



# Assessment of the risk of refoulement under Article 3 of the European Convention of Human Rights in cases of persons returning to Somalia

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## Introduction

In 2013 the European Court of Human Rights (ECtHR) communicated to the Dutch Government several complaints against the Netherlands of Somali applicants who claim that their expulsion to their country of origin would violate Article 3 of the European Convention of Human Rights (ECHR).<sup>1</sup> In the context of these complaints the ECtHR referred questions to the Dutch Government on:

- the general and individual risk of treatment in breach with Article 3 ECHR upon return to Mogadishu;
- the risk of treatment in breach with Article 3 ECHR upon return to other parts of southern or central Somalia, including areas controlled by al-Shabaab, or while travelling through those areas;
- the existence of an internal flight alternative in Mogadishu or elsewhere in Somalia.

The Migration Law Clinic of the VU University Amsterdam conducted research on these questions resulting in this expert opinion, which addresses the following four topics:

### **1. Assessment of the Risk of *Refoulement* in Somali Asylum Cases**

This part deals with the criteria for risk assessment in Somali cases. In particular it explains how the risk factors test, which was endorsed by the ECtHR in the case *NA v UK*, can be applied in the Somali context.

### **2. The Internal Flight Alternative in the Context of Article 3 ECHR**

This part explains the legal criteria for applying an internal flight alternative. It argues that national authorities are required under Article 3 ECHR to assess the risk of *refoulement* upon return to the region of origin first, before applying an internal flight alternative. Also it contends that the national authorities should specify the region which is considered an internal flight alternative in each individual case.

### **3. Internally displaced persons camps in the context of Article 3 ECHR**

This part explains on the basis of which criteria the humanitarian situation in the camps for internally displaced persons (IDPs) in Somalia should be assessed in the light of Article 3 ECHR. It mentions the factors which make it likely that an individual will be compelled to live in an IDP camp upon return. Furthermore it specifically examines the situation of IDPs in Mogadishu.

### **4. Assessment of the Risk of *Refoulement* upon return to al-Shabaab territory**

This part examines returns to regions controlled by al-Shabaab in the light of Article 3 ECHR. It argues that persons who return to Somalia from the Netherlands will have severe difficulties to comply with al-Shabaab. Furthermore it is contended that requiring a returnee to comply with the rules of al-Shabaab rules would amount to inhuman or degrading treatment within the meaning of Article 3 ECHR.

In this introduction we will briefly explain the mission of the Migration Law Clinic and the legal sources and country of origin information researched for the purpose of these expert opinions.

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<sup>1</sup> See Application nos 70517/11, 17848/13, 18135/13, 20010/13, 20673/13, 29240/13, 29664/13, 29841/10, 30162/13, 30268/13, 32894/11, 71247/13.

### The Migration Law Clinic of the VU University

The Migration Law Clinic provides legal advice to lawyers and Non Governmental Organisations on complex legal questions of European asylum law. Top students in the last years of their study at the Law Faculty of the VU University carry out research and write legal advice at the Clinic. They are closely supervised by the staff of the Migration Law Section of this Faculty.

### Sources used for the expert opinion

This expert opinion is based on research of case-law of the ECtHR and other relevant legal sources, in particular the Refugee Convention, the EU Qualification Directive (2011/95/EU), the case law of the Court of Justice of the European Union (CJEU) and judgments of national courts. We are of the opinion that EU law as well as rulings of national courts provide a useful source of interpretation and legal reasoning that the ECtHR may find helpful regardless of the fact that it is not legally bound to follow these external sources.

### International law and EU law

In case of *Demir and Baykara* the ECtHR found that 'it has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein and that it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties'.<sup>2</sup> Furthermore, the ECtHR stated that it takes into account the international law background to the legal question before it since 'the common international law standards of European states reflect a reality that the ECtHR cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty'.<sup>3</sup> Both the Refugee Convention and the Qualification Directive are applicable in relations between a large number of Contracting Parties to the Council of Europe. The ECtHR also relied on the Refugee Convention in a few cases.<sup>4</sup>

In the case law of the ECtHR several examples can be found where EU legislation played a significant role. For instance, in the case of *MSS v Belgium and Greece* the ECtHR based its interpretation of Article 3 ECHR partly on the Reception Directive 2003/9/EC.<sup>5</sup> In the case of *Sufi and Elmi v UK* the ECtHR compared the level of protection under Article 3 ECHR with the level of protection under Article 15(c) of the Qualification Directive.<sup>6</sup>

### Judgments of national courts

Besides international sources, we have also looked into national jurisdictions, namely the UK and Germany. Whereas we use the judgments of the German Federal Administrative Court to find new ways of legal reasoning, UK country guidance cases are of particular importance when it comes to the assessment of real risk and factual background. Country guidance cases are UK asylum appeals in which the Asylum and Immigration Tribunal gives guidance for a particular country. Due to the assumption that the best possible evidence has been gathered in order to provide a country-wide ruling, the UK

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<sup>2</sup> ECtHR (GC) 12 November 2008, *Demir and Baykara v Turkey*, Appl no 34503/97, para 67.

<sup>3</sup> Ibid, para 76.

<sup>4</sup> See for example ECtHR (GC) 28 February 2006 *Z and T v the United Kingdom*, Appl no 27034/05.

<sup>5</sup> ECtHR 21 January 2011, *MSS v Belgium and Greece*, Appl no 30696/09, paras 250 and 263.

<sup>6</sup> ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, Appl nos 8319/07 and 11449/07, paras 225-226.

courts are not free to disregard country guidance cases which remain authoritative until they are set aside on appeal or replaced by a subsequent country guidance determination.<sup>7</sup>

Although the ECtHR is in no way bound to follow decisions of the national courts, it has drawn conclusions on factual findings in country guidance cases on many occasions.<sup>8</sup> Operational Guidance Notes are also commonly taken into account even in cases where the UK is not the respondent state.<sup>9</sup> Moreover legal approaches developed by the UK courts in country guidance cases are often endorsed by the ECtHR.<sup>10</sup>

#### *Country of origin information*

While writing this expert opinion we also relied on country of origin information. We mostly used the reports which are relied on by the ECtHR itself,<sup>11</sup> such as United Kingdom Government Reports, United Nations Reports, United States of America Department of State Reports, reports of the Dutch Ministry of Foreign Affairs and Non-Governmental Organisations' reports, such as Amnesty International and Human Rights Watch. We used the most recent information to provide a factual background and an analysis of the current situation in Somalia. We considered this factual background and analysis of the current situation in answering the questions at hand.

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<sup>7</sup> *SG (Iraq) v Secretary of State for the Home Department* [2012] EWCA Civ 940, para 67.

<sup>8</sup> See for example ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, Appl nos 8319/07 and 11449.

<sup>9</sup> See for example ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, Appl no 1948/04, para 50.

<sup>10</sup> See for example ECtHR 17 July 2008, *NA v UK*, Appl no 2590407, para 129.

<sup>11</sup> See for example *Ibid*, paras 57-80.

# 1 Assessment of the Risk of *Refoulement* in Somali Asylum Cases

## 1.1 Introduction

Somali nationals may be sent back to their region of origin or to a region which is considered an internal flight alternative. In both situations it should be assessed whether an individual risks treatment in breach of Article 3 ECHR in that particular region or while travelling through Somalia to reach that region. This part of the expert opinion will deal with risk assessment in Somali cases in general as well as in the situation of return to three specific regions: Mogadishu, Puntland and Somaliland, and regions controlled by al-Shabaab. This part of the expert opinion is therefore relevant to all cases of persons who are going to be returned to any of these regions. We have decided to address the individual risks of returnees to these three regions in more detail as under the current case-law the general situation in Mogadishu, Puntland and Somaliland does not lead to the breach of Article 3 on its own.<sup>12</sup> Similarly, the areas controlled by al-Shabaab were held to expose the lowest levels of generalised violence while having the worst human-rights conditions.<sup>13</sup> It follows that risk factors are of a particular importance for the applicants who face return to these regions since their risk does not stem from the general situation of violence. On the contrary, their risk must be substantiated on the basis of group or individual features which we try to identify as specific risk factors. Other parts of southern and central Somalia are addressed in Part 3 of this expert opinion.

Section 1.2 will discuss the criteria for risk assessment (general risk, risk for specific vulnerable groups and individual risk) which follow from the case law of the ECtHR. We deem the risk factor test as developed by the UK courts and endorsed by the ECtHR in its judgment in *NA v UK* of particular relevance for Somali cases. Therefore this risk factor test will be explained in section 1.3. In section 1.4 risk factors will be identified for three specific regions of Somalia: Mogadishu, Puntland and Somaliland and regions controlled by al-Shabaab. This is followed by a conclusion in section 1.5.

Parts 2-4 of this expert opinion will go into further detail with regard to the risk assessment in a situation in which a person will be sent to an internal flight alternative (Part 2), (risks to) end up in a camp for internal displaced persons (Part 3) or should travel through or return to a region controlled by al-Shabaab (Part 4).

## 1.2 Risk assessment

There are three possible arguments that may substantiate an applicant's real risk of ill-treatment. Article 3 ECHR may be breached as a result of the *general situation of violence*, or *special distinguishing features* which can arise from returnee's membership of a particular *vulnerable group* or *his individual position*. All three possibilities are elaborated below.

### 1.2.1 Situation of general violence

As a result of the ever-changing state of affairs in Somalia it is not possible to assess on a more permanent basis which areas of Somalia exhibit such a level of violence as to expose everyone present

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<sup>12</sup> See respectively ECtHR 5 September 2013, *KAB v Sweden*, Appl no 886/11, para 91 and ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, Appl no 1948/04, paras 139-143.

<sup>13</sup> ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, Appl nos 8319/07 and 11449/07, para 272.

there to the treatment contrary to Article 3 ECHR.<sup>14</sup> Nevertheless, the ECtHR laid down guidance as to the circumstances it would take into account when assessing the situation of general violence in a specific location. The following non-exhaustive list of considerations can be drawn:

1. whether the parties to the conflict employ methods and tactics of warfare which increase the risk of civilian casualties or are directly targeted at civilians;
2. whether the use of such methods or tactics is widespread among the parties to the conflict;
3. whether the fighting is localised or widespread; and
4. the number of civilians killed, injured and displaced as a result of the fighting.<sup>15</sup>

The ECtHR also remarked that the possibility of well-connected individuals obtaining protection even in the situation of general violence is not excluded.<sup>16</sup> If the Court is not convinced that the general situation of violence is present in the proposed region (be it a home region of an applicant or an internal flight alternative), it will turn to the assessment of the real risk on the individual basis. The applicant's personal situation comprising of his membership of a vulnerable group as well as his individual distinguishing features will be considered.<sup>17</sup> It should be remarked that different individual features and risk factors may be relevant in different situations especially when a state seeks to expel a returnee to parts of Somalia other than Mogadishu.

### 1.2.2 Vulnerable groups

Forasmuch as the ECtHR tends to classify the situation in a certain region as one of general violence only in the most extreme cases, where there is a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return,<sup>18</sup> the concept of vulnerable groups has been developed to deal with Article 3 cases on an individual basis. Vulnerable groups are groups systematically exposed to a practice of ill-treatment.<sup>19</sup> The protection under Article 3 enters into play when an applicant establishes the existence of a practice amounting to ill-treatment as well as their membership of the group thus ill-treated.<sup>20</sup> Moreover, the ECtHR will not insist that the applicant shows individual distinguishing features if their membership of a group and the group's vulnerability are both established.<sup>21</sup>

Taking into account the aforesaid, we conclude that the following groups in Somalia may be considered a vulnerable group systematically exposed to treatment contrary to Article 3 ECHR:

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<sup>14</sup> See inconsistency in case-law and subsequent reports: ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, Appl nos 8319/07 and 11449/07, ECtHR 5 September 2013 *KAB v Sweden*, Appl no 886/11 and Amnesty International, *Mogadishu cannot qualify as an Internal Flight Alternative* (September 2013) [www.refworld.org/docid/524574664.html](http://www.refworld.org/docid/524574664.html) accessed 26 February 2014.

<sup>15</sup> ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, Appl nos 8319/07 and 11449/07, para 241.

<sup>16</sup> Ibid, paras 249-250.

<sup>17</sup> ECtHR 5 September 2013, *KAB v Sweden*, Appl no 886/11, paras 91-96.

<sup>18</sup> ECtHR 17 July 2008, *NA v UK*, Appl no 2590407, para 115.

<sup>19</sup> Ibid, para 116.

<sup>20</sup> Ibid.

<sup>21</sup> ECtHR 17 July 2008, *NA v UK*, Appl no 2590407, para 116, and ECtHR 11 January 2007 *Salah Sheekh v the Netherlands*, Appl no 1948/04, para 148.



### *1. Persons belonging to ethnic minorities*

The ECtHR has held in *Salah Sheekh v the Netherlands* that members of an ethnic minority were exposed to a real risk of ill-treatment without any other individual distinguishing features being required.<sup>22</sup> This vulnerable group is dealt with in more detail in section 1.4.1 of the expert opinion.

### *2. Internally displaced persons*

Were an applicant to fail to gain admittance into an internal flight alternative (IFA) proposed by an expelling state, he would be likely to end up in camps for internally displaced persons.<sup>23</sup> The circumstances in those camps are accorded special attention in Part 3 of this expert opinion. For the time being, internally displaced people may be potentially classified as a vulnerable group.

### *3. Returnees travelling through al-Shabaab areas*

Returnees who will have to travel through or settle in areas controlled by al-Shabaab may face ill-treatment on account of their westernised behaviour.<sup>24</sup> The issues related to al-Shabaab areas are discussed in Part 4 of our expert opinion. Once again, the returnees travelling through or settling in al-Shabaab controlled areas may form a potential vulnerable group.

However, the ECtHR also held that in cases of a group being at *a mere possibility* of ill-treatment, some individual distinguishing features will need to be shown to distinguish a particular applicant from other members of a group.<sup>25</sup> Upon such distinction, an applicant's mere possibility would reach the standard of real risk. Although, this reasoning was not followed in Somali applications where an applicant coming from a vulnerable group was not required to show any individual distinguishing features,<sup>26</sup> we deem it important to mention individual distinguishing features that may nevertheless be insisted on in order to trigger protection under Article 3 ECHR.

## **1.2.3 Individual distinguishing features**

The ECtHR has held that in the absence of both a general situation of violence and a risk stemming from one's membership of a vulnerable group, individual distinguishing features are required to materialise the applicant's risk.<sup>27</sup> However, the general situation in the region that falls short of a general violence, as well as the applicant's membership of a group which falls short of being vulnerable, will be nevertheless considered in connection with the applicant's individual features. For the risk to materialise, the number of individual distinguishing features is not relevant. However, it has been held that in the situation of a lower level of general violence, the applicant should be able to show that he is more affected by reason of his individual features and position.<sup>28</sup> In other words, the situation of general violence and the applicant's personal characteristics (including both his membership of a vulnerable group and individual position) work in inverse proportionality. Individual distinguishing features as recognised by the ECtHR are addressed more specifically in section 1.3.2 of the expert opinion.

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<sup>22</sup> ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, Appl no 1948/04, para 148.

<sup>23</sup> Ibid, para 284.

<sup>24</sup> Ibid, para 272.

<sup>25</sup> ECtHR 30 October 1991, *Vilvarajah and Others v UK*, Appl nos 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, paras 111-112.

<sup>26</sup> ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, Appl no 1948/04, para 148.

<sup>27</sup> ECtHR 5 September 2013, *KAB v Sweden*, Appl no 886/11, paras 91-96.

<sup>28</sup> See also CJEU Case C-465/07 *Elgafaji v Staatssecretaris van Justitie* [2009], para 39.

### 1.3 Risk factors test

The UK Asylum and Migration Tribunal has developed a risk factors test based on twelve principal risk factors in a country guidance case concerning Sri Lanka.<sup>29</sup> This test was endorsed by the ECtHR as a useful tool for the assessment of individual risk stemming from the membership of a vulnerable group or individual distinguishing features.<sup>30</sup> The risk factors test seeks to address the risk a returnee is to face upon his return by means of identifying certain qualities and conditions which may be presumed to increase one's individual risk. Although a single self-standing factor may not render the risk real, an accumulation of certain factors can cause returnee's risk of ill-treatment to materialise. The UK Tribunal provided no guidance as to how many factors can be presumed to substantiate the applicant's claim. Therefore, we are of the opinion that it is not the *number* of risk factors but the *causal link* between some of them which should be looked at. In this section we will briefly outline the risk factors approach using certain factors adopted in the Sri Lankan country guidance case as an example. Thereupon we will look into the judgments of the ECtHR in order to identify a similar attitude in its case-law. We will also explain the slight difference between what the UK Tribunal calls a risk factor and what the ECtHR titles an individual distinguishing feature. We conclude this first part of the expert opinion with a list of risk factors relevant to some areas in Somalia combining the reasoning of the UK Tribunal and factual information from various country of origin reports. We see the value of the risk-factor test in establishing a legal framework for assessment of a real risk in Somali cases on the basis of a *causal connection* between various self-standing features and circumstances, which may not otherwise materialise an applicant's risk when taken on their own.

#### 1.3.1 The risk factors test as applied by the UK courts

Whether or not a certain factor may contribute to the totality of risk assessment is profoundly based on the destination to which a returnee is to be removed, its political order and cultural context. In Sri Lanka, Tamil ethnicity was held to be a risk factor since Tamils were commonly suspected of being supporters of Liberation Tigers of Tamil Eelam (LTTE), a separatist militant organisation targeted by the Government.<sup>31</sup> Recorded evidence of being an actual or suspected LTTE member or supporter, previous criminal record or arrest warrant, bail jumping and confession were all held to contribute to the real risk of ill-treatment since the records were indeed kept by the Sri Lankan authorities and returnees were habitually interviewed at airports.<sup>32</sup> Presence of scarring was recognised as a risk factor forasmuch as Sri Lankan authorities were known to perceive scars as indication of training by LTTE or participation in active warfare.<sup>33</sup> In addition, the authorities employed the practice of strip searches of suspected Tamil LTTE supporters at the airport or in detention.<sup>34</sup> Such searches would indisputably reveal the scars and increase a returnee's risk of being ill-treated. Presence of scarring as a risk factor is a good example of a causal link that the risk-factor test is profoundly based on. Indeed scars would not have posed any risk to a returnee if they had been considered outside of the Sri Lankan context. However, the fact that LTTE

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<sup>29</sup> LP (*LTTE area – Tamils – Colombo – risk?*) *Sri Lanka v Secretary of State for the Home Department* CG [2007] UKAIT 00076, para 161.

<sup>30</sup> ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, Appl no 1948/04, para 129.

<sup>31</sup> LP (*LTTE area – Tamils – Colombo – risk?*) *Sri Lanka v Secretary of State for the Home Department* CG [2007] UKAIT 00076, para 207.

<sup>32</sup> Ibid, paras 209-216.

<sup>33</sup> Ibid, para 217.

<sup>34</sup> Ibid, para.217.

training might leave a person scarred combined with the established practice of strip searches *caused* the presence of scarring on an applicant's body to contribute to the totality of risk assessment. None of the said factual or contextual circumstances, scars on one's body, training resulting in the presence of scarring, or practice of strip searches, would have been sufficient to increase an applicant's risk of ill-treatment when taken on its own. The *causal link* between them was necessary for the presence of scarring to be classified as a risk factor. From this account it becomes clear that risk factors are closely connected to the very circumstances of a particular country. It follows that we will only adopt the approach developed by the UK Tribunal not the factors themselves when assessing the risk factors relevant in Somali context.

### 1.3.2 The approach of the ECtHR

In *NA v UK*, the ECtHR endorsed the risk-factor test and applied it as developed by the UK Tribunal with only one caveat that the risk-factor test should not be considered to comprise an exhaustive list of risk factors.<sup>35</sup> It is open to question whether the ECtHR's approach in other cases can be seen as a replica of the risk-factor test. It is the identification of individual distinguishing features and vulnerable groups commonly employed in the ECtHR's case-law that comes closest to the risk-factor test. The main difference between the risk-factor test and the ECtHR's assessment of personal circumstances rests with the matter that the respective tests focus on. In relation to the former, we have seen that the UK Tribunal has paid paramount attention to the *causal link* between certain factual or contextual circumstances that may seem irrelevant for the risk assessment when separated from each other. In relation to the latter, the ECtHR has held that the assessment based on the applicant's personal circumstances must focus on the *foreseeable consequences* of their removal to the country of destination.<sup>36</sup> While the focus on the foreseeable consequences is indisputably a good tool for assessing an individual risk, there is a danger that certain features get lost in the assessment that takes into account mainly the consequential result of one's return. Such features can, however, be revealed in the chain of causation which may, as the risk-factor test has shown, be triggered by such a negligible personal feature as scars.

Although the ECtHR has never called its approach a risk-factor test, it has indeed used certain risk factors as well as applied the causal link between the respective features identified in its reasoning. For example, in *NK v France*, the ECtHR drew a causal connection between previous ill-treatment, an arrest warrant and the applicant's conversion to Ahmadiyya religion. An arrest warrant effectively showed that the authorities were aware of the applicant's membership of a group of Ahmadiyya converts while the previous ill-treatment substantiated the real risk of such treatment being repeated.<sup>37</sup> The applicant's membership of a group of Ahmadiyya converts would not have materialised his risk of ill-treatment without an arrest warrant causing his conversion to come to the attention of the authorities. It follows that even though the ECtHR's reasoning is worded in terms of foreseeable consequences, the ECtHR itself tends to look at the chain of causation that a respective factor can launch.

Hereinafter we outline some examples of individual distinguishing features that overlap with risk factors:

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<sup>35</sup> ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, Appl no 1948/04, paras 129-130.

<sup>36</sup> ECtHR 30 October 1991, *Vilvarajah and Others v UK*, Appl nos 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, para 108.

<sup>37</sup> ECtHR 19 December 2013, *NK v France*, Appl no 7974/11, para 46.

### *Past ill-treatment*

In *RC v Sweden* the ECtHR held that a risk of being subjected to torture became real once the applicant credibly proved that he had been tortured before.<sup>38</sup> Moreover, in doing so, the applicant was deemed to have discharged the burden of proving the previous ill-treatment and the onus fell on the State to dispel any doubts about the risk of his being subjected to torture upon his return.<sup>39</sup> Past ill-treatment was also recognised as a factor substantiating the real risk of ill-treatment in *Salah Sheekh* where the ECtHR added that, in the absence of indication that the situation in the country of origin had undergone a significant change, past ill-treatment generates a presumption that an applicant would be subjected to the same kind of treatment anew.<sup>40</sup>

### *Presence of scarring*

Presence of scarring as evidence of past ill-treatment or applicant's membership in opposition organisation was given prominent weight in *I v Sweden*.<sup>41</sup> It was held that local law-enforcement officials would have a chance to reveal applicant's scars during detention or interrogation.<sup>42</sup> Scars are therefore recognised as a risk factor once it is credibly established that they will be revealed to the authorities who in turn are likely to see them as indication of applicant's past active involvement in an organisation whose members currently face persecution.<sup>43</sup>

### *Illegal entry or exit*

In *RC v Sweden*, the ECtHR held that Iranians would face a specific risk upon their return to Iran if they were unable to produce evidence of their legal departure from the country.<sup>44</sup> The legality of their departure was to be scrutinised and verified and their past likely to be revealed in such verification which may increase the risk a returnee faces in his country of origin.

### *Contact by the sending State with the authorities of the country of origin*

In *FN v Sweden*, the ECtHR held that the fact that Sweden had contacted the Uzbek authorities in order to have travel documents issued for an applicant drew the authorities' attention to the applicant.<sup>45</sup> Having provided the authorities of the country of origin with substantial information (birth certificate, photos, and employment books) about applicant's history and stay abroad, Sweden effectively increased his real risk of ill-treatment by alerting Uzbek authorities to the possibility of his return.

### *Previous criminal charge*

In the totality of risk assessment, the ECtHR also took into account the fact that an applicant had been charged with a criminal offence in his country of origin.<sup>46</sup> This risk factor adds to the real risk of ill-treatment especially if the applicant is likely to be detained and subjected to ill-treatment on the basis of his criminal charge.

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<sup>38</sup> ECtHR 9 March 2010, *RC v Sweden*, Appl no 41827/07, para 55.

<sup>39</sup> Ibid.

<sup>40</sup> ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, Appl no 1948/04, paras 146-147.

<sup>41</sup> ECtHR 5 September 2013, *I v Sweden*, Appl no 61204/09, paras 67-69.

<sup>42</sup> Ibid, para 68.

<sup>43</sup> ECtHR 17 July 2008, *NA v UK*, Appl no 2590407, para 143.

<sup>44</sup> ECtHR 9 March 2010, *RC v Sweden* Appl no 41827/07, para 56.

<sup>45</sup> ECtHR 18 December 2013, *FN and others v Sweden*, Appl no 28774/09, paras 74-76.

<sup>46</sup> ECtHR 25 April 2013, *Savridin Dzhrayev v Russia*, Appl no 71386/10, para 170, ECtHR 11 July 2000, *Jabari v Turkey*, Appl no 40035/98, paras 40-42, ECtHR 8 November 2005, *Bader and Kanbor v Sweden*, Appl no 13284/04, paras 44-48 and ECtHR 22 June 2006, *D v Turkey*, Appl no 24245/03, paras 47-48.

### *Family members in opposition groups*

The ECtHR has also pronounced itself on the position of family members of political opponents who participated in opposition groups. It held that such family members might also be at risk of persecution purely on account of their association with a person whose membership in an opposition group is known to the authorities of the country of origin.<sup>47</sup>

## **1.4 Risk factors in the context of Somalia**

In this section we will discuss which risk factors apply in the Somali context and specifically in Mogadishu, Somaliland and Puntland, and regions controlled by al-Shabaab. Forasmuch as the assessment of a risk on the basis of risk factors creates a chain of causation, it is inherently future-oriented. Therefore, the risk factors identified hereafter should be used in future assessment of the circumstances of a particular applicant as if he was to be returned to Somalia. With respect to each area we will address vulnerable individuals and targeted individuals. Moreover, we will look at targeted places because even in the absence of general situation of violence, certain groups of people may be at a real risk of ill-treatment simply because they have to spend more time at the targeted places than others. This approach was pioneered by the German Federal Administrative Court in 2010. This Court held that in cases of a lower level of indiscriminate violence, the applicant's profession, religion or ethnic affiliation may materialise a risk for a particular civilian forasmuch as they force him to spend more time near the source of danger.<sup>48</sup> It follows that at first, we have to identify some of the most commonly targeted places. As such taking up a residence at these places exposes a returnee to a risk of ill-treatment. Thereafter we will try to exemplify which types of profession expose a returnee to a greater risk of ill-treatment by virtue of his physical proximity to the targeted places. First of all however we will contend that the fact that a person belongs to a minority clan should be considered a risk factor in all parts of Somalia.

### **1.4.1 Ethnicity as a risk factor for the whole of Somalia**

Similarly to the Sri Lankan case,<sup>49</sup> ethnicity is a good starting point in Somali context forasmuch as weak clans and some minority groups can be indeed considered vulnerable.<sup>50</sup> Knowledge of where the applicant comes from in Somalia, where they have grown up, their age and gender all fall under this heading.<sup>51</sup>

The only minority group recognised as vulnerable in the ECtHR case-law is the Benadiri (Reer Hamar), with the Ashraf as its subgroup.<sup>52</sup> ECtHR provided certain guidelines as to the identification of minority groups and weak clans. It held that a minority clan or group with no armed forces and without protection provided by a majority clan is likely to be deemed vulnerable. It follows that there are two

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<sup>47</sup> ECtHR 2 September 2010, *YP and LP v France*, Appl no 32476/06.

<sup>48</sup> BVerwG 27 April 2010, C4.29 VGH 8 A 611/08.A, para 33.

<sup>49</sup> *LP (LTTE area – Tamils – Colombo – risk?) Sri Lanka v Secretary of State for the Home Department* CG [2007] UKAIT 00076.

<sup>50</sup> Land Info (Norway), *Somalia: Vulnerability – minority groups, weak clans and vulnerable individuals* (June 2009) [www.landinfo.no/asset/1059/1/1059\\_1.pdf](http://www.landinfo.no/asset/1059/1/1059_1.pdf) accessed 26 February 2014.

<sup>51</sup> *LP (LTTE area – Tamils – Colombo – risk?) Sri Lanka v Secretary of State for the Home Department* CG [2007] UKAIT 00076, para 207.

<sup>52</sup> ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, Appl no 1948/04, para 140.

aspects the ECtHR will look at – the *minority* presence of a group in a particular location and the *protection* it has from the majority clan.

For the minority groups in Somalia we refer to the table included in Annex I of this expert opinion. Since the Ashraf group – which has already been held vulnerable – is listed in this table of minority groups, by analogy, the other groups may be presumed to deserve the same recognition by courts. With regard to the possibility of protection by a majority clan in an alternative location, we submit the following observations:

1. Forasmuch as the clan's ability to provide protection is contingent on its military strength, only clans with strong militaries may provide effective protection.<sup>53</sup>
2. Since al-Shabaab and other Islamist group are based on ideological grounds and as such transcend clan structure, the protection in al-Shabaab areas is not realistic (also on account of the fact that dominant clans in many district are subordinate to al-Shabaab).<sup>54</sup>
3. In the general situation of violence, the protection element is irrelevant, as clans cannot protect an individual from random violence.<sup>55</sup>

Whereas ethnicity is a factor to be considered in every Somali case, there are certain risk factors that are more limited to a particular area. Therefore, we have decided to divide other risk factors into three separate groups – Mogadishu, Somaliland and Puntland and al-Shabaab areas. In each group, vulnerable individuals, targeted people and targeted places will be identified.

#### **1.4.2 Risk factors - Mogadishu**

In September 2013 the ECtHR held in *KAB v Sweden* that the situation in Mogadishu no longer amounted to general violence. The ruling was based on the fact that al-Shabaab was no longer in power in the city and there was no front-line fighting or shelling.<sup>56</sup> The majority ruling was criticised in a dissenting opinion for its disregard of the ECtHR's own well-established principles.<sup>57</sup> Since the assessment of the existence of a risk should be a rigorous one, the majority's failure to take into account the massive displacement of persons and unpredictability of the still volatile situation in Mogadishu rendered the decision flawed in the eyes of minority.<sup>58</sup> It is not our aim in this Expert Opinion to reassess the general situation in the capital. We merely point out that even the Chamber was divided over the ruling that departed from the ECtHR's previous ruling in *Sufi and Elmi*. However, we stress that the ruling did not exclude the possibility of a real risk arising from individual's membership of a vulnerable group or their distinguishing features. In relation to Mogadishu being considered an IFA, the UNHCR report of September 2013 stated that return to the capital would be reasonable only where the individual could benefit from the family support and clan protection.<sup>59</sup> Moreover it was suggested that a social network is required for a returnee to survive especially if they qualify as vulnerable individuals (see below in this

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<sup>53</sup> Land Info (Norway), *Somalia: Protection and conflict resolution mechanisms* (June 2009) [www.landinfo.no/asset/1058/1/1058\\_1.pdf](http://www.landinfo.no/asset/1058/1/1058_1.pdf) accessed 26 February 2014.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> ECtHR 5 September 2013, *KAB v Sweden*, Appl no 886/11, para 91.

<sup>57</sup> Ibid, Dissenting Opinion of Judge Power-Forde joined by Judge Zupančič.

<sup>58</sup> Ibid.

<sup>59</sup> UNCHR, *Reply by the United Nations High Commissioner for Refugees in response to request for guidance on the application of the internal flight or relocation alternative, particularly in respect of Mogadishu, Somalia* (September 2013) [www.refworld.org/pdfid/524400964.pdf](http://www.refworld.org/pdfid/524400964.pdf) accessed 26 February 2014, para 28.

section). In 2014, the UNHCR have maintained their previous position stating that the security situation in Mogadishu remains volatile despite reports indicating that the city is under control of the Transitional Federal Government (TFG).<sup>60</sup> Amnesty International added that the situation had deteriorated especially as a result of limited government control and the fact that al-Shabaab was still significantly present in the city.<sup>61</sup> This obvious disaccord, present not only within the Chamber but also in subsequent reports, leads us to conclude that the situation in the capital is not clear-cut at all. We believe that the risk factors approach may help the ECtHR assess personal circumstances in every case in order to determine which applicants will indeed run the real risk to be exposed to violence in Mogadishu.

#### Vulnerable individuals

There are certain self-evident groups of individuals whose vulnerability is rarely disputed. They can be summarised as follows:

- unaccompanied children;
- adolescents at risk of forced recruitment;
- people with physical and mental disabilities; and
- elderly people.<sup>62</sup>

The ECtHR itself acknowledged that the presence of family members and clan protection are prerequisites for gaining admittance to and being able to settle in Somaliland when returned to as an IFA.<sup>63</sup> By analogy, the same conditions also attach to returns to Mogadishu when it is the applicants' IFA. However, there are several good reasons why the presence of family members should also be required when Somalis who originate from Mogadishu are returned there. Although traditional clan protection is no longer effective in the modern urban environment of Mogadishu, the nuclear family has been said to be the main protection mechanism.<sup>64</sup> In November 2013, Ahmed Said, originally from Mogadishu was returned to the capital despite having no family connections there and no place to reside in. Only three days after his return on 8 November he was injured in a suicide attack.<sup>65</sup> This example shows that the family members are of paramount importance for every returnee since they provide the necessary knowledge regarding the local area – for instance which places are dangerous and to be avoided. It follows that all returnees coming to Mogadishu who do not have family connections there are vulnerable regardless of whether Mogadishu is their home region or IFA (see also section 3.5).

Sexual and gender-based violence (SGBV) increased almost fourfold in 2011 and two and a half times from July to December 2012.<sup>66</sup> Many SGBV crimes are committed by Somali National Armed

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<sup>60</sup> UNCHR, *International Protection with Regards to people fleeing Southern and Central Somalia* (January 2014) [www.refworld.org/pdfid/52d7fc5f4.pdf](http://www.refworld.org/pdfid/52d7fc5f4.pdf) accessed 26 February 2014, para 2.

<sup>61</sup> Amnesty International, *Mogadishu cannot qualify as an Internal Flight Alternative* (September 2013).

<sup>62</sup> UNCHR, *Reply by the United Nations High Commissioner for Refugees in response to request for guidance on the application of the internal flight or relocation alternative, particularly in respect of Mogadishu, Somalia* (September 2013), para 21.

<sup>63</sup> ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, Appl no 1948/04, para 139.

<sup>64</sup> UNCHR, *International Protection with Regards to people fleeing Southern and Central Somalia* (January 2014), para 8.

<sup>65</sup> Amnesty International *Delivered by the Netherlands into the clutches of a suicide bomber in Somalia* (29 November 2013) [www.amnesty.org/en/news/delivered-netherlands-clutches-suicide-bomber-somalia-2013-11-29](http://www.amnesty.org/en/news/delivered-netherlands-clutches-suicide-bomber-somalia-2013-11-29) accessed 13 January 2014.

<sup>66</sup> Danish Immigration Service and Landinfo (Norway), *Security and protection in Mogadishu and South-Central Somalia. Danish and Norwegian fact finding mission to Nairobi and Mogadishu, April and May 2013* (8 May 2013)

Forces (SNAF) and allied militias most commonly in newly recovered areas.<sup>67</sup> The most common victims are internally displaced women from minority clans.<sup>68</sup> **Female heads of household, single and lone females**<sup>69</sup> with no access to nuclear family and clan protection run a higher risk of ill-treatment.<sup>70</sup>

#### Targeted people

Although many casualties are a side result of randomised attacks rather than a deliberate killing of civilians, there are also categories of targeted people.<sup>71</sup> Several targeted killings and unknown killings with unclear motives occur in Mogadishu every week.<sup>72</sup> UNHCR points out that even when a specific individual is targeted, the number of civilian casualties unrelated to the targeted individual is often high.<sup>73</sup> On the basis of UNHCR's considerations we contend that the risk may increase not only for those who qualify for any of these categories but also for those who are associated with targeted people, suspected of supporting them, or are forced to remain in physical proximity to the targeted individuals as a result of their affiliation, profession or residence. If a person falls within a category of targeted people, they do not need any other risk factors for their risk to materialise – indeed being targeted can be seen as an individual distinguishing feature that in itself triggers the protection under Article 3 ECHR. Finally, association with or proximity to a targeted person put **family members, bodyguards, drivers or other personnel** or **members of the household** at a risk of falling victim to an attack.<sup>74</sup>

Al-Shabaab most commonly targets their **former members** who have deserted.<sup>75</sup> A lot of weight should be given to this risk factor especially in cases of initial forced recruitment. **People suspected of spying on al-Shabaab for the Government** are also commonly targeted regardless of the credibility or otherwise of such suspicion.<sup>76</sup> Furthermore **government officials** are common victims of targeted attacks.<sup>77</sup> **Business people working with or for the Government** are targeted several times a week<sup>78</sup> as well as those perceived as **government affiliates**.<sup>79</sup> **People associated with the Government or African Union Mission in Somalia (AMISOM)** can also fall a victim to an attack. Such association can originate from just running a small shop near a government office.<sup>80</sup>

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[www.nyidanmark.dk/NR/rdonlyres/6F1A29C6-2F84-40D2-BDE4-42F69897EEC3/0/security\\_and\\_protection\\_in\\_somalia\\_may\\_2013.pdf](http://www.nyidanmark.dk/NR/rdonlyres/6F1A29C6-2F84-40D2-BDE4-42F69897EEC3/0/security_and_protection_in_somalia_may_2013.pdf) accessed 26 February 2014, p 17.

<sup>67</sup> Ibid, p 17-18.

<sup>68</sup> Ibid, p 18.

<sup>69</sup> *AMM, MW, ZF, FM, AF v The Secretary of State for the Home Department* [2011] UKUT 00445 (IAC), paras 216 ff.

<sup>70</sup> Danish Immigration Service and Landinfo (Norway), *Security and protection in Mogadishu and South-Central Somalia. Danish and Norwegian fact finding mission to Nairobi and Mogadishu. April and May 2013* (8 May 2013), p 18.

<sup>71</sup> Ibid, p 11.

<sup>72</sup> Ibid, p 12.

<sup>73</sup> UNCHR, *International Protection with Regards to people fleeing Southern and Central Somalia* (January 2014), para 5.

<sup>74</sup> Ibid.

<sup>75</sup> Danish Immigration Service and Landinfo (Norway), *Security and protection in Mogadishu and South-Central Somalia. Danish and Norwegian fact finding mission to Nairobi and Mogadishu. April and May 2013*. (8 May 2013), p 13.

<sup>76</sup> Ibid, pp 6-7, and UNCHR, *International Protection with Regards to people fleeing Southern and Central Somalia* (January 2014), p 4.

<sup>77</sup> Ibid, p 11.

<sup>78</sup> Ibid, p 13.

<sup>79</sup> Ibid, p 9.

<sup>80</sup> Ibid, p 13.



Killings of **prominent peace activists, community leaders, clan elders and their family members** for their role in peace-building have also been reported. **Soldiers, security and police forces and SNAF-soldiers** are also on al-Shabaab's list of desired targets.<sup>81</sup> **Civilians interacting with security forces** are thus put at a higher risk of suffering from these targeted attacks.<sup>82</sup> Even if they are not the primary target of al-Shabaab, **internationals** (NGOs, UN, diplomats) are nevertheless targeted.<sup>83</sup> We urge that this category should include not only people working for the international community but also those perceived as direct supporters and collaborators.

Although al-Shabaab has taken responsibility only for the killings of journalists from the state run Radio Mogadishu, **journalists** are nevertheless a targeted group.<sup>84</sup> While it is unknown who is behind the rest of the killings,<sup>85</sup> the number of casualties is high enough to classify journalists as targeted individuals.

#### Targeted places

Al-Shabaab still pose threats to civilians in the city<sup>86</sup> while their involvement in violent attacks tend to be underestimated due to the fact that many attacks though not claimed by them can be attributed to their aligned militia.<sup>87</sup> The risk of falling a victim to an attack has been worded in terms of mere bad luck - being at the wrong place at the wrong time.<sup>88</sup> Although such definition is far from precise, we will strive to identify the places which may expose a returnee to a greater risk of ill-treatment if he was to be habitually present there.

Al-Shabaab's influence is most noticeable in Suqahoiaha (Hurriwa District), in the northern part of Daynile, the Industrial road area and at the Bakara market.<sup>89</sup> Taking up residence or employment at or near these places may expose a returnee to a real risk of ill-treatment. Public places are also targeted;<sup>90</sup> an example may be two attacks (suicide bomber and car bomber) in Lido beach that occurred only shortly after the public had started to use it again.<sup>91</sup> The Banadir High Court attack on 14 April 2013 should remind us that even political and legal institutions are not exempted. Government institutions are often a target of al-Shabaab attacks.<sup>92</sup> Villa Somalia, the seat of the Somali Government was a target

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<sup>81</sup> Armed Conflict Location and Events Dataset, *Country Report: Somalia* (April 2013) [www.acleddata.com/wp-content/uploads/2013/04/ACLED-Country-Report\\_Somalia\\_April-2013.pdf](http://www.acleddata.com/wp-content/uploads/2013/04/ACLED-Country-Report_Somalia_April-2013.pdf) accessed 12 January 2014, pp 2-4 and Danish Immigration Service and Landinfo (Norway), *Security and protection in Mogadishu and South-Central Somalia. Danish and Norwegian fact finding mission to Nairobi and Mogadishu. April and May 2013* (8 May 2013), p 11.

<sup>82</sup> Armed Conflict Location and Events Dataset *Country Report: Somalia* (April 2013), pp 2-4.

<sup>83</sup> Danish Immigration Service and Landinfo (Norway), *Security and protection in Mogadishu and South-Central Somalia. Danish and Norwegian fact finding mission to Nairobi and Mogadishu. April and May 2013* (8 May 2013), p 12.

<sup>84</sup> Ibid, p.13.

<sup>85</sup> Ibid, p 13.

<sup>86</sup> Ibid, p 6.

<sup>87</sup> Armed Conflict Location and Events Dataset, *Country Report: Somalia* (April 2013), pp 2-4.

<sup>88</sup> Danish Immigration Service and Landinfo (Norway), *Security and protection in Mogadishu and South-Central Somalia. Danish and Norwegian fact finding mission to Nairobi and Mogadishu. April and May 2013* (8 May 2013), p 12.

<sup>89</sup> Ibid, p 6.

<sup>90</sup> UNCHR, *International Protection with Regards to people fleeing Southern and Central Somalia* (January 2014), para 5.

<sup>91</sup> Ibid, para 6.

<sup>92</sup> Ibid, para 5.

of two mortar attacks in 2013.<sup>93</sup> Seats of international organisations are also commonly targeted; an example may be the attack on the UN compound in Mogadishu on 19 June 2013 which killed 22 people.<sup>94</sup> Hand grenade attacks – which occur approximately four or five times a week or more<sup>95</sup> – target mainly hotels, teashops frequented by politicians, government institutions and offices of NGOs.<sup>96</sup> In November 2013, six people were killed outside a popular hotel as a result of an explosion.<sup>97</sup> UNHCR have further noted that hand grenade attacks doubled in May and June 2013 in comparison to the beginning of 2013.<sup>98</sup> Reports repeatedly state that attacks are undertaken in the evening and at night.<sup>99</sup>

From the above mentioned it is evident that professions which bring an individual close to public places and government institutions put him at a higher risk. Persons associated with or in vicinity of targeted places (and targeted individuals likewise) are at risk of becoming casualties of targeted attacks.<sup>100</sup> We further add that doctors, journalists, lawyers, judges, interpreters, market vendors, shop-assistants, delivery boys, hotel personnel, waiting staff at prestigious teashops and NGO assistants may all be counted among risky professions. Moreover jobs whose scope requires a person to remain at a targeted place till the evening may add up to the general risk assessment.

#### 1.4.3 Risk factors - Somaliland and Puntland

In the case of *Salah Sheekh v the Netherlands* the ECtHR held that the presence of family members and clan protection are prerequisites for gaining admittance to and being able to settle in Somaliland or Puntland for those who do not originate from the territory.<sup>101</sup>

The UNHCR stated in its Eligibility Guidelines of 2010 that whether an internal flight argument exists in Puntland or Somaliland will depend on the circumstances of the individual case, including whether the individual is a member of a majority or minority clan and whether the individual originates from the territory to which they are seeking to relocate.<sup>102</sup> Although Somaliland and Puntland are considered to be generally safe, there is still a risk of ill-treatment for certain groups or individuals. The UNHCR for instance considered in its Eligibility Guidelines that the generally deplorable living conditions of displaced persons in Puntland and Somaliland indicate that an internal flight alternative is generally not available for individuals from southern and central Somalia in these territories.<sup>103</sup> We believe that the risk factors approach may help the ECtHR assess personal circumstances in every case in order to

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<sup>93</sup> Ibid, para 2.

<sup>94</sup> Ibid, para 5.

<sup>95</sup> Danish Immigration Service and Landinfo (Norway), *Security and protection in Mogadishu and South-Central Somalia. Danish and Norwegian fact finding mission to Nairobi and Mogadishu. April and May 2013* (8 May 2013), p 13.

<sup>96</sup> Ibid, p 12.

<sup>97</sup> UNCHR, *International Protection with Regards to people fleeing Southern and Central Somalia* (January 2014), para 5.

<sup>98</sup> Ibid, para 2.

<sup>99</sup> Danish Immigration Service and Landinfo (Norway), *Security and protection in Mogadishu and South-Central Somalia. Danish and Norwegian fact finding mission to Nairobi and Mogadishu. April and May 2013* (8 May 2013), p 12.

<sup>100</sup> UNCHR, *International Protection with Regards to people fleeing Southern and Central Somalia* (January 2014), para 5.

<sup>101</sup> ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, Appl no 1948/04, para 139.

<sup>102</sup> UNCHR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia* (5 May 2010), para 35.

<sup>103</sup> Ibid.

determine which applicants will indeed run the real risk to be exposed to ill-treatment when they are deported to Somaliland or Puntland.

### Vulnerable people

The authorities in both Somaliland and Puntland have implemented strict policies with respect to Somalis who do not originate from these territories. In Somaliland, such persons are considered as foreigners under the Constitution of Somaliland and in Puntland persons who originate from southern and central Somalia have been detained and deported to where they originate from.

**Foreigners**, as well as **members of clans who do not originate from the territory**, do not enjoy effective access to justice and are, as a result, more vulnerable to abuses which include sexual and gender-based violence, robberies, arbitrary arrests, forced child labour, physical violence and murder.<sup>104</sup> In the case of *Salah Sheekh v the Netherlands* the ECtHR has already decided that there is no internal flight alternative to Puntland and Somaliland for persons who do not hail from these areas and do not have clan and/or family links there, since it is unlikely that such applicants will be able to settle there.<sup>105</sup>

**Women** and (female) **children** living in IDP settlements in Puntland and Somaliland run a great risk of sexual and gender-based violence due to lack of security, low social status and a lack of clan protection.<sup>106</sup> There was a reported increase in rapes within IDP camps in Puntland in 2012.<sup>107</sup> In Somaliland gang rape continued to be a problem in urban areas, primarily perpetrated by youth gangs and male students.<sup>108</sup>

### Targeted people

In its Eligibility Guidelines of 2010 the UNHCR mentions that the following groups run a higher risk of ill-treatment in Puntland and Somaliland:

#### *Individuals Perceived as Critics or Opponents of the Puntland and Somaliland Authorities*

There have been violent conflicts concerning the elections in Puntland and Somaliland in 2012. On 30 December 2012 Somaliland forces opened fire on persons who were protesting against local election results. One person died and twelve were injured. In November 2012 Puntland presidential guards shot and killed a girl and wounded at least two other demonstrators who were protesting against the visit of Puntland's president to their region. The guards arbitrarily opened fire on a crowd of mostly women and children.<sup>109</sup>

Freedom of expression and press are guaranteed by Somaliland's Constitution. However, several cases of arrests and beatings of journalists, who were perceived as being critical of the Government or reporting on conflict-related issues, have been reported in Somaliland.<sup>110</sup> According to the Somaliland Journalists Association, over 79 journalists were arrested in 2012.<sup>111</sup> There have been several reports of

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<sup>104</sup> UNCHR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia* (5 May 2010), paras 25 and 34-35

<sup>105</sup> ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, Appl no 1948/04, paras 139-143.

<sup>106</sup> UK Border Agency, *Somalia: Country of Origin Information Report* (5 August 2013), p 98.

<sup>107</sup> US State Department, *Somalia 2012 Human Rights Report* (April 2013), p 28-29.

<sup>108</sup> Ibid, p 38.

<sup>109</sup> Ibid, p 3.

<sup>110</sup> UNCHR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia* (5 May 2010), p 22-27.

<sup>111</sup> US State Department, *Somalia 2012 Human Rights Report* (April 2013), p 20.

attacks against journalists in Puntland. Journalist Liban Abdullahi Farah was murdered in Galkayo in July 2013, presumably because of his publications concerning the elections.<sup>112</sup>

Members of Islamist groups have supposedly been targeted after the suicide attacks in Hargeisa and Bosaso in late 2008. Perceived Islamic militants with alleged links to al-Shabaab have been arrested, detained and killed.<sup>113</sup>

#### *Members of Minority Religious Groups*

The Puntland and Somaliland Constitutions establish Islam as the official religion and state that Muslims cannot change their religion. Promotion of any other religion besides Islam is prohibited. There were reports of Christians targeted in Puntland and of Christians being imprisoned in Somaliland for distributing religious literature. The UNHCR considers that minority religious groups in Somaliland and Puntland that engage in activities which are perceived as being contrary to the Islamic standard, may be at a risk of ill-treatment on basis of their religion.<sup>114</sup>

#### *Individuals Belonging to a Clan Engaged in a Blood Feud*

Several clashes broke out between clans in Somaliland and Puntland. It is reported that the violent clashes are rooted in land conflicts dating back to about 15 years. These inter-clan conflicts put the clan members at a risk for their life while persons not belonging to the concerned clans are also fleeing the fighting because they fear for their safety and security.<sup>115</sup>

#### *LGBT Individuals*

Article 409 of the Somalia penal code, which prohibits and criminalizes 'homosexual conduct', is applied in Puntland and Somaliland. HIV/AIDS sufferers are ill-treated, rejected by families and discriminated. As the subject of sexual orientation is considered a taboo in Somalia, as well as in Puntland and Somaliland, little information is available on abuse and ill-treatment of LGBT individuals.<sup>116</sup>

#### Targeted places

Quite some disturbance and fighting takes places in the territories of Sool, Sanaag and Ayn. These territories are claimed by both Somaliland and Puntland. In 2012 there was an armed conflict between the security forces of Somaliland and the militia of Sool, Sanaag and Ayn. 19 people were killed in the fighting and a lot of people became displaced. The conflict also led to political violence causing the murder of judges and representatives of the Government. Somaliland arbitrarily arrested and detained people whom it suspected to have ties with pro-Puntland militia.<sup>117</sup>

After al-Shabaab suffered losses in southern and central Somalia more and more al-Shabaab fighters came to Puntland during the end of 2012. In the beginning of 2013 Sheikh Ali Mohamoud Raghe, one of the top men of al-Shabaab, declared that al-Shabaab intended to establish a base in Puntland. Al-Shabaab in Puntland is known as Mujahidiin of the Golis Mountains, or as al-Shabaab North East. Al-Shabaab conducted a few military operations in Puntland, such as hit-and-run attacks on

<sup>112</sup> Ministerie van Buitenlandse Zaken, *Algemeen Ambtsbericht Somalië* (December 2013) [www.rijksoverheid.nl/ministeries/bz/documenten-en-publicaties/ambtsberichten/2013/12/19/algemeen-ambtsbericht-somalie-2013-12-19.html](http://www.rijksoverheid.nl/ministeries/bz/documenten-en-publicaties/ambtsberichten/2013/12/19/algemeen-ambtsbericht-somalie-2013-12-19.html) accessed 26 February 2014, p 29.

<sup>113</sup> UNCHR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia* (5 May 2010) [www.refworld.org/docid/4be3b9142.html](http://www.refworld.org/docid/4be3b9142.html) accessed 26 February 2014, p 22-27.

<sup>114</sup> Ibid, pp 22-27.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ministerie van Buitenlandse Zaken, *Algemeen Ambtsbericht Somalië* (November 2012), p. 35 and 53.

checkpoints, ambushes, (suicide) attacks and attacks with improvised explosive devices.<sup>118</sup> Al-Shabaab may be even actively present in Bosasso and Galkayo, which gives rise to an unsafe situation.<sup>119</sup>

#### 1.4.4 Risk factors - Al-Shabaab areas

Although al-Shabaab faced some losses, it still holds control over a great part of southern and central Somalia.<sup>120</sup> For a current overview of the areas controlled by al-Shabaab, see Annex II of this expert opinion. Al-Shabaab applies a 'draconian' version of sharia in the areas it controls. Anyone travelling through or living in their territory runs a high risk of ill-treatment, especially those who might be labelled as (western) spies or apostates.

Since Part 4 of this expert opinion already deals with issues concerning al-Shabaab in more detail, we will focus only briefly on the groups and individuals who run the highest risk to be exposed to ill-treatment upon deportation to or through an area controlled by al-Shabaab. In its Eligibility Guidelines of 2010 the UNHCR mentions that the following groups run a higher risk of being ill-treated by al-Shabaab:

##### *Individuals perceived as supporting the TFG, AMISOM or the international community*

Al-Shabaab is very paranoid with regard to potential spies.<sup>121</sup> Everyone who has some sort of perceived link with the TFG, the African Union Mission in Somalia (AMISOM) or the international community can face harsh punishments and even execution. **Human rights defenders, journalists, humanitarian aid workers, medical students, doctors and women selling food to TFG soldiers**, among others, have already been targeted by al-Shabaab.<sup>122</sup>

##### *Individuals perceived as contravening Islamic decrees or laws*

Al-Shabaab has issued a lot of decrees which deal with very detailed aspects of life. Anyone who does not abide by their decrees and (their version of) Islamic law will face a harsh punishment.<sup>123</sup> The highest burden of al-Shabaab's restrictions and punishments fall on **women and girls**.<sup>124</sup>

##### *Individuals forcibly recruited*

Forced recruitment, including of children, happens on a regular basis.<sup>125</sup> They recruit children as young as eight years old from schools and madrassas.<sup>126</sup> Al-Shabaab also arranged compulsory marriages

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<sup>118</sup> Ibid, p 2.

<sup>119</sup> Ibid, p 53.

<sup>120</sup> UNHCR states: 'Since February 2013, some 80 percent of Southern and Central Somalia was reported to fall under Al-Shabaab control, and there have been no major changes in territorial control since then other than the loss of Xudur in Bakool region, which fell back under control of Al-Shabaab once Ethiopian and Government-aligned forces withdrew in March 2013.' UNHCR, *International Protection Considerations with Regard to people fleeing Southern and Central Somalia* (January 2014) <http://www.refworld.org/docid/52d7fc5f4.html> accessed 24 March 2014, p 3.

<sup>121</sup> Ministerie van Buitenlandse Zaken, *Algemeen Ambtsbericht Somalië* (November 2012), p 62.

<sup>122</sup> UNCHR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia* (5 May 2010), p 10-11.

<sup>123</sup> Ibid, p 12.

<sup>124</sup> UK Border Agency, *Somalia: Country of Origin Information Report* (5 August 2013) p 88.

<sup>125</sup> UNCHR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia* (5 May 2010), p 17.

<sup>126</sup> UK Border Agency, *Somalia: Country of Origin Information Report* (5 August 2013) p 120.

between their soldiers and young girls and used the marriage as a decoy for recruitment of these girls.<sup>127</sup> A refusal to join or remain as an al-Shabaab recruit would be perceived as opposing to fundamentalist Islamic beliefs and/or supporting the TFG and would therefore lead to a high risk of ill-treatment.<sup>128</sup>

#### *Members of minority religious groups*

Al-Shabaab does not make a distinction between apostates or people who were born into a minority religion, both are killed as a punishment for not being Muslim.<sup>129</sup> Everyone is obliged to adhere to the same religious view as al-Shabaab.

#### *LGBT Individuals*

Sharia law imposes death or flogging as a penalty for 'homosexual conduct'. There have been cases in which men and women were executed for 'homosexual conduct'.<sup>130</sup>

### **1.5 Conclusion**

In this part we have explained the current ECtHR principles guiding the risk assessment. Although we deem the tests developed by the ECtHR for the assessment of situation of general violence, group risk and individual risk helpful tools for approaching a case, we have also looked at national jurisdictions of UK and Germany and adopted approaches pioneered by them. The risk factors test based on a list of specific risk factors as developed by the UK courts was explained in relation to the Sri Lanka country guidance ruling. Although the ECtHR has never titled its approach a risk factors test such as that applied by the UK courts, we were able to identify a similar approach in its cases.

In line with this approach we have listed the most common risk factors for specific parts of Somalia, namely Mogadishu, Somaliland and Puntland, and al-Shabaab areas. In each part we have identified vulnerable individuals, targeted people as well as targeted places and argued that the risk of ill-treatment will increase for a returnee who falls within one or more of these groups. In the end we stress that it is not the *number* of risk factors a returnee may meet which is decisive. On the contrary it is necessary to look at the *causal chain of events* that lead from one factor to another and as a whole expose a returnee to a real risk of ill-treatment upon his return to Somalia.

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<sup>127</sup> US State Department, *Somalia 2012 Human Rights Report* (April 2013) p 40.

<sup>128</sup> UNCHR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia* (5 May 2010) p 17.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid, p 21.

## 2 Internal Flight Alternative

### 2.1 Introduction

This part elaborates on the legal requirements that the ECtHR attaches to the concept of internal flight alternative (IFA) when ruling on cases where a breach of Article 3 of the European Convention on Human Rights (ECHR) is alleged. We will first explain the concept of IFA in section 2.2. Section 2.3 will discuss the general requirements for applying an IFA which follow from the ECtHR's case law. In section 2.3.2 we argue that national authorities should be required under Article 3 ECHR to assess the risk upon return to the region of origin first before applying an IFA. Furthermore section 2.3.3 will explain when an IFA can be considered available to the individual concerned. Finally we contend in section 2.3.4 that national authorities should always be required under Article 3 ECHR to specify which region of the country of origin is considered an IFA in each individual case. A conclusion will be drawn in section 2.4.

### 2.2 Concept of the internal flight alternative

The IFA applies in cases concerning return of rejected asylum seekers to countries where the effective governmental control is dispersed throughout the territory. Whereas some regions may be unsafe for a particular applicant to return to, others may not. If deportation of an alien to a certain part of the country (usually the region which he hails from) is inconsistent with the obligation imposed on States under Article 3 ECHR, the alien may be nevertheless required to dwell in another part of the country, which is considered 'relatively safe'. The situation in IFA location may amount to a real risk of ill-treatment for a particular applicant on account of the *general situation of violence*, or *distinguishing features* (returnee's membership of a particular *vulnerable group* or *his individual features*). For the assessment of the risk of *refoulement* based on these circumstances we refer to section 1.4 of this expert opinion. In IFA cases, however, further conditions attach which are to be elaborated hereafter.

### 2.3 Legal requirements of an internal flight alternative

#### 2.3.1 General requirements

To begin with, relying on an IFA does not affect the responsibility of the expelling contracting state to ensure that the alien thus expelled will not be exposed to treatment contrary to Article 3 ECHR.<sup>131</sup> If a returnee is to be expelled to a relatively safe area, there is a marked difference between the position of *individuals who originate from that area* (the first group) and *individuals who hail from elsewhere in Somalia* (the second group).<sup>132</sup> Whereas the first group has a clan or family links there, the second does not enjoy protection provided by such links.<sup>133</sup> Expulsion of aliens belonging to the second group might expose them to treatment contrary to Article 3 ECHR as they do not enjoy, by virtue of originating from other parts of Somalia, the clan protection in the 'relatively safe' areas.<sup>134</sup> Therefore for the IFA to be available further preconditions must be guaranteed, namely the person to be expelled must be able:

1. to travel to the area concerned;

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<sup>131</sup> ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, Appl no 1948/04, para 141.

<sup>132</sup> *Ibid*, para 139.

<sup>133</sup> *Ibid*.

<sup>134</sup> *Ibid*.

2. gain admittance; and
3. settle there.<sup>135</sup>

Since the above criteria are themselves preconditions for relying on IFA it follows that a failure to provide for one of them results in no IFA being available. However, if there is no real risk of ill-treatment in the applicant's home region, relying on IFA is not necessary and the preconditions themselves are not considered by the ECtHR.<sup>136</sup>

A general requirement for invoking the IFA is that such an area is 'relatively safe' which in practice means that there is no general situation of violence at the time of assessment. The ECtHR is commonly presented with an expulsion of an applicant to one of the three 'relatively safe' IFAs: Mogadishu<sup>137</sup>, northern or central Somalia<sup>138</sup> and southern Somalia.<sup>139</sup> Being deemed 'relatively safe' *in general* does not however guarantee that the areas will *always* be safe for a particular returnee. On the contrary, the circumstances in each of them may amount to a breach of Article 3 ECHR on account of the applicant's membership of a vulnerable group or his individual distinguishing features.

Moreover, Article 3 ECHR also applies to transit to alternative regions as well as settling there.<sup>140</sup> Returnees may use certain safe areas in Somalia for transit to their alternative destination. However, the areas with the lowest level of generalised violence are areas under the control of al-Shabaab, where a returnee may face the real risk of ill-treatment due to violations of human rights (see Part 4 of this expert opinion). Likewise, the conditions in camps for internally displaced persons may amount to treatment reaching the threshold of Article 3 ECHR, if the returnee is forced after his arrival to Somalia to seek refuge in these camps (see Part 3 of this expert opinion).

Finally, family ties in the IFA are not enough *per se* to guarantee one's admittance to a 'relatively safe' region. Something more is required, such as affiliation to a majority clan that can offer a strong clan protection for the IFA to be acceptable to both the returnee and the Government concerned.<sup>141</sup> A strong clan protection ensures that a person who does not originate from the IFA will be admitted there and enabled to settle.<sup>142</sup>

### 2.3.2 Order of assessment

Before we discuss two possible orders of assessment under Article 3, it is necessary to make a preliminary remark. The argument deployed hereafter becomes relevant only if the situation of general violence cannot be established. Otherwise, in cases where the ECtHR finds that the situation in a particular country as such amounts to general violence, it does not matter whether this conclusion is drawn on the assessment of home region or IFA. In such cases, any order of assessment would arguably lead to the same conclusion: it would not put the applicant in a disadvantaged position. Our reasoning which supports the traditional order of assessment, with home region being assessed before the IFA, becomes important in cases where the applicant is required to show a targeted risk – either based on his membership of a vulnerable group or his individual distinguishing features.

<sup>135</sup> Ibid, para 141.

<sup>136</sup> ECtHR 5 September 2013, *KAB v Sweden*, Appl no 886/11, paras 86-97.

<sup>137</sup> Ibid.

<sup>138</sup> ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, Appl nos 8319/07 and 11449/07, para 267 and ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, Appl no 1948/04, paras 139-143.

<sup>139</sup> ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, Appl nos 8319/07 and 11449/07, para 267.

<sup>140</sup> Ibid, paras 268-277.

<sup>141</sup> ECtHR 5 September 2013, *KAB v Sweden*, Appl no 886/11, para 84.

<sup>142</sup> Ibid.



In *Hilal v UK* the ECtHR assessed the risk of ill-treatment in the region of origin first before it examined the IFA.<sup>143</sup> This order of assessment seems logical on two grounds. Firstly if the applicant's asylum application has been rejected, it is in his or her best interest to be returned to the home region where he or she may still have family ties or an established social environment. Secondly the Court may itself benefit from the assessment of the real risk in the home region since the same risk may appear in the IFA especially when it stems from influential militant groups who target certain individuals or other groups. Recently, however, we have observed that the reversed line of reasoning has been adopted.

In *H and B v UK*, the ECtHR did not consider it necessary to examine the risk of ill-treatment in any part of the country outside Kabul since the British Government intended to remove both applicants to the capital.<sup>144</sup> Whereas the first applicant's home region may well have been Kabul itself,<sup>145</sup> there was no doubt that Kabul was an IFA for the second applicant.<sup>146</sup> In relation to the second applicant, the reversed order of assessment (first IFA then home region) was thus adopted. An example of the reversed assessment in Somali cases may be found in *KAB v Sweden*, where the alternative region of Somaliland was addressed before the ECtHR found the home region of the applicant, Mogadishu, safe enough for the applicant to return to.<sup>147</sup> However, in some other recent cases, the real risk of ill-treatment in the home region was addressed before the IFA in line with the *Hilal* precedent.<sup>148</sup> It follows that under the current state of law, two approaches can be identified.

For the reasons explained below, we remain of the opinion that the traditional *Hilal* assessment is more suitable for Article 3 cases. In *BKA v Sweden*,<sup>149</sup> the ECtHR adopted the traditional order of assessment with the home region being considered before IFA. The applicant was held to face the real risk of ill-treatment on account of a blood feud between the applicant and his relatives. This risk was substantiated in the applicant's home region (Baghdad) since the relatives involved in the feud were living there. In addition, the Diyala governorate, the region where the blood feud took place and where the relatives still dwelled was excluded from being considered a reasonable IFA under the same reasoning.<sup>150</sup> No separate risk assessment took place in relation to the Diyala governorate and the risk was transferred from the applicant's home region to the Diyala governorate (IFA) on account of the same factual circumstances. The possibility of internal relocation was therefore narrower since certain parts of the country were ruled unsafe for the applicant at the initial examination of real risk of ill-treatment in his home region. Although the threat amounting to real risk was substantiated only in relation to Baghdad and thus geographically limited, Diyala was also deemed unsafe since the real risk of ill-treatment transferred into that region on account of applicant's relatives, the actors of harm, living there. Had a reversed order been adopted and IFA been ruled on before addressing real risk of ill-treatment in the home region, the applicant would have been effectively divested of the possibility to

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<sup>143</sup> ECtHR 6 March 2001, *Hilal v the United Kingdom*, Appl no 45276/99, paras 66-67.

<sup>144</sup> ECtHR 9 April 2013, *H and B v the United Kingdom*, Appl nos 70073/10 and 44539/11, para 95.

<sup>145</sup> *Ibid*, para 83.

<sup>146</sup> *Ibid*, para 87.

<sup>147</sup> ECtHR 5 September 2013, *KAB v Sweden*, Appl no 886/11, paras 81-86.

<sup>148</sup> See e.g. ECtHR 27 June 2013, *SA v Sweden*, Appl no 66523/10, paras 51-54, ECtHR 19 December 2013, *BKA v Sweden*, Appl no 11161/11, paras 40-45, ECtHR 26 June 2013, *AGAM v Sweden*, Appl no 71680/10, paras 33-44, ECtHR 27 June 2013, *DNM v Sweden*, Appl no 28379/11, paras 49-59, ECtHR 27 June 2013, *MKN v Sweden*, Appl no 72413/10, paras 29-40, ECtHR 27 June 2013, *MYH and others v Sweden*, Appl no 50859, paras 56-67, ECtHR 27 June 2013, *NANS v Sweden*, Appl no 68411/10, paras 28-39, ECtHR 27 June 2013, *NMB v Sweden*, Appl no 68335/10, paras 31-42 and ECtHR 27 June 2013, *NMY and others v Sweden*, Appl no 72686/10, paras 28-39.

<sup>149</sup> ECtHR 19 December 2013, *BKA v Sweden*, Appl no 11161/11.

<sup>150</sup> *Ibid*, para 4.

have certain regions identified as *prima facie* unavailable IFAs owing to the transferability of the circumstances that were held to amount to real risk of ill-treatment in his home region. It follows that the traditional *Hilal* order of assessment benefits both the ECtHR and the applicant by identifying unavailable IFAs from the very outset. We are of the opinion that national authorities as well should be always required to assess the risk of ill-treatment in the region of one's origin before examining the possibilities of IFA.

### 2.3.3 Availability of an internal flight alternative

Following from section 2.3.1, it appears desirable to note that it is possible to exclude certain regions from qualifying for IFA as a whole. This possibility can materialise in cases where the actor of harm has the means to find the applicant regardless of his relocation. Where the applicant's real risk of ill-treatment stems from the state and its agents, an IFA is irrelevant for areas under the control of the state. This position is maintained by the UNHCR.<sup>151</sup> The ECtHR also held in several cases that persecution of a returnee by a powerful clan or tribe with influence at the governmental level amounts to a factor going against the reasonableness of an IFA.<sup>152</sup> Besides the influence at governmental level<sup>153</sup> other connections such as a link to authorities or militia were held to exclude the availability of an IFA.<sup>154</sup> The number of people involved in the persecution and the variety of places of their activity should provide evidence of such influence.<sup>155</sup> It follows that militant groups with quasi-governmental powers extending beyond their region, wide field of action and influential connections can be found to possess the necessary means to localise the returnee even in his IFA.

The Transitional Federal Government (TFG) is unable to provide protection against human rights abuses in al-Shabaab controlled areas as well as areas controlled by other militias or armed groups.<sup>156</sup> With the exception of individuals with connections to leaders of militant groups and persons who are influential within the groups in the suggested IFA location, al-Shabaab controlled areas and areas controlled by other militant groups should not be considered available IFAs.<sup>157</sup> Following the ruling in *SA v Sweden* we stress that effective control over a proposed IFA is not a requirement for excluding the availability of a particular region; rather it is *the influence* at the governmental level and links to local authorities that should be taken into account.<sup>158</sup> We add that even if such influence is concealed and latent, the area is not an available IFA.

Although Mogadishu is reported to be under the control of the TFG, al-Shabaab has maintained its operational capacity to carry out attacks regardless of the effective control of pro-government forces.<sup>159</sup> The evidence of high-profile attacks impairs availability of an IFA in Mogadishu. Moreover,

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<sup>151</sup> UNCHR, *International Protection with Regards to people fleeing Southern and Central Somalia* (January 2014), para 13.

<sup>152</sup> ECtHR 27 June 2013, *SA v Sweden*, Appl no 66523/10, para 56.

<sup>153</sup> ECtHR 27 June 2013, *DNM v Sweden*, Appl no 28379/11, para 56.

<sup>154</sup> ECtHR 27 June 2013, *SA v Sweden*, Appl no 66523/10, para 56.

<sup>155</sup> ECtHR 27 June 2013, *DM v Sweden*, Appl no 28379/11, para 57.

<sup>156</sup> Center for Strategic and International Studies, *Somalia Redux? Assessing the New Somali Federal Government* (August 2013) [http://csis.org/files/publication/130819\\_Bryden\\_SomaliaRedux\\_WEB.pdf](http://csis.org/files/publication/130819_Bryden_SomaliaRedux_WEB.pdf) accessed 26 February 2014, p 12-13.

<sup>157</sup> UNCHR, *International Protection with Regards to people fleeing Southern and Central Somalia* (January 2014), para 14.

<sup>158</sup> ECtHR 27 June 2013, *SA v Sweden*, Appl no 66523/10, para 56.

<sup>159</sup> UNCHR, *International Protection with Regards to people fleeing Southern and Central Somalia* (January 2014), para 14.

individuals presumed to be on the al-Shabaab hit list (thus targeted individuals) cannot relocate to the capital since the state is simply not able to provide them with effective protection.<sup>160</sup> We refer to section 1.4.2 of this expert opinion for further guidance on factors applicable to the situation in Mogadishu. The UNHCR further considers areas affected by active conflict unreasonable IFAs regardless of the actor of harm.<sup>161</sup>

#### 2.3.4 Specificity principle

In the absence of a *specific region* that the Government considers a possible IFA, the ECtHR will not be able to assess the risk of ill-treatment the applicant would run upon his return. Moreover, the applicant will be effectively divested of the preconditions that attach to the IFA option mentioned in section 2.3.1 forasmuch as there would be no specific country of origin information to assess the guarantees against. Therefore, we argue that it is utterly necessary for the Government to assert which region they consider to be a plausible IFA. In cases of Somali returnees, the specificity principle has been always observed and we strongly support this approach. However, in other cases, the ECtHR considered it unnecessary to examine whether the applicant would be able to settle in the proposed IFA. It was of the opinion that the applicants would be able to relocate to *other* regions in his country of origin, while it never expressly specified the regions to which the applicant would be able to relocate.<sup>162</sup> No consideration was given to the applicant's ability to travel, get admittance and settle in the IFA since no region was proposed. Judge Power-Forde in her dissenting opinion (joined by Judge Zupančič) explains that the guarantees required under the ECtHR's case law on IFA necessitate that the place of safety be identified by the deporting state.<sup>163</sup> She stresses that in the absence of the knowledge of the proposed IFA, the ECtHR is precluded from being assured that the guarantees have been met. We incline to her view that indication that it would not be impossible for the applicant 'to find a place to settle' outside his home region is too vague a reason to be accepted as plausible in cases where life and safety of a person is at risk.

The benefits of having an IFA specified by an expelling government can be clearly identified in Somali cases. To exemplify, it is the requirement of admittance and settlement that may be problematic to satisfy in the context of Somalia. In *Sufi and Elmi* the Court held that admittance to Somaliland or Puntland was practically impossible unless an applicant was born there or had strong clan connections to the region.<sup>164</sup> Moreover, close family connections were found paramount for admittance to any alternative region in Somalia.<sup>165</sup> Had the IFA not been specified in the given case, the Court would have been effectively precluded from assessing whether or not the criteria of access, admittance and settlement were met in the particular region. It follows that the burden is on the expelling state to specifically ascertain the IFA in order for the national decision-making bodies and courts as well as the ECtHR to be able to assess whether the guarantees that attach to the IFA have been satisfied.

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<sup>160</sup> Ibid.

<sup>161</sup> UNCHR, *International Protection with Regards to people fleeing Southern and Central Somalia* (January 2014), para 14.

<sup>162</sup> ECtHR 27 June 2013, *SA v Sweden*, Appl no 66523/10, para 54.

<sup>163</sup> Ibid, Dissenting opinion of Judge Power-Forde joined by Judge Zupančič.

<sup>164</sup> ECHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, Appl nos 8319/07 and 11449/07267.

<sup>165</sup> Ibid.

## 2.4 Conclusion

In this part we have summarised the legal requirements applicable in cases of IFA. The case-law suggests that as opposed to applicant's home region, the assessment of IFA requires further criteria, namely the applicant's ability to travel, gain admittance and settle in the IFA, to be met. Based on the difference in legal criteria applicable to one's home region and IFA, we have argued that the only logical and reasonable order of assessment starts with the applicant's home region which is followed by the assessment of availability of the IFA. This order seems logical on two grounds; firstly the real risk of ill-treatment established in a home region may transfer to the IFA making the choice of possible alternative locations narrower, and secondly the assessment of IFA encompasses additional criteria of access, admittance and settlement that are not applicable to a home region (since they can be presumed to be met in one's home region). The reversed order would effectively divest the applicant of having the IFA legal requirements assessed.

Furthermore, we have argued that certain regions are not available IFAs. Unavailability may stem from the fact that there is the same real risk present in an IFA as in the applicant's home region. This may be the case in an IFA where the actor of harm can be presumed to have influence at the governmental level or links to authorities or militia. Upon this reasoning, we agree with the finding made by the UNHCR that al-Shabaab controlled areas and areas controlled by other militant groups should not be generally considered as available IFAs. Uniform exclusion can also be made to areas affected by active conflict.

Finally we argued that an IFA must be specifically identified by the Government in order for the Court to be able to assess whether or not the requirements of access, admittance and settlement have been met in the light of a specific regional circumstances and information. We agree with the dissenters in *SA v Sweden* who argue that the specific region must be pointed out in order for the ECtHR to carry out the assessment of the availability of the IFA. Finally we stress that in all Somali cases so far the specific IFA has been indeed identified and such approach should be consistently adhered to.

## 3 The internally displaced persons camps in the context of Article 3 ECHR

### 3.1 Introduction

Somalians who after expulsion have no safe area to go to may end up in a camp for internally displaced persons (IDP camp). Reports of UNHCR and NGO's show that living conditions in such camps are dire.<sup>166</sup> Some of the applicants in the cases before the ECtHR at the time of writing have argued that they would indeed be compelled to live in an IDP camp and that this would give rise to a violation of Article 3 ECHR. In this part of the expert opinion, we address how this type of claim must be examined.

In *Sufi and Elmi v UK* the ECtHR assessed the humanitarian situation in two Somali IDP camps and concluded that Article 3 ECHR would be violated if the applicants would end up in such camps. It came to that conclusion in three steps. First, it assessed the likelihood of the applicant ending up in such a camp. Secondly, it discussed which test should apply: the usual real risk of ill-treatment test, or a more demanding one, which would imply a higher threshold for the applicant. The ECtHR concluded that the normal real risk test applied. Finally it addressed the question under which circumstances the applicant is at real risk of ill-treatment on account of dire humanitarian conditions. Below, we will address these three steps:

1. The risk to end up in an IDP camp (section 3.2)
2. The test which applies to the humanitarian conditions in the country of origin (section 3.3)
3. Application of the minimum level of severity test to humanitarian conditions (section 3.4)

With regard to each step we will first analyse the ECtHR's reasoning in some detail, and identify the criteria and factors relevant for the assessment it applied. After that we will elaborate on the criteria on the basis of the ECtHR's case law or apply the relevant criteria to the situation in Somalia on the basis of country of origin information. Section 3.5 will specifically address the situation of IDPs in Mogadishu.

A note on terminology: we use the term 'internally displaced persons' as defined by UNHCR: persons or groups of persons who have been forced or obliged to flee or to leave their home or places of habitual residence, in particular as a result of or in order to avoid the effect of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.<sup>167</sup> An IDP camp refers to a place in which internally displaced persons settle.

### 3.2 The risk to end up in an IDP camp

In *Sufi and Elmi v UK*, the ECtHR found that expulsion to Mogadishu was prohibited because of the situation of general violence in this area. The Court addressed the situation in IDP camps in the context of the internal flight alternative outside Mogadishu, within southern and central Somalia. Expulsion to this area is only allowed under Article 3 ECHR if the usual conditions are fulfilled: the person to be expelled must be able to travel to the area concerned, to gain admittance and to settle there (see section 2.3.1 of this expert opinion). Gaining admittance to central or southern Somalia would pose no problems. As for settling, the ECtHR observed that 'in view of the humanitarian crisis and the strain that

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<sup>166</sup> See also section 3.5 below.

<sup>167</sup> UNHCR, *The Protection of Internally Displaced Persons and the role of the UNHCR* (27 February 2007) [www.refworld.org/docid/45ddc5c04.html](http://www.refworld.org/docid/45ddc5c04.html) accessed 28 November 2013.

it has placed both on individuals and on the traditional clan structure, in practice the ECtHR does not consider that a returnee could find refuge or support in an area where he has no close family connections'.<sup>168</sup> Therefore, it was reasonably likely that a person returning to an area where he lacks close family ties would have to seek refuge in an IDP settlement or refugee camp.

Hence, the criterion for assessing whether it is sufficiently likely that the applicant will end up in an IDP camp is 'reasonable likelihood of having to seek refuge in an IDP camp'. This criterion is fulfilled if there is a humanitarian crisis that strains the individual and the clan structure, with the result that the applicant has no close family connections in the area, or cannot safely travel to an area where he has such connections. It should be noted that this condition is stricter than the one the ECtHR applies to settling in Somaliland or Puntland: there, clan affiliations suffice.<sup>169</sup>

### 3.2.1 Risk factors for ending up in IDP camp

In *Sufi and Elmi v UK*, the ECtHR found that the applicants could not be expected to settle in Mogadishu due to the general situation of violence and not in the remainder of southern and central Somalia because they had no family affiliations there. In *KAB v Sweden*, the ECtHR ruled that in Mogadishu the situation of general violence had ended; expulsion to that city is therefore no longer excluded (see section 1.4.2 of this expert opinion). When addressing the personal circumstances of *KAB v Sweden* (as opposed to the general situation of violence), the ECtHR explicitly noted that the applicant allegedly had a home in Mogadishu, where his wife lived.<sup>170</sup> Thus, shelter and presence of family members are relevant factors for assessing whether expulsion to Mogadishu is in accordance with Article 3 ECHR. According to UNHCR, in Mogadishu the nuclear family has reportedly become the main protection mechanism.<sup>171</sup> '[N]ewcomers to the city, particularly when they do not belong to the clans or nuclear families established in the district in question, or when they originate from an area formerly or presently controlled by an insurgent group, face a precarious existence in the capital.'<sup>172</sup> UNHCR reports that 'Somalis from the diaspora who have returned to Mogadishu in the course of 2013 are reported to belong to the more affluent sectors of society, with resources and economic and political connections. Many are reported to have a residence status abroad to fall back on in case of need.'<sup>173</sup> We assume therefore that if the applicant has no family ties in either Mogadishu or elsewhere in southern or central Somalia, it is reasonably likely that he will end up in an IDP camp.

It does not follow that all those with family ties in southern or central Somalia are sufficiently safe there so as not to have to take refuge in IDP camps. Furthermore, it is possible that the humanitarian situation in southern and central Somalia will somewhat improve so that reliance on the family will no longer be an absolute requisite.

In this section we elaborate on the risk factors for a returnee to end up in an IDP camp. In contrast to Part 1 of this expert opinion, we will not categorise the risk factors for IDP camps in geographical terms, as these risk factors are more related to the status of a person rather than to a specific area. We make one exception to this division, namely with regard to the risk factor of eviction. It should be noted that a list of risk factors cannot be exhaustive.

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<sup>168</sup> ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, Appl nos 8319/07 and 11449/07267, para 267.

<sup>169</sup> ECtHR 5 September 2013, *KAB v Sweden*, Appl no 886/11, paras 82-84.

<sup>170</sup> *Ibid*, para 96.

<sup>171</sup> UNCHR, *International Protection Considerations with Regard to People Fleeing Southern and Central Somalia* (17 January 2014) [www.refworld.org/docid/52d7fc5f4.html](http://www.refworld.org/docid/52d7fc5f4.html) accessed 24 March 2014, p 8.

<sup>172</sup> *Ibid*, p 9.

<sup>173</sup> *Ibid*, p 9.

### *Ethnic minorities*

Persons belonging to a minority clan or who are not part of the Somali clan lineage system are in a difficult position.<sup>174</sup> There is a low sense of Somali social and ethical obligation to assist individuals from weak lineages and social groups.<sup>175</sup> This stands in sharp contrast to the powerful and non-negotiable obligation Somalis have to assist members of their own lineage.

### *Homeless persons*

Rents in Mogadishu have reached an all-time high due in part to the return of wealthy Somalis from the diaspora.<sup>176</sup> As a result, some persons are being forced to move to overcrowded IDP camps because they cannot afford the new prices quoted by landlords.<sup>177</sup> Remaining IDPs who have not been placed into an IDP camp, dwell in government buildings in and around Mogadishu.<sup>178</sup> These IDPs face forced eviction from the government buildings and land.<sup>179</sup> These IDPs might therefore have no option but to go to an IDP camp.

### *Women*

Women in Somalia in general are in a more vulnerable position than men. For example women often become victims of sexual violence.<sup>180</sup> In particular women from minority clans who are not willing to report their cases run a high risk of ill-treatment.<sup>181</sup> Female heads of household and single and lone females with no access to nuclear family and clan protection run a higher risk of ill-treatment.<sup>182</sup> People working with victims of sexual and gender-based violence have been threatened and detained by the police.<sup>183</sup> The general vulnerability of women may also lead to a higher risk of becoming an IDP.

### *Traditional elders*

Traditional elders who refuse to follow the orders of al-Shabaab have been severely punished or even killed.<sup>184</sup> Al-Shabaab has removed traditional elders from power in those regions which were considered to have been hit the hardest by the organisation's rules and where elders have been outspoken against the organisation's views.<sup>185</sup> Traditional elders might therefore be forced to flee to an IDP camp.

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<sup>174</sup> Ibid, p 9.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid, p 46.

<sup>179</sup> Ibid.

<sup>180</sup> UNCHR, *International Protection Considerations with Regard to People Fleeing Southern and Central Somalia* (17 January 2014), p 6.

<sup>181</sup> Ibid, p 17-18.

<sup>182</sup> *AMM, MW, ZF, FM, AF v The Secretary of State for the Home Department* [2011] UKUT 00445 (IAC), p 216 ff.

<sup>183</sup> Danish Immigration Service and Landinfo, *Security and protection in Mogadishu and South-Central Somalia, Danish and Norwegian fact finding mission to Nairobi and Mogadishu, April and May 2013* (8 May 2013) (8 May 2013) [www.nyidanmark.dk/NR/rdonlyres/6F1A29C6-2F84-40D2-BDE4-42F69897EEC3/0/security\\_and\\_protection\\_in\\_somalia\\_may\\_2013.pdf](http://www.nyidanmark.dk/NR/rdonlyres/6F1A29C6-2F84-40D2-BDE4-42F69897EEC3/0/security_and_protection_in_somalia_may_2013.pdf) accessed 26 February 2014, p 46.

<sup>184</sup> Ibid, p 37.

<sup>185</sup> Ibid, p 8.

### 3.3 Humanitarian conditions in the country of origin: the applicable test

In *Sufi and Elmi v UK*, the ECtHR first addressed the question whether socio-economic circumstances of internally displaced persons may raise an issue under Article 3 ECHR at all. It observed that its previous case law reflected two different positions.<sup>186</sup> *N v UK* concerned the expulsion of a Ugandan woman who was HIV positive and whose lifespan was likely to be significantly reduced after expulsion, on account of the fact that the treatment facilities in Uganda were inferior to those available in the United Kingdom. In this case the ECtHR held that such humanitarian conditions would give rise to a breach of Article 3 only in 'very exceptional cases' where the humanitarian grounds against removal were 'compelling'.<sup>187</sup> *MSS v Belgium and Greece* concerned an asylum seeker who lived in very dire circumstances in Greece; the Greek authorities did not offer any help although Greek law and EU law required them to do so. The ECtHR held that Greece had violated Article 3 ECHR because the applicant's living conditions reached the Article 3 ECHR threshold and Greece was responsible for those conditions.<sup>188</sup> Compelling grounds were not required in *MSS*. Thus, the approach in *N v UK* set a very high threshold, whereas in *MSS v Belgium and Greece* the usual real risk test applied.

In *Sufi and Elmi v UK*, the ECtHR chose for the latter approach. It stated that in *N v UK*, the future harm would emanate not from the intentional acts or omission of public authorities or non-State bodies but from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country. In Somalia however, the dire humanitarian conditions were predominantly due to the direct and indirect actions of the parties to the conflict. Therefore, the *MSS* approach applied.<sup>189</sup>

Hence, the relevant criterion is whether the harm emanates from 'intentional acts or omissions of public authorities or non-State bodies'. This is not the case if dire 'humanitarian conditions are solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as a drought'. In *Sufi and Elmi*, the ECtHR concluded that the humanitarian situation was predominantly attributable to intentional acts and omissions (hence not to the drought which also occurred), because the indiscriminate violence of the warring factions had resulted in widespread displacement and the breakdown of social, political and economic infrastructures. Moreover, al-Shabaab's refusal to permit humanitarian aid agencies to operate in the areas under its control greatly exacerbated the situation.<sup>190</sup> It does not follow from the wording of the judgment that both circumstances (violence resulting in the breakdown of societal structures, as well as obstruction to aid delivery by factions in power) are required to attribute humanitarian conditions predominantly to intentional human actions. On the other hand, it is clear that a 'natural' cause such as drought is not sufficient to deny that. We assume that famine and other dire humanitarian conditions due to (civil) war would be predominantly attributable to acts of the state and third parties, also if humanitarian aid were

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<sup>186</sup> It also noted that it had taken a third position in *Salah Sheekh*: that socio-economic and humanitarian conditions in a country of return do not necessarily have a bearing, and certainly not a decisive bearing, on the question whether a person would face a real risk of ill-treatment within the meaning of Article 3. As this position is utterly incompatible with the other two, it needed no further discussion. See ECHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, Appl nos 8319/07 and 11449/07267, para 278, referring to ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, Appl no 1948/04, para 141).

<sup>187</sup> ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, Appl nos 8319/07 and 11449/07267, para 278, referring to ECtHR 28 May 2008, *N v the United Kingdom*, Appl no 26565/05, para 42.

<sup>188</sup> ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, Appl nos 8319/07 and 11449/07267, para 279, referring to ECtHR 21 January 2011, *MSS v Belgium and Greece*, Appl no 30696/09, paras 253, 254 and 264.

<sup>189</sup> ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, Appl nos 8319/07 and 11449/07267, para 283.

<sup>190</sup> *Ibid*, paras 284-292.



not obstructed. The fact that humanitarian conditions are still dire shows that humanitarian aid was not effective.

Although the ECtHR does not elaborate on the matter in *Sufi and Elmi v UK*, it cannot be excluded that Article 3 ECHR prohibits expulsion if dire humanitarian circumstances in an IDP camp are not predominantly attributable to man-made actions. If that is the case, the criterion to be applied is 'compelling humanitarian grounds'.

### 3.4 Applying the minimum level of severity test to humanitarian conditions in the country of origin

It follows from *Sufi and Elmi v UK* that if the minimum level of severity test (as applied in *MSS v Belgium and Greece*) applies, three factors are relevant:

1. The person's ability to cater for his or her most basic needs such as food, water, hygiene and shelter;
2. Whether the person is vulnerable to ill-treatment; and
3. Whether the person has prospect of their situation improving within a reasonable timeframe.<sup>191</sup>

These factors will be further elaborated upon below in this section.

If the dire humanitarian situation is not predominantly man-made, compelling humanitarian grounds must be shown. This criterion is not easily satisfied; in *N v UK* the ECtHR did not find a violation of Article 3 ECHR because the medical treatment for the illness of the applicant was available in Uganda. The fact that medical treatment was only available at a considerable expense and limited in supply did not alter this conclusion. Thus, the fact that it was not established that relief was effectively available did not lead to the conclusion that humanitarian grounds against removal were compelling. Hitherto, the ECtHR found only in *D v UK* a breach of Article 3 ECHR on account of compelling humanitarian grounds.<sup>192</sup> In this case the following factors were relevant:<sup>193</sup>

1. The applicant was critically ill and close to death;
2. The country of origin could not guarantee any nursing or medical care; and
3. The applicant had no family members who were willing or able to care for him or even to provide basic care.

#### 3.4.1 Relevant factors minimum level of severity test

In *Sufi and Elmi v UK* the ECtHR assessed the socio-economic conditions in the Afgooye Corridor and Dadaab camps in light of Article 3 ECHR and reached the general conclusion that it was contrary to Article 3 ECHR for all to live there.

In this expert opinion we will not examine whether the living conditions in those or other camps still attain the minimum level of severity because the circumstances in the IDP camps can change day by day. Instead, we will elaborate the relevant factors drawing on the case-law of the ECtHR. In section 3.5 we do specifically address the situation of IDPs in Mogadishu, because very recent reports with regard to this situation are available.

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<sup>191</sup> Ibid, para 283.

<sup>192</sup> ECtHR 2 May 1997, *D v the United Kingdom*, Appl no 30240/96.

<sup>193</sup> Ibid, pp 52-53.

It should be borne in mind that the minimum level of severity is a relative test, depending on all the circumstances of the case such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and in some cases the sex and state of health of the victim.<sup>194</sup> Thus, if socio-economic conditions cannot be said to be at variance with Article 3 for all persons involved, they may amount to ill-treatment for particular (categories of) persons.

#### Ability to cater for one's basic needs

The first relevant factor mentioned in *Sufi and Elmi* is a person's inability to cater for his or her own basic needs such as food, water, hygiene and shelter. When it assessed the situation in both camps in *Sufi and Elmi*, the ECtHR took into account the numbers of people dependent on food aid, the (im)possibilities for aid organisations to reach and supply the inhabitants and shortages of food and water.<sup>195</sup>

Would inability to cater for just one of these needs be sufficient for reaching the minimum level of severity? In *O' Rouke v UK* the applicant was evicted from temporary housing after his release from prison.<sup>196</sup> As a result the applicant had to sleep on the street and his health deteriorated. Nevertheless the ECtHR considered that the applicant's suffering following his eviction did not attain a minimum level of severity. In *Budina v Russia* a 61-year old and disabled applicant complained about the amount of her pension.<sup>197</sup> She held that for a couple of years her income was below subsistence level. Only as from 2008 she received enough to pay for her housing, food and hygiene but still could not pay for non-food goods, sanitary and cultural services. The ECtHR held that although the situation of the applicant was difficult, it did not attain the minimum level of severity. It appears that the minimum level of severity has not been reached if the applicant is not able to cater for just one of his basic needs.

#### Vulnerability to ill-treatment

The second element is the vulnerability of the person to ill-treatment. Various risk factors appear to be relevant.

##### *Persons dependent on the State*

A general risk factor can be deduced from the ECtHR's case law. If the person is utterly dependent on the state, then that person is in a vulnerable position.<sup>198</sup> In its assessment of the situation in IDP camps, the ECtHR in *Sufi and Elmi v UK* took into account the security situation, the occurrence of crime, sexual violence, arbitrary arrests and detention.

##### *Supposed collaborators with NGO's/UN agencies*

IDPs are mostly dependent on the humanitarian help from NGO's and UN agencies, which places them in a vulnerable position. However, it might also give rise to another risk factor: NGO's and UN agencies may be perceived as a threat by various parties, because these entities are mostly originating from

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<sup>194</sup> ECtHR 6 March 2001, *Hilal v the United Kingdom*, Appl no 45276/99, para 60.

<sup>195</sup> ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, Appl nos 8319/07 and 11449/07267, paras 284-285.

<sup>196</sup> ECtHR 26 June 2001, *O'Rourke v the United Kingdom*, Appl no 39022/97.

<sup>197</sup> ECtHR 18 June 2009, *Budina v Russia*, Appl no 45603/05.

<sup>198</sup> ECtHR 21 January 2011, *MSS v Belgium and Greece*, Appl no 30696/09.

Western countries, and the dependency relationship might raise suspicion that these IDPs are collaborators.<sup>199</sup>

#### *Minors, elderly persons and persons with disabilities*

In its judgment in *Mubilanzila Mayeka and Kanika Mitunga v Belgium*, a detention case, the ECtHR considered the fact that the applicant was of a very young age and that she was separated from her family and found her to be in an 'extremely vulnerable position'.<sup>200</sup> In our view, age has an effect on the vulnerability of a person. In IDP camps, reports highlight the vulnerability of minors<sup>201</sup> and the elderly<sup>202</sup>, who have more difficulties, for instance, acquiring food supplies. Persons with physical or mental disabilities might also be especially vulnerable for similar reasons.<sup>203</sup>

#### *Women*

Women in Somalia are in general in a more vulnerable position than men. They are often victims of sexual violence inside IDP camps.<sup>204</sup> Perpetrators include other inhabitants of the camp, and the gatekeepers or various militia and security forces – often affiliated with the government – operating inside or near the IDP settlements.

#### Prospect of improvement of the situation

The third factor mentioned in *Sufi and Elmi v UK* requires that there should be no prospect of a person's situation improving within a reasonable timeframe. This criterion is formulated in open terms: the ECtHR does not determine beforehand what the exact duration of a reasonable timeframe is.

### **3.5 The situation of IDPs in Mogadishu**

Several recent reports address the situation IDPs in Mogadishu. Human Rights Watch reported serious human rights abuses against IDPs in Mogadishu in 2011 and 2012. Most serious abuses 'were committed by various militias and security forces, often affiliated with the government, operating within or near camps and settlements for the displaced. Frequently these militias were linked or controlled by managers, or "gatekeepers" as they are known, of the IDP camp'.<sup>205</sup> Since the beginning of 2013 many

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<sup>199</sup> Amnesty International, *No place like home* (February 2014) <http://www.amnesty.org/en/library/asset/AFR52/001/2014/en/109361a7-4d78-493c-94ed-7d76d81faa6b/afr520012014en.pdf> accessed 25 March 2014, p 46.

<sup>200</sup> ECtHR 12 October 2006, *Mubilanzila Mayeka and Kanika Mitunga v Belgium*, Appl no 13178/03, para 55.

<sup>201</sup> Danish Immigration Service and Landinfo, Security and protection in Mogadishu and South-Central Somalia, Danish and Norwegian fact finding mission to Nairobi and Mogadishu, April and May 2013 (8 May 2013), p 47.

<sup>202</sup> UNCHR, *International Protection Considerations with Regard to People Fleeing Southern and Central Somalia* (17 January 2014), p 8.

<sup>203</sup> UNHCR, *Reply by the United Nations High Commissioner for Refugees in response to request for guidance on the application of the internal flight or relocation alternative, particularly in respect of Mogadishu, Somalia* (September 2013) [www.refworld.org/pdfid/524400964.pdf](http://www.refworld.org/pdfid/524400964.pdf) accessed 26 February 2014, para 21.

<sup>204</sup> Amnesty International, *Somalia: No place for the Displaced. Forcible eviction of displaced communities* (September 2013) [www.refworld.org/docid/523801dd4.html](http://www.refworld.org/docid/523801dd4.html) accessed 24 March 2014, p 9. Human Rights Watch,

[http://www.hrw.org/sites/default/files/reports/somalia0214\\_ForUpload.pdf](http://www.hrw.org/sites/default/files/reports/somalia0214_ForUpload.pdf), accessed 25 March 2014, p 9-10.

<sup>205</sup> Human Rights Watch, *Hostages of the Gatekeepers, Abuses against Internally Displaced in Mogadishu, Somalia*, [http://www.hrw.org/sites/default/files/reports/somalia0313\\_ForUpload.pdf](http://www.hrw.org/sites/default/files/reports/somalia0313_ForUpload.pdf) accessed 25 March 2014.

IDPs faced forced evictions from the centre of Mogadishu.<sup>206</sup> These forced evictions have been carried out by private landowners, government representatives, and gatekeepers. They are the result of the relocation plan of the Somali government, which was announced in January 2013. This plan involves the relocation of hundreds of thousands of displaced people from Mogadishu to proposed locations outside the city centre and, later, the return of these people to their areas of origin. According to Amnesty International ‘the threat of eviction hangs over all internally displaced people in Mogadishu.’<sup>207</sup> The forced evictions often take place on a very short notice and may involve serious violence.<sup>208</sup> The IDPs were often not offered any alternative place to live. Many people moved to the north-west outskirts of Mogadishu, to the area known as Km 7-13, where they established settlements without government approval or assistance.<sup>209</sup> Amnesty International states that humanitarian agencies have limited access to the Km 7-13 area ‘as they perceive it as a higher risk area due to its location outside the city centre and the lack of precise knowledge regarding the presence of armed groups. 30% of people residing in the newer settlements reportedly pay for their protection.’<sup>210</sup> The living conditions in the camps in the Km 7-13 area are bad (bad quality shelters, limited access to water and latrines). According to Amnesty International, ‘[a]ny further deterioration in the already dire living conditions for displaced people could have disastrous consequences, especially for the more vulnerable’. However the Somali government fails to allow humanitarian assistance in the Km 7-13. Amnesty International states that this amounts to ‘a violation of Somalia’s international legal obligations as well as a violation of displaced people’s right to an adequate standard of living’.<sup>211</sup> IDPs living in camps outside the centre of Mogadishu also face problems to find or to travel to work.<sup>212</sup>

It may be argued on the basis of the recent information mentioned above that the dire humanitarian situation of IDPs in Mogadishu to a large extent emanates from ‘intentional acts or omissions of public authorities or non-State bodies’. This would imply that the ‘minimum level of severity test’ applies if a person who returns to Mogadishu runs a real risk of becoming an IDP.

Whether the humanitarian situation of the IDPs in Mogadishu amounts to ill-treatment needs to be assessed on the basis of recent country of origin information. The reports of Amnesty International and Human Rights Watch show that many IDPs in Mogadishu become victims of human rights abuses and face very difficult living conditions with severely limited access to humanitarian aid. For that reason, in particular vulnerable people such as those mentioned in section 3.4.1, who return to Mogadishu and are likely to become an IDP may risk ill-treatment within the meaning of Article 3 ECHR.

### 3.6 Conclusion

In this part we addressed the situation of IDPs in the context of Article 3 ECHR. We argued that it is reasonably likely that returnees who have no family ties in either Mogadishu or elsewhere in southern or central Somalia will end up in an IDP camp. We identified several groups of people who may

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<sup>206</sup> Amnesty International, *Somalia: No place for the Displaced. Forcible eviction of displaced communities* (September 2013) [www.refworld.org/docid/523801dd4.html](http://www.refworld.org/docid/523801dd4.html) accessed 24 March 2014.

<sup>207</sup> Amnesty International, *No place like home* (February 2014) <http://www.amnesty.org/en/library/asset/AFR52/001/2014/en/109361a7-4d78-493c-94ed-7d76d81faa6b/afr520012014en.pdf> accessed 25 March 2014, p 40.

<sup>208</sup> *Ibid*, pp 41-43.

<sup>209</sup> *Ibid*, p 43.

<sup>210</sup> *Ibid*.

<sup>211</sup> *Ibid*, p 44.

<sup>212</sup> *Ibid*, p 45.

particularly be forced to live in an IDP camp, including persons belonging to ethnic minorities, homeless persons and traditional elders.

The ECtHR applies two different tests when it assesses the humanitarian conditions in the country to which a person will be returned. Where a dire humanitarian situation is caused by a naturally occurring illness or the lack of sufficient resources, this situation would give rise to a breach of Article 3 only in 'very exceptional cases' where the humanitarian grounds against removal are 'compelling' (the compelling grounds test). However, where a dire humanitarian situation is caused by the intentional acts or omission of public authorities or non-State bodies, the ECtHR applies the normal 'minimum level of severity test'.

When the ECtHR applies the 'minimum level of severity test' to a specific situation it takes into account the following factors:

1. The person's ability to cater for his or her most basic needs such as food, water, hygiene and shelter;
2. Whether the person is vulnerable to ill-treatment; and
3. Whether the person has prospect of their situation improving within a reasonable timeframe.<sup>213</sup>

We elaborated on these factors and identified several groups of persons who in the Somali context may be considered specifically vulnerable to ill-treatment: Persons dependent on the State, supposed collaborators with NGO's or UN agencies, minors, elderly persons, persons with disabilities and women.

On the basis of recent reports concerning the situation of IDPs in Mogadishu we argued that the dire humanitarian situation of IDPs in Mogadishu to a large extent emanates from 'intentional acts or omissions of public authorities or non-State bodies'. Furthermore it was contended that in particular vulnerable people such as those mentioned in section 3.4.1, who return to Mogadishu and are likely to become an IDP may risk ill-treatment within the meaning of Article 3 ECHR.

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<sup>213</sup> Ibid, para 283.

## 4 Return of Somalis to al-Shabaab territory

### 4.1 Introduction

Somali applicants who are denied asylum in the Netherlands may face return to areas under control of al-Shabaab. Others may need to travel through areas controlled by al-Shabaab in order to reach their region of origin in Somalia. This part of the expert opinion will therefore examine the following question: when are the circumstances of return to areas controlled by al-Shabaab at variance with Article 3 of the Convention?

#### The decision of the ECtHR in the case of Sufi and Elmi

It follows from the judgment of the ECtHR in *Sufi and Elmi v UK* that a returned Somali might risk treatment falling within the scope of Article 3 ECHR if he were to come to the attention of al-Shabaab for failing to comply with their rules.<sup>214</sup> Although this treatment could be avoided by Somalis who are able to 'play the game' and obey the rules of al-Shabaab, the ECtHR considered it unlikely that a returnee with no recent experience of living in Somalia would be able to comply with al-Shabaab's rules. Moreover, the ECtHR stated that the risk of attracting the attention of al-Shabaab would be even greater for returnees that became westernised due to their absence from Somalia.<sup>215</sup> Accordingly, the ECtHR considered that 'a returnee with no recent experience of living in Somalia would be at real risk of being subjected to treatment proscribed by Article 3 in an al-Shabaab controlled area'.<sup>216</sup>

#### Dutch asylum policy

As a result of the ECtHR's judgment in *Sufi and Elmi v UK*, Dutch asylum policy offers protection to asylum applicants originating from a place that is (only accessible through an area) under control of al-Shabaab. In order to obtain protection the applicant is required to substantiate that he was or is unable to live under al-Shabaab rules.<sup>217</sup> The fact that the applicant has no recent experience living in Somalia is considered insufficient ground for protection, contrary to the ECtHR's finding in *Sufi and Elmi*.<sup>218</sup> From the Dutch asylum policy and decisions of the Dutch Council of State<sup>219</sup> regarding the application of this policy it can be inferred that an applicant is assumed unable to live under al-Shabaab rules in three situations:

1. The applicant has no experience of living in al-Shabaab territory;
2. The applicant experienced noteworthy problems with al-Shabaab; or
3. The applicant became westernised due to his stay in the Netherlands.

The first situation applies only to applicants who left before or within three months after al-Shabaab came to power.<sup>220</sup> Applicants who left Somalia later and did not experience noteworthy problems with

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<sup>214</sup> ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, Appl nos 8319/07 and 11449/07, para 276.

<sup>215</sup> Ibid, paras 275-277.

<sup>216</sup> Ibid, para 277.

<sup>217</sup> Vreemdelingencirculaire, para C7.23.4.5.

<sup>218</sup> ABRvS 31 July 2012, no 201200969/1V2, [ECLI:NL:RVS:2012:BX3193](#), para 2.3.3.

<sup>219</sup> The Administrative Jurisdiction Division of the Council of State (Afdeling bestuursrechtspraak van de Raad van State or ABRvS) is the highest administrative court in the Netherlands to decide in asylum law cases.

<sup>220</sup> Brief Minister voor Immigratie, Integratie en Asiel, *Uitwerking element 'verwestersing' in landgebonden asielbeleid Somalië* (21 August 2012)

al-Shabaab may according to the policy rules still be awarded protection for being westernised. However the policy rules only consider an applicant to be westernised and thus at risk of coming to the attention of al-Shabaab if he is well integrated into Dutch society. Integration in Dutch society is established on the basis of the applicant's proficiency in the Dutch language, participation in Dutch society and residency in the Netherlands for a significant time (at least ten years for adults).<sup>221</sup> Yet, the last requirement is impossible to meet for any applicant with experience of living in al-Shabaab territory, since al-Shabaab only gained control in Somalia around 2008, approximately six years ago. The requirement of ten years of residency in the Netherlands is not absolute. However, it has been acknowledged that the applicant's westernisation is difficult to substantiate, if he does not fulfill this requirement.<sup>222</sup> Furthermore it should be noted that the policy strongly links the concept of westernisation to integration into Dutch society. It is not examined whether the applicant risks attracting the attention of al-Shabaab because he is or appears to be westernised in the eyes of al-Shabaab.

It must be concluded that applicants who left Somalia after al-Shabaab came to power and who did not face, or are unable to substantiate, past problems are assumed able to live in accordance with al-Shabaab rules. Consequently, these applicants are not protected from return to a region controlled by al-Shabaab or a region which can only be reached travelling through al-Shabaab territory.

#### Outline

It can be inferred from the above that the practical application of the ECtHR's judgment in *Sufi and Elmi* might give rise to a need for further clarification. This part of the expert opinion addresses the issues that we believe are in need of further clarification to help define the state parties' obligations under Article 3 ECHR. First, the factual issue as to the nature of treatment faced by someone coming to the negative attention of al-Shabaab's will be discussed (section 4.2). Section 4.3 will address the question whether it is possible in practice for a returnee to comply with al-Shabaab rules in order to avoid treatment contrary to Article 3 ECHR. Finally, section 4.4 examines the question whether States may expect a returnee to comply with al-Shabaab rules in order to avoid ill-treatment, in light of the ECHR and other relevant sources of international law.

#### **4.2 Nature of treatment faced by someone failing to comply with al-Shabaab rules**

The ECtHR considered in *Sufi and Elmi* that the nature of treatment faced by someone failing to comply with al-Shabaab rules meets the minimum level of severity threshold required by Article 3 ECHR. It follows from recent country of origin Information reports that the types of treatment resulting from a failure to comply with the rules of Al-Shabaab vary. However, most punishments are disproportionate and involve executions, lashings, amputations and arbitrary detentions.<sup>223</sup> When the Hisbah, the religious police, becomes aware of someone violating a religious-moral decree, such as observing the prescribed prayers, they have jurisdiction to deal with these minor offences on the spot. The most common punishment for minor offences is lashing. However, other forms of punishment are also

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[www.tweedekamer.nl/kamerstukken/detail.jsp?id=2012D32592&did=2012D32592](http://www.tweedekamer.nl/kamerstukken/detail.jsp?id=2012D32592&did=2012D32592) accessed 26 February 2014, p 3 and ABRvS 31 July 2012, no 201200969/1V2, para 2.3.1.

<sup>221</sup> Vreemdelingendecret para C7.23.4.5 Ad b.

<sup>222</sup> Brief Minister voor Immigratie, Integratie en Asiel, *Uitwerking element 'verwestersing' in landgebonden asielbeleid Somalië* (21 augustus 2012), p 2-3.

<sup>223</sup> Ministerie van Buitenlandse Zaken, *Algemeen Ambtsbericht Somalië* (30 November 2012)

<http://www.rijksoverheid.nl/documenten-en-publicaties/ambtsberichten/2012/11/30/somalie-2012-11-30.html> accessed 3 March 2014, p 31.

applied, such as cutting a person's hair with pieces of broken glass (because his hair style deviates from the norm), imprisonment, confiscation of property, or even execution.<sup>224</sup> For example, the United Nations Department of Safety and Security in Mogadishu reported persons being executed by al-Shabaab for not being able to pay Zakat (Islamic tax).<sup>225</sup> Also, according to a 2012 report of the United States State Department, al-Shabaab operated detention centres in which thousands were incarcerated in inhumane conditions for minor offenses, such as smoking, playing soccer, or listening to music.<sup>226</sup> The Amnesty International Annual Report 2013 further noted that al-Shabaab continues to torture and execute people they accuse of spying or not conforming to their interpretation of Islamic law. The accused were killed in public – sometimes by stoning – and amputations and lashings were carried out.<sup>227</sup>

#### 4.2.1 Punishment of spies

Most extreme are the punishments of those whom al-Shabaab considers to be spies or having ties with the Transitional Federal Government (TFG), the African Union Mission in Somalia (AMISOM) or the international community. There have been reports of travellers being executed by al-Shabaab when suspected of having links with the TFG. Such executions appear to happen two or three times a week in southern and central Somalia.<sup>228</sup>

#### 4.2.2 Denial of the right to a fair trial

Arguably the the punishments applied by al-Shabaab not only amount to treatment contrary to Article 3 ECHR, but also constitute a flagrant denial of the right to a fair trial as provided in Article 6 ECHR. Those who violate al-Shabaab's rules receive little, if any, due process and many punishments are arbitrarily meted out on the spot, right after the accusation.<sup>229</sup>

The ECtHR established in the case of *Othman v UK* that an expulsion measure might be prevented by Article 6 where this could result in a fugitive suffering a flagrant denial of justice in the requesting country.<sup>230</sup> Accordingly, the return to, or through, al-Shabaab territory should be prohibited on the basis of Article 6 ECHR when, keeping in mind the severity and the disproportionality of the punishments, the returnee risks a flagrant denial of justice under the al-Shabaab regime.

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<sup>224</sup> M. Skjelderup, *Punishment on Stage: Application of Islamic Criminal Law by Harakat al-Shabaab al-Mujahideen*, (University of Oslo, 2011) [www.duo.uio.no/bitstream/handle/10852/23940/Masteroppgaven.pdf?sequence=2](http://www.duo.uio.no/bitstream/handle/10852/23940/Masteroppgaven.pdf?sequence=2) accessed 3 March 2014, p 96.

<sup>225</sup> UK Border Agency, *Somalia: Country of Origin Information Report* (5 August 2013) [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257640/report-08-13.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257640/report-08-13.pdf) accessed 3 March 2014, p 43.

<sup>226</sup> US State Department, *Somalia 2012 Human Rights Report* (April 2013) <http://www.state.gov/documents/organization/204377.pdf> accessed 3 March 2014, p 8.

<sup>227</sup> Amnesty International, *Report 2013: The State of the World's Human Rights* (23 May 2013) [www.amnesty.org/en/annual-report/2013/downloads](http://www.amnesty.org/en/annual-report/2013/downloads) accessed 26 February 2014, p 237.

<sup>228</sup> Danish Immigration Service and Landinfo (Norway), *Security and Protection in Mogadishu and South-Central Somalia* (Copenhagen, May 2013) [www.nyidanmark.dk/NR/rdonlyres/6F1A29C6-2F84-40D2-BDE4-42F69897EEC3/0/security\\_and\\_protection\\_in\\_somalia\\_may\\_2013.pdf](http://www.nyidanmark.dk/NR/rdonlyres/6F1A29C6-2F84-40D2-BDE4-42F69897EEC3/0/security_and_protection_in_somalia_may_2013.pdf) accessed 3 March 2014, pp 49-50.

<sup>229</sup> Human Rights Watch, *Harsh War, Harsh Peace: Abuses by Al-Shabaab, the Transitional Federal Government, and AMISOM in Somalia* (April 2010) [www.hrw.org/sites/default/files/reports/somalia0410webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/somalia0410webwcover_0.pdf) accessed 26 February 2014, p 20.

<sup>230</sup> ECtHR 17 January 2012, *Othman (Abu Qatada) v the United Kingdom*, Appl no 8139/09, para 258.



### 4.3 The ability of returnees to live in accordance with al-Shabaab's rules

Determining whether or not a returnee is able to live in accordance with al-Shabaab rules, and thus in need of protection under Article 3 ECHR, requires recent country of origin information about these rules. Peculiarities of al-Shabaab and the enforcement of its rules, which are relevant when assessing a returnee's capacity to comply with al-Shabaab rules, are discussed below.

#### 4.3.1 New rules

Al-Shabaab rules and decrees seem to be sporadically applied, vary by community, and depend on the attitude of local leaders.<sup>231</sup> According to interviews held with Somali women in Nairobi in March 2011, al-Shabaab has a rotating leadership whereby it replaces the administration in its respective areas every three months, with each new administration introducing new rules.<sup>232</sup> Therefore, it is extremely difficult to tell which rule applies at a certain time in a certain place. Therefore it is unlikely that a returnee knows which rules apply in the al-Shabaab territory to which he is returned.

#### 4.3.2 Rapid enforcement

Decrees issued by al-Shabaab tend to be binding from the moment of their public announcement. New decrees are rapidly and locally enforced by the Hisbah – the religious police – sometimes only one day after the decree is announced.<sup>233</sup> Although decrees are announced publicly at times, they can be so rapidly enforced that it is almost impossible, especially for returnees, to know beforehand what kind of behaviour and lifestyle al-Shabaab requires.

#### 4.3.3 Importance of details

Al-Shabaab deals with the most detailed aspects of life. Therefore it is necessary for returnees to know in full detail the rules al-Shabaab requires in order to be able to 'play the game'.<sup>234</sup> Yet, even Somalis currently living under the al-Shabaab regime face difficulties in complying with al-Shabaab rules. Complying with the rules requires awareness of the existence of the rules and the immorality of certain behaviours (such as playing Scrabble), and paying sufficient attention to detail. A returnee thus runs a great risk of being unable to comply. Even with past experience of living in al-Shabaab territory the returnee might have forgotten some rules, or be unaware of the details. For example, a returnee who fails to wear trousers reaching exactly to the middle of his calf muscles, for being simply unaware of the detailed rule, might already come to the attention of al-Shabaab.<sup>235</sup>

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<sup>231</sup> UK Border Agency, *Somalia: Country of Origin Information Report* (5 August 2013), p 89.

<sup>232</sup> Landinfo (Norway), *Somalia: Vulnerability, minority groups, weak clans and individuals at risk* (21 July 2011) [www.landinfo.no/asset/1805/1/1805\\_1.pdf](http://www.landinfo.no/asset/1805/1/1805_1.pdf) accessed 11 November 2013, p 3.

<sup>233</sup> M. Skjelderup, *Punishment on Stage: Application of Islamic Criminal Law by Harakat al-Shabaab al-Mujahideen*, (University of Oslo, 2011).

<sup>234</sup> Rechtbank 's-Gravenhage z.p. Assen, 11 June 2012, AWB 11/39977, [ECLI:NL:RBSGR:2012:BX2773](https://eclis.nl/asset/2012/1/2012_1.pdf), para 4.2.

<sup>235</sup> Ministerie van Buitenlandse Zaken, *Algemeen Ambtsbericht Somalië* (30 November 2012), p 30.

#### 4.3.4 Additional risk for returnees from western countries

It follows from country of origin information that, aside from the difficulties faced by any returnee to comply with al-Shabaab rules, Somalis returning from western countries are at a even higher risk of ill-treatment. There are numerous reports and witness testimonies about executions of Somalis being accused of spying for the U.S., the Ethiopians or the TFG. People returning from western countries are at a great risk of being accused to have ties with the TFG. Being accused of espionage means being considered an enemy of Islam, which leads to the most severe punishment: decapitation.<sup>236</sup> According to an international agency in Mogadishu, al-Shabaab will kill anyone it suspects of working for the national government or the international community. Well-known persons or persons looking a bit westernised may be at great risk if al-Shabaab stops his vehicle.<sup>237</sup>

According to the Dutch Ministry of Foreign Affairs al-Shabaab has recently become even more paranoid with regard to potential spies. In the eyes of Al-Shabaab, returned Somalis are highly suspect of espionage. The same goes for persons with a western passport, or persons who do not belong to the dominant clan in the area.<sup>238</sup> The Amnesty International Annual Report of 2013 notes that: 'Al-Shabaab factions continued to torture and unlawfully kill people they accused of spying or not conforming to their own interpretation of Islamic law. They killed people in public, including by stoning, and carried out amputations and floggings'.<sup>239</sup> If Somalis who live under the al-Shabaab regime already run a risk to be targeted as western spies, this risk is even higher, and almost inevitable, for people returning from western countries. Consequently, these returnees are at a high risk of coming to the attention of al-Shabaab and becoming the victim of treatment contrary to article 3 ECHR.<sup>240</sup>

#### 4.3.5 Burden of Proof

Taking all of the above into consideration it cannot easily be assumed that a returnee is able to 'play the game'. Furthermore, it is contended that a Somali returnee from a western country who might be able to 'play the game', still runs a high risk of being considered a spy or having ties with enemies of al-Shabaab. As a result, we consider that country of origin information provides evidence capable of proving that there are substantial grounds for believing that returnees from western countries will attract the attention of al-Shabaab. Consequently, we argue for a shift in the burden of proof. The State should dispel any doubts that a returnee risks ill-treatment upon return, and therefore make plausible that the returnee will be able to 'play the game' and avoid the attention of al-Shabaab.

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<sup>236</sup> Ibid, p 31.

<sup>237</sup> Danish Immigration Service and Landinfo (Norway), *Security and Protection in Mogadishu and South-Central Somalia* (Copenhagen, May 2013), p 49-50.

<sup>238</sup> Ministerie van Buitenlandse Zaken, *Algemeen Ambtsbericht Somalië* (December 2013) [www.rijksoverheid.nl/ministeries/bz/documenten-en-publicaties/ambtsberichten/2013/12/19/algemeen-ambtsbericht-somalie-2013-12-19.html](http://www.rijksoverheid.nl/ministeries/bz/documenten-en-publicaties/ambtsberichten/2013/12/19/algemeen-ambtsbericht-somalie-2013-12-19.html) accessed 26 February 2014, p 19.

<sup>239</sup> Amnesty International, *Report 2013: The State of the World's Human Rights* (23 May 2013), p 237.

<sup>240</sup> UK Border Agency, *Operational Guidance Note Somalia* (September 2013) [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257712/somaliaogn.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257712/somaliaogn.pdf) accessed 26 February 2014, p 14.

#### 4.4 Forcing a returnee to comply with al-Shabaab rules

In the previous section we discussed the difficulties for Somalis returning from Western countries to 'play the game' and avoid coming to the attention of al-Shabaab. This section deals with the question whether it is sufficient to establish the returnee's ability to adapt to comply with the al-Shabaab rules. This expert opinion contends that in the assessment of a risk of a violation of Article 3 ECHR also the returnee's intention and willingness to comply with these rules should be taken into account. The applicant's intention to adapt to al-Shabaab rules is relevant because the real risk assessment required by Article 3 should focus on the foreseeability of the risk. The applicant's willingness to 'play the game' should be taken into account because forcing a returnee to comply with al-Shabaab rules may in itself amount to treatment prohibited by Article 3. The recent case law of the Court of Justice of the European Union (CJEU) and the UK Upper Tribunal will be discussed which implies that asylum applicants cannot be required under the Qualification Directive or the Refugee Convention to conceal their religious beliefs or sexual orientation in order to prevent persecution.

##### 4.4.1 Foreseeability of the risk

In order to determine whether Article 3 prohibits the return of an asylum applicant the ECtHR employs a real risk assessment. It has been argued that this implies that it is not the possibility that an applicant can avoid risk that is relevant, but the probability that he will do so.<sup>241</sup> In assessing whether a returnee runs a real risk of being subjected to treatment contrary to Article 3 the ECtHR looks at the *foreseeability* of such a risk: 'In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances'.<sup>242</sup>

Accordingly, when forcing an asylum applicant into a situation where he can only avoid harm by behaving in a certain way, the state should examine whether it is foreseeable that he will or will not behave that way. This could be inferred from the ECtHR's considerations in the case of *N v Sweden*.<sup>243</sup> In this case the ECtHR assessed whether the applicant's intention to divorce her husband would lead to a foreseeable risk. Importantly, in assessing the foreseeability of the risk the ECtHR found it relevant whether the applicant 'can demonstrate convincingly that the intention is real and genuine'.<sup>244</sup> It also follows from the ECtHR's recent decision in the case of *NK v France* that the ECtHR attaches importance to the applicant's intention.<sup>245</sup> In this case the ECtHR found that the applicant, a convert to the Ahmadiyya religion, was at a real risk of treatment contrary to article 3 ECHR when returned to Pakistan.<sup>246</sup> Decisive to the ECtHR was that he could demonstrate convincingly that he would continue to practice his religion in public and try to convert others. Consequently the applicant would attract the negative attention of the Pakistani authorities.<sup>247</sup>

The case of *N v Sweden* and the case of *NK v France* contain facts and circumstances different from the cases of Somalis facing return to al-Shabaab controlled areas. In both *N v Sweden* and *NK v*

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<sup>241</sup> H. Battjes, 'Accommodation: surplus claims and the accommodation requirement in Dutch asylum policy' in: TP Spijkerboer (ed), *Fleeing Homophobia: Sexual orientation, gender identity and asylum* (Abingdon, Routledge, 2013), p 88.

<sup>242</sup> See, eg ECtHR 28 February 2008, *Saadi v Italy*, Appl no 37201/06, para 130.

<sup>243</sup> ECtHR 20 July 2010, *N v Sweden*, Appl no 23505/09.

<sup>244</sup> *Ibid*, para 56.

<sup>245</sup> ECtHR 19 December 2013, *NK v France*, Appl no 7974/11.

<sup>246</sup> *Ibid*, para 47.

<sup>247</sup> *Ibid*, paras 43-47.

France the applicants no longer had the possibility to refrain from certain acts in order to prevent ill-treatment. In the case of *N v Sweden* an Afghan woman had expressed a clear intention of not resuming her marriage and had made attempts to divorce.<sup>248</sup> In *NK v France*, the Ahmadiyya convert previously attracted the negative attention of the Pakistani authorities and was therefore known to them.<sup>249</sup> However, it cannot be inferred from the ECtHR's reasoning that an applicant should only be granted protection under Article 3 ECHR if he is no longer able to take steps or refrain from certain behaviour in order to avoid ill-treatment.

It follows that an applicant's real and genuine intention to behave in a certain manner, is a relevant factor to consider when assessing a real risk under Article 3. Accordingly, we argue that the mere possibility that an applicant could avoid harm by complying to al-Shabaab rules could be insufficient to prevent a real risk under Article 3. Therefore, we believe that in the case of Somali applicants facing return to, or through, al-Shabaab controlled both the applicant's possibility and intent to comply should be included in the real risk assessment under Article 3.

#### 4.4.2 Forcing a person to comply: degrading treatment?

Article 3 prohibits three forms of ill-treatment: torture, inhuman and degrading treatment or punishment. It is the ECtHR's standing case that no derogation of this prohibition is permitted and that it contains the principle of non-refoulement.<sup>250</sup> Below we demonstrate that an applicant's return to an area where he must comply with al-Shabaab rules in order to avoid ill-treatment could in itself constitute degrading treatment within the meaning of Article 3 ECHR. To this end we describe the concept of degrading treatment and discuss its possible application to the case of a returnee who is forced to comply with al-Shabaab rules.<sup>251</sup>

##### What is degrading treatment?

It follows from the ECtHR's standing case law that the following characteristics should be taken into account in the assessment whether a treatment is degrading in the meaning of Article 3 ECHR.<sup>252</sup> First the ECtHR has regard to whether the object of the treatment 'is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3'.<sup>253</sup> This includes treatment 'such as to arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance ..., or as driving the victim to act against his will or conscience'.<sup>254</sup> The intent to humiliate is however not required in order for a treatment to amount to degrading treatment.<sup>255</sup>

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<sup>248</sup> ECtHR 20 July 2010, *N v Sweden*, Appl no 23505/09, para 56.

<sup>249</sup> ECtHR 19 December 2013, *NK v France*, Appl no 7974/11, para 46.

<sup>250</sup> ECtHR 7 July 1989, *Soering the United Kingdom*, Appl no 14038/88.

<sup>251</sup> E Webster, *Exploring the Prohibition of Degrading treatment within Article 3 of the European Convention on Human Rights* (Diss, The University of Edinburgh, 2009)

[www.era.lib.ed.ac.uk/bitstream/1842/4062/1/Webster2010.pdf](http://www.era.lib.ed.ac.uk/bitstream/1842/4062/1/Webster2010.pdf) accessed 3 March 2014.

<sup>252</sup> For example ECtHR 3 April 2001, *Keenan v the United Kingdom*, Appl no 27229/95, para 110 and ECtHR 16 December 1997, *Raninen v Finland*, Appl no 20972/92, para 55.

<sup>253</sup> ECtHR 3 April 2001, *Keenan v the United Kingdom*, Appl no 27229/95, para 110.

<sup>254</sup> *Ibid*, para 110.

<sup>255</sup> E Webster, *Exploring the Prohibition of Degrading treatment within Article 3 of the European Convention on Human Rights* (Diss, The University of Edinburgh, 2009), pp 40-41. See for example ECtHR 16 December 1999, *T v the United Kingdom*, Appl no 24724/94, para 69.

Whether a forced compliance with al-Shabaab rules can be qualified as degrading thus depends on whether these characteristics apply. In section 4.2 we described the treatment and punishments which al-Shabaab applies to persons who come to their attention; in section 4.3 we demonstrated that al-Shabaab rules encompass every aspect of a person's life and that it is very difficult to comply with these rules. We argue, therefore, that the necessity to comply with the rules of al-Shabaab upon return in order to avoid ill-treatment, causes a returnee feelings of fear, anguish and inferiority capable of humiliating or debasing him/her, which potentially adversely affects his or her personality. Furthermore, forcing a returnee to comply with al-Shabaab rules should be considered degrading if it drives the victim to acts against his will or conscience.

### What is treatment?

It follows from the ECtHR's case law that the term 'treatment' is interpreted broadly and many situations fall within the scope of treatment. On the basis of the ECtHR's case law these situations might be divided into four categories: 'treatment as an action, behaviour or conduct; as a situation or set of circumstances; as a failure to act; and as a manner or attitude'.<sup>256</sup>

Although several categories of treatment might apply to the situation of a returnee having to comply with al-Shabaab rules, the following are particularly relevant. First, the situation of returnees to a region controlled by al-Shabaab may fall within the category of treatment as a situation or set of circumstances.<sup>257</sup> Examples of treatment which fall within this category are detention conditions, the death row phenomenon,<sup>258</sup> and the conditions of inadequate care or the set of adverse circumstances faced by a terminally ill patient upon return.<sup>259</sup> We believe this category of treatment could apply in the situation where a returnee is faced with the situation in al-Shabaab territory where he is forced to comply with a whole set of rules and circumstances to prevent ill-treatment.

Secondly, the category of treatment as a manner or attitude might apply. In particular, because the ECtHR found in the case of *Campbell and Cosans v UK* that 'a mere threat of conduct prohibited by Article 3' may in itself conflict with that provision, provided that this threat is 'sufficiently real and immediate'.<sup>260</sup> The ECtHR recognised that non-compliance with the rules of al-Shabaab constitutes a real risk of treatment contrary to Article 3.<sup>261</sup> Consequently, it is likely that a returnee is constantly under a real and immediate threat to comply with al-Shabaab rules which qualifies as treatment.<sup>262</sup>

### Level of severity

The assessment of the minimum level of severity is relative and depends on 'all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim'.<sup>263</sup> In every case of a returnee who is forced to comply with al-Shabaab rules the circumstances may differ. However, it should be contended that it is likely that in such case the minimum level of severity required by Article 3 ECHR is met for the following reasons. First, it is

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<sup>256</sup> E Webster, *Exploring the Prohibition of Degrading treatment within Article 3 of the European Convention on Human Rights* (Diss, The University of Edinburgh, 2009), p 198.

<sup>257</sup> ECtHR 7 July 1989, *Soering v the United Kingdom*, Appl no 14038/88, para 111.

<sup>258</sup> Ibid.

<sup>259</sup> ECtHR 2 May 1997, *D the United Kingdom*, Appl no 30240/96, para 52.

<sup>260</sup> ECtHR 25 February 1984, *Campbell and Cosans v the United Kingdom*, Appl nos 7511/76 and 7743/76, para 27.

<sup>261</sup> ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, Appl nos 8319/07 and 11449/07, para 276.

<sup>262</sup> E Webster, *Exploring the Prohibition of Degrading treatment within Article 3 of the European Convention on Human Rights* (Diss, The University of Edinburgh, 2009), pp 199-200.

<sup>263</sup> ECtHR 3 April 2001, *Keenan the United Kingdom*, Appl no 27229/95, para 109.

probable that the returnee faces negative physical and/or mental effects as a result of the continuous stress and fear in anticipation of the consequences of a failure to 'play the game'.

Secondly, Somalis returning to al-Shabaab territory will be forced to comply with al-Shabaab rules for an infinite time period without any prospect of the situation improving since it is unlikely that al-Shabaab will lose control of the territory.<sup>264</sup>

Thirdly, it has been widely reported and recognised by the ECtHR that areas under al-Shabaab control have the worst human rights conditions of Somalia.<sup>265</sup> We believe it is likely that the return of someone to an area under al-Shabaab control equates forcing someone into a situation where there is no respect for their human rights, in particular the rights laid down in the Convention, such as the right to respect for private and family life (Article 8), the right to freedom of thought, conscience and religion (Article 9), the right to freedom of expression (Article 10), the right to freedom of assembly and association (Article 11) and even the right to marry (Article 12). Moreover, it is not unlikely that the returnee will also face other human rights abuses. For example, the ECtHR considered reports of 'systematic forced recruitment by al-Shabaab of both adults and children in the areas under its control' which might establish a risk of slavery and forced labour (Article 4).<sup>266</sup>

Al-Shabaab's reported 'repressive form of social control' might make it impossible for a returnee to even exercise his rights in the privacy of the home.<sup>267</sup> Thus, the situation of returnees to al-Shabaab areas contrasts with the situation at issue in the case of *F v UK*. In this case the applicant made a claim for protection under Article 3 ECHR from return to Iran because of the regime's criminal prosecution of homosexual acts. The ECtHR dismissed the applicant's claim, taking into consideration the fact that 'the Islamic law is more concerned with public immorality and not what goes on in the privacy of the home'.<sup>268</sup> Consequently, it could be argued that al-Shabaab's excessive control which encompasses every aspect of a person's public and private life is a factor that needs to be taken into consideration when assessing whether there is a risk of treatment contrary to Article 3 ECHR upon return to an area controlled by al-Shabaab.

#### **4.4.3 Forcing compliance: incompatible with the Refugee Convention and Qualification Directive**

In its interpretation of the Convention, the ECtHR takes into account developments in international law. The CJEU found in recent judgments that when assessing an application for refugee status on the basis of the criteria of the Qualification Directive, the authorities of the Member States cannot reasonably expect the applicant to abstain from religious practices or conceal his sexual orientation in order to avoid persecution. The UK Upper Tribunal held that persons from an Al-Shabaab area who can show that they do not genuinely adhere to al-Shabaab's ethos will have a good claim to Refugee Convention protection regardless of whether the person could and would 'play the game'. This case-law will be discussed in more detail in this section. We invite the ECtHR to take this case law into account when interpreting Article 3 ECHR in cases of persons who will be expelled to regions controlled by al-Shabaab.

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<sup>264</sup> See in comparison: ECtHR 21 January 2011, *MSS v Belgium and Greece*, Appl no 30696/09, para 254. In this case the situation was seen as particularly serious because of the lack of any hope of the situation improving.

<sup>265</sup> ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, Appl nos 8319/07 and 11449/07, paras 272-274.

<sup>266</sup> *Ibid*, para 273.

<sup>267</sup> *Ibid*, para 273.

<sup>268</sup> ECtHR 22 June 2004, *F v the United Kingdom*, Appl no 17341/03, under 'the Court's assessment'.

### Case law of the CJEU

The CJEU concluded in the case of *Y and Z*, that two members of the Muslim Ahmadiyya had a well-founded fear of being persecuted for their religion when being returned to Pakistan. The CJEU considered that the applicant's fear of being persecuted is well founded if, in the light of the applicant's personal circumstances, the competent authorities consider that it may reasonably be thought that, upon his return to his country of origin, he will engage in religious practices which will expose him to a real risk of persecution. In assessing an application for refugee status on an individual basis, those authorities cannot reasonably expect the applicant to abstain from those religious practices.<sup>269</sup> Furthermore in the case of *X, Y and Z* the CJEU concluded in the case of three homosexuals:

'When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation in order to avoid the risk of persecution in his country of origin.'<sup>270</sup> Hence, the judgments of the CJEU in the cases of *Y and Z* and *X, Y and Z* show that discretion cannot be required on the basis of the Qualification Directive.

### Case law of the UK Upper Tribunal

These judgments of the CJEU are in line with the interpretation of the Refugee Convention by the Upper Tribunal of the United Kingdom. In the cases of *HJ* and *RT* the Upper Tribunal held that that a person should not be refused refugee status merely because he was likely to hide his sexuality or his genuine political beliefs in order to avoid persecution.<sup>271</sup> In the case of *AMM and Others* the Upper Tribunal decided that persons from an al-Shabaab area who can show that they do not genuinely adhere to al-Shabaab's ethos will have a good claim to Refugee Convention protection regardless of whether the person could and would 'play the game' by adhering to al-Shabaab's rules. The Upper Tribunal also decided that although those with recent experience of living under al-Shabaab may be able to 'play the game', in the sense of conforming with Al-Shabaab's requirements and avoiding suspicion of apostasy, the extreme nature of the consequences facing anyone who might wish to refuse to conform (despite the ability to do so) is such that they will in general be at real risk of persecution by al-Shabaab for a Refugee Convention reason.<sup>272</sup>

### Consequences for the interpretation of Article 3 ECHR

In this section we argued that it is likely that a returnee wanting or intending to exercise his right to freedom of thought, conscience or religion in an al-Shabaab controlled area would receive protection under the Refugee Convention. Because the exercise of these rights would be so flagrantly denied and punished we believe that the ECtHR's reasoning in the case of *Z and T v UK*<sup>273</sup> could apply to an applicant facing return to al-Shabaab territory. The ECtHR held in this case that :

[F]reedom of thought, religion and conscience is one of the foundations of a democratic society and ... manifesting one's religion, including seeking to convince one's neighbour, is an essential part of that freedom .... This is however first and foremost the standard applied within the Contracting States, which are committed to democratic ideals, the rule of law and human rights. The Contracting States nonetheless have obligations towards those from other jurisdictions,

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<sup>269</sup> CJEU Case C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y and Z* [2012], para 80.

<sup>270</sup> CJEU Case C-201/12 *X, Y and Z v Minister voor Immigratie en Asiel* [2013], para 79.

<sup>271</sup>

<sup>272</sup> *AMM and others v Secretary of State for the Home Department* [2011] UKUT 00445.

<sup>273</sup> ECtHR 28 February 2006, *Z & T v the United Kingdom*, Appl no 27034/05.

imposed variously under the 1951 United Nations Convention on the Status of Refugees and under the above-mentioned Articles 2 and 3 of the Convention. As a result, protection is offered to those who have a substantiated claim that they will either suffer persecution for, inter alia, religious reasons or will be at real risk of death or serious ill-treatment, and possibly flagrant denial of a fair trial or arbitrary detention, because of their religious affiliation (as for any other reason). Where however an individual claims that on return to his own country he would be impeded in his religious worship in a manner which falls short of those proscribed levels, the ECtHR considers that very limited assistance, if any, can be derived from Article 9 by itself.<sup>274</sup>

Pursuant to this decision, the human rights violation awaiting the returnee should amount to persecution in order to attract protection against expulsion under the European Convention. The ECJ ruled in *Y and Z* and in *X, Y and Z* that persons who can evade persecution only by hiding their belief or sexual orientation cannot be denied refugee status. Thus, they are people who have well-founded fear of being persecuted. There is therefore no reason to assume they do not run a real risk of being ill-treated.

#### **4.5 Conclusion**

Part 4 of the expert opinion aimed to clarify the obligations placed on state parties under Article 3 ECHR when considering the return of Somali nationals to al-Shabaab territory or to territory which can only be reached traveling through al-Shabaab territory. In particular, we intended to clarify the implications of the ECtHR's decision in *Sufi and Elmi v UK* where such a return is considered in practice. To this end, we elaborated on the nature of treatment faced by a returnee for a failure to comply with al-Shabaab rules and the ability of a returnee to avoid coming to the attention of al-Shabaab, we analysed recent country of origin information reports, and dealt with the question whether the assessment of a risk of a violation of Article 3 ECHR should take into account the returnee's intention and willingness to comply with al-Shabaab rules. Below we conclude our findings.

##### Treatment

The treatment – lashings, amputation, execution – faced by someone coming to the attention of al-Shabaab reaches the minimum level of severity and therefore amounts to treatment contrary to Article 3 ECHR. Furthermore, the manner in which al-Shabaab treats suspects of criminal conduct constitutes a flagrant denial of the right to a fair trial as protected under article 6 ECHR. Therefore, both Article 3 and Article 6 ECHR potentially prohibit a state from returning an applicant.

##### Ability to avoid the attention of al-Shabaab

The ECtHR held in *Sufi and Elmi v UK* that the return is prohibited under Article 3 if an applicant is at a real risk of coming to the attention of al-Shabaab. It is our finding that it is likely that applicants returning from western countries will not be able to comply with the rules of al-Shabaab. The rules of al-Shabaab are constantly subjected to change, new rules are rapidly enforced and the rules are very detailed. There is an additional risk for persons who are returning from western countries, since they risk being marked as spies by al-Shabaab. As a result, returnees run a real risk of attracting the attention of al-Shabaab.

We argued that the country of origin information we examined provides evidence capable of proving that there are substantial grounds for believing that returnees from western countries will

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<sup>274</sup> Ibid, under 'the Law'.



attract the attention of al-Shabaab. Consequently, we asserted that the burden of proof should shift to the State. We believe it should be up to the state to dispel any doubts that a returnee is able to 'play the game' and will not attract the attention of al-Shabaab.

#### Forcing compliance with al-Shabaab rules

Furthermore, it is our finding that if an applicant is found able to avoid the attention of al-Shabaab his return might still be at variance with Article 3 ECHR. We argued that before returning an applicant to al-Shabaab territory the assessment under article 3 ECHR should include the intended behaviour of the applicant upon return and his willingness to comply with the rules of al-Shabaab. An applicant's real and genuine intention to behave in a certain manner, is a relevant factor to consider when assessing the foreseeability of a risk of a treatment prohibited by Article 3 ECHR. On the basis of the ECtHR's case law we asserted that the situation in which a returnee is forced to comply with the rules of al-Shabaab may amount to degrading treatment in the meaning of Article 3 ECHR. Our conclusion was based on the fact that al-Shabaab rules encompass every aspect of a person's life, severely restrict the exercise of his human rights in public areas and in the home and non-compliance with the rules usually leads to severe punishment. Furthermore we invited the ECtHR to take into account the recent rulings of the CJEU in the cases of *Y and Z* and *X, Y and Z*. In these cases the CJEU found that asylum applicants cannot be expected to abstain from religious practices exercise or reserve expression of sexual orientation in order to avoid the risk of persecution.

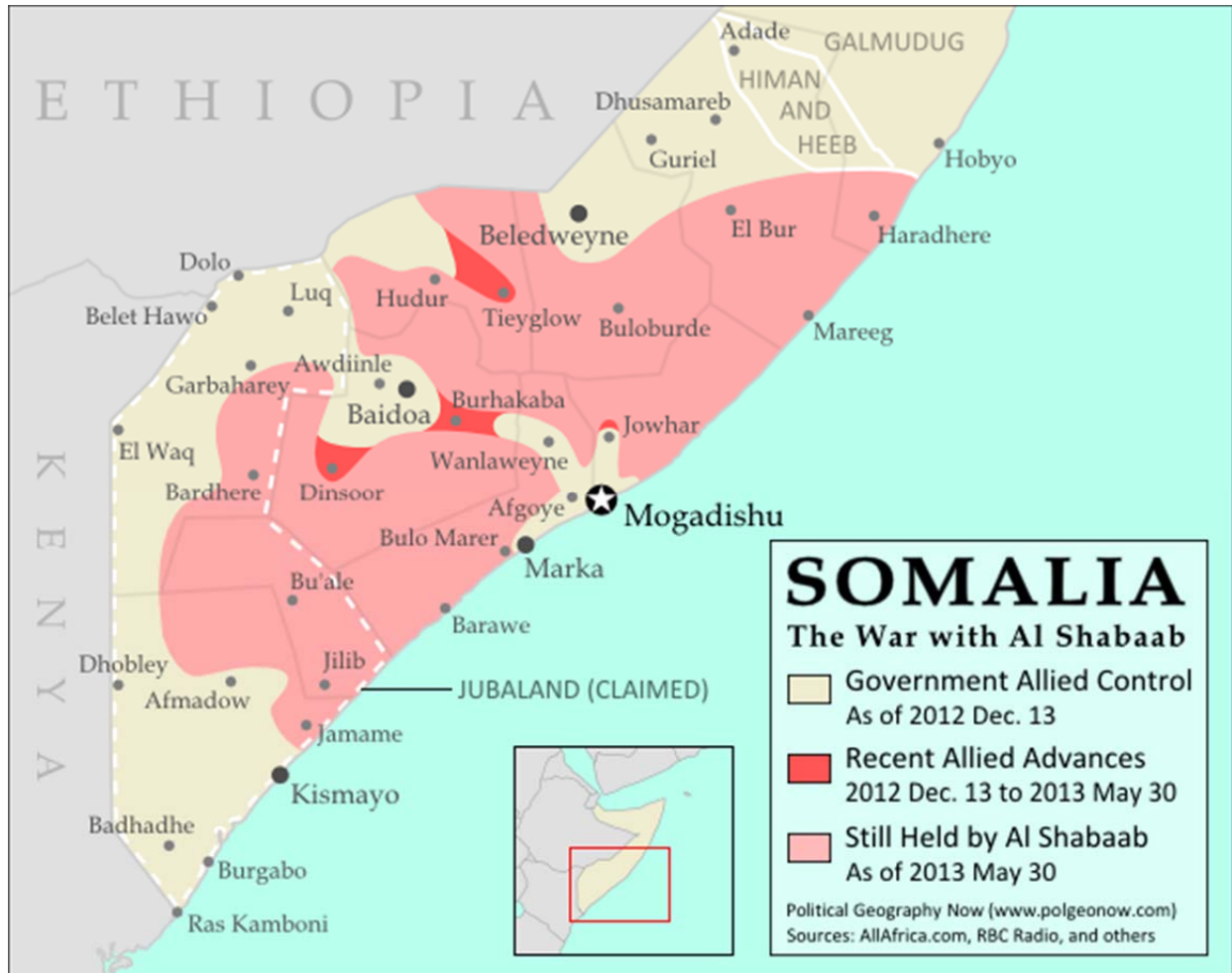
## Annex 1: Minority Groups Somalia

Source: UN Office for the Coordination of Humanitarian Affairs, *A study on minorities in Somalia* (August 2002) [www.reliefweb.int/report/somalia/study-minorities-somalia](http://www.reliefweb.int/report/somalia/study-minorities-somalia) accessed 4 April 2014.

Minority groups	Ethnic origin	Estimated population	Location: Main Districts	Language	Religion	Clan affiliation	traditional skill
Bantu	Bantu communities in East and Central Africa	15% of the total 7000,000 Somali Population	In the riverline areas across the Juba and Shabelle rivers: Jilib, Jamame, Buale, Sakow, Merka, Qoryoley, Afgoye, Jowhar, Balad, Buloburte, Beletweyne,	Somali ( both Maay and Mahatiri); Mushunguli),	Islam and small percentage of Christian (about 300 people) mainly from the Mushunguli communities in Kakuma regugee camp	Some Bantu subclans in the Lower shabelle region identify themselves with Digil and Mirifle in the Lower Shabelle region	Small scale farming and laborers
Rer Hamar	Immigrants from Far East countries	0.5%	Shangani and Hamarweyne districts in Mogadishu; and Merka	Somali (Rer-Hamar Dialect)	Islam	Some subclans have patron clans within Hawadle	Business, fishing
Brawan / Bravanese	Arab immigrants mainly from Yemen	0.5%	Mainly in Brava town	Baravenese	Islam	No patron clans	Business, fishing,
Bajuni	Kswahili people from Kenya Coast	0.2%	Kismaio, and islands off coast: Jula, Madoga, Satarani, Raskamboni, Bungabo, Hudey, Koyama, and Jovay islands.	Bajuni	Islam	No patron clans	Mainly fishing
Galgale	Samale	0.2	Mogadishu and Gedihir in the Middle Shabelle Region.	Somali (Mahatiri)	Islam	Identify themselves as Nuh Mohamud; Clan patrons- Osman Mohamud and Omar Mohamud subclans of	Wood craft making, pastorals

						Majetren,	
Gaheyle	Samale	0.1	Erigabo (Sanag)	Somali (Mahatiri)	Islam	Warsengeli (Darod)	Pastorals
Boni		0.1	Along the border between Kenya and Somalia	Somali (Mahatiri)	Islam	No patron clan	Hunters
Eyle	Sab	0.2	Mainly in Burhakaba, Jowhar and Buloburte	Somali (Some use May, and others Mahatiri)	Islam	Rahaweyn	Hunters and gathers
Midgan or Gaboye	Samale	0.5	Scattered in the north and central Somalia, Hiran, Mogadishu and Kismaio	Somali (Mahatiri)	Islam	No clan patrons	Shoemaker
Tumal	Samale	0.5	North and Central Somalia, Hiran, Mogadishu and Kismaio				Blacksmith
Yibir	Samale	0.5	North and Central Somalia, Hiran, Mogadishu and Kismaio				Hunters
Ashraf	Arab immigrants from Saudi Arabia	0.5	Merka, Brava, Bay and Bakol regions	Mainly May, there are also some Mahatiri	Islam	Rahaweyn	Farmers and pastorals

## Annex II: Map of Somalia



Situation on 30 May 2013

Source: Political Geography Now:

<http://www.polgeonow.com/2013/05/somalia-war-map-al-shabaab-2013.html>