months' imprisonment following a conviction for indecent exposure in October 2007 and to thirty-two months' imprisonment following a conviction for five counts of burglary and theft and two counts of attempted burglary in July 2009.

15. On 15 July 2006 the first applicant was served with a decision to make a deportation order, in which the Secretary of State noted the seriousness of his offences and the need to protect the public from serious crime and its effects. He also noted that he was 19 years of age, in good health and single. Although he had been resident in the United Kingdom for almost two years, he had spent his youth and formative years in Somalia. In the circumstances, it would not be unreasonable to expect him to readjust to life there. The Secretary of State for the Home Department also considered Article 8 of the Convention but concluded that the first applicant's deportation would not constitute a disproportionate interference with his right to respect for his family and private life.

16. On 4 September 2006 his appeal against the Secretary of State's decision was rejected by an Immigration Judge. On 1 November 2006 a deportation order against the first applicant was signed and an application for judicial review of the deportation decision was refused in January 2007.

17. On 27 February 2007 the Court granted the first applicant interim measures under Rule 39 of the Rules of Court to prevent his removal to Somalia prior to the Court's consideration of his application.

B. The second applicant

18. The second applicant, Mr Abdiaziz Ibrahim **Elmi**, is a Somali national who was born in 1969 and is currently detained in an Immigration Detention Centre.

19. He was born in Hargeisa, which is now the capital of the self-declared state of Somaliland. When he was two years of age, his family moved to Mogadishu and he never returned to the north of the country.

20. His father, a high-ranking officer in the army during the Barré regime, was appointed to the Somali Embassy in London as a military attaché in 1988. The second applicant joined him in the United Kingdom on 18 October 1988 and was given six months' leave to enter. On 1 March 1989 his father died. On 26 April 1989 the second applicant made an application for asylum based on his father's position in the Somali army and the beginning of the civil war in Somalia. On 31 October 1989 he was recognised as a refugee and granted leave to remain until 31 October 1993. On 7 January 1994 he was granted Indefinite Leave to Remain in the United Kingdom.

21. The second applicant was convicted of a road traffic offence in June 1992. On 8 March 1996 he was sentenced to a total of five years and six months' imprisonment by a Crown Court for handling stolen goods, obtaining property by deception, robbery and possessing an imitation firearm while committing an offence. On 13 November 2000 he was convicted of perverting the course of justice and sentenced to three months' imprisonment. In the same year he was convicted on further counts of theft and road traffic offences. On 16 March 2001 he was convicted of theft by a

Magistrates' Court and placed on a curfew. On 7 June 2001 he was again convicted of theft and sentenced to 3 months' imprisonment. On 23 May 2002 he was convicted by a Crown Court on eight counts of supplying class A drugs (cocaine and heroin) and on 7 November 2002 he was sentenced to 42 months' imprisonment. On an unspecified date the second applicant was released on licence. On 21 June 2004 he was sentenced to 12 months' imprisonment by a Crown Court for burglary and theft.

22. On 21 June 2006 a decision was made to issue a deportation order by virtue of section 3(5) of the Immigration Act 1971 and the second applicant was invited to rebut the presumption that his continued presence in the United Kingdom constituted a danger to the community.

23. He accepted that he was a drug addict but submitted that he did not constitute a danger to the community because he had made efforts to overcome his addiction and had recognised his past wrongdoings. However, on 4 September 2006 the Secretary of State for the Home Department found that he had failed to demonstrate that he would not constitute such a danger. In respect of his rights under Articles 2 and 3 of the Convention, the Secretary of State found that even though he had been living in the United Kingdom and could be identified as such he would not be at risk on return to Somalia as he was a member of the Isaaq, a majority clan. In respect of his rights under Article 8 of the Convention, the Secretary of State accepted that he had family ties with his three sisters and his mother in the United Kingdom but did not consider that these relationships constituted family life for the purposes of Article 8 as there was no evidence of dependency going beyond the normal emotional ties. The Secretary of State therefore concluded that his removal would not violate Articles 2, 3 or 8 of the Convention.

24. On 27 October 2006 the second applicant's appeal against the decision of the Secretary of State for the Home Department was refused by the Asylum and Immigration Tribunal ("AIT"), which considered that he could obtain clan protection in any part of Somalia as he was a member of a majority clan. Although the AIT accepted that he would not find support in relation to his drug dependency in Somalia, it found that this did not suffice to rebut the presumption in favour of deportation. As to his Article 8 claim, the second applicant had not shown that family life existed amongst his adult siblings and, even if it did, he had not shown that his circumstances were "truly exceptional so that his removal would violate his Article 8 rights". Finally, the AIT noted that the sale of drugs posed a danger to the community and there was a real likelihood of the second applicant re-offending.

25. A deportation order against the second applicant was signed on 8 January 2007 and on 6 March 2007 he was served with removal directions. On 14 March 2007 he requested, and was granted, interim measures under Rule 39 of the Rules of Court to prevent his removal before his application was considered by the Court.

26. On 3 March 2008 the second applicant was convicted of possession of a Class A controlled drug with intent to supply and was sentenced to eighteen months' imprisonment. On 8 July 2010 he was again charged with possession of a Class A drug with intent to supply. A hearing has not yet taken place.

II. RELEVANT DOMESTIC LAW AND PRACTICE

27. At the material time, following the refusal of an asylum application by the Secretary of State for the Home Department, an applicant had a right of appeal to the Asylum and Immigration Tribunal ("the AIT"). Section 103A of the Nationality, Immigration and Asylum Act 2002 (as inserted by section 81(6) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004) provided that a party to an appeal to the AIT could apply for an order that the AIT reconsider its decision on appeal on the ground that it had made a material error of law.

28. Once the appeal process against the refusal of an asylum application had been exhausted, an applicant could continue to make further submissions to the Secretary of State for the Home Department. Paragraph 353 of the Immigration Rules (HC 395, as amended by HC 1112) stated that:

"When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

- (i) had not already been considered; and
- (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.”

29. Where a person was not granted leave to enter the United Kingdom, he or she could be subject to administrative removal pursuant to paragraph 8 of Schedule 2 of the Immigration Act 1971. Pursuant to section 3(5) of the 1971 Act, the Secretary of State also had power to deport any person who was not a British citizen on the ground that his deportation would be “conducive to the public good”.

III. RELEVANT EUROPEAN UNION LAW

30. 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 (“the Qualification Directive”) has the objective, *inter alia*, of ensuring European Union (“EU”) Member States apply common criteria for the identification of persons genuinely in need of international protection (recital six of the preamble). In addition to regulating refugee status, it makes provision for granting subsidiary protection status. Article 2(e) defines a person eligible for subsidiary protection status as someone who would face a real risk of suffering serious harm if returned to his or her country of origin. Serious harm is defined in article 15 as consisting of: (a) death penalty or execution; (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

31. On 17 October 2007 the Dutch Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State*), when considering the case of *M. and N. Elgafaji v. Staatssecretaris van Justitie* (the Deputy Minister of Justice), lodged a reference for a preliminary ruling with the European Court of Justice (“ECJ”) asking, *inter alia*, whether article 15 (c) of the Directive offered supplementary or other protection to Article 3 of the Convention.

32. The ECJ held that article 15(c) protection went beyond that of Article 3 of the Convention, which was covered by article 15(b) of the Qualification Directive. The ECJ summarised the criteria to be applied as follows:

“Article 15(c) of the Directive, in conjunction with article 2(e) of the Directive, must be interpreted as meaning 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, and the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place ... 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 that threat.”

33. In *QD (Iraq) v Secretary of State for the Home Department* [2009] EWCA Civ 620 the Court of Appeal observed that the ECJ in *Elgafaji* had not introduced an additional test of exceptionality, but had simply stressed that not every armed conflict or violent situation would attract the protection of article 15(c). A conflict or violent situation would only attract the protection of article 15(c) where the level of violence was such that, without anything to render them a particular target, civilians faced real risks to their lives or personal safety.

34. More recently, in the case of *HM and Others (Article 15(c)) Iraq* CG [2010] UKUT 331, the Upper Tribunal (Immigration and Asylum Chamber) did not consider it helpful to attempt to distinguish between a real risk of civilian deaths as a result of targeted attacks and a real risk as a result of incidental attacks. In the Tribunal’s opinion, the nexus between the generalised armed conflict and the indiscriminate violence posing a real risk to life and person was met when the intensity of the conflict involved means of combat, whether permissible under the laws or not, that seriously endangered non-combatants as well as to result in such a general breakdown of law and order as to permit anarchy and criminality occasioning the serious harm referred to in the Directive.

IV. RELEVANT PRINCIPLES OF INTERNATIONAL PROTECTION

35. It is a well-established principle that persons will generally not be in need of asylum or subsidiary protection if they could obtain protection by moving elsewhere in their own country. This principle is reflected both in article 8 of the Qualification Directive and paragraph 339O of the Immigration Rules HC 395 (as amended), both of which provide that an applicant is not in need of international protection if there is a part of the country of origin where there is no well-founded fear of persecution or real risk of suffering serious harm, and where the applicant can reasonably be expected to stay.

36. In the cases of *Januzi, Hamid, Gaafar and Mohammed v Secretary of State for the Home Department* [2006] UKHL 5 and *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 the House of Lords held that the decision-maker, taking account of all relevant circumstances pertaining to the applicant and his country of origin, must decide whether it is reasonable to expect the applicant to relocate or whether it would be unduly harsh to expect him to do so. In this regard, the relevant comparison was between the conditions which prevailed in the place of relocation and those which prevailed elsewhere in the country of his nationality, including in his former place of habitual residence. If the applicant could live a relatively normal life in the place of relocation, judged by the standards which prevailed in his country of nationality generally, and if he could reach the less hostile part without undue hardship or undue difficulty, it would not be unreasonable to expect him to move there. However, the more closely the persecution was linked to the State, and the greater the control of the State over those acting or purporting to act on its behalf, the more likely (other things being equal) that a victim of persecution in one place would be similarly vulnerable in another place within the same State.

V. RELEVANT INFORMATION ABOUT SOMALIA

A. Factual background

37. The factual background to the conflict in Somalia, as described in the country reports at paragraphs 80 – 188 below and subsequently agreed by the parties, is as follows.

38. Somalia is comprised of three autonomous areas: the self-declared Republic of Somaliland in the north west, the state of Puntland in the north east, and the remaining southern and central regions. Somali society has traditionally been characterised by membership of clan families, which are subdivided into clans and sub-clans. The four majority clans are Darod, Hawiye, Isaaq and Dir. In addition there are a number of minority groups, which are also divided into sub-groups. The Digli and Mirifle take an intermediate position between the majority clans and the minority groups.

39. Somalia has been without a functioning central government since the overthrow of President Siad Barre by opposing clans in 1991. The clans could not agree on a replacement and lawlessness, civil conflict and clan warfare followed. Mogadishu was fragmented into rival, clan-based factions and control of the city was divided among warlords. The Transitional Federal Government was established in October 2004 but a combination of internal divisions within the Transitional Federal Government and insecurity in central and southern Somalia hindered it from becoming a functioning Government. In June 2006 the Union of Islamic Courts, a union of various Sharia courts, took control of Mogadishu. Following a period of fighting against a coalition of warlords called the Alliance for the Restoration of Peace and Counter-Terrorism, the Union of Islamic Courts took control of most of central and southern Somalia. United Nations Security Council Resolution 1725 (2006) authorised the deployment of an African Union and Intergovernmental Authority on Development force to protect the Transitional Federal Government. Ethiopian ground and air forces also moved into Somalia to support the Transitional Federal Government and by late December 2006 the Union of Islamic Courts had been ousted from Mogadishu and much of southern Somalia. Remnants of the Union of Islamic Courts withdrew to the southern reaches of the Lower Juba region where they continued to fight against the Transitional Federal Government and Ethiopian troops.

40. After the fall of the Union of Islamic Courts, the semblance of order and security that it had created in Mogadishu deteriorated. Roadblocks and checkpoints returned, as did banditry and

violence. Furthermore, attacks by anti-government elements on Transitional Federal Government and Ethiopian forces continued in Mogadishu, with civilians frequently caught up in the fighting. Homes and public infrastructure were destroyed and a significant part of the civilian population was displaced. The fall of the Union of Islamic Courts also brought to the fore some of the inter- and intra-clan rivalries that had been suppressed during the conflict and serious clan related fighting ensued.

41. In 2007 the Alliance for the Re-Liberation of Somalia was created when Somali Islamists and opposition leaders joined forces to fight the Transitional Federal Government and Ethiopian forces.

42. On 20 August 2008 the Transitional Federal Government and the opposition Alliance for the Re-Liberation of Somalia signed a ceasefire agreement in Djibouti. At the same time, the United Nations Security Council extended the mandate of the African Union peacekeeping mission in Somalia. However, the Islamic insurgents at the heart of the escalation in violence were not party to the ceasefire agreement, and instead indicated that they would continue to fight until Ethiopian forces withdrew from Somalia.

43. By late 2008 Islamist insurgents, including a group called al-Shabaab, had regained control of most of southern Somalia.

44. Somalia's Parliament met in Djibouti in January 2009 and swore in 149 new members from the Alliance for the Re-Liberation of Somalia. The Parliament also extended the mandate of the Transitional Federal Government for another two years and installed moderate Islamist Sheikh Sharif Sheikh Ahmad as the new President.

45. Ethiopia pulled its troops out of Somalia in January 2009. Soon after, al-Shabaab took control of Baidoa, formerly a key stronghold of the Transitional Federal Government. In May 2009 Islamist insurgents launched an attack on Mogadishu, prompting President Ahmad to appeal for help from abroad.

46. In October 2009 al-Shabaab consolidated its position as the most powerful insurgent group by driving its main rival, Hizbul Islam, out of the southern port city of Kismayo. Since then it has openly declared its alliance with al-Qaeda and has been steadily moving forces up towards Mogadishu.

47. In December 2010 Hizbul Islam and al-Shabaab merged.

B. Parties to the conflict

1. The Transitional Federal Government

48. The Transitional Federal Government is recognised by the United Nations and almost all key foreign powers as the legitimate government of Somalia. However, it currently controls only a small section of Mogadishu centred on the port, the airport and the presidential palace. It is largely dependent on African Union troops for its survival.

2. African Union Mission in Somalia (AMISOM)

49. AMISOM is an African Union force authorised by the UN Security Council and deployed to Mogadishu to support the Transitional Federal Government. It currently consists of 5,300 Ugandan and Burundian troops.

3. Ethiopian forces

50. Ethiopian forces joined the conflict in 2006 to help drive out the Union of Islamic Courts. They remained in Somalia until their withdrawal at the beginning of 2009.

4. Al-Shabaab

51. Al-Shabaab began as part of the armed wing of the Union of Islamic Courts. When the 2006 Ethiopian military intervention sent the leaders of the Union of Islamic Courts into exile, a hard core of al-Shabaab fighters remained in Somalia to fight. In their April 2010 report, "Harsh War, Harsh Peace", Human Rights Watch indicated that al-Shabaab was an alliance of factions rather than a single entity, but the group's diverse leaders had a common agenda: defeating AMISOM and the Transitional Federal Government and extending Sharia law across Somalia. Some of its leaders have

links with al-Qaeda although the extent of al-Qaeda's influence over al-Shabaab remains unclear.

52. Al-Shabaab has emerged as the most powerful and effective armed faction on the ground, especially in southern Somalia. They have received material support from the Eritrean government, which is eager to undercut Ethiopia's interests in the region. By the end of 2009 al-Shabaab controlled more territory than any other faction in Somalia, including Baidoa, the former seat of the Transitional Federal Government parliament, Jowhar, which had been one of the Transitional Federal Government President's most reliable strongholds, and the strategic port of Kismayo.

53. Al-Shabaab claimed responsibility for twin suicide bombings in the Ugandan capital Kampala on 11 July 2010, which killed 79 people watching the World Cup soccer final on television. It was al-Shabaab's first attack outside Somalia and heightened concerns about its ability to carry out more attacks in the region and beyond.

5. *Hizbul Islam*

54. Hizbul Islam is another armed group which has both a Sharia agenda and the goal of driving AMISOM and the Transitional Federal Government from Mogadishu. In early 2009 it entered into an alliance with al-Shabaab but the alliance came to an end in October 2009 during the fight for Kismayo. In December 2010, however, it once again merged with al-Shabaab.

6. *Ahlu Sunna Waljamaca*

55. Ahlu Sunna Waljamaca is an Islamist group which professes to support a more moderate agenda. The group exists primarily in central Somalia, where it has maintained control over large strips of territory, predominantly in Galgadud and Hiran regions.

56. In February 2010 Ahlu Sunna Waljamaca signed a power-sharing and military unification pact with the Transitional Federal Government, although at times relations between the two groups were strained.

VI. RELEVANT CASE LAW

A. *NM and others (Lone women – Ashraf) Somalia* CG [2005] UKAIT 00076

57. In *NM and others (Lone women – Ashraf) Somalia* CG [2005] UKAIT 00076 the AIT found that conditions in southern Somalia and particularly in and around Mogadishu were such that both men and women from minority clans were in danger of Article 3 ill-treatment and should be regarded as refugees in the absence of evidence of a clan or personal patron which could protect them. Men and women from majority clans were not likely to be in need of international protection, although individual circumstances required separate consideration. Although women were at greater risk than men, they would not be able to show that, simply as lone female returnees from the United Kingdom, they had no place of clan safety. Finally, the AIT held that the general conditions of life or circumstances in Somalia did not engage the obligations of the Refugee Convention or engage Article 3 of the Convention for all female returnees. A differential impact had to be shown. Being a single woman was not of itself a sufficient differentiator.

58. The AIT observed in passing that, on the strength of the background evidence and the expert evidence given at the hearing, it would consider that any person at real risk on return of being compelled to live in an IDP camp would have little difficulty in making out a claim under Article 3, if not under the Refugee Convention.

B. *HH & Others (Mogadishu: armed conflict: risk) Somalia* CG [2008] UKAIT 00022

59. In *HH & others (Mogadishu: armed conflict: risk) Somalia* CG [2008] UKAIT 00022 the Asylum and Immigration Tribunal held that for the purposes of article 15(c) of the Qualification Directive, a situation of internal armed conflict existed in Mogadishu. The AIT held, however, that while all sides to the conflict had acted from time to time in such a way as to cause harm to civilians, they were not in general engaging in indiscriminate violence and, as a consequence, a person would not be at real risk of serious harm by reason only of his or her presence in that zone or area.

60. The AIT found that although clan support networks were strained, they had not yet collapsed.

Majority clans continued to have arms, even though their militias no longer controlled the city. A person from a majority clan, or whose background disclosed a significant degree of assimilation with, or acceptance by, a majority clan would in general be able to rely on that clan for support and assistance, including at times of displacement. A member of a minority clan or group who had no identifiable home area where majority clan support could be found would in general be at real risk of serious harm of being targeted by criminal elements, both in any area of former residence and in the likely event of being displaced. Members of minority groups found it harder to flee and move around to escape fighting, because they were not so easily accepted in new surroundings. The AIT found that persons displaced from their home in Mogadishu without being able to find a place elsewhere with clan members or friends would likely have to spend a significant period of time in a makeshift shelter, such as those along the road to Afgooye, or in an IDP camp, and could well experience treatment proscribed by Article 3 of the Convention.

61. Finally, the AIT held that the issue of whether a person from a minority clan would be able to find majority clan support would often need specific and detailed consideration. The evidence suggested that certain minority groups could be accepted by the majority clan of the area in question, so as to call on protection from that clan. On the current evidence, it might not be appropriate to assume that a finding of minority group status in southern Somalia was in itself sufficient to entitle a person to international protection, particularly where a person's credibility was otherwise lacking.

C. AM & AM (armed conflict: risk categories) Somalia CG [2008] UKAIT 00091

62. In its most recent Somali Country Guidance determination, the Asylum and Immigration Tribunal found that since its decision in *HH* there had been a number of significant changes in Somalia.

63. First, the AIT found that by mid-2008 the armed conflict had spread beyond Mogadishu and its environs. The AIT therefore found that a situation of internal armed conflict existed throughout central and southern Somalia. In respect of the intensity of the violence, the AIT noted that “manifestly all significant armed parties to the conflict have engaged in indiscriminate attacks”. In particular, it noted that the Ethiopians were reported to have used means of war (firing inherently indiscriminate Katyusha rockets in urban areas) and methods of warfare (using mortars and indirect weapons without guidance in urban areas) that violated International Humanitarian Law. The TGF were reported to have engaged in aggression against civilians and to have acted “as if they believe that they are immune from accountability, investigation or prosecution, including for crimes under international law”. Moreover, reports indicated that insurgents had perpetrated raids, robberies and other abuses against civilians, including rape and other forms of sexual violence. The AIT referred to information received from the Inter-Agency Standing Committee (“IASC”) which expressed concerns about:

“indiscriminate bombardment of civilian areas; indiscriminate use of roadside bombs and mortars from and in civilian areas; indiscriminate shooting in response to roadside bombs; arbitrary arrest and detention of civilians, including children; forced evictions; forced recruitment, including of children; sexual and gender based violence; intimidation and assassination of journalists, aid workers and civilian officials; and extra-judicial killings.”

64. The AIT also noted that the worsening security situation was coupled with a deteriorating humanitarian situation. It observed that between 400,000 and 750,000 people had been displaced from Mogadishu and that there had been significant displacements from other towns to which armed clashes had spread. The AIT also observed first, that IDPs experienced serious problems while on the move, which included checkpoints, threats, intimidation, looting, rape, abduction and harassment; secondly, that many did not end up in camps or makeshift settlements and consequently struggled to obtain shelter, food, water and sanitation; and thirdly, that the effect of displacement appeared to reduce the ability of IDPs to count on protection from their own clan: even where they fled to a traditional area for their clan, the pressures of numbers and scarce resources could mean that newcomers were not supported or absorbed by the local community.

65. With regard to the situation in Mogadishu, the AIT considered that:

“the movements of population out of Mogadishu in the past two years have been unprecedented. UN sources have estimated (at various times) that 400,000, up to as many as 750,000 (or around one third to a half), of the population of Mogadishu have been displaced. An 8 April 2008 Voice of America report states that two thirds of Mogadishu

has been turned into an urban battleground. Since the beginning of 2008 there have been significantly fewer returns. Whatever the precise figures, it is clear that the ongoing violence has forced substantial numbers to flee the city more than once and flight seems an ongoing process: the IRIN report of 29 September 2008 cites Elman estimates that 18,500 people recently fled their homes due to the fighting and shelling (COIS, A 4). The COIS Reply dated 24 October 2008 states that: “[a]ccording to the UNHCR an estimated 5,500 people were displaced from the city during the week and over 61,000 since 21 September 2008”. Armed clashes have increasingly destroyed housing, market areas (Bakara market has been deliberately shelled) and infrastructure and the recent closure of the airport is likely to make matters in Mogadishu worse. According to Grayson and Munk, the aid community has been largely ineffective in providing the necessary aid to those who have stayed in Mogadishu (Nairobi evidence 65). They also state that Mogadishu is a “ghost town” and that only the most vulnerable remain there.”

66. It concluded that since *HH* the situation in Mogadishu had changed significantly, both in terms of the extent of population displacement away from the city, the intensity of the fighting and the security conditions there. On the available evidence the AIT considered that Mogadishu was no longer safe as a place to live for the great majority of its citizens. It did not rule out that there might be certain individuals who on the facts might be considered to be able to live safely in the city, for example if they had close connections with powerful actors in Mogadishu, such as prominent businessmen or senior figures in the insurgency or in powerful criminal gangs. However, barring cases of this kind, in the case of persons found to come from Mogadishu who were returnees from the United Kingdom, the AIT found that they would face on return a real risk of persecution or serious harm and it was reasonably likely, if they tried staying there, that they would soon be forced to leave or that they would decide not to try to live there in the first place.

67. Nevertheless, the AIT were not persuaded that the situation in central and southern Somalia had reached the threshold where civilians *per se* or Somali civilian IDPs *per se* could be said to face a real risk of persecution, serious harm or treatment proscribed by Article 3 of the Convention. First, although the levels of violence had increased in intensity, the numbers of those killed and wounded was not of great magnitude. Secondly, while the humanitarian situation was dire, it did not appear that civilians *per se* faced a real risk of denial of basic food and shelter and other bare necessities of life. Thirdly, while there was evidence of attacks on IDPs, in view of the huge numbers of people displaced (over a million according to some reports), it appeared that the great majority of IDPs were able to travel and subsist in IDP camps or settlements without serious setbacks.

68. Rather, the AIT assessment of the extent to which IDPs would face greater or lesser hardships, at least outside Mogadishu, would vary depending on a number of factors. In particular, the AIT noted that IDPs from more influential clans appeared to have a better chance of being tolerated in the area to which they fled; IDPs with a traditional clan area that they could travel to, especially if they had close relatives or close clan affiliations in that area, appeared to have better prospects of finding safety and support (although not if the area concerned was already saturated with fellow IDPs); those who lacked recent experience of living in Somalia appeared more likely to have difficulty dealing with the changed environment in which clan loyalties had to some extent fractured; persons returning to their home area from the United Kingdom could be perceived as having relative wealth and might be more susceptible to extortion, abduction and the like; those who lived in areas not particularly affected by the fighting and which were not seen as strategically important to any of the main parties to the conflict would appear less subject to security problems; women and girls faced the additional risks of rape, abduction and harassment; the prevailing economic conditions in the area would also be relevant, bearing in mind Somalia’s history of droughts, poor harvests and rising food prices.

69. The AIT recognised that there had been a significant change in the clan-based character of Somali society since *HH* was promulgated. Clan protection was not as effective as it had been in the early 1990s and conflicts over scarce resources had complicated the situation and made it unpredictable. This did not mean, however, that the clan or sub-clan had ceased to be the primary entity to which individuals turned for protection.

70. As regards internal relocation, whether those whose home area was Mogadishu (or indeed any other part of central and southern Somalia) would be able to relocate in safety and without undue hardship would depend on the evidence as to the general circumstances in the relevant parts of central and southern Somalia and the personal circumstances of the applicant. Whether or not it was likely that relocation would mean that they had to live in an IDP camp would be an important but not

necessarily a decisive factor.

71. The AIT considered the safety of *en route* travel from Mogadishu International Airport, which was the point of return for anyone being removed to central and southern Somalia. The AIT noted that:

“The airport is one of the facilities patrolled by AMISON troops (COIS, 27.13). According to Somalia Humanitarian Overview, September 2008, normally at least 5 commercial flights arrive and depart on a weekly basis to and from the rest of Somalia, Kenya, Djibouti and Dubai. The COIS Reply of 24 October 2008 notes that it is expected in the next month or so that thousands will leave via MIA to perform Haj in Saudi Arabia. At the time of HH, the airport was fully operational with flights arriving and departing regularly. However in 2008 the situation has been unsettled. There were attacks of some kind in January 2008 and the downing of a plane by a missile in March 2008 (COIS, 27.13). The airport was attacked by insurgents on 1 June 2008 as the President’s plane left for talks in Djibouti. On 14 September 2008 a group identifying themselves as Al Shabab threatened to shut the airport down, although a counter-report from Union of Islamic Courts said that the Islamist forces did not intend to close it. It was closed on 16 September. On 28 September there were mortar attacks on it upon the arrival of an AMISON military plane (COIS, A.2). A Press TV cutting dated 2 October 2008 states that 5 heavy mortars landed inside MIA injuring a number of soldiers. The assailants apparently targeted a plane trying to land. A COIS Reply dated 15 October 2008 reports an Al Shabab source as saying that on 9 October a civilian plane carrying 120 Somali deportees from Saudi Arabia managed to land without incident. A 13 October press report refers to several mortar attacks on the airport. We were told by the respondent at the outset of the hearing that removals to Somalia were temporarily suspended because of travel documentation problems, but it may well be, in the light of these recent developments, that for the immediate future at least, there would be difficulties in ensuring safe arrival in any event.”

72. In *HH* the AIT had concluded that those moving around Mogadishu and the environs would in general not be at risk of serious harm at checkpoints, although it left open the possibility that the situation might be different if a person were likely to encounter a non-Transitional Federal Government checkpoint alone, without friends, family or other clan members. However, in *AM* the AIT noted that from the second half of 2007 United Nations Office for the Co-ordination of Humanitarian Affairs estimate of the number of roadblocks/checkpoints in central and southern Somalia showed an increase from 238 in July 2007 to 400 in July 2008 and considerably more than half were under the control of insurgents. Nevertheless, while the AIT found that the Transitional Federal Government appeared by and large to have lost control of many of the roadblocks and checkpoints in central and southern Somalia, the evidence continued to indicate that they retained control of the main road from the airport into Mogadishu. While there was some evidence that the road came under attack from insurgents on a daily basis, there was clearly a great deal of ongoing movement of people along the roads in central and southern Somalia and in and around the airport and the AIT did not consider that the available evidence demonstrated a real risk *en route* of persecution or serious harm for travellers from the airport to Mogadishu.

D. *HH (Somalia), AM (Somalia), J (Somalia) and MA (Somalia) v Secretary of State for the Home Department* [2010] EWCA Civ 426

73. One of the applicants in *HH* and one of the applicants in *AM* were granted leave to appeal to the Court of Appeal. Their appeals were joined to those of two other Somali applicants.

74. *HH* contended that the AIT had erred in its application of the provisions of article 15(c) of the Qualification Directive as it had held first, that the notion of an “individual threat” required a “differential impact ” and secondly, that article 15(c) did not add anything to Articles 2 and 3 of the Convention. Before the Court of Appeal, the Secretary of State for the Home Department accepted that the AIT had erred in its interpretation of article 15(c), but submitted that the error was not material. The Court of Appeal held that if the correct (post-*Elgafaji*) approach to article 15(c) had been applied to the facts found by the AIT, it was inevitable that it would have found that the population of Mogadishu as a whole was not subject to such a high level of indiscriminate violence as to justify the conclusion that merely to be there attracted entitlement to subsidiary protection. Consequently, the Court of Appeal dismissed *HH*’s appeal on the ground that the error of law was not material.

75. The AIT had accepted that *AM* was from Jowhar. It noted that there was no longer any significant fighting there but accepted that there was evidence that *en route* travel to Jowhar was hazardous. Nevertheless, the AIT held that it was not empowered to consider the risk faced in

making the journey: rather, it was for the Secretary of State for the Home Department, in finalising the removal arrangements, to satisfy herself that there would be safe *en route* travel for AM. AM appealed to the Court of Appeal on the ground that this was not a lawful approach. The Court of Appeal allowed the appeal, finding that in any case in which it could be shown either directly or by implication what route and method of return was envisaged, the AIT was required by law to consider and determine any challenge to the safety of that route or method. The AIT therefore fell into error as it had declined to consider AM's safety on return. The Court of Appeal remitted the case to the AIT to consider this issue.

76. J had sought judicial review of the Secretary of State for the Home Department's refusal to accept as a fresh claim her submissions about the situation facing her were she to be returned to Somalia. The Administrative Court had held that if the removal directions had indicated that J was expected to go by road from Mogadishu International Airport to her home town, the evidence would have given her a strongly arguable case for judicial review. However, as the detail or method of return was neither clearly nor necessarily implicit within the immigration decision, the judicial review application had been refused. J appealed to the Court of Appeal. For the same reasons adopted in AM's case, the Court of Appeal allowed the appeal. The Court of Appeal indicated (on an *obiter* basis) that the Qualification Directive and the Asylum Procedures Directive read together required that the issues of safety during return (as opposed to technical obstacles during return) should be considered as part of the decision on entitlement. Only technical obstacles could legitimately be deferred to the point at which removal directions were being made or considered. If there was a real issue of safety on return the Secretary of State had to engage with it in his decision on entitlement to protection. If he failed to do so, the appeal tribunal would have to deal with the issue. In any case, the decision on entitlement had to be made within a reasonable time and could not be left until the Secretary of State was in a position to set safe removal directions.

77. MA appealed against the rejection of his Article 3 claims by the AIT. In particular, he complained that the AIT had misdirected itself because it had focused on his failure to tell the truth when it should have asked whether there was evidence relating to his own particular situation, even ignoring his own rejected testimony, which would support his contention that there was a real risk on return. The Court of Appeal accepted that the AIT had adopted the wrong approach, apparently considering that the applicant's lies had disabled it from reaching a conclusion on the Article 3 risk. Had it made an assessment on the basis of the available evidence, it would have had to have concluded that the applicant was at risk of Article 3 ill-treatment on return. The Court of Appeal noted that following *AM*, the Country Guidance relating to Mogadishu was such that most potential returnees would be entitled to subsidiary protection under article 15 of the Qualification Directive. It therefore followed that only those Somalis who could get without undue risk to a place of safety or who had access to protection against the endemic dangers could properly be deported or returned. It was accepted that MA was from a minority clan, that he had not been in Somalia for 15 years, and that for much of that time he had been in detention. There was therefore sufficient evidence before the AIT to at least establish a real risk that he would not have the necessary contacts in Mogadishu to afford him the necessary protection.

E. *AM (Evidence – route of return) Somalia* [2011] UKUT (IAC)

78. In *AM (Evidence – route of return) Somalia* [2011] UKUT (IAC) the Upper Tribunal held that the First Tier Tribunal had failed to give adequate reasons for concluding that the applicant could safely reach his home area of Afgooye from Mogadishu International Airport. However, on reconsideration the Tribunal was not satisfied that returning him would give rise to a breach of Article 3 of the Convention. In particular, it found that travel took place with some degree of frequency from the airport to the city of Mogadishu and into other areas of Somalia; that as the applicant had lived in Yemen and Saudi Arabia, he would be well able to anticipate and comply with the requirements of al-Shabaab; that there was nothing which would put him at any risk were he to encounter a Transitional Federal Government checkpoint; that the evidence did not support a finding that all men or young men were at risk of forced recruitment by al-Shabaab; and, that as the applicant was not found to be a minority clan member, and as his uncle had been able to fund his departure from Somalia, he would be able to avoid foreseeable risks and pay the relatively modest sums

demanded at checkpoints.

F. Judgment of 24 February 2011 (UM 10061-09) of the Swedish Migration Court of Appeal (Migrationsöverdomstolen)

79. The Swedish Migration Court of Appeal, which is the court of final instance in immigration cases, found that a situation of internal armed conflict existed throughout the whole of southern and central Somalia which was sufficiently serious to expose the Somali applicant to a risk of serious harm, even though he could not demonstrate that he would be specifically targeted. The court had regard to many reports which indicated that the fighting had increased in recent months and that the situation had become very unstable and unpredictable. Moreover, due to the worsening security situation, the presence of the United Nations and other international organisations had decreased and, as a consequence, detailed and updated information was hard to come by. Although the safety level in Somaliland and Puntland was considered to be acceptable, a Somali returnee could only gain admittance to those areas if he was seen as belonging or having another connection to them. As that was not the case with the applicant, the court concluded that he could not internally relocate and that he should thus be given a residence permit and subsidiary protection in Sweden.

VII. RELEVANT COUNTRY INFORMATION

A. United Kingdom Government Reports

1. Somalia: Report of Fact-Finding Mission to Nairobi, 8 – 15 September 2010

80. The fact-finding mission interviewed a number of anonymous sources, including international NGOs, security advisors and diplomatic sources, about the current security and humanitarian situation in southern and central Somalia. In particular, the mission sought to obtain information on which groups controlled which areas, how easy it was to travel between different areas, the security and human rights situation, and the conditions in the IDP camps.

81. Sources indicated that control of Mogadishu was divided between the Transitional Federal Government, backed by AMISOM troops, and al-Shabaab. Although the sources had different views on which groups controlled which districts, they mostly agreed that the Transitional Federal Government controlled the airport, the seaport, Villa Somalia and the road between the airport and Villa Somalia.

82. Sources indicated that the security situation in Mogadishu was poor, with thousands of civilians killed in the fighting between AMISOM and al-Shabaab. Areas controlled by al-Shabaab were at risk of shelling by AMISOM, while areas controlled by AMISOM were at risk of shelling by al-Shabaab. All parties to the conflict were guilty of indiscriminate shelling. Violence was sporadic and rape was an issue in many areas. Consequently, there was a constant movement of IDPs into and out of the city. However, one diplomatic source suggested that it would be possible to live in non-conflict areas of the city, which were generally considered to be safe.

83. Sources also indicated that the nature of al-Shabaab violence had become more sophisticated over the past twelve months as foreign fighters had brought with them new tactics and techniques. They not only carried out targeted attacks against AMISOM troops and Transitional Federal Government ministers and MPs, but they also carried out random killings of civilians in Mogadishu in order to create disorder and chaos.

84. The report noted that there were regular flights into Somalia, most of which were destined for Mogadishu International Airport. The EU Special Representative informed the Mission that 15-18 flights arrived in Mogadishu each day. An airplane captain working for African Express Airways also told the Mission that his airline had carried 12,000 passengers into Mogadishu in the first eight months of 2010.

85. The road between the airport and Mogadishu was controlled by the Transitional Federal Government with AMISOM support and these groups managed all checkpoints along the route. It would not be particularly dangerous for ordinary Somalis unless they found themselves “in the

wrong place at the wrong time”. However, there were reports of a failed attack on the airport on 9 September 2010 and some sources suggested that contacts were required in order to make the journey from the airport. The EU Special Representative for the EU Delegation on Somalia indicated that those members of the diaspora who regularly travelled to Mogadishu were well-connected and that mobility was limited unless the individual was aligned with a militia. Likewise, a representative from an international NGO indicated that “any Somalis returning to Mogadishu International Airport would need a lot of preparation and would need to ensure they had contacts in Mogadishu”.

86. A representative from one international NGO suggested that al-Shabaab knew who was landing at the airport as they were receiving information from Transitional Federal Government soldiers based there.

87. Most of the sources interviewed agreed that Somalis were able to move around within Mogadishu without much restriction. Two sources described the checkpoints in the city as “random” or “variable” as they tended to change according to fighting areas and the level of control of specific groups. One source suggested that checkpoints operated by the Transitional Federal Government or Hizbul Islam were more difficult to negotiate as they were operated with less discipline and normally demanded money. Al-Shabaab checkpoints normally checked that people were obeying their code of behaviour and would therefore stop women travelling alone. Some individuals operating these checkpoints would punish those who were not acting according to al-Shabaab’s rules.

88. Contrary to the majority opinion, the EU Special Representative informed the fact-finding mission that all civilians in Mogadishu would either be aligned to a militia or completely unable to get out of the town. The Special Representative even suggested that some Somalis were unable to leave their own district.

89. There was no consensus on which groups controlled the other regions in southern and central Somalia, although all agreed that al-Shabaab controlled most of the land south of a line drawn between Beletweyne and Dhusarmareb. Militias broadly aligned with the Transitional Federal Government controlled pockets of land on the Ethiopian border. Hizbul Islam was nominally in control of some small areas, including parts of the Afgooye Corridor, but al-Shabaab’s influence in these areas was significant. Finally, the region of Galmudug was controlled by a local clan-based administration which acted under the umbrella of Ahlu Sunna Waljamaca.

90. Outside Mogadishu, people were generally permitted to travel within the areas controlled by al-Shabaab although they could encounter difficulties at checkpoints if they were not obeying al-Shabaab rules. Although al-Shabaab had endeavoured to remove “illegal” checkpoints, a number of sources indicated that some clan militia checkpoints remained. The evidence appeared to suggest that it was possible to negotiate the various checkpoints, although a certain amount of risk was involved.

91. A diplomatic source stated that young men travelling in al-Shabaab held areas could be targeted by al-Shabaab for recruitment. This was supported by an international NGO, which advised that forced recruitment was becoming systematic. Young men were asked to register with al-Shabaab, including those who were stopped at checkpoints.

92. A number of sources considered the areas controlled by al-Shabaab to be stable and generally safe for those Somalis who were able to “play the game” and avoid the unnecessary attention of al-Shabaab. On the other hand, one international NGO believed that there were “no safe areas in southern-central Somalia as long as al-Shabaab and Hizbul Islam were present”. Another NGO indicated that everywhere in southern and central Somalia had been affected by violations of international humanitarian law and by a situation of generalised violence and displacement over the past three years on account of the expansion of the insurgency outside Mogadishu. Finally, a diplomatic source stated that “everywhere is volatile and can change at any time”.

93. With regard to the human rights situation, forced recruitment of adults and children appeared to be an emerging problem, particularly for those displaced in the Afgooye Corridor. Sources suggested that all parties to the conflict recruited children, although it was not certain that the Transitional Federal Government forcibly recruited them. Child recruitment was, however, very common in al-Shabaab areas, as they would forcibly recruit the eldest son from local families, some of whom were as young as ten years old. Adult males were also forced to register with al-Shabaab in Merca and Doble.

94. Moreover, the sources indicated that in al-Shabaab areas, human rights were practically non-

existent because of the organisation's interpretation of Sharia law, which was not in accordance with the beliefs of ordinary Somalis. Consequently, people lived in fear as there were serious punishments if al-Shabaab orders were not obeyed. Women in particular were routinely targeted and were not permitted to engage in trade. In addition, al-Shabaab had made a concerted effort to drive NGOs out of its areas by a number of means, including demanding payment of a "registration fee" of up to USD 15,000, looting warehouses and threatening workers. In some cases al-Shabaab had stolen aid and confiscated the assets of NGOs to sell for profit. There was therefore no international NGO presence in al-Shabaab controlled areas and health and feeding programmes had been stopped, with significant consequences for the civilian population.

95. Finally, sources were asked about the conditions in IDP camps. They indicated that although those with resources had left Mogadishu, there were some 250,000 people displaced within the city and no humanitarian assistance was available to them. Estimates suggested that there were a further 200,000 to 500,000 people in the Afgooye Corridor, which had become increasingly urbanised. It was difficult to give an exact number of the people based in the corridor because, due to the nature of the fighting, a lot of people were going back and forward to Mogadishu. Moreover, access for NGOs was difficult as the corridor was controlled by "gatekeepers" who controlled who and what moved into and out of the area. These "gatekeepers" tended to be opportunists who were not aligned to any particular group but they were able to make assistance from NGOs very difficult. Two NGOs said that it was incredibly difficult to access the corridor and, where access was possible, aid was often diverted. Moreover, landlords in the area were either selling the land that the IDPs lived on or were charging rent that they could not afford, forcing them to move on.

96. One international NGO believed that there was a hierarchy within the camps, but did not know whether it was based on clan membership or length of residence. Consequently, it could not be guaranteed that majority clan members would not face problems within the IDP camps.

97. The sources were not aware of any other significant IDP settlements within Somalia.

2. *United Kingdom Border and Immigration Agency Operational Guidance Note*

98. Operational Guidance Notes ("OGNs") are produced by the Border and Immigration Agency of the Home Office. They evaluate the general, political and human rights situation in a country and provide guidance on the nature and handling of the most common type of claim.

99. The OGN on Somalia of 1 July 2010 described how fighting by Transitional Federal Government troops, allied militias, and AMISOM forces against anti-government forces in southern and central Somalia had resulted in widespread human rights abuses, including the killing of thousands of civilians, the displacement of more than one million people and widespread property damage, particularly in Mogadishu. However, a fall in clashes between government troops and insurgents had led to a substantial drop in the numbers of civilians killed in fighting in Mogadishu in 2009. The Mogadishu-based Elman Peace and Human Rights Organisation stated that 1,739 civilians were killed in fighting in 2009, down from 7,574 in 2008 and 8,636 in 2007. At least 4,911 civilians were wounded and 3,900 families displaced by clashes in 2009.

100. The report noted that while Mogadishu remained the focus of the insurgency, fighting had occurred in other parts of the country, including Beletweyne, Kismayo, the Gedo and Bakool regions, from Jowhar to Harardhere and around the central towns of Dhusamareb and Beletweyne.

101. The report indicated that restrictions on movement within Somalia had reduced significantly compared to when the AIT considered the situation in *AM and AM (Somalia)*. In particular, checkpoints operated by the Transitional Federal Government had decreased and there were no reports of armed clan factions operating checkpoints in 2009. Al-Shabaab had established checkpoints at the exit/entry routes of the towns under its control for security reasons. It checked goods, searched people and ensured that its strict Islamic codes were enforced, but it did not collect money. There were also reports that Al-Shabaab had eradicated extortion, robbery and murder from bandits in areas it controlled.

102. With the exception of Mogadishu, there were no reports of checkpoints between towns or within towns, as was common in previous years. There were, however, several checkpoints on the route from Mogadishu towards the Central Regions and some precautions could be necessary, particularly during militia fighting. There was no evidence that those not of adverse interest to the

Transitional Federal Government, al-Shabaab or groups such as Hizbul Islam or Ahlu Sunna Waljamaca, would be unable to pass through checkpoints safely. During overland trips clan protection was not required unless ongoing animosities between two rival clans were involved. Individuals would not generally need an escort, but if they considered an escort to be necessary, it would be feasible for them to arrange one either before or after arrival. It would therefore be feasible for many to return to their home areas from Mogadishu International Airport as most areas were more accessible than previously.

103. The report also noted that it was possible for Somalis to fly from Mogadishu International Airport directly to Hargeisa, in Somaliland, a region which was widely considered to be relatively safe. However, the authorities in Somaliland, like the authorities in Puntland, would only admit those who originated from the territory or those who had close affiliation to the territory through clan membership. In Somaliland, the majority clan was the Isaaq.

104. With regard to the human rights situation, the report noted that:

“Al-Shabaab currently controls much of southern and central Somalia, including large portions of Mogadishu. The Transitional Federal Government has maintained control of a few areas in the south east of the city, government installations, the Presidential palace and strategic locations such as the airport and seaport. Al-Shabaab controls large portions of Mogadishu including the north and north-east parts of the city, the main stadium and the main market. It controls nearly all of Middle and Lower Jubba regions, Gedo region, Bay region, Bakool region, and parts of Lower Shabelle region. This includes control of the key port cities of Kismayo and Marka and the Kenya border town of Diif. It also wields significant influence in Middle Shabelle and Hiraaan region.

The human rights situation has deteriorated particularly in areas controlled by al-Shabaab and allied extremist groups. Al-Shabaab and other armed groups have continued to violate women’s rights in southern and central Somalia. Women face arbitrary detention, restriction of movement and other forms of abuse for failure to obey orders, including non-observance of dress codes. There is a rising pattern of inhuman and degrading treatment, including stoning, amputations, floggings and corporal punishment. Men too are subjected to inhuman and cruel treatment for their illicit relationship with women and other offences such as ‘spying’. Journalists have been repeatedly subjected to threats and short-term arbitrary detentions, particularly in Baidoa and Kismayo. Al-Shabaab has increasingly targeted civil society groups, peace activists, media and human rights organisations. Humanitarian assistance has been severely hampered by the prevailing insecurity and threats specifically targeting humanitarian agencies. In southern and central Somalia there is evidence that children are being exposed to recruitment into armed forces by all parties to the conflict.”

105. In respect of the humanitarian situation, the report indicated that by November 2009 the total number of displaced persons had reached 1.55 million, 93% of whom were concentrated in southern and central areas, including 524,000 in the Afgooye corridor. The security situation was having a negative impact on the relief operation. Rising threats and attacks on humanitarian operations, as well as the imposition of demands from armed groups, had made it virtually impossible for the World Food Programme (“WFP”) to continue reaching people in need in southern Somalia. Inflammatory statements by al-Shabaab against relief organisations, threats against humanitarian staff, explicit rejection of foreign food aid and demands for fees had all worsened.

106. The report concluded that while the general humanitarian situation in southern and central Somalia was poor, it was not so serious as to cause, in itself, a breach of Article 3 of the Convention. Aid agencies were subjected to obstructions and dangers in delivering aid to IDPs but most of those in need continued to be reached and efforts were being strengthened to sustain critical food operations in southern and central Somalia. Each case therefore had to be considered on its individual merits in order to assess whether, in the particular circumstances of the case, the Article 3 threshold was met.

B. United States’ Government Reports

1. Department of State Country Report on Human Rights Practices, Somalia, 2009 (11 March 2010)

107. The report indicated that the Transitional Federal Government’s respect for human rights had improved. However, the poor human rights situation in Somalia had deteriorated further during the year, especially in the areas controlled by al-Shabaab and allied extremist groups. Human rights abuses included unlawful and politically motivated killings, kidnappings, torture, rape, amputations, beatings, official impunity, harsh and life-threatening prison conditions, and arbitrary arrest and

detention.

108. With regard to movement within Somalia, the report indicated that checkpoints operated by the Transitional Federal Government and its associated militias had decreased. According to a report by UNOCHA, al-Shabaab established checkpoints at the exit/entry routes of the towns under its control for security reasons. There were no reports of checkpoints between towns or within towns, as was common in previous years. There were also no reports of armed clan factions operating checkpoints during the year.

2. *“Somalia: Current Conditions and Prospects for a Lasting Peace”, Congressional Research Service, 16 December 2010*

109. The report noted that the humanitarian situation in Somalia remained dire as the fighting in Mogadishu had added more challenges to already poor conditions on the ground. An estimated 1.1 million people had been displaced and more than 475,000 had fled to neighbouring countries in the past two years. Targeted attacks on humanitarian groups had made delivery of assistance difficult and the Obama Administration had suspended assistance in areas controlled by al-Shabaab.

C. The Norwegian Directorate of Immigration Country of Origin Centre Somalia: Security and Conflict in the South (23 August 2010)

110. The report noted that the situation in southern Somalia and in Mogadishu in particular was unstable and the power balance in the regions, districts and urban areas could change almost from day to day. Consequently, information on area control could become out of date very quickly.

111. It was clear, however, that the military and political situation remained extremely complicated. Large areas of southern Somalia were controlled by al-Shabaab and other Islamist groups in opposition to the authorities. Many areas of Mogadishu had been the scene of shooting, shelling and fighting between Islamists and Government forces supported by AMISOM. In spite of a certain amount of stability in parts of the country, the civilian population was still the victim of indiscriminate violence, albeit to a slightly lesser extent than previously. Leading observers agreed that the situation was fragile as the Islamist groups had the will and means to continue to fight, while the Transitional Federal Government was weak and probably would not survive without the presence of AMISOM.

112. The UN Special Envoy for Human Rights, together with a number of other international observers, noted that the arrival of foreign jihadists in Somalia had resulted in al-Shabaab operations becoming “professionalised”, which meant that they were implemented with greater precision and brutality. According to a number of observers, individual al-Shabaab cells were controlled by foreign jihadists who did not wish for peace or to enter into any form of dialogue with the authorities.

113. With regard to the humanitarian situation, the report noted that while the nutritional situation was expected to improve in the year ahead on account of a good harvest, the food security situation remained poor. Food prices were high and access to clean drinking water remained a considerable problem.

114. Estimates indicated that the total number of displaced persons in Somalia was around 1.3 million. Resources in local areas were stretched to the maximum as the displaced from Mogadishu sought refuge in traditional clan areas. While clan members were prepared to share what resources they had as far as possible, displaced persons without clan connections did not have that safety net and were therefore in a more difficult position. However, the report quoted the UN Special Envoy as stating:

“Monitoring the human rights situation in south and central Somalia remains very difficult due to the serious constraints on gathering information owing to security conditions. The independent expert was himself unable to visit the region. Nevertheless, major human rights concerns have been documented and the independent expert remains deeply concerned at the deterioration of the situation.”

115. The report noted that freedom of movement in Somalia had improved since January 2009 and the general impression was that the population could travel relatively freely in both government controlled areas and areas controlled by other groups. The removal of road blocks had had a positive effect on criminality as cases of “rape and run” had previously been widespread in these areas. However, in spite of the improvements, restrictions imposed by al-Shabaab on women restricted

their freedom of movement and had a negative impact on their families, which were often dependant on women's income from trading.

116. International organisations had increasingly been the target of violent attacks since 2008 and, because of the safety risk, only a few international representatives remained in southern Somalia. Like the UN and foreign embassies, business was run from main offices in Nairobi while local employees were responsible for work on the ground in Somalia. Local human rights organisations could not publish detailed reports for fear of their own safety. However, aid work in Somalia could be risky for local employees as they were increasingly coming under attack.

117. In any case, aid organisations had limited access in the areas controlled by al-Shabaab. In January 2010 the WFP decided to suspend its activities in the al-Shabaab controlled areas. This has had consequences for the population in Lower Shabelle Bay, Bakool and Gedo as access to the necessary food supplies and other aid was limited. Moreover, at the beginning of August 2010, al-Shabaab ordered the Adventist Development and Relief Agency, World Vision and Diakonia out of the areas under their control on the ground that they were operating missionary activities. With these three organisations gone, very few international aid organisations remained in place in southern Somalia.

118. With regard to the situation in Mogadishu, the report noted that conditions in the different areas varied and there was a difference between the northern and southern parts of the capital. The areas of Hodan, Hawl, Wadaag, Wardhingley, Yaqshiid, Bondheere, Shibis and Abdulaziz were the hardest hit by shelling and attacks. To a lesser extent, the districts of Medina, Dharkley, Hamar Weyne, Waaberi and Hamar Jajab were also affected by the fighting. However, the report noted that the situation was unpredictable and could easily change. For example, the Karaan district in the north had previously been considered relatively peaceful but was now shot to pieces and all its inhabitants had fled.

119. According to a well-informed international aid worker, ten people per week died in Mogadishu due to fighting. It was difficult to estimate how many of the dead were civilians. It was also difficult accurately to estimate the number of displaced. According to the UNCHR, there were around 370,000 displaced persons in Mogadishu and 360,000 in the Afgooye Corridor. However, it was possible that there were great margins of error as the UN estimates were based on satellite images and it was thought that many houses had been built to mislead aid organisations. Nevertheless, well-informed sources indicated that the situation in Somalia today was much more difficult than it had been at the beginning of the 1990s as international organisations were no longer able to carry out their tasks. Poverty was more widespread in Mogadishu than it had been previously and it was therefore more difficult to help those in need. In addition, the clan system had been weakened.

120. Outside Mogadishu the fighting was mostly localised around certain key areas and towns. Strategic towns such as Kismayo, Beletweyne and various towns in the Galgaduud had changed hands many times in recent years and there were also tensions in Bakool and Gedo. However, the main challenge for most of the population of southern Somalia was humanitarian. Fifteen percent of all children under five in southern Somalia were malnourished and medical treatment was limited, especially in villages, where it was estimated that there was one doctor per 25,000 inhabitants.

D. United Nations Reports

1. The UN Secretary-General's Reports

121. In his report to the Security Council on 11 May 2010, the Secretary General noted that there had been increased fighting in southern and central Somalia during the first three months of 2010. Over 110,000 people had been displaced during this period. In addition to the fighting in Mogadishu, there was also continued fighting between al-Shabaab and Hizbul Islam in Lower Juba and Lower Shabelle, and between al-Shabaab and Ahlu Sunna Waljamaca in the central region. National United Nations staff faced direct threats from armed groups in these areas and the presence of international staff in these regions was restricted.

122. The security situation continued to have a direct impact on the provision of humanitarian aid. The report noted that on 28 February 2008 al-Shabaab called for the termination of all World Food Programme ("WFP") operations inside Somalia, and on 1 March 2010 and 7 April 2010 WFP

compounds in Buale and Wajid were occupied by al-Shabaab. There had been no food distribution to over 300,000 IDPs in the Afgooye corridor since November 2009 owing to inaccessibility and another 1.1 million intended beneficiaries were not receiving food distributions throughout the south and central regions.

123. In his report to the Security Council on 9 September 2010, the Secretary General noted that volatility and insecurity had once again increased in Mogadishu. AMISOM and the Transitional Federal Government frequently engaged the insurgents in response to mortar fire and direct attacks and military operations to secure positions in key districts of Mogadishu led to fierce battles. Moreover, the frequency of attacks with improvised explosive devices had led to an increase in civilian casualties during the reporting period. According to the World Health Organisation, approximately 1,600 civilian casualties were admitted to the two main hospitals in Mogadishu from 20 March 2010 to 11 July 2010. That figure, which included almost 400 children under the age of 5 and 48 registered deaths, had left Mogadishu's already weak health services struggling to cope with the casualties. He also reported that beyond Mogadishu, sporadic clashes between al-Shabaab and Ahlu Sunna Waljamaca continued in the central regions and the continuing insecurity had hampered UN operations in Somalia by limiting freedom of movement for UN staff and contractors. In July 2010 al-Shabaab seized the compound of the World Food Programme and the houses of six national staff.

124. The ongoing conflict, particularly in Mogadishu, had displaced 179,000 people in the first quarter and 75,000 people in the second quarter of 2010.

125. In the Secretary-General's report of 9 November 2010 on children and armed conflict in Somalia, he noted that civilians, including children, continued to be the majority of casualties in Somalia, primarily as a result of being caught in the crossfire between the parties to the conflict, shelling and explosions. During 2009 3.64 million people, including approximately 1.8 million children, relied on humanitarian assistance. However, food supplies remained disrupted, access to clean water and medical assistance hindered, and hospitals were stretched to capacity. As from January 2010, food distribution by the World Food Programme was disrupted in all areas controlled by al-Shabaab.

126. Moreover, the climate of violence and impunity exacerbated grave violations of children's rights as individuals were taking advantage of the lack of rule of law and the availability of arms to commit violent crimes against children and other vulnerable members of the population. This was borne out by evidence of rising levels of acts of sexual violence against children. Most at risk were women and girls living on the streets or in open and unprotected settlements for IDPs. In addition, available information indicated that al-Shabaab had undertaken systematic and widespread recruitment of children for use in the conflict. Indeed, it was alleged that at the Galduuma base between Bay and Lower Shabelle, al-Shabaab had 1,800 children, some as young as 9 years old.

127. In his most recent report to the Security Council, dated 28 April 2011, the Secretary General stated that a major military offensive against Al-Shabaab had begun on 19 February 2011. The offensive by the Ahlu Sunnah Wal Jama'a and other groups allied with the Transitional Federal Government against Al-Shabaab in southern central Somalia had focused on the Ethiopia-Kenya-Somalia border. Hostilities centred on the Gedo, Bay and Bakool regions, with armed conflict most prevalent in Bula Hawa and, to a lesser extent, in the vicinity of Beletweyne and Dolo. Troops allied with the Transitional Federal Government had taken control of the town of Dhobley, close to the Kenyan border, on 3 April 2011. Reports of heavy casualties and intensified recruitment efforts on the part of

Al-Shabaab suggested that the group's capabilities might have been reduced. However, Al-Shabaab continued to receive arms and ammunition through southern Somali ports and acquire financial resources from extortion, illegal exports and taxation.

2. Report of the independent expert on the situation of human rights in Somalia, Shamsul Bari (16 September 2010)

128. At the date the report was drafted, heavy fighting had again broken out in Mogadishu and International Committee of the Red Cross reported that hospitals were swamped with war-wounded. According to a report by the Elman Peace Center of Somalia, in the first seven months of 2010

918 civilians died and 2,555 were injured as a result of the increased fighting and shelling. While most casualties appeared to have been the result either of attacks by al-Shabaab and its allies against Transitional Federal Government and AMISOM forces or retaliatory attacks by AMISOM, direct fighting between Islamists such as Ahlu Sunna Waljamaca and al-Shabaab combined with inter-clan clashes in central Somalia also contributed to the high number of deaths. In addition, reports indicated that parties to the conflict had failed to adhere to the principles of international humanitarian law relating to the protection of civilians as hostilities had been waged in urban areas and precautionary measures to avoid civilian casualties had been disregarded.

129. With regard to the human rights situation in areas under al-Shabaab's control, United Nations Workers recorded reports of nine executions by firing squad or stoning, mostly for alleged spying or murder, five cases of amputation, mostly of suspected thieves, and the flogging or whipping of some twenty-eight individuals. In addition, seven cases of beheading were reported, including those of five workers allegedly killed in April 2010 because they were involved in reconstruction work at the Parliament, and two people were allegedly shot dead in June 2010 when they fled from a house in Mogadishu raided by Hizbul Islam because they were watching a World Cup match.

130. Displacement also continued to be a problem. According to a UNHCR report, during the first seven months of 2010 50,065 Somalis sought refuge in neighbouring countries and over 200,000 were internally displaced. As of the end of July 2010, there were 600,484 Somali refugees, mainly hosted in Kenya, Yemen, Ethiopia, Eritrea, Djibouti, Tanzania and Uganda. In addition, 1.4 million Somalis were internally displaced. Assessments conducted revealed that there was a high prevalence of sexual violence in IDP camps, victims were generally of minority clan origin, bereft of clan protection and often forced to engage in risky coping mechanisms.

131. Recruitment of children to be put on the front line remained an issue of major concern. Although recent media attention highlighted the presence of children within the ranks of forces linked to the Government, the majority of reports of new instances of child recruitment attributed responsibility to anti-Government elements.

132. The report further noted that a public health crisis persisted in southern and central Somalia. While good rains between April and June 2010 had improved the food security situation, two million people (27 percent of the total population of Somalia) continued to face a humanitarian crisis. Moreover, the number of acutely malnourished children was estimated to be 230,000, of which 35,000 were severely malnourished, and the majority of these were in southern and central Somalia. The forced movement of people on account of the conflict also limited access to clean water and basic health services.

3. United Nations High Commissioner for Refugees (UNHCR): Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia ("the Eligibility Guidelines"), 5 May 2010

133. UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia ("the Eligibility Guidelines") were published on 5 May 2010. The Eligibility Guidelines noted that over the last three years there had been a consistent failure by all parties to respect basic principles of international humanitarian law, resulting in civilians regularly being caught in the cross-fire. Indiscriminate bombardment and military offensives were carried out in civilian areas with little or no regard for the rules of war and road-side and vehicle-borne bombs, grenade attacks in civilian areas, and deliberate attacks on civilian targets were all too frequent. Hospital records indicated that there were over 900 civilian casualties in Mogadishu in March and April 2010. Other estimates suggested that between 20 and 50 civilians were killed in Mogadishu each week.

134. While the armed conflict was a major cause of displacement, the report noted that increasing numbers of Somalis were fleeing due to fear of persecution linked to the recent political and human rights situation. Others feared persecution due to perceived or actual contravention of traditional Somali social norms and practices. These groups included members of minority clans, women of specific profiles, victims of blood feuds, Christian converts, and lesbian, gay, bisexual and transgender individuals.

135. Consequently, UNHCR concluded that the widespread disregard of their obligations under international law by all of the parties to the conflict and the reported scale of human rights violations made it clear that any person returned to southern and central Somalia would, solely on account of his or her presence there, face a real risk of serious harm. Moreover, UNHCR considered that there was no internal flight alternative available inside southern and central Somalia.

136. UNHCR identified three potential agents of persecution. First, there were Islamic militant groups such as al-Shabaab and Hizbul Islam. Both groups had been accused of, and both had admitted to, using the civilian population as human shields during military operations. Both groups also had conducted a systematic campaign of intimidation and assassination of civilians working for, associated with, or perceived to be collaborating with the Transitional Federal Government, AMISOM or the Ethiopian forces. They had also recruited young people and children into their ranks, often with threats of force and violence. Finally, they had set up Islamist administrations in areas under their control and issued decrees to restrict social behaviour. The enforcement of these decrees was often extreme and abusive and violations were punished severely by Sharia courts.

137. Secondly, UNHCR indicated that business persons and civil society figures were particularly at risk as a result of the increased criminality in Mogadishu.

138. Finally, UNHCR identified the Transitional Federal Government and AMISOM as potential agents of persecution. It noted that both groups were accused of indiscriminately shelling civilian areas of Mogadishu in reprisal to mortar attacks launched by opposition forces. In addition, both groups had also been accused of firing at civilians.

139. The report further noted that effective State protection was unavailable in southern and central Somalia given the situation of armed conflict and the inability of the government authorities to extend control over any territory outside a few districts in Mogadishu. Moreover, since 2007 clan protection had been undermined in Mogadishu and increasingly in other regions of southern and central Somalia by the ongoing conflict and by the diminution of the traditional clan systems of justice due to the favoured strict interpretations of Sharia law being implemented by al-Shabaab and Hizbul Islam in areas under their control.

E. Non-Governmental Organisations' Reports

1. Amnesty International: No End in Sight – The Ongoing Suffering of Somalia's Civilians (25 March 2010)

140. Amnesty International noted that civilians in Mogadishu and other cities such as Dhusamareb in central Somalia and Beletweyne in the Hiran region continued to be killed and seriously injured due to the fighting between the armed opposition groups and pro-TGF forces. It noted that:

“no party to the conflict appears to take the necessary precautions to avoid loss of civilian life and injury, despite their obligations to do so under international humanitarian law. Civilians are often caught up in shelling and cross-fire by all parties to the conflict, resulting in death and injury to thousands. The fighting has provoked massive displacement within and outside cities in south and central Somalia and disruption of access to humanitarian aid, which are already curtailed by insecurity and the targeting of aid workers. Civilians living in areas controlled by armed opposition groups are also increasingly subject to abduction, torture and unlawful killings.”

141. With regard to the security situation in Mogadishu, they noted that:

“There are near weekly incidents of fighting and shelling between armed opposition groups on one side and Transitional Federal Government forces and AMISOM troops on the other side, and near weekly reports of civilian deaths and injuries as a result. Armed opposition groups continue to launch attacks from areas inhabited or frequented by civilians in Mogadishu, endangering the lives of civilians. They fire mortars and heavy artillery in the direction of Transitional Federal Government and AMISOM bases, near which civilians live. Transitional Federal Government and AMISOM forces are repeatedly accused of responding by firing mortars and using other artillery weapons in the direction of the attackers. All sides to the conflict use mortars and other heavy artillery, weapons which are inherently indiscriminate when used in densely populated urban areas. Some sources have even alleged to Amnesty International that AMISOM is firing BM or “Katyusha” rockets when responding to attacks by armed opposition groups. These attacks and counter-attacks invariably result in civilian deaths and injuries.”

142. The report indicated that the delivery of emergency humanitarian aid to Somalia was shrinking, as aid workers were coming under attack and armed groups were imposing restrictions on

the movement of international agencies working in areas under their control. In particular, it noted that:

“On 11 October 2009, Hizbul Islam in the Banadir region asked all humanitarian organisations operating in areas under their control to register within 15 days and pay a registration fee by 25 October, whilst al-Shabab in the Juba region renewed their ban against any agency wishing to operate in the region, stating “We want our people to work for their life rather than depending on food aid.”

In November, al-Shabaab in Bay and Bakool regions issued a list of 11 conditions which humanitarian organisations were required to adhere to in order to continue their work in the regions. These conditions reportedly included replacing all female staff members with men within three months, an agreement not to encourage secularism or democracy in their work and a payment of \$20,000 US dollars every six months to the al-Shabaab administration. This was followed on 25 November by an al-Shabaab statement ordering the World Food Programme (WFP) to immediately cease the import of relief food to the country, accusing the organisation of acting as a barrier to self-sufficiency. All local businesspeople were ordered to terminate their contracts with the WFP and the organisation was ordered to empty their warehouses and food-stocks by 1 January 2010.”

143. On 4 January 2010 the World Food Programme suspended its work in southern Somalia due to insecurity for its staff and the demands placed on them by parties to the conflict. Ninety-five percent of the areas from which the organisation had withdrawn were under the control of al-Shabaab, and al-Shabaab subsequently indicated that it would never permit the organisation to return. However, Amnesty International noted that over half of Somalia’s population was dependent on food aid and many of those people lived in the areas that the WFP had withdrawn from.

144. The report also noted that the WFP had experienced difficulties in delivering food to the IDP settlements in Afgooye, where some 360,000 persons displaced by the conflict were thought to live. On 28 February 2010 armed men stopped trucks transporting food aid from Mogadishu to Afgooye and the WFP have since stated that the last time they organised a general food distribution in Afgooye was in November 2009.

2. Amnesty International Briefing Paper, 18 October 2010

145. The report indicated that civilians in Mogadishu continued to bear the brunt of the fighting and were often caught up in shelling and cross-fire by all parties to the conflict. There were nearly weekly incidents of fighting and shelling between armed opposition groups on one side and Transitional Federal Government forces and AMISOM troops on the other, and near weekly civilian deaths and injuries as a result.

146. Medical records of the Daynile hospital on the outskirts of Mogadishu showed that for the first seven months of 2010 48 percent of its patients were suffering war-related injuries and 38 percent of those patients were women and children. Between June and July 2010, hundreds of civilians were killed or injured in Mogadishu. Some field reports claimed that there were as many as fifty deaths in one day, while UNHCR estimated that during the last week of August and the first week of September 2010, 230 civilians were killed and 400 were injured in fighting.

147. Likewise, Médecins sans Frontières stated that between 23 August and 24 September 2010 its medical team in Daynile hospital treated 542 war-wounded people and performed over 200 surgeries. Following intense fighting on 23 September 2010 MSF treated 161 war-wounded patients in one day.

148. The African Union recently signalled its intention to increase the number of AMISOM troops to 8,000 and Amnesty International believed that when this happened it was likely to result in more attacks against the force by armed Islamist groups and more retaliatory shelling by AMISOM.

149. The report noted that the fighting had also caused the destruction of homes, the separation of families during chaotic flight, and massive displacement. UNHCR estimated that 42,400 people had been displaced from within and around Mogadishu since 23 August 2010, some 25,400 having fled Mogadishu and about 17,100 others having moved to different parts of the city.

150. Al-Shabaab had also been seizing cities elsewhere in southern and central Somalia. In particular, there had been clashes in and around Kismayo, Dhusamareb, Beletweyne and Doble. As a result, 29,000 civilians had been displaced from Dhusamareb and 25,000 had been displaced from Beletweyne. In addition to the fighting, al-Shabaab had also severely restricted humanitarian access in most of southern and central Somalia, putting civilians at risk. According to the report,

humanitarian access in southern Somalia was at its lowest since the end of 2006.

151. In addition to indiscriminate attacks and the situation of generalised violence, certain categories of people were particularly at risk of targeted killing. These categories included people linked with the Transitional Federal Government, civil society activists, aid workers and journalists. Children and young men were also at high risk of being forcibly recruited to fight for the armed Islamist groups.

3. Amnesty International – From Life Without Peace to Peace Without Life

152. This report, which was published on 8 December 2010, focussed on the treatment of Somali refugees and asylum-seekers in Kenya, which hosted the largest number of Somali refugees in the region. As of September 2010, there were 338,151 registered refugees in the region, but it was estimated that the actual number was much higher.

153. In 2007 the Kenyan authorities closed the country's border with Somalia and, according to estimates of Kenyan NGOs, thousands of Somali refugees were subsequently returned to Somalia by the Kenyan security forces. Some were expelled at the border while others were denied entry altogether. Many of these refugees were women and children who, according to UNHCR's eligibility guidelines, should have been granted international protection.

154. Amnesty International also received numerous reports of the Kenyan police at the closed border threatening asylum-seekers with forced removal to Somalia in order to extort bribes or arresting or detaining asylum-seekers until they paid a bribe. In addition, Somali asylum-seekers were often arbitrarily arrested, detained and charged with "illegal entry".

155. Prior to the closure of the border, new refugees were registered and medically screened at an UNHCR-administered transit centre 15km from the border before being transported to refugee camps. When the border closed, this transit centre also closed with the consequence that refugees who made it to Kenya had to travel a further 80km to the refugee camps before they could be registered. This journey was often a dangerous one, during which Kenyan police were able to commit abuses against them with impunity.

156. Approximately 280,000 registered Somali refugees were confined to three refugee camps in Dadaab in north eastern Kenya, which were originally intended to accommodate 90,000 refugees. As a result of the severe overcrowding, access to shelter, water, sanitation and other essential services was impeded. As no plots of land were available, new refugees could not build shelters and instead had to stay with relatives or clan members. In addition, the water infrastructure was only designed for one third of the number of people currently living in the camps and, as a result, many refugees complained that the allocation of water was insufficient. Those living at the edges of the camps often had to walk long distances to collect water.

157. Refugees also complained of insecurity in the camps, which they attributed either to tensions between different clans or to the alleged presence of members of or sympathisers with al-Shabaab. Incidences of theft and sexual abuse were on the increase. Aid and protection agencies told Amnesty International that there were not enough police officers present in the camps adequately to address security incidents. In any case, refugees often distrusted the Kenyan police as many had been the victim of abuses by the security forces while on their way to the camps.

158. In October 2009 reports emerged that the Kenyan security forces were recruiting Somali refugees for military training in order to fight for the Transitional Federal Government in Somalia. UNHCR subsequently launched an awareness campaign in the camps, warning refugees that they would lose their refugee status if they joined armed groups.

159. Somali refugees in the Dadaab camps were generally not permitted to leave the camps, unless in exceptional circumstances, and they had almost no livelihood opportunities. They did, however, receive free humanitarian assistance in the camps.

4. Human Rights Watch: Harsh War, Harsh Peace

160. In this report, published in April 2010, Human Rights Watch documented abuses by al-Shabaab, the Transitional Federal Government and AMISOM in Somalia. The report indicated that over the past year, hostilities had raged in strategically important areas, like Mogadishu, while much of the rest of Somalia enjoyed relative peace. However, the report concluded that both the inhabitants

of the shattered capital and those living in more peaceful areas had endured devastating patterns of abuse.

161. In Mogadishu and in other conflict areas in southern and central Somalia the fighting had exacted a heavy toll on civilians. In particular, the report noted that all parties to the conflict had conducted numerous mortar attacks against enemy forces in densely populated areas of Mogadishu without regard for the civilian population, causing a high loss of civilian life and property. While mortars could be highly accurate weapons if guided to their targets by spotters or guidance systems, none of the warring parties in Mogadishu had employed such methods. Opposition armed groups had indiscriminately fired mortar rounds in the general direction of Transitional Federal Government or AMISOM installations in southern Mogadishu. Transitional Federal Government and AMISOM forces sometimes responded in kind, directing mortar rounds towards the general area they had taken fire from or simply bombarding areas such as Bakara Market that were opposition strongholds. Such attacks, while of limited military value, caused considerable loss of civilian life and property damage.

162. The report noted that there had been sporadic fighting between other groups outside Mogadishu which had exacted a heavy toll on civilians. For example, clashes between Hizbul Islam and Ahlu Sunna Waljamaca around the central towns of Dhusamareb and Beletweyne displaced more than 25,000 people at the beginning of 2010.

163. The report further indicated that humanitarian workers had been targeted. According to the Office of the UN Emergency Relief Co-ordinator, 47 aid workers were killed in Somalia in 2008 and 2009. Humanitarian workers also faced a variety of other threats, from the broader trend of indiscriminate violence in conflict areas to al-Shabaab accusations of spying on behalf of western powers. For example, in early 2009 the WFP suspended delivery of food aid to a vast swath of southern Somalia controlled largely by al-Shabaab, citing the group's escalating attacks and harassment against its staff and "unacceptable" demands for payment.

164. Forced and unlawful recruitment was also a problem. The report noted that opposition forces, especially but not exclusively al-Shabaab, were expanding their ranks by threatening those who resisted with death and at times carrying out their threats. In addition, both insurgent groups and government forces were recruiting and using child soldiers to varying degrees and had entered refugee camps in Kenya to enlist additional fighters. The report noted that al-Shabaab had recruited children in a more deliberate and systematic manner than the Transitional Federal Government or other armed groups. Thus the recruitment of children – and the fear of it – was widespread in many areas controlled by al-Shabaab.

165. The report stated that in areas controlled by al-Shabaab (much of the south of Somalia), the population was subjected to targeted killings and assaults, a repressive form of social control and brutal punishments under its draconian interpretation of Sharia law, which went well beyond its traditional interpretation in Somalia. While in many areas al-Shabaab's rule had brought relative peace and order, security came at a steep price. In many areas, al-Shabaab dictated even minute details of daily life, from clothing styles to prayer observance to cell phone ring tones. The report indicated that:

"Al-Shabaab exerts enormous control over personal lives and devotes remarkable energy to policing and penalizing conduct that it deems idle or immoral. Almost no detail is too minute to escape the group's scrutiny. In many areas, al-Shabaab administrators have banned public gatherings, dancing at weddings, musical ringtones on cell phones, western music, and movies. They have outlawed qat chewing and cigarette smoking. They have barred men from shaving their beards and moustaches, or wearing long hair or long trousers. They have refused to allow people on the streets during prayer times.

In many areas, al-Shabaab patrols break up public gatherings, no matter how small, unless they are the organizers. Frequently, al-Shabaab justifies the dispersals on the grounds that participants are engaged in 'idle' or 'useless' activity, a concept that is arbitrarily applied and often includes everything from playing soccer to talking among friends. 'If they find a group of people talking, they may just beat them and tell them to go and do something useful', said one man from the border village of El Wak.

One young man from Kismayo said he watched an al-Shabaab patrol throw a group of teenage boys in jail one evening for playing Scrabble:

'They said this was idle activity. They took them away and jailed them overnight and shaved some of their heads with a razor blade or a broken bottle. One of them was injured from the shaving. They won't even let people gather to listen to the BBC, or to smoke tobacco.'

166. Human Rights Watch also interviewed a widower in an IDP camp in the Afgoye corridor, who claimed that al-Shabaab gunmen had threatened to kill him if he didn't stop tucking in his shirt, which they criticised as a western custom.

167. Human Rights Watch noted that while all Somalis living under local al-Shabaab administrations had to cope with onerous and repressive edicts, women bore the brunt of the group's repression and abuse. In particular, some al-Shabaab leaders had ordered women to wear a particularly thick and bulky type of abaya, an over-gown which covered everything except the hands, face and feet. Al-Shabaab fighters would patrol neighbourhoods and punish women in lighter-weight abayas. In many cases women were beaten or whipped for wearing the wrong clothing.

168. In addition, al-Shabaab administrations ordered women to close their shops as commercial activity permitted them to "mix with men". In a country with a vast number of war widows and female-headed households, this edict left many families without crucial sources of income. Moreover, the segregation of men and women applied to all areas of daily life. Women were not permitted to go to the market with men, even if they were relatives, and if travelling in a vehicle, they had to sit in different seats. There were reports of women being flogged at checkpoints if they were found to be sitting beside a man.

169. Finally, the report noted that in many areas, al-Shabaab leaders had embraced amputations and executions as punishment and turned them into a public spectacle. Since 2008 at least three people had been stoned to death for allegedly committing adultery. There were some unconfirmed reports that one of these people was a thirteen year old girl.

5. Human Rights Watch: World Report 2010

170. Human Rights Watch Annual World Report summarised the situation in Somalia as "one of the world's worst human rights catastrophes". Mogadishu was wracked by indiscriminate warfare in which all parties were implicated in war crimes or other serious human rights abuses, while much of the rest of the country was under the control of local administrations linked to armed opposition groups. In many of these areas the population had suffered from the abusive application of Sharia law and forced conscription of civilians, including children, as militia fighters. In addition, a humanitarian crisis of enormous proportions was unfolding, fuelled by years of drought and insecurity that had often prevented the effective delivery of aid. Some 3.75 million people – roughly half of Somalia's remaining population – were in urgent need of humanitarian assistance. More than a million people were displaced from their homes within Somalia and tens of thousands had fled the country as refugees in 2009.

171. The delivery of humanitarian assistance to Somalia had been severely hampered by the prevailing insecurity and by threats specifically targeting humanitarian agencies. Most of the humanitarian agencies operating in Somalia had had to dramatically curtail their operations or had been driven out of southern and central Somalia altogether. In opposition-controlled areas where millions of Somalis were in need of assistance, humanitarians had come under regular threat by al-Shabaab and other groups which accused them of colluding with international efforts to back the Transitional Federal Government.

6. Human Rights Watch – "Welcome to Kenya": Police Abuse of Somali Refugees

172. This report, which was published in June 2010, details the continuing abuses perpetrated by the Kenyan authorities against Somali refugees and asylum-seekers. It noted that despite the closure of the border, more than 140,000 refugees entered Kenya and registered at the Dadaab camps between 1 January 2007 and 30 April 2010. However, the closure of the border and UNHCR's transit centre had created a lawless no man's land in Kenya's border area near the refugee camps. Consequently, asylum-seekers endeavouring to reach the camps were often intercepted by Kenyan police who sought to extort money from them and unlawfully arrest, detain, abuse and even deport those who could not pay.

173. Human Rights Watch spoke with dozens of Somali refugees whose vehicles had been stopped by police patrolling the border to extort money from them in exchange for free passage to the camps. In some cases, police had raped women and physically assaulted men. In many other cases, refugees were arrested and detained by the police before being permitted to register in the

camps. They were detained in overcrowded cells with poor ventilation and no, or almost no, food and water. Some were not permitted to use the toilet and had to use the cell floor to urinate and defecate. Detained refugees were often released upon the payment of a bribe. If they could not pay, they were threatened with court proceedings in a last ditch attempt to extort money from them.

174. Moreover, Human Rights Watch documented eight separate incidents in which Kenyan police returned asylum-seekers to Somalia. All of these incidents, which involved 152 men, women and children, took place between September 2009 and March 2010. According to this sample, Human Rights Watch estimated that hundreds if not thousands of Somalis were being returned to Somalia each month in breach of the principle of non-refoulement.

175. Such widespread abuses compelled many asylum-seekers to travel through Kenya on smaller paths where criminals preyed on them, stealing their belongings and raping women.

176. There were further reports of serious abuses by Kenyan police officers within the refugee camps. Seven refugees told Human Rights Watch of ten separate incidents during which police had violently assaulted them or during which they had observed police assaulting other refugees. One woman complained that she had been raped by a police officer in the camps.

177. In addition, refugees reported that the police failed to respond to allegations of sexual violence within the camps. In particular, a lack of capacity and expertise impeded the prevention, investigation and prosecution of acts of sexual violence. International policing standards required 1 police officer per 400 people. Although Kenya's official average was 1 per 800 people, the official ration in the camps was 1 per 5500 people. There were reports that the police would not investigate crimes unless the victims could pay them, and in other cases it was alleged that investigations were discontinued and perpetrators were released upon the payment of a bribe. According to UNHCR, in 2009 police in the camps prosecuted sixteen cases of sexual and gender-based violence of which seven resulted in convictions, six in acquittals, and three remained pending at the end of the year.

178. Human Rights Watch also reported that since the early 1990s, Kenya had adopted an informal encampment policy for most refugees, restricting their movement to the limited confines of the refugee camps. Refugees found outside the camps without "movement passes" were arrested, fined and imprisoned for months at a time.

7. International Displacement Monitoring Centre – Somalia: Political and security crises, access limits and donor cuts increasing IDP vulnerability (10 December 2009)

179. The International Displacement Monitoring Centre estimated that as of November 2009 1.55 million people were internally displaced in south and central Somalia. Many IDPs had fled from the conflict in Mogadishu. Hundreds of mini-buses were ferrying people out of the city but, as a result of high demand, the cost of transportation was going up daily and many people were being forced to remain in the city.

180. Some IDPs had fled from conflict in other areas of southern and central Somalia. The report noted that people in Beletweyne, Kismayo and Afmadow had been displaced as a result of fighting in late 2009. In addition, up to 90 percent of the population of Dhuusamarreeb and Guriceel towns in the Galgaduud region of central Somalia fled their homes after fighting began in December 2008. Many of these people had already been displaced as a result of the fighting in Mogadishu.

181. Many of the displaced from Mogadishu moved to the already overcrowded settlements that lined the 30 kilometre road between Mogadishu and Afgooye. UNHCR had estimated that in November 2009 there were 610,000 IDPs around Afgooye, 370,000 around Mogadishu, 150,000 in Galgaduud, 70,000 in Galkayo (Puntland), 66,000 in Baydhaba and 51,000 in Hiran. However, due to the security situation, it was extremely difficult to verify these figures.

182. The report further noted that half of the population in Somalia was believed to be in need of humanitarian assistance but the continuing insecurity was preventing the delivery of essential supplies. In May 2009 militia had attacked a UNICEF warehouse. In July 2009 camps in Jowhar hosting 49,000 IDPs were cut off from assistance as the WFP was unable to distribute food due to insecurity. In August 2009 UNICEF were forced to suspend the dispatch of hundreds of tons of supplies for the prevention and treatment of acute malnutrition. Targeting of humanitarian workers has also affected delivery of aid to needy populations. From 2008 to November 2009 some 42 aid workers had been killed, 33 had been abducted and 10 remained in captivity.

183. In July 2009 al-Shabaab announced a ban on a number of UN agencies in areas of southern and central Somalia under its control, including the United Nations Development Agency. Towards the end of November 2009 al-Shabaab demanded that WFP stop importing food into Somalia from January 2010 and instead buy local produce, despite the fact that the country could not meet the food needs of its population. Despite the threats, WFP managed to provide food through local and international partners where security permitted. In the first half of 2009, WFP provided food aid to 2.87 million Somalis. UNICEF and other agencies continued to provide health care and water, sanitation and health programmes in IDP settlements. However, the security situation had impacted these programmes.

184. Aid work had also been impacted by funding cuts. The USA had withheld millions of dollars from UN agencies, possibly due to a fear that donations may reach al-Shabaab, which was thought to have growing ties with al-Qaeda. In November 2009 WFP reported that its food supply to Somalia had been effectively broken as a result of the USA's policy as it had been the largest donor to the WFP.

185. In September 2009 Oxfam reported that poor sanitation and the lack of access to basic services were creating a public health emergency in IDP camps. It described the Afgooye camps as "the world's densest concentration of displaced people" and described the situation as "a human tragedy of 'unthinkable proportions'". The camps were also vulnerable to environmental problems. In October 2009 flash floods hit IDP camps in Kismayo and Mogadishu and destroyed the makeshift shelters of thousands of people. In Kismayo, rains left an estimated 36,000 people homeless and exposed them to mosquitoes and other hygiene-related problems.

186. The report noted that close to 80 percent of the Somali population had no access to safe water and nearly 50 percent had no access to sanitation. Many displaced women were forced to walk up to 10 kilometres each day to fetch water, increasing the risk of being attacked or raped by militias. IDPs often had to pay to use the latrines in the camps in addition to paying rent. As a result, many camps were littered with garbage and faeces, increasing the incidence of disease.

8. *The World Food Programme ("WFP")*

187. On 5 January 2010 the WFP issued a statement reporting that:

"Rising threats and attacks on humanitarian operations, as well as the imposition of a string of unacceptable demands from armed groups, have made it virtually impossible for the World Food Programme (WFP) to continue reaching up to one million people in need in southern Somalia.

WFP's humanitarian operations in southern Somalia have been under escalating attacks from armed groups, leading to this partial suspension of humanitarian food distributions in much of southern Somalia.

WFP's offices in Wajid, Buale, Garbahare, Afmadow, Jilib and Beletweyne in southern Somalia are temporarily closed, and food supplies and equipment have been moved, along with staff, to safer areas in order to ensure that food assistance continues to reach as many vulnerable people as possible."

188. The Food Security and Nutrition Analysis Unit (FSNAU) reported in its Special Brief – Post-Deyr '09/10 Analysis issued on 12 February 2010 that Somalia has:

"... 42% of the population, or an estimated 3.2 million people, in need of emergency humanitarian assistance and/or livelihood support until June 2010. The results indicate that although there are some positive indicators in terms of the lifting of the livestock export ban and improved crop and livestock production in southern parts of the country, the food security and nutrition situation in central regions remains in crisis, where 70% of the population require assistance. The situation is exacerbated by escalating conflict and displacements, creating a double burden for drought affected populations in central regions, having to support those recently displaced yet with reduced access to assistance from aid agencies due to the insecurity.

Emergency levels of acute malnutrition continue to be reported, with 1 in 6 children in Somalia acutely malnourished and in need of specialist care. Of these children, 1 in 22 is severely malnourished and at a 9 times increased risk of death compared to well-nourished children. However, in south and central Somalia the rates are higher, with 1 in 5 children acutely malnourished of which 1 in 20 is severely malnourished. These national rates of acute malnutrition continue to be amongst the highest in the world. Currently, these rates translate into estimated 240,000 children under 5 years of age in Somalia being acutely malnourished, of which 63,000 are severely malnourished. More than two thirds of these children are located in south and central Somalia, the areas most affected by the current conflict. The people currently in crisis include 1.25 million rural people affected by drought, 580,000 urban people who struggle with very high food and non-food prices, and 1.39 million internally displaced people (IDPs) who are fleeing from the conflict."

9. *Médicins Sans Frontières (MSF)*

189. In a report of 21 December 2009, entitled “Top ten under-reported humanitarian stories of 2009, MSF described the situation in Somalia as follows:

“In 2009, the Somali population continued to fall victim to indiscriminate violence, while severe drought plagued parts of the country. Millions of people urgently require health care, yet the enormous gap between the needs of Somalis and the humanitarian response on the ground continues to widen. Ongoing abductions and killings of international and Somali aid workers is thwarting the efforts of humanitarian organizations to respond, and the public health-care system remains in near total collapse.

...The impact of such high levels of violence and insecurity stretches far beyond MSF’s surgical units, contributing to a general lack of access to basic lifesaving medical care countrywide. MSF’s ability to provide assistance was further diminished when in April two MSF staff members were abducted in Huddur in Bakool region leading to the closure of its largest health centre in south and central Somalia and four other health posts. In June an MSF employee died in an explosion in Belet Weyne, Hiraaan region, which killed 30 other people. In July, the heightened insecurity forced MSF, for the first time in 17 years, to close activities in its pediatric hospital and three other health clinics in northern Mogadishu as staff were forced to flee for their own safety.

Another major challenge is the lack of qualified medical staff in Somalia, with so many health workers among those who have fled the violence and no medical universities open. In December 2008, there was a ray of hope with the graduation of 20 doctors from Benadir University in Mogadishu—the first graduating class of new physicians in two decades. This hope was short-lived with the bombing of the next graduation ceremony on December 3, 2009, killing 23 people, mostly graduates, and wounding more than 50 others.

The lack of free medical care available throughout the country exacerbates the health issues people face as a result of chronic poverty and this year’s severe drought. Although little reliable data is available at the national level, health-care indicators in Somalia are among the worst in terms of immunization, maternal mortality, malnutrition and access to basic health care services. According to the World Health Organization, women have a one in ten lifetime risk of dying during pregnancy or childbirth. One in five children under the age of five is acutely malnourished.”

F. Recent news reports

190. On 16 September 2010 IRIN reported that property owners in Somalia’s Afgooye corridor were selling the land on which thousands of IDPs had been settled for years, displacing them anew. The new landlords were building structures for rent, but few could afford to pay the prices asked. Some well-placed sources had heard reports that the people buying the land had links with piracy.

191. On 1 October 2010 the UN News Centre reported that according to UNHCR estimates, 410,000 IDPs from Mogadishu had sought refuge in the Afgooye corridor, which represented a considerable increase from 366,000 in September 2009. This increase was thought to be a reflection of the deteriorating security in the city since 2007. In addition to the 410,000 IDPs living in Afgooye, there were another 55,000 displaced people in Dayniile, north of Mogadishu, 15,200 in the Bal’cad corridor in the northern periphery of city, and 7,260 others in Kax Shiiqaal in the western outskirts. Mogadishu itself had an estimated 372,000 IDPs.

192. The report noted that there had been a rapid urbanisation of the Afgooye corridor, which was clearly apparent in the satellite imagery. Structures in Afgooye were becoming more permanent as hopes faded for a safe return to the capital any time soon. According to UNHCR, living conditions in the Afgooye corridor were extremely difficult, with people struggling to feed themselves and lacking other basic necessities, while as the precarious security situation prevented humanitarian agencies from accessing those in need. Some assistance was getting there through local partners, but the amounts were minuscule compared to the needs.

193. The Secretary-General’s Special Representative for Somalia, Augustine Mahiga, said that without peace in southern and central Somalia, it would be difficult to envisage profound and lasting changes in the precarious human rights situation there, especially with regard to the right to life, and even basic human rights such as the right to food, shelter, education and health.

194. On 3 February 2011 the Guardian reported that Somalia was once again facing a malnutrition crisis. An estimated 2.4 million people – about a third of Somalia’s population – required humanitarian aid after the failure of recent rains and drought had overtaken insecurity as the leading cause of displacement. In fact, it was reported that as a consequence of the drought, the exodus from conflict-racked Mogadishu in recent years had been reversed, with thousands of people

now leaving the countryside for the capital in search of food and water.

195. On 17 February 2011 UN News Centre reported that severe drought in Somalia was once again exacerbating the humanitarian crisis with more people becoming internally displaced and others moving into refugee camps across the border in Kenya. Malnutrition rates among children, already above emergency levels in Somalia, had risen and an estimated 2.4 million people – 32 per cent of the country’s 7.2 million people – were in need of relief aid.

THE LAW

196. Given their similar factual and legal background, the Court decides that the two applications should be joined pursuant to Rule 42 § 1 of the Rules of Court.

I. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION

197. The applicants complained that their removal to Mogadishu would expose them to a real risk of being subjected to treatment in breach of Article 3 of the Convention and/or a violation of Article 2 of the Convention. Articles 2 and 3 provide, so far as relevant, as follows:

“Article 2

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

...

Article 3

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

They further complained that their removal would constitute a disproportionate interference with their rights under Article 8 of the Convention, which provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

198. The Government contested those arguments.

199. The Court considers that it is more appropriate to deal with the complaints under Articles 2 and 8 of the Convention in the context of its examination of the related complaint under Article 3 and will proceed on this basis (*Said v. the Netherlands*, no. 2345/02, § 37, ECHR 2005-VI; *D. v. the United Kingdom*, 2 May 1997, § 59, *Reports of Judgments and Decisions* 1997-III; and *NA. v. the United Kingdom*, no. 25904/07, § 95, 17 July 2008).

A. Admissibility

1. The parties’ submissions

200. The Government submitted that the applicants had failed to exhaust domestic remedies as they did not make fresh claims for asylum under paragraph 353 of the Immigration Rules HC 395 (as amended) in light of the developing situation in Mogadishu. They further submitted that the second applicant also failed to exhaust domestic remedies as he had not applied for an order for reconsideration of the Asylum and Immigration Tribunal’s decision pursuant to section 103 of the Nationality, Immigration and Asylum Act 2002.

201. Alternatively, the Government submitted that the applicants’ complaints under Article 3 of the Convention were manifestly ill-founded.

202. The applicants submitted that they had exhausted all domestic remedies. First, they

submitted that paragraph 353 did not provide a remedy which they were required to exhaust, as the making of a fresh claim was a discretionary remedy and not an automatic right. Secondly, even if paragraph 353 did provide a remedy which they were required to exhaust, the applicants submitted that they were unable to make a fresh claim as the content of their claims had already been considered and they were not in possession of material which could be considered to be “significantly different” to that previously considered. Thirdly, as the applicants had not been found to be credible, in practice any fresh claim would have had virtually no prospect of success.

203. The second applicant further submitted that he did not seek an order for reconsideration of the Tribunal’s decision because he was advised both by his lawyer, a senior lawyer from the Refugee Legal Centre, and Counsel, a highly experienced asylum practitioner, that there were insufficient grounds on which to challenge the decision. The Court had always held that experienced counsel’s opinion to the effect that a remedy had no prospect of success was enough to indicate that an appeal would not be successful (*O’Reilly and Others v. Ireland*, no. 54725/00, 29 July 2004 and *H. v. the United Kingdom*, 8 July 1987, Series A no. 120).

2. The Court’s assessment

204. The Court recalls that the rule of exhaustion of domestic remedies in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before the Court for their acts before they have had an opportunity to put matters right through their own legal system. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time, namely, that the remedy was accessible, capable of providing redress in respect of the applicant’s complaints and offered reasonable prospects of success (see *T. v. the United Kingdom* [GC], no. 24724/94, 16 December 1999, § 55). Article 35 must also be applied to reflect the practical realities of the applicant’s position in order to ensure the effective protection of the rights and freedoms guaranteed by the Convention (*Hilal v. the United Kingdom* (dec.), no. 45276/99, 8 February 2000).

205. The Court has consistently held that mere doubts as to the prospects of success of national remedies do not absolve an applicant from the obligation to exhaust those remedies (see, *inter alia*, *Pellegrini v. Italy* (dec.), no. 77363/01, 26 May 2005; *MPP Golub v. Ukraine* (dec.), no. 6778/05, 18 October 2005; and *Milosevic v. the Netherlands* (dec.), no. 77631/01, 19 March 2002). However, it has also on occasion found that where an applicant is advised by counsel that an appeal offers no prospects of success, that appeal does not constitute an effective remedy (see *Selvanayagam v. the United Kingdom* (dec.), no. 57981/00, 12 December 2002; see also *H. v. the United Kingdom*, cited above; and *McFeeley and others v. the United Kingdom*, no. 8317/78, Commission decision of 15 May 1980, Decisions and Reports (DR) 20, p. 44). Equally, an applicant cannot be regarded as having failed to exhaust domestic remedies if he or she can show, by providing relevant domestic case-law or any other suitable evidence, that an available remedy which he or she has not used was bound to fail (*Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 156, ECHR 2003-VI; *Salah Sheekh v. the Netherlands*, no. 1948/04, §§ 121 et seq., ECHR 2007-... (extracts)).

206. The Court accepts that where there has been a significant change in either the applicant’s circumstances or the conditions in his country of origin, making further submissions under paragraph 353 of the Immigration Rules could constitute an effective domestic remedy which an applicant would be required to exhaust. However, in the present case the Court recalls that after the applicants’ complaints were considered by the Asylum and Immigration Tribunal, the Tribunal considered a number of other complaints by applicants challenging their removal to Mogadishu. Prior to the Country Guidance decision of *AM & AM (Somalia)*, which was promulgated towards the end of 2008, the Tribunal had consistently held that the situation in Mogadishu, and in Somalia generally, was not sufficiently grave to place anyone being returned at risk of serious harm and that members of majority clans could still look to their clan for protection. As the first applicant’s claim to be a member of a minority clan had not been believed and the second applicant had accepted that he was a member of a majority clan, the Court does not accept that there was a reasonable prospect that the Secretary of State for the Home Department would have accepted any further submissions by the

applicants as amounting to fresh claims for asylum prior to the decision in *AM & AM (armed conflict: risk categories) Somalia* CG [2008] UKAIT 00091.

207. In *AM & AM (Somalia)* the Asylum and Immigration Tribunal found that the situation in Mogadishu had changed significantly and that it was no longer a safe place to live for the majority of its citizens. Nevertheless, it also found that it would be possible for persons from Mogadishu to relocate safely within Somalia. In view of this finding, the Court considers it likely that even if the applicants had made further representations following the decision in *AM & AM (Somalia)*, and even if the Secretary of State had considered those representations to amount to a fresh claim for asylum, such a claim would not have been successful as the applicants would have been considered to have had an internal flight alternative within Somalia.

208. Consequently, in the circumstances of the present case, the Court does not consider that paragraph 353 of the Immigration Rules HC 396 (as amended) provided the applicants with an effective domestic remedy which offered reasonable prospects of success. It therefore rejects the Government's submission that the applicants failed to exhaust domestic remedies on account of the fact that they did not make further representations to the Secretary of State for the Home Department when the situation in Somalia worsened.

209. With regard to the Government's submission that the second applicant failed to exhaust domestic remedies as he did not apply for an order for reconsideration, the Court recalls that he was advised by a senior lawyer from the Refugee Legal Centre and by experienced counsel that such an application would have had no realistic prospect of success. The Court notes that both the lawyer and counsel advising the second applicant were senior and experienced specialists in the immigration and asylum fields. In these circumstances, the Court has no hesitation in concluding that it was "settled legal opinion" that the applicant would not have succeeded in an application for reconsideration.

210. The Court therefore also rejects the Government's submission that the second applicant failed to exhaust an effective domestic remedy by failing to apply for reconsideration of the Tribunal's decision.

211. Finally, the Court recalls that the Government have also submitted that the applicants' complaints are manifestly ill-founded. The Court considers that this submission raises questions which are closely linked to the merits of the case. It will therefore deal with that submission in its examination of the merits below. It further notes that the application is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. General principles applicable in expulsion cases

212. It is settled case-law that Contracting States have the right as a matter of international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (*Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-....; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 34, § 67, *Boujlifa v. France*, judgment of 21 October 1997, *Reports* 1997-VI, p. 2264, § 42). The right to political asylum is also not contained in either the Convention or its Protocols (*Salah Sheekh*, cited above, § 135, with further authorities). However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country (*Saadi v. Italy* [GC], no. 37201/06, § 125, 28 February 2008). As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victims conduct, the nature of the offence allegedly committed by the applicants is irrelevant for the purposes of Article 3 (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, § 79; and *Saadi v. Italy*, cited above, § 127). Consequently, the conduct of the applicants, however undesirable or dangerous, cannot be taken into account (*Saadi v. Italy* [GC], § 138).

213. The assessment whether there are substantial grounds for believing that the applicant faces such a real risk inevitably requires that the Court assess the conditions in the receiving country against the standards of Article 3 of the Convention (*Mamatkulov and Askarov v. Turkey* [GC],

nos. 46827/99 and 46951/99, § 67, ECHR 2005-I). These standards imply that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case (*Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II). Owing to the absolute character of the right guaranteed, Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (*H.L.R. v. France*, judgment of 29 April 1997, *Reports* 1997-III, § 40).

214. The assessment of the existence of a real risk must necessarily be a rigorous one (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, § 96; and *Saadi v. Italy*, cited above, § 128). It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it.

215. If the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Saadi v. Italy*, cited above, § 133). A full and *ex nunc* assessment is called for as the situation in a country of destination may change in the course of time. Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities (see *Salah Sheekh*, cited above, § 136).

216. The foregoing principles, and in particular the need to examine all the facts of the case, require that this assessment must focus on the foreseeable consequences of the removal of the applicant to the country of destination. This in turn must be considered in the light of the general situation there as well as the applicant's personal circumstances (*Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, § 108). In this connection, and where it is relevant to do so, the Court will have regard to whether there is a general situation of violence existing in the country of destination.

217. In *Vilvarajah v. the United Kingdom* the Court appeared to suggest that a mere situation of general instability would only give rise to a breach of Article 3 of the Convention if there was evidence to demonstrate that the applicant's personal situation was worse than that of the generality of other members of his group (*Vilvarajah v. the United Kingdom*, cited above, § 111). However, in *N.A. v. the United Kingdom* the Court expressly considered its earlier decision in *Vilvarajah v. the United Kingdom* and concluded that it should not be interpreted so as to require an applicant to show the existence of special distinguishing features if he could otherwise show that the general situation of violence in the country of destination was of a sufficient level of intensity to create a real risk that any removal to that country would violate Article 3 of the Convention (*N.A. v. the United Kingdom*, cited above, §§ 115 – 116). To insist in such cases that the applicant show the existence of such special distinguishing features would render the protection offered by Article 3 illusory (*N.A. v. the United Kingdom*, cited above, § 116). Moreover, such a finding would call into question the absolute nature of Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment.

218. Therefore, following *NA v. the United Kingdom*, the sole question for the Court to consider in an expulsion case is whether, in all the circumstances of the case before it, substantial grounds have been shown for believing that the person concerned, if returned, would face a real risk of being subjected to treatment contrary to Article 3 of the Convention. If the existence of such a risk is established, the applicant's removal would necessarily breach Article 3, regardless of whether the risk emanates from a general situation of violence, a personal characteristic of the applicant, or a combination of the two. However, it is clear that not every situation of general violence will give rise to such a risk. On the contrary, the Court has made it clear that a general situation of violence would only be of sufficient intensity to create such a risk "in the most extreme cases" where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return (*ibid.*, § 115).

219. Accordingly, in the present case the Court must examine whether substantial grounds have been shown for believing that the applicants, if deported, would face a real risk of being subjected to treatment contrary to Article 3. In doing so, it will first consider the general situation both in Mogadishu, which will be the point of their return, and in the remainder of southern and central Somalia before focusing on the foreseeable consequences of removal for each of the applicants. However, before it can begin its assessment of risk on return, it must address two preliminary issues which have arisen in the present case: first, the relationship between Article 3 of the Convention and article 15(c) of the Qualification Directive, and secondly, the weight to be attached to country reports which primarily rely on information provided by anonymous sources.

2. *The relationship between Article 3 of the Convention and article 15(c) of the Qualification Directive*

(a) **The parties' submissions**

220. The applicants suggested that article 15(c) was clearly intended to provide for situations falling short of the protection provided both by article 15(b) of the Qualification Directive and Article 3 of the Convention. They therefore accepted that there might be some circumstances in which a serious threat to a civilian's life or person by reason of indiscriminate violence would not, without more, be sufficient to constitute a violation of Article 3 of the Convention. However, they submitted that in the context of their proposed removal, the threat presented was such that the threshold envisaged in *NA v. the United Kingdom* had been exceeded.

221. The Government submitted that both the ECJ in *Elgafaji* and the Court of Appeal in *QD (Iraq) v Secretary of State for the Home Department* had correctly adopted the approach that article 15(c) of the Qualification Directive was distinct from Article 3 of the Convention and, as such, it enabled Member States of the European Union to offer protection to asylum seekers over and above the minimum standards imposed by Article 3.

222. In particular, the Government submitted that this interpretation was consistent with the overall objective of the Qualification Directive, which was to set "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". As such, it combined the traditional criteria contained in the Geneva Convention with the concept of "subsidiary protection status", which drew together the international obligation of Member States as set out in the European Convention on Human Rights with the broader humanitarian practices adopted by Member States towards individuals manifestly in need of protection who did not necessarily qualify under either Convention.

223. The fact that the European Union had adopted a broader scope for subsidiary protection did not mean that the same should necessarily be transplanted into Article 3. That was not what was intended by the adoption of the Directive, which clearly chose a wider scope than that of the Convention. Rather, the Government submitted that the more broadly-based standard of protection adopted by the European Union might not be appropriate across the wider membership of the Council of Europe, particularly in the absence of the express agreement of the Contracting States.

224. Allied to this, the Government submitted that the rigours of the Qualification Directive were mitigated by a number of exclusions set out in article 17 which were based on the conduct of the individual. However, if article 15(c) were to be subsumed into Article 3 of the Convention, these exclusions would not similarly be incorporated.

(b) **The Court's assessment**

225. In *Elgafaji* the ECJ held that article 15(c) would be violated where substantial grounds were shown for believing that a civilian, returned to the relevant country, would, solely on account of his presence on the territory of that country or region, face a real risk of being subjected to a threat of serious harm. In order to demonstrate such a risk he was not required to adduce evidence that he would be specifically targeted by reason of factors particular to his personal circumstances (*Elgafaji*, cited above, § 35). Nevertheless, the ECJ considered that such a situation would be "exceptional" and the more the applicant could show that he was 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 (*Elgafaji*, cited above, § 39).

226. The jurisdiction of this Court is limited to the interpretation of the Convention and it would not, therefore, be appropriate for it to express any views on the ambit or scope of article 15(c) of the Qualification Directive. However, based on the ECJ's interpretation in *Elgafaji*, the Court is not persuaded that Article 3 of the Convention, as interpreted in *NA*, does not offer comparable protection to that afforded under the Directive. In particular, it notes 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.

3. *The weight to be attached to the report of the fact-finding mission to Nairobi (see paragraph 80, above)*

(a) The parties' submissions

227. The applicants submitted that following *NA. v. the United Kingdom*, no. 25904/07, §§ 118 – 122, 17 July 2008, little or no weight should be attached to the report of the fact-finding mission as it did not visit Somalia, did not appear to contact anyone in Somalia, and the majority of "sources" were anonymous, identified only as "an international NGO", "a diplomatic source", or "security advisors". No information was provided about the extent of the sources' presence in Somalia, their roles within their respective organisations, or the type of work (if any) that they carried out in Somalia. This was of particular concern on account of the fact that so few international NGOs and diplomatic missions had any presence in Somalia.

228. In response, the Government submitted that such criticisms were misplaced and unjustified. Although they acknowledged that the mission did not travel to Somalia, they claimed that this was pursuant to advice provided by the Foreign and Commonwealth Office which warned British nationals against travel to Somalia. The Mission went instead to Nairobi, which was the location of the African Headquarters of the United Nations, the location of the highest concentration of inter-governmental and non-governmental organisations operating in and with daily contact to the situation in Somalia. In Nairobi, the Mission was able to interview a number of contacts who had recently returned to Nairobi from Somalia, some of whom had been in Somalia for a number of weeks in the period immediately preceding the mission.

229. The Government further acknowledged that the majority of sources were not named in the report. However, they submitted that anonymity had been granted at the sources' request as they were concerned about the risk to their operations and staff and they asked the Court to take notice of the fact that the sources cited in the report by the Norwegian Directorate of Immigration were also anonymous.

(b) The Court's assessment

230. In assessing the weight to be attributed to country material, consideration must be given to its source, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations (*Saadi v. Italy* [GC], no. 37201/06, § 143, ECHR 2008-... and *NA. v. the United Kingdom*, cited above, § 120).

231. The Court also recognises that consideration must be given to the presence and reporting capacities of the author of the material in the country in question. In this respect, the Court observes that States (whether the respondent State in a particular case or any other Contracting or non-Contracting State), through their diplomatic missions and their ability to gather information, will often be able to provide material which may be highly relevant to the Court's assessment of the case before it. It finds that the same consideration must apply, *a fortiori*, in respect of agencies of the United Nations, particularly given their direct access to the authorities of the country of destination as well as their ability to carry out on-site inspections and assessments in a manner which States and

non-governmental organisations may not be able to do.

232. The Court appreciates the many difficulties faced by governments and NGOs gathering information in dangerous and volatile situations. It accepts that it will not always be possible for investigations to be carried out in the immediate vicinity of a conflict and, in such cases, information provided by sources with first-hand knowledge of the situation may have to be relied on. The Court will not, therefore, disregard a report simply on account of the fact that its author did not visit the area in question and instead relied on information provided by sources.

233. That being said, where a report is wholly reliant on information provided by sources, the authority and reputation of those sources and the extent of their presence in the relevant area will be relevant factors for the Court in assessing the weight to be attributed to their evidence. The Court recognises that where there are legitimate security concerns, sources may wish to remain anonymous. However, in the absence of any information about the nature of the sources' operations in the relevant area, it will be virtually impossible for the Court to assess their reliability. Consequently, the approach taken by the Court will depend on the consistency of the sources' conclusions with the remainder of the available information. Where the sources' conclusions are consistent with other country information, their evidence may be of corroborative weight. However, the Court will generally exercise caution when considering reports from anonymous sources which are inconsistent with the remainder of the information before it.

234. In the present case the Court observes that the description of the sources relied on by the fact-finding mission is vague. As indicated by the applicants, the majority of sources have simply been described either as "an international NGO", "a diplomatic source", or "a security advisor". Such descriptions give no indication of the authority or reputation of the sources or of the extent of their presence in southern and central Somalia. This is of particular concern in the present case, where it is accepted that the presence of international NGOs and diplomatic missions in southern and central Somalia is limited. It is therefore impossible for the Court to carry out any assessment of the sources' reliability and, as a consequence, where their information is unsupported or contradictory, the Court is unable to attach substantial weight to it.

4. *The security situation in Mogadishu*

(a) **The parties' submissions**

235. The applicants submitted that there had been increasing violence in Mogadishu following the withdrawal of Ethiopian troops in January 2009. Human Rights Watch described how Mogadishu had been torn apart by "indiscriminate warfare", while UNHCR reported that both al-Shabaab and Hizbul Islam had been accused of using the civilian population as human shields. In 2010 the Asylum and Immigration Tribunal in *AM (Somalia)* held that the situation in Mogadishu was such that everyone except possibly prominent businessmen or senior figures in the insurgency or in powerful criminal gangs would be at risk if returned there (see paragraph 66, above). The background information post-dating *AM (Somalia)* showed that the situation had since deteriorated (see, for example, paragraphs 121, 123 and 127, above).

236. The applicants submitted that the number of civilian casualties in Mogadishu had been immeasurable and the level of violence was only set to increase. They had obtained a witness statement from a Mr Kahiye Alim, a lawyer who had recently spoken with both General Ahmed Jumal Geedi, the Chief of Army Staff, and Mr Warsame Mohammed Hassan, the Second Deputy Mayor of Mogadishu. Mr Alim had been informed that with the assistance of the new Ugandan troops, the Transitional Federal Government, with the assistance of AMISOM, intended to go on the offensive and retake those parts of Mogadishu which were under the control of al-Shabaab. He had also been informed that following the attempted suicide bombings at Mogadishu International Airport on 9 September 2010, the airport had been subject to daily shelling and bombing.

237. The applicants therefore submitted that the indiscriminate violence in Mogadishu was currently at such a level of intensity as to pose a risk to the life or person of any civilian in the capital.

238. The Government submitted, with reference to the most recent country reports, that Mogadishu was by no means a "no-go area". On the contrary, a number of sources interviewed by the fact-finding mission had emphasised that, despite the dangers, there was still a substantial degree

of normality in Mogadishu and that the risk to civilians appeared to be from being caught up in the crossfire and not from being specifically targeted (see paragraph 87, above).

239. The Government further argued that al-Shabaab had become more sophisticated under the influence of foreign jihadists and, as a consequence, the risks they posed to the general civilian populace appeared to have lessened. In particular, they referred to the report of the recent fact-finding mission, which indicated that al-Shabaab was now targeting its attacks specifically against Transitional Federal Government and AMISOM interests (see paragraph 83, above). The Government also referred to the report of the Norwegian Directorate of Immigration, which indicated that although conditions varied significantly across different areas of Mogadishu, in the areas controlled by al-Shabaab there were some positive signs, high levels of law and order (see paragraph 115, above).

240. Consequently, the Government contended that there were no substantial grounds for believing that the applicants' removal to Mogadishu would give rise to a real risk of ill-treatment contrary to Article 3 of the Convention.

(b) The Court's assessment

241. In the present case the applicants submitted that the indiscriminate violence in Mogadishu was of a sufficient level of intensity to pose a real risk to the life or person of any civilian in the capital. Although the Court has previously indicated that it would only be "in the most extreme cases" that a situation of general violence would be of sufficient intensity to pose such a risk, it has not provided any further guidance on how the intensity of a conflict is to be assessed. However, the Court recalls that the Asylum and Immigration Tribunal had to conduct a similar assessment in *AM and AM (Somalia)* (cited above), and in doing so it identified the following criteria: first, whether the parties to the conflict were either employing methods and tactics of warfare which increased the risk of civilian casualties or directly targeting civilians; secondly, whether the use of such methods and/or tactics was widespread among the parties to the conflict; thirdly, whether the fighting was localised or widespread; and finally, the number of civilians killed, injured and displaced as a result of the fighting. While these criteria are not to be seen as an exhaustive list to be applied in all future cases, in the context of the present case the Court considers that they form an appropriate yardstick by which to assess the level of violence in Mogadishu.

242. It is not in dispute that towards the end of 2008 Mogadishu was not a safe place to live for the great majority of its citizens. In the most recent Country Guideline determination, *AM & AM (Somalia)* (cited above), the then Asylum and Immigration Tribunal carefully considered the intensity of the fighting, the security situation and the extent of the population displacement and concluded that the armed conflict in Mogadishu amounted to indiscriminate violence of such a level of severity as to place the majority of the population at risk of serious harm. However, it did not rule out that there might be certain individuals who on the facts might be considered to be able to live safely in the city, for example if they had close connections with powerful actors in Mogadishu, such as prominent businessmen or senior figures in the insurgency or in powerful criminal gangs.

243. The objective information would appear to suggest that the situation in Mogadishu improved in 2009. The United Kingdom Border and Immigration Agency Operational Guidance Note of 1 July 2010 indicated that a fall in clashes between government troops and insurgents had led to a substantial drop in the numbers of civilians killed in fighting in Mogadishu in 2009 (see paragraph 99, above). This conclusion was offered some support by the report of the Norwegian Directorate of Immigration Country of Origin Centre, which recorded that although the civilian population of Mogadishu was still the victim of indiscriminate violence, it was "to a slightly lesser extent than previously" (see paragraph 111, above).

244. Nevertheless, the most recent reports indicate that all significant parties to the conflict have continued to engage in indiscriminate violence, conducting numerous mortar attacks against enemy forces in densely populated areas of Mogadishu without regard to the civilian population. Moreover, all parties have continued to use mortars without spotters or guidance systems, firing indiscriminately in the general direction of opposition fire or bombarding areas such as Bakara Market which were considered to be opposition strongholds (see paragraphs 82, 123, 127, 132, 137, 139-140 and 160, above).

245. Furthermore, the reports indicate that the security situation in Mogadishu deteriorated in

2010. On 9 September 2010 the Secretary-General of the United Nations reported that volatility and insecurity had increased in Mogadishu (see paragraph 123, above) and on 16 September 2010 Shamsul Bari, the Independent Expert, reported that at the time of drafting his report fighting had once again broken out in Mogadishu and hospitals were swamped with war-wounded (see paragraph 127, above). Estimates of civilian casualties and displaced persons vary from one report to another. The Secretary General reported that from 20 March 2010 to 11 July 2010 approximately 1,600 civilian casualties had been admitted to the two main hospitals in Mogadishu (see paragraph 123, above). In addition, 179,000 people had been displaced in Mogadishu during the first quarter of 2010 and a further 75,000 people had been displaced during the second quarter. The UNHCR reported that 20-50 civilians were dying each week in Mogadishu and that there had been over 900 civilian casualties in Mogadishu in March and April 2010 (see paragraph 132, above). Amnesty International's Briefing Paper of 18 October 2010 suggested that a further 230 civilians had been killed and 400 injured in fighting during the last week of August 2010 and the first week of September 2010 and that 42,400 people had been displaced from around and within Mogadishu since 23 August 2010 (see paragraphs 145 and 148, above). Meanwhile, the Independent Expert referred to statistics produced by the Elman Peace Centre of Somalia, which recorded that 918 civilians had died in the first seven months of 2010 and a further 2,555 were injured (see paragraph 127, above).

246. Whatever the precise figures, it is clear that since the beginning of 2010 the ongoing fighting in Mogadishu has resulted in thousands of civilian casualties and the displacement of hundreds of thousands of people. Although there were reports that al-Shabaab's tactics had become more sophisticated following the recruitment of foreign fighters, none of the reports suggested that the use of new tactics had in any way reduced the risk to civilians. On the contrary, one source told the fact-finding mission that the new tactics introduced by foreign fighters included random attacks on civilians (see paragraph 83, above). The report of the Norwegian Directorate also suggested that the professionalisation of al-Shabaab operations resulted in their being implemented with "greater brutality" (see paragraph 112, above).

247. The situation in Mogadishu has been described by the Norwegian Directorate as unpredictable, capable of changing on a daily basis (see paragraphs 110 and 118, above). While it would appear that at any given time the fighting is more intense in some areas than in others, the report of the Norwegian Directorate indicated that the power balance in districts and urban areas could change almost from day to day and, as a consequence, information on area control could become out of date very quickly (see paragraph 110, above). In particular, the report described how one area which had previously been considered safe was now "shot to pieces" and all its inhabitants had fled (see paragraph 118, above).

248. The Court considers that the large quantity of objective information overwhelmingly indicates that the level of violence in Mogadishu is of sufficient intensity to pose a real risk of treatment reaching the Article 3 threshold to anyone in the capital. In reaching this conclusion the Court has had regard to the indiscriminate bombardments and military offensives carried out by all parties to the conflict, the unacceptable number of civilian casualties, the substantial number of persons displaced within and from the city, and the unpredictable and widespread nature of the conflict.

249. The Court notes that in *AM & AM (Somalia)* the Asylum and Immigration Tribunal left open the possibility that certain individuals who were exceptionally well-connected to "powerful actors" in Mogadishu might be able to obtain protection and live safely in the city. The Court has not received any submissions specifically addressed to this issue and observes that it is one on which the country reports have been largely silent. As Article 3 requires the decision-maker to focus on the foreseeable consequences of removal for each individual applicant, it would not exclude that it might be shown that a well-connected individual would be protected in Mogadishu. However, it considers it likely that this would be rare. First, in the light of the Tribunal decision it would appear that only connections at the highest level would be in a position to afford such protection. For example, it would not be enough to show that an individual was a member of a majority clan. Secondly, it recalls that in *HH (Somalia) and Others v Secretary of State for the Home Department* [2010] EWCA Civ 426 the Court of Appeal found that an applicant who had not been to Somalia for some time was unlikely to have the contacts necessary to afford him protection on return. It is therefore unlikely that a Contracting State could successfully raise such an argument unless the individual in question had

recently been in Somalia.

250. Consequently, the Court concludes that the violence in Mogadishu is of such a level of intensity that anyone in the city, except possibly those who are exceptionally well-connected to “powerful actors”, would be at real risk of treatment prohibited by Article 3 of the Convention.

5. *Conditions in southern and central Somalia (outside Mogadishu)*

(a) **The parties’ submissions**

251. The applicants submitted that it would be unrealistic for them to travel to another part of southern and central Somalia. The entry point to Somalia was Mogadishu International Airport and as a consequence of the intense level of violence prevalent in and around Mogadishu, travelling, or attempting to travel, from the airport to another part of southern and central Somalia would expose them to a real risk of treatment proscribed by Article 3.

252. The applicants relied on the UNHCR Eligibility Guidelines, which did not consider that there was any internal flight or relocation alternative available inside southern and central Somalia. Throughout 2009 and 2010 there had been widespread violence throughout the region and UNHCR considered that there was substantial evidence of generalised violence resulting in indiscriminate harm (see paragraphs 132 - 134, above).

253. In addition to the high levels of violence, there had also been a marked increase in detention, torture, unlawful killing and “ruthless attacks” in both Mogadishu and elsewhere in southern and central Somalia. Amnesty International reported a worrying trend of individuals stoned to death, publicly shot dead, amputated and flogged on the orders of quasi-judicial bodies operated by local leaders linked to armed groups (see paragraphs 164 - 168, above).

254. The applicants further submitted that if returned to Mogadishu there was at least a reasonable likelihood that they would be forced into IDP camps and the dire humanitarian conditions in these camps and makeshift settlements therefore had to be taken into account in assessing compliance with Article 3.

255. As the IDP camps and settlements were virtually inescapable, the applicants argued that they were similar to detention camps and, as such, the Court should apply by analogy its jurisprudence on detention conditions. The applicants argued that the conditions in the camps and settlements resembled, but were very much worse than, conditions which the Court had found to violate Article 3 in respect of detainees (see, for example, *Dougoz v. Greece*, no. 40907/98, ECHR 2001-II, *Peers v. Greece*, no. 28524/95, ECHR 2001-III, *S.D. v. Greece*, no. 53541/07, 11 June 2009, *Riad and Idiab v. Belgium*, nos. 29787/03 and 29810/03, ECHR 2008-... (extracts) and *Al-Agha v. Romania*, no. 40933/02, 12 January 2010). They lacked the basic necessities of life such as food, water and healthcare. The level of violence, including violence against women and children, meant that many lived in constant fear for their lives or physical safety. In addition, although 70 percent of people located in the central Somalia region were in need of humanitarian assistance, UNHCR and other NGOs experienced insuperable difficulties in accessing many key locations. The applicants therefore submitted that being forced to have recourse to these camps would engage the United Kingdom’s responsibilities under Article 3 of the Convention.

256. The Government submitted that outside Mogadishu, much of southern and central Somalia was controlled by al-Shabaab. Recent reports, including that of the fact-finding mission, indicated that these areas were more stable and that harvests had increased. The Government accepted that the increased stability has carried with it an increase in human rights abuses, apparently arising from the extreme nature of al-Shabaab’s interpretation and application of Sharia law. However, they contended that civilians would be safe provided that they “followed the rules”.

257. The Government observed that according to recent reports, the travel situation within Somalia had improved significantly since early 2009. Members of the diaspora flew to Mogadishu regularly, with an established route from Nairobi carrying thousands of passengers in the first eight months of 2010. From information provided to the fact-finding mission it appeared that although returning Somalis would usually have to make arrangements with family members to be met on their return, armed escorts were not necessarily needed. In fact, evidence suggested that Somali citizens could use taxis to travel from the airport to the city (see paragraphs 84 - 85, above).

258. The Government submitted that security had also improved with regard to travel between

the different regions of Somalia and the general impression was that the population could move freely in both Government controlled areas and areas controlled by other groups. Improved security was in part due to the removal of many roadblocks. Although checkpoints still operated, most of these were operated by al-Shabaab in order to check persons and goods and to ensure that its strict Islamic codes were being enforced. This, combined with the fact that al-Shabaab was reported to have largely eradicated crimes such as robbery, theft and banditry, had contributed to the reduction in the risks of travelling (see paragraph 90, above).

259. Insofar as the applicants were relying on the “dire” humanitarian conditions in Somalia as creating the risk of ill-treatment contrary to Article 3 of the Convention, the Government submitted that the principles established in *N. v. the United Kingdom* [GC], no. 26565/05, §§ 42 – 45, 27 May 2008 were applicable. Therefore, humanitarian conditions would only reach the threshold of Article 3 if the circumstances obtaining in the receiving State were “very exceptional”, it was “highly probable” that the applicant would not have access to the basic necessities of life, and that these deficiencies would result in an immediate threat to life or the impossibility of maintaining human dignity.

260. The Government accepted that the humanitarian situation in Somalia was undoubtedly grave. However, they believed that recent reporting highlighted more positive signs. For example, according to UNHCR statistics, there were considerably fewer people in the Afgooye Corridor than there had been previously and a well-informed international source had told the Norwegian Directorate of Immigration that the actual number might be even lower as there was evidence to suggest that the internal refugee figures were exaggerated.

261. Indeed, the fact-finding mission had indicated that the Afgooye Corridor was taking on a more permanent character, with an increasing number of businesses operating in the area. One interviewee had recorded that satellite pictures showed evidence of settling, urbanisation and normal life (see paragraph 95, above). Away from the Afgooye Corridor, there were a limited number of IDP settlements as it was more common for displaced persons to find homes with relatives in other areas. In this regard, the clan system remained important as clan members were prepared to share resources as far as possible.

262. The Government also noted that the recent reporting had consistently identified an increase in human rights abuses in areas controlled by al-Shabaab, based largely on that group’s extreme interpretation and application of Sharia law. Women in particular were considered to be particularly at risk of human rights abuses, although there was also a significant risk to men and children of forced recruitment. However, the Government submitted that while the al-Shabaab regime was undoubtedly repressive, there was evidence to suggest that those who abided by their rules could live their day to day lives freely (see paragraph 92, above).

263. The Government therefore submitted that the dire humanitarian conditions which the applicants might face on return to Somalia would not cross the “very exceptional” threshold as they could show no more than a speculative risk, based on a “worst case scenario”.

264. Consequently, the Government submitted that the level of risk likely to be faced by the applicants if they were to travel from Mogadishu into central or southern Somalia was not sufficient to constitute a breach of Article 3.

(b) The Court’s assessment

α. The internal flight alternative

265. The Court observes that in the present case the Government intends to return both applicants to Mogadishu. However, it cannot limit its consideration of the risk on return to an assessment of the conditions in Mogadishu as the Asylum and Immigration Tribunal found that despite the existence of a real risk of serious harm in the capital, it would be possible for the applicants to relocate to a safer region in southern or central Somalia.

266. In the United Kingdom an application for asylum or for subsidiary protection will fail if the decision-maker considers that it would be reasonable – and not unduly harsh – to expect the applicant to relocate (*Januzi, Hamid, Gaafar and Mohammed v Secretary of State for the Home Department* [2006] UKHL 5 and *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49). The Court recalls that Article 3 does not, as such, preclude Contracting States from

placing reliance on the existence of an internal flight alternative in their assessment of an individual's claim that a return to his country of origin would expose him to a real risk of being subjected to treatment proscribed by that provision (*Salah Sheekh v. the Netherlands*, no. 1948/04, § 141, ECHR 2007-I (extracts), *Chahal v. the United Kingdom*, 15 November 1996, § 98, *Reports of Judgments and Decisions* 1996-V and *Hilal v. the United Kingdom*, no. 45276/99, §§ 67 – 68, ECHR 2001-II). However, the Court has held that reliance on an internal flight alternative does not affect the responsibility of the expelling Contracting State to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention (*Salah Sheekh v. the Netherlands*, cited above, § 141 and *T.I. v. the United Kingdom* (dec.), no. 43844/98, ECHR 2000-III). Therefore, as a precondition of relying on an internal flight alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of his ending up in a part of the country of origin where he may be subjected to ill-treatment (*Salah Sheekh v. the Netherlands*, cited above, § 141).

267. Although it is clear that Somali nationals would not be able to gain admittance to Somaliland or Puntland unless they were born there or had strong clan connections to the region (see paragraphs 79 and 103, above), the Court is not aware of the existence of any similar obstacles which would prevent a Somali returnee from gaining admittance to another part of southern and central Somalia. However, in view of the humanitarian crisis and the strain that it has placed both on individuals and on the traditional clan structure, in practice the Court does not consider that a returnee could find refuge or support in an area where he has no close family connections (see paragraphs 114, 119 and 138, above). If a returnee either has no such connections or if he could not safely travel to an area where he has such connections, the Court considers it reasonably likely that he would have to seek refuge in an IDP settlement or refugee camp. Therefore, in considering the internal flight alternative, the Court will first consider whether a returnee would be exposed to a risk of ill-treatment either in transit or upon settling in another part of southern and central Somalia before considering whether he would be at risk of ill-treatment in an IDP or refugee camp on account of the humanitarian conditions there.

β. The risk in transit or upon settling elsewhere in southern and central Somalia

268. Although there are a number of airports in southern and central Somalia, all applicants facing removal from the United Kingdom have been issued with removal directions to Mogadishu International Airport. The airport is currently controlled by the Transitional Federal Government and AMISOM and, as a consequence, it has been the subject of a number of attacks by al-Shabaab (see paragraphs 71 and 85, above). Nevertheless, the airport appears to be in regular use, with the EU Special Representative reporting that 15 - 18 flights were arriving every day (see paragraph 84, above). Consequently, the Court does not consider that there is a real risk that a person being returned to southern and central Somalia would be subjected to ill-treatment at the airport.

269. Although the Court has found that Mogadishu is not a safe place for the majority of Somalis, it notes that a returnee could travel from Mogadishu International Airport to another part of southern and central Somalia without entering the city. However, the safety of this onward journey will vary from case to case depending on the returnee's destination.

270. The country reports indicate that there has been fighting in the towns of Beletweyne, Kismayo, Dhusamareb, Afmadow, various towns in the Galgaduud region, the Gedo and Bakool regions, the Lower Juba region and Lower Shabelle (see paragraphs 100, 118, 121, 149, 161 and 179 above). Although there is little information available concerning the intensity of the fighting in these areas, it would appear that it is the conflict in Mogadishu which is primarily responsible for Somalia's civilian casualties and widespread displacement (see paragraphs 100, 109, 120, 123-124, 132, 145, 159, 169 and 178, above). Moreover, the reports describe the fighting outside Mogadishu as sporadic and localised around key strategic towns (see paragraphs 120 and 161, above). Consequently, while there is fighting in some areas, other areas have remained comparatively stable (see paragraphs 92, 120, 144 and 159, above).

271. The Court is therefore prepared to accept that it might be possible for a returnee to travel from Mogadishu International Airport to another part of southern and central Somalia without being exposed to a real risk of treatment proscribed by Article 3 solely on account of the situation of

general violence. However, this will very much depend upon where a returnee's home area is. It is not possible for the Court to assess the level of general violence in every part of southern and central Somalia and, even if it were to undertake such an exercise, it is likely that its conclusions would become outdated very quickly. Consequently, if the applicant's home is one which has been affected by the conflict, the conditions there will have to be assessed against the requirements of Article 3 at the time of removal.

272. The Court observes that the situation of general violence is not the only risk that a returnee might have to face if he were to relocate to another part of southern and central Somalia. According to the country reports, the areas with the lowest levels of generalised violence are the areas under the control of al-Shabaab (see paragraphs 92 and 159, above), which are also the areas reported to have the worst human rights conditions (see paragraphs 94, 104, 128 and 164-168, above). Consequently, even if a returnee could travel to and settle in his home area without being exposed to a real risk of ill-treatment on account of the situation of general violence, he might still be exposed to a real risk of ill-treatment on account of the human rights situation.

273. It is clear that in the areas under their control al-Shabaab is enforcing a particularly draconian version of Sharia law which goes well beyond the traditional interpretation of Islam in Somalia (see paragraphs 94 and 164, above) and in fact amounts to "a repressive form of social control" (see paragraph 164, above). The reports indicate that al-Shabaab are concerned with every little detail of daily life, including men's and women's style of dress, the length of men's beards, the style of music being listened to and the choice of mobile phone ringtone (see paragraphs 164 – 165, above). Women appear to be particularly targeted. In addition to strict dress codes, women in al-Shabaab controlled areas are not permitted to go out in public with men, even with male relatives, and have been ordered to close their shops as commercial activity permitted them to "mix with men" (see paragraphs 104 and 166 – 167, above). There were also reports of "systematic" forced recruitment by al-Shabaab of both adults and children in the areas under its control (see paragraphs 91, 93, 126 and 163, above).

274. Al-Shabaab's strict interpretation of Sharia law does not apply only to those living in areas under its control, but also to those travelling through these areas. According to the country reports, al-Shabaab has established checkpoints at the exit/entry routes to towns under its control, where goods and people are searched to ensure that its strict Islamic codes are complied with (see paragraphs 87, 90 and 101 above). Persons not obeying al-Shabaab's rules could experience difficulties at these checkpoints. For example, there were reports of women being flogged at checkpoints because they had been sitting beside a man in a vehicle (see paragraph 167, above). Moreover, there were also reports of young men and children being forcibly recruited at checkpoints (see paragraphs 91, above).

275. In spite of the repressive regime in place, a number of sources told the fact-finding mission that areas controlled by al-Shabaab were generally safe for Somalis provided that they were able to "play the game" and avoid the attention of al-Shabaab by obeying their rules (see paragraph 92, above). However, as al-Shabaab only began seizing parts of southern and central Somalia following the fall of the Union of Islamic Courts in late 2006, the Court considers it unlikely that a Somali with no recent experience of living in Somalia would be adequately equipped to "play the game", with the risk that he would come to the attention of al-Shabaab, either while travelling through or having settled in an al-Shabaab controlled area. The Court considers that this risk would be even greater for Somalis who have been out of the country long enough to become "westernised" as certain attributes, such as a foreign accent, would be impossible to disguise.

276. It is not possible to predict with any certainty the fate of a returnee who came to the attention of al-Shabaab for failing to comply with their rules. The reports suggest that punishments inflicted by al-Shabaab can include stoning, amputation, flogging and corporal punishment (see paragraphs 104 and 164 – 168, above), all of which would attain the minimum level of severity required to fall within the scope of Article 3 (see, for example, *Jabari v. Turkey*, no. 40035/98, § 41, ECHR 2000-VII and *A. v. the United Kingdom*, 23 September 1998, § 22, *Reports of Judgments and Decisions* 1998-VI). The Court accepts that in all likelihood, the punishment would depend on the gravity of the infringement but the Court cannot ignore reports that Somalis have been beaten or flogged for relatively minor infringements, such as playing scrabble (see paragraph 164, above), watching World Cup matches (see paragraph 164, above), and wearing "inappropriate" clothing (see

paragraphs 165 – 166, above).

277. Consequently, the Court considers that a returnee with no recent experience of living in Somalia would be at real risk of being subjected to treatment proscribed by Article 3 in an al-Shabaab controlled area. Accordingly, if a returnee's home area is in an al-Shabaab controlled area, or if it could not be reached without travelling through an al-Shabaab controlled area, the Court does not consider that he could relocate within Somalia without being exposed to a real risk of Article 3 ill-treatment.

γ. Humanitarian conditions in refugee and IDP camps

278. In *Salah Sheekh v. the Netherlands*, cited above, the Court held that socio-economic and humanitarian conditions in a country of return did not necessarily have a bearing, and certainly not a decisive bearing, on the question whether the persons concerned would face a real risk of ill-treatment within the meaning of Article 3 in those areas (§ 141). However, in *N. v. the United Kingdom*, cited above, the Court held that although the Convention was essentially directed at the protection of civil and political rights, the fundamental importance of Article 3 meant that it was necessary for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases. It therefore held that humanitarian conditions would give rise to a breach of Article 3 of the Convention in very exceptional cases where the humanitarian grounds against removal were "compelling" (§ 42).

279. In the recent case of *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21 January 2011, the Court stated that it had not excluded the possibility that the responsibility of the State under Article 3 might be engaged in respect of treatment where an applicant, who was wholly dependent on State support, found himself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity (§ 253). In that case, the applicant had spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that, the Court noted the applicant's ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving (§ 254). It held that the conditions in which the applicant was living reached the Article 3 threshold and found Greece in breach of that Article as it was the State directly responsible for the applicant's living conditions (§ 264). It also found Belgium to be in breach of Article 3 because, *inter alia*, it had transferred the applicant to Greece and thus knowingly exposed him to living conditions which amounted to degrading treatment (§ 367).

280. In the present case the Government submitted, albeit prior to the publication of the Court's decision in *M.S.S. v. Belgium and Greece*, that the appropriate test for assessing whether dire humanitarian conditions reached the Article 3 threshold was that set out in *N. v. the United Kingdom*. Humanitarian conditions would therefore only reach the Article 3 threshold in very exceptional cases where the grounds against removal were "compelling".

281. The Court recalls that *N. v. the United Kingdom* concerned the removal of an HIV-positive applicant to Uganda, where her lifespan was likely to be reduced on account of the fact that the treatment facilities there were inferior to those available in the United Kingdom. In reaching its conclusions, the Court noted that the alleged future harm would emanate not from the intentional acts or omission of public authorities or non-State bodies but from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country. The Court therefore relied on the fact that neither the applicant's illness nor the inferior medical facilities were caused by any act or omission of the receiving State or of any non-State actors within the receiving State.

282. If the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as a drought, the test in *N. v. the United Kingdom* may well have been considered to be the appropriate one. However, it is clear that while drought has contributed to the humanitarian crisis, that crisis is predominantly due to the direct and indirect actions of the parties to the conflict. The reports indicate that all parties to the conflict have employed indiscriminate methods of warfare in densely populated urban areas with no regard to the safety of the civilian population (see paragraphs 82, 123, 127, 132, 137, 139-140 and 160, above). This fact alone has resulted in widespread displacement and the breakdown of social, political and economic infrastructures. Moreover, the situation has been greatly exacerbated by al-Shabaab's refusal to permit international

aid agencies to operate in the areas under its control, despite the fact that between a third and a half of all Somalis are living in a situation of serious deprivation (see paragraphs 125, 131, 169, 187 and 193, above).

283. Consequently, the Court does not consider the approach adopted in *N. v. the United Kingdom* to be appropriate in the circumstances of the present case. Rather, it prefers the approach adopted in *M.S.S. v. Belgium and Greece*, which requires it to have regard to an applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame (see *M.S.S. v. Belgium and Greece*, cited above, § 254).

284. The reports indicate that the conditions for internally displaced persons in southern and central Somalia are dire. Prior to the recent failure of the rains, the reports indicated that over half of Somalia's population was dependent on food aid, and many of those people lived in the areas from which the WFP had withdrawn (see paragraph 169, above). Two million people, representing more than a quarter of the population of Somalia, faced a humanitarian crisis (see paragraph 131, above). The United Nations estimated that that figure had already risen to 2.4 million, nearly a third of the population of Somalia, and that the situation would only deteriorate further if the rains continued to fail (see paragraphs 193 and 194, above). However, despite the humanitarian crisis, al-Shabaab continues to deny international NGOs access to areas under its control (see paragraphs 94, 105, 117, 122, 141-142, 162, 169-170, 181-182 and 186, above).

285. The largest concentration of IDPs is in the Afgooye Corridor. It is impossible to state with any degree of accuracy how many IDPs currently live there, but the most recent estimates indicate that it may be as many as 410,000 people. It is exceptionally difficult for aid agencies to access the corridor (see paragraphs 95, 122 and 143, above) and recent reports suggest that IDPs are being forced to return to Mogadishu in search of food and water (see paragraph 193, above). IDPs in the camps also appear to be extremely vulnerable to exploitation and crime. Both adults and children displaced in the Afgooye Corridor are being forcibly recruited to fight for al-Shabaab (see paragraph 93, above) and there is a high prevalence of sexual violence in the area (see paragraph 129, above).

286. The Government submitted that there is evidence of increased urbanisation of the Afgooye Corridor. Although this assertion is supported by a number of the country reports, it is not clear to the Court whether or not urbanisation has improved conditions for the majority of IDPs. In fact, some reports suggest that IDPs are experiencing increasing difficulties in finding shelter in the Afgooye Corridor as landlords are either selling land that IDPs live on or are charging rent that they cannot afford (see paragraphs 95 and 189, above).

287. Unlike those in the Afgooye Corridor, NGOs have access to the Dadaab camps in Kenya and both Amnesty International and Human Rights Watch have published detailed reports documenting the conditions there. Both organisations reported the difficulties experienced by refugees in reaching these camps following the closure of the Kenyan border (see paragraphs 152, 171-174, above). In particular, there are numerous reports of refugees being arbitrarily detained and/or abused by Kenyan police officers (see paragraphs 153, 154 and 171-173, above), preyed upon by criminal gangs (see paragraph 174, above), and in some cases being returned to Somalia unless they agreed to pay a bribe (see paragraphs 153, 171 and 173, above).

288. Although UNHCR have a presence in the camps and humanitarian assistance is available, the reports indicate that the camps are severely overcrowded. The camps initially were intended to hold approximately 90,000 refugees but the most recent reports indicate that approximately 280,000 registered refugees are now living there (see paragraph 155, above). As a result of the overcrowding, new refugees cannot build shelters and instead have to stay with relatives and/or clan members (see paragraph 155, above). In addition, many refugees complain that the allocation of water is insufficient as the water infrastructure was only designed for one third of the number of people currently living in the camps (see paragraph 155, above).

289. There were also reports of insecurity within the camps, with high levels of theft and sexual violence. This appeared to be in part due to a minimal police presence (see paragraph 176, above) and in part due to police inaction when confronted with reports of crime or sexual violence (see paragraph 176, above). In addition, there were reports that the Kenyan authorities had been taking advantage of vulnerable refugees by recruiting them to fight for the Transitional Federal Government in Somalia (see paragraph 157, above).

290. Both the report of Amnesty International and that of Human Rights Watch indicated that refugees were not permitted to leave the camps, except in exceptional circumstances, and refugees found outside the camps without “movement passes” were arrested, fined and imprisoned for months at a time (see paragraphs 158 and 177, above).

291. In light of the above, the Court considers that the conditions both in the Afgooye Corridor and in the Dadaab camps are sufficiently dire to amount to treatment reaching the threshold of Article 3 of the Convention. IDPs in the Afgooye Corridor have very limited access to food and water, and shelter appears to be an emerging problem as landlords seek to exploit their predicament for profit. Although humanitarian assistance is available in the Dadaab camps, due to extreme overcrowding access to shelter, water and sanitation facilities is extremely limited. The inhabitants of both camps are vulnerable to violent crime, exploitation, abuse and forcible recruitment. Moreover, the refugees living in – or, indeed, trying to get to – the Dadaab camps are also at real risk of *refoulement* by the Kenyan authorities. Finally, the Court notes that the inhabitants of both camps have very little prospect of their situation improving within a reasonable timeframe. The refugees in the Dadaab camps are not permitted to leave and would therefore appear to be trapped in the camps until the conflict in Somalia comes to an end. In the meantime, the camps are becoming increasingly overcrowded as refugees continue to flee the situation in Somalia. Although the IDPs in the Afgooye Corridor are permitted to leave, in reality the only place they are able to return to is Mogadishu, which the Court has found not to be a safe place for the vast majority of civilians. Consequently, there is also little prospect of their situation improving while the conflict continues.

292. Accordingly, the Court finds that any returnee forced to seek refuge in either camp would be at real risk of Article 3 ill-treatment on account of the dire humanitarian conditions. Although there is little information regarding the situation in other IDP settlements in Somalia, from the information that is available the Court sees little reason to believe that the conditions there would be any better than those in the Afgooye Corridor or in the Dadaab camps. If anything, the situation in those settlements is likely to be worse as there has been less publicity concerning the plight of their inhabitants and there is therefore even less chance that they might receive humanitarian assistance.

6. Summary of the Court’s conclusions

293. In conclusion, the Court considers that the situation of general violence in Mogadishu is sufficiently intense to enable it to conclude that any returnee would be at real risk of Article 3 ill-treatment solely on account of his presence there, unless it could be demonstrated that he was sufficiently well connected to powerful actors in the city to enable him to obtain protection (see paragraph 249, above).

294. Nevertheless, Article 3 does not preclude the Contracting States from placing reliance on the internal flight alternative provided that the returnee could travel to, gain admittance to and settle in the area in question without being exposed to a real risk of Article 3 ill-treatment. In this regard, the Court accepts that there may be parts of southern and central Somalia where a returnee would not necessarily be at real risk of Article 3

ill-treatment solely on account of the situation of general violence (see paragraph 270, above). However, in the context of Somalia, the Court considers that this could only apply if the applicant had close family connections in the area concerned, where he could effectively seek refuge. If he has no such connections, or if those connections are in an area which he could not safely reach, the Court considers that there is a likelihood that he would have to have recourse to either an IDP or refugee camp (see paragraph 266, above).

295. If the returnee’s family connections are in a region which is under the control of al-Shabaab, or if it could not be accessed except through an al-Shabaab controlled area, the Court does not consider that he could relocate to this region without being exposed to a risk of ill-treatment unless it could be demonstrated that he had recent experience of living in Somalia and could therefore avoid coming to the attention of al-Shabaab (see paragraph 276, above).

296. Where it is reasonably likely that a returnee would find himself in an IDP camp, such as those in the Afgooye Corridor, or in a refugee camp, such as the Dadaab camps in Kenya, the Court considers that there would be a real risk that he would be exposed to treatment in breach of Article 3 on account of the humanitarian conditions there (see paragraph 295, above).

7. Application of the aforementioned principles to the applicants' cases

(a) The first applicant

α. The parties' submissions

297. The first applicant submitted that he was at an enhanced risk of torture and ill-treatment over and above that which arose solely from being returned to Somalia on account of the fact that he was from a minority clan, the Reer Hamar. He relied on the report of Dr Virginia Luling, prepared in 2007 in the course of the domestic proceedings, which concluded that, as claimed, he belonged to the Benadiri Shanshiya (a sub-clan of the Reer Hamar) on the basis of his knowledge of that clan, his dialect, his appearance and on the basis of information provided by a third party concerning the identity of his father. As a member of a minority clan whose family had either fled persecution or been killed, he would be unable to obtain any clan protection in Somalia. Moreover, as he had claimed asylum in the United Kingdom at the age of sixteen, and had not lived in Somalia for over seven years, he would be seen as a westernised outsider.

298. The first applicant further submitted that he would be unable to cope on return as he suffered from Post-Traumatic Stress Disorder ("PTSD"). He submitted a psychiatric report prepared by Dr Paul Monks, a Consultant General and Forensic Psychiatrist, on 18 August 2008. Dr Monks was of the opinion that the first applicant suffered PTSD which was caused by witnessing the rape of his mother and the murder of his father and sister at the hands of militia. His symptoms included evolving depressive symptoms which were exacerbated by his imprisonment and the uncertainty surrounding his future. His psychiatric problems had resulted in repeated self-harm and suicidal acts, although it was noted that his PTSD symptoms appeared to be partially resolving.

299. The Government did not accept that the first applicant had conclusively demonstrated that he was a member of a minority clan. Dr Luling had interviewed the applicant in August 2007, nearly four years after his arrival in the United Kingdom and some two years after the Adjudicator had rejected his claim that he was a member of the Reer Hamar. The Government therefore submitted that he had had an opportunity to carry out basic research into the Reer Hamar in the period before his interview and the answers relied on by Dr Luling as demonstrating knowledge of the sub-clan was all based on information which would have been in the public domain. With regard to the first applicant's dialect, Dr Luling did not explain on what basis the interpreter was qualified to carry out an assessment of the language used and she did not consider alternative explanations for the mixture of Reer Hamar and general dialect allegedly spoken by him. In particular, the Government relied on the report of the Norwegian Directorate of Immigration, which noted that other Somalis growing up and living in the same neighbourhood as the Reer Hamar probably also know and speak the Hamar dialect.

300. The Government also noted that the first applicant purported to originate from Qoryoley, a small town to the south of Mogadishu in an area currently controlled by al-Shabaab. In light of this and all the other recent information, the Government submitted that the level of risk likely to be faced by him if he were to travel from Mogadishu into central or southern Somalia, and in particular to his home town, was not sufficient to constitute a breach of Article 3 of the Convention.

β. The Court's assessment

301. In view of its findings at paragraph 249, above, the Court finds that if the first applicant were to remain in Mogadishu, there would be a real risk that he would be subjected to Article 3 ill-treatment.

302. As the first applicant originates from Qoryoley, the Court accepts that he might have close family who could support him there. However, the town is currently under the control of al-Shabaab and, as the first applicant arrived in the United Kingdom in 2003, when he was only sixteen years old, the Court considers that there is a real risk he would be subjected to Article 3 ill-treatment by al-Shabaab if he were to attempt to relocate there.

303. The evidence submitted to the Court does not suggest that he has family elsewhere in southern and central Somalia. Consequently, as he could not safely travel to Qoryoley, it is likely that he would find himself in an IDP settlement such as the Afgooye Corridor or in a refugee camp

such as the Dadaab camps. The Court has already found that the conditions in these camps are sufficiently dire to reach the Article 3 threshold and it notes that the first applicant would be particularly vulnerable on account of his psychiatric illness.

304. The Court therefore concludes that the removal of the first applicant to Mogadishu would violate his rights under Article 3 of the Convention.

(b) The second applicant

α The parties' submissions

305. The second applicant submitted that he would be at increased risk in areas controlled by al-Shabaab because he would be seen as westernised and therefore anti-Islamic. He had arrived in the United Kingdom as a young man and had spent his entire adult life there. He wore an earring, which might lead to the perception that he was gay, he spoke little or no Somali and he had a thoroughly "London" accent. Moreover, if it was discovered that he had been a drug addict or thief then he would be liable to double amputations or being publicly flogged or killed.

306. Even though he was from a majority clan, the applicant would be unable to obtain protection as clan structures were breaking down and in any case he no longer had any links to his clan. In addition, it was likely that he would be conscripted to fight for al-Shabaab.

307. The Government submitted that as the second applicant was a member of the Isaaq clan it was likely that, if returned to Mogadishu, he would be able to make contact with, and receive assistance from, other members of his clan. Although it was not clear whether the system of clan protection was as strong in Mogadishu as it had been traditionally, it was still a factor which could reduce further any potential risks to the second applicant arising from the general security situation.

308. Moreover, the Government submitted that even if the second applicant would face a real risk of ill-treatment contrary to Article 3 of the Convention if returned to Mogadishu, he was unlikely to face a similar level of risk if he were to be returned to Hargeisa, the place of his birth. In this regard, the Government noted that the Operational Guidance Note of July 2010 indicated that people could travel by air between Mogadishu and Hargeisa.

β. The Court's assessment

309. In light of the Court's findings at paragraph 249 above, it considers that the second applicant would be at real risk of ill-treatment if he were to remain in the city of Mogadishu. Although it was accepted that he was a member of the majority Isaaq clan, the Court does not consider this to be evidence of sufficiently powerful connections which could protect him in Mogadishu.

310. It does not consider that he would be able to relocate safely within southern and central Somalia. There is no evidence to suggest that he has any close family connections in the region and, in any case, he arrived in the United Kingdom in 1988, when he was nineteen years old. He has therefore spent the last 22 years in the United Kingdom and, like the first applicant, he has no experience of living under al-Shabaab's repressive regime. Consequently, the Court considers that he would be at real risk of Article 3 ill-treatment were he to seek refuge in an area under al-Shabaab's control. Likewise, there would be a real risk he would be subjected to Article 3 ill-treatment if he were to seek refuge either in the Afgooye Corridor or in the Dadaab camps.

311. The Court recalls, however, that the second applicant was born in Somaliland and has accepted that he is a member of the Isaaq clan. The country information indicates that persons who originate from Somaliland and/or have strong clan connections to the region, such as members of the Isaaq clan, would be permitted to return there (see paragraphs 79 and 103, above). Nevertheless, if the second applicant could be admitted to Somaliland, it is not clear to the Court why he was issued with removal directions to Mogadishu rather than Hargeisa, where those originating from Somaliland have in the past been directly returned. The fact that they have chosen not to do so appears to contradict their assertion that he would be admitted there.

312. Accordingly, the Court is not satisfied that the second applicant could travel to Hargeisa, gain admittance and settle there. It therefore concludes that the removal of the second applicant to Mogadishu would also violate Article 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

313. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

314. The applicants made no claim in respect of pecuniary and non-pecuniary damage.

B. Costs and expenses

315. The first and second applicants initially claimed GBP 14,539.99 and GBP 4074.44 respectively for the costs and expenses incurred before the Court. However, both claims were submitted to the Court out of time. The applicants subsequently jointly claimed GBP 4545 in respect of the supplementary observations submitted to the Court in October 2010.

316. The Government submitted that the first applicant’s claim for GBP 14,539.99 was excessive, even allowing for the fact that the case was a lead judgment on returns to Mogadishu.

317. In the circumstances of the present case, the Court has decided to exercise its discretion to admit the applicants’ claims for just satisfaction.

318. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the first applicant the sum of EUR 14,500 for the proceedings before the Court and the second applicant the sum of EUR 7,500 for the proceedings before the Court.

C. Default interest

319. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

III. RULE 39 OF THE RULES OF COURT

320. The Court recalls that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

321. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see above § 4) must continue in force until the present judgment becomes final or until the Panel of the Grand Chamber of the Court accepts any request by one or both of the parties to refer the case to the Grand Chamber under Article 43 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;
2. *Declares* the applications under Article 3 of the Convention admissible;
3. *Holds* that the applicants’ removal to Somalia would violate Article 3 of the Convention;

4. *Holds*

(a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 14,500 (fourteen thousand five hundred euros), plus any tax that may be chargeable, in respect of costs and expenses, to be converted into British pounds at the rate applicable at the date of settlement;

(b) that the respondent State is to pay the second applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of costs and expenses, to be converted into British pounds at the rate applicable at the date of settlement;

(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 28 June 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı Lech Garlicki Deputy Registrar President

**Map provided by the Cartographic Section of the Departments of Peacekeeping Operations and Field Support in
UNHQ**

SUFI and **ELMI** v. THE UNITED KINGDOM JUDGMENT

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