

THIRD SECTION

CASE OF SALAH SHEEKH v. THE NETHERLANDS

(Application no. 1948/04)

JUDGMENT

STRASBOURG

11 January 2007

FINAL

23/05/2007

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

In the case of Salah Sheekh v. the Netherlands,

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

Mr B.M. Zupančič, *President*,

Mr J. Hedigan,

Mr C. Bîrsan,

Mrs A. Gyulumyan,

Mr E. Myjer,

Mr David Thór Björgvinsson,

Mrs I. Ziemele, *judges*,

and Mr V. Berger, *Section Registrar*,

Having deliberated in private on 12 December 2006,

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

PROCEDURE

1. The case originated in an application (no. 1948/04) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Somali national, Mr Abdirizaq Salah Sheekh (“the applicant”), on 15 January 2004.

2. The applicant was represented by Mr Ph.J. Schüller, a lawyer practising in Amsterdam. The Netherlands Government (“the Government”) were represented by their Agent, Mr R.A.A. Böcker, of the Ministry of Foreign Affairs.

3. On 18 March 2004 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided on 9 March 2006 to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant submitted that he was born in 1986 and is currently living in Amsterdam.

A. Reasons for the applicant's request for asylum

5. The applicant requested asylum in the Netherlands for the reasons set out below.

6. He originally hailed from Mogadishu and belonged to the minority Ashraf population group. In 1991, due to the civil war, his family were forced to leave behind their belongings in Mogadishu and flee to the village of Tuulo Nuh, 25 km from Mogadishu, where they lived in primitive conditions.

7. After their flight from Mogadishu, the family were robbed of their remaining possessions. Tuulo Nuh was controlled by the Abgal clan of the Hawiye clan-family. That clan's armed militia knew that the applicant and his family had no means of protection because they belonged to a minority, and for that reason the family were persecuted. Three other Ashraf families were living in Tuulo Nuh; they were treated in the same manner.

8. Members of the militia would frequently come to the family home and threaten the applicant and his family. The first time this occurred was when the applicant was about seven years old: the militia threatened the applicant's father, saying that they would set the house on fire if he did not give them money. Whenever the applicant went out he would be harassed and beaten; sometimes

when he went to fetch water, the bucket would be knocked over by members of the Abgal. The applicant's mother sold fruit and vegetables on the market. She was repeatedly robbed and ill-treated. Sometimes, when her daily takings had been stolen, the family had to go without food and drink.

9. In 1995 the applicant's father was killed by members of the Abgal militia. One evening in December 1998, on one of the occasions when members of the militia came to the house, the family members were locked up and ill-treated – the applicant was hit with a belt and a rifle butt. His brother Ali had his arm broken. Then the militia members took the applicant's mother and sister as well as a female acquaintance outside with them. They left his mother, but took his sister and the acquaintance to a place outside the village where they raped them. They did not release them until the next morning.

10. In May 2001 the applicant and one of his brothers were held by members of the militia, ill-treated and forced to unload a lorry from 10 a.m. until 5 p.m.

11. In March/April 2002 the applicant's brother, who ran a small grocery shop, was shot and killed in his shop by Abgal militia members. The applicant heard the shots and when he went to look he saw the body of his brother lying on the floor while the militia members looted the shop. The militia knew his brother and saw him as easy prey because, being a member of a minority, he was unable to defend himself.

12. About three months later, in June or July 2002, Abgal militia members came to the family home in a car, took the applicant's sister away, raped her and released her late the same night. Although the applicant was at home, he was powerless to intervene because he might have been killed in the process. It was not uncommon for militia members to rape girls. The majority of girls in the village belonged to the large clans and were therefore well protected. Of the families belonging to the Ashraf minority, the applicant's was the only one with a daughter, making her an easy target.

13. The last time members of the militia came to the family home prior to the applicant's flight was in March 2003. Eight men came in a Jeep, carrying AK47 and M16 rifles. The applicant was at home with two younger brothers. He was threatened, beaten, punched and kicked. The militia searched the house looking for money. They left, saying that his mother should get money ready for them or the consequences would be dire.

14. On several occasions the applicant's mother had requested the village wise men to ask the militia to stop persecuting the family, but to no avail.

15. The family had been wanting to leave the country for a long time, but there was not enough money. Fleeing to another place in Somalia was not an option, as things might be even worse elsewhere. Finally, after lengthy negotiations conducted by the applicant's uncle with clan elders, his mother received compensation from the people who had moved into the family home in Mogadishu. This meant she had the financial means to pay for the applicant's escape to the Netherlands.

B. The applicant's journey to the Netherlands

16. The applicant's flight from Somalia was arranged by his mother and his uncle.

17. On 1 May 2003 he went from Tuulo Nuh to Mogadishu, where he stayed in his uncle's house for one week while his uncle established contact with a “travel agent” calling himself Frank. The applicant handed over a number of passport pictures to Frank, which the latter used to obtain a Somali passport in the applicant's name. Frank then put the applicant up in a house in Mogadishu for a day. There the applicant met a boy by the name of Abdulkadir who was also about to flee the country. The next day, the applicant, Abdulkadir and Frank flew from Mogadishu to Nairobi (Kenya) in an aeroplane used to transport qat (a plant grown in Kenya, Ethiopia and Yemen; the chewing of its leaves and twigs is popular among Somalis). In Nairobi they took a taxi to a hotel. Frank did not allow the applicant to continue the journey using the Somali passport, which he took back from him. After staying in Nairobi for three days, the applicant, Frank and Abdulkadir flew to

Istanbul and from there to Amsterdam. On this leg of the journey the applicant used a Kenyan passport in the name of one Mahat **Ahmed** Hassan, born in 1977, as well as an identity card in the same name. Frank would give these documents to the applicant when they had to pass through passport controls, but would then take them back again. On arrival at Amsterdam Schiphol Airport on 12 May 2003, Frank told the applicant and Abdulkadir to wait for him as he had to go somewhere in the airport. Whilst they were waiting they were approached by police, whereupon they said that they wished to request asylum.

C. The asylum procedure in the Netherlands

18. On his arrival, the applicant indicated that he wished to apply for asylum. He was refused entry into the Netherlands and deprived of his liberty. He was taken to the asylum application centre (*aanmeldcentrum*, “AC”) at Schiphol to lodge his request for asylum (*verblijfsvergunning asiel voor bepaalde tijd*) on 13 May 2003. A first interview with an official of the Immigration and Naturalisation Department (*Immigratie- en Naturalisatiedienst*) took place the same day in order to establish the applicant's identity, nationality and travel route. He stated, *inter alia*, that he thought he had been born in 1986 because he knew there was a three-year difference between himself and his brother.

19. A number of further questions concerning the applicant's age were put to him on 14 May 2003. He said that as a result of an illness he had lost his hair, and this explained why he did not have much hair. He did not know his exact date of birth and estimated that he was 17 years of age. He consented to undergo an examination to determine his age.

20. The same day a lawyer acting on behalf of the applicant submitted a small number of corrections to the record drawn up of the first interview. Referring to a report from the National Ombudsman, the lawyer also objected to the method used to determine the applicant's age. He further requested that the applicant be granted, *ex officio*, a residence permit for stateless persons who, through no fault of their own, are unable to leave the Netherlands (the so-called “no-fault residence permit” – “*buiten-schuld vtv*”).

21. On 19 May 2003 the examination to determine the applicant's age was conducted. According to the results of the examination, the applicant was at least 20. On this basis the applicant's theoretical date of birth was given as 1 January 1983.

22. On 28 May 2003 the applicant was interviewed about the reasons for his request for asylum. During the interview he stated, *inter alia*, that his mother had told him that he had been born on 23 February 1986 and that he had been five years old at the start of the war in Somalia. He did not agree with the attribution of a different date of birth, as he trusted his mother more than the doctor who had carried out the examination to determine his age.

23. Meanwhile, on 15 May 2003, the Minister of Immigration and Integration (*Minister voor Immigratie en Integratie* – “the Minister”) had notified the Regional Court (*arrondissementsrechtbank*) of The Hague sitting in Haarlem of the measure imposed on the applicant depriving him of his liberty. According to section 94(1) of the Aliens Act 2000 (*Vreemdelingenwet 2000*), the applicant was deemed to have appealed against the measure by means of this notification. On 2 June 2003 the Regional Court rejected the appeal.

24. On 3 June 2003 the applicant was given a copy of the statement of the Minister's intention to refuse him asylum (*voornemen*). On 20 June 2003 a lawyer acting on behalf of the applicant submitted written comments (*zienswijze*) on this intention.

25. By a decision of 25 June 2003 the Minister refused the applicant's asylum request. The fact that the applicant had failed to submit documents establishing his identity, nationality and travel route was held to cast doubt on the sincerity of his account and detract from its credibility. This conclusion was not altered by the fact that it had subsequently been established that the applicant had flown to the Netherlands from Istanbul, since this information had come to light without any help from the applicant.

26. The Minister further considered that the applicant had made unreliable statements as to his date of birth and his age. Although he had submitted that he was 17 years of age, an examination had shown that he was at least 20. This was also deemed seriously to affect the credibility of his account.

27. The Minister found that, in any event, the reasons advanced by the applicant for his flight were insufficient to qualify him for refugee status. The situation in Somalia for asylum seekers, whether or not they belonged to the Ashraf population group, was not such that the mere fact of coming from that country was sufficient in order to be recognised as a refugee. The applicant's account contained insufficient indications that he had made himself known as an opponent of the (local) rulers. He had never been a member or sympathiser of a political party or movement, nor had he ever been arrested or detained.

28. The applicant's claim that he had been harassed from when he was a child by members of the Abgal clan because he belonged to a minority in the area where he lived was also deemed insufficient to qualify him for refugee status. In this context the Minister held that the problems experienced by the applicant had not come about as the result of systematic, major acts of discrimination which rendered his life unbearable. Rather, these problems should be seen as a consequence of a generally unstable situation in which criminal gangs frequently, but arbitrarily, intimidated and threatened people.

29. The applicant's claims that he had been held for one day in May 2001 and had been forced to perform hard labour, and that he had several times been threatened with death by members of the Abgal, were also deemed insufficient. The Minister considered that the applicant's situation could not have been desperate, given that he had stayed in the area where he was living despite having been the victim of extortion. This conclusion was not altered by the applicant's claim that he had wanted to leave sooner but had lacked the money.

30. The Minister concluded that there had not appeared to be a real risk of the applicant's being subjected to treatment in breach of Article 3 of the Convention on his return to Somalia. Moreover, the applicant was not eligible for a residence permit under the policy of leniency towards asylum seekers who had undergone trauma (*traumatabeleid*), given that the alleged murder of his brother had occurred as far back as March/April 2002 and the alleged rape of his sister as far back as 1998 and June/July 2002.

31. According to the Minister the return of the applicant to Somalia, given the general situation there, did not amount to an unduly harsh measure since, in order to avoid any future problems, he could settle in one of Somalia's relatively safe areas. The applicant had only heard, but had no proof, that he would experience the same problems there because he belonged to a minority. There was no reason to conclude that a general humanitarian emergency pertained in those areas. Whether or not the applicant had family or clan ties in the relatively safe areas, or whether or not he had ever been there before, was of no significance in this context.

32. The Minister found that the applicant was not stateless since he held Somali nationality. Therefore, the applicant was not eligible for a "no-fault residence permit". Finally, the Minister extended the measure depriving the applicant of his liberty.

33. On 26 June 2003 the applicant appealed against the rejection of his request for asylum. He argued, *inter alia*, that a controversial method had been used to determine whether or not he was a minor, that the Minister had ignored the fact that his horrific experiences had their roots in a form of ethnic exclusion and exploitation and that no internal flight alternative existed within Somalia. The same day he also filed an objection (*bezwaar*) against the refusal to grant him a "no-fault residence permit" for stateless persons. The appeals against the deprivation of his liberty which he was deemed to have lodged by means of a ministerial notification were rejected by the Regional Court of The Hague sitting in Haarlem, by decisions of 2 June, 14 July, 25 August, 14 October and 1 December 2003 and 14 January 2004.

34. On 15 August 2003 the Minister rejected the applicant's objection against the refusal to grant him a "no-fault residence permit" for stateless persons. She maintained that the applicant was not

stateless; although there was no effective government in Somalia at the present time, the possibility existed that one would be established in the future. Moreover, the international community did not doubt the existence of the State of Somalia.

35. Following a hearing on 16 September 2003 the Regional Court of The Hague sitting in Amsterdam dismissed the applicant's appeal against the rejection of his request for asylum on 7 November 2003. The Regional Court did not agree with the Minister that the applicant's account was rendered implausible as a result of the incorrect date of birth; according to the Regional Court, the applicant had merely stated what he had been told by his mother. However, for the remainder, the Regional Court considered that the Minister's view that the applicant's situation as he described it was insufficiently serious to qualify him for refugee status was well-founded. The Regional Court agreed with the Minister that the problems experienced by the applicant had come about not so much as the consequence of a targeting of the applicant personally; rather, the events were to be seen as a result of the generally unstable (security) situation in Somalia, where intimidation and insults by criminal groups regularly and arbitrarily occurred. In this context the Regional Court attached relevance to the fact that the applicant could have removed himself from the situation pertaining in his immediate environment by moving to the "relatively safe areas" of Somalia, as appeared from, *inter alia*, the country reports (*ambtsberichten*) drawn up by the Minister of Foreign Affairs (see paragraph 47 below). In view of the foregoing, the Regional Court further held that the Minister had been correct in finding that the applicant had failed to substantiate his claim that he would run a real risk of being subjected to treatment in breach of Article 3 of the Convention if he were expelled to his country of origin. Finally, the Regional Court, referring to a judgment of the Administrative Jurisdiction Division of the Council of State (see paragraph 85 below), considered that the Minister could reasonably have taken the view that the applicant's return to Somalia did not constitute an exceptionally harsh measure in the context of the overall situation there, having regard to the fact that rejected asylum seekers belonging to minority groups could remove themselves from any problems they might experience by staying in the "relatively safe areas" of Somalia.

The applicant did not lodge a further appeal (*hoger beroep*) with the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State (*Raad van State*) against the dismissal of his appeal, his lawyer advising him that, in view of that body's established case-law concerning the availability of an alternative place of abode in Somalia, such further appeal would stand no chance of success.

36. Having been informed that he was to be issued with a European Union ("EU") travel document and deported to the "relatively safe areas" of Somalia, via Nairobi, on 16 January 2004, the applicant lodged an objection with the Minister on 8 January on the basis of section 72(3) of the Aliens Act 2000. He further requested the Regional Court of The Hague sitting in Amsterdam to issue a provisional measure to the effect that he would not be deported pending the appeal. The applicant argued that there were too many incongruities surrounding his deportation as planned: not only was the legal basis of the EU travel document unclear, it was also not known whether the authorities in Puntland and the Somali province of Mudug allowed persons travelling on such documents entry to their territory. In addition, the applicant, as a member of a minority unable to obtain protection from one of the ruling clans, would be forced to live in a camp for internally displaced persons ("IDPs") in the "relatively safe areas", where the conditions were so appalling that they had been described by the UN Independent Expert on the Situation of Human Rights in Somalia as a clear violation of human rights. This expert had also noted that the most pressing issue of concern in Puntland was discrimination against minorities who had no government or armed protection and were therefore vulnerable to sporadic rape and looting.

37. The provisional measures judge (*voorzieningenrechter*) of the Regional Court of The Hague sitting in Amsterdam rejected the applicant's request for a provisional measure on 20 January 2004. The judge held that deportation with an EU travel document would be unlawful only if there were indications that entry to a territory would be denied to persons travelling with such a document. No such indications existed. Moreover, the airline company transporting rejected asylum seekers from

Nairobi to Somalia had undertaken to return the persons concerned should they be denied entry to Somalia. The fact that an expulsion via Nairobi entailed a short stop at an airport in Mogadishu was insufficient to conclude that there would be a risk of treatment in breach of Article 3 of the Convention. Finally, the Regional Court considered that the recent tensions between Puntland and Somaliland did not render the expulsion unlawful, given that the applicant would be expelled to the province of Mudug.

38. Meanwhile, on 15 January 2004, the applicant introduced the present application. He also requested the Court under Rule 39 of the Rules of Court to indicate to the Government not to expel him pending the proceedings before the Court. That same day, the President of the Chamber decided to indicate to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings before the Court not to expel the applicant. Thereupon, the Netherlands decided not to proceed with the applicant's expulsion. The applicant was also released.

39. On 27 February 2004 the Minister dismissed the applicant's objection against the decision to expel him. His appeal to the Regional Court of The Hague sitting in Amsterdam was declared inadmissible on 10 January 2005. The Regional Court held that the applicant no longer had an interest in a determination of the merits of his objection in view of the fact that its aim, a halt to the expulsion, had been achieved since, following the interim measure indicated by the European Court, it had been decided not to proceed with his expulsion. This decision was upheld by the Administrative Jurisdiction Division of the Council of State on 27 May 2005.

40. On 7 July 2005 the Government informed the Court that the applicant was eligible for a residence permit on the basis of a temporary "policy of protection for certain categories" (*categoriaal beschermingsbeleid*, see paragraphs 42-43 and 87 below) adopted by the Minister on 24 June 2005 in respect of asylum seekers coming from certain parts of Somalia. Pursuant to this information, the applicant lodged a fresh application for asylum on 23 September 2005. The application was granted on 10 March 2006.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Asylum

41. As of 1 April 2001 the admission, residence and expulsion of aliens have been regulated by the Aliens Act 2000 (*Vreemdelingenwet 2000*), the Aliens Decree 2000 (*Vreemdelingenbesluit 2000*), the Regulation on Aliens 2000 (*Voorschrift Vreemdelingen 2000*) and the Aliens Act Implementation Guidelines 2000 (*Vreemdelingencirculaire 2000*). The General Administrative Law Act (*Algemene Wet Bestuursrecht*) is also applicable, except where otherwise stipulated.

42. On the basis of section 29(1) of the Aliens Act 2000, in force at the relevant time, a residence permit for the purposes of asylum may be issued to an alien:

(a) who is a refugee within the meaning of the Convention relating to the Status of Refugees of 28 July 1951 ("the 1951 Convention");

(b) who makes a plausible case that he or she has well-founded reasons for believing that, if expelled, he or she will run a real risk of being subjected to torture or other cruel or degrading treatment or punishment;

(c) who cannot, in the opinion of the Minister, for compelling reasons of a humanitarian nature connected with the reasons for his or her departure from the country of origin, reasonably be expected to return to that country; or

(d) for whom return to the country of origin would, in the opinion of the Minister, constitute an exceptionally harsh measure within the context of the overall situation there.

43. Pursuant to section 29(1)(d) the Minister may pursue a policy of protection for a particular category of asylum seekers. Section 3.106 of the Aliens Decree 2000 specifies the indicators that are used to assess whether such a policy would be justified. In brief, they are the nature, degree and geographic spread of the violence in the country of origin, the activities of international organisations (in so far as they bear strongly on the position of the international community with

regard to the situation in the country of origin) and the policies of other Member States of the European Union. Protection for certain categories is based on considerations related not to specific persons but to the overall situation or patterns of violence in the country of origin. The criterion of exceptional harshness, laid down in section 29(1)(d), is not a formal one, such as the declaration of a state of siege, a state of war or the existence of some form of armed conflict, but a material one. It relates to whether the risks that could arise on a person's return, in connection, *inter alia*, with armed conflict or the like would be unreasonable from a humanitarian perspective or from the perspective of the law of armed conflict. In general, protection for certain categories is justified only if armed conflict (including armed civil conflict) has disrupted daily life to such an extent that such humanitarian risks arise.

44. An asylum seeker whose application for asylum has been rejected may appeal against that decision to the Regional Court of The Hague. Further appeal from the Regional Court's judgment lies to the Administrative Jurisdiction Division of the Council of State.

45. Section 45 of the Aliens Act 2000 stipulates that a decision rejecting an asylum application automatically has the following consequences: the alien is no longer legally resident in the Netherlands, his or her access to services for asylum seekers is terminated and he or she is required to leave the Netherlands within a fixed time-limit, failing which the competent authorities are authorised to expel the person concerned. A separate removal order is therefore not required. However, section 72(3) of the Aliens Act 2000 stipulates, in relation to means of redress, that acts taken in respect of an alien – including expulsion – are to be equated with a decision (*beschikking*) within the meaning of the General Administrative Law Act. As a result, the remedies provided for in that Act – objection and appeal – may be employed in respect of the manner in which an expulsion is to be carried out or if the situation at the time of expulsion differs from that at the time of the final rejection of the asylum application in such a way that it can no longer be said that the lawfulness of the expulsion has already been established.

46. As a rule, the Netherlands authorities do not monitor asylum seekers after expulsion, since it is held that this is not appropriate in the context of a conscientious asylum procedure and would undermine the credibility of the decisions emerging from that procedure. It is argued that if an application for asylum has been rejected and the courts have determined that this decision was correct, there is no reason to suppose that on returning to the country of origin, the asylum seeker in question will face persecution or a breach of Article 3 of the Convention. If the latter were the case, he or she would have been granted a residence permit for the purposes of asylum pursuant to section 29(1)(b) (see paragraph 42 above).

B. Netherlands policy on Somali asylum seekers

47. The respondent Government's policy on Somali asylum seekers has been devised by the Deputy Minister of Justice (*Staatssecretaris van Justitie*) and, since 2002, by his successor, the Minister of Immigration and Integration, on the basis of country reports published by the Minister of Foreign Affairs, who in 1993 published the first such report on the general situation in Somalia.

1. Country reports and policy based on them prior to November 2004

48. The country report issued in February 2000 indicated that in the “relatively safe” areas the need for protection by one's own clan was declining as the effectiveness with which the regional authorities maintained security was increasing. Although this did not mean that the clan no longer played a role in Somali society, protection by one's own clan or family was no longer considered necessary in the “relatively safe” areas, where the local and regional authorities were generally able to maintain peace and security and to offer an inclusive, neutral form of protection. As a result, the policy pursued as of April 2000 no longer included the principle of clan protection on a person's return.

49. While the country report dated June 2001 found that the position of minorities in the “conflict” area continued to be bad, it nevertheless stated that despite this lack of security, it was not

the case that all persons belonging to a minority had to fear (person-specific) persecution for the sole reason that they belonged to that minority. As the June 2001 report further found a continuation of the trend towards a diminishing need for clan (or family) protection in the “relatively safe” areas, the then Deputy Minister of Justice abolished on 24 September 2001 the policy of protection for certain categories of Somalis (see paragraphs 42-43 above), which until then had still been applied to members of two particular clan families. Even though the situation in the “conflict” and “transitional” areas of the country could support the conclusion that such a policy continued to be called for, the government took the view that an alternative place of abode for all failed Somali asylum seekers, including minorities, was available in the “relatively safe” areas. In addition, asylum seekers in respect of whom it had been determined that they had a well-founded fear of persecution or that they ran a real risk of being subjected to treatment in breach of Article 3 of the Convention were not eligible for a residence permit for the purpose of asylum if it was established that they could remove themselves from the perceived threat of persecution or real risk by settling elsewhere within the country of origin.

50. According to the country report issued in March 2003, Somalia could be divided into the following areas, in terms of the risk for non-combatants of falling victim to conflict-related violence or political violence:

- the “conflict” area in southern Somalia, consisting of Mogadishu, Kismaayo, the environs of those cities and the provinces of Bay and Bakool;
- the “transitional” area in southern Somalia, consisting of the provinces of Lower and Middle Juba and Middle Shabelle (in so far as they were not part of the conflict area), Gedo and the north-western part of the province of Galgaduud;
- the “relatively safe” part of Somalia, consisting of the northern provinces of Adwal, Woqooyi Galbeed, Togdheer, Sahil, Sanaag, Sool, Bari, Nugaal and the north of Mudug (together making up the self-declared State of Somaliland in the north-west and the self-declared autonomous region of Puntland in the north-east), the south of Mudug, the central provinces of Hiran and Galgaduud (in so far as they were not in the “transitional” area) and the islands off the coast of southern Somalia.

51. The March 2004 country report emphasised once more that clan protection was not necessary and that the security situation was not so bad that all members of a given minority were justified in fearing person-specific persecution due to their minority status, even if it was the case that minorities and the clanless were more likely to fall victim to intimidation and abuse by armed militia members.

2. The November 2004 country report

52. In June 2004 officials from the Netherlands Ministry of Foreign Affairs paid a five-day working visit to the city of Bosaso in Puntland. The November 2004 country report was partly based on the findings of this mission.

53. Since there was no clear difference in the number of armed clashes between the “conflict” areas and the “transitional” areas as referred to in the March 2003 country report, the November 2004 report divided Somalia into two regions, namely a “relatively safe” and a “relatively unsafe” region. On the basis of the risk run by the civilian population of falling victim to acts of violence, the two regions were defined as follows:

- the “relatively unsafe” region: Mogadishu and Kismaayo and the area around those towns, the provinces of Bay, Baykool, Lower and Middle Juba, Lower and Middle Shabelle, Gedo, Hiran and Galgaduud;
- the “relatively safe” region: the provinces making up Somaliland and Puntland, the south of Mudug and the islands off the coast of southern Somalia.

54. As previous reports had done, the report of November 2004 further elaborated on the existence of clans and minority groups in Somalia: besides the dominant Somali nomadic culture, there are various groups with differing cultures, such as farming Somali clan families and non-ethnic Somali minority groups. The farming clan families are regarded as less “noble” by the

nomadic clan families and the status of the minority groups, who are estimated to account for fifteen percent of the population, is even lower. The minorities either lack a clan structure or have a clan structure which is much less pronounced than that of the nomadic clan families. Traditionally, these minority groups have not been covered by Somali clan law and have therefore received no protection unless a clan has agreed to protect them. In general, the minority groups suffered greatly from the armed conflicts, since they were unarmed and often had some financial resources derived from their occupations. They were easy targets for robbery, looting and murder by militias. Many members of the minority groups in the south fled in the course of the civil war, particularly to Kenya and western countries, but also to Somaliland and Puntland.

55. According to the country report, it was not known exactly how many minority groups existed in Somalia. One of the main minority groups is the Benadiri (or Reer Hamar) whose ancestors are people of Persian, Indian, Arab and Portuguese origin who settled in some of the coastal towns of Somalia from the ninth century onwards and mixed to varying degrees with the original population and subsequent newcomers. Each Benadiri group can trace its origin back to a single forefather; Benadiri often refer to these descent groups as clans. The Ashraf, consisting of two groups traditionally regarded as descendants of the two grandchildren of the Prophet Muhammad, is one of these Benadiri groups.

56. The November 2004 country report described the position of minority groups in the “relatively unsafe” regions as bad. Members of these groups were much more likely to be victims of intimidation and assault by armed members of the militias. Notwithstanding this lack of safety, not all people belonging to a given minority group had cause to fear individual persecution simply on account of their membership of the minority, nor was the situation the same for all minority groups. As the Benadiri did not have a special relationship with one or more of the Somali clan families, they could not count on clan protection. Since the outbreak of the civil war, the Benadiri had tended to be the first victims of robbery and looting owing to their relatively isolated social position and presumed wealth. As a consequence of these problems, a large proportion of the Benadiri had fled abroad. Those who remained had often lost some or all of their possessions. Although the scale of violence had greatly decreased, they were still in a vulnerable position since they were living in the “relatively unsafe” regions. They were virtually absent from the “relatively safe” areas and their numbers there were too small for general statements to be made about them.

57. Since the civil war, the populations of towns and cities in the “relatively safe” areas had skyrocketed, partly owing to an influx of displaced persons from the south and partly owing to migration from rural to urban areas. Many displaced persons had managed to settle in their new areas on a lasting basis. Almost all of them had ties with the inhabitants of the area, for example because they were members of the same clan family or because a relative came from there. A social safety net might also be provided by other ties, for instance with old school friends, neighbours or business partners. Displaced persons without such ties almost invariably ended up in miserable settlements for the internally displaced, with no real chance of proper integration.

58. There were still some 30,000 people living in settlements for displaced persons in Puntland, of whom 28,000 were living in the town of Bosasso. The majority of these people originated from southern Somalia and also comprised members of the Midgan and Bantu minorities. The camp-dwellers perceived poor accommodation and lack of affordable sanitation as the most serious problems. They were living in huts built from discarded materials which did not provide adequate protection against Bosasso's harsh climate. There was also a serious risk of fire, as the high winds could easily cause cooking fires to get out of control. Another problem was security in the camps: theft and occasional crimes of violence. Whenever an incident was reported to the police, there was an investigation and increased patrolling for about a week, but in most cases the police were unable to catch the culprits. However, camp-dwellers said this was not because of discrimination.

59. In Somaliland, displaced persons were also living in miserable huts that they had built for themselves from discarded materials. In October 2003 the Somaliland Government decreed that all displaced persons who were not originally from Somaliland must leave the country. Although no

one was actually deported, it was made abundantly clear to displaced persons from southern Somalia that they were no longer welcome. Most of them had moved to Puntland or Yemen.

60. No reports of violent incidents on the islands off the coast of southern Somalia had been received in the period under review. Since 2001, members of the Darod/Marehan clan have had control of these islands, which are also inhabited by members of the Bajuni minority who are employed in the fishing industry by members of the aforementioned clan.

61. According to the November 2004 report, the rate of crime in the “relatively safe” areas was low, certainly compared with other countries in Africa. In general, the local and regional administrative authorities were able to maintain law and order, if necessary with the help of the police. In Somali society, law enforcement had always been primarily the preserve of clan elders, village elders, imams and other community leaders. This traditional form of law enforcement was, by its very nature, much less effective if the victim was a member of a minority group or of a small, poorly armed clan. As a result, displaced persons and unarmed minorities were an easy target for criminals. The police force of a given city contained members of all the clans who lived there, as well as a few members of minority groups and a small number of women. Although the police discriminated against minority groups and displaced persons, they seldom refused categorically to act. Where a displaced person or member of a minority group was a victim of crime, the police would generally take adequate (or reasonably adequate) action, even though it was likely that they would be less inclined to do their best for a displaced person than for local inhabitants belonging to the clans. However, if there was a dispute with a clan member, there was a real likelihood that the police would take the side of that clan member. In such cases there were indications that police officers might even commit crimes against displaced persons or members of minority groups.

62. The country report concluded that in general, displaced persons in the “relatively safe” parts of Somalia could be said to have a marginal, isolated position in society. This made them vulnerable, and they were victims of crime to a greater than average extent. Their vulnerability partly depended on what resources they possessed (money, skills, and so forth), but in general their socio-economic position was significantly worse than that of the local population. They were not persecuted by the local authorities. There was some discrimination by local people, but in Somaliland or Bosasso at least no serious incidents were known to have occurred. However, people were not ready to accept the idea of displaced persons who had no ties whatsoever with their clan becoming genuinely integrated into their community.

63. Somalis could enter and leave the country overland without restriction, in keeping with ancient nomadic tradition. There were several flights a week to a number of destinations in Somalia from the surrounding countries and the United Arab Emirates. Persons entering Somaliland via Hargeisa airport had their travel documents checked. The other airports in Somalia operated under the authority of local warlords, who ran them as private businesses. Passengers were not asked to produce travel documents at any of these latter airports.

64. Since the collapse of Somalia's central government in 1991 there had been no internationally recognised body that issued or extended Somali passports. Travel documents that passed for Somali passports could be bought at markets in Somalia and in neighbouring countries. Officially, Somali passports were not internationally recognised as travel documents, but in practice they were accepted by the countries of the European Union, Somalia's neighbouring countries and the Gulf States, since there was no alternative travel document for Somalis to use. Nor were Somali passports officially recognised as proof of identity.

65. Somalis returning to Somalia met with no hindrance from the local authorities on arrival. However, in the “relatively unsafe” areas, passengers were sometimes waylaid en route from the airport by militias or criminals who stole all their belongings, often resorting to extreme violence. As a result of the decree of October 2003, Somalis without ties with Somaliland were not normally allowed to live in that entity. There were no formal residence restrictions in the remainder of Somalia. Organised return (voluntary or otherwise) to Somaliland and Puntland required the consent of the local authorities. In the past few years UNHCR had helped many thousands of

Somalis return to Somalia, especially to the north. However, the authorities in Somaliland and Puntland had pointed out that there was only limited scope for providing those who returned with work and facilities.

66. Following the issuance of this country report, the applicant requested the Minister of Foreign Affairs to provide him with documents relating to the working visit of the Ministry delegation to Bosasso in Puntland in June 2004. In response, the Minister made public the written report on interviews conducted by the delegation with fifteen individuals. A number of passages relating to the identity of and background information on the interviewees had been deleted for reasons which were permitted under section 10(2) of the Transparency of Public Administration Act (*Wet openbaarheid van bestuur*) as grounds for withholding information (for example the protection of sources or of the private life of third persons). Administrative proceedings instituted by the applicant aimed at obtaining a complete version of the report were unsuccessful.

67. The written report on the interviews consists of summaries of the information and replies received by the delegation in the course of the interviews, some of which were held in two camps for IDPs. The identities of those interviewed and/or organisations for which they worked have been deleted, and the questions that were put to them are not included in the report.

68. Below are some quotes from the report.

- "Banditry and crime in a general sense are much less prevalent in Somalia than in Kenya ... In the whole of Puntland hardly any fighting is taking place."

- "In the villages the councils of elders have a firm grip on the situation. Accordingly, it is very safe there. In the cities things are different in this respect."

- "No serious confrontations took place in Puntland in 2004. There were a number of small-scale conflicts over ownership of land or between families."

- "The police actually undertake action if their assistance is sought and are generally efficient. The police are composed of different clans and are capable of acting independently."

- "If a minority such as the Bantu go to the police, the police will in general not do very much. This is mainly because there is not a great deal that the police can do; they prefer the settlement of disputes through the old clan traditions. As a result it is more difficult for minorities without a clan ... to obtain justice."

- In one of the camps for IDPs visited by the delegation, there were 2,000 persons who "had come from Somaliland following the decree of October 2003. Most of them had been forced to leave and had not even been given the opportunity to collect their belongings."

- "There are a total of around twenty camps for IDPs in or near Bosasso. Each camp has a different ethnic composition, and persons belonging to the same clan/minority look out for each other."

- "In Bosasso ... there are no Reer Hamar ..., except for those who are on their way to Yemen (which is a regular occurrence)."

- "Reer Hamar are virtually absent from the north of Somalia (in Bosasso there are at most 100)."

- "Ultimately the clan system will continue to control politics. People nevertheless feel a certain connection to Puntland as an entity; they are proud of the stability in Puntland and consider themselves less primitive than the southerners."

- "New IDPs arriving in Bosasso usually have existing ties with family members or acquaintances already living in Bosasso, who take care of their immediate needs. ... IDPs who come to Bosasso without having any ties there experience considerably more difficulties. Such IDPs generally turn to the mosque for help. In practice they manage in the end to join other IDPs."

- "IDPs are not discriminated against. IDPs and minorities have their committees and such like to protect their interests."

- "The human rights situation in Puntland has worsened in recent years, especially for IDPs and minorities."

- “There is no question of genuine integration of IDPs; they continue to be an isolated group, even after twenty years. They do not form part of the community and do not own land. Although this is officially permitted, it is in practice not allowed. In short, the position of IDPs is a marginalised one.”

3. The May 2005 country report

69. A new country report was issued in May 2005. This report was virtually the same as its predecessor, except for the following elements.

70. The report divided Somalia into three areas: a “relatively unsafe” area, a “relatively safe” area, and a “transitional” area consisting of the northern provinces of Sool and Sanaag, to which both Somaliland and Puntland lay claim. The “relatively safe” area was the same as in the November 2004 country report, except that the south of the province of Mudug was now considered “relatively unsafe”.

71. It was reiterated in the May 2005 report that no actual deportations from Somaliland had taken place. However, the many thousands of displaced persons residing in Somaliland were living in constant fear. The country report further referred to statements from the Norwegian Refugee Council, according to which the situation of displaced persons in Somaliland had worsened and they were subjected to exploitation, extortion and harassment.

72. The country report further stated that the UN had carried out a large-scale study amongst IDPs in Puntland in 2004, in the course of which 99.3% of displaced persons said they felt safe in their settlements. A footnote stated that on the basis of this report the Norwegian Refugee Council – co-author of the report together with the United Nations Office for the Coordination of Humanitarian Affairs – had come to a different conclusion: “Their small huts made of cloth with often no proper door offer no protection against assaults by men stealing belongings and raping women at gunpoint with impunity.”

73. The fact that travel documents were checked when entering Somaliland via Hargeisa airport had not changed. The May 2005 report added that no reports had been received of non-Somalilanders having been refused entry. The report further added that travel documents were also checked at Bosasso airport in Puntland.

74. The May 2005 report further specified that organised returns (voluntary or otherwise) to Somaliland and Puntland required the consent of the local authorities if they concerned the return of a group of persons.

75. Between 1 January 2004 and 15 April 2005, twenty-six Somalis returned voluntarily to Somalia from the Netherlands. Ten of them chose to go to Mogadishu, two to other destinations in the south, thirteen to Hargeisa (Somaliland) and one to Bosasso (Puntland). Only one had a Somali travel document; the others travelled using an EU travel document.

4. The country report of July 2006

76. The most recent country report dates from July 2006. According to this report, the “relatively safe” areas were practically the same as those described in the May 2005 report (see paragraph 70 above), except that the provinces of Sool and Sanaag were once again “relatively safe”, while the south of the province of Mudug continued to be “relatively unsafe”. Moreover, the whole of the town of Galkayo was now considered to belong to the “relatively unsafe” areas.

77. It was reiterated in the July 2006 report that in the “relatively safe” areas, minorities and displaced persons were victims of crime more often than the average. However, these persons' chances of falling victim to crime were considerably higher in the “relatively unsafe” regions. Minorities were further said to constitute a disproportionately large part of the prison population in the “relatively unsafe” regions.

78. It continued to be the case that Somalis without ties to Somaliland could not in principle obtain a right to reside there, although no forced expulsions had taken place. As regards Puntland,

no reports had been received of problems experienced by Somalis who hailed from elsewhere in staying there.

79. In 2005 nine Somalis voluntarily returned from the Netherlands; seven to Mogadishu, one to Kismayo and one to Hargeisa.

5. *Comments on and reactions to the country reports*

a. *Médecins sans Frontières*

80. In a letter of 26 May 2004 to the Dutch Minister of Immigration and Integration, *Médecins sans Frontières* (“MSF”) wrote that the situation in the relatively safe areas as described in the country report of March 2004 (see paragraph 51 above) did not correspond to that organisation's experiences in Puntland. MSF supported two hospitals in the Puntland town of Galkayo. It was necessary to support two hospitals in the same town because Galkayo was split into two by a “Green Line” dividing two warring clans.

According to MSF, the security situation in Puntland had not improved in the course of 2004 and was not compatible with a policy of forced returns. Members of both clans and minorities were victims of violence against which the authorities were unwilling or unable to offer protection. There was also widespread banditry. A generation of former child soldiers who had grown up in an environment where weapons were the only law and the strongest ruled were now the elders and warlords. This had led to the demise of rules and traditional customs in favour of chaos and brutality, with civilians being systematically targeted.

b. *Dutch Refugee Council*

81. In an analysis of the November 2004 country report¹, the Dutch Refugee Council (*Vereniging VluchtelingenWerk Nederland*) pointed, *inter alia*, to a statement made by a person interviewed by the delegation of the Dutch Ministry of Foreign Affairs during its working visit to Bosasso (see paragraph 68 above). Although the country report stated that no one had actually been deported from Somaliland, this person had told the delegation that many people had been forced to leave Somaliland and that “they had not even been given time to pack their clothes.” The Dutch Refugee Council also referred to a report from the UN Secretary General to the Security Council of 9 June 2004, which stated as follows:

“... the environment for 'foreigners' in general and IDPs from southern Somalia in particular has continued to deteriorate in Somaliland. Harassment, exploitation and extortion of these groups is quite common. These conditions have forced many of those affected to flee to Puntland, where they are living in squalid conditions.”

In addition, according to the Dutch Refugee Council, there were many signs that forced deportees or rejected asylum seekers were not welcome in Somaliland. On 24 November 2004 the Somaliland Minister of Resettlement, Rehabilitation and Reintegration had written a letter to the Dutch Minister of Immigration and Integration saying that his Government did not accept forced deportees or rejected asylum seekers. The Somaliland Government had also warned all airlines flying via Dubai to stop transporting forced deportees to any airport in Somaliland.

82. The Dutch Refugee Council disputed the claim that police protection was available and effective in Puntland, since effective law-enforcement mechanisms were absent and the authorities of Somaliland and Puntland were themselves sometimes the source of human rights violations.

83. Whereas the country report had suggested that the fact that some of the camps in Puntland burned down was due to a combination of inflammable materials used to build huts and high temperatures, the Dutch Refugee Council pointed to a number of reports which suggested that three camps had been set on fire, killing people and leaving thousands of people homeless. The Dutch Refugee Council reported that the situation of IDPs in Somaliland seemed to be going from bad to worse. They quoted Mr Jan Egeland, UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, as saying, after a visit to a settlement for returning refugees: “This is one of the most forgotten places in the world. Darfur is privileged compared to this.”

c. Amnesty International

84. The Dutch section of Amnesty International commented on the November 2004 country report in a letter of 25 February 2005 to the lawyer of the applicant in the present case. They stated that displaced persons and members of minorities and low-status clans were in constant danger of becoming victims of violence. According to Amnesty's information, the need for clan protection was still very strong, and those lacking it ran substantial risks.

6. Case-law of the Administrative Jurisdiction Division of the Council of State in cases concerning Somali asylum seekers and/or Article 3 of the Convention, and policy based on that case-law

85. In a judgment of 24 June 2003 (*Jurisprudentie Vreemdelingenrecht* (Immigration Law Reports – “JV”) 2003/352), the Administrative Jurisdiction Division of the Council of State ruled that it did not appear from the country reports that such serious, widespread and structural infringements of the security situation were occurring in the “relatively safe” areas of Somalia as to prompt the conclusion that the Minister could not reasonably have considered that the relatively safe situation there was durable and that the areas provided an alternative place of abode. While it was true that certain regions of the “relatively safe” areas were temporarily not accessible via the country's external borders, there was no reason to believe that the Minister could not reasonably have reached the conclusion, as far as minority groups were concerned, that a return to the “relatively safe” areas of Somalia would not constitute an exceptionally harsh measure in the context of the overall situation there.

86. Following the above-mentioned decision, the Administrative Jurisdiction Division consistently dismissed appeals lodged by failed Somali asylum seekers claiming that they could not settle in the “relatively safe” areas. On 28 May 2004, however, the Division held that a particular interim measure indicated by the President of the European Court² stood in the way of the expulsion to northern Somalia of Somali nationals belonging to a minority and who did not have family or clan ties in northern Somalia (JV 2004/278). Following this decision, the Minister on 11 June 2004 adopted a moratorium on expulsions (*vertrekmoratorium*) for Somalis belonging to this group. On 20 February 2005 the scope of this moratorium was extended to all Somalis who did not hail from the “relatively safe” areas, pursuant to a decision of the Administrative Jurisdiction Division of 17 December 2004 (JV 2005/70), in which account was taken of the interim measure indicated by the European Court in an application concerning a Somali national belonging to a clan whose members constituted a majority in Puntland³.

87. Since, according to national law, the duration of a moratorium on expulsions could not exceed one year, and in view of the interim measures indicated by the European Court and the interpretation of those measures by the Administrative Jurisdiction Division, the Minister on 24 June 2005 adopted a policy of protection for certain categories (see paragraphs 40 and 42-43 above). In this context the Minister had regard not just to the actions of the European Court but also to the nature and geographical spread of the violence in parts of Somalia, as described in the country report of May 2005. Provided that no contra-indications exist (in the form of criminal convictions, for instance), the policy applies to Somali asylum seekers who do not originate from Somaliland or Puntland (apart from Sool and Sanaag provinces) and who have not spent more than six months in Somaliland or Puntland, unless that stay took place in a camp for IDPs. It also applies to Somalis originating from the islands off the coast of southern Somalia. Even though those islands are considered to be “relatively safe” they can only be reached via “relatively unsafe” territory.

No time-limit has been set for the duration of the policy; it will be reviewed when the European Court reaches a decision on the merits in the cases in which an interim measure has been indicated.

88. In a decision of 22 August 2003 (JV 2003/526) the Administrative Jurisdiction Division had regard to the information contained in the country report of June 2001, according to which persons did not have to fear (person-specific) persecution merely because they belonged to a minority. In the light of that information the Administrative Jurisdiction Division found that the Deputy Minister

of Justice had correctly considered that the problems which the alien concerned had allegedly suffered as a result of the fact that he belonged to the Reer Hamar – namely slave labour, ill-treatment and intimidation – had come about as a consequence not of the specific targeting of the alien personally, but of the general situation in the country of origin at that time.

89. In a case concerning an Afghan national, and with reference to this Court's judgment in the case of *Vilvarajah and Others v. the United Kingdom* (judgment of 30 October 1991, Series A no. 215), the Administrative Jurisdiction Division held in a decision of 7 November 2003 (JV 2004/17) that, even if an alien was to be expelled to a country where organised, large-scale human rights violations were committed against a group to which that alien belonged, he or she would have to make out a convincing case that specific facts and circumstances existed relating to him or her personally, in order to be eligible for the protection offered by Article 3 of the Convention. This passage has since become a standard feature of decisions of the Administrative Jurisdiction Division relating to Article 3.

90. On 5 December 2003 the Administrative Jurisdiction Division rejected the complaint under Article 3 of the Convention raised in a further appeal lodged by a Somali national who claimed that she belonged to the Reer Hamar and had been subjected to ill-treatment including rape (JV 2004/62). The Administrative Jurisdiction Division considered that the alleged events demonstrated neither that the acts committed had been specifically aimed at the appellant personally, nor that she thereby found herself in a position which substantially deviated from that of other members of the Reer Hamar in Somalia.

7. The position of the Somaliland and Puntland authorities on the forced return of Somali nationals

91. On 14 December 2002 the Minister of Resettlement, Rehabilitation and Reintegration of the self-proclaimed Republic of Somaliland wrote to the Netherlands Ministers of Justice and Foreign Affairs, informing them of his Government's policy on the repatriation of rejected asylum seekers. He stated that the Government of Somaliland would not accept the resettlement, voluntary or otherwise, in Somaliland of nationals of Somalia. They did, in principle, accept the voluntary return of Somaliland nationals. However, such voluntary return operations were only to take place within the context of a bilateral relationship between the Somaliland Government and the host Government, in accordance with specific agreements and relevant provisions of international law, and the return of rejected asylum seekers in the absence of such agreements would be considered unacceptable and illegal. The only persons eligible for resettlement were Somalilanders (whose nationality was to be verified by the Ministry beforehand) who had not been abroad for more than three years and who were travelling on a Somaliland passport. The Somaliland authorities did not accept the EU travel document or other documents.

92. In reply to questions from a member of Parliament, the Dutch Minister of Immigration and Integration stated on 12 March 2003 that the letter from the Somaliland Minister of Resettlement, Rehabilitation and Reintegration did not give cause for a moratorium on expulsions. As Somaliland was not the only “relatively safe” area of Somalia, rejected Somali asylum seekers still had the possibility of returning to the other “relatively safe” areas, which included Puntland (Records of the Lower Chamber of Parliament – *Handelingen Tweede Kamer* – 2002-2003, no. 905, Annex, pp. 1893-94). The Minister added that the Netherlands attached great importance to successful cooperation in respect of the return of illegal migrants, and that he would inform Parliament of the outcome of any consultations should these prove possible.

93. The President of the Puntland State of Somalia addressed a letter to the Netherlands Minister of Foreign Affairs on 24 January 2004, expressing his deep concern about the forceful removal of Somali asylum seekers by the Dutch authorities in the absence of any meaningful negotiations with the existing Somali authorities. He stated that his authorities were “disappointed by the actions of the Dutch Government to dump ... refugees ... forcefully [into] the Puntland State of Somalia regardless of which part of Somalia they originally came from without seeking either the acceptance

or prior approval [of] our Administration”. The President further wrote that the Puntland State of Somalia did not accept the EU travel document.

94. The Netherlands Minister of Immigration and Integration transmitted this letter to the President of the Lower House of Parliament on 13 April 2004 (Parliamentary Paper – *Kamerstuk* – 2003-2004, 19 637, no. 812). In a covering letter, she stressed that she attached great importance to close cooperation with the (*de facto*) Somali authorities and was open to possibilities for cooperation with them. She further noted that it did not appear from the letter that the Puntland authorities objected to the voluntary return of Somali rejected asylum seekers, regardless of their ethnic origin or area of origin. As far as forced returns were concerned, the Minister stated that the “relatively safe” area of Somalia consisted of more than Puntland alone. There was, therefore, still the possibility of effecting the forced returns of Somalis to the “relatively safe” area of Somalia. The Minister remarked that she considered the use of the term “dumping” in the letter of the President of Puntland misplaced. In this context she explained that Somalis who were being removed were given the opportunity in a country of transit to indicate to which part of Somalia they would prefer to return. The number of Somalis who had so far been removed to Puntland was small.

95. In a letter of 20 November 2004 to the Dutch Minister of Justice, the Somaliland Minister of Resettlement, Rehabilitation and Reintegration stated that as a matter of policy it was impermissible for any forced deportee or rejected asylum seeker to enter Somaliland territory. His Government having become aware of two memoranda of understanding concluded by the Government of the Netherlands with the Dubai Government and Emirates Airlines respectively, the Somaliland authorities had warned all airlines flying via Dubai International Airport to stop transporting forced deportees to any airport in Somaliland. The Minister added that his Government were ready to discuss “how to solve the problem of rejected asylum seekers”.

8. *The EU travel document*

96. The EU travel document is based on a Recommendation adopted on 30 November 1994 by the Council of Ministers of Justice and Home Affairs of the European Union (Official Journal of the European Communities C 274). Acknowledging, *inter alia*, that the great majority of Member States were experiencing difficulties in dealing with cases of third-country nationals who were required to be expelled from their territory but were not in possession of travel documents, the Council recommended that a standard travel document valid for a single journey be used as appropriate by all Member States when effecting such expulsions.

97. Since 1995 the Netherlands has made use of the standard EU travel document as a replacement document in the event of expulsions to a number of countries. It can be used for the return of aliens to their country of origin, as well as for their return to another country to which they are guaranteed admission. It is issued by the Immigration and Naturalisation Service (*Immigratie- en Naturalisatiedienst*) on behalf of the Minister of Immigration and Integration.

98. In legal literature, as well as in the Lower House of Parliament and before the national courts, it has been argued that the EU travel document as used by the Netherlands is not a lawfully issued document, since the above-mentioned Recommendation has not been incorporated into Dutch law and since no authority on the part of the Minister of Immigration and Integration to issue travel documents could be derived from the Passport Act (*Paspoortwet*). In reply to questions put by members of Parliament, the Minister of Immigration and Integration denied that the EU travel document lacked a legal basis, and stated that it had not appeared that any of the Somali aliens who had returned, either voluntarily or involuntarily, to Somalia in 2003 and 2004 – some of whom had travelled on an EU travel document – had been refused entry to the country. She added that if an alien travelling on an EU travel document was nevertheless denied admission to his or her country of origin, the provisions concerning inadmissibles and deportees contained in Annex 9 to the Chicago Convention on International Civil Aviation applied, on the basis of which the Netherlands would allow such aliens to return to the Netherlands (Records of the Lower House of Parliament, 2003-2004, no. 800, Annex, pp. 1695-96).

In the above-mentioned covering letter to the President of the Lower House of Parliament (see paragraph 94 above), the Minister wrote, on the subject of the stated non-acceptance by the Puntland authorities of the EU travel document, that the latter could be used to facilitate the return journey, be it voluntary or involuntary, of Somali aliens who were not, or were no longer, in possession of a Somali passport. In this context the EU travel document was intended to serve as a travel document rather than a document for crossing borders. Whether or not entry to Somalia was granted depended on whether the person concerned was of Somali origin and/or if he or she was considered as such by the (*de facto*) authorities.

99. In the decision of 28 May 2004 cited above (paragraph 86), the Administrative Jurisdiction Division of the Council of State held as follows in response to the appellant's claim that the use of the EU travel document was unlawful:

“The authority to issue this EU travel document is based, according to information submitted by the Minister [of Immigration and Integration], on the Recommendation of the Council of the European Union of 30 November 1994. It has become clear that this Recommendation has not been incorporated into Dutch law. The fact that no legal basis exists for the issuing of an EU travel document is not in keeping with the principle of lawfulness. This does not however mean that expulsion on the basis of such a document is unlawful vis-à-vis the appellant, given that this defect concerns the Dutch internal legal order, that the appellant is under a legal obligation to leave the Netherlands and that the Minister ... has provided sufficient evidence that this document ... is accepted by third countries.

The fact that no agreement on expulsions exists between the Netherlands and the *de facto* authorities in the different parts of Somalia does not rule out the possibility that in practice an alien may return to his country of origin using an EU travel document. The manner in which an expulsion is carried out is unlawful only ... if on the basis, *inter alia*, of previous experience in comparable cases, it is likely that the alien concerned will not reach his intended destination or will otherwise encounter problems if he uses the documents issued to him.”

III. RELEVANT INTERNATIONAL MATERIAL

A. UNHCR

100. In its January 2004 position paper on the return of rejected asylum seekers to Somalia, the United Nations High Commissioner for Refugees (“UNHCR”) stated, *inter alia*, the following:

“Throughout the country, human rights violations remain endemic. These include murder, looting and destruction of property, use of child soldiers, kidnapping, discrimination of minorities, torture, unlawful arrest and detention, and denial of due process by local authorities. ...

The challenges faced by both Somaliland and Puntland in integrating Somali refugees back home remain a critical humanitarian, recovery and development concern. In both areas, tens of thousands of returnees from exile continue to live in slums on the outskirts of towns where they are often indistinguishable from other vulnerable groups, and as such face many of the same problems accessing basic social services and becoming self-reliant.

Combined with the fragility of Puntland's economy and the downturn of Somaliland's, their presence has increased competition over scarce resources. More sustained assistance is needed if they are to successfully integrate into these local economies. Without it, they could become a potential threat to the hard won peace and stability in both areas. ...

In view of the improvements in peace, security, stability and governance in northern Somalia (Somaliland and Puntland), UNHCR is promoting the voluntary repatriation of Somali refugees originating from there. ...

In the case of Somalia, UNHCR has assessed that the majority of refugees who fled areas which are now in the northern sector can safely return to their habitual areas of former abode, although their right to return is seriously challenged by the over-stretched absorption capacity. Also, importantly, it cannot be ruled out that some individuals originating from Somaliland and Puntland may have a well-founded fear of persecution. Claims to this effect should therefore be dealt with in line with global standards of refugee status determination. A similar positive assessment cannot be made for the southern sector of the country, where conflict, insecurity and lawlessness still dominate the situation in large areas. This is why UNHCR continues to encourage the granting of refugee status, or other forms of complementary protection, to those being forced to leave the southern sector. ...

Prior to arranging repatriation movements, UNHCR Somalia requests clearance from the local authorities for all refugees wishing to repatriate to Somalia. This is to ensure that repatriates are welcome in their area of return, and to avoid any negative consequences arising from their being possibly considered to belong to an area different than

their chosen destination. This is of particular relevance in Somaliland, which, because it considers itself an independent state, considers non-Somalilanders as foreigners. In the case of the Puntland State of Somalia, its Charter and Constitution stipulate that any Somali who respects the provisions of the Charter/Constitution is allowed to reside in, travel through and conduct business in Puntland. However, due to the over-stretched absorption capacity, the authorities, while respecting the provisions of their basic law, have grown wary of non-Puntlanders settling there in large numbers. Clan considerations play an important role. Generally, the lack of local clan and other support-systems forces most Somalis who do not originate from the area to join the misery of the 31,000 IDPs, who live in squalid conditions below the poverty line with very limited access to basic services and physical and legal protection.

It is essential to be aware of the overall impact of more than half a million voluntary returns (organized and spontaneous) on the already over-stretched services and resources of Somaliland and Puntland. As a result, in many cases the returnee population remains marginalized, often forced to live in squalid conditions and in a disturbing state of poverty. ...

... the 2003 and 2004 Consolidated Inter-Agency Appeals for Somalia single out returnees from exile as one of the three most vulnerable groups in Somalia, together with IDPs and minorities. ...

For purposes of refugee status determination, as with regard to voluntary repatriation, UNHCR policy divides the country into north and south, i.e. areas recognized as being stable (north) and areas recognized as not yet stable because of the absence of civil administrative structures to guarantee security (south). The areas administered by the Somaliland and Puntland authorities fall into the northern sector of the country, and the rest into the southern sector. The two sectors are roughly separated by a line that goes through the town of Galkayo. ...

The general pattern of human settlements prevailing in many parts of Africa, including Somalia, is often characterized by common ethnic, tribal, religious and /or cultural factors, which enable access to land, resources and protection from members of the community. Consequently, this commonality appears to be the necessary condition to live in safety. In such situations, it would not be reasonable to expect someone to take up residence in an area or community where persons with a different ethnic, tribal, religious and/or cultural background are settled, or where they would otherwise be considered as aliens. The only conceivable alternative could be to move to the slums of a big city, where internal migrants from the countryside lead a precarious existence, often in appalling living conditions. Persons with a rural background may be rendered destitute there and thus be subjected to undue hardship. Therefore, it would be unreasonable to expect a person to move to an area in his or her own country other than one where he or she has ethnic, tribal, religious and/or cultural ties.

This is true also in Somaliland and Puntland. They already host some 60,000 and 31,000 IDPs respectively, which by far exceeds their absorption capacity. In the absence of clan protection and support, which means weak or negligible social networks, a Somali originating from another area would be likely to join the many other underprivileged IDPs who suffer from lack of protection, limited access to education and health services, vulnerability to sexual exploitation and abuse and labour exploitation, eviction, destruction and confiscation of assets. Depending on the goodwill of the local community and what meagre humanitarian assistance may be available, persons perceived as 'outsiders' may be forced to live in a state of chronic humanitarian need and lack of respect for their rights. Specifically, in Somaliland, a self-proclaimed independent state, those not originating from this area (non-Somalilanders) would be considered as foreigners, and face significant acceptance and integration problems, particularly taking into account the extremely difficult socio-economic situation of those native to the territory. ...

... UNHCR is of the view that the internal flight alternative is not applicable in the context of Somalia. ...

UNHCR considers that persons originating from southern Somalia are in need of international protection and objects to any involuntary return of rejected asylum-seekers to the area south of the town of Galkayo.

Despite the fact that security, stability and governance prevail in Somaliland and to an increasing extent in Puntland, the conditions are not generally favourable for the forced return of large numbers of rejected asylum-seekers. While the restoration of national protection, in line with protection standards applicable to all other citizens, is not likely to be a problem for persons originating from these areas, the weak economy, which offers few employment opportunities, and the lack of sufficient basic services, result in an environment which is not conducive to maintaining harmonious relations among the population. Therefore, UNHCR advises against indiscriminate involuntary returns. It is recommended that cases be reviewed individually, and that States take into consideration the particular circumstances of each case (age, gender, health, ethnic/clan background, family situation, availability of socio-economic support), in order to determine whether possible return of the individuals/families in question can be sustainable, or whether they should be allowed to remain on their territory on humanitarian grounds.

In this regard, it should also be noted that women, children and adolescents face particular challenges upon return to Somalia after a long stay in exile, which may have changed some of their habits and affected their ability

to speak Somali without an unfamiliar accent. While it is not a policy of the authorities in Somaliland and Puntland, returnees and deportees from further afar than the immediate region, or even from urban areas within the region, often face severe discrimination by their community on account of not being sufficiently Somali. A 2003 UN-OCHA report entitled 'A Gap in Their Hearts: the experience of separated Somali children' concludes: 'Bi-cultural separated Somali minors who are returned to their homeland under duress or through deception are in danger of harassment, extortion, rape and murder.' Perceived unacceptable and culturally insensitive behaviour by girls results in harsher discrimination and punishment than for boys. While this study focuses on child smuggling and its consequences, the findings related to the treatment of returning youths to Somalia are relevant also for other young Somalis who are involuntarily returned to their homeland, after having been exposed and to a certain extent adapted to another culture. ...

With reference to what is said on the non-applicability of the internal flight alternative in Somalia, it is UNHCR's position that no Somali should be returned against his/her will to an area of the country, from where he/she does not originate. In this regard, considerations based on the prevailing clan system are of crucial importance."

101. On 11 August 2004 the UNHCR Representative for Somalia provided country of origin information in reply to queries from lawyers with the Amsterdam Bar. The Representative stated, *inter alia*:

"Particularly looking first at the situation of the IDPs located in Somaliland and Puntland, UNHCR is clear in stating that there is a continued deterioration both in legal protection and in socio-economic security since the writing of the Position Paper. This is chiefly due to coping mechanisms of the IDPs being stretched further and further with the prolongation of the conflict and the resulting exposure to extreme poverty and discrimination. ... In Somali society, protection is the responsibility of the clan and is a process that generally functions. However, IDPs and other minority groups are largely devoid of such benefactors. Consequently they are subject to exploitation (both sexual and economic), denied access to services, subject to forced relocation and forced labour, restricted in their movements and otherwise discriminated against. ... [T]he regional authorities of Somalia are not likely to accept deportations or even to accept voluntary returns of persons not originating from the respective areas. In the case of Puntland, it should be noted that the authorities, despite what is enshrined in their constitution, are very wary of non-Puntlanders coming to their territory."

102. In November 2005, UNHCR issued the following advisory on the return of Somali nationals to Somalia:

"1. UNHCR issued its current position concerning returns to Somalia in January 2004. By way of this additional advisory, which complements and should be read alongside the position of January 2004, UNHCR re-confirms that this position remains valid. Indeed, prevailing problems in Somalia only support its continued validity and application.

2. ... According to the Report of [UN] independent expert on the situation of human rights in Somalia Ghanim Alnajjar, 'The right to life continues to be violated on an extensive scale in Somalia. Most of the country is marked by insecurity and violence and the most insecure areas are in the south, notably the capital city Mogadishu.' (UN Commission on Human Rights, E/CN.4/2005/117, 11 March 2005, paragraph 17)

...

5. ... UNHCR underlines that an internal flight alternative is not applicable in Somalia, as no effective protection can be expected to be available to a person in an area of the country, from where he/she does not originate. In this regard, considerations based on the prevailing clan system are of crucial importance.

6. Therefore, international protection should not be denied on the basis of an internal flight alternative. Such a denial would effectively condemn the persons in question to a form of internal displacement, which brings along a high risk of denial of basic human rights and violation of socio-economic rights, exacerbating the already high levels of poverty and instability for both the individual and the community. ...

7. UNHCR acknowledges that not all Somali asylum seekers may qualify for refugee status under the 1951 Convention. However, UNHCR considers that asylum seekers originating from southern and central Somalia are in need of international protection and, excepting exclusion grounds, should be granted, if not refugee status, then complementary forms of protection.

8. Correspondingly, UNHCR reiterates its call upon all governments to refrain from any forced returns to southern and central Somalia until further notice.

9. As regards forced returns to northern Somalia, while some returns are possible under certain conditions, notably where there are clan links within the area of return and effective clan protection, large-scale involuntary returns should be avoided. Persons not originating from northern Somalia should not be forcibly returned there."

B. Other relevant international material

1. “Somalia: A Situation Analysis and Trend Assessment” – Professor K. Menkhaus⁴

103. This report, dated August 2003, was commissioned by UNHCR and written by Professor Menkhaus. According to the author, while the chronic and widespread level of underdevelopment and insecurity in Somalia – especially south-central Somalia – places a large portion of the population at risk, some sections of the population are especially vulnerable to human rights abuses. Two of these groups are IDPs and members of minorities and weak clans. As regards the latter group, Menkhaus writes:

“... members of politically weak clans – minority groups, low status clans, and clans residing in areas where they are badly outnumbered or outgunned – are not able to call upon their clan for protection, and hence are vulnerable to predatory or abusive acts by criminals and militia with little hope of protection by the law. A report on human rights abuses by the Mogadishu-based Isma'il Jimale Human Rights Centre in 2003 concludes that most of the victims were from minority groups 'who have no clan affiliations as protection'.”

104. According to Menkhaus, human rights violations in Somalia remain endemic and very serious, despite some progress having been made since the early 1990s. Menkhaus distinguishes the following three categories of human rights violations: violations of the rules of armed combat; human rights violations perpetrated by criminals which go unaddressed by local authorities; and human rights violations perpetrated by the political authorities themselves. As regards the second category – criminal violations of human rights – he writes, *inter alia*:

“The distinction between militia and criminal activity in Somalia is very difficult to make, as warfare itself is an enterprise for looting and as armed conflict is increasingly linked to retaliation against criminal acts. Still, there are numerous instances in which crimes committed by 'civilians' – be they criminals or unpaid militia engaging in criminal acts – are generating serious human rights crises. Certain types of crimes which qualify as human rights violations, such as murder, generally are addressed via blood payments or *sharia* courts. But some violations go almost entirely unpoliced.”

Menkhaus goes on to list a number of crimes whose perpetrators are rarely held accountable by the local authorities. These include discrimination against minorities, about which he writes:

“Though presented as a homogeneous society, Somalia features a number of low-status and minority groups which are frequently subject to abuse and exploitation. The Somali Bantu population is now the best known of these minorities; representing about 5 per cent of the total population, the Bantu are prone to theft of their land, rape, forced labour, and a range of discriminatory behaviour. Minority and low status groups such as the Bantu are afforded little protection under customary clan law and have virtually no recourse to a system of justice when victimised. Those who do bring complaints to clan, legal, or religious authorities place themselves at great risk of intimidation and assault.”

2. “Somalia – Situation and Trend Analysis” – Professor K. Menkhaus

105. In this report, dated 20 September 2004 and written for the organisation *Schweizerische Flüchtlingshilfe*, Professor Menkhaus writes, *inter alia*, that “the most important common element of personal security across all of Somalia is clan affiliation.” In his view, IDPs constitute the most vulnerable group in the country:

“They are especially vulnerable as a group for several reasons: most are from weak, minority, agricultural clans, and hence easily abused with impunity; nearly all are 'guests' in territory dominated by larger clans, affording them less protection (in some places, such as Somaliland, IDPs from south-central Somalia are seen as 'foreigners' with no legal rights or claims); all are destitute and survive on short-term wage labour and periodic infusions of humanitarian aid; and most reside in camps which are controlled by 'camp managers', militiamen who restrict their movement and who divert assistance away from the IDPs.”

106. According to Menkhaus, “... the zone of Somalia from Galkayo to the Kenyan border is the most conflict-ridden and lawless portion of the country”. Puntland is described as follows:

“...one of the most difficult regions to read politically in recent years: at times it exhibits impressive levels of stability, reconciliation, unity and modest government capacity, at other times it lurches toward what appears to be

political crisis and collapse. ... [T]hroughout its recent political confrontations, Puntland has remained relatively free from violent crime and lawlessness. ...

Personal security in Puntland has been and remains relatively good. ... One growing exception to this rule is the increasing number of IDPs and migrant labourers from south-central Somalia who now reside in Puntland's main towns of Bosasso, Garowe and Galkayo. These outsiders do not enjoy full rights and protection in customary law; the poorest of the migrants reside in sprawling slums and are subject to abuses for which there is little recourse."

107. Somaliland is said to have remained "a zone of impressive law and order ..., with very low crime rates and a high degree of public safety".

3. *"Somalia: Urgent need for effective human rights protection under the new transitional government" – Amnesty International*

108. In this report, published on 17 March 2005, Amnesty International urgently called on the Transitional Federal Government, which was about to begin a five-year transitional period intended to bring Somalia back into the international community of nations, to make human rights protection one of its central and constant aims. Under the heading "Protection of minority rights", the report states as follows:

"The minority groups, who have no armed militias, have been extremely vulnerable during the period of state collapse and absence of a justice system and rule of law to killing, torture, rape, kidnapping for ransom, and looting of land and property with impunity by faction militias and clan members. Such incidents are still commonly reported and are being documented by local human rights NGOs."

4. *"Operational Guidance Note Somalia" – Asylum and Appeals Policy Directorate of the Immigration and Nationality Directorate of the United Kingdom Home Office*

109. The "Operational Guidance Note Somalia", issued on 5 May 2006, contained a summary of the general, political and human rights situation in Somalia and provided information on the nature and handling of asylum claims frequently received from nationals/residents of that country.

110. The Note stated that, although the country's human rights record remained poor and serious human rights abuses continued in 2005, the human rights situation was better in Somaliland and Puntland than in other parts of Somalia. It further stated that Somali society was characterised by membership of clan families (which were sub-divided into clans and sub-clans) or membership of minority groups, and that an individual's position depended to a large extent on his or her clan origins. In general terms, a person should be safe in an area controlled by his or her clan, and any person, irrespective of clan or ethnic origin, would be safe from general clan-based persecution in Somaliland and Puntland. The chronic and widespread level of underdevelopment in Somalia made a large portion of the population vulnerable not only to humanitarian crisis, but also to violations of their human rights.

111. In respect of persons belonging to the Benadiri minority, the Note stated the following:

"Treatment. Somalis with no clan affiliation are the most vulnerable to serious human rights violations, including predatory acts by criminals and militias, as well as economic, political, cultural and social discrimination. These groups comprise an estimated two million people, or about one third of the Somali population and include the Benadiri (Reer Hamar) ...

The Benadiri are an urban people of East African Swahili origin. They all lost property during the war and the majority of Benadiri fled to Kenya. Those that remain live mainly in the coastal cities of Mogadishu, Merka and Brava. The situation of the Benadiri remaining in Somalia is difficult, as they cannot rebuild their businesses in the presence of clan militias. As of 2003, 90% of the Reer Hamar population in Mogadishu had left the city as a consequence of civil war and lack of security. The majority of Reer Hamar who are still in Mogadishu are older people who live in Mogadishu's traditional Reer Hamar district, Hamar Weyn which is controlled by militias of the Habr Gedir sub-clan, Suleiman. Most homes belonging to the Benadiri ... in Mogadishu had been taken over by members of clan militias, although sometimes the clan occupants allowed them to reside in one room.

...

Sufficiency of protection. Minority groups based in southern or central Somalia that are politically and economically the weakest and are culturally and ethnically distinct from Somali clan families such as the Benadiri

(Reer Hamar) ... are not able to secure protection from any major clan family or related sub-clan in these regions. They are vulnerable to discrimination and exclusion wherever they reside. ...

Internal relocation. As the Benadiri (Reer Hamar) ... are vulnerable to discrimination and exclusion by major clan and sub-clan groups throughout southern and central Somalia, internal relocation within these regions is not a reasonable option. The possibility of internal relocation to Somaliland or Puntland is restricted; in these areas the authorities have made it clear that they would only admit to the territory they control those who are of the same clan or who were previously resident in that particular area.

...

Conclusion. The Benadiri (Reer Hamar) ... are part of the underclass in Somali society and are subject to political and economic exclusion due mainly to them being culturally and ethnically unconnected to any major clan group. They are usually unable to secure protection from any clan group and are therefore in a vulnerable position wherever they reside in southern and central Somalia. ... [I]ndividual applicants who have demonstrated a reasonable likelihood that they are of Benadiri (Reer Hamar) origins from southern or central Somalia are likely to encounter ill-treatment amounting to persecution. The grant of asylum in such cases is therefore likely to be appropriate.”

5. *“Can the Somali Crisis Be Contained?” – International Crisis Group*

112. The executive summary of this report, which was published on 10 August 2006, states as follows:

“Somalia has been drifting toward a new war since the Transitional Federal Government (TFG) was formed in late 2004 but the trend has recently accelerated dramatically. The stand-off between the TFG and its Ethiopian ally on the one hand, and the Islamic Courts, which now control Mogadishu, on the other, threatens to escalate into a wider conflict that would consume much of the south, destabilise peaceful territories like Somaliland and Puntland and possibly involve terrorist attacks in neighbouring countries unless urgent efforts are made by both sides and the international community to put together a government of national unity.”

6. *“Somaliland nabs Belgian officials” – BBC*

113. This report, which appeared on the BBC News website on 15 August 2006, tells of three Belgian immigration officials having been apprehended in Hargeisa, the Somaliland capital, when they arrived there on a flight from Ethiopia with a man they had deported from Belgium. In the report, Somaliland's Minister of Aviation is quoted as saying that the men did not have visas to enter Somaliland or the prior consent necessary to deliver a deportee there, and that the deportee had been sent back to Ethiopia on the flight on which he had arrived.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

114. The applicant complained that his expulsion to Somalia would expose him to a real risk of being subjected to treatment in breach of Article 3 of the Convention, having regard to his personal situation of belonging to a minority in the context of the overall human rights situation in Somalia. Article 3 provides:

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

A. Admissibility

1. *Whether the application should be struck out*

115. In their letter of 7 July 2005 informing the Court that the applicant was eligible for a residence permit under the policy of protection for certain categories (see paragraph 40 above), the

Government suggested that this development might lead the Court to strike the application out of its list of cases on the basis of Article 37 of the Convention. Article 37 reads:

“1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

(a) the applicant does not intend to pursue his application; or

(b) the matter has been resolved; or

(c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.”

116. The applicant requested the Court not to strike the case out.

117. Noting that the applicant intends to pursue the application, the Court will examine whether the matter has been resolved. While it is true that the applicant has been issued with a residence permit (see paragraph 40 above) as a result of which he is not, at present, liable to expulsion, the Court cannot nevertheless find that this amounts to resolution of the matter. After all, the decision establishing the policy of protection for certain categories unambiguously states that the policy will be reviewed when the Court has decided on the merits of cases lodged by Somali nationals in which it has indicated an interim measure (see paragraph 87 above). Bearing in mind that a strike-out means that no decision is taken on the merits of a case, it would thus appear that the Government do not consider the matter to be resolved but in fact want the Court to continue its examination of the application. This would in any event appear to be the most efficient way of proceeding since if, after a decision striking the application out of the list, the policy of protection for certain categories were to be discontinued, the applicant would in all probability seek to have the application restored to the list in accordance with paragraph 2 of Article 37.

118. In the absence of “any other reason” within the meaning of Article 37 § 1 (c), the Court finds, therefore, that no circumstances pertain on the basis of which the application should be struck out of its list of cases.

2. *Exhaustion of domestic remedies*

119. The Government submitted that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention. Firstly, he had failed to lodge a further appeal with the Administrative Jurisdiction Division of the Council of State in the proceedings on his application for asylum. Secondly, an appeal lay against the dismissal of his objection against the manner of his expulsion which, as far as the Government were aware, the applicant had not used.

120. The applicant argued that, in view of the case-law of the Administrative Jurisdiction Division, a further appeal to that body would not have stood any chance of success; hence, this did not constitute a domestic remedy which he was required to exhaust. With regard to the decision on his objection lodged on the basis of section 72(3) of the Aliens Act 2000 – which was in any event not capable of providing him with an effective remedy against expulsion –, the applicant pointed out that he had appealed against that decision.

121. The Court reiterates the relevant principles as to exhaustion of domestic remedies as set out in, *inter alia*, its judgment of 28 July 1999 in *Selmouni v. France* ([GC], no. 25803/94, §§ 74-77, ECHR 1999-V). The purpose of Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. The obligation to exhaust domestic remedies is, however, limited to making use of those remedies which are likely to be effective and available in that their existence is sufficiently certain and they are capable of redressing directly the alleged violation of the Convention. An applicant cannot be regarded as having failed to exhaust domestic remedies if

he or she can show, by providing relevant domestic case-law or any other suitable evidence, that an available remedy which he or she has not used was bound to fail.

122. The Court observes that in his appeal to the Regional Court against the refusal of his asylum application the applicant argued that the application should not have been rejected and that the “relatively safe” areas of Somalia did not constitute an internal flight alternative (see paragraph 33 above). It is true, as the Government have pointed out, that following the dismissal of the appeal by the Regional Court a subsequent remedy in the shape of a further appeal to the Administrative Jurisdiction Division of the Council of State was available to the applicant (see paragraph 44 above). On counsel's advice the applicant chose not to have recourse to this remedy (see paragraph 35 above).

123. The Court considers that, although the Administrative Jurisdiction Division may in theory have been capable of reversing the decision of the Regional Court, in practice a further appeal would have had virtually no prospect of success. In this context it notes, firstly, that on the same day the Regional Court rejected the applicant's appeal, the Administrative Jurisdiction Division specified – and has reiterated ever since – that an individual member of a group against which organised, large-scale human rights violations are committed must make out a convincing case to the effect that specific facts and circumstances exist relating to him or her personally, in order to qualify for the protection offered by Article 3 (see paragraph 89 above). In accordance with a subsequent decision of the Administrative Jurisdiction Division concerning a Somali national who, like the applicant in the present case, belonged to the Reer Hamar, this means that the acts committed must have been specifically aimed at the person of the individual concerned and that he or she must have thus been placed in a position which substantially deviated from that of other members of the Reer Hamar in Somalia (see paragraph 90 above). The applicant, however, has never argued that he was treated differently, or substantially worse, than other members of the Reer Hamar; on the contrary, he has stated that the other Ashraf families in the village of Tuulo Nuh were subjected to the same treatment meted out to him and his family (see paragraph 7 above). It is therefore difficult to see how the Administrative Jurisdiction Division could have come to a different conclusion in the case of the applicant.

124. Secondly, the Court considers that the applicant's argument that no internal flight alternative existed was similarly bound to fail, in view of the Administrative Jurisdiction Division's consistent case-law at the relevant time to the effect that an alternative place of abode in the “relatively safe” area of Somalia was available to members of minority groups (see paragraphs 85-86 above).

125. In respect of the complaint relating to the manner of his expulsion, the Court observes that the applicant – contrary to the Government's contention – did lodge an appeal against the dismissal of his objection, as well as an equally unsuccessful further appeal (see paragraph 39 above). The fact that these proceedings were still pending at the time the applicant lodged the present application with the Court cannot be held against him in this context, since the act of lodging the objection did not suspend his expulsion, and his request for a provisional measure to stay his expulsion had been turned down (see paragraphs 36-37 above).

126. The Court accordingly finds that the Government's plea of inadmissibility for non-exhaustion of domestic remedies must be dismissed.

127. The Court considers that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

a. The applicant

128. The applicant argued that if he were deported to northern Somalia there was a real risk that he would be subjected to torture or to cruel and inhuman treatment because he belonged to the Reer Hamar minority group. Not having any clan or family ties in the “relatively safe” areas, there was every possibility that he would be forced to live in a camp for IDPs; conditions in these camps had been described as inhumane. In the applicant's opinion, national policy based on the country reports prepared by the Dutch Ministry of Foreign Affairs paid only lip service to the position paper issued by UNHCR (see paragraph 100 above). An analysis of the November 2004 country report carried out by the Dutch Refugee Council (see paragraphs 81-83 above) had undermined that report's validity and highlighted its inadequacies. Nevertheless, from an anthropological point of view it gave a useful insight into the position of the Reer Hamar in Somalia, a position with which the applicant's personal circumstances were completely in line.

129. The applicant further claimed that there was no guarantee that he would be admitted to the “relatively safe” areas of Somalia to which it was intended to expel him, given that the authorities of Somaliland and Puntland had stated that Somalis with no family or clan ties to those areas would not be admitted and that they did not accept the EU travel document with which the Netherlands authorities expected him to travel. Furthermore, the Government had no agreements with the *de facto* authorities in those areas. He feared that he would not be readmitted to the Netherlands if he were to be denied entry to the “relatively safe” areas, because the respondent Government would not be aware of his situation, and that as a result he would end up as a “refugee in orbit”.

130. He also argued that the journey would take him through Mogadishu and that sometimes aircraft that landed there were robbed and failed asylum seekers arriving from the Netherlands forced to disembark. Having regard to his previous experiences in Mogadishu, it was clear that a sojourn in that city would expose him, as a member of the Reer Hamar minority, to a real risk of being subjected to treatment proscribed by Article 3.

b. The Government

131. The Government remained of the opinion that the applicant, if expelled, did not run a real risk of being exposed to treatment in breach of Article 3, since the problems experienced by him were not so much the result of his being targeted personally, but of events that could better be described as the result of the generally unstable security situation in Somalia. In that context they argued that it could not necessarily be concluded solely on the basis of the overall situation in a country that a particular person ran a real risk, but that individuals were required to show that they had been singled out for persecution.

132. In so far as the applicant claimed that, as a member of the Ashraf or Reer Hamar minority, he would experience problems if expelled to the “relatively safe” areas of Somalia, the Government, referring to the country reports drawn up by their Minister of Foreign Affairs, submitted that the minorities present in Somaliland and Puntland were not persecuted and that their safety was not generally at risk. While their socio-economic situation was often precarious, they nevertheless managed to provide for themselves by displaying flexibility on the local labour market and taking on all kinds of work. Newcomers generally established links with other members of their minority group if they were present in significant numbers.

133. As regards access to the “relatively safe” areas, the Government noted that Somalis were free to enter and leave the country, the state borders being subject to very few controls in accordance with age-old nomadic tradition. Even though the Netherlands Minister of Immigration and Integration had informed the authorities of Somaliland, in reply to the letter from that entity's Minister of Resettlement, Rehabilitation and Reintegration, that she would like to negotiate arrangements for the return of failed asylum seekers (see paragraphs 91-92 above), the Government had not concluded any agreement with the *de facto* Somali authorities on this matter. Arrangements had been made with the immigration authorities in Dubai (United Arab Emirates) and Nairobi (Kenya). In those countries of transit, Somali asylum seekers forced to return were given the opportunity to specify to which area within the “relatively safe” part of Somalia they would prefer

to return. In both cities, the Immigration and Naturalisation Department had liaison officers who worked closely with the authorities of the airports from which failed Somali asylum seekers travelled on to airports in the “relatively safe” areas in Somalia.

134. In response to the applicant's contention that if he were to travel with an EU travel document he would run the risk of being denied entry into the “relatively safe” part of Somalia, the Government supplemented the considerations of the decision dated 20 January 2004 by the provisional measures judge of the Regional Court of The Hague sitting in Amsterdam (see paragraph 37 above), as follows: the number of Somali aliens expelled to Somalia via Dubai or Nairobi had been 33 in 2003 and 20 in 2004 up to the time when the Government submitted its observations in the present case. This included aliens who had said, when applying for asylum, that they belonged to a minority. The Government were not aware of any instances of Somali aliens having been denied entry into Somalia because they were using a travel document provided to them. In any event, were this to happen, the provisions of the Chicago Convention on International Civil Aviation would be applicable. The Government were further unaware of any aircraft being robbed or of failed asylum seekers from the Netherlands being forced to disembark while on a stop-over in Mogadishu on the flight from Nairobi. The Nairobi station manager of the airline involved had informed the Government that these claims were not supported by the facts.

2. *The Court's assessment*

a. **General principles**

135. The Court reiterates at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. The right to political asylum is not contained in either the Convention or its Protocols. However, in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct, however undesirable or dangerous. The expulsion of an alien may give rise to an issue under this provision, and hence engage the responsibility of the expelling State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country (see, for example, *Hilal v. the United Kingdom*, no. 45276/99, § 59, ECHR 2001-II, and *Ahmed v. Austria*, judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2206, §§ 38-41).

136. The establishment of any responsibility of the expelling State under Article 3 inevitably involves an assessment of conditions in the receiving country against the standards of Article 3 of the Convention (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, ECHR 2005-I, § 67). In determining whether it has been shown that the applicant runs a real risk, if expelled, of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material placed before it, or, if necessary, material obtained *proprio motu*, in particular where the applicant – or a third party within the meaning of Article 36 of the Convention – provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government. In respect of materials obtained *proprio motu*, the Court considers that, given the absolute nature of the protection afforded by Article 3, it must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations. In its supervisory task under Article 19 of the Convention, it would be too narrow an approach under Article 3 in cases concerning aliens facing expulsion or extradition if the Court, as an international human rights court, were only to take into account

materials made available by the domestic authorities of the Contracting State concerned, without comparing these with materials from other reliable and objective sources. This further implies that, in assessing an alleged risk of treatment contrary to Article 3 in respect of aliens facing expulsion or extradition, a full and *ex nunc* assessment is called for as the situation in a country of destination may change in the course of time. Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion (see *Vilvarajah and Others*, cited above, p. 36, § 107). In the present case, given that the applicant has not yet been expelled, the material point in time is that of the Court's consideration of the case. Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, pp. 1856 and 1859, §§ 86 and 97, *Reports* 1996-V; *H.L.R. v. France*, 9 April 1997, *Reports* 1997-III, p. 758, § 37; and *Mamatkulov and Askarov*, cited above, § 69).

137. Ill-treatment must also attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case (see, amongst other authorities, *Hilal*, cited above, § 60). Owing to the absolute character of the right guaranteed, Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (see *H.L.R. v. France*, cited above, p. 758, § 40).

b. Application to the present case

138. The Court observes at the outset that it is not the Government's intention to expel the applicant to any area in Somalia other than those that they consider to be "relatively safe", and that the applicant's complaint concerns his expulsion as envisaged by the Government. The issue before the Court is, therefore, whether an expulsion to those "relatively safe" areas would be in violation of Article 3.

139. It appears from the most recent country report on Somalia compiled by the Dutch Ministry of Foreign Affairs that the areas currently considered "relatively safe" are Somaliland, Puntland (except for the town of Galkayo) and the islands off the coast of southern Somalia (see paragraphs 53, 70 and 76 above). Apart from the islands, this corresponds to the areas identified as "safe" by the UNHCR in its position paper of January 2004 (see paragraph 100 above). The Court has been provided with and has obtained a considerable amount of information relating to the situation in both Somaliland and Puntland, from which it appears that those territories are undoubtedly more stable and peaceful in general than southern and central Somalia. Nevertheless, there is a marked difference between the position of, on the one hand, individuals who originate from those areas and have clan and/or family links there and, on the other hand, individuals who hail from elsewhere in Somalia and do not have such links in Somaliland or Puntland. On the basis of the available information, the Court is prepared to accept that the expulsion to Somaliland or Puntland of a failed asylum seeker belonging to the first group would not generally expose the person concerned to a real risk of being subjected to treatment in violation of Article 3. As far as the second group is concerned, however, the Court is not persuaded that the relevance of clan protection in the "relatively safe" areas has diminished to the extent suggested by the Government. It notes in this respect that as regards the expulsion of a Somali national to a part of the country from where he or she does not originate, UNHCR is of the opinion that "considerations based on the prevailing clan system are of crucial importance" (see paragraphs 100 and 102 above). Clan affiliation has further been described as the most important common element of personal security across all of Somalia (see paragraph 105 above), and hence not merely in the "relatively unsafe" areas.

140. The Court considers it most unlikely that the applicant, who is a member of the Ashraf minority – one of the groups making up the Benadiri (or Reer Hamar) minority group (see paragraph 55 above) – and who hails from the south of Somalia, would be able to obtain protection from a clan in the “relatively safe” areas (see paragraph 111 above). According to the Government's November 2004 country report, individuals who do not originate from Somaliland or Puntland and who are unable to claim clan protection there almost invariably end up in miserable settlements for the internally displaced, with no real chance of proper integration (see paragraph 57 above). They are said to have a marginal, isolated position in society which renders them vulnerable and more likely than most to be the victims of crime (see paragraph 62 above). Indeed, the three most vulnerable groups in Somalia are said to be IDPs, minorities and returnees from exile (see paragraph 100 above). If expelled to the “relatively safe” areas, the applicant would fall into all three categories. In this context it should further be noted that, again according to the Government, there are so few Benadiri in the “relatively safe” areas that no general statements can be made about their position there (see paragraph 56 above). However, the Court considers that it is not necessary to examine whether the conditions in which the applicant is likely to end up if expelled to Somaliland or Puntland are such as to expose him to a real risk of being subjected to treatment in violation of Article 3, since it is of the opinion that that provision stands in any event in the way of such an expulsion for the following reasons.

141. In its position paper of January 2004 and its advisory of November 2005, UNHCR states its opposition to the forced return of rejected asylum seekers to areas of Somalia from which they do not originate, emphasising that there is no internal flight alternative available in Somalia (see paragraphs 100 and 102 above). It is nevertheless to be noted that it does not appear to be UNHCR's position that the individuals concerned would have a well-founded fear of persecution within the meaning of Article 1 of the 1951 Convention in the areas it considers safe. Rather, the organisation's concerns are focused on the possible destabilising effects of an influx of involuntary returnees on the already overstretched absorption capacity of Somaliland and Puntland, as well as the dire situation in which returnees find themselves. While the Court by no means wishes to detract from the acute pertinence of socio-economic and humanitarian considerations to the issue of forced returns of rejected asylum seekers to a particular part of their country or origin, such considerations do not necessarily have a bearing, and certainly not a decisive one, on the question whether the persons concerned would face a real risk of ill-treatment within the meaning of Article 3 of the Convention in those areas. Moreover, Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative in their assessment of an individual's claim that a return to his or her country of origin would expose him or her to a real risk of being subjected to treatment proscribed by that provision (see *Chahal*, cited above, p. 1859, § 98, and *Hilal*, cited above, §§ 67-68). However, the Court has previously held that the indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention (see *T.I. v. the United Kingdom* (dec.), no. 43844/98, ECHR 2000-III). It sees no reason to hold differently where the expulsion is, as in the present case, to take place not to an intermediary country but to a particular region of the country of origin. The Court considers that as a precondition for relying on an internal flight alternative certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of the expellee ending up in a part of the country of origin where he or she may be subjected to ill-treatment.

142. The Court observes that the authorities of Somaliland have issued a decree – which, admittedly, has not been enforced to date – ordering all displaced persons not originally from Somaliland to leave the country, and that the Puntland authorities are said to have grown wary of non-Puntlanders coming to their territory and have made it clear that they will only admit to the territory they control those who are of the same clan or who were previously resident in the area

(see paragraphs 59, 71, 81, 100-101 and 111 above). More importantly, the authorities of both entities have informed the respondent Government of their opposition to the forced deportations of, in the case of Somaliland, non-Somalilanders and, in the case of Puntland, “refugees regardless of which part of Somalia they originally came from without seeking either the acceptance or prior approval” of the Puntland authorities. In addition, both the Somaliland and Puntland authorities have indicated that they do not accept the EU travel document (see paragraphs 91 and 93 above).

143. While it appears that the stance of the Somaliland and Puntland authorities has led the United Kingdom Government to refrain from expelling rejected asylum seekers belonging to the Benadiri to those regions (see paragraph 111 above)⁵, the Netherlands Government have insisted that such expulsions are possible and have pointed out that in the event of an expellee being denied entry, he or she would be allowed to return to the Netherlands. Bearing in mind that, according to information provided by the respondent Government, Somalis are free to enter and leave the country as the State borders are subject to very few controls, the Court accepts that the Government may well succeed in removing the applicant to either Somaliland or Puntland (although in the light of a recent BBC report (see paragraph 113 above) this is not certain). However, this by no means constitutes a guarantee that the applicant, once there, will be allowed or enabled to stay in the territory, and with no monitoring of deported rejected asylum seekers taking place, the Government have no way of verifying whether or not the applicant succeeds in gaining admittance. In view of the position taken by the Puntland, and particularly the Somaliland, authorities, it seems to the Court rather unlikely that the applicant would be allowed to settle there. Consequently, there is a real chance of his being removed, or of his having no alternative but to go to areas of the country which both the Government and UNHCR consider unsafe.

144. As regards the islands off the coast of southern Somalia, which are considered “relatively safe” by the Government, the Court notes that these are inhabited by members of the Darod/Marehan clan and of a minority different from the one to which the applicant belongs. It has not been suggested that the applicant would be able to obtain clan protection there. As with Somaliland and Puntland, there are similarly no guarantees that the applicant would be able to settle there, quite apart from the fact that the islands can be reached only via “relatively unsafe” territory (see paragraphs 60 and 87 above).

145. The question must therefore be examined whether, if the applicant were to end up in areas of Somalia other than Somaliland or Puntland, he would run a real risk of being exposed to treatment contrary to Article 3. In this context, the Court is aware that the Government do not consider areas in Somalia “relatively unsafe” because of any risk that individuals may run there of being subjected to treatment in breach of Article 3 of the Convention, but because of an overall situation which is such that, in the opinion of the Minister of Immigration and Integration, a return to those areas would constitute an exceptionally harsh measure.

146. The Court considers that the treatment to which the applicant claimed he had been subjected prior to his leaving Somalia can be classified as inhuman within the meaning of Article 3: members of a clan beat, kicked, robbed, intimidated and harassed him on many occasions and made him carry out forced labour. Members of the same clan also killed his father and raped his sister (see paragraphs 7-9 and 12-13 above). The Court notes that the particular – and continuing – vulnerability to this kind of human rights abuses of members of minorities like the Ashraf has been well-documented (see, for instance, paragraphs 103-104 above).

147. While the Netherlands authorities were of the opinion that the problems experienced by the applicant were to be seen as a consequence of the generally unstable situation in which criminal gangs frequently, but arbitrarily, intimidated and threatened people (see paragraphs 28 and 35 above), the Court is of the view that that is insufficient to remove the treatment meted out to the applicant from the scope of Article 3. As set out above (see paragraph 137 above), the existence of the obligation not to expel is not dependent on whether the risk of the treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country, and Article 3 may thus also apply in situations where the danger emanates from persons or groups of

persons who are not public officials (see also *T.I. v. the United Kingdom*, cited above). What is relevant in this context is whether the applicant was able to obtain protection against and seek redress for the acts perpetrated against him. The Court considers that this was not the case. Moreover, having regard to the information available (see for instance paragraphs 100-102, 108 and 111-112 above), the Court is far from persuaded that the situation has undergone such a substantial change for the better that it could be said that the risk of the applicant being subjected to this kind of treatment anew has been removed or that he would be able to obtain protection from the (local) authorities. There is no indication, therefore, that the applicant would find himself in a significantly different situation from the one he fled (see *Ahmed*, cited above, § 44).

148. The Court would further take issue with the national authorities' assessment that the treatment to which the applicant was subjected was meted out arbitrarily. It appears from the applicant's account that he and his family were targeted because they belonged to a minority and for that reason it was known that they had no means of protection; they were easy prey, as were the other three Ashraf families living in the same village (see paragraph 7 above). The Court would add that, in its opinion, the applicant cannot be required to establish the existence of further special distinguishing features concerning him personally in order to show that he was, and continues to be, personally at risk. In this context it is true that a mere possibility of ill-treatment is insufficient to give rise to a breach of Article 3. Such a situation arose in the case of *Vilvarajah and Others v. the United Kingdom*, where the Court found that the possibility of detention and ill-treatment existed in respect of young male Tamils returning to Sri Lanka. The Court then insisted that the applicants show that special distinguishing features existed in their cases that could or ought to have enabled the United Kingdom authorities to foresee that they would be treated in a manner incompatible with Article 3 (judgment cited above, p. 37, §§ 111-112). However, in the present case, the Court considers, on the basis of the applicant's account and the information about the situation in the "relatively unsafe" areas of Somalia in so far as members of the Ashraf minority are concerned, that it is foreseeable that on his return the applicant would be exposed to treatment in breach of Article 3. It might render the protection offered by that provision illusory if, in addition to the fact of his belonging to the Ashraf – which the Government have not disputed –, the applicant were required to show the existence of further special distinguishing features.

149. The foregoing considerations are sufficient to enable the Court to conclude that the expulsion of the applicant to Somalia as envisaged by the respondent Government would be in violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

150. The applicant complained that he did not have an effective remedy, since the Netherlands authorities had refused to suspend his expulsion pending a decision on his objection against the manner of that expulsion. He relied on Article 13 of the Convention, which provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

151. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

152. The Government contested the applicant's argument, submitting that effective legal remedies were available against the rejection of the asylum application and the manner of expulsion.

153. The Court reiterates that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see *Čonka v. Belgium*, no. 51564/99, § 79, ECHR 2002-I).

154. The Court observes that the objection which the applicant lodged on 8 January 2004 against the manner in which his expulsion was to be carried out did not automatically suspend that expulsion. However, he was able to apply to the provisional measures judge of the Regional Court of The Hague requesting that the expulsion be stayed pending a decision on his objection. According to the judgment which the provisional measures judge delivered on 20 January 2004, and of which the applicant was informed verbally on 15 January 2004 – the day before he was to be expelled –, his expulsion would not be in breach of Article 3 of the Convention (see paragraph 37 above). Bearing in mind that the word “remedy” within the meaning of Article 13 does not mean a remedy bound to succeed (see *Hilal*, cited above, § 78), and that the compatibility of the planned removal with Article 3 was examined, the Court considers that the applicant was provided with an effective remedy in respect of the manner in which his expulsion was to be carried out.

Accordingly, the Court concludes that there has been no violation of Article 13 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

155. Article 41 of the Convention provides:

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

156. The applicant submitted that he did not wish to make any claims for pecuniary or non-pecuniary damage. Moreover, he did not claim reimbursement of costs and expenses incurred at the national level, since he had had the benefit of legal aid awarded to him by the Legal Aid Council (*Raad voor Rechtsbijstand*). Depending on the outcome of the present proceedings before the Court, the Legal Aid Council would also reimburse the expenses incurred in these proceedings.

157. No claim for just satisfaction having been made by the applicant, the Court perceives no cause to examine this issue of its own motion.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that the applicant's expulsion to Somalia would be in violation of Article 3 of the Convention;
3. *Holds* that there has been no violation of Article 13 of the Convention;
4. *Holds* that there is no need to examine the issue of just satisfaction.

Done in English, and notified in writing on 11 January 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent Berger Boštjan M. Zupančič

Registrar President

1. "Put to the Test, part 2, Sources of the Dutch Foreign Office Country Report on Somalia, Analysis by the Dutch Refugee Council", February 2005, pp. 4-5
2. Interim measure indicated on 30 April 2004 in application no. 15243/04, *Barakat Saleh v. the Netherlands*.
3. Interim measure indicated on 31 August 2004 in application no. 20218/04, *Hassan Abukar v. the Netherlands*.
4. K. Menkhaus is professor of political sciences at Davidson College, USA. He frequently acts as a consultant to the UN, NGOs and the US Government on Somalia.
5. In this context, regard may also be had to Guideline 2, paragraph 6 of "Forced return", twenty guidelines adopted by the Committee of Ministers of the Council of Europe on 4 May 2005, according to which a removal order should not be enforced if the authorities of the host State have determined that the State of return will refuse to readmit the returnee.

SALAH SHEEKH v. THE NETHERLANDS JUDGMENT

SALAH SHEEKH v. THE NETHERLANDS JUDGMENT

In the case of H.L.R. v. France (1),

The European Court of Human Rights, sitting, in accordance with Rule 51 of Rules of Court A (2), as a Grand Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr R. Bernhardt,
Mr Thór Vilhjálmsson,
Mr F. Gölçüklü,
Mr F. Matscher,
Mr L.-E. Pettiti,
Mr A. Spielmann,
Mr J. De Meyer,
Mrs E. Palm,
Mr I. Foighel,
Mr R. Pekkanen,
Mr A.N. Loizou,
Mr A.B. Baka,
Mr M.A. Lopes Rocha,
Mr L. Wildhaber,
Mr G. Mifsud Bonnici,
Mr J. Makarczyk,
Mr D. Gotchev,
Mr P. Jambrek,
Mr K. Jungwiert,
Mr U. Lohmus,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 29 November 1996 and on

20 February and 22 April 1997,

Delivers the following judgment, which was adopted on the last-mentioned date:

Notes by the Registrar

1. The case is numbered 11/1996/630/813. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the French Republic ("the Government") on 25 January and 29 February 1996 respectively, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 24573/94) against France lodged with the Commission under Article 25 (art. 25) by a Colombian national, H.L.R., on 4 July 1994. The applicant asked the Court not to reveal his identity.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Article 48 (art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 3 of the Convention (art. 3).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 4 (b)). On 8 February 1996, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr A. Spielmann, Mr J. De Meyer, Mr M.A. Lopes Rocha, Mr L. Wildhaber, Mr G. Mifsud Bonnici and Mr K. Jungwiert (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the

Government's memorial on 30 July 1996 and the applicant's memorial on 12 August. On 12 September the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 27 June 1996 the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51).

The Grand Chamber to be constituted included ex officio Mr Ryssdal, President of the Court, Mr R. Bernhardt, Vice-President, and the other members (see paragraph 3 above) and the substitute judges (namely, Mr R. Macdonald, Mr A.N. Loizou, Mr A.B. Baka and Mr U. Lohmus) of the Chamber which had relinquished jurisdiction (Rule 51 para. 2 (a) and (b)). On 1 July 1996, in the presence of the Registrar, the President drew by lot the names of the seven additional judges, namely Mr F. Gölcüklü, Mr F. Matscher, Mrs E. Palm, Mr I. Foighel, Mr R. Pekkanen, Mr J. Makarczyk and Mr D. Gotchev. Subsequently Mr P. Jambrek replaced Mr Macdonald, who was unable to take part in the further consideration of the case (Rule 22 para. 1 and Rule 51 para. 6).

6. On 26 September 1996 Mr Ryssdal, after consulting the members of the Grand Chamber, granted leave to Rights International, a non-governmental organisation based in New York, to submit written comments subject to certain conditions. These were received at the registry on 31 October 1996.

The Court received Amnesty International's reports for 1995 and 1996.

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 25 November 1996. The Court had held a preparatory meeting beforehand.

At that meeting, the Grand Chamber decided not to include in the case file the documents lodged on 24 October and 12, 20 and 22 November 1996 by the applicant, since they were late and as the Government had objected.

There appeared before the Court:

(a) for the Government

Mr J.-F. Dobelle, Deputy Director of Legal Affairs,
Ministry of Foreign Affairs, Agent,
Mr J. Lapouzade, administrative court judge, on
secondment to the Legal Affairs Department,
Ministry of Foreign Affairs,
Mr E. Boscq, central administration attaché,
Ministry of the Interior, Advisers;

(b) for the Commission

Mr J.-C. Geus, Delegate;

(c) for the applicant

Mrs H. Clément, of the Paris Bar, Counsel,
Mr G. Parent, Adviser.

The Court heard addresses by Mr Geus, Mrs Clément and Mr Dobelle.

AS TO THE FACTS

I. Circumstances of the case

8. H.L.R., who is a Colombian national and was born in 1968, is currently in France subject to a compulsory residence order.

A. The applicant's conviction

9. On 14 May 1989 the applicant, who was travelling from Colombia to Italy, was arrested while in transit at Roissy Airport in possession of a package containing 580 grammes of cocaine.

According to the record of the interviews that took place on 16 May 1989, whilst he was in police custody H.L.R. supplied information on the instigators of the traffic and on H.B., by whom he had been recruited. That information subsequently enabled Interpol to identify H.B., who appeared in their records under two different names and had been arrested on 21 May 1989 at Frankfurt-on-Main Airport in possession of 552 grammes of cocaine. H.B. was convicted and on 23 January 1990 was sentenced by the Frankfurt-on-Main Regional Court to two years and eight months' imprisonment; he was deported to Colombia pursuant to an order issued on 12 April 1990 by the Chief Administrative Officer (Landrat) of the district (Landkreis) of Darmstadt-Dieking.

10. In the meantime, on 25 September 1989, the Bobigny Criminal Court had convicted the applicant of an offence under the misuse of drugs legislation and sentenced him to five years' imprisonment. It also made an order permanently excluding him from French territory.

11. On 24 July 1992 the Paris Court of Appeal upheld both that judgment and the judgment of 22 June 1992 of the same court whereby his application to have the permanent exclusion order cancelled was dismissed.

12. On 31 July 1992 the applicant, arguing in particular that he had assisted the judicial authorities, petitioned the President of the Republic to have the exclusion order rescinded. His petition was dismissed on 20 September 1994.

13. On 18 December 1992 the Bobigny public prosecutor, who had initially instructed the Prefect of the Dordogne département to enforce the exclusion order on 30 December, the date of the applicant's release, ordered that his deportation be stayed.

14. After serving his sentence, the applicant was given accommodation, at the home of one of his prison visitors.

B. The deportation procedure

1. The deportation order

15. Notwithstanding that the petition to the President was pending, the Minister of the Interior directed that the applicant's file be submitted to the Aliens' Deportation Board for an opinion in accordance with section 23 of the Ordinance of 2 November 1945 as amended (see paragraph 24 below).

16. On 17 February 1994, having been informed of the risks the applicant would run if he were deported to Colombia, the Aliens' Deportation Board expressed the following opinion:

"The Board is of the opinion that [H.L.R.] should not be deported as his presence in France does not constitute a serious threat to public order and there are in addition good reasons for believing that his integration in the national community is possible."

17. On 26 April 1994 the Minister of the Interior nonetheless issued an order for the applicant's deportation. He relied on the following reasons:

"Whereas Mr H.L.R., a Colombian national, ..., committed a drugs offence in 1989 by illegally importing nearly 600 grammes of heroin [sic];

Whereas on account of his general behaviour the presence of this foreign national in French territory represents a serious threat to public order;

Having regard to the opinion issued on 17 February 1994 by the Board referred to in section 24 of the Ordinance [no. 45-2658 of 2 November 1945, as amended, concerning the conditions of entry and residence of aliens in France]."

18. The Prefect of the Dordogne département served the deportation order on the applicant by a letter of 9 May 1994, which the applicant received on 20 May. He stated that the applicant was to be deported to Colombia, unless he was accepted by another country, within one month of the date of receipt of the letter. On 20 June 1994 the Prefect granted the applicant a final extension of one month in which to find a host country.

2. The application to have the deportation order rescinded

19. On 30 May 1994 the applicant applied to the Minister of the Interior to have the deportation order rescinded. His application was rejected on 17 June 1994 on the following grounds:

"I regret [to have] to inform you that, at the present time, in spite of the various considerations you cite in your client's favour, it is impossible for me to grant your application because the acts which gave rise to the order for your client's deportation occurred recently and were serious. In 1989 he was involved in the trafficking of almost 600 grammes of heroin [sic].

Consequently his presence in France continues to constitute a serious threat to public order."

3. The applications for judicial review

20. At the same time, by applications lodged with the Bordeaux Administrative Court and registered on 7 and 28 June 1994 the applicant sought judicial review of the deportation order and of the refusal to rescind it.

21. In its judgment of 18 April 1996 served on 17 July 1996, the court joined and then dismissed the applications. It gave the following reasons:

"Under the final paragraph of section 27 bis of the Ordinance of 2 November 1945, 'an alien shall not be sent to a country if he

shows that he is in danger of losing his life or his liberty there or that he will be exposed there to treatment contrary to Article 3 (art. 3) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950'; by virtue of the provisions of Article 2 (art. 2) of the European Convention on Human Rights, '1. Everyone's right to life shall be protected by law ...' and of Article 3 of that Convention (art. 3): 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'; the impugned deportation order of 26 April 1994 did no more than enjoin [Mr H.L.R.] to leave French territory; it follows that, in any event, the submission that his return to Colombia would infringe the provisions cited above (art. 2, art. 3) is ineffective.

... [Mr H.L.R.] is single, has no children and no family life in France; it follows that the submission that the provisions [of Article 8 (art. 8) of the Convention for the Protection of Human Rights and Fundamental Freedoms] have been infringed cannot be accepted."

22. On 10 September 1996 the applicant appealed against that judgment to the Bordeaux Administrative Court of Appeal. The outcome of the appeal is not known.

4. The compulsory residence order

23. In the meantime, the Minister of the Interior had issued a compulsory residence order on 12 July 1994 pursuant to section 28 of Ordinance no. 45-2658 of 2 November 1945 as amended (see paragraph 24 below). Considering that it had been established that the applicant was unable to leave France at that time, the Minister ordered him to reside in a designated location "until such time as he [was] in a position to comply with the deportation order against him". That position has remained unchanged.

II. Relevant domestic law

24. The applicant's deportation is governed by Ordinance no. 45-2658 of 2 November 1945 "on the conditions of entry and residence [of aliens] in France", as amended by Law no. 93-1027 of 24 August 1993. The relevant provisions, in the wording applicable at the date of the impugned decision, are as follows:

Section 23

"Subject to the provisions of section 25, deportation may be decided by order of the Minister of the Interior if an alien's presence on French territory constitutes a serious threat to public order.

The deportation order may at any time be rescinded by the Minister of the Interior. Where the application for an order to be rescinded is made on the expiry of a period of five years from the actual execution of the deportation order, it may be rejected only after the opinion of the board provided for in section 24, before which the applicant may be represented, has been obtained.

..."

Section 24

"Deportation as provided for in section 23 may be ordered only

where the following conditions are satisfied:

(1) The alien must be given advance notice in accordance with the conditions laid down in a decree of the Conseil d'Etat;

(2) The alien shall be summoned to be interviewed by a board convened by the prefect and composed as follows:

the president of the tribunal de grande instance of the administrative capital of the département or a judge delegated by him, chairman;

a judicial officer (magistrat) designated by the general assembly of the tribunal de grande instance of the administrative capital of the département; and

an administrative court judge.

The head of the aliens' department at the prefecture shall act as rapporteur; the director of health and social affairs of the département or his representative shall be heard by the board. They shall not attend the board's deliberations.

The summons, which must be served on the alien at least fifteen days before the board's meeting, shall inform him that he has the right to be assisted by a lawyer or by any other person of his choice and to be heard with the help of an interpreter.

The alien may request legal aid in accordance with Law no. 91-647 of 10 July 1991 on legal aid. Reference shall be made to this possibility in the summons. A provisional grant of legal aid may be decided by the chairman of the board.

The board's hearing shall be public. The chairman shall ensure the proper conduct of the proceedings. All orders made by him to that end must be executed immediately. Before the board the alien may put forward all the reasons that militate against his deportation. A report recording the alien's statements shall be transmitted, together with the board's opinion, to the Minister of the Interior, who shall give a decision. The board's opinion shall also be communicated to the person concerned."

Section 25

"A deportation order made under section 23 may not be issued against the following persons:

(1) a minor alien under 18 years of age;

(2) an alien who proves by any means that he has habitually resided in France since the age of 6 or younger;

(3) an alien who proves by any means that he has habitually resided in France for more than fifteen years or an alien who has lawfully resided in France for more than ten years, unless for the whole of this period he has been in possession of a temporary residence permit bearing the word 'student';

(4) an alien, who has been married for at least one year and whose spouse is a French national provided that they have not ceased to live together and that the spouse has kept his or her

French nationality;

(5) an alien who is the father or the mother of a French child residing in France provided that he or she exercises parental rights, even only on a partial basis, in respect of the child or actually provides for him or her;

(6) an alien who is in receipt of an industrial accident or occupational disability pension paid by a French institution where his or her permanent disability is at least 20%;

(7) an alien residing lawfully in France by virtue of one of the residence permits provided for in this Ordinance or in the international agreements, who has not been sentenced with final effect to a non-suspended term of imprisonment of one year or more.

However, by way of derogation to (7) above, an alien may be expelled if he has been sentenced with final effect to a non-suspended term of imprisonment for an offence under section 21 of this Ordinance, sections 4 and 8 of Law no. 73-548 of 27 June 1973 on multiple occupation, Articles L-362-3, L-364-2-1, L-364-3 and L-364-5 of the Labour Code or Articles 225-5 to 225-11 of the Criminal Code.

The aliens referred to in sub-paragraphs (1) to (6) may not be the subject of a removal order made under section 22 of this Ordinance.

By way of derogation from the provisions of this section, a deportation order under sections 23 and 24 may be made against an alien falling within one of the categories listed in sub-paragraphs (3), (4), (5) and (6) if he or she has been sentenced with final effect to a non-suspended term of imprisonment of at least five years."

Section 27 bis

"An alien who is the subject of a deportation order or who has to be removed from France shall be sent to:

(1) the country of which he is a national unless the French Office for the Protection of Refugees and Stateless Persons or the Refugee Appeals Board has granted him refugee status or has not yet ruled on his application for asylum; or

(2) a country which has delivered him a travel document which is currently valid; or

(3) a country which he may lawfully enter.

An alien shall not be sent to a country in which he shows that there is a danger that he will lose his life or liberty or that he will there be exposed to treatment contrary to Article 3 (art. 3) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950."

Section 28 (1)

"An alien subject to a deportation order or required to leave France who proves that it is impossible for him to leave France

by showing that he can neither return to his country of origin nor travel to any other country may, by way of derogation from section 35 bis, be ordered to reside in a designated location where he must report to the police and the gendarmerie at regular intervals."

PROCEEDINGS BEFORE THE COMMISSION

25. H.L.R. applied to the Commission on 4 July 1994. He complained that if he were deported to Colombia he would run a serious risk of being treated in a manner contrary to Article 3 of the Convention (art. 3).

26. On 8 July 1994 the Commission indicated to the French Government under Rule 36 of the Commission's Rules of Procedure that it was desirable, in the interests of the parties and the proper conduct of the proceedings, to refrain from deporting the applicant. The Commission has renewed that recommendation on several occasions, the most recent being 16 January 1996.

27. The Commission declared the application (no. 24573/94) admissible on 2 March 1995. In its report of 7 December 1995 (Article 31) (art. 31), it expressed the opinion by nineteen votes to ten that there would be a violation of Article 3 (art. 3) if the applicant were to be deported to Colombia. The full text of the Commission's opinion and of the four separate opinions contained in the report is reproduced as an annex to this judgment (1).

Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-III), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT

28. In their memorial, the Government invited the Court to dismiss Mr H.L.R.'s application.

29. The applicant requested it to hold that his forced removal from French territory would constitute a violation of Article 3 of the Convention (art. 3).

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION (art. 3)

30. The applicant alleged that if he were deported to Colombia he would certainly be subjected there to treatment proscribed by Article 3 of the Convention (art. 3), which provides:

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

In view of his criminal record in France, he would not be able to find a country willing to accept him other than his country of origin. Yet, in Colombia, he would be exposed to vengeance by the drug traffickers who had recruited him as a smuggler.

By virtue of the positive obligations incumbent on the States and

the absolute character of the right concerned, Article 3 (art. 3) applied to inhuman and degrading treatment resulting from the actions of private individuals where a Contracting State had, through its acts or passivity, failed to comply with its duties under the Convention. As the French State had sought and obtained from H.L.R. information on the organisers of the traffic, it had a duty to protect him. The communications exchanged between different branches of Interpol, and the documents from the German proceedings against H.B., from whom the applicant had received his instructions, showed that the applicant's statements had enabled H.B., who was arrested in Germany and convicted of drug trafficking, to be identified (see paragraph 9 above).

In addition to the endemic violence perpetuated by the Colombian criminal organisations, the applicant ran a real and personal risk; his situation would consequently be worse than that of other Colombians. By informing on drug traffickers he had broken the law of silence. As several Colombian lawyers' groups had stated, informers were frequently subjected to reprisals. In addition, in her various letters to the applicant (the first, which is in the Commission's file, dated 25 September 1993 and the last 13 August 1996) his aunt had reminded him that his life would be in danger if he returned because the person who had recruited him was waiting for him. H.B., who had been released in the meantime, regularly questioned her about the applicant, of whom he had photographs, and wanted revenge.

Furthermore, the Colombian authorities were unable to offer H.L.R. adequate protection against the risk. The degree to which organisations connected with drug trafficking had infiltrated the whole machinery of government was such that Colombia was sometimes referred to as a "narco-democracy". Wholesale human rights violations caused by the acts or omissions of State officials had been condemned on all sides. The ineffectiveness of the judicial institutions meant that it was impossible to accede to requests for protection and that 90% of murders went unpunished. Besides, no provision was made under Colombian legislation for persons who had cooperated with the judicial authorities of another country to be given special protection from the threat of reprisals by those on whom they had informed.

The drug cartels had infiltrated the security and intelligence services and corruption was rife in the judicial system and in the police and armed forces. Certain paramilitary groups, whose role was to back up the army in its fight against guerilla movements and opposition groups, received financial aid from the drug trade. They controlled large areas of Colombia and were responsible for the escalation of violence since the end of the 1980s.

31. The Commission agreed in substance with that view. In determining whether there was a risk of treatment proscribed by Article 3 (art. 3), strict criteria had to be applied regard being had to the absolute character of that provision (art. 3). Only the existence of an objective danger could be taken into account, such as the nature of the political regime in the State to which the applicant was likely to be sent, or a specific situation existing in that State. Making such a finding did not necessarily require that the receiving State be in any way responsible. In the instant case, the risk did not come from the Colombian authorities. Given the special circumstances prevailing in Colombia with respect to drug trafficking, the applicant's criminal activities in connection with dealers in narcotics and his statements to the French police, he faced, if deported, a real and serious risk of being subjected to treatment proscribed by Article 3 (art. 3). It appeared more than likely that the Colombian authorities would not be able to give H.L.R. adequate

protection.

32. The Government maintained, by way of primary submission, that the application was incompatible *ratione materiae* with the provisions of Article 3 of the Convention (art. 3) since the risk of inhuman or degrading treatment relied on by the applicant did not stem from the conduct of the Colombian authorities.

Article 3 (art. 3) could be construed as also applying in cases where the risk of such treatment emanated exclusively from private individuals or groups only by considerably extending the scope of the Convention. The travaux préparatoires on Article 3 (art. 3), cited by the applicant, did not assist him since an amendment expressly referring to the absolute character of the ban on proscribed treatment had been withdrawn. In support of their contention, the Government also relied on Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted in New York on 10 December 1984 which expressly includes an element of intent in the definition of "torture". That text represented the most recent statement of international law on the subject. Likewise, the Geneva Convention of 28 July 1951 relating to the Status of Refugees required an element of intent on the part of the official authorities before a person could be granted refugee status.

In any event, H.L.R. had not shown that the risk was real and serious. The features of the case that were related to the applicant's personal situation were based solely on his claims and were not substantiated by any *prima facie* evidence. With respect to protection by the authorities of the country of destination, it was impossible to require total safety. Despite the means deployed by developed countries, States were not always able to guarantee the security of, for instance, the most senior members of the judiciary. In the instant case, there was nothing to show that the Colombian authorities would be unable to provide protection appropriate to the applicant's situation. In conclusion, deporting him to his country of origin could not be seen as a measure which would definitely and inevitably place him in a situation where his life or his physical integrity would be threatened.

33. The Court observes firstly that the Contracting States have the right, as a matter of well-established international law, and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see the *Vilvarajah and Others v. the United Kingdom* judgment of 30 October 1991, Series A no. 215, p. 34, para. 102).

34. However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) in the receiving country. In these circumstances, Article 3 (art. 3) implies the obligation not to deport the person in question to that country (see the *Soering v. the United Kingdom* judgment of 7 July 1989, Series A no. 161, p. 35, paras. 90-91; the *Cruz Varas and Others v. Sweden* judgment of 20 March 1991, Series A no. 201, p. 28, paras. 69-70; the *Vilvarajah and Others* judgment cited above, p. 34, para. 103; the *Chahal v. the United Kingdom* judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, p. 1853, paras. 73-74, and p. 1855, para. 80; and the **Ahmed v. Austria** judgment of 17 December 1996, Reports 1996-VI, p. 2206, para. 39).

35. The Court further reiterates that Article 3 (art. 3), which enshrines one of the fundamental values of democratic societies (see the Soering judgment cited above, p. 34, para. 88), prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 163; the Chahal judgment cited above, p. 1855, para. 79; and the **Ahmed** judgment cited above, pp. 2206-07, paras. 40-41).

36. Under the Convention system, the establishment of the facts is primarily a matter for the Commission (Articles 28 para. 1 and 31) (art. 28-1, art. 31). Accordingly it is only in exceptional circumstances that the Court will use its powers in this area (see the Cruz Varas and Others judgment cited above, p. 29, para. 74). However, the Court is not bound by the findings in the Commission's report and remains free to verify and to assess the facts itself.

37. In determining whether it has been shown that the applicant runs a real risk, if deported to Colombia, of suffering treatment proscribed by Article 3 (art. 3), the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained proprio motu (see the Vilvarajah and Others judgment cited above, p. 36, para. 107). Furthermore, as the risk is assessed as at the date the Court considers the case, it is necessary to take into account information that has come to light since the case was examined by the Commission.

38. The Court notes that on 14 May 1989 the applicant, who was travelling from Colombia to Italy, was arrested in possession of drugs while in transit at Roissy Airport. On being convicted of drug trafficking, he was sentenced to a term of imprisonment and an order was made permanently excluding him from French territory. While in detention, he gave the names of three drug traffickers, which subsequently enabled one of them to be identified on the basis of the information the applicant had provided (see paragraph 9 above). The order for the applicant's deportation was made on 26 April 1994 on the ground that his presence on French territory represented a serious threat to public order. He is currently subject to a compulsory residence order in France.

39. It is therefore necessary to examine whether the foreseeable consequences of H.L.R.'s deportation to Colombia are such as to bring Article 3 (art. 3) into play. In the present case the source of the risk on which the applicant relies is not the public authorities. According to the applicant, it consists in the threat of reprisals by drug traffickers, who may seek revenge because of certain statements that he made to the French police, coupled with the fact that the Colombian State is, he claims, incapable of protecting him from attacks by such persons.

40. Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention (art. 3) may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.

41. Like the Commission, the Court can but note the general situation of violence existing in the country of destination. It considers, however, that this circumstance would not in itself entail, in the

event of deportation, a violation of Article 3 (art. 3).

42. The documents from various sources produced in support of the applicant's memorial provide insight into the tense atmosphere in Colombia, but do not contain any indication of the existence of a situation comparable to his own. Although drug traffickers sometimes take revenge on informers, there is no relevant evidence to show in H.L.R.'s case that the alleged risk is real. His aunt's letters cannot by themselves suffice to show that the threat is real. Moreover, there are no documents to support the claim that the applicant's personal situation would be worse than that of other Colombians, were he to be deported.

Amnesty International's reports for 1995 and 1996 do not provide any information on the type of situation in which the applicant finds himself. They describe acts of the security forces and guerilla movements. Only in the 1995 report is there any reference, in a context which is not relevant to the present case, to criminal acts attributable to drug trafficking organisations.

43. The Court is aware, too, of the difficulties the Colombian authorities face in containing the violence. The applicant has not shown that they are incapable of affording him appropriate protection.

44. In the light of these considerations, the Court finds that no substantial grounds have been established for believing that the applicant, if deported, would be exposed to a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 3 (art. 3). It follows that there would be no violation of Article 3 (art. 3) if the order for the applicant's deportation were to be executed.

FOR THESE REASONS, THE COURT

Holds by fifteen votes to six that there would be no violation of Article 3 of the Convention (art. 3) if the order for the applicant's deportation were to be executed.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 29 April 1997.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the following dissenting opinions are annexed to this judgment:

- (a) dissenting opinion of Mr De Meyer;
- (b) dissenting opinion of Mr Pekkanen, joined by Mr Thór Vilhjálmsson, Mr Lopes Rocha and Mr Lohmus;
- (c) dissenting opinion of Mr Jambrek.

Initialled: R. R.

Initialled: H. P.

DISSENTING OPINION OF JUDGE DE MEYER

(Translation)

The considerations set out in paragraphs 41 to 43 of the judgment are unconvincing and do not suffice to allay the fears about the fate awaiting the applicant on his return to Colombia.

Rather they suggest that he will there face risks at least as serious as those to which Mr Chahal would have been exposed had he been sent back to India (1). I fully subscribe to what Mr Pekkanen says on this subject (2), and to his conclusion in this case (3).

1. See the Chahal v. United Kingdom judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, pp. 1859-62, paras. 98-107.

2. See his dissenting opinion below, para. 4.

3. Ibid., para. 5.

DISSENTING OPINION OF JUDGE PEKKANEN, JOINED BY
JUDGE THÓR VILHJÁLMSOON, JUDGE LOPES ROCHA AND JUDGE LOHMUS

1. I accept that H.L.R., as a convicted drug trafficker, must be taken to have understood the consequences of his activities and of his involvement with drug cartels. However, in spite of this, there can be no denying that he is still entitled to protection under Article 3 of the Convention (art. 3).

It should be stressed that, while detained in France, H.L.R. had given the names of three drug traffickers, one of whom was subsequently identified on the basis of the information he had provided (paragraph 38 of the judgment). It should not therefore be forgotten that from the point of view of the drug cartel which recruited him, H.L.R. was an "informer" and that criminal organisations are prone to take harsh revenge on such persons in order to intimidate and deter future "informers".

The real evidence showing that H.L.R.'s life would be at risk if he were deported is, admittedly, quite meagre. But that is only to be expected: killers seldom give advance warning before striking. In my view to demand more concrete evidence from an applicant who has been shown to be an "informer" is to impose an unrealistic burden on him. For "informers" to meet such a fate is not unknown in Colombia.

According to a Joint Special Rapporteurs' Report of 16 January 1995 submitted to the United Nations Commission on Human Rights on the situation in Colombia, numerous accounts were received of the killing of persons accused by the guerillas of being "informers" for the security forces. There is thus every reason to believe that the much more powerful drug cartels would treat their "informers" in the same fashion.

2. The probability of H.L.R. being subjected to treatment in violation of Article 3 of the Convention (art. 3) if deported to Colombia must also be assessed against the background of the general situation regarding the protection of human rights in Colombia. In this respect the above-mentioned report provides a revealing picture.

According to the Special Rapporteurs, Colombia, which has 36 million inhabitants, has one of the world's highest records of homicide; in 1994 there were about 30,000 cases. In approximately 77%

of all cases it was not possible to ascertain who the perpetrators of violations of the right to life were. This violence included extrajudicial, summary or arbitrary executions and torture by security forces and groups cooperating with them, particularly in the context of counter-insurgency activities, but also with a view to protecting particular economic privileges and interests, as well as large-scale and grave abuses by armed insurgents and armed groups at the service of drug traffickers or large land owners.

With the aid of their enormous financial resources the drug cartels and individual drug traffickers have converted their private armed groups into highly operational forces equipped with sophisticated weapons. They are reported as having close links with local military commanders and are active throughout the national territory. In some instances private forces financed by drug traffickers are said to cooperate with the security forces.

It is pointed out in the report that the deficiencies in the administration of justice and the inability of the State authorities to ensure security for the civilian population are important factors contributing to the increased level of violence. Between 1982 and 1994, about 270 members of the judiciary are reported to have been murdered. In respect of the 28,000 violent deaths that occurred in Colombia during 1992, only 2,717 convictions were obtained through the criminal justice system, i.e., in barely 10% of the cases.

3. Taking into account the huge commercial interests of drug cartels and also the powerful position they occupy in Colombia, there is every reason to believe that they have a vested interest in ensuring that "informers" do not go unpunished. In the climate of lawlessness which prevails in Colombia it must be an easy task for a drug cartel to track down an "informer" and to take revenge on him. The ability of the State authorities to protect an informer's life or even to bring his murderers to justice can only be assessed, at the present time, as being very limited.

4. In the case of *Chahal v. the United Kingdom*, the Court came to the conclusion that despite the efforts of the Indian authorities to bring about reform, problems persist with regard to observance of human rights by certain members of security forces in Punjab and elsewhere in India, and that the deportation of a well-known supporter of Sikh separatism would have been likely to make him a target of hard-line elements in the security forces. His deportation would thus have violated Article 3 of the Convention (art. 3).

The *Chahal* case can be compared with the present case in that the powerful private armies of drug cartels, which are known to have worked in cooperation with members of the security forces, seem to be able to operate with only limited hindrance by the State authorities. Bearing in mind the overall situation with regard to human rights in Colombia the applicant is, in my opinion, subject to as great a risk of reprisals as the applicant in the *Chahal* case was. I reach the same conclusion in this case as the Court did in the *Chahal* case.

5. In conclusion, these are, in my opinion, substantial reasons to believe that H.L.R., if deported to Colombia, would face a real risk of being subjected to treatment contrary to Article 3 of the Convention (art. 3) by the drug cartel concerned. Since the Colombian State authorities are not currently in a position to provide sufficient protection against such treatment, I find that Article 3 of the Convention (art. 3) would be violated if H.L.R. were to be deported to Colombia.

DISSENTING OPINION OF JUDGE JAMBREK

I regret that I am unable to join the majority in finding no violation in the case of *H.L.R. v. France*. For me, the danger or degree of risk run by the applicant, if deported to Colombia, of suffering treatment proscribed by Article 3 (art. 3) is the most important criterion. I agree that such a risk is more predictable when the State authorities are involved. However, in my view, a clear distinction cannot be made in abstracto between situations where the danger comes from the State, or where there is complicity on the part of the Government, or even where the State is non-existent and the applicant cannot be protected. Therefore, an assessment must be made in the light of the particular circumstances of each case.

The key reasons given in paragraphs 42 and 43 of the present judgment did not convince me that the risk for the applicant was not sufficiently documented as real and serious, and that the Colombian authorities were capable of affording him appropriate protection. Given that the applicant cooperated with the French authorities while in detention, it would in my view be appropriate for them to give him at least minimal protection against the threat of reprisals by Colombian drug traffickers by refraining from executing the order for his deportation.

On the other hand, it seems that his continued presence on French territory would not represent such a threat to public order as to outweigh the risk of his being subjected to treatment proscribed by Article 3 (art. 3), if deported to Colombia. It does not seem to me to be likely that he would continue with his criminal activities after his recruitment by the drug traffickers had been exposed and he had been punished.

Otherwise, I agree with most of the reasons given in Judge Pekkanen's dissenting opinion.