Asylum and Immigration Tribunal

HH & others (Mogadishu: armed conflict: risk) Somalia CG [2008] UKAIT 00022

THE IMMIGRATION ACTS

Heard at Field House
On 19 to 22 November 2007

Before

SENIOR IMMIGRATION JUDGE STOREY
SENIOR IMMIGRATION JUDGE P R LANE
MRS L R SCHMITT JP

Between

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For appellant H:	Mr J Collins, Counsel, instructed by Sheikh & Co.
For appellant S:	Mr R Young, Solicitor of Sheikh & Co.
For appellant A:	Mr I Maka, Counsel, instructed by Messrs Sultan Lloyd
For the respondent:	Mr J Swift, Mr S Wordsworth & Ms D J Rhee, Counsel, instructed by the Treasury Solicitor.

*(1) In deciding whether an international or internal armed conflict exists for the purposes of paragraph 339C of the Immigration Rules and the Qualification Directive (but **not** for any wider purpose outwith the jurisdiction of the Tribunal), the Tribunal will pay particular regard to the definitions to be found in the judgments of international tribunals concerned with international humanitarian law (such as the Tadic jurisdictional judgment). Those definitions are necessarily imprecise and the identification of a relevant armed conflict is predominantly a question of fact.*

(2) It will in general be very difficult for a person to succeed in a claim to humanitarian protection solely by reference to paragraph 339C(iv) of the Immigration Rules and article 15(c) of the Directive, ie. without showing a real risk of ECHR article 2 or article 3 harm.

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(3) Applying the definitions drawn from the Tadic jurisdictional judgment, for the purposes of paragraph 339C of the Immigration Rules and the Qualification Directive, on the evidence before us, an internal armed conflict exists in Mogadishu. The zone of conflict is confined to the city and international humanitarian law applies to the area controlled by the combatants, which comprises the city, its immediate environs and the TFG/Ethiopian supply base of Baidoa.

(4) A person is not at real risk of serious harm as defined in paragraph 339C by reason only of his or her presence in that zone or area.

(5) Neither the TFG/Ethiopians nor the Union of Islamic Courts and its associates are targeting clans or groups for serious harm. Whilst both sides in the conflict have acted from time to time in such a way as to cause harm to civilians, they are not in general engaging in indiscriminate violence.

(6) Clan support networks in Mogadishu, though strained, have not collapsed. A person from a majority clan or whose background discloses a significant degree of assimilation with or acceptance by a majority clan will in general be able to rely on that clan for support and assistance, including at times of displacement as a result of security operations, etc. Majority clans continue to have access to arms, albeit that their militias no longer control the city.

(7) A member of a minority clan or group who has no identifiable home area where majority clan support can be found will 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 event (which is reasonably likely) of being displaced as described in sub-paragraph (6) above. That risk is directly attributable to the person's ethnicity and is a sufficient differential feature to engage the Refugee Convention, as well as article 3 of the ECHR and paragraph 339C/article 15(c) of the Qualification Directive (but for the first sub-paragraph (ii) of paragraph 339C).

(8) The evidence discloses no other relevant differentiating feature for the purposes of those Conventions and the Directive.

(9) The issue of whether a person from a minority clan or group falls within sub-paragraph (7) above will often need specific and detailed consideration. The evidence suggests that certain minority groups may be accepted by the majority clan of the area in question, so as to be able to call on protection from that clan. On the current evidence, it may therefore not be appropriate to assume that a finding of minority group status in southern Somalia is itself sufficient to entitle a person to international protection, particularly where a person's credibility is otherwise lacking.

(10) Subject to sub-paragraph (9) above, outside Mogadishu and its immediate environs, the position in southern Somalia is not significantly different from that analysed in NM and Others (Lone women-Ashraf) Somalia CG [2005] UKIAT 00076

(11) Air travel to and from Mogadishu has not been significantly interrupted; nor has the mobile telephone network in southern Somalia.

(12) Subject to what is said above, NM continues to be country guidance. However, FK (Shekal Ghandershe) Somalia CG [2004] UKIAT 00127 is not to be relied on as authority for the proposition that all members of the Sheikhal Jasira or the Sheikhal Ghandershe are as such entitled to international protection as unprotected minorities. The evidence on which the Tribunal in AA (Risk-Geledi-Benadiri Clan) Somalia [2002] UKIAT 05720 reached its conclusions is also now materially out of date and unreliable and should no longer be followed.

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Notes: (1) "R" or "A" followed by a number refers to the ring binder of documents produced by the respondent or the appellants, as the case may be.
(2) For ease of reference certain spellings have been standardised, including in passages directly quoted.

DETERMINATION AND REASONS

Introduction

1. The appellants are female citizens of Somalia. Appellant H, who gave her date of birth as 3 February 1967, claimed to have arrived in the United Kingdom in 2005 for the purposes of family reunion. On 26 May 2006 she was convicted at Croydon Crown Court and sentenced to nine months imprisonment for the offence of seeking leave to remain in the United Kingdom by means which included deception. The court recommended that appellant H should be deported. She appealed against that decision, asserting that she was an Ashraf and would suffer persecution or other serious harm, if returned to Somalia. The original Tribunal, sitting at Birmingham in March 2007, did not find the appellant to be credible as regards her Ashraf ethnicity or, indeed, anything else about her claim, apart from her coming from Mogadishu. On 19 June 2007 the Tribunal, on reconsideration, found that there was a material error of law in the determination of the original Tribunal, concerning its assessment of the risk to the appellant, as a woman, returning to Mogadishu as at March 2007. It is common ground that this is the only matter which is capable in law of preventing appellant H's deportation.

2. Appellant S entered the United Kingdom on 14 January 2004 and claimed asylum two days later. Her claim having been refused on 31 May 2005, she appealed to the Tribunal which, by a determination that followed a hearing before an Immigration Judge in October 2005, dismissed the appellant's appeal.

3. On 24 October 2006, the Tribunal, on reconsideration, found that there was a material error of law in the determination of the Immigration Judge. Senior Immigration Judge Jarvis's reasons for so finding are as follows:-

"1. The Appellant is a citizen of Somalia, whose date of birth is given as 10 April 1976. She claims to have experienced being persecuted and other serious harm in the past in Somalia and to have a well-founded fear of being persecuted and of other serious harm in Somalia, should she be returned there, together with her dependent child, by reason of her membership of the minority Sheikhal Jasira clan, at the hands of members of majority clans, from whom the authorities are unable to protect her and her child. On 31 May 2005 the Respondent refused to grant leave to enter or remain in the UK on refugee or human rights grounds.

2. The Appellant appealed. Immigration Judge Goldfarb dismissed the Appellant's appeal in a determination issued in October 2005. The Appellant then sought and obtained an order for reconsideration from Senior Immigration Judge Lane which is dated 28 October 2005. It was found to be arguable that the Immigration Judge had erred in law in

- her approach to the expert report of Dr Luling
- failing to have any regard to the explanation given by the Appellant for not attending for a language test
- misapplying evidence as to the Sheikhal Loboge sub-clan
- concluding that the Appellant was a dependent of her uncle in Saudi Arabia
- concluding that the Appellant was not telling the truth regarding her raising of funds to travel.

3. Mr R Young of Sheikh and Co. appeared on behalf of the Appellant. He relied upon the grounds. Although the expert had stated that the Appellant's knowledge of her clan was 'scrappy', the Immigration Judge had completely failed to take into account that she also found it to be accurate and that it was likely that the Appellant is a member of the Sheikhal Jasira. There had been consideration of extracts from the report only and the evidence had not been considered in the round. There had been failure to note that the Appellant appears to speak the Af Reer Hamar dialect which is the dialect of the Benadiri.

4. As to the language test, the Immigration Judge had clearly failed to take into account the fact that the Appellant had explained that she did not know what was required of her in relation to a language test. It appears that the Respondent and the Immigration Judge have misapplied the evidence about the Sheikhal Loboge, mistakenly, it seems, believing that the Appellant was in some way claiming something that she was not, and wrongly holding that against her. The Appellant had clearly stated that her clan is not affiliated to the other clans known as Sheikhal, including the Loobogey (i.e.Loboge). Dr Luling in her expert report makes clear that the Sheikhal of Jasira and the Gandershe are ethnically distinct from other groups such as the Sheikhal Loboge. The Immigration Judge had been referred to two decisions of the Tribunal in which preference had been given to the evidence of Dr Luling as opposed to that in the Joint British Danish, Dutch Fact Finding Mission to Nairobi.

5. There was nothing implausible, Mr Young submitted, in the Appellant having been able to buy jewellery. Her husband was said to have been working illegally and he could have bought it for her. It was not implausible that the jewels were sold to fund the travel.

6. The Immigration Judge was wrong to conclude that the Appellant had lived without difficulties from 1991 until 1995 as this was not her evidence (see paragraph 33). Further, this finding contradicts paragraph 37 where the Immigration Judge herself notes the difficulties that the Appellant had referred to. Without more from the Judge than her finding that the Appellant did not experience 'the level of difficulty that one would have expected' , it was impossible to know what level of difficulty the Judge had in mind, and therefore impossible to know what impact the Appellant's evidence would have had, had the Judge taken it into account. As the matter turns upon the findings as to credibility, these are said to be material matters rendering the determination unsafe and unsustainable.

7. Mr Peter Deller, Senior Presenting Officer, submitted that the ground relating to the non-participation in the language test would not make a significant difference as not much turns upon it. As to the funds for the journey, it was possible that the husband could have saved money, but it was not central. However, so many points were not clear. No strong reason was given for rejecting the expert evidence of Dr Luling. The reference simply to the 'scrappy' point was not a proper approach by the Immigration Judge. Mr Deller accepted that the determination was inadequately reasoned. Paragraph 30 was very troubling. It was difficult to see the stage at which the expert evidence was considered as the Judge simply seems to recite the Respondent's letter of refusal. Nor was the reasoning adequate in relation to what was said to have happened to the Appellant between 1991 and 1995.

8. Mr Deller submitted that he could not seek to argue that the determination be upheld, but neither did he have instructions to concede the clan membership. It was, however, accepted by the Respondent that the Appellant is a Somali national.

9. In all the circumstances, I find, for all the reasons advanced by both parties, as summarized above, that the Immigration Judge did fall into material error of law and that the way forward in this case is for there to be a full second stage reconsideration hearing, before an Immigration Judge or Judges other than Immigration Judge Goldfarb, when all issues will be at large, save that it is accepted by the Respondent that the Appellant is a Somali national."

4. Unlike appellant H, who was properly found by the original Tribunal not to be a member of the Ashraf but, rather, a member of some majority clan, it is common ground that one of the issues to be decided by this Tribunal is whether appellant S is a member of the Sheikhal Jasira.

5. Appellant A was born on 1 June 1976. She claims to have entered the United Kingdom in February 2004, using a passport to which she was not entitled, accompanied by three dependants. She claimed asylum on 5 February 2004 and, when that claim was refused the following month, she appealed to an adjudicator, who dismissed her appeal in a determination promulgated in June 2004. She then successfully sought permission to appeal against the Adjudicator's determination and the resulting appeal to the Immigration Appeal Tribunal was pending when, on 5 April 2005, that body ceased to exist and the Asylum and Immigration Tribunal came into being. On 26 July 2005 the Tribunal found that there was a material error

of law in the Adjudicator's determination, concerning the assessment of risk on return as a member of "the Ashraf clan". The reconsideration was then completed by an Immigration Judge, following a hearing on 28 October 2005. He found that, despite the appellant being of Ashraf ethnicity, "she has had the support of the majority clan and I believe that such support would still be available to her" (paragraph 18 of his determination). However, by an order made by consent on 27 June 2006, the Court of Appeal allowed the appellant's appeal against the determination of the Immigration Judge and remitted the matter to the Tribunal for reconsideration. The respondent consented to that course because it was considered that the Immigration Judge had provided insufficient reasons to enable the parties to understand the basis upon which he reached his conclusion; in particular, whether or to what extent the Immigration Judge was proceeding on the basis of the Adjudicator's findings of fact. It remains common ground that the appellant is an Ashraf.

6. Whilst on the subject of common ground between the parties to these appeals, it is relevant to record that, in the light of the Court of Appeal judgment in AG (Somalia) and Others v Secretary of State for the Home Department [2006] EWCA Civ 1342, no reliance was placed by the appellants upon any risk that they might face in travelling from any hypothetical point of return, such as the international airport in Mogadishu, to their home areas. In none of the three cases has the respondent actually set removal directions, giving details of the place in Somalia to which the appellant is proposed to be removed. In the case of AG, Hooper LJ, having noted that directions for the appellant's removal would be given to Somalia, found that:-

> "13. No such removal directions have so far been given and it is accepted that such a direction must be given before the appellant's return to Somalia could be effected. It is also accepted that such a removal direction may, as a matter of law, be open to challenge before a court or tribunal …
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> …
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> 15. In cases involving Somalia it would be unrealistic for the Secretary of State to make firm plans for the appellant's removal to Somalia as long ago as 22 January 2004. A week is not only a long time in politics but it is also a long time in the life of a country as sad and war torn as Somalia. It follows, so it seems to me, that a tribunal or court asked to resolve issues under the Refugee Convention or under the Human Rights Convention will have to approach the matter on the basis that precise directions will only be given after the appellate routes have been exhausted."

7. At paragraph 25 Hooper LJ considered the submission on behalf of the appellant that, absent an undertaking from the respondent that the latter would give adequate time for the making of the telephone arrangements for the appellant's protection, once returned, the Tribunal could not exclude the risk that the appellant would not have time to set in motion the necessary arrangements for protection. Hooper LJ then continued as follows:

"30. I had thought at first that the respondent should be invited to give the necessary undertakings and that, in the absence of any undertakings, the appeal might well have to be allowed. I have concluded that undertakings are not necessary. If and when the respondent makes a removal direction for the appellant, the respondent must take into account, if the circumstances in Mogadishu have not changed much to the better, that an unannounced deposit would put the appellant at real risk, absent special factors. The respondent must also take into account that the appellant must be given an opportunity to make arrangements for protection at the airport and on his way home. That means that the appellant must be told, in advance of his removal, at which airport or landing strip it is intended to leave him. Ms Webber rightly reminded us of the strong criticisms of the practice of giving insufficient notice to proposed returnees: *see e.g.* *R (on the application of Karas and Another) v. SSHD* *[2006] EWHC 747 (Admin)*. I endorse those criticisms.

31. Why then do I take the view that undertakings are not necessary? It seems to me that given the volatility of the situation in Somalia, it would be wrong to require undertakings which might be inappropriate in a changed situation. The downside is that, in the absence of undertakings, there is a risk of further litigation at the point of removal. However the length of time between the decision to remove and a decision to effect removal in Somalia cases, coupled with the volatility of the situation in Somalia means that it might be difficult to shut out any chance of further litigation at some uncertain point in what may be a long time in the future.

32. I have reached the conclusion that it is impossible for Immigration judges in cases of this kind (involving the safety of arrival at an airport and of a journey into Mogadishu) to deal with all the eventualities at the time of the hearing. The judge may have to make it clear what has to be done by the respondent so that an enforced returnee to Somalia does not face a real risk of article 3 ill-treatment at the point of his return. The judge is then entitled to assume, for the purposes of the hearing before him or her, that what is required will be done."

8. The country guidance determination which is most relevant to the issues raised in the present appeals is NM and Others (Lone Women – Ashraf) Somalia CG [2005] UKIAT 00076, notified on 31 March 2005. The Immigration Appeal Tribunal in NM heard evidence from Professor Lewis and considered a written report from Dr Luling. At paragraphs 96 to 98, the IAT considered the nature of the risks posed to returnees to Somalia and lone women in particular:-

"96. Partly because of the different nuances to be found in the major sources of objective evidence, we regard it as important to consider the two issues of risks to returnees and risk to lone women returnees in the context set out by Professor Lewis and Dr Luling in their reports written for this hearing. Both experts, each of whom has a close familiarity with the most recent background materials relating to Somalia, seemed to us to agree that, whilst there are significant dangers for returnees and lone women returnees in particular, these can be significantly reduced in certain cases: those who, as majority clan members, can avail themselves of the protection of a majority clan, or as a minority, the protection of a clan patron, and also those who will be accepted back into Somaliland and Puntland. The former two groups may be able to arrange in advance for militia protection from the airport onwards, through

close relatives or fellow clan members. The latter group may not need to do so if returned directly to Somaliland or Puntland.

97. We do not seek to suggest that all of Professor Lewis' formulations when giving evidence showed that majority clan protection of this type was always available or adequate. He made very plain throughout that he thought Somali society generally was in a parlous state. But he was asked numerous direct questions on the issue of overall risk to returnees, lone women returnees in particular and was quite adamant in reply that majority clan protection of this type made a significant and material difference to the level of risk. Dr Luling's report likewise indicated that the existence of majority clan militia protection made an important difference.

98. Professor Lewis emphasised that for persons with close family members in Somalia the latter would feel under a strong duty to take steps to ensure a safe reception and onward travel. For those here who would have less close links with fellow clan members, payment may be required, but we do not understand from anything we have read that the amounts involved would be prohibitive. Allied to this, we note that although both Professor Lewis and Dr Luling mention examples of returnees, male and female, who have fallen foul of banditry by clan militias on return, neither they nor any of the other reports before us sufficiently evidence that such incidents are occurring routinely where militia protection is provided. "

9. There are, and have been for some time, camps for internally displaced persons in southern Somalia. On this issue, the IAT in NM found as follows:

"102. These appeals do not raise specifically the discrete question of the safety for persons in IDP camps. However, we would observe in passing that, on the strength of the background evidence and the oral evidence of Professor Lewis, we would consider any person at real risk on return of being compelled to live in one of these camps as having little difficulty in making out a claim under article 3, if not under the Refugee Convention also."

10. At paragraph 107, the IAT concluded that internal flight "is excluded where majority clan protection is not available or cannot be accessed". In that context, however, it should be noted that the Tribunal at paragraph 93 had found:-

"93. The further paragraphs on IFA emphasise that in the Somalia context "*place of origin*" should not necessarily be equated with "*place of birth*" and that "*the determining factor in defining where a person originates from is where the person has effective clan and family ties, and* ***where clan protection is thus available***" (emphasis added). They also deal in discrete terms with the specific situation in Somaliland and Puntland."

11. The IAT's principal conclusions at paragraphs 116 to 128 also merit being set out in full, albeit that the comments regarding travel from the point of return to the home or safe area (both here and in the earlier passages cited above) now need to read in the light of AG:-

116. We have given particular weight to the evidence of Professor Lewis and Dr Luling. What they said is consistent with the picture emerging from the 2004 materials both UNHCR and the JMR [Joint Mission report of 2004], which was strongly influenced by

UNHCR. Their evidence is significant for its development of a particular point, practicality of safe movement and the potential availability of majority clan militia escort, which is foreshadowed in certain parts of the background but not brought out as clearly as they brought it out.

117. The starting point is that male and female members of minority clans from the south will, in general, be at risk of breaches of their article 3 rights, and will be refugees, in the absence of evidence that they have a clan or personal patron and the means to access that area of safety without a real risk. Were such evidence to exist, which at present would be unusual, their return would involve no breach of either Convention. We recognise that there may be minority clans who are, at least locally, integrated with majority clans, and other groups who may not be a minority clan at all, being closer to a caste. Those will require specific consideration. We also recognise that a division between minority and majority does not represent a bright line on one or other side of which every clan must fall, because there are some which could be considered to be intermediate. But those issues do not arise here.

118. Those issues should be addressed where the evidence permits. There is obviously a greater risk for lone females both in the place of safety and in access, both in terms of degree of risk of occurrence and degree of severity of ill-treatment. Their position would call for particular care.

119. However, where the claimant, male or female, from southern Somalia, is not found to be a minority clan member or equivalent equally at risk, different considerations apply. First, there is likely to be a location in southern Somalia in which the majority clan is able to afford protection sufficiently for neither Convention to apply. It is important not to over-generalise; individual factors and locations will be relevant, as will the past history and individual or family connections. Likewise, lone females will be at a greater risk than males but they will not be able to show that, simply as lone female returnees from the United Kingdom, they have no place of clan majority safety.

120. Second, the question of risk in accessing any such safe place will arise, the more strongly for females than males. We accept that, where positive findings have been made as to what is the home area of a claimant, the prospects of being able to travel safely within Somalia to that area (or if that is unsafe, to an alternative area) is a crucial issue, certainly in cases involving southern Somalia. It will be relevant to the issue of return to a person's home area or, where appropriate, relocation to another area. That is because of the fact that many of the main road routes in this portion of the country have military checkpoints or roadblocks. In this context, the issue as to how claimants will get from the point of arrival to their home area or to an area where they have clan connections, is a real one.

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122. A majority clan can be characterised as one which has its own militia. The strongly clan and family based nature of Somali society makes it reasonably likely, though not certain, that a militia escort could sufficiently protect a returnee from Mogadishu through the roadblocks and en route banditry, to the clan home area. This would have to be pre-arranged. Any unwillingness on the part of a claimant to make such arrangements is irrelevant. The telephone connections to Mogadishu are good. We do

not know anything of their availability to other towns. The mere unannounced deposit, even of a majority clan member, and especially a female, at Mogadishu airport would be likely to put them at a real risk, in the absence of special factors.

123. There are problems with those whose case has been so disbelieved that it is not known what their clan or place of origin is. It is difficult to see that such a person could succeed; he or she would be a majority clan member who was in effect declining to demonstrate, even to the low standard of proof that they were at risk on return because unable to arrange for clan militia escorts from Mogadishu or wherever else they might be returned to.

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125. We do not accept that the general conditions of life or circumstances in Somalia engage the obligations of the Refugee Convention for all returnees or all female returnees, in the light of Adan [1997] IWLR 1107, [1998] Imm AR 338. A "*differential impact*" has to be shown. We have recognised the scope for differential impacts in our analysis above. Being a single woman returnee is not of itself a sufficient differentiator, although the risks they face are greater and call for careful individualised consideration on the material which is accepted. Nor do we consider that those general conditions or circumstances engage article 3, without more, again as we have discussed.

126. Returnees or lone women returnees claiming protection under the Refugee Convention or under the Human Rights Convention who are found to be former residents of Somaliland or Puntland or persons having a connection with a clan or sub clan based in either of these regions, would not in general face a real risk of serious harm, whether or not they could arrange in advance for clan militia protection to meet them at the airport and escort them thereafter, provided that they were returned directly to those areas and not via Mogadishu. If they were to be returned via Mogadishu, we do not know whether a majority clan militia escort could be arranged for them.

127. The same may well apply in the case of returnees or lone women returnees returned directly to the Bay and Bakool region. We did not hear submissions on this issue, but in the light of references in the reports before us to the dominance in that region of various sub clans of the Rahanweyn, it may be that access by air into that region for persons formerly resident or having local clan connections there, might give rise to a similar outcome, with the same reservations about return via Mogadishu.

128. Internal relocation is not in general a viable option for members of minority clans except where they may be able to obtain majority clan protection in a secure area. In respect of majority clan members, this may be a viable option for those whose majority clans have a secure location elsewhere within southern Somalia than where the claimant came from, if the home area were not or had ceased to be one where the majority clan was sufficiently strong to provide protection. Here, however, there would need to be an assessment of whether clan militia escort protection could be obtained. As regards the question of whether returnees could relocate to Somaliland or Puntland (or the Bay and Bakool regions), we have affirmed that the findings made in AJH remain valid, subject to a possible addition in relation to young men returning to Puntland."

Evidence of appellant S

12. Appellant S gave evidence with the assistance of an interpreter in the Somali language. She confirmed as true and adopted her SEF statement, appeal statement of 15 September 2005 and supplementary statement of 9 November 2007. The essence of appellant S's claim, as disclosed in those documents, is essentially as follows. She was of the Sheikhal Jasira clan, having been born in the Jasira area of Mogadishu. Her father formerly worked as a district judge but stopped doing so after the fall of the Sayad Barre regime. Thereafter her father would "hide somewhere in Mogadishu", although he used to visit the family in Jasira from time to time. In 1995, the family heard that the father had been shot in the legs by the Hawiye militia and that he was paralysed. Appellant S and her sister were gang-raped in 1995 by Hawiye militia and her sister died as a result of the gang rape. That militia also killed appellant S's brother and beat other family members. Appellant S gave birth to a female child as a result of her rape.

13. Appellant S's paternal uncle, who worked in Saudi Arabia, came to Somalia to collect his family. When he failed to find them he decided to take appellant S along with him, since he considered that she would be at risk as a woman if she continued to live in Somalia. Having arrived in Saudi Arabia in 1996 with her uncle, appellant S married there in 1997 another member of the Sheikhal Jasira. She had two sons by him. Appellant S's husband was working illegally in Saudi Arabia and in 2003 the authorities there arrested him and one of appellant S's sons, since which time appellant S knew nothing about their whereabouts. Fearing that she would be arrested by the authorities for being in Saudi Arabia illegally, and deported to Somalia, appellant S decided to leave Saudi Arabia and was assisted by her neighbour, who arranged for an agent. Appellant S gave the neighbour her jewellery to sell in order to help pay the agent and appellant S left Saudi Arabia with that agent in January 2004, together with her other son.

14. Commenting on the respondent's reasons for refusal, appellant S said at paragraph 9 of her statement of September 2005 that from 1991 until 1994 the Hawiye militia raided the home several times and stole valuables but that, although they verbally insulted the family, they did not beat them as the militia were looking for appellant S's father "and always asked about his whereabouts. I believe the militia did not harm us physically because they never wanted that my father should get scared of returning back to my home and it may become difficult for them to catch him". In her statement of November 2007, appellant S reiterated this point, stating that, although not physically abused between 1991 and 1995, the family suffered verbal abuse "so it is not right that we were without problems". So far as her entry into Saudi Arabia was concerned, appellant S said that she had posed as the daughter of her uncle and that the daughter had only a six month visa. Although her uncle was also Sheikhal Jasira and thus had taken a risk in returning to Somalia to look for his family, that reason for returning to Somalia was important to him. Having been unable to locate his family, appellant S's uncle became mentally disturbed upon returning to Saudi Arabia and appellant S did not know his current whereabouts.

15. So far as appellant S's daughter in Somalia was concerned, appellant S stated that it was "not an easy thing" to leave her there but that appellant S "had no alternative as I could not take my daughter to Saudi Arabia". She left the daughter with her mother. She did not say, as the respondent had assumed from an earlier statement, that her daughter had been left with both of her parents. She had not seen her father since 1995. Her husband in Saudi Arabia had worked in a car wash and had purchased gold jewellery for appellant S "because he wanted to show his love for me". The sale of the jewellery did not cover the entirety of the agent's costs. The balance was covered by appellant S's neighbour. Appellant S would ask people who travelled to the United Kingdom "from African countries if they have heard anything about my family". She had been put in touch with a lady in an area of Mogadishu and had telephoned that lady, "who agreed to look for my missing family. When I tried to contact her again, to find out whether she had heard anything, I was unable to get through to her on the telephone". Appellant S did not consider that if returned to Somalia, she would be able to track down her mother, daughter or two remaining brothers.

16. Cross-examined, appellant S was asked about the interview she had had with Dr Luling in September 2005. She confirmed that she had told Dr Luling that Jasira was a small village just south of Mogadishu and that the inhabitants made salt and were fishermen. There was also the tomb of a local saint. Asked whether she had told Dr Luling anything else, appellant S said that she answered the questions that had been put to her by Dr Luling. Asked about her earlier statement, in which she said that Jasira was part of Mogadishu, appellant S replied that it was near Mogadishu, in the south of that city. She reiterated that she was living in Jasira, rather than Mogadishu. She had never said that she had lived in Mogadishu. Dr Luling had asked her who the Sheikhal Jasira were and what they did by way of occupations. Asked what answers she gave, appellant S said that she remembered only that she had answered the questions she had been asked. Appellant S eventually confirmed that she had said that her clan fished and made salt. She was asked about the origins of the Sheikhal Jasira and about their rituals. Appellant S said that they were known as being religious and taught the Koran. Asked if she had mentioned the names of any particular religious rituals with which the Sheikhal Jasira were associated, appellant S said again that she answered the questions she had been asked. Asked if she could not remember what she had said about such rituals, appellant S said that she had answered the questions posed about trades and occupations.

17. Appellant S was asked how often, before 1995, the militia would come to the family home. She said that it was routine for them to do so. The militia would steal from the family and anyone else whose home they fancied. Asked whether she was harmed by the militia, she replied that the militia gave them "constant harassment" and that they "threatened and beat us." It was put to appellant S that in her statement of September 2005 at paragraph 9, she had asserted that the militia did not harm the family physically. Appellant S denied that she had said this. The militia would ask

where the father was and sometimes, when the family would not answer, they would be beaten. The family told the militia that they did not know the father's whereabouts. She could not say why she had been raped in 1995, when previous incidents had involved only the stealing of belongings. Her daughter had been a few months old at the time appellant S left without her for Saudi Arabia. Asked why she had not taken her daughter, appellant S said she was accompanied by her uncle and he needed someone to show the immigration authorities that he had a daughter. Although appellant S said that she was fearful for her family's safety in 1996, she had left her daughter with her mother. Asked if she had been keen to stay in touch with her mother in order to get news of her daughter, appellant S said not and that she had not been in contact. Asked again if she had wished to stay in touch, appellant S said that there was no way in which she could contact her mother.

18 Asked about her husband in Saudi Arabia, appellant S said she did not know anything about his family except that they had been in Somalia when he had left that country. He said they had lived in Jasira. Asked if she had known the husband's family in that place, appellant S said that she had not. It was put to her that Jasira was a small village. She said that she did not know how many people lived there. She was young and kept indoors and did not count them. Asked how many brothers and sisters her husband had, appellant S replied that he had two brothers and three sisters, naming them. She had never asked whether her husband had told his family that he decided to stay on illegally in Saudi Arabia after his Haj. As far as she knew her husband did not make contact with his family in Somalia. She did not ask him if he had told his family about his situation.

19. Asked about the position in 2003 when her husband had been arrested, appellant S said that as a woman in Saudi Arabia she had been unable to go out alone and could not seek information about him. She had not been living with her uncle at that time. After her marriage to her neighbour in 1997, her uncle had lived on his own in the same premises as appellant S and her husband. After 1997, her uncle had gone mad. This was when it was clear to him that he could not locate his family. The uncle had lost his residency permit, because, like that of appellant S, it had expired. After her uncle became sick, there came a time when he just disappeared. He would very occasionally leave the house in the company of her husband, although he did not have legal status in Saudi Arabia. Although her husband worked in the car wash, he lived in fear. There was nothing appellant S could do to find her uncle. Her husband had, however, gone to look for him. It was put to appellant S that she had done little for her uncle, despite his allegedly saving her from continuing difficulties in Somalia. Appellant S said that there was little she could do. It was put to appellant S that she had not been in Saudi Arabia at all. She replied that she had gone there with her uncle. She thought that the arrest of her uncle and her son in Saudi Arabia had been in February or March 2003. She had stayed in the country until January 2004. She asked people if they had seen her husband. These were neighbours of Somali origin.

20. Appellant S said that her husband's job in the car wash was not a well-paid occupation and that he did not have any money left over from his wages. After his

disappearance she had received assistance from Somali neighbours. The agent had demanded $5,000 and the sale of her jewellery amounted to half of this sum. Asked how much her neighbour had given, appellant S said she was unsure. Her neighbour would bring her food but she had no money to give her neighbour for this. Appellant S received food from the neighbour for eleven months. Asked if the same neighbour had also met half the cost of the agent, appellant S said she had. Her husband had not bought the jewellery all at one time but, rather, gradually. There had been two necklaces, four bracelets, earrings and two rings, all made of gold.

21. Asked what she had done since coming to the United Kingdom to find her husband, appellant S said she did not know how to find him. She had not contacted any friends in Saudi Arabia. She had been given a number for a lady in Somalia and had asked her if she knew about her husband. Appellant S wondered whether her husband and son were back in Somalia. Asked how her husband could have bought gold jewellery when there was not enough money to buy food, appellant S replied that he was trying his best. It was put to appellant S that the reason she had contacted a woman in Mogadishu to seek the whereabouts of certain family members was in truth because appellant S herself was from that city. Appellant S denied this.

22. It was put to appellant S that she had given incorrect answers to Dr Luling regarding her sub-sub-clans. One of those mentioned, "Ba Hassan," was not a sub-sub-clan but an alternative name for the whole sub-clan; the third sub-sub clan was Reer Qasim. Appellant S denied that she had said that her sub-sub-clan was Reer Ba Hassan. What she had actually been asked was whether there was an equivalent sub-clan. It was in that context that she had referred to Reer Ba Hassan.

23. Re-examined, appellant S reiterated that she and her family were in constant fear of the militias from 1991 to 1994. Her father had worked in Medina in the Mogadishu area. She said it is disrespectful for her to enquire how much her father had earned. She reiterated that she had been threatened and also beaten. Asked why she had said in September 2005 that she was not harmed physically, appellant S replied that she had never claimed that the family were not assaulted physically at that time. She had meant to say that the militia would not leave any visible scars, even though they were beating her and the family. She had meant to say that the militia would not assault the family with something that would leave a trace or a mark, such as a knife or "breaking one of our organs". Asked what form the physical attacks took, appellant S said that she would be slashed with a stick and sometimes hit with the butts of guns but the militia avoided leaving physical scars. Asked why they were keen not to leave such scars, appellant S said that the militia feared that, if the family were seriously injured, the father of the family would not come back. The militia had hoped to catch him.

24. It was put to appellant S that she had said at one point that she had lived in Jasira until 1995 and that she had lived nowhere else in Somalia; but elsewhere she had claimed that she went to Saudi Arabia in 1996. Asked to explain this, appellant S

said that she was living in Jasira until she had left. She left for Saudi Arabia in 1996. She was unsure what month but thought it might have been March. Her neighbour in Saudi Arabia had sympathised with appellant's S's situation and that was why she had helped appellant S. They were both Somali ladies, and Muslims would also help each other. Although her husband earned little money, there was still some left over to buy the gold. She had not been in touch with the neighbour who had helped her in Saudi Arabia because that neighbour did not have a telephone. Appellant S's lack of telephone numbers had also precluded her from contacting anyone in Jasira.

25. Appellant S was asked why she had refused the respondent's request to undergo a recorded language test. She replied that she did not understand what she was being asked to do. She had asked the interpreter who was present at the time but he had not given her an answer.

Evidence of appellant A

26. Appellant A gave evidence with the assistance of an interpreter in the Somali language. She confirmed as true and adopted her written statement of 12 November 2007, in which she said that there was no airport near her home area of Shibiz, Mogadishu and that it would be dangerous for her and her children to travel across the city from the airport to get to her home area. Even if she did manage to reach that area, appellant A did not consider that she would be safe in Mogadishu, as a member of a minority clan. She had been unable to contact anyone in Somalia since she left that country. At the time she left only her mother and mother-in-law were known to be alive there. Appellant A knew no one who had a telephone in Somalia and so could not call anyone to help search for her family.

27. Appellant A then addressed the issue of whether her neighbours could provide protection, bearing in mind her evidence that they had given assistance during two attacks on the appellant's family. The appellant referred to a sketch plan she had made of her immediate neighbourhood, showing neighbours from minority clans such as Ashraf, Reer Hamar, Shanshiya and Bhandabow, with a house on the street to the side of her own home being occupied by Abgal clan members. This majority clan family was quite large but was not, appellant A recalled, connected to the militia. After the civil war started, the head of the household obtained some small weapons to protect himself and his family but was still not considered to be well-armed in Somali terms.

28. In 1996, appellant A said she was attacked by Abgal militia who wanted to rape her. Having escaped from the militia, appellant A was shot and fell because the bullet had grazed her. This was near the house of her Abgal neighbours, who came out of the property, by which time the militia had lost interest in appellant A. The neighbours took appellant A to see a retired doctor.

29. In 2000 there was a further militia attack in the course of which appellant A's brother was killed, trying to protect appellant A and his other sister. Upon hearing gunfire,

the neighbours gathered around the house and the militia then "backed off". The neighbours on this occasion included the Abgal family and also other minority clan neighbours. It was the fact that the crowd had gathered that caused the militia to leave.

30. Appellant A had spoken to a woman in the United Kingdom who had come to seek asylum from Mogadishu. She was an Ashraf who used to live in an area close to Shibiz. When appellant A asked her about the current position of the area, the woman said that it had been destroyed and no one was living there anymore. Everyone had fled, including the Abgal neighbours "and the whole place now looks like a graveyard".

31. Cross-examined, appellant A said that after the looting of the family home in 1991, the family had lived with neighbours. Her brothers, however, had lived elsewhere. It was about fifteen minutes' walk from the place where the appellant's brother lived to where appellant A was living. Her brother Hassan had moved around, not staying in the same place for very long, because he was afraid. Her brother Mohammed had been killed in 2000. He had lived with appellant A. The other two brothers' whereabouts were unknown. They had gone missing after the civil war had broken out.

32. Asked how she survived, appellant A said that her neighbours gave her food but she was not able to pay anything for this. What money had been left from the father's savings was used for the family's own purposes. They had enough to buy flour and make sweets. They would provide the neighbours occasionally with the food the family had prepared. The Abgal neighbours had been fond of appellant A's father. Appellant A did not consider the actions of the neighbours to be particularly brave.

33. Appellant A said that she had married in 2000. Her husband had previously lived in the same home as appellant A. His mother also lived there. Her husband would see her from time to time but stayed elsewhere through fear of the militia. He would go wherever he could get shelter. Appellant A was asked if she had ever enquired of her husband where he stayed. She said that she did not ask him but he had distant relatives in the area. He said that he went to stay with relatives. He had become more afraid after he had got married, compared with before. This was because an individual had tried to rape appellant A in 1996 and, after her marriage, that individual became jealous and so her husband was in more danger. This individual was the person who had killed her brother.

34. Appellant A was asked about her statement of February 2004. There was no reference there to appellant A having seen the would-be rapist (who was also the person who had shot her) between 1996 and 2000. She replied that he used to come with the militia to attack them but she had not seen him face-to-face. It was put to appellant A that her claimed reason for her husband being in greater fear could not be due to her husband's fear of the individual. She said that if he had met him at home, her husband would have been in danger. In Somalia life was cheap.

35. Appellant A was asked why she had not gone with her husband. She said that there was no specific place to go and she could not accompany a man to live in the forest by himself. Asked if she had ever enquired where her husband went, she said not in particular but she took it that he was living with distant relatives. Appellant A was asked why she therefore could not have lived with those relatives. She said that she was living with her mother and sister and so "how could I live there". Her husband might have to change residence from day to day. Asked if she had been concerned when her husband ceased to visit in September 2002, she said that she had and his mother had started to cry. Asked if an attempt had been made to contact the distant relatives, appellant A said she did not know where they lived or who they were. It was put to her that her mother-in-law was living with her. Appellant A said that that lady was sick with high blood pressure and had needed help going to the toilet. Asked what appellant A had done to try to find her husband, she said that she used to ask people from other areas if they had seen him. She would do this whenever the possibility arose.

36. Her father-in-law got in contact with the family shortly after the birth of her son Abdullah in 2003. Her father-in-law sent appellant A an agent bearing a verbal message. She had never met her father-in-law. He had left Somalia before the civil war started. She had only spoken to him once she had come to the United Kingdom. She had obtained his telephone number. She had not met the agent before and was therefore asked how it was she knew that he had been sent on behalf of her father-in-law. Appellant A replied that the agent had asked for her and her mother-in-law and had told her to prepare herself, the two children and her sister. Appellant A was very happy when she heard the news. It was put to her that she would be leaving her mother and mother-in-law. Appellant A said that if Mr Swift had been in her situation, she wondered how he would feel. In fact, her mother was happy that appellant A was going to a safe place. She and her mother-in-law had said they were two old ladies but they had asked appellant A to help them if she could. Appellant A did not know where she was supposed to be going.

37. Asked what arrangements she had made in order to keep in touch with her mother and mother-in-law, she said that they had no address and no telephone. Nor did she know anyone else who had a telephone or a mobile telephone. Asked if there were not shops where one could telephone and leave a message, appellant A said that Mr Swift was looking at things from a United Kingdom perspective. There was no telephone.

38. The Somali lady appellant A had encountered in Leeds had previously lived in Shibaz. The lady had not told appellant A for how long. She had lived about five minutes walk from where appellant A had been living. Although it was a small district, the two had not previously known each other. The lady had said to appellant A that Shibiz was deserted and the occupants had left by sea. Appellant A had seen on the internet that there was a lot of destruction in the area. It was put to her that an internet search revealed that there was a Hotel Global in Shibaz and she

was asked if it was true that all the buildings there had been destroyed. She said as far as she had seen and heard they had been. The Hotel Global, if it still existed, could be occupied by the militia. It transpired that appellant A had, in fact, been listening to Hiran Radio over the internet. Asked what other attempts she had made to contact Somalia since being in the United Kingdom, she said that there were no Somalis living in the place that she lived. She had, however, gone to a group which she thought had been associated with the Red Cross and a person had come to visit her at home, who had said that efforts would be made to relocate her mother and her mother-in-law. She could not remember when this was but thought it was in 2006, some two years after she arrived in the United Kingdom. She had not tried to speak to anyone in the organisation recently, notwithstanding the news that Shibiz had been destroyed. She had spoken to her father-in-law by telephone at the end of Ramadan, several months ago. Asked what news he had about his wife and appellant A's mother, she said that they would ask each other if they had obtained information. Asked if the father-in-law had sent a message to his wife in Somalia, appellant A replied that he had not told her that he had received any information. She was unaware whether he had tried to send any messages. If he had any news to impart to appellant A, he would do so. Appellant A then said that she had asked her father-in-law and he had said that he did not have any clue. Asked if her father-in-law had tried to contact his son (appellant's A's husband), appellant A said whatever news he received he would give her.

39. Re-examined, appellant A said the only assistance neighbours gave was to come out of their homes once they heard the disturbance, by which time appellant A's sister was already dead. She had not maintained contact with her neighbours since coming to the United Kingdom. The lady she met in Leeds said that the whole area was deserted and no one was living there any longer. The militia had come after the family because they were a minority clan and could not defend themselves.

40. In answer to a question from the Tribunal, appellant A said that her father-in-law was divorced from his former wife before the time appellant A had left Somalia. In answer to further questions, appellant A agreed that she had previously been recorded as saying that she had seen her father-in-law before the civil war. She did know him before she had married her husband. They came from the same clan. She admitted that she did, accordingly, encounter her father-in-law earlier. Appellant A was also asked about discrepancies in her evidence regarding her treatment by a local person in Somalia, after she was shot. In her written statement she said that she was treated by traditional medicine. However, she had told her doctor in the United Kingdom that she had been given antibiotics. Appellant A agreed she had said this. Asked about the delay in trying to find out about her mother and mother-in-law, after appellant A reached the United Kingdom, she said that there were no Somalis to ask and she suffered language difficulties. She had not had legal help. It was put to her that she had first seen solicitors in 2004. Appellant A said she did not think to ask them for assistance in finding her family. She would not contact her father-in-law by telephone. She would wait for him to contact her. Asked if she had not

thought fit to do so even after hearing the news about Shibaz, she said that her father-in-law could not do anything.

Expert evidence

Professor Lewis

41. Professor I M Lewis is Emeritus Professor of Anthropology at the London School of Economics. He has specialised in the social institutions of culture of the Somali people since the 1950s. Amongst his publications is *The Modern History of the Somalis* (2002). He is a Fellow of the British Academy, an ex-chairman of the Africa Educational Trust and a former Director of the International African Institute. As already noted, he gave evidence to the IAT in NM.

42. Professor Lewis prepared three reports in relation to appellant S. In his report of 29 August 2007, Professor Lewis described interviewing appellant S by telephone, when he noted her strong Benadiri accent and corresponding vocabulary. He considered her to come from the Benadir coastal region, which included the Sheikhal Jasira, "a minority religious group who also extracts salt from the sea and fish". Appellant S told Professor Lewis that her father had been an Islamic judge (*Qadi*) working in Madina at the time of Sayad Barre's dictatorship. Professor Lewis categorised the father as "a minor official with duties in matters of marriage and inheritance and other Sharia issues. As a religious sheikh he also taught the Quran". Professor Lewis considered that pattern of activities to be typical of men belonging to religious lineages like the Sheikhal, literally meaning those who are sheikhs, i.e. professional men of religion. Appellant S recited her family genealogy over five generations, during her conversation with Professor Lewis, as well as telling him that the founding ancestor was annually commemorated at a shrine built on a large stone on a coastal island near Jasira. The ceremony involved slaughtering animals and feasting.

43. Professor Lewis found the world depicted here "entirely in keeping with [appellant S's] claimed identity as a member of the Sheikhal Gesira". He noted that she was also well versed in the wider tribal context of her minority. Although Professor Lewis considered that appellant S did not know much in detail, she did know the existence of other Sheikhal groups. At paragraph 6 of the August report Professor Lewis wrote:-

> "More generally, and without implying any common clan identity, the term 'Sheikhal' is used to designated any lineage of religious specialists and does not mean *that those so designated are all members of the same clan*."

44. Professor Lewis considered that the Sheikhal were not an integrated clan of many branches scattered throughout Somalia but, rather, that the various Sheikhal were "different in clan terms and only similar in terms of occupation: to put it more simply they are an occupational category and the clan setting of those who practise this

occupation varies according to circumstances". He stated that no inference of shared clan identity could be made from the fact that some people of this occupation lived in the "guest" section of the Hawiye Herab clan.

45. Turning to the current political situation in southern Somalia, Professor Lewis considered that, since the formation in 2004 of the "so-called transitional federal government" (TFG) led by a former guerrilla and war lord, Colonel Addillahi Yusuf, the situation has "deteriorated spectacularly". The TFG had, according to Professor Lewis, only summoned the courage to enter Mogadishu with direct Ethiopian military support. This followed:-

> "a period of some six months of peace and civil progress in Mogadishu and southern Somalia as a grass roots movement (the "Islamic Courts"), led by Muslim clerics, chased the pernicious 'warlords' out of the region and established a brief period of tranquillity and normal life".

46. Professor Lewis considered there to be little truth in the accusation that the Islamic courts were in league with Al Qaeda but when those charges attracted the attention of the USA, the Ethiopians were encouraged to invade Somalia in support of the unpopular TFG. Since Abdillahi Yusuf belonged to the Darod clan, the largely Hawiye population of Mogadishu regarded the seizure of the city as "another Darod invasion" on the model of the previous Darod dictator Sayad Barre.

47. Throughout the first half of 2007, Professor Lewis considered that the civilian population in Mogadishu had "steadily melted away" and that life had become impossible even by Somali standards. The insecurity which returned to Mogadishu was on a scale equivalent to that at the start of the civil war in 1990. The situation for asylum seekers was, he considered, as bad as at the height of war-lord terror prior to the rise of the Islamic courts. Professor Lewis considered that it was "now hard to see how Somalia can ever recover".

48. In his report of 21 October 2007, Professor Lewis attempted to bring his analysis of the situation in Somalia up to date. He considered that the latest developments indicated that "security… was even more perilous than I reported previously" and that Yusuf had lost all control of general security in Mogadishu and southern Somalia. Quite apart from this, Puntland, Yusuf's own tribal territory, had lost its cohesion as a federal unit and neighbouring Somaliland had taken control of a disputed area on the edge of Puntland. Such control as the TFG exercised was provided by the Ethiopian forces, who acted with "extreme brutality", shooting "indiscriminately" so as to cause a high level of civilian casualties. Tensions had arisen within the TFG, with the Hawiye Prime Minister Gedi being accused of corruption by figures close to Yusuf. A recent spate of murders of prominent journalists was widely attributed to Yusuf's personal security police and, in mid-October 2007, "these goons were employed to arbitrarily arrest the Somali manager of the World Food Programme in Somalia and to hold him without explanation or trial". Roads in southern Somalia were the subject of checkpoint militias, who would hold passing traffic to ransom. Only twenty per cent of children in southern Somalia

were receiving food and medicine necessary for their survival. According to Professor Lewis, the judgement of the UN was that there was no state in existence in Mogadishu or southern Somalia: “all we have are rival gangsters pursuing their own private interests un-checked by any functional government structure”.

49. Professor Lewis stated that he was not surprised by the failure of the TFG, a position he contrasted with that of the British Government and their European partners who “had no understanding of the de-centralised segmented nature of Somali political units and their inherent stability”.

50 In a note dated 2 November 2007, Professor Lewis attempted to answer certain questions put to him by the solicitors for appellant S. Asked how accurate it was to say that some members of minority populations had strong positions in Somali society, Professor Lewis replied that he could not think of any minority person who had, at that time, a strong position in such society. The TFG “does have a number of token minority members, but they are just that and membership of the TFP (Transitional Federal Parliament) which is a rhetorical organisation does not in any way indicate social strength”.

51. Asked how safe travel would be to Mogadishu from the airport, Professor Lewis said that minority lone women “would certainly not be safe travelling to Mogadishu” because they would be prime targets for robbery and rape at roadblocks. Any Ashraf or Sheikhal Jasira clan member would be “placed at the end of the queue” for shelter/housing in Mogadishu. The same applied to healthcare provision, if such existed in Mogadishu. If lucky, an Ashraf or Sheikhal Jasira clan member could live in an IDP camp but these were “inadequately resourced and unsafe especially for women”. A lone woman with a young child “would be the most likely to perish for lack of food and medicine and shelter”. As for a lone woman found not to be a minority clan member, Professor Lewis considered that it would be unsafe to return any woman and child to Mogadishu unless they would be received at the point of entry by majority clansmen.

52. Finally, asked about the likely effect of the recent resignation of the Prime Minister of the TFG, Professor Lewis though that this would further destabilise the situation and he doubted whether Yusuf would be able to find a replacement enjoying the full support of the Hawiye in Mogadishu.

53. In examination in chief, Professor Lewis said that the TFG was a “so-called” government because it was not accepted by Somalis. It was the outcome of a conference in Kenya. Professor Lewis knew Yusuf personally. During the rule of the Union of Islamic Courts (UIC), the citizens of Mogadishu had been able to walk around the city freely without being robbed, assaulted or raped. The UIC managed to get the port and airport functioning. Professor Lewis acknowledged, however, that there were drawbacks to the UIC, since there were elements of it that practised extreme forms of religiosity.

54. Professor Lewis considered that the Ethiopians in Mogadishu demonstrated extreme brutality by using heavy armaments against civilian residences, at short range. There had also been air strikes, which might return. Ethiopians were the traditional enemies of Somalis, who viewed the latest events as an act of war by Ethiopia. If an insurgent in Mogadishu took action against the Ethiopians, the latter would start shooting at short range into neighbouring houses. There were two kinds of insurgents, according to Professor Lewis. The first category comprised local secular people who were unconnected with Islamists. There were local clansmen in Mogadishu who saw Yusuf's presence as Darod domination. The second group comprised religious puritanical organisations, which he categorised as Islamists. President Yusuf was attempting to present all the insurgents as falling into the second category. However, Professor Lewis considered that the majority of them fell into the first category.

55. Asked about his comments regarding lone women from majority clans, Professor Lewis said that it all depended which clan was involved. If the woman belonged to a locally dominant Hawiye clan, her position would be much more favourable. By contrast, the Ashraf and Sheikhal did not bear arms and were pacifists. They could only exist if their rights were respected.

56. Professor Lewis believed that since the period considered by the IAT in NM, matters in Somalia had become much worse. There was a higher level of public insecurity and the survival chances of minority clans were worse. Only President Yusuf and his group were in a better position but even that was a precarious one. People who fled inevitably suffered difficult circumstances, with women liable to rape and foodstuffs liable to be seized by any passing villain. The seas off Somalia were the haunts of pirates, who committed extraordinary feats of brigandage, making those waters the most dangerous in the world. Hospitals in southern Somalia were overflowing and there were no working social services in Mogadishu.

57. Asked whether he still had the positive views of Dr Luling's expertise that he has expressed to the IAT in NM, Professor Lewis said he did. Dr Luling had in his view an excellent knowledge of Somalia and as a woman she might possess an empathy that he did not have.

58. In answer to questions from Mr Young, Professor Lewis said that the situation was worse than at the time of NM. Professor Lewis did not give his unqualified approval to the UIC, since he was critical of many things that they had done whilst in control of Mogadishu. Although he would be surprised if it was now possible to create a functioning system in southern Somalia, Professor Lewis said that he was not a soothsayer. To call appellant S's father a judge was, Professor Lewis considered, to describe him as something much grander than he in fact was. The father was best described as a local Islamic magistrate. Professor Lewis had read Dr Luling's reports and agreed with them. A good description of a Sheikhal was a person of religion who was a pacifist by definition. These were not groups, like clans. The terminology of clans was inappropriate to describe them. Thus, an Ashraf was a holy person

based on clanship with the Prophet and did not correspond to the system of majority clans built up on smaller units. Thus the term Sheikhal was a descriptive category, not a group. The Benadiri were not a clan but a group of people who lived in the coastal region of Somalia. Such people were to be contrasted with the Hawiye, Darod and Rahanweyn clans. The Sheikhal were neither a majority nor a minority clan. They existed outside the clan system. They used to be treated with respect and had religious functions but had now totally lost their previous aura.

59. Asked about Dr Luling's view that appellant S displayed a scrappy knowledge of clanship, Professor Lewis said that he would not describe S's knowledge in those terms. A woman would not have a detailed knowledge of her lineage. There would be intermarriage between these religious categories, which, Professor Lewis re-emphasised, were not clans. Having met appellant S at the hearing, Professor Lewis stood by what he said about the sound and timbre of her voice and her range of social knowledge.

60. In answer to questions from Mr Maka, Professor Lewis said that not all Ashraf were light-skinned. There were Ashraf groups amongst the Rahanweyn and the Ashraf would have relationships with whichever clan they happened to live amongst but they would be outsiders. The form of deference shown to them because of their knowledge of the Koran was no longer relevant. Professor Lewis regarded the current position of the Ashraf as no better than it had been in the period considered in NM. Mogadishu is on the brink of total anarchy and catastrophe. The Prime Minister of the TFG was a member of a less important branch of the Hawiye, whose militias were in loose alliance with Islamists and were currently fighting the TFG. The resignation of the Prime Minister would cause a serious problem in that President Yusuf needed to get a major Hawiye figure into the government if he wanted to have any "clout".

61. Cross-examined, Professor Lewis said that the information that appellant S had given him corresponded to what he knew about the Sheikhal. Asked about appellant S's description of her "kindred," Professor Lewis said that Somalis attempted to construct groups in the image of majority clans and then claimed descent from certain members, thereby forming links with other groups. Professor Lewis was asked how Dr Luling could say that different Sheikhal groups may or may not belong to the majority population (see paragraph 103 below). He was asked whether he agreed with her apparent view that some such groups had become fully assimilated into the majority group. Professor Lewis considered that these "guests" had not in fact been fully assimilated in the social and political senses.

62. The passage in question in Dr Luling's report of 6 September 2005 reads as follows:-

> "The other Sheikhal groups on the other hand belong to the majority (dark skinned) population. The Sheikhal Loboge for instance formed part of the Hawiye, being adopted into the Herab section; Lewis says they are 'a good example of a religious group or community firmly assimilated to the clan of adoption' (Lewis 1998 p17). They are therefore also known as Martiile "the guests" (Mohammed Abdi Mohammed vol.II

p371). They were at one point allied with Awdid and the Habar Gidir. This is not the case with the Jasira and the Gandershe Sheikhal.

Hence the answer to the question whether the Sheikhal are a minority clan is, I believe, that some groups are and some are not. The Sheikhal of the area around Jasira and Gendershe are part of the Benadiri minority. They are recognised as such by the other Benadiri and often included in lists of the Reer Hamar (of Mogadishu) and the Benadiri of Marka. They will be found in the list prepared by "Somali Benadir Global Unity" (printout from their website attached)."

63. Professor Lewis said that the Martiile were tame priests and he did not consider that they could draw on protection from the majority clan in the fullest sense. Asked if he had changed his mind, compared with what he was quoted as saying in 1998, Professor Lewis said that Dr Luling's source was based on Italian information, whereas he had based his observations on field work. He had been using an Italian source, in the passage that Dr Luling had quoted. Professor Lewis had not, however, researched the Martiile himself.

64. Professor Lewis was asked about the information in his first report and how much of this was interpolation of his own, rather than information which appellant S had volunteered to him. He replied that appellant S had volunteered information regarding the Aw Qutub as a kindred group of the Sheikhal. Asked about the Hwebjire, Professor Lewis said that appellant S knew that they lived in the North West. Appellant S knew about the Walamogge but the information in paragraph 6 of Professor Lewis's first report regarding the lineage of this group was his own interpolation.

65. Professor Lewis was asked what sources he had used in describing the current political situation in southern Somalia (paragraphs 9 *et seq*). He said that it was partly an analysis of information available on Somali websites and the Somali press. He described the sites as *Welcome Benadet* and *Hurain*. He also discussed matters with Somali colleagues and friends in London and the USA. Professor Lewis was also asked about the sources for the statements contained in his report of 21 October. He said they were websites and also general knowledge amongst Somalis in London.

66. All the Somalis with whom Professor Lewis had contact in the United Kingdom had their own direct contacts in southern Somalia. The arrest of the manager of the World Food Programme was confirmed by UN sources. The sources of the answers given in the note of 21 October and in the note of 2 November were, again, websites and conversations with Somalis.

67. Asked if he had read the three-monthly UN Secretary General's reports on Somalia and whether they were broadly accurate, Professor Lewis said that he had generally a very negative view of the UN's actions in Somalia, especially in relation to humanitarian matters. He considered the information emanating form the UN Humanitarian Co-ordinator to be better than that that in the Secretary General's reports. Asked how he could decide which was better, when he himself had not been

in the area in recent years, Professor Lewis said that he knew President Yusuf and his representative in the United Kingdom and he tried to come to a realistic view of what the situation actually was. The President's representative had spoken to Professor Lewis the previous week. Professor Lewis also spoke to Somalis who were constantly going backwards and forwards to and from southern Somalia. Professor Lewis knew how the TFG had been put together and how those responsible for its formation had gone out looking for warlords like Major General Mogan, whom Professor Lewis described as a "dreadful person". Professor Lewis disagreed with the United Nations and the European Union's policy to establish the TFG. He considered that, as a result, the UN's report on Somalia lacked objectivity. Asked why he should be regarded as any more objective, Professor Lewis said that the British did not have anyone in Somalia and the UN were often similarly uninformed. Their representative in Somalia spent most of his time in Nairobi and UN reports on the country were, he considered, sometimes poorly informed.

68. Asked about the Border and Immigration Agency (BIA) reports on Somalia (R3, pages 1119 *et seq*), where the methodology (page 1121) was described as involving a mission team based in Nairobi holding meetings with individuals and organisations with detailed knowledge of the position on the ground in Mogadishu and central and southern Somalia, Professor Lewis said this represented the usual situation. Professor Lewis had not read the BIA report of May 2007 on Somalia and had only recently come to know of its existence. Some of those described as being consulted might, Professor Lewis thought, be quite acceptable but he did not know who had done the interviewing. Professor Lewis had not read any of the Foreign and Commonwealth Office reports regarding Somalia in preparation for the hearing. He did not necessarily regard people as lacking knowledge if they happened to disagree with him, provided that those people possessed the necessary methodological knowledge. Professor Lewis did not, for example, always agree with Dr Luling.

69. Professor Lewis had known President Yusuf since the early 1970s, when the latter was a Divisional Commander. Sometimes Yusuf would visit Professor Lewis in London. He could not remember the last such visit but thought it must have been in 1996. He had not see Yusuf since.

70. Professor Lewis was asked about the BIA's COIS report on Somalia (12 November 2007) (R1, pages 1 to 154). Professor Lewis was not aware of this document. Having looked at paragraph 3.06, he agreed with the summary recorded there of the UN Secretary General's report of 28 February 2007, concerning the removal from power between 24 December 2006 and early January 2007 of the Union of Islamic Courts. Remnants of the UIC were there said to have been pursued in southern Somalia by the TFG and Ethiopian forces. Commenting on a passage in the same paragraph, concerning an attack on Villa Somalia (the President's official Mogadishu residence) on 9 January 2007, Professor Lewis said that this and other incidents described in the paragraph were terrorist-style attacks, in response to what he described as the Ethiopian invasion.

71. Professor Lewis was asked about the testimony given to the UN Congress Sub-Committee on African Affairs on 6 February 2007 by Dr Ken Menkhaus, Professor of Political Science at Davidson College (A1, page 256). Professor Lewis said he knew Dr Menkhaus. Professor Lewis "roughly agreed" with Dr Menkhaus's analysis that:-

> "Ironically, the end result of the seismic changes of 2006 is to some extent a return to the *status quo ante bellum*. Somalia in early 2007 looks very much like Somalia of 2005, featuring a weak and unpopular TFG facing resistance from a loose coalition of clans, Islamists, and other interests in Mogadishu, in a context of de facto state collapse".

72. Nor did Professor Lewis dissent from what was recorded in the UN Secretary General's report of 25 June 2007 (R1, page 258) concerning the situation in Mogadishu:-

> "12. The Transitional Federal Government, with the support of Ethiopian forces, launched operations to disarm insurgents in Mogadishu on 21 March. However, this was met with stiff resistance from remnants of the Union of Islamic Courts and militiamen from the various sub-clans of Mogadishu's Hawiye clan. Heavy fighting ensued and lasted until 27 April, when government and Ethiopian troops captured insurgent strongholds in North Mogadishu. Heavy weapons were used and large numbers of casualties occurred as a result of the hostilities. The month-long fighting in Mogadishu was unusually fierce, also involving heavy weapons. The death toll numbered in the hundreds, including many civilians. Hundreds of thousands of residents were displaced and Mogadishu's few hospitals were overwhelmed with the injured, as were the hospitals in nearby towns. In late April the government claimed a victory over the insurgents in Mogadishu and invited displaced residents to return, indicating that military operations had then ended. For the first time since their arrival in March, troops of the African Union Mission in Somalia (Amisom) began patrolling the streets of Mogadishu and provided medical assistance to those injured in the hostilities".

73. Professor Lewis also accepted what was said at paragraph 62 of the same report:-

> "62. Allegations have been made that serious violations of human rights and international humanitarian law took place during the last few months of serious fighting. Non-military targets, such as hospitals and schools, had been attacked. It was also reported that some of the wounded were prevented from receiving medical treatment and protection and that urgent deliveries of food aid were hampered or blocked. Whilst there is no independent and official account, local human rights organisations based in Mogadishu report that over 1,000 civilians were killed in this period, several thousand people were injured and sixty percent of the dead and wounded were elderly, women and children. A joint statement made on 28 April by twelve mandate-holders expressing deep concern at the latest round of fierce fighting in Mogadishu was welcomed by many local actors and drew the attention of the media and the international community to human rights and humanitarian issues".

Professor Lewis also either accepted or did not dissent from what was said in the BIA's report of the Information Gathering Mission of 27-30 April 2007 (17 May 2007 (R3, page 1119):-

“3.02 The source [a UN security officer] said that there had been no fighting since 26 April. The recent fighting had taken place inside Mogadishu, but there had been mortar attacks on the airport and there had also been roadside bombs and suicide attacks on the road between Mogadishu and Afgoye.

……..

4.01 The source [a security advisor to NGOs operating in Somalia] explained that the function of his organisation was to provide advice to about 200 NGOs on safety and security in Somalia. When asked about the current situation in Mogadishu, he said it is quiet at the moment. It is “Mogadishu quiet”, which means that there are still occasional gunshots or roadside bombs. He said that the recent spell of fighting has finished, and the anti-government elements have been dispersed. But although the opposition forces have been dealt a very serious blow, they have not been defeated; they would regroup and continue using “terrorist-style” tactics.

……..

6.01 The source [a Senior Advisor on Somalia to a Western Government (not UK)] said that with the exception of Kismayo, fighting was confined to Mogadishu. He considered that it was not possible at the time we spoke to say which parts of Mogadishu were or were not safe. The territorial battle is now largely over, with the TFG and Ethiopians controlling strategic points in the city although they do not exert day to day control over individual neighbourhoods and there have been widespread reports of looting and violent crime across the city. The source did not think there had been any disarmament since the fighting stopped. Around 1/4 to 1/3 of the city was badly damaged or destroyed by shelling or bombing; much of the area long the industrial road was reduced to rubble. The government gave broadly accurate warnings to civilians to leave certain areas of the city to avoid the violence, although the source was in no doubt that bombardment within these areas was indiscriminate.

6.02. The likelihood is that Mogadishu will remain relatively peaceful now for a short period while everyone takes stock, but that fighting may resume in the near future. If so, the next phase is likely to be “asymmetrical warfare”, similar to that of January and February 2007, characterised by increased use of terrorist-style attacks. Although much of the population of Mogadishu had been prepared to give the TFG ‘the benefit of the doubt’, recent actions by Ethiopian and TFG forces are likely to leave a legacy of fear, anger and resentment.”

74. Professor Lewis concurred that by the end of April 2007 the fierce fighting had come to an end and that the situation was relatively quiet until the holding of the National Reconciliation Conference. Professor Lewis said that he was the ex-Chairman of the African Educational Trust and as such received reports from people on the ground in Mogadishu. The last such report had come about a week before the hearing from an NGO in Mogadishu. Professor Lewis was referred to the 25 June 2007 report of the UN Secretary General, who said:-

"53. According to the Office of the United Nations High Commissioner for Refugees (UNHCR), as of mid-May [2007] some 90,000 people had returned to Mogadishu. However, specific protection concerns have arisen as returnees have reportedly been prevented from returning to their homes. Tension is also rising over the fate of some public buildings that until recently were occupied by urban internally displaced persons and are now being claimed by the Transitional Federal Government without providing the necessary displaced persons with an alternative durable solution for their resettlement" (R1, page 268).

75. Professor Lewis accepted that some 90,000 people had returned to Mogadishu, as described, but said that they had all left again subsequently. The latest (7 November 2007) report of the UN Secretary General (R4, page 1588A) had not been read by Professor Lewis, although he had seen what he described as a synopsis. Professor Lewis accepted that between April and June 2007 there had been a period of relative quiet. There had then been an increase in violence in early July in advance of the National Reconciliation Conference. He said, however, that there had been even more violence after that conference.

76. Professor Lewis was asked about the BIA's report of the Fact Finding Mission of 11-15 June 2007 to Somalia (20 July 2007) (R2, page 594). He said he had not read this report. He had, however, no reason to doubt what was said at paragraphs 4.01 to 4.09, regarding the security situation in Mogadishu:

"4.01 A journalist from an international news agency stressed to the delegation that Mogadishu is in effect 'the centre of the [security] problem' as it is the city in which the majority of fighting had taken place and where the TFG continues to focus its efforts. He stressed that the current conflict (post the heavy fighting during March-April 2007) is the worst time that the country has faced for sixteen years. This is due to the sheer volume of hostility and mistrust among officials and civilians alike.

4.02 Seven sources stressed the unpredictability and volatility of the security situation in Mogadishu. Three sources explained that north of the city is more dangerous than other parts of Mogadishu. A relevant department of the UN stated that although the north of the city is more volatile and dangerous than the south, in both areas a degree of relative normality has returned, more so in the south, but even in the areas in the north which are most unstable. An executive of an internationally recognised NGO said further that the north was disrupted by TFG cordoning-off and house to house searches; however this has not occurred in the southern parts of the city. One source explained that most of the fighting has taken place around Thirtieth Street (the main road in Mogadishu), particularly north of the street and central areas to it. When asked what the situation was like on this street the source said that the road is very hostile, with few people residing there and with little still functioning. The source explained that he had recently been in Mogadishu and travelled through this area at his own will. He did not encounter any hostilities towards him. OCHA, in its situation report dated 6 July 2007, noted that house to house weapon search operations have intensified since 4 July, coinciding with the increased security incidents.

4.03 Six sources agreed that most of the violence in Mogadishu has become more sophisticated and more political in nature, precisely targeting TFG and Ethiopian

forces, high profile political targets, law enforcement agencies, Ethiopian troops and occasionally at African Union forces. On 11 July 2007, Shabelle Media Network reported that the Bondhere District Commissioner was wounded in Mogadishu after unknown gunmen shot him on his way home from work. An embassy official added UN staff and their personnel and westerners, specifically white people, to the above list of possible targets. However, this contrasted with the information provided by one source who claimed that the TFG and Ethiopian troops were attacking anyone and any visible target that they perceived to be a threat to them. He told the delegation that 'anyone who is remotely perceived to be anti-TFG, and anyone who is perceived to be Arabic, anyone who is perceived to be a radical Islamist (to give just three examples), are targets'.

4.04 Three sources stress that there were virtually always civilian casualties either from the insurgent blast itself or from gunfire and retaliatory action by the targeted forces. A relevant department of the UN explained that the rate of such incidents, except in roadside and suicide bombs, has remained broadly steady since the TFG announced victory on 26 April 2007. …

4.05 An advisor to an EU institution explained that Shabaad is damaged but has become more targeted in its attacks. There are suicide bombers, and more being trained. A relevant department of the UN stressed that the insurgents are now making a comeback with almost daily attacks in the city. Terrorism Focus, in its weekly journal dated June 19 2007, noted that 'The recently established Mujahideen Youth Movement has emerged as the most potent military group [in Somalia].' The group emerged in April claiming to have attempted to assassinate two prominent Somali officials. The report also claims that the Mujahideen youth movement were responsible for the attack on Prime Minister Ghedi on June 3 2007.

4.06. A relevant department of the UN claimed that clan militias were now regrouping around powerful individuals or factions and that: 'most clans had some network in operation in Mogadishu, though most people were now playing on personal rather than clan connections'. There is also evidence that the armed opposition groups both inside and outside Somalia are 'coalescing'. This could greatly increase the resources available to the armed opposition groups operating in Somalia, although there is also a suggestion that the Shabaab have signalled frictions with exiled opposition groups.

4.07 However an internationally recognised NGO claimed that violence had reduced to 'Mogadishu normal' and the group thought that the Ethiopians' more powerful weaponry was responsible for the previous higher level of violence. An adviser to an EU institution stated that the streets felt 'quite safer' inasmuch as there was a large military presence.

4.08 A relevant department of the UN explained that since the TFG's raid on Bakhara Market in early June, which hitherto had been traditionally held as a key neutral point, where all clans were able to trade and give protection to trade, there has been disagreements (sic) along clan lines. Since then the Bakhara has also become a target of grenade attacks by alleged insurgents. Shabelle Media Network reported an attack on Bakhara market which took place on 11 July 2007. The attack was targeted at Somali Police in the area, however three civilians were wounded in the blast.

4.09 A journalist from an international news agency summed up the current security situation as a vicious circle because every time the TFG managed to effect some level of peace and security, this peace spurred the insurgents to attack as it is their aim to prove to the wider world that Mogadishu is not safe/controlled and that the TFG is ineffective with no support fro Somali citizens."

77. Professor Lewis also accepted what was said at paragraph 4.17:-

"4.17 One source detailed that many Somalis considered that the TFG had done 'a good job in cleansing the city' and there was a hope that this would have an effect outside the city. However, there were conflicting reports as to whether the TFG has been able to effect disarmament. One source said that there are no weapons apparent on the street as most had been hidden, another source detailed that there were 'few visible weapons' on the streets and another that 'there was no formal ban on carrying weapons and disarmament attempts were ineffective'. One source said that the government is trying to take away people's weapons but the problem is that Somalis 'do not know who has the guns any more'.

78. Professor Lewis was also referred to the following passages from the same report:-

"Checkpoints

4.27 An advisor to an EU institution told the delegation that the six main checkpoints in Mogadishu were not permanently operated but rather utilised in periods of high tension. A journalist from an international news agency explained that the TFG have cleared the city of all checkpoints that are not Ethiopian/TFG, with the effect of enforcing a 'general' level of security in a period of great insecurity. He explained that the number of checkpoints in the city can be an indicator as to the level of hostilities at any one time, i.e. when it is feared that there are an increased number of insurgents, there will be an increased number of checkpoints with the aim of regaining some form of control over the city. An example is in 2004, when there was a high level of uncertainty in Somalia, and there were a reported 54 checkpoints from Mogadishu to Afgoye.

…..

Security Situation – Ordinary Somalis and Returnees

4.28 The fact-finding team received semi-conflicting information regarding the security situation for ordinary Somalis. One source told the delegation that although the security situation in Mogadishu is unpredictable, it is rare for an ordinary Somali to be randomly targeted in the shooting. A Somali researcher said in his opinion, except for attacks on TFG and associated forces, and the often over-zealous retaliatory action on the part of those forces, in which civilians are often victims of cross-fire, levels of violence in Mogadishu are currently fairly low. But there is still general insecurity and high levels of crime, so although people can and do move around, on the whole they tend to stay in their home area. An NGO working in Somalia claimed that there is also the risk of arrest to ordinary Somalis as after a suspected insurgent attack, the security forces would arrest anybody near the scene, and also arrest ordinary citizens for extortion purposes as well, with random demands sent by phone. A native Somali

researcher told the fact-finding team that 'if you are not from the Abgal (the Prime Minister's sub-clan) or from the Magerten (the President's sub-clan) then you are not immune from TFG attacks, and then if you are in any way associated with the TFG, you are also not immune from the insurgent attacks'.

……

5.08 Within Mogadishu itself, the north of the city is more volatile and dangerous than the south, but in both cases a degree of relative normality has returned, more so in the south, but even in the areas in the north which are most unstable. There are security incidents in Mogadishu every day but these are precisely targeted at government forces or suspected insurgents. However, this does mean there is some risk to civilians either in the original attack or in retaliatory action. The rate of such incidents, excepting roadside and suicide bombs, has remained broadly steady since the TFG announced victory on 26 April 2007.

5.09 There has been a 'remarkable reduction in checkpoints, with fewer bandit checkpoints, and less interest in clan affiliation. Only occasional TFG/Ethiopian checkpoints exist, typically only one on a long road. When asked about why ordinary Somalis would not be targeted, the source explained that it is a politically targeted risk now, not aimed at ordinary Somalis. The distribution of clans throughout Mogadishu is more or less the same as it was 4 to 5 years ago'."

79. Professor Lewis accepted that the methodology set out at the beginning of this report had been followed. He was aware that the material in question was on the internet but said that he had no reason why he had not happened to read it.

80. Professor Lewis said that he had not seen a letter from Ben Lyon of the Foreign and Commonwealth Office of 12 November 2007 (R2, page 1096) entitled "Past and Current Levels of Armed Violence in Somalia". He accepted, however, what it said regarding the latest violence of October/November 2007:-

> "The latest ongoing violence of October/November 2007 is held by published news sources as the worst violence since December 2006/January 2007. In the period 2-11 October, reports allege incidences of violence including: the death of one individual in the fire following reported violence between government and insurgent forces on 3 October in Bakhara Market, Mogadishu; and the murder of a Somali General and two other women by insurgents on 6 October in Mogadishu; attacks by insurgents against government targets on 8 October in Mogadishu resulting in the death of over four officials and a car bomb incident on 11 October when two Ethiopian soldiers were killed in Baidoa by insurgents. News sources suggest that Regional Administrators are particularly targeted for assassination by insurgents, no group of insurgents is identifiable. It is impossible to corroborate these reports."

81. Professor Lewis thought that he had seen the United Nations Office for the Co-ordination of Humanitarian Affairs Situation report on Somalia of 2 November 2007 (R2, page 1104) but in any event accepted that:-

"Nearly 90,000 Mogadishu residents fled during the past weekend following the most intense fighting in months. The United Nations High Commissioner for Refugees (UNHCR) and local partners indicate that a huge wave of more than 70,000 people left the capital in the three-day period between 27 to 29 October, whilst some 17,000 are estimated to be displaced within the city. The movement of people was also triggered by an announcement advising those living in districts surrounding Bakhara Market to vacate the area due to security operations. In addition to causing fear and panic among the city residents, the busiest market in Somalia was essentially closed between 26-30 October, cutting off access to livelihoods and basic necessities. Currently, Bakhara is open and business is gradually picking up."

82. Returning to the UN Secretary General's report of 7 November 2007 (R4, page 1588a), Professor Lewis was asked whether he agreed with what was said in paragraph 15, that most attacks involved insurgents targeting the TFG forces and Ethiopian military and that (at paragraph 18) most checkpoints were now being manned by militias loyal to the TFG. Limited progress was said (paragraph 17) to have been made by the TFG and Ethiopians in securing Mogadishu. At paragraph 20, reference was made to the TFG forces and Ethiopian groups having "*at times* opened fire indiscriminately, causing many civilian causalities." Professor Lewis said that all this painted the same picture as he would have painted although in a much more detailed manner. He accepted that attacks were targeted and that there were now fewer of them, albeit that they were more serious. It was put to Professor Lewis that the reference to the TFG/Ethiopian response being at times indiscriminate was different from the evidence he had given. Professor Lewis denied that. He had not meant to suggest that the TFG/Ethiopian forces always responded indiscriminately.

83. The attention of Professor Lewis was drawn to the passages in the report regarding the resignation of the Prime Minister:-

"13. On 29 October, Prime Minister Gedi tendered his resignation, which was accepted by President Yusuf. Deputy Prime Minister Salim Aliyo Ibrow was appointed acting Prime Minister pending parliament's election of a permanent replacement. President Yusuf has since initiated consultations with clans and political leaders to appoint a new Prime Minister".

84. And, later:

"I [the Secretary General] welcome the amiable resolution of the divisions between President Yusuf and Prime Minister Gedi and the consolatory spirit of the statements issued by both on the latter's resignation. I call upon the Transitional Federal Government to continue to seek peaceful solutions to its internal differences so as to focus its efforts on national reconciliation".

85. Professor Lewis did not consider that the matter had in reality been handled in such a manner. The Prime Minister's position had become intolerable. Website reports from people in Mogadishu painted a different picture, involving animosity between

the individuals concerned and their respective clans. Professor Lewis reiterated that in his opinion the establishment of the TFG had been fundamentally flawed.

86. Re-examined by Mr Collins, Professor Lewis said that he examined a range of websites but two in particular were used by him. He also saw monthly reports from a small grouping of NGO's in Mogadishu, through the Africa Educational Trust. He in addition examined material from Somali social scientists. He could not be sure that any of this was accurate but he examined it with the benefit of his career as a social anthropologist. He had read some of the materials produced by the Home Office but not systematically. He had, however, examined comments on those materials that had appeared on Somali websites and to working on cases involving Somali asylum seekers. His contacts with people from Mogadishu involved the telephone and speaking to people who had been to that city and returned.

87. Professor Lewis considered that the security situation in Mogadishu was deteriorating, highlighting a severe problem with something that called itself a government but could not carry out the functions of government. Professor Lewis said the range of his contacts had widened since he gave evidence to the Tribunal in NM.

88. Re-examined by Mr Maka, Professor Lewis said that the websites he examined were in English and Somali. He spoke standard Somali. Asked about paragraph 18 of the latest UN Secretary General's report (R4, page 1588D), Professor Lewis said that he did not, in fact, accept as a comprehensive statement the claim that most checkpoints were now manned by militias loyal to the TFG. Referred to page 43 of the material submitted on behalf of appellant A, where is set out the BBC News reports in which Somalis describe their lives in and around Mogadishu and the comment of one such person that there were a large number of checkpoints, at which people would be compelled to part with money and other possessions, Professor Lewis said that he was not surprised by any of this.

89. In answer to questions by the Tribunal, Professor Lewis said that the Somalis to whom he spoke in the United Kingdom, and who travelled to and from Mogadishu, included persons involved with NGOs and also journalists. He knew their clan affiliations in most cases, but only to the level of generality of them being Darod or Hawiye. He was also in touch with people who travel to and from Somaliland. The websites that he consulted were run by Somali diaspora having close links to their respective clans. Every major Somali clan had its own website. The two which Professor Lewis most commonly consulted were run by the Hawiye and the Benadiri/Reer Hamar respectively. Members of the Somali diaspora would remit money to fellow clan members in Somalia. There was no great understanding or sympathy between different clans amongst the diaspora. The NGOs with which Professor Lewis was in touch were not entirely run along clan lines. They had been able to operate during 2007, albeit with varying levels of success. All were, however, still "in business".

90. Professor Lewis said that the rise of the UIC had been unexpected, so far as he was concerned. The UIC comprised a mixture of radicalised Islamists and humble sheikhs. The majority of the UIC comprised sheikh groups, whilst a minority had much more extreme views. The latter had unnecessarily antagonised Ethiopia. Professor Lewis considered that the intelligence information available to the USA about the UIC had to a degree been misinformed. US intelligence relied excessively upon technology.

91. Professor Lewis considered that it was possible the UIC had not discriminated against people along clan lines whilst they controlled Mogadishu and that they continued not to do so now that they were in the position of being insurgents. The Ashraf would, he considered, be afforded a measure or protection if they were involved with a majority clan but that majority would, at present, he considered be more interested in their own future and less likely to provide "charity" for minority groups.

92. Asked if it was safe to return a lone woman to Somalia who was not a minority clan member, Professor Lewis said that it was unsafe to return any woman and child unless they would be received at the point of entry by majority clansmen. Given, however, that many people had recently fled Mogadishu, there would not necessarily be time to organise such protection. The position might be otherwise where the person able to afford protection was a close relative of the returnee. A distant fellow clansman would, however, be disinclined to offer protection to the returnee. The current level of violence was at a comparable level to that in the early 1990s, during the civil war.

93. Professor Lewis said that he had not been to Mogadishu since 1990/1991 although he had been to Somaliland. Under the Barre regime, Mogadishu had been a peaceful city, possibly the most tranquil in Africa.

94. In further examination by Counsel, in response to the Tribunal's questions, Professor Lewis was asked about his comment regarding the NGOs having varying degrees of success. Some were trying to provide schools in Mogadishu and some medical help and famine relief. None of this was on a very grandiose scale. The NGOs had been present all of the time, albeit that the degree of security in Mogadishu had waxed and waned. The UIC were all Sunni Muslims. The minority who were interested in jihad were connected with "outfits" that originated in Saudi Arabia, which was the main source of the most subversive elements in Islam.

Evidence of Dr Luling

95. Dr Luling holds a PhD in Social Anthropology from London University, her principal field of study being southern Somalia; in particular, the Afgooye near Mogadishu, where she did her initial fieldwork in the 1960s. Further visits to Somalia took place in 1980, 1986, 1989, 1996 and 2001. Dr Luling remains in touch with people in Somalia as well as having "many Somali friends in the UK".

96. Dr Luling produced four reports in respect of appellant S. In her first report of 6 September 2005, Dr Luling described her face-to-face interview with appellant S on 30 August 2005 when, although Dr Luling spoke Somali "fairly well," the interview was undertaken through an interpreter. The two questions which Dr Luling addressed in that report were whether appellant S came from Jasira near Mogadishu or possibly from outside Somalia, in one of the diaspora communities; and whether appellant S belonged to the Sheikhal Jasira clan.

97. As to nationality, Dr Luling was sure that appellant S was a Somali national because of her "accurate account of the village or small town of Jasira" and her dialect. She said that Jasira was a small village by the sea just south of Mogadishu; that the people there made salt from sea water; that they were fishermen; that there was little or no cultivation; and that the tomb of the local saint was cut off at high tide. All of this Dr Luling confirmed as accurate. Dr Luling then said:-

> "I do not think [it] likely that she is a Somali from the diaspora who has learnt this; I believe she is from Jasira as she says."

98. As to clan, the first reason given by Dr Luling for stating that appellant S was in her view a Sheikhal Jasira was appellant S's knowledge of the village:

> "The Sheikhal are the main inhabitants of this small place, so that is prima facie evidence that she is Sheikhal."

99. Dr Luling also referred to appellant S's knowledge of the Sheikhal, which was "scrappy but accurate". The scrappiness could, Dr Luling considered, be excused by the fact that appellant S was a young woman rather than a tribal elder and that she grew up in troubled times. Appellant S also told Dr Luling that "she came from the lighter-skinned Sheikhal. The other similar group was the Sheikhal of Gandershe, who live near Marka. This is correct". Appellant S had heard of the Sheikhal Loboge but did not know where they lived. She did not know the origin of the Sheikhal Jasira and said that their sub-clans were Reer Ba Hassan, Reer Hassan, Reer Maad and Reer Haji. Dr Luling said that this was "nearly right, according to my other informants: in fact the first sub-sub clan is Reer Qasim while 'Ba Hassan' is an alternative name for the whole sub-clan".

100. Appellant S was able to tell Dr Luling that about the Badgal - the ritual of entering the sea – and the annual commemoration of the ancestor known as Aw Hassan. As to dialect:-

> "As far as I could tell, she was speaking in the Af Hamar dialect. I have not been able to verify this with a native speaker of the dialect, because of pressure of time."

101. In Dr Luling's second report of 6 September 2005, Dr Luling placed the Sheikhal Jasira within the group of minorities that fall outside the Somali system of clans and

sub-clans, all of whom trace their descent from a single, fabled ancestor, Hiil. Relations between the clans and the minority groups had in the past ranged from alliance to distrust or contempt by the majority for the minorities:

> "The most relevant minority in this context are the group of people who have become known as "Benadiri", as they live (or used to live) along the "Benadir" coast from Mogadishu to Brava and in the inland towns from Afgoye along the Shabelle river. They are partly Arab and Persian descent, going back to the 11th century; this accounts for their complexion, which is typically much lighter than that of the majority Somalia. (However it is not safe to rely on this for identification, as there are exceptions both ways and plenty of people who from their appearance could be either). Unlike the most of the Somali (sic) they were never nomadic pastoralists or warriors, but were a peaceful trading community".

102. As a result of harassment since the civil war, Dr Luling considered that "most of" the Benadiri "have fled the country, to Kenya and elsewhere. Some however still remain in the cities, often living a semi-clandestine existence under the protection of Hawiye families".

103. So far as the Sheikhal were concerned, Dr Luling found that they were "very badly documented" and that most of her information about them had come from a member of the Sheikhal Gandershe, who was now an accountant living in London:

> "The Sheikhal of Jasira and Gandershe are ethnically distinct from the other groups of the Sheikhal Loboge. Jasira and Gandershe are both small towns on the coast between Mogadishu and Merca; in recent times many of the Sheikhal originating from these two places came to live in Mogadishu, but went on calling themselves after their home towns. The Sheikhal Jasira also call themselves Ba Hassan (often pronounced Ba Wassan) because they trace their descent from Hassan, son of Faqi Omar, while the Sheikhal of Gandershe trace descent from son of Faqi Omar, known as Aw Garweyne (Big Beard). Both groups belong to a 'light skinned' 'Benadiri' population, and are very similar and close to each other. They are an urban population who are generally shopkeepers and businessmen. They are especially noted for salt making from sea water. The Gendershe and the Jasira Sheikhal are noted as entrepreneurs, and have made an impact out of proportion to their numbers (about 1,500). They used to live in a relation of alliance and symbiosis with the Somali groups of that area, providing them with religious services. Since 1991 however they have largely been 'ethnically cleansed'. They are among the groups who have been robbed and been made the victims of atrocities, as they are a minority with no means of self-defence".

The remainder of this passage is set out at paragraph 62 above.

104. In her report of 14 February 2007, Dr Luling commented on the determination of the Immigration Judge who had dismissed appellant S's appeal. Dr Luling considered that appellant S had been right in describing in her statement that the Sheikhal Jasira was a mixed community rather than a clan. The Sheikhal were not one but several groups with different cultures and dialect:-

> "The word [Sheikhal] is simply the plural of 'Sheikh' and signifies a lineage who have an inherited religious status. They all trace descent *in legendary terms* from the same ancestor … I have here added italics to my original statement to emphasise that this common descent is not to be taken literally, and indeed is an invention intended to fit a number of groups of diverse origins into a genealogical framework… However, the joint British, Danish and Dutch Fact-Finding Missions 'report on Minority Groups in Somalia' 2000, followed by the Home Office, swallows the genealogical fiction and refers to the Sheikhal as 'a clan'."

105. In the same report, Dr Luling opined that during the rule of the UIC it seemed to many that conditions in Mogadishu and elsewhere had become sufficiently secure for asylum applicants to be returned there without serious risk. However, following the fall of the UIC, Dr Luling considered that the position had completely changed.

106. In her report of 3 November 2007, Dr Luling attempted to deal with the current position in Somalia. Contrary to her expectations, as expressed in February 2007, neither the Ethiopian troops nor the Ugandan troops had withdrawn. No further African Union troops had arrived:

> "At the same time, Mogadishu and the country generally have not returned to the pre-2006 situation of separate clan-based enclaves, each under its own 'warlord'; instead the Transitional Federal Government (TFG) is in nominal control, and there have been efforts to set up an administration and clean up the city of Mogadishu, but at the same time violence by anti-government forces has only intensified, as have reprisals by the TFG forces and their backers."

107. The anti-TFG forces consisted, according to Dr Luling, of the Shabaab – the militant wing of the UIC – and other less organised clan-based or anti-Ethiopian forces. As for the TFG, there were four competing factions within it: (i) the police of the Mayor and former warlord Dheere; (ii) the Ethiopians and their forces; (iii) the TFG's own followers; and (iv) other TFG collaborative forces. Apart from these, the African Union troops comprised a force of their own.

108. In late March 2007, in the face of a growing insurgency, the TFG/Ethiopians began a large scale operation to clear insurgents form their strongholds. From late March to May 2007, military engagements in Mogadishu were the worst the city had seen for a decade or more. Both sides could be accused of acting indiscriminately against their perceived opponents. The National Reconciliation Conference in Mogadishu on 15 July 2007 brought greater levels of violence and, quoting a report by Dr Barnes of the Refugee Documentation Centre, Dr Luling stated that the current level of conflict "would seem unsustainable even by the very low standards of the Mogadishu". Quoting the same report, Dr Luling recorded that "abuse of human rights is at its worst for quite some years" and that suspicion on both sides "makes almost any person at risk of human rights abuse, up to and including harassment, persecution, imprisonment, kidnap, physical violence or assassination". Freelance militias and illegal checkpoints had returned, with regular instances of extortion and robbery. Whilst in April 2007 many of those who had fled Mogadishu to take refuge in the

"bush" were returning to the city, there had since been another, quite larger exodus, with UNHCR estimating that about 90,000 escaped during the week preceding 2 November 2007. reports as to whether it was safe to go from any of the Mogadishu airports into the city were confused and contradictory. In any event, however, Dr Luling considered that appellant S would not need to go into the centre of Mogadishu from the airport but would rather travel straight to Jasira. Once there, however, she would not be safe if her fellow clansmen were not in a position to give her protection.

109. Whilst Dr Luling had "no reports of specific assaults on specific minority groups" she considered that members of minority groups were particularly at risk because of their unarmed state and that this would be particularly true for a woman. This would apply "whether all the details of [appellant S's] personal statement were true or not".

110. Answering specific questions put by appellant S's solicitors, Dr Luling considered that "So far as I know, minority clans are still as much subject to discrimination as ever. However, this must be seen in the context of the general increasing violence not now only random but a virtual war between the PFG (with its backers) and 'insurgents'". Also the Hawiye clans, who were previously in control and therefore responsible for the discrimination, are now out of power; many of their members constitute the wave of refugees fleeing the city and others are joining the anti-government insurgency". Dr Luling considered that a woman, particularly with a young child, would be especially vulnerable.

111. In examination in chief, Dr Luling said that by "scrappy" in her first report, she meant that appellant S could have known more about the Sheikhal. When Dr Luling had asked appellant S where they had come from, appellant S did not know that they had originated in Arabia. Her information about sub-clans was also not quite right. However, Dr Luling did not consider that this was unusual in a young woman such as appellant S. She stood by her conclusion that appellant S was probably Sheikhal Jasira. She could not at this point remember the interview; she had undertaken so many. If returned with a child, appellant S would not be able to run away at the sign of danger and would also have to find food enough for two people. She had read Professor Lewis's August 2007 report and agreed with it.

112. Mr Collins asked Dr Luling what the situation would be on return today for a female majority clan member with a child. Dr Luling said that such a person would be in danger, albeit not to the same degree as a minority person. Members of the woman's majority clan might not be in a position to offer much help in the current circumstances. Furthermore, the position was not the same as it had been a year ago, when certain Hawiye clans could find safety in their enclaves. Hawiye were now amongst those pouring out of Mogadishu.

113. Dr Luling was asked about the respondent's apparent stance, in the light of material submitted to the Tribunal, that Dr Luling was not objective or independent. She said

her reports on the general situation in Somalia were based on objective evidence which was in the public domain. She had no "hot line" to the TFG or to the warlords. She did her best to be objective.

114. Dr Luling said that she had read the material set out at pages 1371 to 1401 of R3. These concerned a person ("the claimant") who had sought asylum in 2002 on the basis that he was a Reer Hamar who had suffered persecution in the past and would do so again in the future, if returned. At the request of the claimant's solicitors, Dr Luling produced a report. This report was prepared in connection with the claimant's appeal. In it, Dr Luling stated that "I understand that my duty to the court is to provide an impartial expert opinion and to assist the court in reaching a decision". The report details questions Dr Luling put to the claimant at interview regarding Somalia in general and Mogadishu in particular. In doing so, she made express reference to the respondent's reasons for refusing the claimant's application for asylum. Her conclusion was that the claimant "in fact has quite a good knowledge both of Mogadishu and its recent history" and that the claimant was a Somali national.

115. It appears that the solicitors for the claimant supplied the Adjudicator who was to hear the appeal not only with Dr Luling's report but also with the letter of 13 March 2003 which she had written to them, in which she said as follows:-

> "Here is my report on this client.
>
> I have said in it that I am sure that he is a Somali national from Mogadishu. However, I have said nothing about his clan, as I do not believe that he is Reer Hamar – Morshe. This is mainly because he knows very little about them, and his names … are not the sort of names used by the Reer Hamar, as they are Somali words, not the Arabic Muslim words that the Reer Hamar used.
>
> May I point out that the date of his refusal was September 2002, before the regulations changed in October. Hence as a Somali national he arguably should get ELR.
>
> If you need any modifications to the report please let me know."

116. The Adjudicator who heard the claimant's appeal dismissed it. At paragraphs 34 and 35 he wrote as follows:-

> "34. However, rather disconcertingly, in her covering letter [Dr Luling] volunteers, 'I do not believe he is Reer Hamar – Morshe. This is mainly because he knows very little about them and his names … are not the sort of names used by the Reer Hamar because they are Somali words, not the Arabic Muslim names the Reer Hamar use'.
>
> 35. It is not entirely clear from this covering letter the extent to which Dr Luling was instructed to consider whether or not the appellant was a member of the Morshe sub-clan and what questions she had asked for the purpose of establishing her conclusions. In that letter she invited modifications to her report if needed."

117. The Adjudicator came to the conclusion that the appellant was not a Reer Hamar. He did so without making express reference to Dr Luling's letter. The matter then appears to have been taken up by the respondent's Presenting Officers' Unit in Cardiff, who wrote to the Deputy Chief Adjudicator and received from her a reply in April 2003, in which she said that it seemed appropriate that adjudicators should be made aware of Dr Luling's "reluctance to express an opinion which might be adverse to the appellant's claim", and that it would seem sensible for that information to be brought to the attention of Presenting Officers so that adjudicators could be made aware of the need to approach Dr Luling's reports with some caution.

118. Asked what she would say if the respondent's stance was that she tailored her reports in order to omit material that might be detrimental to appellant S's interests, Dr Luling said that she would probably have followed the instructions of her solicitors in the case in question. Somali nationals at the time were obtaining temporary leave to remain and it was therefore permissible to leave clanship to one side. She had thought, however, that the solicitor should know that her client was not from a minority clan. If the issue had been relevant, she would have included it in her report.

119. So far as the present position in Mogadishu was concerned, Dr Luling described it as disastrous and dire. The chances were not good of someone finding a protector from a majority clan and the Hawiye were in any event out of power and their protection was not worth very much.

120. Cross-examined, Dr Luling said that the Hawiye had been dominant until two years ago but the TFG relied largely on the Darod clan and Hawiye militias were no longer controlling Mogadishu. It was put to her that the Prime Minister of the TFG had been Hawiye and that the TFG were currently looking for a replacement from the same clan. Dr Luling agreed but said that this did not mean that armed militias of the Hawiye were in control of Mogadishu as they used to be.

121. Dr Luling was referred to paragraph 46 of Dr Mullen's initial report, entitled "Statement to the Court," where Dr Mullen recorded that he understood "that my duty in writing this report is to help the court within my area of expertise. I understand that this duty overrides any obligation to the parties from whom I have received instructions or by whom I am paid and I have complied with that duty in formulating this report". Dr Luling agreed that that was a correct description of an expert's duties. She confirmed that those were her obligations in 2003, in particular, when she wrote the letter of 30 March 2003 (R3, page 1375 and paragraph 115 above). Dr Luling said that it was usual for her to obtain details of what the appeal in question was about and she would have known that this particular claim was one for asylum. She agreed that she would have known the relevance of clan membership to the asylum claim. She supposed she knew what the claimant's claim had been. Asked whether she appreciated her duty included an obligation to tell the Adjudicator whether or not the appellant was from a minority clan, Dr Luling said that she did not appreciate that that was her duty. She understood, however, that

her duty was to help the court. It was put to her that she had gone out of her way not to help. She replied that she thought her duty was to say what she had done. It was put to her that she had told a version of the truth. Dr Luling said that what she had written was true as far as it went. Asked if it was acceptable not to tell the whole truth, she said that she answered the questions put to her by her solicitor. She could not, however, remember what questions these were in the context of the particular claimant's case.

122. Turning to appellant S, Dr Luling recalled that the interview lasted about 30 minutes. Dr Luling had never been to Jasira. Her source of information about it was from other people; in particular, the person mentioned in her report. She herself knew it to be a village by the sea most of whose inhabitants were Sheikhal Jasira, known for the manufacture of salt. There was also an ancestral tomb in the sea. Dr Luling said she did not think she needed to know more about Jasira. It was put to her that the three matters which she had recorded in her report as persuading her that the appellant came from Jasira were no more than the sort of thing one could find in a *Lonely Planet* guide and that knowledge about people from Jasira being fishermen and making salt would be bound to be known in Mogadishu. Dr Luling concurred as to the last point but said that such knowledge would not exist outside Somalia. Asked whether she would agree that her conclusions as to appellant S coming from Jasira and having lived there all of her 19 years were based on rudimentary knowledge, Dr Luling said that she could not have asked appellant S anything more because she herself would not have known what the answers were.

123. Dr Luling said that the information in her report about people from Jasira being entrepreneurs was not something that appellant S had told her. Asked if that did not suggest that appellant S's knowledge was less than complete as regards basic matters, Dr Luling disagreed. She had not asked appellant S about entrepreneurship and it was not the sort of thing that she would have expected appellant S to know about.

124. Dr Luling said that as to clan knowledge appellant S had demonstrated a "scrappy" appreciation because appellant S had been unable to provide certain answers to her questions. Dr Luling was reminded that her report made it clear that she had received an incorrect name from appellant S. Dr Luling said that appellant S had got things nearly right and it was not surprising that she had not done better. This was so notwithstanding appellant S's claim that her father had been a religious judge. The head of the household would not necessarily communicate oral traditions to a female child. Dr Luling was, however, expecting that appellant S could say that her ancestors had come from Arabia.

125. Dr Luling could not remember whether the appellant was light-skinned. Mr Swift put to Dr Luling the fact that, as his own assertions had indicated, there had been a massacre in 1989 near Jasira of opponents of Barre and that the appellant could have been expected to know about that. Dr Luling said she had forgotten that the incident took place near Jasira and she had not asked appellant S about it.

126. The documentary reference relating to this exchange is at pages 1149 to 1151 of R3. This COIS reply to an information request states:-

> "The town is about 20km (now) south-west of Mogadishu City limits, along the coast. It has been close to areas of the outward growth of Mogadishu, such as Afgoye and Madina, as the centre has been abandoned with the population fleeing to the outskirts of the city.
>
> …
>
> Before the collapse of Somalia as a state, the town was a beach resort and described by many sources as 'the former resort of Gzira Beach'.
>
> The beach at Gzira was the scene of a massacre of political opponents to President Barre by government troops variously dated 14 July or 16 July 1989".

127. Dr Luling was asked about the passages in her report of 14 February 2007 regarding events since June 2006. It was put to her that these passages were unsourced. Dr Luling said she had drawn on many sources such as UN reports and news reports. She had not, however, seen the November 2007 COIS report. She had seen the report of the Fact Finding Mission of 11-15 June 2007 (R2, page 594) and had also seen the report of the Information Gathering Mission of 27-30 April 2007 (R3, page 1119). She thought she had seen the UN Secretary General's report of February 2006 (R1, page 224). Her own November 2007 report drew upon the COIS report of June 2007.

128. Paragraphs 4 and 5 of Dr Luling's report of 3 November 2007 drew upon material from the Refugee Documentation Centre, Ireland and UNHCR (Dr Barnes). The reference to the inauguration of the National Reconciliation Conference bringing greater levels of violence came, Dr Luling agreed, from the following paragraph of the RDC report (A2, page 61):-

> "The current political situation (as of late August 2007) in Mogadishu and its immediate environs is a matter of perspective. There are evidently significant sections of the population who did not support the TFG Government; there are regular and often successful assassination attempts against TFG officials of all ranks. Buildings, businesses and installations associated with TFG are targeted by mortars on daily basis. The TFG and Ethiopian forces conduct wide-ranging 'security' operations against groups or individuals perceived to be actively resisting the government. Both sides can be accused of acting indiscriminately against their perceived opponents. The inauguration of the much delayed National Reconciliation Conference in Mogadishu on 15 July has brought still greater levels of violence".

129. So far as checkpoints were concerned, Dr Luling was asked whether she agreed with the assessment at paragraphs 5.06 *et seq* of the BIA report of the Fact Finding Mission of June 2007, that as at June 2007 there had been a remarkable reduction in checkpoints (R2, page 614). Dr Luling said she had no reasons to disagree with those

findings. Dr Luling was asked why she had not made reference in her report to these materials. She replied that she thought that the BIA Fact Finding Mission report had been talking about checkpoints between the airport and Mogadishu City. It was put to her that paragraph 4.27 (R2, pages 610/611) made it plain that all Mogadishu checkpoints were in issue. Dr Luling disagreed and said that she preferred the report of Dr Barnes. Dr Luling agreed, however, that the BIA report was sourced, unlike that of Dr Barnes. Asked whether she agreed that the BIA report was wholly credible, Dr Luling said that she could not comment. Asked on what basis she selected material to put in her reports, Dr Luling said that she selected what seemed to give a broad and general account of the situation.

130. Dr Luling was asked about her description of people leaving Mogadishu as having "escaped". She was referred to the "latest news" section of the November 2007 COIS report (R1, page 8), where the website *Garoweonline* was quoted as stating that a Hawiye elder claimed that Mayor Dheere had ordered evacuations from parts of Mogadishu during the security operations and about the UN (OCHA) Situation report of 2 November 2007 (R2, page 1104), which stated that the large movements of people in late October 2007 was partly due to "an announcement advising those living in districts surrounding the Bakhara Market to vacate the area due to security operations". Dr Luling was not sure if she had seen the latter document when she wrote her report of 3 November. She would nevertheless not accept the categorisation of the exodus as a well-ordered arrangement. She did not think it was relevant that part of the movement of people out of Mogadishu had been in response to warnings. She maintained that the people in question were escaping Mogadishu.

131. Dr Luling said that the Somali contact referred to in paragraph 9 of her report of 3 November was a woman living in London who communicated by telephone with Mogadishu, and another Reer Hamar informant, also in London, who also obtained information by telephone from Somalia. Dr Luling's answers to the questions put by appellant S's solicitors (paragraph 14 of her 3 November report) were, she said, based on general information that she had collected and also on common sense.

132. Dr Luling was referred to paragraphs 20.14 and 20.15 of the November 2007 COIS report (R1, page 79):-

"20.14 The Danish Refugee Council and the Danish Immigration Service, in their Joint Fact Finding Mission report on Human Rights and Security in Central and southern Somalia, published August 2007 noted:

'Hibo Yassin, Regional Co-ordinator Cooperatione per lo Sviluppo dei Paesi Emergenti (COSPE) explained that minority populations in Somalia, i.e. members of ethnic minority groups and members of clans being in a minority position are no longer victims of targeted looting and other targeted human rights violations. However, it was added that any person in Somalia who does not enjoy strong clan protection because he or she is from a weak clan or minority group has to keep a low profile. Such a person should never be outspoken or express political opinion openly or he or she will have to go into hiding or conceal his/her

identity. During the period of UIC control members of minority populations were in a much better position and some were even able to reclaim property, however today this is no longer so. Everyone is now under threat and many are afraid, not least members of minority groups … Regarding blood-compensation (diya) Yassin explained that minority groups cannot expect to obtain compensation from major clans such as the Hawiye or the Darod and to obtain compensation from the Abgal clan is also very difficult since this clan is dispersed over a large area. However, if blood-compensation is being negotiated on a lower sub-sub clan level it is very likely that compensation may take place. Even the Reer Hamar, Sheikhal and other minority groups today have profiled elders who can negotiate blood compensation'.

20.15 The report notes the OCHA and the NOVIB continue to regard minorities in Somalia as vulnerable and targeted. The report continues:

> 'Jabirel Ibrahim Abdulle, Director, Centre for Research and Dialogue – Somalia (CRD – Somalia) explained that 'social capital' in Somalia is not for members of minorities. The minority groups are vulnerable, but on the other hand as they do not have access to the same resources as the rest of the population they are often not involved in direct conflicts. However, Abdulle acknowledged that members of minority groups and clans are often victims of human rights violations'.

133. Earlier in the same report we find:-

"2.06 The Danish Refugee Council and the Danish Immigration Service, in their Joint Fact Finding Mission report on Human Rights and Security in Central and southern Somalia published August 2007 noted a difference in opinion regarding clan protection:

> 'An international organisation (A) explained that individual persecution per se does not take place in Somalia. Any Somali has the opportunity to obtain security within his or her own clan. This is even applicable if a person does not have any close relatives in the country. As long as a person is living inside the traditional area of the clan he or she enjoys the protection of that clan.'

134. However, the report also notes:

> '2.07 An international organisation (C) stated that it is too broad to say that everyone upon return to Somalia from abroad will have access to protection from his or her clan in Somalia. The clan may try to assist and protect the person at the initial stage but not in the long term.'

135. The report goes on to note:

> '2.08 Lazzarini explained that in general clan protection is better in northern Somalia than in the south. In central and southern Somalia the situation is very complex when it comes to clan protection. In these areas there is no guarantee that a person will enjoy protection form his or her

own clan. Many clans are rather dispersed and the mixture of clans is much more blurred. Lazzarini, however, acknowledged that in principle one could expect to be protected by one's own clan if he or she is living among clan members. Lazzarini emphasised that it is not possible to say something reasonable as to whether a person will be certain to enjoy clan protection in central and southern Somalia. It was added that many Somalis living abroad or as IDPs would not be able to return safely to central and southern Somalia. The IDPs experience no clan protection and accordingly there is no negotiation or compensation if an IDP is the victim of a crime.'

'Yassin considered that 'clanism' is generally no longer an issue in Somalia. This has been the situation during the last three to four years. No one is being persecuted or targeted solely because of their clan affiliation and in principle anyone can expect to enjoy protection by his or her own clan'."

136. Dr Luling accepted these findings. She was asked, therefore, whether it was the case that the findings by the Tribunal in NM regarding majority clan protection had changed little. Dr Luling said that it depended. In Mogadishu, clan protection would be of little relevance. It was put to her, however, that in March-April 2007 there had been intense fighting in Mogadishu, and yet the Danish authorities had found that clan protection existed. Dr Luling replied that there were no reports of minorities being specifically targeted. Dr Luling was referred to the report of the Fact Finding Mission of 11-15 June (R2, pages 639-640):

"10. In the recent waves of IDPs, the minorities have not been particularly discriminated against. The source said that the Bantus were not noticeably discriminated against either. The source explained that IDPs go back to wherever they feel secure, in most cases back to clan areas, with 'the first safety net is the sub-clan'. In this sense, the clan maps are still valid, as people go back to clan areas. He added that it was very difficult for outcasts. The source said that the clan assisted female-headed households, unlike the treatment of widows in other African scenarios."

137. Dr Luling said that she would question that finding. She did not know what the source there quoted was talking about. Dr Luling accepted that a person's personal circumstances would be important, as well as clan affiliations. In the end, Dr Luling thought that she probably could accept the statements in the Danish reports. She had thought it likely that appellant S was Sheikhal Jasira and had done her best to be balanced.

138. Re-examined, Dr Luling said that she relied upon her human source for information on Jasira. She had not checked things like *Lonely Planet* and similar materials. She considered that there was "not a lot else to know about Jasira". Appellant S would not have been likely to have known about the reputation of Jasira for entrepreneurial activities or as a place that produced entrepreneurs.

139. Dr Luling said that she trusted her London contacts both of whom she believed to be honest and reliable.

140. In answer to questions from the Tribunal, Dr Luling confirmed that she had seen the refusal letter in the case of the 2003 claimant. Members of minority clans and groups were likely to be less well off than others but sometimes relatives in other countries collected money and sent it to Somalia, so that the persons concerned could come to Europe.

141. Dr Luling said that she had around 1,000 entries on her database for cases in which she had been involved and that in most cases the claim was that that a person was from a minority clan. In around 170 cases, she had said that she could not support a person's claim and she refused to act in about one in four or one in five cases.

142. The Tribunal asked Dr Luling to look at appellant S, who was seated in the hearing room. Dr Luling said that appellant S was "obviously" not light-skinned but that was not definitive and one could get a range of appearance in persons who were Benadiri. Dr Luling could not remember if she had ascertained what occupation was pursued by appellant S's father.

143. On further re-examination by Mr Swift following the Tribunal's questions, Dr Luling was asked why she had not stated in her written reports that appellant S was not light skinned. Dr Luling was unable to say at this point.

Evidence of Dr Mullen

144. Dr Mullen holds a PhD in African politics from the University of Edinburgh and until recently was Senior Lecturer in International Property Conflict at the University of Manchester, where he is also Programme Director of the Poverty, Conflict and Post-Conflict Reconstruction Programme. He is an Honorary Senior Fellow of the University of Manchester, Visiting Lecturer at the University of York and an external PhD examiner for the Universities of York and Salford. He has advised the Commonwealth Secretariat, the Foreign Office's Department for International Development, the British Council, the European Commission and the Governments of the Netherlands and the Irish Republic. From October 2005 to March 2006 Dr Mullen was Team Leader and Governance/Human Rights Specialist in the European Commission's evaluation of their development programme in Somalia, which involved travel to Somalia, Somaliland and Puntland.

145. Dr Mullen produced an expert report in connection with appellant A. The report is dated 29 April 2007. The first addendum to that report is dated 6 November 2007, the second addendum is dated 16 November 2007 and the third is undated. In his main report, Dr Mullen recorded how, since the break-up of Somalia in 1991, Mogadishu had been characterised by intra-clan fighting among the two Hawiye sub-clans of the Habar Gedir and the Abgal for control of the capital and of its infrastructure, over which time the indigenous Benadiri population were

dispossessed and subjected to severe physical harm by the opposing warlord armies. With the help of the international community, the TFG was established in 2004, with government posts distributed across the four major clan groupings plus a fifth category which included the minority groupings. Finance for the TFG came from the European Community, Ethiopia and Kenya.

146. After the UIC came to power in Mogadishu in 2006, militia-controlled checkpoints were dismantled, the international airport re-opened, the previous sea landing area of El Maan abandoned in favour of re-opening the port of Mogadishu, piracy activities curtailed, the export of rare wildlife species prohibited and "even illegal fishing in Somalia's national waters received attention" (paragraph 18). In the course of two months "an unbelievable change took place in Mogadishu, which provided a degree of security and protection for average citizens, particularly women". Certain freedoms were restricted, in particular, the use of tobacco and khat.

147. However, in late 2006 the TFG moved against the UIC, displacing it from Mogadishu, since which time the situation in that city "deteriorated substantially and the level of conflict escalated into a near Baghdad-style urban warfare" (paragraph 20). The TFG was perceived as being Darod, with the united resistance in Mogadishu claiming to be defending the Hawiye people. Mogadishu slipped gradually back to the violence and anarchy of recent years, with very large numbers of people fleeing the city between 1 February and 25 April 2007. By 29 April a tentative calm was established when former warlords were appointed to the post of National Police Chief and Mayor of Mogadishu.

148. Writing in April 2007, Dr Mullen considered possible outcomes of the National Reconciliation Conference. If the UIC/Hawiye were given a prominent role in national governance in conjunction with the TFG, then the treatment of a lone female would depend upon her clanship. If she were Hawiye, "assuming that the sub-clans of Habar Gedir, Abgal and Ayr are not at war with each other", Dr Mullen assessed the level of risk as moderate. If the woman came from a minority clan, however, or a non-Hawiye clan, the risk would be high. He considered that risk would be "even greater for minority clan males in the majority of cases" (paragraph 23). Were the TFG to assume primary responsibility for national governance, a scenario which Dr Mullen categorised as utopian, then "one could assume that a level of protection could be extended to females from both majority and minority clans, with a consequent moderate to low level of risk" (paragraph 24). The third, "doomsday" scenario was that the armed conflict continued, in which case the level of risk would be very high in the case of both minority clan and majority non-Hawiye clan women and children. Again, it was "likely that the risk would be even greater for men of all clans" (paragraph 25).

149. Both the UIC and the TFG had a strong clan character, although Dr Mullen recognised that the TFG had made provision for the presence of minorities within their ranks. Dr Mullen considered that there was a lack of "hard evidence at the moment on how the UIC in practice has dealt with minority clans". Since both clan

and caste are proscribed in Islamic law, one would anticipate an outcome of tolerance. Anecdotal evidence suggested that the UIC "are not discriminating against minorities" (paragraph 31). He considered that one could "imagine a certain empathy between the UIC and minorities such as the Ashraf (traditionally a devout and religious Benadiri sub-clan) for instance" (paragraph 32). On the other hand it was known that there had been a good deal of infiltration of the UIC and the Al Ittihad by "Wahabi-type/Salihiyya/Salafi sects which would advocate strict observance and could lead to jihadism". However, since the military defeat of the mainstream UIC forces, the extremist protagonists had had to moderate their views in order to maintain an alliance with the clan militias (paragraph 32).

150. At paragraph 39 of the report, Dr Mullen considered the issue of roadblocks. "If the female in question belonged to the local clan and she could indicate so by the name of her father, it is unlikely that she would be harmed. The presence of accompanying children would also, as a general rule, "contribute to risk reduction". Nevertheless, it was often necessary to transit through another clan's territory to reach one's home. At paragraph 41, Dr Mullen concluded that, at the time of writing, humanitarian grounds "would dictate that returns to Mogadishu, under the current circumstances, whether male or female, majority or minority clan would not accord with human rights legislation and the ECHR. Other areas of the country may have acceptable levels of security and lower levels of risk, particularly for majority clan members."

151. In his first addendum, Dr Mullen considered the position as at 6 November 2007. He observed that since the end of April 2007 key changes had taken place in Mogadishu, with attacks intensifying on the ground between the TFG and Ethiopian troops, on the one hand, and remnants of the UIC, in alliance with Hawiye militias, on the other. There had been two peace and reconciliation conferences, one sponsored by the TFG in mid-July and the other held in Eritrea by a broad Islamic alliance in September. After the Eritrean conference, the impression was given that the Jihadists in the UIC held the upper hand in policy making. Within the TFG there had been a power shift, with Prime Minister Gedi resigning. The Bakhara Market in Mogadishu had been bombed, as it was suspected of harbouring terrorists. This had the effect of breaking the food supplies/marketing chain. Security problems in Mogadishu had forced people to abandon the capital and had broken the social support system upon which vulnerable people depended. Since 27 October 2007 approximately 46,000 people had settled along the Mogadishu-Afgoye road, including large numbers of women and children. UNHCR's Population Movement Tracking reported that between February and May 2007 roughly 400,000 IDPs had moved from Mogadishu, some 125,000 had returned and a further 85,000 moved out since June.

152. Dr Mullen considered that even the ability of a person's clan to provide protection had to be called into doubt in south/central Somalia in November 2007. The clan composition of the IDPs covered all groups "so we are dealing with a scale of the degree of vulnerability as, even if all shared the same condition of destitution, those of a minority clan would not enjoy the social support mechanisms or protection in numbers available to a majority clan".

153. In his second addendum dated 16 November 2007, Dr Mullen attempted to address the issue of whether appellant A's male family members in Somalia could provide her with support and whether such support could alternatively be provided from fellow Ashraf and members of a majority clan who had afforded appellant A protection. Dr Mullen wrote:-

> "The social support system available to Somali clan members is legendary for its breadth and generosity. However, it does presuppose a degree of stability in which there is a certain equilibrium of demands and capacity to respond. The disintegration of societal stability, even in the case of majority clans, since the beginning of this year, with the occupation of the Ethiopian Army and its Transitional Federal Government (TFG) allies, droughts and floods has given rise to a situation where human existence itself is even in question and the support system has effectively collapsed. An excerpt from a report delivered by an NGO on the ground, to the international community describes the situation in graphic terms:
>
> > 'The TFG in Mogadishu appears increasingly as an Abgal venture; and the opposition increasingly dominated by Habir Gedir. The danger of a new clan civil war increases, but remains not inevitable. That said, leaders from both clan groupings don't want a new civil war, but they are largely not on the ground, and nor are their families. The level of desperation on the ground is increasing. Individuals, families, sub-clans and clans are having to mobilise and arm themselves for survival. The existential survival imperative is increasingly dominating and the political decisions or desires by transitional or political leaders are increasingly meaningless. Civil war is not inevitable, but more precursors for a new war for basic survival continue to manifest themselves.'
>
> The population in Mogadishu is more mobile with people fleeing from one district to another to avoid the ubiquitous bombing. My NGO informant in Mogadishu writing on 5/11/07 stated that 'there are Reer Hamari people residing outside Shangani and Hamar Weyne districts. They are currently residing in Shidis, Bondhere, Hamir Jajjab and Abdulaziz Districts".

154. In his third addendum, Dr Mullen provided further information as to the status of the airports in the vicinity of Mogadishu. Mogadishu International, K50 Jowhar and Balidogle were all open for commercial and civilian traffic. The International Airport was controlled by the Hawiye – Habar Gedir, as were K50 and Balidogle. September 2007 had, according to Dr Mullen, shown "a bumper sale of light weapons" in Mogadishu.

155. Giving oral evidence, Dr Mullen said that Mogadishu was now a zone of intense conflict. There was a note of desperation coming from the city. There had been a breakdown in the discipline of the Ethiopian forces. The population of North and Central Mogadishu was moving south into areas which had already been devastated by fighting. The network of social support was breaking down and clan leaders were not interested in the fate of Mogadishu because the Abgal and Habar Gedir sub-clans of the Hawiye had managed to get their families asylum overseas and so no longer

had any interest in the fate of the Mogadishu population. That population was now almost entirely dependent on humanitarian food aid. The TFG had greatly increased the money supply, causing inflation.

156. The warfare taking place in Mogadishu was, Dr Mullen considered, essentially Baghdad-style, with attacks taking place by means of remote-controlled bombs and civilians being used as cover. Military facilities and police stations were targeted by the UIC. Journalists who criticised the TFG were targeted by the latter. The Ethiopian troops were concerned with their own survival and would, accordingly, not intervene if a woman was being raped at a roadblock. A Hawiye would be seen by the Ethiopian troops as a potential insurgent. There had been a breakdown in the traditional governance by clan or religious authorities. Basic survival was now a priority. Even though the clan network had broken down in terms of social support, minorities would still be at the bottom of the scale. The Bantu were, according to Dr Mullen, in some respects now more vulnerable than the Reer Hamar. The Reer Hamar and the Ashraf were the only minorities who had received assistance from majority clans in the past. The Reer Hamar/Ashraf could be described as broadly being the Benadiri. Such minorities could not as such obtain much protection at the present time, although there were individual instances of protection. An example was the former speaker of the Parliament, who was an Ashraf, but married to a Rahanweyn. Dr Mullen considered that the word "protection" was perhaps too strong in any event and preferred to refer to support. Patronage had not, however, entirely evaporated. Dr Mullen considered that the situation was now close to that described as the doomsday scenario in his main report.

157. Cross-examined, Dr Mullen said that he was aware of the UN Secretary General's reports and the November 2007 COIS report. He was unsure about the BIA Mission reports following the visits in April and June 2007. He had not seen the one relating to April.

158. Dr Mullen agreed that the security situation in southern Somalia was specific in terms of time and place. Within Mogadishu, a feature of the recent past had been the introduction of security sweeps into areas of the city that had previously been protected from insurgency. There was still a difference in the situation of North and South Mogadishu respectively. In the previous week the Ethiopian forces had swept the north of Mogadishu, which had the effect of displacing people to the south, which presupposed that the south was more secure than the north of the city. The situation in Mogadishu could, Dr Mullen acknowledged, change very quickly but unless the Ethiopians withdrew or there was a reconciliation between the clans, it was unlikely that any positive developments would emerge.

159. Dr Mullen agreed that the rise of the UIC was a great change and entirely unexpected so far as everyone, including Somali watchers, were concerned.

160 Dr Mullen was asked about what he had said in paragraph 11 of his main report:-

"Risks are proportionate to the historical situation of security or conflict on the grounds at a given period in time. Risk is associated with the degree of danger associated with a given operation or course of action. In terms of forecasting the impact of a particular line of action, risk may be subdivided into high risk; high moderate risk; moderate risk; low moderate risk and low risk. The risk calculus would then be premised upon the situation that the degree of danger or harm associated with the repatriation of different groups of persons to Somalia at a given moment in time. Minority rights group international have classified Somalia as having the most hostile environment for minorities in the world, ahead of Afghanistan, Iraq and Burma. Overall Somalia is a risk-prone society and among development practitioner organisations, it is viewed as perhaps the most dangerous country in the world. In the context of Somalia, security is both fluid and is location specific and this affects the level of risk permeating the politico-economic environment. Levels of risk perception are also, to a degree, subjective".

161. Dr Mullen said that by subjectivity he meant that he was viewing the matter from the prospective of the Western European relief-worker; whereas for a Somali, the situation had been part of everyday life for a number of years. The opening of the international airport for relief purposes had come about as a result of international pressure on the TFG. Dr Mullen accepted to an extent that his information regarding the airports in Somalia in his report suggested a worse position as at mid-2007, compared with other observers whose reports were contained in the written evidence. The airport known as K50 was 50 kilometres outside Mogadishu, in a much more secure area than the International Airport, and handled the bulk of air traffic. Checkpoint numbers had varied considerably during 2007, although the nature of the checkpoints was, according to Dr Mullen, more worrying. Checkpoints were to an extent clan-neutral: some were run by bandits who would extort money from anybody, irrespective of clan. It was put to Dr Mullen that his report was at variance with the statements of sources recorded in the BIA's report of the Fact Finding Mission in June 2007 (R2, page 611), that the TFG had cleared away militia checkpoints. The information in Dr Mullen's report, coming from aid workers, Mr Swift suggested, necessarily reflected concerns that aid convoys would suffer more frequent interference. Dr Mullen demurred. Checkpoints were, he said, used as tolls to fund the war effort. Tariffs would be adjusted according to capacity to pay.

162. In the report on the June 2007 Mission (R2, page 643), an adviser to an EU institution provided the following information:-

"6. Regarding movement in the city, there are minibuses moving freely. There has been a 'remarkable' reduction in checkpoints, with fewer bandit checkpoints, and less interest in clan affiliation. Only occasional TFG/Ethiopian checkpoints, typically only one on a long road. Returning Somalis can move around, and not be targeted as insurgents. But it is better if they can hire a car. When asked about why ordinary Somalis would not be targeted, the source explained that it is a politically targeted risk now and not aimed at ordinary Somalis."

163. Asked about this source, Dr Mullen said that he could have reason to doubt the completeness of her knowledge, given the frequency of her travel to the area. Dr Mullen's source was an NGO operative contracted to an EU institution, who worked on the ground in Mogadishu. The source was unpublished.

164. Regarding the UIC and the Hawiye, Dr Mullen said that they had previously been in conflict and their alliance now was not a close one but, rather, one of convenience.

165. Regarding the movement of people in Mogadishu, it was accepted that in May/June 2007 some 190,000 people returned to Mogadishu during a lull in the violence. It was put to Dr Mullen that "Mogadishu normal" life involved a degree of such mobility. Dr Mullen said that it indeed represented the reality and that there had been a good deal of movement. He agreed with what was said in the report of the June 2007 Mission (R2, page 629):-

> "12. For IDPs, there are areas in which they cannot go, particularly after the public building evictions. However the group [executives of an internationally recognised NGO] impressed the need to understand 'normal life' in a Mogadishu sense, where there is an acceptance of a mobile type of life created by displacement. In this current conflict, there had been many displacements within the city of Mogadishu, with 68 per cent of the city's population affected."

166. Dr Mullen said, however, that the current displacements were of a scale of magnitude greater than that seen previously. Dr Mullen accepted that the evacuations had in part been a response to security operations. Dr Mullen appeared to accept what was said in the report of the June 2007 Mission regarding violence becoming more sophisticated and targeted and it being of a relatively low level at the time of the mission.

167. Dr Mullen was asked about the UN Secretary General's report of 7 November 2007 (R4, page 1588a) where he stated:-

> "17. The Transitional Federal Government and the Ethiopian forces continued to concentrate on securing Mogadishu and seeking to apprehend and disarm insurgent elements. Limited progress has been made to date, with targeted attacks by insurgents continuing on a regular basis. Such attacks include the use of roadside bombs, rocket-propelled grenades, mortar and hand grenade attacks against Transitional Federal Government personnel and Ethiopian forces. In addition, there had been frequent gun battles between the Transitional Federal Government's security forces and insurgent elements lasting several hours. On 27 October, local insurgents and Ethiopian troops engaged in some of the heaviest fighting in Mogadishu in months.
>
> 18. Most checkpoints are now being manned by militias loyal to the Transitional Federal Government, many of which appear to lack a proper command structure and training …
>
> 20. Civilians have been caught in the line of fire as insurgents continue to stage targeted assassinations and suicide bombings. Furthermore, Transitional Federal Government

forces and Ethiopian troops have, at times, opened fire indiscriminately, causing many civilian casualties…."

168. Dr Mullen first accepted these descriptions as relevant as at September 2007. It was pointed out to him that the report was written in November and related to a later time period. Dr Mullen accepted that. He also accepted that Bakhara Market had now reopened, having been closed between 26 and 30 October 2007. There had been a bombing in the market, followed by a security operation, which had now ended.

169. Dr Mullen was asked about the second addendum to his report, where he quoted a report delivered by an NGO regarding the TFG in Mogadishu as appearing to be increasingly an Abgal venture. Dr Mullen said that the NGO in question was called Saacid and the information could be found on its website. Dr Mullen was asked about the reference to the Abgal, given that Professor Lewis said that the TFG was regarded as being controlled by the Darod. Dr Mullen said that the Saacid comments related to Mogadishu. There was an alliance between the Abgal and the Darod and the Mayor of Mogadishu was an Abgal, who controlled the region to the north of Mogadishu. Dr Mullen said that the desire to survive was eroding clan solidarity in Somalia. There were movements of people from the north of Mogadishu and from the south and hospitality was no longer possible because of the collapse of the social support networks. He took this information from a Human Rights report. So far as the cost of weapons was concerned, as to which Dr Mullen had produced a bar chart, he agreed that this varied.

170. Re-examined by Mr Maka, Dr Mullen said that Shibiz was in the centre of Mogadishu and had not been mentioned as a place to which people were moving. Jasira was near the international airport. Mogadishu had been pock-marked with bombs and few buildings had roofs. The situation now was not normal, even by Mogadishu standards. The UN Secretary General's report of June 2007 (A2, page 93) referred to targeted assassinations and attacks but did not have anything to say about the destruction of property. The Mayor of Mogadishu had been Governor or Middle Shebelle, where he had gained the reputation for extortion and rape. He had been brought in by President Yusuf to clean-up Mogadishu. So great was Dr Mullen's distaste for Mayor Mohammed, that he had refused to meet the latter. As for checkpoints, Dr Mullen considered that his own source was more reliable because it was more recent.

171. In answers to questions from the Tribunal, Dr Mullen could not say how the ICRC had come to the conclusion (as referred to in paragraph 20 of his report) that the fighting in Mogadishu had been the worst for fifteen years. As to the allegation of alleged war crimes, Dr Mullen thought that a reference had been made to the International Criminal Court but was unsure if the jurisdiction of that body extended to Somalia. At page 227 of appellant A's ring binder of materials, there was a Voice of America News report of 14 November 2007, in which it was recorded that the head of a Mogadishu-based group that promotes human rights and democracy said

that Somalis in the capital are fleeing to escape being used as human shields and becoming victims of revenge attacks and that all sides had committed war crimes.

172. As for armed groups in Somalia, excluding Somaliland and Puntland, the Abgal sub-clan of the Hawiye were aligned with the TFG, but the predominant clan in the TFG was the Darod, the clan of President Yusuf, and the TFG could actually be described as the Army of Puntland. In Kismayo, two sub-clans of the Darod were fighting for control of the city. In Lower Shabili the Indhe Addeh was also engaged in conflict. Estimating the size of the armed groups was difficult. The dispute over territory between Somaliland and Puntland was becoming a second front for the TFG. The disputed territory was geographically in Somaliland but the clan of the population was that of Puntland.

173. As for the number of armed groups that were ranged against the TFG, Dr Mullen said the original UIC was based on clan militias. Where there were Shari'a courts, messengers from those courts would go and bring people in to be dealt with. Where the Shari'a courts were strong the number of such messengers or staff would be fifty to sixty. The system had been expanded to form the UIC. The business community saw the courts as a way of creating a secure environment. The various court districts were unified. Dr Mullen thought that there might be some 2,000 to 3,000 UIC combatants at the present time. There was considerable enmity between Al-Ittihad, an element of the UIC, and President Yusuf. Al Ittihad would be around 700 to 800 strong the overall size of the anti-TFG resistance was less than 10,000.

174. As for command structures, Al Ittihad adopted a cellular system. In the Hawiye militia, there was some command structure.

175. The issue of the level of violence at present was, Dr Mullen considered, a complex one. Civilian displacements from Mogadishu had been caused by large build-ups of Ethiopian troops, which caused panic in the civilian population, who feared a "Herculean battle" between the Darod and Hawiye. The population was asking itself whether there was to be a winner-take-all.

176. On a scale of one to ten, starting in 1991, Dr Mullen estimated the current violence in Mogadishu as about nine. It had hit ten in January 2007, when Ethiopian troops had entered Mogadishu. Dr Mullen was sure that there was an armed conflict ongoing in Mogadishu at the present time. He was unclear as to whether that conflict had been continuous since January 2007. Whilst the UIC had been in control of Mogadishu, the city was peaceful. This was between 24 June 2006 and late December 2006. Before the UIC took control, the armed conflict had been of a different order, being warlord and resource-based. The struggle had been for the import export and khat business.

177. Telephone communications in southern Somalia had, Dr Mullen said, interestingly enough been maintained in the times of conflict. Three mobile telephone companies were operating in Mogadishu. Telephone masts were off-limits so far as the

combatants were concerned. Mobile telephone cards could easily be purchased from huts on the roadside.

178. Dr Mullen was asked about those passages of his report which suggested there was a greater risk to men than women in southern Somalia. He said that the received wisdom was that women were more vulnerable because they were liable to abuse. However, they were regarded as an asset in terms of childbearing and domestic labour and thus, although they might be raped, they were unlikely to be killed. Males, however, would either be conscripted into the militia controlling the checkpoint at which they were stopped, or shot outright. Children were increasingly being conscripted.

179. Asked whether the UIC was still operating in a non-discriminatory way, so far as minorities were concerned, Dr Mullen said that there was some evidence that the UIC did not discriminate against minorities, especially the Bantu, and that the Ashraf were not perceived as a despised minority. In Islam it was anathema to consider people in terms of clans. However, other Somalis might have regarded the UIC as being centred around various different district courts, and therefore reflecting the clan or clans of those districts. Dr Mullen agreed that links between the Ashraf and UIC had not yet been picked up in the relevant literature.

180. Dr Mullen accepted that, although majority clan leaders in Mogadishu may have sent their families abroad and regarded clan warfare as a commercial activity, the rise of the UIC had shown that there was powerful public support for order and stability. Although middle and lower Shebelle were more stable than Mogadishu, refugees in Afgoye had risen from 10,000 to 40,000, which had an effect on stability. In the Bay and Bakool regions there was some instability, in that two sub-clans of the Rahanweyn were in conflict but there was stability in the town of Baidoa, which was used by the Ethiopians as a supply base for Mogadishu. The other area with a degree of stability was Hiran, which enjoyed a very good and enlightened local government.

181. Defections from the TFG were significant and increasing. Before deserting, TFG militiamen would sell their weapons. The Ugandan troops of the African Union had made a considerable impact on the local population, in that they provided free medical facilities and water for the people, but the force was of no significance militarily.

182. Asked about the town of Jasira, the claimed home of appellant S, Dr Mullen said that that would be “basically Hawiye territory”. The Hawiye would form the majority of the population of Jasira, in a ratio of, he considered, 5:1. Dr Mullen had been in Jasira in the 1980s. Medina was, he considered, quiet, although there had been a number of TFG forays into it.

183. In answer to further questions from Counsel in the light of the Tribunal’s questions, Dr Mullen said that the UIC was a “broad church” but after the Eritrea Conference in

2007 the radical elements in the UIC appeared to be dominating the agenda. Certain elements of the UIC would be not unlike the Taliban but the Somali population as a whole was not by nature radical in the religious sense and if the UIC were going to take power, Dr Mullen considered that moderation would return, since this was a part of the Somali character. Dr Mullen's comment about a certain empathy between the Ashraf and the UIC applied to the religious leaders of the Ashraf, rather than mainstream Ashraf people, who would not associate with the UIC.

184. Asked to estimate total combatants on all sides, Dr Mullen thought that there might be around 25,000, excluding what he described as the Puntland Army.

185. Asked about Jasira, Dr Mullen said that he was in the area in 1988. In the case of minority groups, it was unusual to have such a minority dominating any particular area, as minority groups did not have homogeneous minority villages. Minorities such as the Sheikhal Jasira were named after the areas in which they lived.

186. Asked by Mr Swift about combatant numbers, Dr Mullen said that he consulted IRIN and *benadir.com.* There were no overall figures but one could sometimes make estimates. It was put to him that the respondent had been unable to find any reports regarding command structures of the combatants. Dr Mullen said that he had not looked at any one particular source.

Submissions on general issues and credibility

Mr Collins for appellant H

187. On behalf of appellant H, Mr Collins submitted that NM was the starting point for the Tribunal's analysis of the current situation. The conclusion in paragraph 117 that members of minority clans would in general be at risk of article 3 ill-treatment were still valid. So was the finding in paragraph 102, that any person at real risk of having to live in an IDP camp would "have little difficulty in making out a claim under article 3, if not under the Refugee Convention also". What had changed, however, since NM was that any lone female returnee, regardless of clan, would be at risk. Mr Collins referred to the determination of the Tribunal in AA (Involuntary returns to Zimbabwe) Zimbabwe [2005] UKAIT 00144 where, in considering the case law on the criteria for establishing a general risk of article 3 ill-treatment, independent of individual circumstances, the Tribunal found at paragraph 50 that "the question is simply whether the evidence establishes that there is a real risk". and "any expression of the rule would be clearly wrong if it had the effect that, in order to establish the risk of harm to him, a claimant was required to show that the actual harm was universal or nearly so – that is, certain or nearly so". In paragraph 53, the Tribunal held that, in order to succeed in such a claim, an appellant "does not need to show that all, or nearly all, returned asylum seekers are harmed. It needs only to show that all returned asylum seekers are at real risk of harm". In the report of Mr Ghaanim Alnajjar to the Office of the UN High Commissioner for Human Rights on the situation of human rights in Somalia (13 September 2006) the actions of the TFG

had been praised and it was considered that Somalia had appeared to take another tentative step forward on the "perilous road to peace and security" (A2, page 216). By February 2007, however, the situation had deteriorated, as was evident from the report on 28 February of the UN Secretary General (R4, page 1572). Asked by the Tribunal to comment on Vilvarajah and Others v United Kingdom [1991] 14 EHRR 248, which established that it was necessary to show more than that a person would be returning to a country torn by war and that (as indicated at paragraph 112 of the judgment) there needed to be distinguishing features in a claimant's case, Mr Collins stated that appellant H was so distinguished by reason of being a lone woman. Unlike the position in Vilvarajah or HLR v France [1997] 26 EHRR 29, the real risk of serious harm for appellant H could be foreseen. The humanitarian situation in South Central Somalia had deteriorated, according to the UN Secretary General in his February 2007 report, over the preceding three months "due to the compounded effects of the flood emergency and the intensification of conflict. Heavy rains in Somalia and the Ethiopian Highlands during 2006 brought large-scale flooding to parts of southern Somalia, displacing an estimated 454,000 people in the Gerba and Shabelle riverine regions" (R4, page 1578). According to an HJT Research Paper of 27 April 2007 (A2, page 133), the UN indicated that the violence in Somalia in the preceding two months had displaced more people than anywhere else in the world. Since that time, Mr Collins submitted, the situation had become even more volatile. The report of Dr Barnes of August 2007 (A2, page 47) found the UIC victory in 2006 "was due partly to a small group of well trained and disciplined militia, but also to a groundswell of 'public opinion' against 'warlordism' in Mogadishu, made effective by clan elders transferring tacit support from the warlords to the Islamic courts". So far as the TFG victory over the UIC was concerned:-

> "For all the apparent ease of the winning the war against the Islamic courts, winning the peace in Mogadishu proved difficult for combined Ethiopian-TFG forces. Within the first few months of the TFG's arrival in Mogadishu a visitor characterised the TFG as "in residence, but not in power". Large parts of the powerful political and business elite of Mogadishu (mostly Hawiye based) regarded the TFG with deep suspicion. Many saw it as an alien occupying force since it was a predominantly Darod backed entity closely associated with Ethiopia and indirectly with the United States.
>
> The first three months of 2007 saw a steady deterioration in security in Mogadishu. The tardy and partial deployment of African Union Peacekeeping Force 'AMISON' of only 1,700 Ugandan troops of a promised 8,000 strong force had little success in keeping the peace. ... From late March to May 2007 military engagements were the worst Mogadishu had seen for a decade or more … at the height of the fighting in Mogadishu it was estimated by various agencies that up to 40,000 people may have been displaced.
>
> … both sides can be accused of acting indiscriminately against their perceived opponents. The inauguration of the much delayed National Reconciliation Conference in Mogadishu on 15 July has brought still greater levels of violence.
>
> The TFG Government has struggled to maintain its unity; the government is in a constant state of flux, full of personal rivalries and unreliable alliances. The insurgency

also involves a number of disparate and often uncoordinated factions fighting for different ends and with different means. Glib comparisons in the media with the insurgency in Iraq have become common. Prime Minister Gedi recently announced that the TFG will try and create a Baghdad style 'Green Zone' for the safety of government officials and foreign visitors. Overall, the current level of conflict would seem unsustainable even by the very low standards of Mogadishu.

…

Despite the polarised political climate in Mogadishu, there is no doubt that abuse of human rights it at its worst for quite some years. Neither side of the current conflict in Mogadishu is blameless. In current conditions suspicion of association with 'terrorists' or 'insurgents', or suspicion of collaboration or identification with the TFG, makes almost any person at risk of human rights abuse, up to and including harassment, persecution, imprisonment, kidnap, physical violence or assassination.

For the last six months there has been an increase in general criminality in Mogadishu and surrounding areas. The disruption to Mogadishu's economy has led to an increase in freelance militias, the re-appearance of illegal checkpoints, and regular instances of extortion and robbery. Kidnapping and ransom demands are increasing. Sexual violence is also endemic. Most reporting has come from Mogadishu, but it is clear there are considerable instances of human rights abuse in other areas of southern Somalia, such as the second city of Kismayo.

…

A recent report based on extensive field work across the Somaliland during 2006 stated:

> 'Generally, the fundamental human rights in Somalia for women, children, minorities, other vulnerable groups and IDPs are not guaranteed'.

It should be noted that though the situation for some individuals and groups is certainly better than others, and some regions are more secure than others – notably Somaliland – nevertheless it remains true that universal respect for fundamental human rights is not certain in *any* part of Somalia.

… In terms of the population as a whole, women and children are especially vulnerable to abuse of their basic human rights. In present day Somalia women feel that they "carry the greatest burdens of insecurity and survival". In general, sexual and gender based violence is endemic in all the Somali lands, although more widespread in some areas than others.

…

Rights of children are equally weak in all regions of the Somali lands. A recent report by the United Nations Security General, Ban Ki-Moon, estimated that a third of fatalities due to conflict in Somalia during 2006 were children, and that the ongoing violence in southern and South-Central Somalia was characterised by 'grave child rights violations'. "

188. Later in the same report we find:-

> "The civil war and the continuing collapse of the central State in Somalia made large civilian populations subject to serious violations of internationally accepted humanitarian norms and human rights laws. A common and continuing response of civilian populations to insecurity – whether due to man-made conflict or natural disasters such as famine or flooding – was to move either within or outside Somalia. Within Somalia there has been massive displacement of civilian populations, often several times over, particularly in the South-Central regions.
>
> The security of Mogadishu, and specifically the risk of ordinary individuals returning to Mogadishu and travelling between the airport and their final destinations, is subject to almost daily changes. Nevertheless, return to Mogadishu is evidently possible since flights are arriving and departing from at least two airports serving the city.
>
> It is the case that the physical act of return to Somalia will not in itself be a risk of breach of human rights unless the individual is suspected of involvement with the opposition to the TFG. However, anecdotal information suggests that many with the wherewithal to leave – i.e. businessmen and professionals, have chosen to leave Somalia in the last month because of the declining security situation, especially the risk of kidnap for ransom purposes.
>
> The possibility of returning failed asylum seekers to Somalia should be judged against the prevailing security conditions that all ordinary Somalis face in Somalia. At the present moment and for the last two months security conditions have deteriorated. Recent communications from Mogadishu have noted that there is an increase in freelance militias, illegal checkpoints, and generalised harassment and persecution of civilians especially on roads leading out of the capital. Violence against women and girls is also rising. More worryingly in a recent interview, the Mayor of Mogadishu, an ex-warlord Mohamed 'Dheere,' stated that 'terrorists' were hiding in the camps for displaced peoples and said 'we will go after them wherever they are for the sake of security of the region'. As in the past, any large scale further security operations will entail civilian casualties."

189. In the Human Rights Watch report "Shell-shocked Civilians under siege in Mogadishu" (13 August 2007) (A2, page 251) there was, according to Mr Collins, the most comprehensive recent account of the situation in Somalia. Based on "dozens of eye witness accounts", the report detailed routine deployment by "the insurgency" of their forces in densely populated civilian areas, carrying out hit and run mortar attacks, which placed civilians at unnecessary risk. They fired weapons, particularly mortars, in a manner that did not discriminate between civilians and military objectives, and they targeted TFG civilian officials for attack." The TFG forces, meanwhile, "failed to provide effective warnings when alerting civilians of impending military operations, committed widespread pillaging and looting of civilian property, and interfered with the delivery of humanitarian assistance. TFG security forces committed mass arrests and have mistreated persons in custody". The report expressed indignation that "these serious international crimes" elicited a muted response from the international community:

> "Between January and March 2007 insurgent attacks took several forms: assassinations of government officials; attacks on military convoys; and rocket-propelled grenade (RPG) or mortar attacks on police stations, TFG and Ethiopian military bases, or other locations or individuals deemed by the insurgency to be political or military targets. For instance, several hotels known to accommodate TFG officials, such as the Ambassador Global, and Lafweyne hotels, were repeatedly hit with RPGs and mortar rounds and were the site of the attempted assassinations of TFG officials.
>
> The insurgency was mobile, often using hit-and-run tactics in its attacks or setting up and launching mortar rounds in minutes, then melting back into the civilian population. After an insurgent attack on a convoy or other mobile target, Ethiopian and TFG forces typically sealed off the area and conducted house to house searches of the area. The Ethiopian and TFG response to mortar attacks increasingly included the return firing of mortars and rockets in the direction of origin of insurgency fire."

190. So far as international humanitarian law and the armed conflict in Somalia were concerned, the report had this to say:-

> "International humanitarian law (the laws of war) imposes upon parties to an armed conflict legal obligations to reduce unnecessary suffering and to protect civilians and other non-combatants. It is applicable to all situations of armed conflict, without regard to whether the conflict itself is legal or illegal under international or domestic law, and whether those fighting are regular armies or non-state armed groups. All armed groups involved in a conflict must abide by international humanitarian law, and any individuals who violate humanitarian law with criminal intent can be prosecuted in domestic or international courts for war crimes.
>
> International humanitarian law does not regulate *whether* states and armed groups can engage in hostilities, but rather *how* states and armed groups engage in hostilities. Insurgency itself is not a violation of international humanitarian law. The laws of war do not prohibit the existence of insurgent groups or their attacks on legitimate military targets. Rather, they restrict the means and method of warfare and impose upon insurgent forces and regular armies alike a duty to protect civilians and other non-combatants and minimize harm to civilians during military operations."

191. The reports quotes sources in the form of Hawiye clan elders who said that the first round of fighting in March 2007 killed between 400 and 1,000 civilians, whilst the second round resulted in the deaths of 300 civilians. Members of the ceasefire committee interviewed by Human Rights Watch described seeing the corpses of civilians. It was, however, almost impossible to calculate the number of dead and missing.

192. According to eye witness and other evidence, the insurgents were armed with a variety of mortars, rocket propelled grenades, bazookas, recoilless rifles, anti-aircraft guns and other small arms. Anti-aircraft artillery mounted on the back of pick-up trucks (known as "technicals") had also been a typical feature of the Somali conflict. When the insurgency launch rocket of mortar attacks, the Ethiopian forces responded with barrages of rockets, artillery and mortar shelling of areas of Mogadishu

perceived to be areas of origin of the attack or strongholds of the insurgency. There was said to be "strong evidence that the indiscriminate bombardment of populated neighbourhoods by Ethiopian forces was intentional" and it was asserted that commanders who knowingly or recklessly ordered indiscriminate attacks were responsible for war crimes. The deployment of insurgent forces in densely populated neighbours and the Ethiopian military offensive resulted in the unnecessary deaths of hundreds of civilians and injured thousands more. Those fleeing Mogadishu were on occasions attacked by bandits and other criminal elements "occasionally raping women and girls" (page 284).

193. At page 285, we find that, according to Human Rights Watch, international humanitarian law is set out in The Hague Regulations of 1907 and the first Additional Protocol of 1977, which provided the most detailed and current codification of the conduct of hostilities during international armed conflicts, not directly applicable to the conflict in Mogadishu. Nor was the second Additional Protocol of 1977 because Somalia was not a party to the Protocol. Nevertheless, it was said that many if not most of the Protocols I and II had been recognised by states to be reflective of customary international law. The legal analysis in the report was said to reference norms enshrined in Protocols I and II "as an important clarification of customary law rather than as a treaty obligation. Customary humanitarian law as it relates to the fundamental principles concerning conduct of hostilities is now recognised as largely the same whether it is applied to an international or non-international armed conflict". International humanitarian law prohibited indiscriminate attacks such as aerial bombardment, a practice used by the TFG/Ethiopian forces. International humanitarian law required the parties to a conflict to take constant care during military operations for the civilian population and to take all feasible precautions to avoid or minimise the incidental loss of civilian life. According to the Red Cross, this required the person launching an attack to take steps needed to identify the target as a legitimate military objective in good time and to spare the population as far as possible (page 286). Mr Collins submitted that such care was not being taken in Mogadishu. Human Rights Watch moreover submitted to the US House of Representatives Committee on Foreign Affairs in October 2007 (A2, page 23) that the situation in Mogadishu for civilians had grown "intolerable"; that the insurgency had acted in violation of the laws of war; and that Ethiopian troops had indiscriminately bombarded insurgent strongholds with no apparent effort to distinguish between civilians and insurgent targets. Human Rights Watch asserted that the current US-backed Ethiopian approach would lead to "a mountain of civilian deaths and a litany of abuses". Mr Collins submitted that this bore out the concerns that Professor Lewis had voiced regarding the attitude of the US to the conflict. There was a real risk for a lone female or, indeed, in the light of Dr Mullen's comments, any returnee to Somalia.

194. Mr Collins also relied upon the United Nations Office for the Co-ordination of Humanitarian Affairs Situation report of 5 October 2007 (A2, page20):-

"During the week, a serious fire broke out at the Bakhara Market, the main trading centre for the South Central Region of Somalia, which will have a decidedly negative impact on economic activities of the country. The market was forced to close earlier this year due to the widespread conflict in the capital, with negative consequences on trade and prices. Somali citizens are already reeling from basic food cost increases due to increased transport expenses linked to checkpoints and ad hoc 'taxis' and spiralling inflation. Many casual labourers at the market have lost their only source of income and reduced food supplies to the rest of the country will increase demand hence weakening the purchasing power of the already stretched communities.

Meanwhile, persistent insecurity in Mogadishu continues to restrict movement for residents. For example, the area surrounding the market was sealed by the TFG following the fire to prevent looting. Neighbourhoods are frequently sealed by the authorities during searches for weapons, preventing people from leaving their homes and earning a living. Many Mogadishu residents who have not fled the city have moved from the northern part of the city to join family members in the relative calm of South Mogadishu, burdening already impoverished families.

According to media reports, the TFG this week announced that it would deploy more soldiers in the city, intensifying arms search in an effort to restore peace and order. Targeting and killing of government officials and police continued in the capital unabated, with a District Commissioner assassinated, three roadside bombs and four hand grenade attacks on police during the week, with civilians caught in the crossfire. In Mogadishu's Madina hospital, records indicate that in August and September, 305 people were admitted with wounds caused by gunshots or shelling. One journalist held in prison for one week in Deletweyne was released and Radio Shabelle finally went back on air on 2 October after fifteen days of closure following being sprayed by gunfire from government troops."

195. A report from the same source of 19 October 2007 (A2, page 13) stated that:-

"This week, Mogadishu saw one of its worst fighting between government troops and anti-government elements. Reportedly, over 30 people were injured and an unknown number killed due to the crossfire. This follows the intensification of firearms searches by the TFG to rid the city of insurgents. As the targeting of government officials by unknown groups continues, for the third time this year, a Yaqshid District Commissioner was assassinated. The continuing clashes in Mogadishu further aggravated the daily lives of the neediest people, as they have not been able to meet their basic social needs on a regular basis since February".

As far as the UNHCR was concerned, its February 2007 note on Somalia described the situation in Mogadishu as 'very unstable and insecure with deadly incidents being reported on a daily basis'. The UNHCR had requested the TFG 'to appoint focal points regarding voluntary return to Mogadishu and, generally, South/Central Somalia'. As at the date of the report, however, there was no contact person with whom UNHCR had been able to discuss the issue. The TFG had initiated a very basic immigration service at Mogadishu Airport but it is now unclear whether this would continue to operate. The TFG had indicated to the UN that the former did not have the capacity and resources to receive people and requested UNHCR support to

inform European countries accordingly. With the constant insecurity, IDPs and marginalised groups were said neither to be able to protect themselves from violence nor to expect any remedy for human rights violations committed against them (A2, page 17). The most recent (2 November 2007) OCHA report (A2, page1) referred to the flight of 90,000 Mogadishu residents during the past weekend following the most intense fighting in months. Those living in districts surround Bakhara Market were warned to leave, pending security operations but although the market was closed between 26 and 30 October, it was subsequently opened 'and business is gradually picking up'. UNHCR and the Population Monitoring Tracking (PMT) Network reported that:

> " the 90,000 people displaced from and in Mogadishu came largely from the four districts of Hodan, Hawl Wadaaq, Wardhigley and Haliwaa. Some 17,000 had moved to relatively safer areas within the city while 56,000 went to Lower Shebelle, including the 46,000 to Afgoye. An additional 8,000 people went to Middle Shebelle and some 5,600 to Baidoa (Bay)".

196. Referring to the UN Secretary General's report of 7 November 2007 (R4, page 1588a), Mr Collins drew attention to the fact that the situation in Mogadishu remained volatile, with daily attacks mostly by insurgents targeting TFG forces and Ethiopian military. Mogadishu was in a "phase five" situation, in which all United Nations' staff were evacuated, and Somalia was said to present one of the most challenging security environments, particularly in the capital. According to paragraph 22 (page 1588e), piracy was on the increase, which was particularly significant, given that nearly 80% of assistance to Somalia was shipped by sea. In a report of 7 November 2007 by Medicine sans Frontieres entitled "Somalia: no safe place in Mogadishu", MSF, one of the few international organisations providing health services in Mogadishu, was witnessing increasing violence in the area near one of its clinics. Those who were able to do so had left the city whilst others had fled into other areas of it "but are increasingly left with no safe place to seek refuge" (additional appellant documentation bundle of 22/11/07). Some MSF staff were said not to be able to travel to work due to roads being closed due to the violence. According to a report in the *Independent* (additional bundle, page 36) on 22 November 2007, the refugee crisis in Somalia was said to surpass that of Darfur "in its horror". The article concerned IDPs living alongside the road outside Mogadishu to Afgoye. On 15 November 2007 (additional bundle, page 40) the European Parliament had passed a resolution strongly condemning the serious violations of humanitarian law and humanitarian rights law committed by all parties to the conflict in Somalia and calling for an immediate end to hostilities.

197. Mr Collins said that the view expressed at paragraph 3.2.11 of the respondent's Operational Guidance Note of 12 November 2007 (R1, page 1187), that there was no longer any general serious risk that a returnee to Mogadishu would be caught in the crossfire or seriously injured by indiscriminate bombing or other military action, was out of date, being based on the situation as at June 2007. There was now evidence of such fatalities and there was now a serious or real risk. To this extent, the guidance in NM needed to be modified.

198. Turning to the criticism mounted by the respondent of Dr Luling, Mr Collins said it was unclear what her instructions had been in the case in question. The matter was one of concern but, on the other hand, Dr Luling could not be said to have become a "bad expert overnight". On the contrary, she had since the events in question been specifically praised by the Tribunal in a number of determinations.

199. Mr Collins urged us to accept the evidence of Dr Luling, which carried a real flavour of the situation in Mogadishu and the sense of "desperation" felt by everyone concerned.

200. As for the issue of internal armed conflict, Mr Collins submitted that there was such a conflict in southern Somalia at the present time and appellant H met the requirements of paragraph 339C of the Immigration Rules. Asked by the Tribunal about the reference in that provision to a "serious and individual threat", and recital (26) to the Council Directive 2004/83/EC of 29 April 2004, which provided that risks to which the population of a country or a section of the population is generally exposed do not normally create in themselves an individual threat which will qualify serious harm, Mr Collins acknowledged that there was a difficulty. He submitted, however, that the situation in Somalia was not one where the risks could be categorised as "normal".

Mr Young for appellant S

201. Mr Young said it was important to appreciate that the letter of refusal in respect of appellant S had made no great challenge to her claimed clan and that the basis of the respondent's refusal of appellant S's claim had been that the Sheikhal Jasira could not be regarded as a minority clan, despite the country guidance in FK (Sheikhal Gandhershe) Somalia CG [2004] UKIAT 00127. The Tribunal in that case had effectively endorsed the finding in Mohamed [2002] UKIAT 08403, based on the evidence of Dr Luling, that the Sheikhal Gandhershe and the Sheikhal Jasira "were minority groups which were not protected by the Hawiye".

202. Mr Young submitted that appellant S had been consistent throughout in her account. Whether or not she had refused to participate in the respondent's language test was immaterial, given that she was identified by Professor Lewis and Dr Luling as speaking with a Benadiri accent. The respondent's practice of sending recordings of asylum applicants to Scandinavia, to be assessed by Somali speakers, was short lived and its methodology had been questionable. Appellant S's failure to attend an asylum interview was due to the legal advice she had received.

203. Mr Young accepted that paragraph 7 of his skeleton argument needed some amendment, in that appellant S had now said she was physically harmed during earlier visits by the militias. However, her description fitted the objective evidence regarding the violence escalating in 1995. Whether Jasira was a separate village or part of Mogadishu was open to debate. What appellant S said about the matter

added to her credibility. As for knowledge of her clan, whilst this was deficient, appellant S had some knowledge about its origins. In any event, a young woman would not have had a keen interest in such matters. The evidence contained in the Minority Group's report (A4, page 95) had to be treated with some caution given that the compilers of the report had not met the representatives of the Sheikhal. At page 118, it was noted that not all Benadiri knew their sub-groups and Benadiri did not put as much emphasis on their background as did members of majority clans. Appellant S had been correct as to her description of the occupations of the inhabitants of Jasira as fishermen and producers of salt. Whether or not her father had been a man of education, appellant S herself was uneducated and her father may merely have been a minor official. The fact that he was a judge was in keeping with appellant S's claimed background during the time of the Barre regime. The report on minorities (A4, page 106) recorded that people associated with the Barre regime subsequently faced difficulties. It was plausible that appellant S would have left Somalia in 2006. As for the account regarding events in Saudi Arabia, it was plausible that appellant S's husband, working long hours in the car wash, could have earned enough in order to buy the jewellery described. As for the assistance which appellant S said she received from her neighbour in Saudi Arabia, appellant S had made it clear that her neighbour did so for religious reasons. Furthermore, by helping appellant S to leave Saudi Arabia, the neighbour avoided further obligations to appellant S by way of support.

204. As for the error regarding her sub-clan, appellant S asserted that she thought she was being asked by the respondent's interviewing officer to name other sub-clans, rather than her own. The interview had not been read back to appellant S. Appellant S's later clarification of the fact that she had been harmed between 1991 and 1995 did not detract from her credibility, since she had clearly referred at interview to suffering harassment.

205. As for Dr Mullen's evidence regarding the fact that the Sheikhal Jasira were a minority even in Jasira, Mr Young said that Dr Mullen had not been there. Mr Young asked the Tribunal to accept the evidence on this issue from Dr Luling rather than Dr Mullen. Professor Lewis was clear that appellant S spoke with a Benadiri dialect.

206. Mr Young reminded the Tribunal that the respondent's stance was that if appellant S was credible in terms of being of the Sheikhal Jasira, then she was entitled to refugee status. The objective evidence showed that a member of a minority clan would be at real risk. She had no known family and could not access protection from anyone. Mr Young endorsed the comments of others that there was likely to have been an under-reporting of the difficulties faced by minorities at the present time in Somalia. In any event, as a lone woman with a child, Mr Young endorsed what Mr Collins had said on the issue of risk, irrespective of clanship, and asked the Tribunal to find that appellant S's appeal should be allowed, even if we found her not to be Sheikhal Jasira.

207. Both Mr Collins and Mr Young relied on various passages from the CIOS report of November 2007 (R1, page1). At paragraph 4.03, the UN Secretary General in June 2007 had observed that the movement of civilians from Mogadishu was the largest new population displacement anywhere in the world that year. The PIA Fact Finding Mission was referred to in paragraph 4.05 as demonstrating the difficulty in estimating numbers of people who returned to Mogadishu as many IDPs seemed to be moving back and forth. At paragraph 7.02 the UN Secretary General, in his report of June 2007, considered that over the past six months the human rights situation in Somalia appeared to have worsened. Allegations had been made of human rights violations and violations of international humanitarian law, with civilian targets being attacked. At paragraph 8.08 the Fact Finding Mission counted seven sources who stressed the unpredictability and volatility of the security situation in Mogadishu, with the north of the city being more dangerous than other parts. As already noted, however, the passage goes on to state that a UN source said that even in the north there is a relative degree of normality.

208. So far as clan protection was concerned, section 20 of the COIS report stated that the Danish Fact Finding Mission of August 2007 had encountered a difference of opinion regarding clan protection, with one international organisation asserting that individual persecution per se did not take place in Somalia and that any Somali had the opportunity to attain security within his or her own clan, even if that person did not have close relatives in the country. As long as a person was living within the traditional area of the clan he or she enjoyed the protection of that clan. However, another international organisation said that it was too broad to say that everyone upon return to Somalia from abroad would have access to protection from his or her clan. That clan might try to assist and protect a person at the initial stage but not in the long term. In central and southern Somalia the situation was "very complex when it comes to clan protection" (20.08). In those areas there is "no guarantee that a person will enjoy protection from his or her own clan. Many clans are rather dispersed and the mixture of clans is much more blurred". However, the informant "acknowledged that in principle one could expect to be protected by one's own clan if he or she is living among clan members" although it was not certain that a person would enjoy clan protection and many Somalis living abroad or as IDPs will not be able to return safely to Central and southern Somalia.

209. At paragraph 20.13 the UN Commissioner on Human Rights (September 2006) was recorded as estimating that minority groups in Somalia might constitute up to one third of the population (approximately two million). These labourers, metal workers, herbalists and hunter-gatherers continued to live in conditions of great poverty and suffer numerous forms of discrimination and exclusion. Members of minority groups also found it harder to flee and move around to escape fighting. This was because they were not as easily accepted in new surroundings, as was the case for many other IDPs from major clans. Such IDPs also often had a better chance of being tolerated in the area to which they had fled. There had been "enormous relief among the minorities when the UIC took over in June 2006" and many minority members were accorded high or prominent positions in its administration (20.15).

210. With the defeat of the UIC, the International Crisis Group considered that there had been a return of clan-based politics to southern Somalia and that whereas the UIC drew its support predominantly from the Hawiye, the TFG was widely perceived as dominated by the Darod. Although control of Mogadishu had been wrested from the UIC, a grassroots network of mosques, schools and private enterprises that underpinned the spread of Salafist teaching remained in place and continued to expand thanks to generous contributions from Islamic charities and the private sector (20.18).

211. So far as women were concerned, the Danish Fact Finding Mission recorded one international organisation as explaining that there were powerful women in Somalia but socially such women might be treated badly and their own community might marginalise them. Another organisation "added that women are not vulnerable just because they are women. A woman's vulnerability depended on particular circumstances and it was not right to say that all women in Somalia are vulnerable" (23.05). Domestic violence against women was a serious concern in many parts of Somalia and some civil society groups focusing on women's rights were working to sensitise the public however government and clan elders were yet to engage on the issue. Children remained as chief victims of societal violence, with many boys as young as fourteen or fifteen participating in militia attacks or becoming members of marauding gangs known as "parasites" or "maggots" (24.01).

212. At paragraph 26.03, dealing with health issues, MSF stated in January 2007 that the conflict in Somalia might generate fleeting worldwide attention but the abysmal day-to-day living conditions faced by Somalis remained largely forgotten. Somalia had some of the world's worst health indicators. However, at paragraph 26.13 it was noted that the ICRC continued to support Keyseney Hospital in Mogadishu North, run by the Somali Red Crescent, and the community run Medina Hospital in Mogadishu South. These were the man referral hospitals for war wounded patients throughout Central and southern Somalia. The ICRC provided hospitals with staff salaries, supplies, equipment, training and job supervision (paragraph 26.13).

213. At paragraph 28.07, the BIA's Fact finding Mission of June 2007 found that IDPs who had been settled since 1991 had been particularly badly affected by the latest conflicts, with their livelihoods gone and assets now running out due to the increased number of IDPs using their resources. According to one source:-

> "Waves of IDPs will go back to wherever they feel secure, in most cases back to clan areas, where 'the first safety net is the sub-clan'. On the question of whether clans were disrupted by such movement, one source said this was not the case, adding that people moved as clans, and were received as families with the sub, sub-clans structure. However, two security advisors on Somalia said that clan maps cannot be used any longer even as a guideline, because groups had been displaced and were not disputing who is the original occupant of various lands".

Mr Maka for appellant A

214. Mr Maka submitted that appellant A had given a good account of herself in cross-examination. She clearly engaged with the questioning and corroborated what she had said in her witness statement. She had a four inch scar, from when she had been shot. Being an Ashraf had a number of consequences. Professor Lewis had stood by his evidence given to the Tribunal in NM and Mr Maka urged the Tribunal to take the same approach to his client as the IAT had done with the first claimant in NM:-

> "131. We considered that the determination of the Adjudicator who dealt with the first claimant was legally flawed. We have taken account of the recent materials placed before us and in particular the oral evidence we heard. Professor Lewis's evidence made clear that the Ashraf were a minority clan which was especially vulnerable to targeting by majority clan militias and that for members of the clan there would be three particular problems afflicting any travel within Somalia. Firstly, most Ashraf could be picked out by their appearance, being relatively light-skinned. Secondly, the Ashraf had no clan militia and so would be particularly at risk from militias manning checkpoints both at any airport in southern Somalia they might land at and along any route they might take by land to the Hamar Wayne area of Mogadishu or to any other part of southern Somalia such as Gedo or Afgoye. Thirdly, lack of clan militia meant that there was no area of southern Somalia which would be a safe destination for Ashraf, including Gedo. The latter region had been unsafe for Ashraf for a number of years. This is in line with what the Tribunal has routinely held.
>
> 133. For those reasons, this claimant's appeal is allowed outright. There is no evidence that she has any majority clan patronage."

215. Mr Maka referred to the UNCU/UN-OCHA report of August 2002 on minorities in Somalia (appellant A's bundle, page 125). At page 133, in the table dealing with the main minority groups in Somalia, the Ashraf were described as Arab immigrants from Saudi Arabia, some 500,000 strong, whose main location districts were Merka, Brava, Bay and Bakool regions, with a clan affiliation to the Rahanweyn. Dr Mullen, however, had spoken of the wife of the Speaker of the Somali Parliament (an Ashraf) as being Rahanweyn. In the case of appellant A, the Abgal (Hawiye) family who had turned out to help the appellant and her family were merely one majority family in the midst of a number of minority groups and appear to have assisted because the father of appellant A had been helpful to the Abgal family in the past. In any event, the family had not proved particularly effective in preventing attacks on appellant A and her family. Such assistance as she received arose after the attack in question, including the attempted rape of her sister and the shooting of her brother.

216. It was not incredible that appellant A did not know where her husband was staying, after he left the family home. There was no inconsistency in her evidence; her husband was moving around. Accordingly, he would not have been permanently living with distant relatives. Appellant A's mother and mother-in-law had each given her their blessing to leave the country. Her father-in-law had been divorced from her mother-in-law and would not therefore wish to bring the latter out of Somalia. Any suggestion that, following her arrival in the United Kingdom, appellant A had made only feeble attempts to maintain contact with her family in

Somalia was, Mr Maka submitted, to approach the matter form a western point of view. She did not have a telephone in Mogadishu. There was nothing unreasonable or incredible about what appellant A had said. Although Professor Lewis and Dr Luling were in frequent contact with Somalis in Somalia, this did not mean that appellant A, as a minority clan member, could be so. Appellant A had explained in her most recent statement why she had not immediately fled the persecution she had been suffering. She could not be expected to remain indoors for the rest of her life.

217. Drawing on the Court of Appeal judgment in Kinuthia [2001] EWCA Civ 2100, that "subsequent judicial action may be insufficient protection again maltreatment pending trial" (paragraph 21), Mr Maka submitted that any assistance which appellant A received or might receive after the event would be too late.

218. Although Professor Lewis had dismissed the suggestion that the Ashraf had any connection with the Rahanweyn, Mr Maka acknowledged that Dr Mullen had spoken of the Speaker of the Somali Parliament as having such a connection. Whilst that might be so it all depended on the circumstances of a particular case. In present-day Somalia, Professor Lewis had explained that the priority for majority clan members was self-preservation; whereas Dr Luling said that minority members could not expect protection unless they had maintained contact with the protecting group, which appellant A had not. Given the fact that (appellant A's bundle, page 104) entire districts in Mogadishu had emptied in May 2004, according to an IRIN news report, and that appellant A had arrived in the United Kingdom in February 2004, her inability to contact relatives in Somalia was credible.

219. Paragraph 3.5.6 of the respondent's OGN of 12 November 2007 (R3, page 1192) clearly stated that although some individuals from minority groups like the Reer Hamar and the Bravanese were in some circumstances able to secure protection from major or sub-related clans, in general those based in southern or central Somalia were culturally and ethnically distinct from Somali clan families and unlikely to be able to secure protection from any major clan family or related sub clan. Paragraph 3.5.7 stated that Benadiri and Bravanese groups could not in general avail themselves of internal relocation within southern central Somalia. According to the latest background evidence, minority groups in Somalia were particularly vulnerable. In this regard, Mr Maka referred to the Danish Fact Finding report of March 2007 (R2, page 569) where IDPs were said to be extremely vulnerable to various abuses and were a targeted population in Mogadishu. Being a minority was a sufficient differential impact to satisfy the requirement of Adan. That being an Ashraf was a sufficient distinguishing feature to put appellant A at real risk was borne out by the decision of the ECtHR in Salah Sheekh v Netherlands [2007] ECHR 36:-

> "148.The court would further take issue with the national authority's assessment that the treatment to which the applicant fell victim was meted out arbitrarily. It appears from the appellant's account that he and his family were targeted because they belonged to a minority and for that reason it was known that they had had no means of protection; they were easy prey, as were the other three Ashraf families living in the same village… The court would add that, in its opinion, it cannot be required of the

applicant that he establishes that further special distinguishing features, concerning him personally exist in order to show that he was, and continues to be, personally at risk. In this context, it is true that a mere possibility of ill-treatment is insufficient to give a rise to a breach of article 3. Such a situation arose in the case of *Vilvarajah and Others v the United Kingdom* where the court found that the possibility of detention and ill treatment existed in respect of young male Tamils returning to Sri Lanka. The court then insisted the applicants show that special distinguishing features exist in their case that could or ought to have enabled the United Kingdom authorities to foresee that they would be treated in a manner incompatible with article 3… However, in the present case, the court considers, on the basis of the applicant's account and the information about the situation in "the relatively unsafe" areas of Somalia insofar as members of the Ashraf minority are concerned, that it is foreseeable that on his return the applicant will be exposed to treatment in breach of article 3. It might render the protection offered by that provision illusory if, in addition to the fact that he belongs to the Ashraf – which the government have not disputed – the applicant be required to show the existence of further distinguishing features".

220. The OCHA situation report of 9 November 2007 on Somalia (appellant A's bundle, page 118) described the recent fighting in Mogadishu and its impact on the population as "alarming". Some 40 NGOs released a statement in October 2007 on what they described as a "humanitarian catastrophe" in South/Central Somalia and called for the protection of civilians and the delivery of aid. The nature of the language used in the OCHA report had, Mr Maka submitted, implications for international humanitarian law. On anyone's view, however, there was a real risk of a breach of the relevant Conventions. The BBC News report (appellant's bundle A, page 39) regarding a 22 year old woman who for the past seven years lived in a camp for displaced persons in Central Mogadishu, since fleeing Baidoa, returned to Baidoa in April 2007 when there was heavy fighting in Mogadishu. However, she returned to Mogadishu recently because her husband was hit by a stray bullet and she had to look after him. The family did not feel safe and when the children became ill the family had no access to medical facilities and resorted to herbal medicine or "a traditional burning method". Although there were hospitals near their camp, they did not accept the family because the family did not have money. The hospital would, however, take the most serious cases "like the wounded or gunshots". The informant's own child had died of diarrhoea. Six months ago there had been an increase in the number of rapes in the IDP camp but "since the transitional federal government said no one could walk around at night the number of cases has decreased". This was because "it is not so easy any more to enter our camp after dark". Having said that, the informant stated that the camp "doesn't have gates so anyone can just come in and out". If a woman in the camp was raped, one could hear her screaming but there was little one could do. According to another BBC News report (page 42) pro-government militias were frustrating UN efforts to deliver aid by demanding up to $300 at checkpoints. IDPs were having to wait in line for up to six hours for twenty litres of water. Another informant quoted by BBC News (page 43), who had lived in Mogadishu all his life, described the fighting of the past few months as unlike anything he had previously witnessed. Although he was used the checkpoints, the ones now in operation were "unlike anything else I have seen"

(page 44), Ethiopian forces were shelling civilian areas. All of this information was more recent than that referred to in the COIS report.

221. According to Ken Menkhaus in "There and Back Again in Somalia" (11 February 2007) (R3, page 1402):-

> "Under the Courts' administration, public security improved dramatically throughout the capital. The Islamists disarmed clan militias, rid the city of warlords and criminal gangs, re-opened the seaport and airport, and made the streets safe. Not surprisingly, they earned widespread respect and support among locals and in the diaspora. That respect began to fray, however, once hard-line elements in the Courts promoted strict interpretations of Shari'a, restricted the rights of women, the media and civil society, and began mobilising for irredentist Jihad against Ethiopia. Somalis were torn between their desire to support a movement that brought calm to the capital for the first time in 15 years, and feared that the same movement was beginning to replicate many of the authoritarian tendencies at home and ill-considered clashes with Ethiopia that had proved so disastrous under the Said Barre regime".

222. Menkhaus considered the sudden dissolution of the Courts to be the result of a deep, unresolved set of divisions within the Islamic alliance in Mogadishu. Although the Union of Islamic Courts were "defunct as an organisation, political Islam will remain a powerful factor in any future political dispensation in Somalia. Islamist groups retain a strong infrastructure of schools, charities and mosques". Armed resistance to the TFG and Ethiopians had, however, already arisen because of clan-based resistance to the TFG in Ethiopia, attacks and "mischief" by recently returned warlords seeking to disrupt any effort to impose law and order in the city, regrouping Jihadi cells and criminal gangs. Menkhaus considered that these disparate sources of armed violence "could coalesce into more organised resistance, although Ethiopia's pledged withdrawal reduces the odds of true insurgency". The crumbling of the UIC, combined with the failure of the TFG to provide even a token administrative presence, had produced ideal conditions for the revival of armed criminality. The rise in assassinations in Mogadishu in recent weeks suggested a possible return of the "dirty war" tactics of 2004-2006. Somali families were fleeing "a combination of war, criminal violence, political insecurity and natural disasters" such as floods (page 1406). Menkhaus described the extent of US involvement in the offensive against the UIC as "unclear", although some in the Pentagon saw the offensive against the UIC as a preferred template for the war on terror (page 1408). Mr Maka submitted that the TFG had excluded key organisations and he said that the objective evidence showed clearly that there were indiscriminate killings going on in Mogadishu.

223. Jonathan Evans, Director General of MI5, in a speech entitled "Terrorism is 'product of a much wider extremist ideology' "(5 November 2007) (appellant A's bundle, page 222) considered that Al Qaeda was undertaking terrorist activities in Somalia. The Foreign Secretary on 27 November 2006 said in the House of Commons that a UN Monitoring Group on Somalia had alleged "that foreign fighters have entered Somalia in answer to calls for Jihad that have been uttered by members of the Union

of Islamic Courts". Mr Maka said that the forces ranged against the TFG were, accordingly, not unorganised bandits but an armed opposition organisation. This was relevant to the issue of whether there existed an internal armed conflict. The only conclusion to reach was that the situation in Somalia had deteriorated to the point that all three appellants should succeed and that any failed asylum seeker from Somalia should do likewise.

Mr Swift for the respondent

224. Mr Swift's oral submissions on 22 November were supplemented by written submissions received the following day, which were copied to the appellants' counsel and Mr Young. The respondent accepted that the country situation in Somalia was "fluid" but, whilst that might affect the general level of security enjoyed by all civilians, it was not a factor that altered the relevance or significance of the analysis of asylum claims. To the extent that the current situation might have altered the motivation of the participants, the evidence suggested that the current state of targeted violence was not concerned with the persecution of minority groups or attacks on individuals on the basis of clan membership as such. The respondent submitted that the general approach in NM regarding the distinction between majority and minority groups remained valid at the present time. There was, indeed, no reason to depart from the general guidance given in NM in relation to minority/majority clan membership and that case's approach to women.

225. Mr Swift submitted that appellant H fell to be treated as a member of an unidentified majority clan and that she accordingly had no arguable claim for asylum. Although Somali women were recognised as a particular social group, appellant H had not shown that she had a well founded fear of persecution by reason of membership of that group. AG and paragraph 123 of NM were relied upon. There was in any event no reason to suggest that the status of Somali women was materially worse now than at the time of NM. As for article 3, appellant H could not be taken to have shown that she was a lone woman, that is to say, with no access to male family support; or that she did not have a safe clan area that she could live in. Any evidence appellant H had given regarding the existence and whereabouts of her family should be assessed in the light of the adverse credibility findings of the Tribunal. As well as being guilty of a criminal offence of attempting to obtain leave to enter or remain by deception, appellant H had initially claimed to be a member of the Reer Hamar and, later, to be a member of the Ashraf. The original Tribunal had reached justified findings regarding her credibility. It did not accept that what she had said about her relatives was true. She should be treated as having an area in which she could enjoy the protection of her majority clan.

226. Appellant S's claim to be a member of the Sheikhal Jasira was, Mr Swift submitted, wholly lacking in credibility. Appellant S's knowledge of her clan structure was both inaccurate and differed as between the account given to the screening officer and to Dr Luling. Given her family background, it was not credible that, even as a young woman, she would not have a rudimentary knowledge of her clan identity. Her

knowledge of the village of Jasira was very basic and comprised the sort of information that most people in Mogadishu could be expected to know. No weight should be given to the evidence of Dr Luling in respect of appellant S's clan identity because Dr Luling accepted she had no knowledge of Jasira apart from what she had set out in her report and therefore was not in a position to test the veracity of appellant S's claim to come from there. Dr Luling's report was in places ambiguous and/or "economical". It was unclear from it what information came from appellant S and what had been supplied by Dr Luling by way of elaboration. Having included the observation (without more) that appellant S said she came from the "light skinned" Sheikhal, Dr Luling, when asked to comment on appellant S's appearance at the hearing, indicated that she was in fact dark-skinned. Dr Luling could give no explanation for this omission. Dr Luling was unable to verify appellant S's dialect. Professor Lewis's evidence, that he spoke northern Somali and could identify whether someone was speaking in a southern Somali dialect, did not suggest any basis for being able precisely to identify the dialect of appellant S who, moreover, had refused to undertake a language test.

227. Appellant S's evidence about attacks from the Hawiye was contradictory of her statement, that she had not been beaten physically in the period 1991 to 1995. She was unable to elaborate on the nature of the beatings except to say that she was beaten in such a way that no scars would be left. That she had left her daughter in Somalia contradicted her evidence that it was dangerous to stay in that country. Her evidence as to losing contact with her husband and elder son in Saudi Arabia was wholly lacking in credibility, as was her account of how she came to raise thousands of dollars with the assistance of a Somali lady from another clan.

228. In the light of those credibility factors, Mr Swift submitted that the appeal of appellant S should fail for the same reasons as appellant H.

229. The respondent accepted that appellant A was Ashraf but Mr Swift submitted that her evidence showed that she and her family were able to live reasonably safely in Mogadishu; her account of her husband and brothers being unable to live with her was wholly lacking in credibility; her explanation for not going with her husband, instead of staying with her mother and mother-in-law, was inconsistent with the fact that she had left those women to come to the United Kingdom; and she had made only feeble attempts whilst in this country to contact her family in Mogadishu, particularly given that the Tribunal observed in NM that telephone connections in Mogadishu remained good.

230. Mr Swift submitted that there was evidence that the Ashraf had relationships with other majority groups and may accordingly be able to access protection form them. Appellant A's circumstances were an example of this protection. The particular community in which she lived had acted collectively for some thirteen years to provide protection for itself and that protection had encompassed appellant A and her family. Whatever the reason, appellant A had been accepted by her neighbours, who had compelled the militia to depart and had helped her when she was

wounded. Thus, Mr Swift said that, even if one were a member of a minority clan or group, the identity of the minority concerned might be significant, as would the individual circumstances of the person concerned. In this regard, Mr Swift relied upon paragraphs 117 and 119 of NM. The Ashraf fell to be looked at by reference to their particular circumstances. In the situation which Somalia now found itself, it appeared that there was in fact no particular persecution going on of minority groups and that the lack of respect for the Ashraf, which had developed during the civil war, might be disappearing.

231. As for the argument that the protection afforded by the neighbours, including the member of the Abgal, was insufficient because it arose *ex post facto*, Mr Swift said that neighbours could not be expected to be on hand on a twenty four hour basis; the important thing were that they were willing not only to react but to react bravely, when the occasion demanded. The lack of a well-founded fear at the time appellant A was in Mogadishu was shown by the fact that she did not leave in response to any particular event but, rather, when an agent was fortuitously provided by her father-in-law.

232. Mr Swift referred to paragraphs 23.18 and 23.21 of the November 2007 COIS report (R1, page 571), quoting Danish sources, for the proposition that there was no evidence that women were specifically targeted in Somalia at the present time. Overall, he said that the COIS report was the most valuable source of materials on the country, producing a comprehensive picture which, despite claims to the contrary, demonstrated that the position in Somalia was nowhere near the same as that of Darfur. Humanitarian relief agencies were operating in Somalia. They were stretched on occasion but their activities were not being frustrated by any of the players. There were significant population movements in *both* directions and it was accordingly difficult to see any net effect. According to Dr Mullen, the most recent movements arose because people were fearful of a Darod/Hawiye conflict and not because of the *actuality* of such a conflict. The situation was not such as to give rise to a general well-founded fear of article 3 abuse. In any event, circumstances varied significantly across Somalia. As an example, Mr Swift said there was an absence of evidence to show that conflict was taking place in Jasira, appellant S's alleged home village.

233. In the respondent's written submissions it was asserted that the current political and security situation in Mogadishu, whilst adding a "further dimension", had not served to "shift the central place that clan structures hold in Somali society". Nor had there been any significant change in the status of Somali women, although there were "increased security risks which unaccompanied women may face in the current climate". The Tribunal was urged to endorse the position of the IAT in paragraph 117 of NM and confirm that a person of either sex who was not found to be a minority clan member or a equivalent would be likely to have a location in southern Somalia where the majority clan concerned could offer sufficient protection, although individual factors and locations would be relevant, as would past history and individual or family connections.

234. A review of the material showed, the respondent said, that there was some evidence that majority clan members would not be attacked by members of other clans, unless in the context of an inter-clan dispute; that a majority clan member would generally be safe within an area controlled by his or her clan; that the violence currently taking place did not at face value appear to be based on clan lines; that such violence was motivated primarily by political considerations (albeit that those might in fact directly correlate to clan membership); that an ordinary Somali with no particular political affiliations, perceived or actual, who was not involved in any dispute, faced a limited risk within his or her own clan area; and that particular clan areas might be safe for other clans traversing them.

235. At R1, page 192, the US State Department, reporting in March 2007 on the year 2006, noted that the vast majority of killings in Somalia during 2006 resulted from clashes between militias or from unlawful militia activities. The fall of the UIC had resulted in violence between the TFG and factions opposed to it and there had, according to the UN Secretary General (R1, page 258 and R4, page 1588a), been a re-emergence of inter-clan fighting which had abated under the UIC control. But objective evidence indicated that majority clan members were not targeted by other clan members for purely clan reasons and majority clans were generally perceived to be safe within their areas. In this regard, Mr Swift relied upon the BIA report of the April 2007 Mission (R1, page 1119). In this, a UN security officer was recorded (page 1129) as stating that, apart from Mogadishu, other areas could be safe for return if an individual's clan was dominant in the area concerned and the individual had not done anything to antagonise them in the past. The position as of April 2007, compared with eighteen months previously was different (leaving aside Mogadishu) only in Middle and Lower Shebelle, where there was a vacuum in leadership. Apart from Mogadishu, the source said that there would be no problem for Somalis travelling through an area dominated by a different clan and that "peaceful interaction between members of different clans did take place when they were not in dispute". There would, however, be a risk if a person was caught up in sporadic inter-clan fighting, for example, by being subjected to a revenge attack in response to an incident that the person concerned might have been unaware about. Another source (page 1131) said that safety on return depended on the circumstances. In general it would be "irresponsible" to return people to Mogadishu without very careful checking but there might be cases where this could be possible. In terms of the rural village areas which had been unaffected by the Mogadishu fighting, it could be possible to return individuals of the predominant clan in that area. Clanship was important – if a person had not offended against his clan they would take him back and defend him. Feasibility of return depended on a case-by-case assessment: theoretically, returning is not impossible or 'a complete no', particularly if the person left Somalia for economic reasons. But you would have to look very carefully at factors such as whether the person's clan wanted him back or whether he might be at risk from the TFG/Ethiopian forces for being a member of the UIC. Travel through another clan area could be achieved provided this was done "in a respectful and

appropriate manner". Outside Mogadishu, clan relations were generally maintained in a state of balance or "cold war" which enabled them to interact peacefully.

236. Another source was quoted (R3, page 1138) as stating that although it was unsafe until 1993 for an individual to travel from his own clan area to one of a rival clan, genuine clan warfare had subsequently ceased and clan enmity had largely dissipated. Clashes tended to be between clan-based militias, but about matters unrelated to any clan issues that might impact upon "innocent" individuals. So, in the main, a private individual could safely travel outside their own clan areas throughout the country. However, recent hostilities had seen "the beginning of a return to the pre-1993 situation, with clan enmities being revived as a direct result of the TFG's actions". The TFG's military command and control structures were almost exclusively Darod and the TFG was increasingly being described as a "clan clique".

237. At R3, page 1141, a Swedish researcher of Somali dissent explained that, although his clan was Hawiye (Habr Gedir) he did not "live" the clan system and did not generally disclose his clan background. He would consider travelling through an area dominated by a different clan to be "very dangerous". The same source then continued:-

"8.05.He said that the current war marked a new development because clans which were normally hostile to each other had joined forces against a common enemy – the Ethiopians and Darods. Another new development was the intensity of the conflict. Clan disputes were normally characterised by posturing, brief flare-ups and then withdrawal but the intensity of this war had been sustained.

8.06. Mr Khaire commented that people saw the period when the Islamic courts were in control as one of relative peace and tranquillity when things functioned reasonably well. This had promoted greater contact between different clans and more social interactions.

8.07. We asked about general safety in areas in Central and South Somalia outside Mogadishu and its immediate environs. Mr Carey said that the provinces had been relatively unaffected by the main fighting, and that life there remained much the same as it had always been, with little impact from IDPs most of whom remained on the outskirts of Mogadishu. He thought that other areas would be increasingly affected if the war carried on.

8.08. He said that in the provinces there continued to be local disputes between local clans and militias, often about water rights (he thought that the provision of reliable water supplies would see the end of inter-clan conflict in Somalia). But this was 'normal life' Somalia style. Although not comparable to the western standards, the local administration and justice administered by local clans was reasonably fair. However, even without the current war, Somalia remained a dangerous place. Mr Carey did not think that it would be appropriate for anyone to be returned to any part of Somalia and said this was likely to be the case for another ten-fifteen years".

238. At R3, page 1143, an airline executive source was quoted as saying that his researchers indicated that, although a person would not be welcome on a permanent basis in the area of another clan, particularly given the pressure that that would put upon resources, in particular, water, in ordinary circumstances a member of one clan would not harm one of another clan solely because of their clan membership – it would be because of what they did. The exception would be if there were an inter-clan dispute, such as a killing.

239. The BIA Fact Finding Mission of June 2007 (R2, page 609) heard from many sources "that the internal conflict with the TFG was for the most part not due to clan differences. For example, the Ali Ghedi and the Mohamed Dheer, both members of the Abgal sub-clan of the Hawiye, did not work together because of the underlying struggle of power between them. It was deceptive to see the current crisis in Somalia as a Darod-Hawiye clan conflict. That conflict was now over and the main one was now political in nature. This warlord conflict involving government officials "had little popular support as many civilians believe it to be nothing more than a struggle for power, land, money and dominance between warlords. Mohamed Dheere's targeted arrest of hundreds of Somalis (all Hawiye, many of them businessmen) in mid-2007 included those from his own sub-clan, the Abgal.

240. The respondent's submissions reiterated what was said to be the importance of paragraph 5.08 of the same report, concerning the "remarkable" reduction in checkpoints and "less interest in clan affiliation". The risk at checkpoints was now political, rather than aimed at ordinary Somalis. At paragraph 5.2, the Mission found that outside Mogadishu "protection used to be arranged within clan lines, but now there is a fragmented pattern of fiefdoms and emerging factions". One source said that, although clan was most important in times like these "when you need each other the most", the same source also said that "if you have your close friends in Somalia then you may be more likely to contact them than your own clan if you need somewhere to stay etc." Although the clan traditionally supported both men and women, men were more likely to be welcomed back, regardless of how long they had been away from Somalia, because of the shortage of males and the importance of their role in the clan.

241. As for travel in Mogadishu, the Mission found that there was a rudimentary private transport network in the city and returning Somalis could move around the city "and not be targeted as insurgents, but despite this, it would be "better" (i.e. safer) if they could hire a car. All sources asked agreed there was no problem travelling to rival clan areas except at times of inter-clan clashes".

242. Referring to the respondent's OGN (R1, page 1189) where, at 3.3.7, it was considered that any Somali from a major clan family would be unlikely to be able to demonstrate a well-founded fear of persecution on the basis of clan affiliation alone; that all clan family groups were represented in Mogadishu; that people displaced from their home area may move to other areas populated by their clan; and that Somalis were increasingly able to both visit and live in cities outside their clan's traditional

domain, the respondent asserted that there was an increasing body of evidence to show that clan protection was not always necessary for majority clan members, although the deteriorating security situation gave rise to increasing uncertainties, and that by and large the disturbances recorded in the background evidence were primarily politically motivated. It was submitted that the approach of the Tribunal at paragraph 117 of NM remained appropriate. There, the IAT had recognised that there were minority clans who were, at least locally, integrated with majority clans and other groups that might be more accurately described as a caste. Those cases were said to require specific consideration and it was recognised that a division between minority and majority did not represent a "bright line on one or other side of which every clan must fall". The respondent submitted that this was correct so far as minority groups were concerned. Reference was made to R1, page 84, where at 20.30 of the COIS report, it was said that Reer Hamar families in Mogadishu had been able to secure majority protection by marrying their daughters to members of the majority clan such as the Habr Gedir. The Danish report of January 2007 (R2, page 563) found that one source explained that the minority populations in Somalia were "no longer victims of targeted looting and other targeted human rights violations. However, it was added that any person in Somalia who did not enjoy strong clan protection because he or she is from a weak clan or minority group has to keep a low profile". The BIA mission of June 2007 recorded one source (R2, page 639) as stating that in the recent waves of IDPs the minorities have not been particularly targeted or discriminated against.

243. A "practical example" of the way in which minorities could be effectively protected was, the respondent submitted, to be found in the case of appellant A, who received assistance from non-Ashraf neighbours continuously from 1991 and over a period of thirteen years had the benefit of shelter and protection afforded by a community which acted collectively for its own protection. The reasons for that state of affairs might well have been mixed, including elements of personal loyalty (in appellant A's case, to her father). The respondent contended that the position of the Ashraf is not precisely the same as that of other Benadiri sub-groups. The Ashraf have continually been held in respect (by reason of the religious functions which they have traditionally carried out). There was also the issue of historical links between the Ashraf and the Rahanweyn in Baidoa and the Abgal in Mogadishu. Thus, an individual Ashraf was more likely than other persons from another Benadiri group to have a clan or personal patron to which to turn for protection. Although the "special status" of the Ashraf was eroded following 1991 and they, like other minorities, were vulnerable to attack by militias, their previous position was said to have placed them in a better position to be able to obtain protection from majority clan members. In any event, the evidence showed that minority groups were no longer subject to active persecution. By contrast, building on the point made by Dr Mullen, there was nothing to suggest that the Ashraf were generally associated with the UIC and they were therefore not vulnerable on that basis.

244. Turning to the position of women, the respondent urged the Tribunal to confirm the guidance of the IAT at paragraph 125 of NM; that in the light of Adan, a "differential

impact" had not been shown as regards female Somali returnees, nor were general conditions such as to engage article 3. An individualised consideration of the position of the female appellant in question had to be undertaken. So far as the *status* of women in Somali society was concerned, the objective evidence did not indicate any significant worsening (or indeed improvement) in the situation.

Mr Collins's reply to the respondent's submissions

245. Mr Collins criticised the respondent for choosing not to submit an expert of her own and seeking "merely to unduly and unfairly criticise and nitpick and on that basis attempt to undermine the expert evidence called on behalf of the appellants". It was not right to categorise Professor Lewis and Dr Luling as one-sided or extreme and politicised. It could not in any event be said that Dr Mullen had adopted any extreme positions. Any criticism of the respondent that the experts had not provided adequate sourced material ignored the reality of obtaining information from sources on the ground in Somalia, in particular Mogadishu. In any event, Mr Collins pointed out that the BIA's Fact Finding Mission did not actually visit Mogadishu but, like the three experts who had given oral evidence, was informed through contacts on the ground, and contacts with those contacts. The evidence of Lewis, Luling and Mullen was compatible, Mr Collins submitted, with the Human Rights Watch report "Shell Shocked: Civilians under Siege", which relied on first hand evidence from Mogadishu.

246. The respondent had accepted that the current position involves serious perturbing armed violence and the objective evidence clearly showed that the situation in Mogadishu was one of ongoing deterioration.

Mr Maka's reply to the respondent's submissions

247. In his written comments on the respondent's submissions, Mr Maka submitted that the respondent's attempt to distinguish the Ashraf as some special group, owing to their religious background, was fundamentally flawed. It was only adopted by the respondent when it became plain that that was the *only* position that she could take against appellant A, in the light of the evidence, including appellant A's performance in cross-examination. The aura of respect accorded to the Ashraf as a "religious" group had, according to Dr Mullen, ceased to exist after the civil war. Numerous Tribunal decisions had consistently approached the matter on the basis that the Ashraf were a minority clan, especially vulnerable to targeting by majority clan militias (paragraph 131 of NM). The respondent's position was in any event inconsistent, as between appellant A and appellant S, who, if accepted as a Sheikhal, would, the respondent acknowledged, have a well founded fear of persecution. However, "Sheikhal" was only the plural of "Sheikh", a term of reverence utilised for professional men of religion (as stated in the evidence of Professor Lewis). According to the Danish report (R1, page 326), whilst the Ashraf were a religious people, the Sheikhal were religious Sheikhs and judges, a position Mr Maka submitted was "superior in the religious pecking order" than merely being religious

people. Furthermore, so far as the association with the Rahanweyn was concerned, the Danish report (R1, page 368) noted Ashraf elders as explaining that the Ashraf have no particular affiliation with any of the major Somali clans. They stated that they used to have good relations with all other clans in Somalia. They were considered a highly respected clan with devout religious members. However, to some degree now, the Ashraf "are considered strangers in Somalia by the other major Somalia clans. … They are considered to be a weak, unarmed religious group with no social legal rights". Those left behind had no protection from any other clan and were at risk of being looted, raped and even killed (page 370). That, Mr Maka said, was what the Danish had found in 2000. There was also evidence that there was no so-called Abgal connection with the Ashraf and that R3, page 1161 was inaccurate as referring to the fact that *some* Abgal militia did not respect the Ashraf. The actual source, a Canadian IRB paper of 1996, actually recorded that after Barre fled, "some Abgal militias were brought into Mogadishu… These militias did not respect the Ashraf". Dr Mullen had also said in evidence that the Islamists of the UIC would only have respect for those who were religious teachers, rather than ordinary Ashraf.

248. So far as the protection by neighbours was concerned, Mr Maka referred to the map produced by appellant A at page 16 of her bundle, which clearly showed that, besides one Abgal family, which was favourably disposed to appellant A's family because of her father's past, all the other neighbours were actually minority clans themselves. These comprised other Ashraf, Reer Hamar and Shanshiya, Reer Faqi and Bandhawaw, all minority Benadiri groups. The family accommodating appellant A was, itself, a minority clan. There was, accordingly, no evidence to show that appellant A was locally integrated with a majority clan or that she was living in some closed community or secure village. It could not possibly be said, living in urban Mogadishu, that she was safe, when her father had been shot, her sister had been shot and appellant A had been attacked with a view to rape and also shot. Her brother had been shot, her sister beaten up and the family property regularly looted. It was not denied by the respondent that what A had suffered amounted to persecution.

249. Appellant A had nowhere to go until arrangements were made for her to leave Somalia, thanks to her father-in-law. The actions of the neighbours had been sporadic and, in any event, after the event. Given what had been happening in Mogadishu, it could not realistically be said, in any event, that this network of neighbours would be available to appellant A if returned today. Her home area of Shibiz was described by Dr Mullen as being in Central Mogadishu, whereas looking at the map of Mogadishu overall, Mr Maka submitted that it was in North Mogadishu. There had been civilian killings and heavy shelling in the north of Mogadishu. Furthermore, the OCHA report of March 2007 referred to Shibiz as being in the north of Mogadishu and a place from which people were fleeing.

250. Mr Maka submitted that even majority clan members were at real risk today. Dr Mullen had said that there was evidence of inter-clan and intra-clan fighting, that

males were at risk of forced recruitment or being shot and the females were at risk of rape or being used as assets for domestic labour and child-bearing. Given that the dynamics of the area were constantly changing, a majority clan member would have to negotiate his way past enemy clan lines in order to get home. The finding in NM for majorities could not stand, in the light of the current evidence. There were many checkpoints and, insofar as these were manned by the TFG, the respondent's own Fact Finding Missions had recorded that the TFG were ill-disciplined.

251. So far as Dr Luling was concerned, Mr Maka submitted that she should not be cast in a light in which she was no longer able to give evidence before the Tribunal. Her reports and views had been found helpful in the past. He accepted, however, that there were concerns about "the 1993 material" and that the Tribunal should make clear that expert reports should include a statement setting out the duties and obligations of an expert. The fact that Dr Luling did not include such a statement did not make her reports less reliable. Mr Maka echoed Mr Collins's observation that the respondent had not seen fit to put forward an expert to give oral evidence. So far as women were concerned, there was objective evidence to show they were particularly at risk in the present situation, as were children. It was submitted that "in a war situation, the vulnerable and weak in society suffer the most".

Submissions on article 15(c) of Council Directive 2004/83/EC and paragraph 339C of the Immigration Rules – serious and individual threat to civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict

252. The Tribunal received considerable oral and written submissions on one particular issue of subsidiary protection, as provided in Chapter V of Council Directive 2004/83/EC ("the Qualification Directive"): the risk of suffering the form of serious harm identified in article 15(c) of the Qualification Directive, namely, a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. We have already noted the initial submissions of Mr Collins on this issue (paragraphs 190, 193 and 200 above). In order to put the parties' detailed submissions in context, it is necessary to set out at some length the legal background, as disclosed in the materials that were before us. All the representatives were agreed that, although the actual decisions in the cases of the three appellants fell to be made under paragraph 339C(iv)(second) of the Immigration Rules, the fact that the wording of that provision mirrored that of article 15(c) meant that it was convenient to refer to that article directly.

The legal background

253. The following recitals to the Qualification Directive play a part in helping to understand the purpose and scope of article 15(c):-

"(1) A common policy on asylum, including a common European asylum system, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.

(2) The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951 (Geneva Convention), as supplemented by the New York Protocol of 31 January 1967 (Protocol), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.

(3) The Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees.

(4) The Tampere conclusions provide that a Common European Asylum should include, in the short term, the approximation of rules on the recognition of refugees in the content of refugee status.

(5) The Tampere conclusions also provide that rules providing refugee status should be complemented by measures on subsidiary forms of protection, offering an appropriate status to a person in need of protection.

(6) The main objective of this Directive is, on the one hand, to ensure that Member States apply a common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.

…

(8) It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who request international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of article 1(A) of the Geneva Convention, or a person who otherwise needs international protection.

(9) Those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, full outside the scope of this Directive.

…

(11) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are a party and which prohibit discrimination.

…

(24) Minimum standards for the definition of content of subsidiary protection status should also be laid down. Subsidiary protection should be complimentary and additional to the refugee protection enshrined in the Geneva Convention.

…

(25) It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.

(26) Risks to which a population of a country or a section of the population is generally exposed do normally create in themselves an individual threat which would qualify a serious harm."

254. As part of the process of implementing the Qualification Directive in the United Kingdom, the respondent added the following provision to the Immigration Rules, with effect from 9 October 2006:-

"339C. A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:

(i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;

(ii) he does not qualify as a refugee as defined in regulation 2 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006;

(iii) substantial grounds have been shown for believing that the person concerned, if he returned to a country of return, would face a real risk of suffering serious harm and is unable, or owing to such risk, unwilling to avail himself of the protection of that country; and

(iv) he is not excluded from a grant of humanitarian protection.

Serious harm consists of:

(i) the death penalty or execution;

(ii) unlawful killing;

(iii) torture or inhuman or degrading treatment or punishment of a person in the country of return; or

(iv) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

255. The reference in article 15(c) and paragraph 339C(iv) (second) to an international or internal armed conflict appears to touch upon concepts relevant to international humanitarian law or the law of armed conflict. This body of international law has as its purpose the regulation of the activities of those taking part in armed conflicts, in particular, so as to avoid so far as possible harm to non-combatants, particularly

civilians. Having witnessed the aftermath of the battle of Solferino, Henry Dunant published in 1862 a book called *A Memory of Solferino,* which directly led to the 1864 Geneva Convention. The current international instruments are the four Geneva Conventions of 1949 and their Protocols. Common article 3 of the Conventions provides:-

> "ARTICLE 3
>
> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> 1. Persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed "hors de combat" by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised people.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the parties to the conflict.
>
> The parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provision shall not affect the legal status of the parties to the conflict".

256. Common article 3 applies to all cases of armed conflict which are not of an international character occurring in the territory of one of the parties to the Convention. The law of armed conflict contains no authoritative definition of armed

conflict. Pictet's Commentary on the Fourth 1949 Geneva Convention (respondent's authorities bundle/49) states:-

> "A. 'Cases of Armed Conflict' – what is meant by 'armed conflict not of an international character'?
>
> That was burning question which arose again and again at the Diplomatic Conference. The expression was so general, so vague, that many of the delegations feared that it might be taken to cover any act committed by force of arms – any form of anarchy, rebellion, or even plain banditry. For example, if a handful of individuals were to rise in rebellion against the state and attack a police station, would that suffice to bring into being an armed conflict within the meaning of the article? In order to reply to questions of this sort, it was suggested that the term "conflict" should be defined or – and this would come to the same thing – that a list should be given of a certain number of conditions on which the application of the Convention would depend. The idea was finally abandoned – wisely, we think. Nevertheless, these different conditions, although in no way obligatory, constitute convenient criteria, and we therefore think it well to give a list drawn from the various amendments discussed; they are as follows:
>
> 1. That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
>
> 2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organised as military and in possession of a part of the national territory.
>
> 3. (a) That the de jure Government has recognized the insurgents as belligerents; or
>
>   (b) That it has claimed for itself the rights of a belligerent; or
>
>   (c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
>
>   (d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
>
> 4. (a) That the insurgents have an organisation purporting to have the characteristics of a State.
>
>   (b) That the insurgent civil authority exercises de facto authority over persons within a determinate portion of the national territory.
>
>   (c) That the armed forces act under the direction of an organised authority and are prepared to observe the ordinary laws of war.

(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

The above criteria are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganised and short-lived insurrection.

Does this mean that article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfil any of the above conditions (which are not obligatory and are only mentioned as an indication)? We do not subscribe to this view. We think, on the contrary, that the scope of application of the article must be as wide as possible."

257. According to *The Manual of the Law of Armed Conflict - UK Ministry of Defence* ("the Manual") (respondent's authorities/41):-

"Neither the Geneva Conventions nor Additional Protocol I contain any definition of the expression 'armed conflict' but the following guidance has been given:

(a) 'any difference arising between States and leading to the intervention of members of the armed forces is an armed conflict';

(b) an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups within a State'.

These definitions do not deal with the threshold for an armed conflict. Whether any particular intervention crosses the threshold so as to become an armed conflict will depend on all the surround circumstances."

The authority for paragraph (a) is Pictet; that for paragraph (b) is Prosecutor v Tadic (Jurisdiction) (1995) 105 ILR 419. In that judgment, the International Criminal Tribunal for the Former Yugoslavia, a body established by the United Nations, held:-

"An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached or, in the case of internal armed conflicts, a peaceful settlement is achieved. Until that time, international humanitarian law continues to apply in the whole territory of the warring States or, in the cases of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there" (paragraph 70).

The Tribunal accordingly found that there had therefore been an armed conflict in the Prijedor region of Bosnia-Herzegovina at the time the offences were alleged to have been committed, even though the accused had argued that there had been no fighting in that region and that the Bosnian Serbs had 'assumed power' there without

encountering opposition. The head note to the judgment (summarising paragraphs 96 to 127 thereof) states that:

> (5) Internal armed conflicts were subject to an extensive body of customary international law which extended beyond the rules codified in common article 3 of the Geneva Conventions. This customary law included rules relating to the conduct of combat, such as rules on weaponry and what constituted a legitimate target. They included, but were not limited to, many of the rules set down in Additional Protocol II to the Geneva Convention. Although many of these rules were similar to those applicable in international armed conflicts, only a number of the rules of the law of international armed conflicts had been extended to conflicts of an internal character. Moreover, it was the general essence of those rules, rather than their detailed regulation, which had become applicable to internal armed conflicts."

258. Additional Protocol II to the Geneva Conventions (8 June 1977) has a more extensive ambit than common article 3, with provisions relating to, amongst other things, the protection of medical and religious personnel, the protection of medical units and transports, the right of the civilian population and individual civilians to "enjoy general protection against dangers arising from military operations", with civilians not to be the object of attack or subjected to threats for the purpose of spreading terror, and works or installations such as dams and nuclear electrical generating stations not to be the object of attack, even where they are military objectives, if that would cause the release of "dangerous forces and consequent civilian losses among the civilian population". According to the Manual (paragraph 3.7):-

> "For Additional Protocol II to apply, there must be an armed conflict of an internal nature between the forces of the state party to the Protocol and dissident armed forces or other organised armed groups under responsible command. The dissident forces are required to have a territorial base and to exercise such control over a part of the State's territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol."

259. Protocol I to the Geneva Convention (8 June 1977) contains specific provisions in article 51 for the protection of the civilian population, including a prohibition on "indiscriminate attacks", which are those not directed at a specific military objective; which employ a method or means of combat which cannot be directed at a specific military objective; or which employ a method or means of combat the effects of which cannot be limited as required by the Protocol. Article 51(5) specifically states that an attack is indiscriminate if it is a bombardment that treats as a single military objective a number of clearly separated and distinct military objectives located in the city, town, village or other area containing a similar concentration of civilians or civilian objects. Also indiscriminate is an attack which "may be expected to cause incidental loss of civilian life, injuries to civilians, damage to civilian objects, or a combination thereof, which will be excessive in relation to the concrete and direct military advantage anticipated". Protocol I applies to international armed conflicts (see article 2 of the 1949 Conventions) and, by reason of article 1(4) of Additional Protocol I to internal armed conflicts in which "peoples are fighting against colonial

domination and alien occupation and against racist regimes in the exercise of their right of self-determination". It is insufficient for the authority representing the people simply to claim that this is happening; the condition has to be assessed objectively. A substantial degree of international recognition of the legitimacy of the liberation movement is necessary. On ratifying Protocol I, the United Kingdom stated it would not be bound by an authorities' declaration unless the United Kingdom expressly recognised that it was made by a body which was genuinely an authority representing a people engaged in this type of armed conflict (Manual, paragraph 3.4).

260. The Manual sums up the matter as follows:-

> "**Spectrum of Conflict**
>
> The application of the Law of Armed Conflict to internal hostilities thus depends on a number of factors. In the first place, it does not apply at all unless an armed conflict exists. If an armed conflict exists, the provisions of common article 3 apply. Should the dissidents achieve a degree of success and exercise the necessary control over a part of the territory, the provisions of Additional Protocol II come into force. Finally, if a conflict is recognised as a conflict within Additional Protocol I, article 1(4) it becomes subject to the Geneva Conventions and Protocol I".

261. At page 66 of appellant A's bundle, there is a useful article by James G. Stewart, a New Zealand lawyer, entitled *Towards a Single Definition of Armed Conflict in International Humanitarian Law: a Critique of Internalized Armed Conflict*. The article begins as follows:-

> "International humanitarian law applies different rules depending on whether an armed conflict is international or internal in nature. Commentators agree that the distinction is 'arbitrary', 'undesirable', 'difficult to justify', and that it 'frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs'. The views are not new. In 1948 the International Committee of the Red Cross (ICRC) presented a report recommending that the Geneva Conventions apply the full extent of international humanitarian law "in all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties". In 1971, it submitted a draft to the Conference of Government Experts recommending a further proposition that was intended to make the whole body of international humanitarian law applicable to a civilian war if foreign troops intervened. The ICRC put forward a more subtle proposal along the same lines the following year. Finally in 1978 a Norwegian delegation of experts to the same conference proposed that the two categories of armed conflict be dropped in favour of a single law for all kinds of armed conflict, again without success. Somewhat surprisingly, calls for a unified body of international humanitarian law have since died out, even though 'the manifold expressions of dissatisfaction with a dichotomy between international and internal armed conflicts' persist."

262. At pages 69 and 70, Stewart has this to say:-

“70. Traditionally, international humanitarian law has sought to regulate the conduct of and damage caused by conflict between rather than within States. The distinction was based on the premise that internal armed violence raises questions of sovereign governance and not international regulations. On that basis, the 1899 and 1907 Hague Conventions respecting the laws and customs of war on land apply solely to international warfare.

The Geneva Conventions of 1949 continue to very heavily favour regulation of inter-state rather then domestic warfare, the vast majority of the substantive provisions contained in the Geneva Convention 1949 applying solely to:

> ‘… all cases of declared war of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance’. [article 2]

Although the scope of the article was more restrictive than some would have hoped, the wording marked an important departure from earlier Conventions that have required more formalistic declarations of war. From the perspective of internationalized armed conflicts, which are often characterised by covert rather than direct military action, the change was critical.

In addition, the international communities’ experience of the Spanish Civil War, which was in fact heavily internationalised, and the mass of atrocities committed against minority groups within individual nations during the Second World War, contributed to a political willingness to at least superficially regulate some aspects of civil war. After considerable disagreement in giving that willingness form, article 3 common to the four Geneva Conventions of 1949 extended the most rudimentary principles of humanitarian protection to those persons taking no active part in hostilities and placed *hors de combat*. The problematic issue of defining internal armed conflict was circumvented by a negative definition that rendered common article 3 applicable in ‘armed conflicts not of international character’ even if ‘one of the most assured things that might be said about the words ‘not of an international character’ is that no one can say with assurance precisely what they were intended to convey’. Although the substance of common article 3 defines principles of the Conventions and stipulates certain imperative rules, the article does not contain specific provisions. In addition, the scant principles enumerated in it apply only where the intensity of hostilities reaches the level of ‘protracted armed violence between governmental authorities and organised armed groups or between such armed groups’.

The Additional Protocols to the Geneva Conventions continue the distinction between international and non-international armed conflicts ‘leaving unresolved the troublesome question of the law to be applied to armed conflicts in which there are both international non-international elements’. Additional Protocol I sought to reaffirm and develop the rules affecting victims of international armed conflicts, specifically indicating in article 1 that ‘this Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in article 2 common to those Conventions’. Tellingly in relation to internationalised armed conflicts, article 1(4) of Additional Protocol I also explicitly

provides that '… armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination' automatically qualifies international armed conflict for the purposes of the Protocol. Although the subject of some considerable criticism, the inclusion of such conflicts within the scope of article 1(4) confirms that the dichotomy between international and non-international conflict is far from strict or principled: international armed conflict is not a synonym for inter-state warfare, nor does the full extent of international humanitarian law presuppose that the collective belligerents must be States.

The more limited development of the law applicable in non-international armed conflicts was continued by Additional Protocol II, which sought to develop and supplement article 3, until the Geneva Conventions of 12 August 1949. While providing greater clarity to the broad principles identified in common article 3, Additional Protocol II set a significantly higher threshold for its own application, limiting its scope:

> 'to all armed conflicts which are not covered by article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949 … (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this protocol'.

Therefore, unlike common article 3 of the Geneva Conventions, Additional Protocol II will not apply to conflicts between two warring dissident groups. It will also only apply in conflicts that in fact approximate to traditional conceptions of inter-state warfare, namely where an organised dissident armed force exercises military control over a part of a territory of State Party.

In the context of internationalised armed conflicts, which by definition contain both international and internal elements, determining which set of rules applies and to what aspects of the conflict is critically important".

263. Under the heading "The Substantive Legal Differences", Stewart finds:

> "Superficially, the difference between substantive regulation of international armed conflicts and the laws applicable in non-international armed conflicts is striking. As a reflection of the historical bias in international humanitarian law towards the regulation of inter-state warfare, the 1949 Geneva Conventions and the 1977 Protocols contain close to 600 articles, of which only article 3 common to the 1949 Geneva Conventions and the 28 articles of additional Protocol II apply to internal conflict. In addition and as previously mentioned, the law of the Hague addressing methods and means of combat and conduct of armies in the field is not applicable in internal armed conflicts.

264. Consequently, Stewart finds that a strict reading of the Conventions and their Protocols would suggest that a range of very significant disparities between the two regimes exist. For example, common article 3 covers only non-participants and

persons who have laid down their arms, and does little to regulate combat or protect civilians against the effect of hostilities. Common article 3 also fails to define elaborate rules of distinction between military and civilian targets and makes no mention of the principle of proportionality and target selection. Although Additional Protocol II does address the protection of civilian populations more explicitly, its coverage does not compare to the prohibitions on indiscriminate attack, on methods and means of warfare causing unnecessary suffering and on damage to the natural environment, that are applicable under Additional Protocol I.

265. Most significant from a political perspective is the fact that there is no requirement in either common article 3 or Additional Protocol II that affords combatants *prisoner-of-war* status in non-international armed conflicts, nor is there anything preventing parties from prosecuting enemy combatants in those circumstances for having taken up arms.

266. According to Stewart, the "uncomfortable overlap" between the legal regimes applicable to international and non-international armed conflicts respectively was reinforced by the Rome Statute of the International Criminal Court, which "perpetuates the cumbersome international/non-international legal dichotomy. The statute limits the grave breaches regime to international conflicts and, despite similarities, the serious violations provisions of common article 3 that are applicable in "armed conflicts not of an international character" are both different and less comprehensive than their international counterparts. However, Stewart goes on to say:-

> "Yet somewhat ironically given the staunch opposition to explicitly assimilating the laws of war applicable in internal and international armed conflict, there is now extensive literature that suggests that customary international law has developed to a point where the gap between the two regimes is less marked." [footnote 48 refers to a number of academic articles in support of that proposition] The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic Jurisdiction Appeal* held that customary rules governing internal conflicts include:
>
> > "Protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities" (paragraph 127 of the judgment).

267. Whilst acknowledging that the Appeals Chamber of the ICTY have made it plain that principles of customary international law can be used to lessen somewhat the disparity between the laws applicable in international and non-international armed conflicts, Stewart considers that this process has its limitations. As the Appeals Chamber in *Tadic* said in its jurisdictional judgment:-

> "126. The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects.

Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflict; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflict; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts".

268. Stewart has made partial reference to paragraph 127, but it is worth setting this out in full:-

"127. Notwithstanding these limitations, it cannot be denied that the customary rules developed to govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities".

269. That it is important for international law purposes to establish whether an armed conflict is internal or international is plain from the *Tadic* appeal judgment of 15 July 1999, referred to by Stewart (page 76 of appellant A's bundle). Although the Criminal Tribunal for the Former Yugoslavia decided in that appeal judgment that it had jurisdiction in respect of offences committed in both internal and international armed conflicts, it found that article 2 of its governing Statute, which gave it jurisdiction in respect of grave breaches of the Geneva Conventions, was applicable only to offences committed in the context of international armed conflicts:-

"83. The requirement that the conflict be international for the grave breaches ….. to operate pursuant to article 2 of the statute has not been contested by the parties.

84. It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in the case of an internal armed conflict breaking out on the territory of the State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another state intervenes in that conflict through its troops or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other state.

85. In the instant case, the Prosecution claims that at all relevant times, the conflict was an international armed conflict between two States, namely Bosnia and Herzegovina ("BH") on the one hand and the FRY on the other. Judge McDonald, in her dissent, also found the conflict to be international at all relevant times.

86. The Trial Chamber found the conflict to be an international armed conflict between BH and FRY until 19 May 1992, when the JNA formally withdrew from Bosnia and Herzegovina. However, the Trial Chamber did not explicitly state what the nature of the conflict was *after* 19 May 1992. As the prosecution points out "the Trial Chamber made no express finding on the classification of the armed conflict between the Bosnian Serb Army (VRS) and the BH after the VRS was established in May 1992".

Nevertheless it may be held that the Trial Chamber at least simplicity considered that after 19 May 1992 the conflict became internal in nature.

87. In the instant case, there is sufficient evidence to justify the Trial Chamber's finding of fact that the conflict prior to 19 May 1992 was international in character. The question whether after 19 May 1992 it continued to be international or became instead exclusively internal turns on the issue of whether Bosnian Serb forces – in his hands the Bosnian victims in this case found themselves – could be considered as *de jure* or *de facto* organs of a foreign power, namely the FRY." ([1999] ICTY 2)

270. As Stewart indicates, the most frequently applied limb of the *Tadic* appeal judgment's test for determining whether internal armed conflict has become international is whether "some of the participants in the internal armed conflict acted on behalf of another State". The test of "dependence on the one side and control on the other", set out in Nicaragua v United States of America (ICJ reports 1986 p14), was rejected by the Appeals Chamber in favour of a looser test described, according to Stewart, by some as "dubious".

The submissions

271. We have set out the legal background to the law of armed conflict in some detail because it is against that background that the Tribunal must consider the parties' submissions as to the proper interpretation and application of article 15(c) of the Qualification Directive. In her opening skeleton argument, the respondent deals with these issues, again in some detail.

272. Relying on Recital (25) to that Directive, which states that the criteria on which applicants are to be recognised as eligible for subsidiary protection is to be drawn from "international obligations under human rights instruments and practices existing in Member States," the respondent contends that subsidiary protection "is not intended to identify or impose any new or more extensive form of obligation on Member States". Instead, the provisions of the Qualification Directive regarding subsidiary protection "do no more than re-state certain (but not all) existing bases on which refoulement is prohibited". The bases identified in article 15 of the Directive are Protocol 6 to the ECHR (death penalty), article 3 of the ECHR (torture/inhuman or degrading treatment/punishment) and "in part" article 2 (right to life). article 15(a) relates to the death penalty; article 15(b) corresponds to article 3 of ECHR and, against that background, article 15(c) is said by the respondent to show, by reference to the words "life or person," a connection with so much of article 2 of the ECHR as implies "a duty to abstain from acts which needlessly endanger life".

273. According to the respondent's submission, the Commission's Proposal for what became the Qualification Directive showed that article 15(c) was drawn from article 2(c) of the Temporary Protection Directive (Directive 2001/55/EC of 20 July 2001). This Directive, which followed the mass influx into the EU of displaced persons from the former Yugoslavia, provides a mechanism whereby temporary protection is to be granted to "displaced persons", defined in article 2(c) as:

"third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, and who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:

(i) persons who have fled areas of armed conflict or endemic violence:

(ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights;"

The existence of a "mass influx of displaced persons" is to be established by a Council Decision adopted by a qualified majority on a proposal from the Commission (article 5(1)). This, the respondent contends, demonstrates that the level of armed conflict envisaged in article 15(c) "is armed conflict of a scale that induces people to flee the relevant area".

274. So far as attempts to define the concepts of international armed conflict and non-international armed conflict are concerned, the respondent contends that "the extent to which these may offer assistance to the Tribunal may be approached with caution" and that it is not appropriate "simply to adopt such international law definitions as there are". Amongst the reasons given for that is the fact that international humanitarian law applies in a different context and serves difference purposes and that even within international humanitarian law there are differing definitions. Drawing on the Pictet Commentary, the respondent submits that the threshold for the application of the Geneva Conventions in the case of an international armed conflict is "very low". Pictet considered that any difference arising between two States and leading to the invention of members of the armed forces would be an armed conflict within the meaning of article 2 of the 1949 Conventions, regardless of how long the conflict lasted or how much "slaughter takes place". According to the respondent, the rationale for that view is that an affected individual might require specific protection under international humanitarian law, once an international armed conflict has arisen. By contrast, such a low threshold does not apply with respect to article 15(c) since there the question is whether there are substantial grounds for believing that a real risk of serious harm exists vis-à-vis a specific "civilian" who is in a Member State. What is regarded by the respondent as the "higher threshold for establishing an internal armed conflict" is said by her to be "entirely explicable in the context of international humanitarian law, which has developed alongside a reluctance on the part of States to allow infringements of their sovereignty in terms of the application of the laws of war to domestic conflicts". Since it would be anomalous if article 15(c) had separate definitions for what constituted an armed conflict, depending on whether it was international or internal, and there was no basis for such a distinction in the purpose of article 15(c), that provision required an interpretation "that is autonomous of international humanitarian law". There were varying definitions of armed conflict in the relevant

legal materials and, as is pointed out in the *Manual of the Law of Armed Conflict* at paragraph 15.3.1, "the point at which situations of internal disturbances and tensions develop into an armed conflict is open to interpretation". We should add here that, in the course of his oral submissions, Mr Swift appeared to accept that, in international humanitarian law, whilst the threshold for establishing an internal armed conflict was higher than that for an international armed conflict, the test for the former was not a particularly high one in absolute terms.

275. The respondent considered it significant that the reference to the Fourth Geneva Convention that appeared "in one of the drafts to the Directive (document 13354/02) was not retained" and that according to Catherine Costello (respondent's authorities/40) in her article *Subsidiary Protection and the EC Qualification Directive*, "the nature of the armed conflict is restricted to 'international or internal armed conflict' and so may exclude internal disturbances. However, unlike the previous draft, there is no longer an explicit reference to international humanitarian law, so that the definition may take on an autonomous interpretation". Again, the respondent relied upon recital (25) to the Qualification Directive, which referred only to international obligations and human rights instruments and practices existing in Member States, without any reference to international humanitarian law.

276. In the light of the above, the respondent submitted that, as with the term "civil war", in the charter party which was the subject of Mustill J's judgment in <u>Spinney's v Royal Insurance</u> [1980] 1 Lloyd's Rep 406 the Tribunal should apply the "ordinary" as opposed to the "technical, international law" meaning of armed conflict.

277. Paragraph 40 of the skeleton argument reads as follows:-

> "40. Finally, it is a matter of great legal and practical importance that any decision on whether there is, or is not, armed conflict in any part of Somalia is by reference to that term as defined for the purposes of article 15(c) alone. The Tribunal is respectfully requested to make clear in its judgment that its decision has no wider ramifications in terms of whether, as a matter of international law (including international humanitarian law), there is any such armed conflict. For the reasons set out above, it is submitted that it is entirely appropriate to recognise that article 15(c) contains the use of the term 'armed conflict' that is autonomous from these other areas of international law. Such an approach best serves the purpose underlying article 15(c). Nevertheless, any characterisation by the English courts of broader application would be to stray into highly sensitive areas that are matters for foreign policy and military determination".

278. In the respondent's further note of 23 November 2007, her concern was further elaborated:-

> "2. The Tribunal raised the possibility of inconsistent decisions, i.e. a prior decision of an International Tribunal such as the ICTFY, or of the Security Council, and a subsequent decision of the AIT taken in applying different criteria. In these circumstances, however, the AIT (and all parties) would have the previous decision firmly in mind in coming to any determination.

3. Of very real concern to the SSHD is a situation where the AIT would have made a determination strictly applying international humanitarian law, e.g. that there is no armed conflict in State A, but then (i) the FCO or MoD come to a different conclusion on the materials and intelligence before them or (ii) there is a subsequent Security Council resolution mandating the use of force that is predicated on the existence of an international or non-international armed conflict. One point is that the determination of whether or not armed violence is [such an armed conflict is] of huge importance including in terms of targeting decisions (of particular importance where UK troops are involved in some form). See eg. *The Manual of the Law of Armed Conflict* at 15.6 [respondent's authorities bundle, tab 41, page 387]: a distinction is to be drawn between those who are taking a direct part in hostilities *and may be attacked …*".

…..

5. The SSHD is certainly alive to the concerns expressed by the Tribunal as to a consistent approach to the Directive across Member States. But that concern is met if the Tribunal decides that it wants to look at or even largely borrow from international humanitarian law definitions (insofar as these exist). It is indeed correct that the SSHD does not object to 'mining of the quarry', although it has separately made the point that there is an absence of rich seams to be found. As demonstrated in the passage from the *Manual of the Law of Armed Conflict* at 3.3.1, the definitions derived from *Tadic* 'do not deal with the threshold for an armed conflict' and it later states in terms (at 15.3.1) that: attempts to define the term "armed conflict" have proved unsuccessful…".

6. It is also to be noted that the SSHD's concerns are not rooted in comity. (The starting point of the submissions advanced, but rejected in *Krotov*). Even the concern that a judicial characterisation of a situation as an armed conflict *as a matter of international humanitarian law* may lead to escalation is rooted in foreign policy, not an unwillingness to see matters determined that should be left to other States. The concern is that foreign policy decisions of the FCO (including the application of Security Council resolutions), and military and strategic decisions of the MoD, should be made unhindered by the existence of AIT adjudications on whether *as a matter of international humanitarian law* there is an armed conflict in a given State".

279. Mr Collins's response to that note was to contend that it was the respondent "who seeks to hinder the Tribunal in its task of assessing whether there exists for the present time in Somalia a situation of internal armed conflict". He considered it difficult to see how the Directive should not be interpreted by reference to general principles of Community law including international humanitarian law. Dr Gil-Bazo in her article, *Refugee Status and Subsidiary Protection under EC Law* had stated that EC secondary legislation should be "assessed by reference to international human rights law". Mr Collins concluded:-

"18. There have been various uses made in the instant case of the metaphor of "mining the quarry of international humanitarian law". The Secretary of State's initial position (and still clearly preferred one) is that the Tribunal should not even enter the quarry. Under examination from the Tribunal that position has now shifted … to the extent that the Tribunal can now mine at the quarry, i.e. 'look at or even largely borrow from international humanitarian law definitions'. It is difficult to reconcile the Tribunal

being able to 'look at' or 'borrow' from humanitarian law definitions but not strictly apply international humanitarian law …"

280. Mr Maka's submissions were in a similar vein. He referred to A and Others v Secretary of State for the Home Department [2005] UKHL 71, where the House of Lords accepted as uncontentious a submission that a treaty, even if ratified by the United Kingdom, had no binding force in the domestic law of this country "unless it is given effect by statute or expresses principles of customary international law". Mr Maka submitted that the AIT "is obliged by law to apply whatever international or human rights law it feels necessary to determine the appeal before it, provided the UK is a party to that law. If the FCO or the MoD come to a different conclusion on the material before it as after a particular date in time then it is not bound by any Tribunal decision provided in the unlikely event of a challenge it can justify the legal change in a Court of law".

The Tribunal's assessment of the expert evidence

281. It is, to some extent, understandable that the appellants expressed concern that, although they put forward expert witnesses to give oral evidence, the respondent, as usual, chose not to do so, and then sought to undermine the evidence of the experts. Nevertheless, we must look objectively at the evidence of the experts.

Evidence of Professor Lewis

282. The Tribunal and its predecessors have, in the past, been materially assisted by the evidence of Professor Lewis and that was also the case in the present appeals. There was, however, a degree of resentment and even anger in Professor Lewis's attitude to the TFG and what he saw as the American and European interference that had brought about the fall of the UIC in southern Somalia. Professor Lewis is fully entitled to his opinions. Indeed, over a long and distinguished academic career that has focused on the people of Somalia, it would frankly be strange if Professor Lewis had not developed a marked degree of concern for the welfare of Somalis and had come to see the activities of other countries by reference to his own views about what is best for Somalia. Nevertheless, we could not but conclude that Professor Lewis's strongly-held opinions to some extent compromised his ability to be objective as regards some aspects of the evidence he gave. One particular example of this was in relation to Professor Lewis's views on the activities of the Ethiopian forces. At paragraph 48 above, he described them as acting with "extreme brutality" and shooting "indiscriminately" so as to cause a high level of civilian casualties. Overall, his evidence suggested that the Ethiopians and the TFG take no regard at all to the position of civilians, when responding to attacks from anti-TFG/Ethiopian forces operating in Mogadishu. However, when taken to the UN Secretary General's report, which Professor Lewis had not read, he accepted that there was evidence that the TFG and the Ethiopians were, according to certain reports, behaving far more responsibly in their relationship with civilians although they had "at times" opened fire indiscriminately (paragraph 82 above). Professor Lewis's assertion, when the point was put to him, that he had not meant to suggest that the TFG/Ethiopia forces

"always responded indiscriminately" (paragraph 82 above) did not sit comfortably with his written reports and evidence in chief.

283. It was, in general, impossible to escape the conclusion that Professor Lewis's distaste for the TFG had caused him to take a jaundiced view of the UN, which he considered had given unwarranted support for the TFG. In cross-examination, however, Professor Lewis accepted considerable amounts of what the Secretary General had to say in his reports on Somalia regarding the position on the ground. Professor Lewis's knowledge of the BIA reports of the Fact finding Missions in 2007 appeared to have been derived from his reading of two Somali diaspora websites, which were connected to particular clans or groups. It was apparent that, despite their being on the internet, Professor Lewis was not conversant with the actual reports. When faced with these reports, Professor Lewis fairly acknowledged that he had no reason to doubt what was said at paragraphs 4.01 to 4.09 of the July 2007 report (paragraph 76 above) and that he also accepted what was said at paragraph 4.17 (paragraph 77 above). This matter was of some significance, given that many of the issues in these appeals turned on very recent events and their interpretation.

284. At paragraph 79 above, Professor Lewis is recorded as accepting the methodology set out at the beginning of the BIA reports. Although he at times sought to stress the second-hand nature of the sourced evidence recorded by the Fact Finding Missions, his own "human" sources were not, upon analysis, in any markedly better position to provide an overall picture of the position on the ground in southern Somalia. Professor Lewis was in contact with at least one NGO that had been operating in the educational sphere in Mogadishu throughout the relevant period, as well as Somalis in the United Kingdom "who are constantly going backwards and forwards" between here and Somalia" (paragraph 67 above).

285. The Tribunal places significant weight upon Professor Lewis's anthropological evidence; especially what he had to say about minority groups (paragraphs 42 to 44, 58 and 60 above). In particular, we note Professor Lewis's insistence that the Benadiri people of southern Somalia are not a clan but a group consisting of people who live in the coastal region of Somalia. Thus, although the Sheikhal people might have sought in effect to manufacture a history of common lineage, they are in reality neither a majority nor a minority clan but an entity existing outside the clan system. The same can be said of the Ashraf. This does not, of course, mean that such groups have not faced persecution.

286. At paragraphs 60 to 63 above, Professor Lewis was asked about the degree to which some at least of the Benadiri groups could be said to have been assimilated into the majority clan with whom they live. Dr Luling's report of 6 September 2005 appeared to rely on Professor Lewis at least in part in finding that certain of the Sheikhal groups could be said to have been "firmly assimilated" to the majority clan in question. The Tribunal did not find Professor Lewis's response (paragraph 63 above) to be particularly clear. Overall, it appeared to the Tribunal that Professor Lewis was to some extent attempting unduly to down play the degree to which some minority

groups had assimilated with (and, accordingly, might in certain circumstances look to protection from) the majority clans with whom they lived.

Evidence of Dr Luling

287. Dr Luling has given evidence, largely in the form of written reports, in a considerable number of cases before the AIT and its predecessors. On a number of occasions, the resultant determinations have acknowledged the weight given to her evidence. She is a respected anthropologist who has devoted much of her academic career to Somalia. We have, nevertheless, concluded that her evidence falls to be treated with caution. Our reasons for so finding are as follows.

288. The matters set out at paragraphs 113 to 121 above are troubling. In the case in question, it would have been apparent to Dr Luling that the appellant has put his claim for asylum and with it his claim to be entitled to indefinite – as opposed to exceptional – leave to remain on the basis that he was a Reer Hamar. Dr Luling prepared her report at a time when it was plain to her (from the letter of refusal) that the appellant's claim had been refused and that that decision was being appealed. In those circumstances, to fail to deal with the important issue of clan or group ethnicity in the report was a failure on Dr Luling's part to discharge the duties of an expert. Whilst accepting that the events in question occurred some while ago, we do not consider that Dr Luling provided any satisfactory explanation for the omission.

289. Dr Luling's reports in the present appeal are problematic. Whilst we accept that she has never been to appellant S's claimed village of Jasira, and that she will consequently have been reliant on third party information as to those matters that might be known by someone living there, her report of 6 September 2005 was structured in such a way as to make it unclear what information appellant S was giving to Dr Luling about life in Jasira. Furthermore, having noted appellant S's claim to come "from the lighter skinned Sheikhal" (paragraph 99 above) and that the Benadiri people "is typically much lighter than that of the majority" (paragraph 101 above), Dr Luling failed to point out what was obvious to all who saw appellant S in the hearing room; namely, that she was in no sense a person who could be described as light-skinned. Although it is common ground that skin colour is not itself determinative and the Tribunal accepts Dr Luling's evidence that "there are exceptions both ways", to include references to this matter in her report, without informing the reader that appellant S was not light-skinned, can only be described as unhelpful.

290. Finally, as recorded at paragraph 98 above, Dr Luling asserted in terms that the Sheikhal are the main inhabitants of "Jasira" (page 2 of her first report). That assertion is unsourced and, in view of Dr Luling's not having been to Jasira and knowing little about it, the lapidary nature of the statement is puzzling. In fact, it turns out to be entirely wrong; but the Tribunal only discovered as much in the course of its own questions to Dr Mullen, who had been in Jasira in the 1980s and who immediately and categorically stated that the place would be "basically Hawiye

territory", with a ratio of Hawiye to others of 5:1 (paragraph 182 above). A central plank of appellant S's case thus fell away, since Dr Luling's evidence was plainly to the effect that, if appellant S came from Jasira, she was likely to be a Sheikhal Jasira. Whilst it is true that Professor Lewis also opined that appellant S was Sheikhal Jasira because she knew something about her group's background, that knowledge was, according to Dr Luling "scrappy" and its asserted accuracy by no means plain.

291. So far as Dr Luling's evidence regarding the general situation in southern Somalia is concerned, by her own admission, this is largely reliant on reports in the public domain, reinforced by her conversations with Somalis in the United Kingdom who, in turn, are in contact by telephone with those in Somalia. Overall, the Tribunal has concluded that in these appeals we have been unable to give weight to much of Dr Luling's evidence.

Evidence of Dr Mullen

292. Of the three experts who gave oral evidence, Dr Mullen was probably best placed to assist the Tribunal. He had visited Somalia in the relatively recent past and had plainly read a much greater quantity and range of the relevant sourced material, than had Professor Lewis and Dr Luling. In general, we accord Dr Mullen's evidence considerable weight. However, some of the assertions made by Dr Mullen in oral evidence did not appear to be supported in the background materials, including those cited in his reports. For example, at paragraph 153 above, Dr Mullen is recorded as saying that the support system amongst clans "has effectively collapsed" although he went on to refer to an NGO's report that suggested that people in Mogadishu were reacting to the difficult situation there in part by mobilising on a clan and sub-clan basis. Furthermore, in the vicinity of Mogadishu, it was plain from Dr Mullen's own evidence that majority clans continued to have an identifiable presence: see paragraph 154 above, where the International Airport and two other airports were described by Dr Mullen as controlled by the Habar Gedir sub-clan of the Hawiye. Dr Mullen's assertion, recorded at paragraph 155 above, that clan leaders were no longer interested in the fate of Mogadishu because the Abgal and Habar Gedir sub-clans of the Hawiye had managed to get their families asylum overseas, sat uneasily with the NGO report, referred to above, that spoke of leaders from both the Abgal and Habar Gedir groupings as indicating that they did not want a new civil war, albeit that they and their families were "largely not on the ground". Dr Mullen's claim recorded at paragraph 156 above that a Hawiye would be seen by the Ethiopian troops as a potential insurgent is to be contrasted with paragraph 169 above, where he is recorded as regarding the TFG in Mogadishu "as appearing to be increasingly an Abgal venture" and that there was "an alliance between the Abgal and the Darod". Dr Mullen's view that a man would be at greater risk at a checkpoint than would a woman does not find support in any of the other evidence and understandably was not pressed upon us by the appellants' representatives. We have, nevertheless, had regard to it in the context of considering the risk to a person who, not belonging to a majority clan or being otherwise under their protection, may find himself having to negotiate an "unofficial" checkpoint alone.

293. The expertise of Professor Lewis and Dr Luling is, in each case, primarily that of an anthropologist; a point that needs to be borne in mind because, as we shall later indicate, whatever else the evidence may show, the security situation in Mogadishu and its immediate environs is currently incapable of being categorised as one where majority clans are actively targeting minority clans or groups for persecution. That the situation in Mogadishu is more complex than has perhaps been thought is also borne out by the fact that both Professor Lewis and Dr Mullen said that, notwithstanding their undoubted expertise, they had not foreseen the fundamental change which came about in Mogadishu and southern Somalia in 2006, when the UIC effectively took control, originally at least at the behest of influential people in Mogadishu who had had their fill of clan-based warlords. Finally, all three experts, when asked to consider specific passages in the UN Secretary General's reports and those of the two BIA Fact Finding Missions, tended to accept what was there said about the very recent situation in southern Somalia. This underscores the need to give those reports significant weight.

The Tribunal's analysis of the current situation

The position of clans and groups in Mogadishu: attitudes and behaviour of the combatants

Majority clans

294. Although the Hawiye clan were dominant in Mogadishu and its environs until 2006, the emergence of the UIC in that year effectively negated the power of the Hawiye warlords and their militias. Despite what might superficially seem to be the import of the evidence noted in paragraphs 239 and 240 above, the fall of the UIC has not led to a return of the previous state of affairs, since the entry into the city of the TFG and the Ethiopian forces has significantly changed the dynamics of the situation. We agree with Dr Luling's view that the Hawiye militias no longer control Mogadishu (paragraph 120 above). That is not to say, however, that both the UIC, in its present, insurgent form, and the TFG do not have a "strong clan character" (paragraph 149 above); but that character is, we find, more complex than that suggested in parts of Professor Lewis's evidence, in that, whilst the TFG is Darod-dominated, there are plainly Hawiye elements supporting it.

295. Although the evidence shows that elements of the Habir Gedir sub-clan of the Hawiye are aligning themselves with the UIC insurgents in Mogadishu, the evidence read as a whole does not, in the Tribunal's view, show that the TFG/Ethiopians in Mogadishu are targeting the Habar Gedir or other Hawiye sub-clans as such. Although an adviser is mentioned at paragraph 4.30 of the BIA report of July 2007 as considering that the TFG were "repressing on a clan basis with certain sub-clans of the Hawiye being the main targets of a revenge" (R2, pages 611-612), such an assertion is not supported in the rest of the evidence and, indeed, another source of the same report said there was no routine targeting of members of particular clans. The background evidence, which includes the BIA reports of the 2007 Fact Finding

Missions (which we consider to be generally fair and well-balanced), does not support Professor Lewis's contention (at paragraph 48 above) that the TFG are, in reality, no more than warlords or gangsters. That is not to say that the TFG/Ethiopians cannot be properly criticised for the way in which they have, from time to time, gone about things in Mogadishu; but were the TFG and Ethiopians as thoroughly venal as Professor Lewis at times appeared to contend, we would have expected that to have been demonstrated far more clearly in the background materials, including those sourced from the observations of NGO's and others operating in the area. The same is true of the UN Secretary General's reports. The background evidence shows that those ranged against the TFG/Ethiopians primarily conduct their operations against specific targets, although, particularly where these attacks involved bombs or mortars, nearby civilians are put at risk (paragraphs 76 and 189 above). By the same token, whilst there have plainly been instances of overreaction and insufficiently focused retaliation by the TFG/Ethiopians, the evidence read as a whole indicates that the objects of retaliation are those attacking the TFG/Ethiopian forces. Thus, despite the one source referred to in paragraph 4.03 of the Fact Finding Mission report of July 2007 (paragraph 76 above), a journalist from an international news agency was quoted at paragraph 4.09 as considering that the TFG had "managed to effect some level of peace and security", whilst paragraph 4.17 recorded the efforts of the TFG to effect disarmament in the city. At paragraph 4.28, it was said to be "rare for an ordinary Somali to be randomly targeted in the shooting" and that despite the "often over-zealous retaliatory action on the part of [the TFG] forces", the level of violence in Mogadishu as at mid-2007 was "fairly low" and that, notwithstanding high levels of crime, people could and did move around, although on the whole they intended to stay in their home areas (paragraph 78 above). It is also significant that the mass movement of people over the weekend of 27/28 October 2007 from Mogadishu was in response to "an announcement advising those living in districts surrounding Bakhara Market to vacate the area due to security operations" (paragraph 81 above). As previously noted, Professor Lewis accepted the comment in the UN Secretary General's report of 7 November 2007 that the response of the TFG/Ethiopian forces was "*at times* indiscriminate" (paragraph 82). Other references in the materials, to the TFG/ Ethiopians cordoning off areas and conducting house-to-house searches, do not demonstrate that the Hawiye population of Mogadishu or any sub-clan thereof, can as such be said to be at real risk of persecution or serious harm at the hands of the TFG/Ethiopians.

296. For their part, the UIC and their allies or associates are, the evidence shows, targeting TFG/Ethiopian military and political personnel. The evidence does not indicate that members of the Darod clan or the Abgal sub-clan of the Hawiye are, in either case, as such at real risk of persecution or serious harm at the hands of the UIC and others fighting against the TFG/Ethiopians. In this regard, it is also worth observing that, during the time of their dominance in Mogadishu, the UIC were widely perceived as establishing a system of law and order in the city that benefited all of the clans and other groups residing there (and more widely throughout southern Somalia). The more extreme religious elements of the UIC took action against those engaged in

what were perceived as un-Islamic activities such as the consumption of alcohol and khat but this was not pursued by reference to a person's clan or group.

Minority clans and groups

297. The evidence does not disclose that the TFG/Ethiopians are targeting the Ashraf or other minority groups. That is so notwithstanding that the Ashraf and the Sheikhal groups, to take two examples, have an association with Islamic religious teaching. Even the single source quoted at paragraph 4.03 of the Fact Finding Mission report (paragraph 76 above) does not appear to have made such a claim. That is not to say, however, that the Darod and Abgal elements within the TFG are likely to go out of their way to be helpful to those from minority groups but, although there might be a failure of discipline from time to time at TFG-controlled checkpoints, we do not consider that the evidence shows that minority clans and groups in Mogadishu at the present time are the victims of targeting by the TFG/Ethiopians.

298. So far as the UIC are concerned, we do not find that, despite Professor Lewis's attempt to distinguish between "religious" and "ordinary" Ashraf, that the evidence is such as to show that the UIC is reasonably likely to target a member of a minority group. In this regard, we prefer the evidence of Dr Mullen (paragraph 149 above).

The general security position in Mogadishu and the relevance of clan areas and support networks

299. Whatever misgivings one might have about the rule of the UIC, it is manifestly the case that life in Mogadishu for the vast majority of its citizens was considerably better under the UIC than that which pertained before or, it must be said, has pertained since. So far as 2007 is concerned, the mass migrations evidenced in the background materials disclose a very serious state of affairs. A person who has been displaced from his or her home in Mogadishu, without being able to find a place elsewhere (including in another part of that city) with clan members or friends, and who as a result, is likely to have to spend any significant period of time in a makeshift shelter alongside the road to Afgoye, for example, or in an IDP camp, may well experience treatment that would be proscribed by article 3 of ECHR.

300. That said, the position in 2007 has been characterised by significant movements of civilians, not only out of Mogadishu, but also back again, as soon as the security position in the city has allowed (see eg. paragraph 165 above). Thus, one security source was able to say in April 2007, that the position in Mogadishu was "Mogadishu quiet", whilst the government "gave broadly accurate warnings to civilians to leave certain areas of the city to avoid the violence, although the source was in no doubt that bombardment within these areas was indiscriminate" (paragraph 73 above). A significant factor in the movement of people is Bakhara Market, which plays an important role in the provision of food for the inhabitants of Mogadishu. The UIC insurgents have on occasion targeted the market, eliciting a military response from the TFG/Ethiopians. Following a warning that a security operation was to take

place in the market, there was a significant exodus in late October 2007, as we have already noted. However, closure of the market appears to have lasted only five days, and Dr Mullen accepted (paragraph 168 above) that it had re-opened, according to the information produced in early November 2007. The resilience of the market is, we consider, of some significance. We also note that several sources questioned by the Fact finding Mission of June 2007 stressed "a need to understand 'normal life' in the Mogadishu sense, where there is an acceptance of a mobile type of life created by displacement" (R2, page 600).

301. Notwithstanding the Tribunal's generally positive impression of the evidence of Dr Mullen, we have seen how, under cross-examination, he was unable to sustain the stance that clan support networks had completely broken down during 2007. Despite the fierce fighting in early 2007, the Danish Refugee Council and Danish Immigration Service, in their report published in 2007, noted the continuing ability of clans to protect their own, albeit that someone returning from abroad might receive assistance "in the long term" (paragraph 134 above). The same report, at paragraph 20.08 (paragraph 135 above), whilst noting the source's inability to be "certain" that someone would enjoy clan protection in Central and southern Somalia, nevertheless recorded his acknowledgement that in principle one could expect to be protected by one's own clan. The source quoted at paragraph 4.31 of the July Fact Finding Mission report as saying that there is little protection from one's own clan (R2, page 612) appears to have based his view on an anecdote involving a friend who was for some reason shot at by a fellow clan member. Similarly, the source referred to at paragraph 4.32, who said returning Somalis who had left for economic reasons would be considered as traitors, based that view in part on the experience of someone she knew. The source's view is, in any event, out of step with the preponderance of the evidence. It appears to be the case that certain areas of Mogadishu (namely, the south) have remained better off than other areas, such as the north, during the disturbances of 2007 and that the educational NGO with whom Professor Lewis is in contact appears to have continued to function throughout the relevant time. As noted at paragraph 4.06 of the Fact Finding Mission report of July 2007 (paragraph 76 above) a relevant department of the UN is quoted as saying that "most clans had some network in operation in Mogadishu, though most people were now playing on personal rather than clan connections". We also observe that Professor Lewis's United Kingdom-based contacts were able to travel to and from Somalia and that Dr Mullen told us the airports outside Mogadishu were functioning at the date of the hearing. Indeed, the evidence given to the Fact Finding Missions of April and June 2007 by an airline executive is particularly noteworthy. In the May report we find:

> "9.03 The source said that his airline had not cancelled a flight to Mogadishu since 1991… He explained that the airline works with whoever is in control on the ground in Mogadishu to ensure the safe operation of the flights, be that the UIC as before, or the TFG now.
>
> …

9.05 He explained that the airline has 'special status' in Somalia and that it would be in no-one's interests to harm the flights. He said that any fighting around the airports stops during the times the flights arrive. When questioned on this, he explained that it is quite likely that all sides will have their own people on the flight. Also, because the current conflict is political rather than clan based, the clans do not want to kill members of another clan which would lead to retributive attacks.

9.06 Asked about travel from Mogadishu International Airport to Mogadishu, the source said that there were no difficulties. He contrasted this with the previous situation, under the warlords, when flights had been to Bale Dogle airport, around 90kms from Mogadishu. From there, he said, it had been necessary for people to arrange militia escorts because there were so many roadblocks but that did not apply from Mogadishu International. He said that his airline had never had a passenger ambushed.

9.07 The source said that he did not know what the current position was following the US airstrikes on 26 April, but before the airstrikes there were always lines of taxis queuing up outside Mogadishu International. There was no problem for anyone to take a taxi into Mogadishu and there were no roadblocks or checkpoints to impede their 12km journey. When asked about the situation for those who wished to travel elsewhere in Somalia he thought that, distance aside, this was no more difficult than travelling into Mogadishu." (R3, pages 1143 and 1144)

In the July 2007 report, the airline executive told the delegation:

"1. The source said that flights continue to operate between Nairobi and Mogadishu International Airport via Aden and Berera. Traffic is now building up again after the conflict. Numbers have been thin on the flight into Mogadishu, but the source did not consider that this was because of the security situation. Normal turnaround for the flights in Mogadishu is 45 minutes to 1 hour, and they remain in Mogadishu for a maximum of four hours. No flight has ever been cancelled for security reasons.

2. The airline operates its own minibus to transport its staff from Mogadishu International Airport into and around Mogadishu city, including the airline's three offices in North, South and Central Mogadishu. Although not technically for airline passengers' use, on the infrequent occasions when regular public transport has been interrupted, the airline's minibus has been used to transfer passengers into the city. The airline had not encountered any difficulties in operating this service and at no time had its staff or passengers come to any harm. In addition to the airline's own transport, the source informed the delegation that there were regular minibus services from the airport into the city and taxis were freely available.

3. To illustrate the ease with which travel from the airport to and within Mogadishu could be undertaken, the source invited a member of the delegation to speak on the telephone with a member of his staff who was based in and lived in Mogadishu. The source called the member of staff on his mobile telephone, explained why the delegation wished to speak to him , and told him to answer honestly any questions he was asked. The staff member in Mogadishu told the delegate that the had driven in his private motor car from Mogadishu International Airport to his home in the Halanie district, on the opposite side of Mogadishu, two hours previously. He makes this

journey every working day and, apart from routine checks at TFG operated checkpoints, has never encountered any difficulty. Nor had he ever heard of any airline passenger being mistreated en route from the airport into the city, and seemed surprised at the question." (R2, page 624)

Although this evidence is in some respects qualified or contradicted by other sources to whom the Mission spoke, its provenance is, in our view, such that it cannot lightly be discounted. It also chimes with the evidence regarding Somalis travelling back and forth between Somalia and the United Kingdom and with the UN source (R2, page 617), who said that passengers "arriving at MIA or K50 airports should generally not have any difficulty travelling into Mogadishu or anywhere else" and that a passenger bound for Mogadishu "would not need a protective escort".

302. Looking at the evidence as a whole, the Tribunal does not find that the current situation in Mogadishu is such that any person living there is at real risk of serious harm. (We shall deal later with the issue of armed conflict). In making this finding, the Tribunal has had regard to the issue of checkpoints. Within Mogadishu itself, we accept the information contained in the report of the Fact Finding Mission of June 2007, that there had been a "remarkable reduction in checkpoints", a finding with which Dr Luling said she had no reason to disagree (paragraph 129 above) and that as at mid-2007, the TFG had cleared away most militia checkpoints (paragraph 161 above). Although Dr Mullen demurred on this issue, his evidence was to the effect that non-TFG checkpoints were run by those whose purpose was to extort money, irrespective of clan, and that tariffs "would be adjusted according to capacity to pay". The Tribunal concludes that those moving around Mogadishu and its environs, including those taking refuge with fellow clan members, will in general not be at risk of serious harm at checkpoints. The position may, however, be otherwise where there is a real risk that a person will encounter a non-TFG checkpoint alone, without friends, family or other clan members.

Women

303. The Tribunal in NM did not consider that being a woman constituted a "differential impact", of the kind required by Adan. There is nothing in the evidence before us to indicate that the position in this regard has changed. We accept what is said at paragraphs 23.18 and 23.21 of the November 2007 COIS report (paragraph 232 above) regarding there being no current evidence that women are specifically targeted in Somalia at the present time. This finding, however, needs to be read in the light of what we have just said about checkpoints. Post-AG, checkpoints will not in general be a substantive issue as regards risk on return to the "home" area from the point of return. However, the possibility, once in that area, of having to leave it in the way discussed above, in response to a fresh deterioration in the security situation in Mogadishu, is relevant in assessing a person's claim to be in need of international protection. It is on that basis that the respondent's acknowledgment at paragraph 233 above, that there are "increased security risks which unaccompanied women may face in the current climate," needs to be considered. In general, it would, we consider, be difficult to see how a woman who, *ex-hypothesi* could be returned to live

in her "home" area with fellow clan or group members would be able to show that, in the event of having to move for security purposes, she would be at real risk of having to do so alone, rather than in the company of others, who would provide her with requisite protection at any "unofficial" checkpoint. According to a Senior Policy Adviser to the EU, interviewed by the BIA Mission in April 2007, "the highways could be dangerous but people always travelled with escorts arranged by their own clan, so checkpoints just meant paying a 'toll'" (R3, page 1127).

The Ashraf and other minority groups

304. As we have already said, the events of 2006 and 2007, concerning the rise to dominance of the UIC, the intervention of the Ethiopians, the expulsion of the UIC from Mogadishu, and its aftermath, represent, in our view, a departure from the previously accepted paradigm of majority clan warlords preying upon those from minority clans and groups, whilst contending amongst themselves over such things as land and the trade in khat. Although the genesis of the UIC, in the system of district religious courts described by Dr Mullen, is complex, the fact that Hawiye businessmen in Mogadishu were both able and willing to call upon assistance from such a source suggests that persons perceived as being, or having a connection with, Islamic teachers, jurists, officials and the like were not as despised and marginalised by other Somalis as may have been thought (paragraph 173 above). The evidence before us also indicates that the issue of patronage from or integration with a majority clan may very often need specific and detailed consideration. This was identified by the Tribunal at paragraph 117 of NM but, in our view, it now requires greater emphasis.

305. So far as the Sheikhal are concerned, we have set out at paragraph 286 above our reasons for finding that Professor Lewis underestimated the extent to which a member of such a group could become integrated with his or her host-clan community. The respondent's initial position was that appellant S, if found to be a Sheikhal Jasira, would be entitled by reason of that finding to international protection. In the light of the evidence, we have doubts about that; nevertheless, for the purposes of appellant S's appeal, the concession must, of course, stand. Apart from what we say in the previous paragraph, our concern arises because by her own account appellant S's father was, on the face of it, an official of just the type of religious court upon which the UIC was founded and, even if appellant S was truthful about his disappearance, there plainly must have been many others who remained in post during the era of the warlords or who were at least available to be called upon in 2006. In addition, given that, in general, members of such minority groups in southern Somalia would not have (as Dr Mullen made clear) their own majority areas but, in general, be living amongst other, major clans, the possibility of a significant degree of local acceptance or even integration becomes apparent. In the light of the evidence before us and the concerns regarding Dr Luling's evidence, it seems to us that FK (Shekhal Gandhershe) Somalia CG [2004] UKIAT 00127 should not be relied on for the proposition that all Sheikhal Gandhershe (and, by implication, all Sheikhal Jasira) are, as such, at real risk, as being unprotected

minorities. FK relied on a report of Dr Luling which appears to have been similar in various respects to the ones before us.

306. A similar issue arises in relation to the Ashraf. A person of that group who has continued to live in southern Somalia until recent times may well have been able to do so, not by living in hiding and/or suffering periodic harassment (or worse) but because she has enjoyed the significant protection of her geographic community. In short, we emphasise what Ouseley J said in paragraph 117 of NM "that a division between minority and majority does not represent a bright line on one or other side of which every clan must fall". In this regard, we also remind ourselves of what the IAT had to say in KS (Minority Clans – Bajuni – ability to speak Kibajuni) Somalia CG [2004] UKIAT 00271, where, at paragraph 38, it found that a minority clan member may have protection from a majority clan where, for example, she marries into such a majority clan. Being an Ashraf will still usually be a significant step on the path to establishing a claim to international protection. But the evidence we have before us, including that concerning the rise of the UIC and its aftermath, seems to us to point towards a less mechanistic approach to the consequences of being an Ashraf or other minority group member than may have been thought necessary hitherto: in particular, where the *only* credible part of an appellant's claim is that she is an Ashraf or a member of some other minority group. What we have just said is, we consider, fully compatible with the ECtHR's judgment in Salah Sheekh v The Netherlands , where, on the facts as found, the claimant had plainly not enjoyed any degree of assimilation and protection: indeed, quite the opposite (paragraph 148 of the judgment).

307. What, then, of a person who is found to be an Ashraf (or other such minority) from an area that has not accepted her or would not accept her in such a way as to offer any requisite protection? As we have seen, such a person would not as such be at real risk of persecution or other targeted harm at the hands of the TFG/Ethiopians or the UIC insurgents. However, if the appellant came from Mogadishu, her position on return to her former home area would, on the evidence before us, be extremely problematic. The TFG/Ethiopians are plainly not in the position of being able to offer such a person protection from the activities of criminal elements in the city which would be likely to seek to exploit those without any form of support mechanism. Notwithstanding the fact that the minority populations of Mogadishu are no longer the victims of targeted looting and other human rights violations at the hands of majority militias, we do not see how it can properly be said that the return of a lone Ashraf or other minority group member to Mogadishu would not result in that individual facing a real risk of serious harm, contrary to article 3 of the ECHR, absent the type of protection just described. In this regard, we observe, in addition to the evidence to which we have earlier set out, the finding in the UN Commissioner on Human Rights report (paragraph 209 above), that members of minority groups found it harder to flee and move around to escape fighting, because they were not as easily accepted in new surroundings. This fell to be contrasted with displaced persons from majority clans, who often had a better chance of being tolerated in the area to which they have fled.

308. We must then ask whether this risk contains any sufficient differential impact as to engage the Refugee Convention. In other words, assuming that the feared serious harm is persecutory, could it be said to be "by reason of" the person's membership of the Ashraf? It is because the person has no identifiable home area and, thus, a community in which she could find protection, that she is particularly vulnerable to criminality, both within the area itself but also, in the event of displacement for security reasons, by reason of having nowhere to go other than an IDP camp or some roadside refuge. This state of affairs is directly related to her minority status. Applying the principle enunciated in Adan, we are satisfied that the differential requirement is met and that such a person (male or female) would be a refugee, as well as succeeding under article 3 of the ECHR. It should be noted that, despite the changes in the factual position since NM, our conclusions in this regard are in line with those of the Tribunal in that case.

309. The significance of belonging to, or otherwise being able to secure the protection of, a majority clan was identified in NM as lying in the fact that majority clans had their own militias (paragraph 122 of the determination; paragraph 11 above).Whilst we find that the evidence shows that in Mogadishu majority clan militias are no longer in control (and have not been since the rise of the UIC), and that members of majority clans have on occasion been compelled to leave their home areas during 2007 as a result of fighting and other security operations, the evidence does not indicate that the majority clans have lost their militias or that they have otherwise become unprotected. As Dr Mullen's testimony shows, large numbers of guns of all kinds are being sold in Mogadishu and the written materials confirm both this and the very limited success of the TFG/Ethiopians in attempting to disarm the population. Accordingly, the distinction drawn in NM between majority clans and minority clans and groups continues to hold good, both in Mogadishu and the rest of southern Somalia.

The position outside Mogadishu

310. The security situation in Mogadishu is, we find, peculiar to that city and its immediate environs. The areas beyond remain much as before. According to Dr Mullen (paragraph 180 above), Middle and Lower Shebelle are more stable than Mogadishu. Although he considered that (internal) refugees in Afgoye had had an effect on stability there, we note at paragraph 8.07 of the report of the Fact Finding Mission of April 2007, one source said that "the provinces had been relatively unaffected by the main fighting, and that life there remained much the same as it had always been, with little impact from IDPs most of whom remained on the outskirts of Mogadishu," although he "thought that other areas would be increasingly affected if the war carried on". "Normal life" in those areas was, the source said, characterised by local disputes, usually about water rights, and that, although not comparable to western standards, the local administration and justice administered by local clans were "reasonably fair" (paragraph 237 above). In the South, Kismayo appears to be unstable. According to a UN security officer (R3, page 1130): "it was an area that was

always likely to see instability: there were many clans there but none was dominant so it was inherently unstable and volatile."

311. Dr Mullen considered the Bay and Bakool regions to have some stability, albeit that two sub-clans of the Rahanweyn were in conflict. There was, in particular, stability in the town of Baidoa, which was being used by the Ethiopians as a supply base for Mogadishu. Finally, according to Dr Mullen the "other area with a degree of stability was Hiran, which enjoyed a very good and enlightened local government" (paragraph 180 above).

The Tribunal's findings on the legal issues regarding article 15(c) of the Qualification Directive

(a) Meaning of international or internal armed conflict

312. The Asylum and Immigration Tribunal is a creature of statute. It may, accordingly, exercise only that jurisdiction which Parliament has seen fit to confer upon it. For the present purpose, that jurisdiction is limited to deciding whether the appellants (or any of them) are entitled to subsidiary protection for the purposes of the Immigration Rules, which implement article 15(c) of the Qualification Directive. Any finding which we make on the issue of whether there is or is not an international or internal armed conflict in Somalia for the purposes of paragraph 339C(iv) (second) of the Immigration Rules is limited to these purposes. That is so, irrespective of whether and to what extent, in reaching a decision on that issue, we have regard to and apply anything that can be said to constitute a rule, principle or terminology found in international humanitarian law, the law of armed conflict or any other form of international law, whether customary or otherwise. International humanitarian law and the law of armed conflict exist in order to regulate the activities of combatants. This Tribunal has no such function. Unlike international tribunals such as the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (to give that body its full title), we have no jurisdiction whatsoever to pass judgment on those who may have violated international humanitarian law. Nor is it any part of our function to identify for the purposes of international humanitarian law the existence of armed conflict in countries other than the United Kingdom in a way that would affect the Government of the United Kingdom, otherwise than in relation to its responsibilities under the Qualification Directive and related legislation.

313. To that extent, the Tribunal is readily able to give the respondent the assurances she seeks. Otherwise, we consider the respondent's submissions on the issue of armed conflict to be ones which exclusively involve the question of the statutory interpretation of the expression "international or internal armed conflict" in article 15(c) and paragraph 339C(iv)(second). We now turn to that issue. It is one that currently is without United Kingdom judicial authority. We have endeavoured to

deal with the substantive issues, on the basis of the submissions made to us. That last point needs to be stressed (see paragraphs 331 to 333 below).

314. Whilst there is some force in the argument that article 15(c) is, upon analysis, no more than a limited part of the obligations which Member States have by reason of article 2 of the ECHR, elevated to the point of conferring the "status" of subsidiary protection, as opposed to the right of *non-refoulement*, we do not accept that the position is as straightforward as the respondent contends or, even if it is, that this necessarily compels a definition of "international or internal armed conflict" that pays no substantial regard to international humanitarian law etc. There are two reasons why we reach that conclusion.

315. First, if that had been the intention of the drafters of the Qualification Directive, they could easily have made it plain that the serious harm covered by article 15(c) was limited to certain forms of harm that were already "covered" by article 2 of the ECHR. The respondent's argument is further weakened by the fact that paragraph 339C(iii)(second) of the Immigration Rules provides that serious harm includes "unlawful killing", which, on the face of it, leaves no room for sub-paragraph (iv) to be concerned solely with some other aspect of article 2. Secondly, the respondent herself makes the point that the drafting history of article 15 shows that paragraph (c) derives to some extent from the Temporary Protection Directive. As the definition of "displaced persons" in article 2 of that Directive makes plain (paragraph 273 above), those who have, for example, fled areas of armed conflict or endemic violence may include those who do not satisfy the requirements of recognition as refugees under the Geneva Convention. By the same token, it may be inferred that such persons would also include those who, if their claims were analysed on an individual basis, might not be entitled to resist *refoulement* by relying upon article 2 of the ECHR.

316. The somewhat tortuous drafting history of article 15(c) described in the materials to which we have made reference has undoubtedly played a part in making the meaning and scope of that provision less than plain. However, we consider that two points can be made. First, the fact that the Temporary Protection Directive was one of the midwives of article 15(c) does not necessarily mean that the *primary* international obligation for the purposes of Recital (25), and thus for the Qualification Directive itself, is anything other than the ECHR, with the consequence that the concept of subsidiary protection is to be seen as predominantly if not entirely as a way of according a *status*, as opposed to a bare right of *non-refoulement*, to certain of those who are able to resist return by reference to article 2 or 3 of the ECHR. (We shall have more to say about this below). But, secondly, that this should be so cannot require us to shut our eyes to the terminology used in article 15(c), which plainly makes use of terminology that is drawn from international humanitarian law, notwithstanding the absence of any specific reference to that law in the Directive, as finally made. There is, in short, nothing contradictory in the concept of subsidiary protection being about the protection of an individual from serious harm and the identification of that harm involving (in certain circumstances) the identification of "dangerous" situations by

reference to interpretative tools that are "borrowed" from another system of law. But, what are those tools?

317. As is manifest from the 1949 Geneva Conventions and their Protocols, and the *Tadic* judgments (which have been widely followed by other similar international tribunals), there is no authoritative definition in international humanitarian law of "armed conflict", "international armed conflict" or "internal armed conflict". Furthermore, although the Fourth of the 1949 Conventions relates to civilians, there is nothing in common article 3 that deals expressly with their protection from indiscriminate violence. Indeed, the only specific reference to indiscriminate violence is in Protocol I, which applies only to international armed conflicts and those "in which people were fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination", a concept which, as we have seen, has caused the United Kingdom Government considerable concern. Protocol II, whilst not referring in terms to indiscriminate attacks involving civilians, does specifically provide that civilians "shall enjoy general protection against the dangers arising from military operations". In order for that Protocol to apply, however, there has to be an armed conflict taking place "in the territory of a High Contracting Party against its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained concerted military operations and to implement the Protocol". That test may not, accordingly, be of much use in seeking to identify actual situations where an individual merits subsidiary protection under the Qualification Directive. To take the present case, neither the appellants nor the respondent appeared to contend that the military opposition to the TFG and its Ethiopian allies in Mogadishu exercised control over a part of the territory of Somalia.

318. As we have seen above, international tribunals such as the ICTY have, in recent years, turned increasingly to customary norms of international law, drawn *inter alia* from the Conventions, other international instruments, UN resolutions and case law, in order to punish certain acts perpetrated during conflicts such as those in the former Yugoslavia. In the course of such an exercise, the Appeals Chamber in *Tadic* attempted to provide a definition of armed conflict. As already noted, it found that:-

> "an armed conflict exists wherever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state" (paragraph 70 of the jurisdiction judgment).

The Appeals Chamber specifically recognised (at paragraph 67) that "the definition of armed conflict" varies depending on whether the hostilities are international or internal. That, no doubt, is the reason for its use in paragraph 70 of the criterion of "protracted" in connection with internal armed conflict.

319. In seeking to identify the tests to be applied in the interpretation of article 15(c), this Tribunal is not bound to follow the *Tadic* judgments, as if they were binding

authority. We nevertheless have concluded that we should pay particular regard to the authoritative pronouncements of those international tribunals which operate directly within the sphere of international humanitarian law. We say this, not so much because in so doing we may achieve consistency as between the Member States of the EU in relation to the interpretation of article 15(c). If such consistency is achieved, all well and good; although given the somewhat blunt nature of the interpretative tools we have identified from those systems, complete consistency is unlikely to be obtained. Rather, we adopt this course because we consider it to be the correct way of undertaking our task of legislative interpretation. Just because article 15(c), read as a whole, has a significantly different purpose from that of international humanitarian law, and that express references to that law appear to have been deliberately omitted from the final draft of the Qualification Directive, does not mean that we should shut our eyes to the fact that the terminology of "international or internal armed conflict" clearly derives from that law.

(b) The Tribunal's conclusions on the meaning of international or internal armed conflict

320. The Manual (*op cit*) draws on both Pictet's commentary (which was relied upon by the respondent and the appellants) and the *Tadic* jurisdictional judgment in order to provide guidance on the definition of armed conflict (paragraph 3.3). Expanded to reflect more accurately the wording in *Tadic* and other judgments of international tribunals, we consider that it may properly be said that an "armed conflict" exists where:-

(a) any difference between States leads to the intervention of members of the armed forces (Pictet, Commentary, volume 3, 23); or

(b) whenever there is a resort to armed force between States (*Tadic* jurisdictional judgment, paragraph 70); or

(c) whenever there is protracted armed violence between governmental authorities and organised armed groups or between such groups within a State (*ibid*).

321. Whether the threshold for an armed conflict is crossed in any case will depend on all the surrounding circumstances. An international armed conflict will, however, be usually easier to establish than an internal conflict. Nevertheless, as the Manual states, "an accidental border incursion by members of the armed forces would not, in itself, amount to an armed conflict, nor would the accidental bombing of another country".

322. So far as internal armed conflicts are concerned, the list in Pictet, drawn from various proposed amendments to common article 3, is, taken as a whole, probably no longer representative of current juridical thought. Nevertheless, the basic thrust of the factors set out in that list reflects a distinction of some importance in the context of armed conflicts, which finds an echo in other international instruments (such as the

Rome Statute, article 8(2)(d) and Protocol II), that an internal armed conflict does not cover situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence, or other acts of a similar nature.

323. As has been seen, for the purposes of international humanitarian law it is important to determine whether, at any particular time, an armed conflict is international or internal in nature. This is in part because international criminal law imposes different regimes of liability and punishment, depending on whether the armed conflict is of one or the other kind: eg. liability for "grave breaches" under article 2 of the Statute establishing the ICTFY depends upon there being an international armed conflict (paragraph 269 above). For the purposes of article 15(c), however, once a conflict has been identified as international or internal, it is unlikely that any change in its nature (as opposed to its existence) will matter. Nevertheless, were circumstances to arise in which the continuation of an armed conflict depended upon whether it had started as an internal one and become international, what the Appeals Chamber said at paragraph 84 of the *Tadic* appeals judgment should be borne in mind:-

> "[In the] case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State."

324. It is extremely important to emphasise that the determination of whether there exists an armed conflict of either kind is predominantly one of fact and that the tests articulated in the case law, including *Tadic,* are not sharp instruments. That this is so should be neither surprising nor alarming. A large part of the work of the Asylum and Immigration Tribunal involves applying similarly broad concepts to factual situations (see eg. Krotov v SSHD [2004] EWCA Civ 69 or Huang and Kashmiri [2007] UKHL 11 (in the context of article 8 and the test of proportionality)).

325. The respondent's opening skeleton identified a further potential indicator, albeit that on the facts of the present cases it is one that might be said to work against her. This is that, bearing in mind the partial genesis of article 15(c) in the Temporary Protection Directive, an armed conflict for the purposes of that provision may be one that "induces people to flee the relevant area". This indicator is useful, insofar as it helps in the application of the *Tadic* test, by providing one means of differentiating between a relatively minor revolt or other disturbance and an internal armed conflict. Taken any further, however, it runs the risk of leading to the assembly of an *ad hoc* set of indicators, not firmly rooted in international law.

326. Although the question of whether, for the purposes of article 15(c), there is a situation of international or internal armed conflict in a particular country at a particular time is predominantly one of fact, it is one which is plainly capable of constituting country guidance, as envisaged by the Tribunal's Practice Direction 18.2.

(c) The temporal and geographic extent of an armed conflict

327. As already noted, paragraph 70 of the *Tadic* jurisdictional judgment states that, once an international or internal armed conflict has begun, "international humanitarian law extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of an internal armed conflict, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal armed conflicts, the whole territory of a party, whether or not actual combat takes place there".

328. To what extent should we have regard to this particular finding in the context of applying the rules which implement the Qualification Directive? If the guns of the contending parties fall silent, perhaps as a result of what is at first merely seen as a truce or temporary ceasefire, it may be asked what purpose is served by requiring judicial fact-finders to consider article 15(c). On one view, it may not matter if they do, because, unless the peace is plainly fragile or ephemeral, the appellant will be unable to show a real risk of a serious and individual threat to his life or person in a situation of armed conflict. There may, however, be cases where the actual armed conflict (as opposed to the legal regime triggered by it) has so clearly and durably ceased to exist, as to make it pointless for article 15(c) even to be considered. In the present appeals, we heard insufficient argument to come to any firm general conclusions. We do, however, consider that the existence of an armed conflict at any particular time is to be examined not only by reference to whether the conflict *at that time* falls to be regarded as an international or internal armed conflict, having regard to the *Tadic* definition regarding the initial identification of an armed conflict; it has *also* to be decided by reference to the history of conflict in the area concerned. This is the approach we have adopted below on the issue of whether there is a relevant armed conflict in Mogadishu, where the current security situation needs to be examined in the light of what has been occurring in Somalia since the early 1990's: a history which is sufficiently generally known.

329. According to *Tadic*, in the case of an internal armed conflict, the geographic extent of international humanitarian law is the whole territory under the control of a party to that conflict. In the context of that system of law, the principle clearly makes a great deal of sense. Were it otherwise, a party could evade international criminal responsibility by removing enemy combatants from the combat zone, and ill-treating them somewhere else. In the appeals before us, it appeared to be common ground between all the parties that the existence or otherwise of an armed conflict turned on what was happening in Mogadishu and its immediate environs. That being so, on the application of the relevant case law, the fighting in Mogadishu between the TFG/Ethiopians and the UIC and related elements cannot lead to a finding that an internal armed conflict exists outside the area or areas controlled by the contending parties. As we have seen, the evidence shows that the control of the TFG/Ethiopians does not extend much if at all beyond Mogadishu, its immediate environs and the supply base of Baidoa. Even within Mogadishu, the TFG's control

is tenuous. The insurgents, for their part, have no material areas under their control (see paragraph 337 below).

330. Accordingly, if, as submitted, the conflict in Mogadishu constitutes the relevant internal armed conflict for the purposes of article 15(c), the geographical extent of international humanitarian law, as it applies to the contending parties, is effectively co-extensive with the area (Mogadishu and its immediate environs) on which it was common ground we should focus in assessing risk on return. But even if the geographical extent of that law were much wider (say, the country as a whole), the practical value of any country guidance finding by the Tribunal on the issue of armed conflict in any particular country will, we think, often lie in the analysis of where that conflict is *actually* taking place: ie. in the identification of the conflict zone. That is because, whether or not a person is at real risk of a serious and individual threat to life or person by reason of indiscriminate violence in a situation of armed conflict will normally depend on whether, if returned to the country in question, she will be reasonably likely to find herself within or near that zone. We say "normally" because there may be cases where the requisite risk will exist anywhere within the territorial area to which international humanitarian law applies. The judgment of the Appeals Chamber in Prosecutor v Kunarac (12 June 2002; Case No. IT–96–23 & IT-96-23/1-A) is relevant in this regard, as is *Tadic* itself (paragraph 257 above). In short, our provisional view is that (always assuming that some examination of paragraph 339C(iv)(second) is needed separately from that given in the course of assessing refugee eligibility or paragraph 339C(iii) eligibility), the Tribunal should endeavour to identify both the territorial area in respect of which international humanitarian law applies (following the identification of an internal armed conflict) and, where feasible, the parameters of the actual zone of conflict. In any event, that is what we have done in the present cases.

(d) "…serious and individual…"

331. We have already touched on the issue of serious and individual threat but something more needs to be said. As we have seen, the fact that we have not accepted the respondent's contention that article 15(c) was intended as no more than an identification of a specific kind of EHCR article 2 harm does not in any way mean that we should refuse to approach the opening words of that provision without regard to the principles of human rights law. On the contrary, it seems to us that those words point clearly to the intention to create a high threshold for succeeding under article 15(c), directly analogous to the well-established high threshold required to demonstrate a breach of article 2 or article 3 of the ECHR. Furthermore, at least on the basis of the submissions made to us, we consider that the concept of "an individual threat" requires there to be some form of "differential impact", of the kind recognised by the House of Lords for the purposes of the 1951 Geneva Convention in Adan [1997] 1 WLR 1107 and by the ECtHR for the purpose of article 3 in Vilvarajah v United Kingdom [1991] 14 EHRR 248. Whether an individual can show such a "differential impact" will depend on the facts. We shall later return to this matter in the context of the three appellants. It is, however, important to bear in mind in this

regard Recital (26), which states in terms that the risks to which a population of a country or a section of the population is generally exposed do not normally create in themselves an individual threat which would qualify as serious harm.

(e) "… threat to a civilian's life or person …"

332. We did not have much by way of submissions on this particular aspect, and so what we say here must inevitably be somewhat tentative. Article 15(c) defines serious harm by reference to a "threat" to life or person, as opposed to article 15(b), which speaks of treatment or punishment. It is well-established that, in certain circumstances, a threat to a person can constitute inhuman or degrading treatment or punishment, contrary to article 3 of the ECHR, and thus constitute serious harm within article 15(b) of the Qualification Directive. On the assumption that the word "threat" must have been intended to have some significance, it is possible that a "threat" for the purpose of article 15(c) may comprise something less than the kind or degree of threat required to constitute ill-treatment within article 15(b). But even if that is so, the significance of the words that precede the word "threat" in article 15(c), and of the words "life or person", which follow, together with the requirement arising from article 2(e) for there to be "substantial grounds for believing" the person concerned to be at "real risk" if returned, mean in practice that there is likely to be very little scope for a person to succeed in a claim for humanitarian protection by reference *solely* to paragraph 339C(iv)(second) or article 15(c); in other words, without showing a real risk of ECHR article 2 or article 3 harm (and, thus, serious harm within the meaning of paragraph 339C or the Qualification Directive).

(f) "indiscriminate violence"

333. Once again, the lack of full submissions on this part of the relevant provisions is a reason for caution on our part. But, nevertheless, three points about the phrase "indiscriminate violence" appear noteworthy. Contrary to what appears to have been the submission of the respondent, we do not consider that this phrase can be elided with that of armed conflict, so as to require *indiscriminate* violence to be present before an armed conflict can be said to exist for the purposes of article 15(c). The basic aim of international humanitarian law is to achieve a situation where armed conflicts, if they must happen, are conducted in accordance with the principles enshrined in that law (and its customary norms), including respect for civilians and other non-combatants. An armed conflict of the relevant kind must, therefore, be capable of arising and of subsisting independently of whether indiscriminate violence occurs. Secondly, it is clear that the indiscriminate violence can comprise violence perpetrated by combatants, which fails to distinguish between civilian and military targets. But, thirdly, the indiscriminate violence does not have to be violence that emanates directly from the combatants themselves. If that had been intended, we think the drafters could and would have said so. The indiscriminate violence may, for example, be perpetrated by looters and other criminal elements, taking advantage of a breakdown in law and order to go on the rampage.

334. In the light of the above, it is plain that, to reiterate, a person will in general be very unlikely to satisfy article 15(c) if she is unable to show that there are substantial grounds for believing that, if returned, she faces a real risk of ECHR article 2 or article 3 harm. This point is important. The fact that an international or internal armed conflict has been found to exist in no way means that a claimant is entitled to expect to succeed under article 15(c) or its domestic counterpart.

Armed conflict in Mogadishu

335. Applying the approach set out above, we must now consider whether, there exists a situation of international or internal armed conflict for the purposes of paragraph 339C of the Immigration Rules and article 15(c) of the Qualification Directive. Bearing in mind what we have said at paragraphs 329 and 330 above and that each of the appellants' cases falls to be assessed on the assumption that they come from Mogadishu (treating Jasira for these purposes as part of Greater Mogadishu), whether or not a situation of international or internal armed conflict exists in any other part of Somalia is for present purposes immaterial.

336. The TFG is the internationally recognised Government in Somalia. Accordingly, for the purpose of the *Tadic* test, we must consider whether there can be said to be protracted armed violence between the TFG and "organised armed groups". Notwithstanding that the TFG came into existence relatively recently, we consider that, as part of the exercise of considering whether there exists an armed conflict, we should have regard to the issue of protraction in the context of the situation that has largely pertained since the fall of the Said Barre regime. To do otherwise would risk distorting the reality of the position. The reason why the TFG and the Ethiopians are in Mogadishu, fighting insurgents from the former controllers of the city - the UIC - and other hostile elements, is a direct result of the state of civil war that arose in Somalia in the early 1990s and which (although abating in the north of the country) continued to affect parts of southern Somalia, including Mogadishu, until comparatively recently.

337. It cannot be said that the UIC and its "allies" at the present time have any identifiable territory or are in possession of what can realistically be described as any significant part of Somalia. That the UIC etc. possesses a degree of organisation is, however, manifest from the way in which it has been able to target numerous attacks on the TFG/Ethiopians during 2007. In particular, there are within the ranks of the UIC certain Salafist or Al Qaeda elements, which are likely to be using a cell-type structure, whereby each cell is controlled from above but remains largely or entirely unaware of its peers. We also consider that some inference relevant to the degree of organisation can be drawn from the figures concerning the numbers and types of weaponry, some of it clearly heavy, being used in Mogadishu by the anti TFG forces. Such munitions cannot be effectively used over time without a certain level of organisation. Dr Mullen was asked various questions by the Tribunal about the numbers of the UIC etc. forces. It was apparent that, without any criticism of him, Dr Mullen was in some difficulties in giving any meaningful figures. That there are

sufficient numbers of combatants to cause the TFG and the Ethiopians serious problems is, however, obvious.

338. One of the Pictet factors we consider, on the facts before us, to be of particular significance. This concerns the issue whether the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression (see paragraph 256 above). In this regard the Court in AG made reference to the Somalia (United Nations Sanctions) Order 2002. Looking at that Order (SI2002/2628), which is made under the United Nations Act 1946, it is clear that its purpose is to prohibit the direct or indirect supply to Somalia of technical advice, financial and other assistance, and training related to military activities, and that the Order was made pursuant to UN Resolution No.1425 of 22 July 1992 and the decisions of the Security Council of the United Nations in Resolution No. 733 of 23 January 1992 and 19 June 2001, concerning arms embargos in respect of Liberia, Somalia and the former Yugoslavia. At R4, pages 1589 to 1609, the respondent has produced further Security Council resolutions on Somalia of 2006 and 2007, which, amongst other things, reinforced the calls for compliance with the provisions regarding the arms embargo, condemned the influx of weapons as a "serious threat to the Somali peace process", welcomed the African Union's mission to Somalia and expressed concern at the continued violence in Somalia.

339. At paragraph 325 above, we indicated that the respondent's identification of part at least of the genesis of article 15(c) in the Temporary Protection Directive could cause her difficulties in contending that an armed conflict does not exist in Mogadishu or southern Somalia at the present time. This is because if, as the respondent asserts at paragraph 28(b) of her opening skeleton, the effect of looking at article 15(c) through the prism of the Temporary Protection Directive is that the armed conflict "must be of a scale that induces people to flee the relevant area", then this is precisely what has happened on a major scale in Mogadishu during 2007, albeit that the pattern is one of movement followed by return.

340. As we have already said, we do not accept the respondent's submission that article 15(c) falls to be read in a way which requires a conflict to be one that gives rise to indiscriminate violence, in turn giving rise to a serious and individual threat to a civilian's life or person, before the conflict can be categorised as an armed conflict for the purposes of that provision. Notwithstanding the kin-relationship between article 15(c) and the Temporary Protection Directive and, indeed, the ECHR, the expression "international armed conflict" is plainly drawn from international humanitarian law, as is "internal armed conflict". As we have already noted, the purpose of international humanitarian law is, amongst other things, to seek to proscribe and, thus, eliminate indiscriminate violence involving civilians, in situations of armed conflict. The presence of indiscriminate violence cannot, therefore, be said to be a pre-requisite for the existence of an armed conflict (paragraph 333 above).

341. The Tribunal finds as a fact that, on the evidence before it, Mogadishu is in a state of internal armed conflict. Having regard to paragraph 84 of the *Tadic* appeals judgment (see paragraph 323 above), the intervention of the Ethiopian forces may have led to that armed conflict becoming also an international one, or having international elements. Whether or not that is the case is, however, irrelevant for our purposes.

342. Before we embark upon a specific consideration of the situations of the three appellants, we should consider whether we can make any findings of a general nature regarding the impact of paragraph 339C/article 15(c) on appeals involving those from the Mogadishu area.

343. The first point to make is that, as we have already found in relation to article 3 of the ECHR, the particular security situation giving rise to the current situation of armed conflict relates only to Mogadishu itself and some of its immediate environs, where the TFG has a presence and where it is being attacked by the UIC.

344. Turning to the issue of the serious individual threat to civilian's life or person, in the light of our findings about the attitude of the TFG/Ethiopians on the one hand and the UIC on the other towards majority clans and minority clans and groups, we do not consider that even a member of a minority group, such as the Ashraf, can successfully demonstrate a differential impact arising out of the armed conflict in Vilvarajah/Adan terms. An Ashraf's chance of being injured by shrapnel from a bomb intended for Ethiopian soldiers or of being struck by a bullet from such a soldier, intended for an insurgent, is in general no greater than the chances of a majority clan member being so harmed.

345. So far as indiscriminate violence is concerned, neither the TFG/Ethiopians nor the UIC are, we have found, engaging in what might be described as indiscriminate violence to such an extent as to place the citizens of Mogadishu (regardless of their circumstances) at real risk of such violence.

346. However, as we have already indicated (paragraph 333 above), the words "indiscriminate violence" are not to be read as limited to violence directly attributable to the combatants in the armed conflict. Accordingly, article 15(c)/paragraph 339C can apply where there is such a conflict and indiscriminate violence, such as arson, robbery and rape arising from a breakdown in law and order, is perpetrated by non-combatants.

347. As a result of these findings, a minority group member, with no home area in which she can call on adequate protection from majority clan neighbours etc or who, having been forced to move for security purposes, is reasonably likely to have to run the gauntlet of a non-TFG/Ethiopian checkpoint outside the city and/or find refuge only in an IDP camp or *ad hoc* roadside shelter, would, we find, face a "differential threat" such as to satisfy the "serious and individual" requirement. In practice, however, her recognition as a refugee will disentitle her to humanitarian protection (paragraph

339C(ii)(first)). Such a person would also, of course, be able to show a violation of article 3 of the ECHR (see paragraph 308 above).

348. As can be seen, even leaving aside the point just made, our general conclusions on paragraph 339C/article 15(c) in the context of Mogadishu do not in practice provide any separate entitlement to subsidiary protection, in that the minority person whom we have just identified would in any event fall within the scope of paragraph 339C(iii)(second)/article 15(b). That conclusion is, however, unsurprising in view of what we say at paragraph 334 above.

The Tribunal's assessment of the appellants' cases

Appellant H

349. On the basis of our general findings, appellant H cannot succeed in her claim to be in need of international protection. The inevitable result of the rejection of her claim to be a member of a minority group, namely, the Ashraf, is that she falls to be treated as a member of a majority clan. Given that it is common ground that appellant H originates from Mogadishu, the reality of the matter is, we find, that she is a member of the Hawiye. Which sub-clan matters not, given our findings that the Mogadishu sub-clans of the Hawiye are not at real risk of persecution or targeted ill-treatment at the hands of the TFG/Ethiopians or the UIC and their associates. Nor does the evidence show that the Hawiye sub-clans are targeting each other.

350. The fact that members of majority clans may claim international protection outside Somalia on the false basis that they come from a minority is, we find, highlighted by Dr Mullen's evidence, that Hawiye warlords have "managed to get their families asylum overseas" (paragraph 155 above). Whilst we do not accept Dr Mullen's inference from this, that clan leaders can no longer be said to be interested in the fate of Mogadishu, his evidence on this matter is nevertheless significant and judicial fact-finders should bear it in mind in appeals involving Somalia.

351. Appellant H has failed to show a reasonable likelihood that she is without a home area to go to in Somalia, where she would have not only family but also fellow majority clan members to protect her. Even if she lacked a family, the evidence we have considered fails to show that, even in the circumstances in which Mogadishu has found itself in recent times, fellow clan-members would refuse to accept her, as a person returning from outside Somalia. Furthermore, as we have found, the clan support system, although undoubtedly strained by the movements of people on the scale seen last year, has not collapsed. Appellant H has failed to show a reasonable likelihood that, in the event of displacement in response to a security operation, she would be forced to deal with any unauthorised checkpoints in a way that would give rise to a real risk to her of serious harm or be compelled to take refuge in a place of danger, without the protection of majority clan members.

352. As a result of our findings, appellant H is not entitled to refugee status. Her removal in pursuance of the decision to deport her would not give rise to a real risk of her suffering article 3 ill-treatment or serious harm within the meaning of the domestic legislation implementing the Qualification Directive. Notwithstanding the fact that she would return to a city which is in a situation of armed conflict, she has failed to show that there are substantial grounds for believing that she would face a serious and individual threat to her life or person by reason of indiscriminate violence in the situation of that armed conflict. On the evidence, being a woman, without more, is not a sufficient differentiator to place her at such risk.

353. If and when directions are specifically made for the removal of appellant H, it might be open to her, depending on the situation then pertaining, to seek to persuade the Administrative Court that those directions cannot be put into effect without violating her rights under the ECHR. We are mindful of the observation in AG that the Tribunal might nevertheless be able to make what would in effect be *obiter* findings by reference to a hypothetical point of return; but, as we agreed with counsel at the outset of the hearing, it was not appropriate to attempt any detailed exercise in this regard. We would thus merely observe that, given the extent of appellant H's failure to make out her case, it is reasonable to assume that, in the event of removal directions being set, she would be able to contact relatives and/or friends in Mogadishu, who could make arrangements to meet her at the airport and travel with her to her home in Mogadishu. In the light of the evidence recorded at paragraph 301 above, we doubt whether a substantial militia escort would in practice be necessary.

354. As noted at paragraph 1 above, it is only appellant H's claim to be in need of international protection that affects the question of whether the respondent was entitled in law to decide to deport her. No article 8 case having been advanced, we find that appellant H's appeal must be dismissed since, absent human rights, there is nothing "exceptional" about her case in terms of paragraph 364 of the Immigration Rules. Indeed, no submission to the contrary was advanced.

Appellant S

355. As we have already noted, the respondent's position as regards appellant S is that, if we find that she is reasonably likely to be a member of the Sheikhal Jasira, appellant S is entitled to refugee status. We have already expressed the view that that concession does not easily fit with the totality of the evidence placed before us. Be that as it may, however, we have concluded that appellant S's claim to belong to that group is not reasonably likely to be true.

356. Although to some extent supported by Professor Lewis, the conclusion that appellant S was probably a Sheikhal Jasira comes from the reports of Dr Luling which, for the reasons we have given, cannot be accorded significant weight. Although both Professor Lewis and Dr Luling sought to support their conclusion on ethnicity by reference to appellant S's accent and general manner of speech, neither of them professes to be an expert on that particular issue. Appellant S rejected, for no

satisfactory reason, the respondent's proposal that she subject herself to linguistic analysis. In any event, in the light of our findings, based on the evidence of Dr Mullen, about the demographics of Jasira, the linguistic evidence of Professor Lewis and Dr Luling cannot be said to demonstrate that appellant S is reasonably likely to be a Sheikhal Jasira inhabitant of Jasira, as opposed to one of its Hawiye inhabitants.

357. The Tribunal agrees with the respondent's submission that appellant S's knowledge of her clan structure was not only inaccurate but differed as between the accounts given respectively to the respondent's screening officer and Dr Luling. Having heard appellant S, we do not accept the explanation proffered on her behalf by Mr Young for her error as to the sub-sub-clans (paragraph 204 above). Furthermore, our attention was not drawn to any evidence to show that female Somalis are, in general, less likely to know about their clans or groups than are males. In any event, appellant S was by her own account the daughter of an official in a religious court. Against this background, we do not believe that, during her formative years, she would have been unable to glean more than the "scrappy" knowledge identified by Dr Luling or, in our view, the inaccurate knowledge exposed by the respondent.

358. There is also the fact of the inconsistent evidence given by appellant S as to when she was first subjected to physical harm (paragraphs 17, 203 and 227 above). Appellant S's assertion that, although the militia attacked her, they did so in ways that would not leave marks because that might persuade her father to reappear at home is, in the circumstances, wholly unbelievable.

359. So too is appellant S's account of her alleged experiences in Saudi Arabia. How her husband, working long hours in a car wash, where he earned barely enough to support the family, could have purchased (whether gradually or otherwise) a significant amount of gold jewellery, worth a substantial sum, which appellant S used to fund in part her trip to the United Kingdom, is inexplicable. The motivation of appellant S's neighbour, who is not said to be from the same clan, in providing appellant S with an equal sum to that realised by the sale of the jewellery, is incredible, particularly in the light of the absence of evidence to show either that the woman in question was a member of the same clan as appellant S or that, if not, Somalis outside Somalia would be likely to act in so benevolent a manner towards those from other clans (paragraphs 19 to 22 above). That appellant S should, in circumstances described by her, see fit for the reasons she gave to leave one of her children in Somalia also defies belief, as does her lack of interest in the fate of her uncle, who had allegedly been responsible for her escape.

360. Then there is, of course, the issue of the demographic composition of Jasira. Dr Luling asserted, without reference to any source material, that the majority are Sheikhal Jasira. Dr Mullen, who, contrary to Mr Young's submission, did indeed say that he had been to Jasira, was clear that it was "basically Hawiye territory", with that clan being in the majority to the ratio of around 5:1. Not only does that evidence undermine a significant part of the evidence of Dr Luling; it also explains what is the

reality of appellant S's position, namely, that she is a Hawiye clan member from Jasira, who has been sent by her family (whether or not via Saudi Arabia) to seek asylum in the United Kingdom on a false basis. Appellant S is not to blame for Dr Luling's failure to point out that appellant S was not light-skinned; but her actual skin-colour is plainly not a factor that can advance her case.

361. We conclude that appellant S has not shown that she is reasonably likely to suffer persecution or other serious harm if returned to Somalia. She is not entitled to the grant of any status. No article 8 case was advanced before us. Her appeal is dismissed. The conclusions we have reached above regarding appellant H also apply to appellant S but, as regards the latter, we additionally find as follows.

362. Whether Jasira is, in geographical terms, to be described as just outside Mogadishu or part of its southern extension is, for present purposes, immaterial. In either case, there is an absence of evidence to show that the security position there has, during 2007, been bad; in particular, that there have been movements of civilians in response to attacks by the UIC or security operations of the TFG/Ethiopians. Through her father, appellant S has asserted a connection with Medina, a place which, according to Dr Mullen, was "quiet" (paragraph 182 above).

363. If and when the respondent sets removal directions for appellant S, it may be of relevance that, on the basis that she is a Hawiye from Jasira, the evidence of Dr Mullen shows that, as at November 2007, at least some of the airports serving Mogadishu were in territory controlled by the Hawiye (paragraph 154 above) and Jasira is near the international airport (paragraph 170 above). The airline executive interviewed by the BIA Mission described a situation in which one of the airports used for international traffic was as at April 2007 controlled by the TFG. It appears that appellant S would be able to travel from an airport to Jasira, without having to venture into central Mogadishu but, even if she had to do so, we make the same observations as regards her as we did in the case of appellant H at paragraph 353 above. Appellant S has not shown that she will be without family and clan member support in undertaking such a journey.

Appellant A

364. The respondent accepts that appellant A is an Ashraf. Apart from that, however, the respondent takes issue with the credibility of appellant A's claim. The Tribunal can understand why the respondent adopts this stance. Certain aspects of appellant A's evidence are, it has to be said, troubling. Although Mr Maka asked us to have regard, as a point in her favour, appellant A's means of delivering her oral evidence, we found her at times to be deliberately obtuse. Her apparent lack of interest in where her husband spent his time, once leaving the matrimonial home, is unbelievable. There was also no adequate explanation as to why her husband and her brothers were unable to live with appellant A and the other female members of the household. Her explanation for not going with her husband was unpersuasive (paragraphs 31 to 40 above).

365. That said, we have nevertheless concluded that the core of appellant A's account is reasonably likely to be true. Her evidence has been basically consistent. More particularly, the respondent has not taken issue with appellant A's ethnicity or that she and her family were subjected to harassment and, in appellant A's case, far worse. Appellant A bears the scar of a gunshot wound, which we accept occurred in the circumstances described by her (paragraph 28 above). Despite our reservations regarding certain aspects of appellant A's evidence, her production of a sketch map showing the immediate environs of her home, and her oral evidence in relation to it, were, we find, unfeigned. The map was detailed and appellant A spoke to it in a detailed but straightforward way.

366. So far as her time in the United Kingdom is concerned, we accept that appellant A's initial failure to seek to get in touch with her family in Somalia was caused by her inability to access the necessary assistance. In the circumstances, we accept that appellant A was told by a Somali woman originally from Shibiz, that this place had subsequently been at least seriously damaged and that the population had fled (paragraph 30 above).

367. On the basis of these specific findings of fact and of the general findings we have made, the Tribunal has concluded that appellant A's appeal falls to be allowed on asylum and human rights (article 3) grounds. Notwithstanding our general conclusions regarding the possibility of the Ashraf and other minority groups being able, in certain circumstances, to call on the protection of the majority clan with whom they are living, each such case remains highly fact-sensitive. In the present case, it cannot properly be said that appellant A and her family were so much a part of a dominant clan community as not to be at real risk, during the years preceding appellant A's departure from Somalia. The place in which the family home was situated appears to have been somewhat mixed, as far as clans are concerned. Although one particular Abgal family sought from time to time to drive off the militias who were, we find, persecuting appellant A and her family, their efforts were not particularly successful. Indeed, the life described by appellant A, which we accept is reasonably likely to be true, was a highly precarious one. Her past persecution and serious harm are, by reason of paragraph 339K of the Immigration Rules, a serious indication of appellant A's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such a persecution or serious harm will not be repeated.

368. On the basis of our general findings, no such reasons exist. Appellant A would be required to return to a home area which, some time ago, appears to have suffered mass population dispersal. At this point in time, it appears unlikely that appellant A's family in Somalia are discoverable by her. Given the nature of the community in which appellant A lived and the absence of evidence demonstrating a substantial connection with a majority clan community, it is not reasonably likely that, if returned to Mogadishu, appellant A will enjoy any degree of clan or other protection.

369. On our findings, appellant A has shown that, *following* return, she will be a lone Ashraf woman, with children, unable to call upon the support of any third party. In the absence of a protecting clan community, whether in Shibiz or elsewhere, appellant A will be particularly vulnerable to criminality. That vulnerability is a direct consequence of her minority status. That status is a sufficient differential factor for the purposes of the Refugee Convention and article 3 of the ECHR. Accordingly, as we have already indicated, appellant A's appeal is allowed on asylum and human rights grounds. In the light of our finding on refugee status, appellant A is not entitled to the grant of humanitarian protection (paragraph 339C(ii)(first) of the Immigration Rules).

General findings and conclusions

370. On the basis of the submissions we had in these appeals, the Tribunal's general findings and conclusions may be summarised as follows:

(1) In deciding whether an international or internal armed conflict exists for the purposes of paragraph 339C of the Immigration Rules and the Qualification Directive (but ***not*** for any wider purpose – see paragraph 312 above), the Tribunal will pay particular regard to the definitions to be found in the judgments of international tribunals concerned with international humanitarian law (such as the *Tadic* jurisdictional judgment). Those definitions are necessarily imprecise and the identification of a relevant armed conflict is predominantly a question of fact.

(2) It will in general be very difficult for a person to succeed in a claim to humanitarian protection *solely* by reference to paragraph 339C(iv) of the Immigration Rules and article 15(c) of the Directive, ie. without showing a real risk of ECHR article 2 or article 3 harm.

(3) Applying the definitions drawn from the *Tadic* jurisdictional judgment, for the purposes of paragraph 339C of the Immigration Rules and the Qualification Directive, on the evidence before us, an internal armed conflict exists in Mogadishu. The zone of conflict is confined to the city and international humanitarian law applies to the area controlled by the combatants, which comprises the city, its immediate environs and the TFG/Ethiopian supply base of Baidoa.

(4) A person is not at real risk of serious harm as defined in paragraph 339C by reason only of his or her presence in that zone or area.

(5) Neither the TFG/Ethiopians nor the UIC and its associates are targeting clans or groups for serious harm. Whilst both sides in the conflict have acted from time to time in such a way as to cause harm to civilians, they are not in general engaging in indiscriminate violence.

(6) Clan support networks in Mogadishu, though strained, have not collapsed. A person from a majority clan or whose background discloses a significant degree of

assimilation with or acceptance by a majority clan will in general be able to rely on that clan for support and assistance, including at times of displacement as a result of security operations, etc. Majority clans continue to have access to arms, albeit that their militias no longer control the city.

(7) A member of a minority clan or group who has no identifiable home area where such support as is mentioned in sub-paragraph (6) above can be found will 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 event (which is reasonably likely) of being displaced as described in sub-paragraph (6) above. That risk is directly attributable to the person's ethnicity and is a sufficient differential feature to engage the Refugee Convention, as well as article 3 of the ECHR and paragraph 339C/article 15(c) of the Qualification Directive (but for the first sub-paragraph (ii) of paragraph 339C).

(8) The evidence discloses no other relevant differentiating feature for the purposes of those Conventions and the Directive.

(9) The issue of whether a person from a minority clan or group falls within sub-paragraph (7) above will often need specific and detailed consideration.

(10) Subject to sub-paragraph (9) above, outside Mogadishu and its immediate environs, the position in southern Somalia is not significantly different from that analysed in NM.

(11) Air travel to and from Mogadishu has not been significantly interrupted; nor has the mobile telephone network in southern Somalia.

371. The Tribunal wishes to put on record that the cases of each of the parties to these appeals were conspicuously well argued and that the documentary evidence assembled by the representatives for the appellants and the respondent was well-presented and generally useful.

Signed Date: 22 January 2008

Senior Immigration Judge P R Lane

APPENDIX

LIST OF BACKGROUND MATERIALS BEFORE THE TRIBUNAL

Various dates	UN Security Council resolutions on Somalia
Various dates	Miscellaneous Hansard Extracts
October 1999	Tampere European Council Conclusions
1 March 2000	US State Department: *Somalia: profile of asylum claims and country conditions*
July 2000	Journal of Humanitarian Assistance: *International Law and internal armed conflict – clarifying the interplay between human rights and humanitarian protection,* Mark Freeman
1 December 2000	Joint British, Danish and Dutch Fact Finding Mission to Nairobi, Kenya: *Report on minority groups in Somalia*
June 2002	International Committee of the Red Cross: *The Law of Armed Conflict, Basic Knowledge.*
25 July 2002	Joint British, Danish and Dutch fact finding mission to Nairobi, Kenya and Baidoa and Belet Weyne Somalia: *Report on political, security and human rights development in Southern and Central Somalia, including South West of Somalia, and Puntland State of Somalia*
1 August 2002	Full OCHA report of 1 Aug 2002
30 June 2003	International Review of the Red Cross: *Towards a single definition of armed conflict in International Humanitarian law. A critique of Internationalised armed conflict No. 850, p313-350,* James G. Stewart
20 January 2004	UNHCR: *position on the Return of Rejected Asylum Seekers to Somalia*
25 February 2004	US State Department: *Country Reports on*

	Human Rights Practices 2003: Somalia
17 March 2004	Joint Danish, Finnish, Norwegian and British fact-finding mission to Nairobi, Kenya: *Human rights and Security in Central and Southern Somalia*
May 2004	Home Office Immigration and Nationality Directorate: *Operational Guidance Note: Somalia*
13 May 2004	IRIN News: *Death toll mounts as fighting in Mogadishu continues*
16-22 May 2004	United Kingdom Ministry OCHA: *Somalia - Humanitarian Update*
1 July 2004	United Kingdom Ministry of Defence: *The Manual of Armed Conflict*
8 July 2004	Medicins Sans Frontiers UK: *Not safe to return – MSF attacks Home Office's forcible return of failed asylum seekers to Mogadishu*
9 August 2004	Immigration and Refugee Board of Canada: *Somalia: The Situation of minority groups and their members*
October 2004	Home Office Immigration and Nationality Directorate: *Somali Country Report, October 2004, UK*
24 November 2004	IDP Project, Norwegian Refugee Council: *Internally displaced Somalis face uncertain future after years of state collapse*
May 2005	Refugee Studies Centre*: Revised version of paper presented at the Conference "How much freedom, security and justice? Developments in Eu Ayslum and Immigration Law "*Dr Maria-Teresa Gil-Bazo
30 June 2005	IBID: *Operational Guidance Note: Somalia*
November 2005	UNHCR: *UNHCR Advisory on the Return of Somali Nationals to Somalia*
21 November 2005	IBID: *Operational Guidance Note: Somalia*

5 May 2006	Border and Immigration Agency: *Operational Guidance Note: Somalia*
29 June 2006	US House of Representatives Committee on International Relations: *Joint Hearing: Somalia: Expanding Crisis in the Horn of Africa*
13 September 2006	Office of the United Nations High Commissioner for Human Rights: *Report of the Independent Expert, Mr Ghanim Alnajjar, on the situation of human rights in Somalia*
October 2006 – September 2007	SAACID – *Light Weapon Prices – Mogadishu*
27 October 2006	Border and Immigration Agency: *Operational Guidance Note: Somalia*
19 December 2006	Reuters: *UN reports growing food insecurity*
21 December 2006	BBC News: *Somali town on the brink of war*
23 December 2006	BBC News: *Somalia Islamists call for help*
25 December 2006	BBC News: *Ethiopia attacks Somalia airports*
1 January 2007	BBC News: *Somalia's sudden shift in power*
2 January 2007	BBC News: *Ethiopians to stay on in Somalia*
2 January 2007	BBC News: *Fragile peace fuels Somalia fears*
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