Asylum and Immigration Tribunal

KH (Article 15(c) Qualification Directive) Iraq CG [2008] UKAIT 00023

THE IMMIGRATION ACTS

Heard at Field House
On 28 January- 1 February 2008

Before

MR C M G OCKELTON, DEPUTY PRESIDENT, ASYLUM AND IMMIGRATION TRIBUNAL
SENIOR IMMIGRATION JUDGE STOREY
SENIOR IMMIGRATION JUDGE GRUBB

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Husain and Ms S Knights instructed by the Refugee Legal Centre
For the Respondent: Mr P Saini QC, Mr S Wordsworth and Mr A Palmer instructed by the Treasury Solicitor

(1) *Key terms found in Article 15(c) of the Qualification Directive are to be given an international humanitarian law (IHL) meaning. Subject to (3) below, the approach of the Tribunal in HH & others (Mogadishu: armed conflict: risk) Somalia CG [2008] UKAIT 00022 to this provision is confirmed.*

(2) *Article 15(c) does add to the scope of Article 15(a) and (b), but only in a limited way. It is limited so as to make eligible for subsidiary protection (humanitarian protection) only a subset of civilians: those who can show that as civilians they face on return a real risk of suffering certain types of serious violations of IHL caused by indiscriminate violence.*

(3) *Article 15(c) is not intended to cover threats that are by reason of all kinds of violence. It does not cover purely criminal violence or indeed any other type of non-military violence. Nor does it cover violence used by combatants which targets adversaries in a legitimate way.*

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(4) *Where it is suggested that a person can qualify under Article 15(c) merely by virtue of being a civilian, the principal question that must be examined is whether the evidence as to the situation in his or her home area shows that indiscriminate violence there is of such severity as to pose a threat to life or person generally. If such evidence is lacking, then it will be necessary to identify personal characteristics or circumstances that give rise to a "serious and individual threat" to that individual's "life or person".*

(5) *Given that the whole territory of Iraq is in a state of internal armed conflict for IHL purposes (that being conceded by the respondent in this case), a national of Iraq can satisfy the requirement within Article 15(c) that he or she faces return to a situation of armed conflict, but will still have to show that the other requirements of that provision are met.*

(6) *Neither civilians in Iraq generally nor civilians even in provinces and cities worst-affected by the armed conflict can show they face a "serious and individual threat" to their "life or person" within the meaning of Article 15(c) merely by virtue of being civilians.*

DETERMINATION AND REASONS

1. The plight of persons who flee armed conflicts affronts our common humanity. But when such persons claim asylum the answer given by host states has often been that merely being a victim of armed conflict does not make a person a refugee: see e.g. Adan [1999] 1 AC 293. Claims based on human rights, Article 3 ECHR in particular, have often met with a similar negative response: see e.g. Vilvirajah v UK (1991) 14 EHRR 248. The underlying question raised by this case is whether, by virtue of the provisions made in the EU Qualification Directive relating to eligibility for subsidiary protection, Member States of the EU are obliged to take a different view. That we have to decide this question in the context of a claim made by a national of Iraq, a country which has seen many leave in order to flee conflict there, underscores how potentially important is its answer.

2. We refer throughout this decision to the EU Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive"), in particular to Article 15 of this Directive, because that is the "common text" we share with courts and tribunals in other Member States. It is important to note, however, that our decision in this case is made under para 339C and related paragraphs of the Immigration Rules HC395 as amended, it being these rules, together with the Refugee or Person in Need of International Protection (Qualification) Regulations SI 2006/2525 ("the Protection Regulations") which have implemented into United Kingdom law the provisions of the Qualification Directive concerning international protection. We likewise refer for the most part to "subsidiary protection", that being the term used in this Directive; but for the purposes of the Immigration Rules and the Protection Regulations the term is "humanitarian protection". Since we refer frequently to "IHL", we should identify at

the outset that this is the body of international law applicable to international and non-international (internal) armed conflicts (formerly known as the "laws of war"). It comprises both treaty law (e.g. the 1949 Geneva Conventions) and customary international law. The most widely applicable provision of IHL is common Article 3 to the four 1949 Geneva Conventions. It stipulates that in the case of international and non-international armed conflict:

> "(1) Persons taking no active part in the hostilities…shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end the following acts are and shall remain prohibited at any time and in any place, whatsoever with respect to the above-mentioned persons:
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, afforded all the judicial guarantees which are recognised as indispensable by civilised peoples.
>
> (2) The wounded and sick shall be collected and cared for.
>
> …"

According to the UK Ministry of Defence Manual of the Law of Armed Conflict, the basic principles of IHL are "military necessity, humanity, distinction and proportionality" (p.387).

The appeal

3. The appellant is a national of Iraq. In a determination notified following a hearing on 21 February 2007 Immigration Judge R Morris dismissed his appeal against a decision dated 4 December 2006 to remove him as an illegal entrant, a decision which was made in the light of an earlier decision dated 30 November 2006 refusing to grant him asylum. He successfully obtained an order for reconsideration and so the matter comes before us.

4. The basis of the appellant's claim was that he was born in Kirkuk to an ethnic Arab father and an ethnic Kurdish mother. Save for a period of less than one year when he went to Baghdad to join his cousin who was working there, he had lived all his life in Kirkuk, until he left Iraq in late July 2006. He worked as a taxi driver but then joined the police in Almas, Kirkuk. After one year and ten months he left this job because of threats to him and his family by insurgents and because his identical twin brother had been nearly killed by terrorists.

5. The Immigration Judge did not find the appellant's account credible. She did not accept that the appellant faced a real risk of suffering persecution or serious harm in his home area of Kirkuk. In particular she did not accept that the appellant would face a serious and individual threat by reason of indiscriminate violence in a situation of international or internal armed conflict. She stated:

> "As set out in the Supplementary Letter, the United Kingdom has not accepted that Iraq is in a state of civil war. It is not accepted either that the situation there amounts to internal armed conflict. This is in line with the findings of UNHCR. This being the case, so far as the appellant's past adverse experiences are concerned, I find that the situation in Iraq, (even in the turbulence of Baghdad) is not one that can be characterised as internal armed conflict, serious though the internal strife in that country is. In summary, the threat to the appellant is not personal or 'individual' to him."

6. She did, however, accept that he was from Kirkuk, of mixed Arab and Kurdish ethnicity, and that:

> "given the precarious security situation in Iraq, the appellant might have faced dangerous and violent situations and that members of his family may well have been killed in the general military and civilian upheaval in Iraq".

7. Having found that the appellant was not at risk in his home area, the Immigration Judge also dealt briefly, in the alternative, with the question of whether he could relocate in any event to other parts of Iraq. Given his mother's Kurdish ethnicity, the Immigration Judge considered that "if he preferred, he would be able to relocate to the Northern Governorates" (para 22(v)).

8. In line with these conclusions the Immigration Judge found that the appellant was not at real risk of treatment contrary to Articles 2 and 3 of the ECHR.

9. The grounds for reconsideration raised two challenges. One was to the Immigration Judge's adverse credibility findings. The other was to the Immigration Judge's failure to apply para 339C of HC 395 to the appellant's claim "adequately or at all". The order for reconsideration was confined to the second ground.

<u>The HH appeal</u>

10. We heard the appellant's appeal together with the appeal of HH (IA/01739/2007). In the event we decided to issue a separate determination in HH's case. We would emphasise, however, that we have taken fully into account in this case all the evidence submitted by HH's representatives, together with the submissions made on his behalf by Mr M Symes (instructed by IAS (London)).

Decision as to whether material error of law

11. Mr Saini QC did not seek to persuade us that the Immigration Judge had not materially erred in law and in our view he was right not to do so. The Immigration Judge concluded that the appellant could not meet the requirements of para 339C(iv). This provision states that one subcategory of serious harm consists in "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict"; this wording precisely mirrors Article 15(c) of the Directive. Leaving aside that the Immigration Judge wrongly referred to the requirement in para 339 (iv) as one concerned with situations of "international *and* internal armed conflict" (emphasis added), she appeared to see

the reason why the relevant threat was not personal or "individual" to him as being because the situation in Iraq was not one of internal armed conflict. We analyse the notion of a "serious and individual threat" later on in this determination, but it suffices to say here that the Immigration Judge's reasoning on this point failed to recognise that, if there was no internal armed conflict, the issue of whether there was any threat individual to the appellant (within the meaning of Article 15(c)) was irrelevant. Moreover, the reasons she gave for finding that Iraq was not in a state of internal armed conflict were misconceived. It was wrong to view it as a matter settled by the (assumed) fact that the United Kingdom government has not accepted Iraq is in such a state. It is a matter to be judicially determined by applying legal criteria to the factual situation in that country. In any event, the letter from the respondent dated 9 February 2007, on which the Immigration Judge relied, did not state that the United Kingdom government disputed that Iraq was in a situation of internal armed conflict. What it stated was that "it is a matter of record that the government of the United Kingdom does not accept that Iraq is in a state of *civil war*" (emphasis added). It was quite wrong to equate the concepts of "internal armed conflict" and "civil war". Further, to the extent that the Immigration Judge might be thought to have intended simply to point to an evidential basis for her finding that Iraq was not in a state of civil war and/or armed conflict - consisting in the view of the UNHCR - this was based simply on the appellant's representative's acceptance that UNHCR had not classed Iraq as being in a situation of international or internal armed conflict. We can find nothing on file to show that UNHCR had taken such a view. (That in a recent report dated August 2007 UNHCR describes Iraq as having been in a state of internal armed conflict since 28 June 2004 further confirms our belief that the Immigration Judge, like the appellant's representative, was certainly wrong to suggest that UNHCR had rejected such a view.)

12. We consider that the Immigration Judge's erroneous understanding of the legal criteria she had to apply, when considering whether the appellant was at real risk of serious harm and of the evidence that was relevant to her decision on that issue in relation to this appellant, amounted to a material error of law.

13. Both parties agreed that we were in a position to decide the appeal for ourselves without further adjournment.

The issues

14. The appellant's asylum and human rights grounds of appeal have already been rejected and it is common ground that the only issue before us concerns whether the appellant is able to show eligibility for subsidiary protection under Article 15 of the Qualification Directive (humanitarian protection under paragraph 339C).

15. The principal basis on which the appellant puts his case is that he meets the requirements of Article 15(c) by virtue of the fact that he faces return to a country which is in a situation of internal armed conflict and in which the indiscriminate violence there would give rise to a serious and individual threat to his life or person

(1) merely by virtue of the fact that he is a civilian from Iraq or a civilian in his home area (Kirkuk), and in any event (2) by virtue of his being from Kirkuk and of mixed (Sunni) Arab/Kurdish ethnicity. Mr Saini for the respondent contends that the appellant fails under Article 15(c) for a number of reasons: that there is no internal armed conflict in Iraq or Kirkuk within the meaning of Article 15(c); that even if there is, he cannot meet the other requirements of Article 15(c), in particular the existence of a "serious and individual threat" and he cannot succeed merely by virtue of being a civilian in Iraq or in Kirkuk or a person of mixed (Sunni) Arab/Kurdish ethnicity in Kirkuk.

Submissions

16. We had lengthy written and oral submissions in this case. We are indebted to the parties (and to Mr Symes who appeared in the case of HH, which we heard at the same time) for the great care and attention to detail which their submissions exhibited. What progress we have made in clarifying the law and analysing the evidence in this case is in part due to the high quality of their respective preparations. However, partly because of their length and partly because of the fact that on some issues the parties changed their position in the course of the hearing, we do not propose to set them out in any detail. Where appropriate we shall address points they raise when setting out our own reasoning.

17. An extremely important feature of this case is that it must be decided in the light of a concession made during the hearing by Mr Saini on behalf of the Secretary of State. He stated that she accepted that for IHL purposes Iraq was in a situation of internal armed conflict and that this situation embraced the whole territory of the state of Iraq, including the Kurdish Regional Government (KRG) and that the Government of Iraq (GOI) is a party to it.

18. More generally Mr Saini submitted that Article 15(c) afforded no additional scope beyond that of Article 15(a) and (b); that it would be wrong to endow key terms in Article 15(c) with an IHL meaning, but that if we did so we should accord them a narrow meaning, since to do otherwise would fly in the face of the fact that the Member States clearly did not envisage this provision as giving rise to a new species of international protection; that (in any event) so far as key terms within Article 15(c) were concerned, "the international humanitarian law cupboard is relatively bare"; that in relation to Iraq, although the respondent accepted that for IHL purposes there was an internal armed conflict in Iraq, we should find, by applying a "pragmatic", "autonomous" approach to definition built out of existing United Kingdom case law on war and civil war, that there was not such a conflict; that in any event neither the class "civilians in Iraq" nor the class "civilians in Kirkuk" (the appellant's home area) could show they faced a "serious and individual threat" within the meaning of Article 15(c); and that none of the appellant's personal characteristics (being male, being of mixed ethnicity) sufficed to show he faced a "serious and individual threat" either. On all these matters Mr Husain's (and Mr Symes') submissions and those by

Ms Knight in respect of the situation in Iraq, were almost precisely to the opposite effect.

The legal framework

19. Article 2(e) of the Qualification Directive provides:

> "[person eligible for subsidiary protection] means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country."

20. Article 15(c) states:

> "Serious harm consists of:
>
> (a) death penalty or execution; or
> (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict".

21. Complementary to this provision is recital 26 which states:

> "Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm".

22. Article 17 sets out who is excluded from being eligible for subsidiary protection. It is not relevant to this case.

23. Mention should also be made of recitals 25 and 11. Recital 25 states:

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

24. Recital 11 states:

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

25. Implementing Articles 2(e) and 15, para 339C of the Immigration Rules provides as follows:

> "A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:
> (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;
> (ii) he does not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
> (iii) substantial grounds have been shown for believing that the person concerned, if he returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country; and
> (iv) he is not excluded from a grant of humanitarian protection.
>
> Serious harm consists of:
> (i) the death penalty or execution;
> (ii) unlawful killing;
> (iii) torture or inhuman or degrading treatment or punishment of a person in the country of return; or
> (iv) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

Interpretive principles

26. The methods of interpretation applied within EU law deviate in some respects from the rules laid down in the 1969 Vienna Convention on the Law of Treaties, but we do not understand there to be any disagreement that when interpreting an EU directive we must bear in mind the following canons: that we must construe a directive as far as possible, in the light of its wording, context and purpose, paying particular regard to purpose, in order to achieve the result pursued (Case C-106/89 Marleasing [1990] ECR I-4135, para 8); that a directive is to be construed so that its operative parts are effective; that the meaning of any particular provision of a directive must be consistent with the higher legal rules of the Community under which, and in furtherance of which, it was adopted; that the preamble is a most important aid in determining the scope and purpose of a directive, but is of no legal force in itself, and therefore yields in the face of a contrary provision of the directive (Case C-184/99 Grzelcsyk [2001] ECR I-6193 para 44; Case C-413/99 Baumbast [2002] ECR I-7091); that preparatory documents although relevant, are not of decisive importance in identifying the intention underlying the measure ("[t]hat intention is embodied and disclosed in the legislative text and essentially must be gathered from the actual meaning of the words, from the function of the measure itself and from the system of which it forms part", Case C-300/89 Commission v Council [1991] ECR I-2867, 2895); that less significance will attach to a preparatory document that is private than to documents that are formally required by the legislative process and to which reference is made in the recitals when the measure is adopted; and that the Court has disapproved of *a contrario* reasoning (see Case C-9-56 First Meroni Case [1957] 162,163).

Article 15 as a whole

27. This is only the second occasion on which the Tribunal has looked in any depth at Article 15(c). The first occasion was in HH & others (Mogadishu: armed conflict: risk) Somalia CG [2008] UKIAT 00022, promulgated on 28 January 2008, which dealt, inter

alia, with the issue of whether there was an internal armed conflict in Somalia, in Mogadishu in particular. In that case the panel went out of its way to emphasise that its conclusions were very much based on the submissions made to it in that case. That determination having been made available to the parties in this case, the submissions before us (understandably) sought to develop arguments in response. They also brought to bear a far wider array of legal sources and materials. Having said that, on the general approach to Article 15(c) we consider that (save in one respect: see below para 96) our conclusions are broadly similar to those stated in HH & others.

28. It is the respondent's contention that Article 15 is simply designed to deal in a specific way with three (not all) aspects of the protection afforded by nonderogable ECHR rights. Article 15(b) codifies Article 3. Article 15(a) codifies the Sixth and Thirteenth Protocols. Article 15(c), according to this argument, merely codifies aspects of Articles 2 and 3. Thus Article 15's role, argued Mr Saini, is essentially clarificatory, particularising three existing bases of Member States' obligations under international human rights law. It was intended to ensure merely that a status was given to those who could previously qualify only for non-removability under ECHR provisions. Article 15(c) was intended to benefit those who were able to show that in a situation of armed conflict they faced a risk personal to them. Mr Husain's opposing submission has two main limbs. First he argues that to treat Article 15(c) as a subcategory of Article 3 (and Article 2) ECHR would offend the EU principle of *effet utile*, since it would mean that Article 15(c) adds nothing to Article 15(b), whose wording mirrors that of Article 3 ECHR. Second he argues that Article 15 can only be properly understood as setting out three separate but overlapping types of serious harm, each with its own distinct scope. Third, it is his contention that Article 15(c) only makes sense if read as creating a new obligation of wider scope (at least in some respects) than Articles 3 and 2 of the ECHR. Before we look in depth at Article 15(c), therefore, we have to consider Article 15 as a whole. (We have also to have regard to the addition within para 339C of the Immigration Rules of a further head of type of harm, "unlawful killing" (para 339C(ii)).

29. We are persuaded that Article 15(c) must be understood as having some scope additional to that contained in Article 15(a) and (b). Even if at some point in the drafting process it was thought that Article 15 should correspond with nonderogable ECHR rights and that in particular Article 15(c) should correspond with Article 3 (or Articles 2 and 3), it is clear that the eventual text goes further and that in doing so it reflects the underlying purposes behind the Directive.

30. For Mr Saini's reading to be correct, it would be necessary to see both Article 15(c) and 15(a) as subcategories of nonderogable ECHR rights. But, even without reference to Article 15(c), that reading breaks down in relation to Article 15(a). His argument depends on the subject-matter of Article 15(a), the prohibition on the death penalty and execution (irrespective of whether in time of war or peace) corresponding precisely with Member States' obligations under both the Sixth and Thirteenth Protocols and Article 3. But only some Member States have ratified the Thirteenth

Protocol and so at present their obligation is only to ensure prohibition of the death penalty in time of peace. Article 15(a) applies that prohibition in time of war or peace. And as regards Article 3, it is clear from Ocalan v Turkey (2005) 41 EHRR that the Court still does not consider that the death penalty violates that article. At para 165 of this judgment the Grand Chamber stated:

> "For the time being, the fact that there are still a large number of States who have yet to sign or ratify Protocol No 13 may prevent the Court from finding that it is the established practice of states to regard the implementation of the death penalty as inhuman and degrading treatment contrary to Article 3 of the Convention, since no derogation may be made from that provision, even in time of war".

31. In our view there is a similar lack of correspondence between Article 15(c) and nonderogable ECHR rights generally. Whereas the latter (like Article 15(a) and (b)) require substantial grounds for believing that a person would face a real risk of the relevant ill treatment (death penalty, torture or inhuman or degrading treatment or punishment), Article 15(c) requires only that such a person would face a *threat* of the relevant ill treatment. We shall return to this feature when discussing the meaning of "serious and individual threat", but our point here is that it is simply not possible to equate ill treatment and threat of ill treatment.

Meaning of Article 15(c)

Approach to interpretation

32. Before we can analyse the constituent elements of Article 15(c) in detail, we must address the general question of what approach we should take to interpretation of this provision, a provision which Dr J McAdam, Complementary Protection in International Refugee Law (at p.70) states went through seven amendments during the drafting process. The Directive's Article 2 "Definition" section does not deal with its key terms. On any reading Article 15(c) is tortuously worded. Most conspicuously, if it is given an ordinary language reading then it would appear to contain a near contradiction in terms. On the one hand it requires that the threat must be one which is "individual"; on the other hand it requires that such a threat must be by reason of violence which is indiscriminate, meaning, in ordinary language, random or arbitrary. But if violence is random or arbitrary then it is not individualised and so it is exceedingly difficult to see how it can ever give rise to an individual threat. In any event it is accepted that under EU principles the approach to interpretation must be one which has regard to context and is purposive or teleological.

An IHL reading of Article 15(c)

33. Once one adopts a purposive approach, the reasons for giving as far as possible an IHL meaning to key terms in Article 15(c) are overwhelming.

34. One reason which could be given is that an IHL approach to Article 15(c) is also one which has been taken by a number of courts and tribunals in other EU Member States: see e.g. French Commission des Recours des Refugies (CRR) 22 November 2005, MA); the Belgian court decision in VB/05- 5833/W12.182/SB5 (27 October 2006);

the Dutch Council of State judgment, Raad van Staat, 20-07-2007,200608939/1 LJN BB0917; the Swedish Migration Court of Appeal 2007.9 decision (UM 23-06) and the Higher Administrative Court of Schleswig-Holstein (Northern Germany) judgment 21 November 2007, 2 LB 38/07. Given that one of the objectives of the Directive is to achieve the application of common criteria throughout the EU, that is not an unimportant matter. But lacking as we do any full picture of the approach taken by judicial decision-makers throughout the EU, we shall not rely on it to justify our own reasoning.

35. At first sight the drafting history appears to point against an IHL reading of Article 15(c). The draft version of Article 15(c) in 13354/02, Asile 55, 23 October 2002, made reference to: "[in accordance with the 1949 Convention relating to the Protection of Civilian Persons in time of War,] serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict" (this draft was also the subject of a proposal by the Council Legal Service to "add a reference to the Annexes and Protocols related to this Convention"). But the final version contains no such reference.

36. However, although reference to the 1949 Geneva Convention IV did not survive the drafting process, the terminology of IHL did. It is abundantly clear that several of the terms used in Article 15(c) are terms of art within international humanitarian (and international criminal) law: e.g. "civilian", "life and [or] person" "indiscriminate" and, of course, "international or non-international [internal] armed conflict". The only body of law in which all of these terms feature is IHL (together with international criminal law). The terminology of Article 15(c) thus provides a powerful reason in favour of giving the provision an IHL reading.

37. Furthermore, the preparatory documents contain no explanation for the deletion of the reference to Geneva Convention IV and its cause can really only be a matter of speculation. In one respect the eventual text chosen *logically* required a deletion of reference to common Article 3 *simpliciter*, since the confinement of serious harm to threats to a civilian's "life or person" at the very least excludes acts or threats covered separately by common Article 3(1)(c) (outrages upon personal dignity) and the causal requirement of "indiscriminate violence" is a further limit on scope. But leaving that aside, there is clearly a range of likely reasons, including recognition that even all four of the 1949 Geneva Conventions, together with their two Protocols and Annexes, comprise only part of a wider body of IHL rules, some of which have developed into customary international law as recognised by the jurisprudence of international criminal tribunals in cases heard since 1949.

38. It can also be seen that the drafters of the Directive specifically recognised that IHL was one of two sources of law (along with Strasbourg case law) of particular relevance in the context of formulating Article 15(c). The Explanatory Memorandum on the Proposal for a Council Directive on the minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (COM (2001) 510 final), in

its commentary on what became Article 15(c) stated that part of the thinking behind Art 15(c) was to draw on not just ECHR principles (especially Article 3) but also "general principles of international humanitarian law": the commentary states that "[p]artly in response to the case law of the European Court of Human Rights and general principles of international humanitarian law, Member States have developed schemes of 'subsidiary' or 'complementary' protection."

39. An IHL approach provides an objective framework for interpreting Article 15(c) - in the form of an identifiable set of legal rules which exist and are applied both EU-wide and internationally. Basing interpretation of Article 15(c)/para 339C(iv) on international law norms enables decision-makers to proceed on a more objective footing. As we shall see when we turn to evaluate the expert reports furnished for this appeal, failure on the part of those seeking to assess situations of armed conflict in a particular country to apply a consistent IHL approach can also cause difficulties in understanding what they mean when they seek to identify different types of violence (e.g. "targeted" and "indiscriminate"). An approach based on an international law framework is also consonant with that taken by the House of Lords in cases such as Horvath [2001] AC 489 *per* Lord Hope at 495C-E and 499-500D and Sepet and Bulbul [2003] UKHL 15 [2003] 1 WLR 865 and by the Court of Appeal in Krotov [2004] EWCA Civ 69 [2004] 1 WLR 1825 and the Immigration Appeal Tribunal in Gurung* [2002] UKIAT 04870 [2003] INLR 133 in respect of key terms contained within the Refugee Convention at Article 1A(2) and Article 1F.

40. An interrelated reason arises from the nature of the provisions which we are obliged to interpret in this case: provisions which are United Kingdom legislative measures taken to implement the Qualification Directive, one of whose principal purposes is to introduce EU-wide criteria on the basis of which persons are to be recognised as eligible for subsidiary protection. Recital 6 states that:

> "The main objective of this Directive is, on the one hand, to ensure that Member States apply *common criteria* for the identification of persons genuinely in need of international protection [which covers both refugee and subsidiary protection], and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States." (emphasis added)

41. If (as Mr Saini submitted) a UK tribunal or court could sensibly construct its own notion of the "autonomous meaning" of the term "international or internal armed conflict" without regard to any shared international law framework, then (except accidentally) there would be nothing "common" about the criteria it devised and no basis to complain about other Member States adopting similarly unilateral notions.

42. Using IHL as an aid to construction does not involve any recourse to extraneous (non-EU) legal norms. International obligations (including treaties to which most Member States are a party) automatically form part of the laws of Member States and the EU: see Case-540/03 Parliament v Council. The rules of IHL (at least insofar as they constitute customary international law) are likewise binding upon the Community institutions and form part of the Community legal order: see C-162/96

Racke [1998] ECR 03655, paras 45-6. Using these IHL rules as an aid to construction of Article 15(c) accords with general principles of Community law.

43. Further, the specific EU law basis for asylum measures such as the Qualification Directive, Article 63(1) of the Treaty Establishing the European Community (TEC), recognises as a relevant source not just the Refugee Convention but also "other relevant treaties". Article 63(2)(a) expressly treats the areas covered by such measures as including: "minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin *and for persons who otherwise need international protection*." (emphasis added). Article 63 clearly intended, therefore, that the deference to relevant international treaty law (not specifically restricted to international human rights treaties) was to apply to both protection regimes. It is true that nothing is specified about IHL treaties but neither are such treaties excluded.

44. So far as the Directive itself is concerned, recital 11 states:

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

45. Whilst this provision only refers to international instruments of a particular kind, it is clear, and Mr Saini conceded as much, that major IHL instruments contains express provisions prohibiting discrimination: see e.g. Article 3(1) of common Article 3 of the 1949 Geneva Conventions and Article 2(1) of Additional Protocol II.

46. Mr Saini contended that the wording of another recital, recital 25, argued against giving Article 15(c) an IHL reading because it confined the sources from which subsidiary protection criteria could properly be drawn to international human rights instruments. There are two major difficulties with this contention. First, recital 25 refers to drawing criteria "from international obligations under human rights instruments *and practices existing in Member States*." (emphasis added).

47. In our view the reference to existing "practices" is to be given a broad meaning and is to be understood as covering both national laws and policies. So far as laws are concerned, the manner in which Member States give effect to their international obligations varies considerably depending on whether they adopt monist or dualist systems and on the precise hierarchy of their legal norms, but all are signatories to the 1949 Geneva Conventions and, so far as we are aware, all accept and apply customary international law, including common Article 3 of the 1949 Geneva Conventions: effect is given to those Conventions in the UK by the Geneva Conventions Act 1957 (as amended). Accordingly "existing practices" include laws giving domestic effect to IHL obligations.

48. Second, even if recital 25 were read as permitting the drawing of criteria regarding eligibility for subsidiary protection from international obligations under human rights instruments only, we do not see that this would necessarily preclude drawing

also on IHL as an aid to construction of Article 15(c)'s key terms. As is explained in one of the documents submitted by the respondent, C Greenwood, Essays on War in International Law at paras 3.27-3.40, the two bodies of law – IHL and international human rights law - share the same underlying principles and overlap. Within IHL, for example, the Preamble to Additional Protocol II recalls that "international human rights instruments relating to human rights offer a basic protection to the human person". Within international human rights law the UN Convention on the Rights of the Child expressly recognises the distinct function of state obligations under IHL, Article 38(1) stating that "States Parties undertake to respect and ensure respect for rules of IHL applicable to them in armed conflicts which are relevant to the child". When the subject area is armed conflict the International Court of Justice has held that IHL is the "*lex specialis*" (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996 [1996] ICJ Rep 66). And the European Court of Human Rights has consistently seen the ECHR as forming body of a wider body of international law, with which State parties must comply: see Bosphorus Airways, Application no. 45036/98 at para 150, Al-Adsani v. the United Kingdom [GC], no. 35763/97, § 55, ECHR 2001-XI. Furthermore, on any reading of Strasbourg jurisprudence dealing with armed conflict situations under Article 2 or 3 (cases such as Muslim v Turkey [2006] 42 EHRR 16 paras 66-76 and Isayeva v Russia App. nos. 57947/00, 57948/00 and 57949/00, paras 168-200), there is nothing to suggest that the criteria (such as they are) that have been articulated are any different from those set out (with both greater detail and clarity) in IHL.

49. We do not need to deal with Mr Saini's submission that the main or an important building-block for Article 15(c) (along with Article 3 of the ECHR) was Article 2 ECHR guaranteeing the right to life - beyond pointing out that the addition within para 339C of the Immigration Rules of an additional limb of serious harm - "unlawful killing" - rather undermines his argument, since that limb is quintessentially about Article 2 of the ECHR. His submission runs into the further difficulty that the Strasbourg Court has dealt with applications by persons fearing return to situations of armed conflict primarily under Article 3: see e.g.Vilvirajah v UK and Muslim v Turkey.

50. In deciding to draw criteria regarding eligibility for subsidiary protection at least in part from EHCR norms (see recital 25) Member States cannot have been blind to the fact that they thereby ensured that the meaning of Articles 15(a) and (b) could be further developed through international jurisprudence (especially that of the Strasbourg Court). In similar, albeit not identical, fashion, giving Article 15(c) an IHL reading enables it too to be further developed by reference to the jurisprudence of the international criminal tribunals.

51. We have left until last the reason we regard as the most compelling. If one assumes, as we must, that the drafters intended to create a regime of subsidiary protection based on rational principles and then if one looks at the eventual text of Article 15(c), it is apparent that one question that could be asked of the Member States party to the Directive is "Since you have chosen to benefit a subset of civilians affected by armed

conflict, on what principled basis can you do that. Why should some civilians in situations of armed conflict be excluded whilst others are included?" In our view the only principled basis that stands scrutiny is this: that it must be wrong to seek to refoule persons who on return would face a real risk of being the victims of international crimes caused by a serious threat of indiscriminate violence. In much the same way that Article 9(e) of the Directive and case law under the Refugee Convention has recognised that it would be persecutory to return soldiers if they would on return face punishment for "refusal to perform military service in a conflict, where performing military service would includes crimes or acts falling under the exclusion clauses as set out in Article 12(2)" (which cover, inter alia, war crimes and serious breaches of IHL), so Article 15(c) reflects the view that it cannot be right in principle to return civilians to a situation where they, likewise, would face a realistic threat of being victims of war crimes or other serious breaches of IHL. Even if the test imposed by Article 15(c) might still be considered a stringent one, there is a rational basis, anchored in (but not simply reflective of) existing international law obligations, for considering that civilians in some situations of armed conflict can qualify whilst others cannot.

52. It remains for us to address several arguments advanced by Mr Saini against giving Article 15(c) an IHL reading.

53. To give Article 15(c) an IHL reading, argued Mr Saini, would wrongly ignore the very different context and the fact that this article and IHL have "wholly different" purposes. Mr Saini outlined that whereas IHL operates by way of a series of restrictions and prohibitions in terms of the way protagonists may behave, Article 15(c) by contrast establishes a right of protection in a third country Member State based on the objective presence of factors that may lead to a serious and individual threat.

54. In broad terms we can agree that IHL and Article 15(c) have different functions. IHL is concerned with regulating situations of armed conflicts, whereas Article 15(c) is concerned with a type of harm arising from exposure by way of refoulement to such situations. But at the same time the difference can be overstated and it is important to note that both legal regimes have protective purposes: one underlying purpose of IHL being protection of civilians in situations of armed conflict, the purpose of Article 15(c) being protection of a subcategory of civilians facing return to situations of armed conflict. Further, the differences of function which there are only become problematic if they involve some attempt to apply the provisions of IHL out of context. But there is no reason to think that any such attempt is involved in drawing for interpretive purposes on an existing IHL framework of criteria. Furthermore, all that is at issue here is the interpretation of specific components of Article 15(c). There is no assertion that Article 15(c) is co-extensive with IHL in full: in some respects (restriction to civilians, to a "civilian's life or person" and to causation by "indiscriminate violence") it does not even cover the entirety of common Article 3 protection.

55. Another argument raised by Mr Saini was that particular features of IHL make it hazardous to draw on it, in particular the absences and complexities of definition. Thus he pointed out, correctly, that there is no treaty definition of armed conflict and that is has been described as a "purely factual" notion (by C Greenwood in (1997) 2 Max Planck Yearbook of United Nations Law 97, 114-5). In any event, he added, since such definition as there is treats the threshold for the existence of an armed conflict as a 'low' one, that cannot be applied within Article 15(c) since the latter clearly contemplates only armed conflict in which there is a real prospect of a serious and individual threat arising. A further point was that since IHL comprises two separate sets of legal rules depending on whether the armed conflict is 'international' or 'internal', that would lead, if these were applied within Article 15(c) to anomalous applications, with differing standards of protection being applied depending on whether the civilian was in one kind of armed conflict or the other.

56. Taking each of these arguments in turn, we find the gloss which Mr Saini sought to place on the reference to the notion of "armed conflict" as "purely factual" misconceived. It seems to us that in describing "armed conflict" as a purely factual notion, Professor Greenwood QC was simply seeking to reflect the view taken by the Pictet Commentary to the 1949 Geneva Conventions that terms such as armed conflict are not invested with any rigid or technical meaning (we note that in Essays on War in International Law at para 3.46 the same author stated that there was "powerful support" for the view that the concept of armed conflict "should be given a very broad definition"). In none of the materials before us has Professor Greenwood or other any other academic authority suggested that lack of any codified definition - or the undesirability of a highly precise definition - has stripped it of any legal content or prevented it being the subject of legal interpretation. It is not suggested, for example, that the International Criminal Tribunal dealing with the Former Yugoslavia (ITFY) lacked jurisdiction or was mistaken in deciding whether there was an armed conflict in Croatia at the relevant time by reference to a set of legal criteria which it enunciated. In any event, if Professor Greenwood was indeed suggesting that the term "armed conflict" is incapable of legal definition, we cannot agree. The fact that the appropriate definition to be given to a legal term is one which treats it as highly fact-specific or open-textured (or very much a question of fact or degree) does not mean that the term is incapable of definition. To describe the notion of "armed conflict" as a purely factual notion only makes sense in the context of an acceptance that there are some criteria (even if imprecise) which can assist in deciding what is as a matter of fact an armed conflict.

57. We find no substance in the argument that the wording or context of Article 15(c) requires the notion of "armed conflict" to be interpreted as having a high threshold (or at least a higher threshold than (the low one obtaining)) under IHL. The only reason given by the respondent for considering that it would be inappropriate depends on treating the notion of "…armed conflict" as containing within itself the concept of "serious", whereas the latter is plainly a separate element of the Article 15(c) definition.

58. As for the alleged anomaly that would be created if Article 15(c) were to apply separate definitions for what constituted an armed conflict, depending on whether the conflict was international or internal, all we see as resulting from an IHL approach to defining the relevant terms is clarification that the relevant criteria are those identified by that body of law. If there is an anomaly in the international law framework (and it is true that because of the different rules applied depending on the nature of the armed conflict it has been called - by Boelaert-Suominen - a "two-legged edifice"), then we do not see anything impermissible if decisions under Art 15(c) take that into account. Whether properly called an anomaly or not, it is not one which guidance manuals issued by the International Committee of the Red Cross (ICRC) or by individual states such as the United Kingdom (in the UK Manual on the Law of Armed Conflict) see as an obstacle to the two sets of rules being properly understood and applied in practice by serving soldiers/combatants. It should not, therefore, be beyond persons charged with making decisions as to eligibility for subsidiary protection. Indeed on our approach eligibility should be expected to vary precisely as the nature of the armed conflict varies: the rules governing what amounts to an international crime are different depending on whether the armed conflict concerned is an international or internal one. In any event, so far as eligibility for subsidiary protection under Article 15(c) is concerned, it is of no consequence to the individual that the applicable rules under international humanitarian law are different: what matters is that the country to which they fear return is one where there arise situations of *either* international *or* internal armed conflict.

59. We should briefly note that we were entirely unpersuaded by Mr Saini's suggestion that we should seek to base our approach to Article 15(c) on UK cases dealing with "war" and civil war" in a commercial law context: one of the two cases he cited (Kawasaki Kisen Kabushiki Kaisa v Bantham [1939] 2KB 44) pre-dated even the 1948 UN Charter and neither it nor the other (Spinney's v Royal Insurance [1980] 1 Lloyd's Rep 406) involved the issue of the United Kingdom's obligations under treaty law.

Consequences of an IHL approach

60. Having established that Article 15(c) must be given an IHL reading, it is important to bear in mind that this only take us so far. In the first place, our reasoning in the foregoing paragraphs only establishes that the proper approach to interpretation of Article 15(c) is that of IHL. We have yet to explain why, as noted at the outset, we think that Article 15(c) affords a protection which in some (but only limited) respects goes wider than that which Articles 3 and 2 of the ECHR give. Additionally we should emphasise that seeing Article 15(c) as being largely built out of IHL norms does not entail seeing it as simply reflecting Member States' existing treaty obligations. Plainly, if we are right, it cannot, since IHL does not guarantee a right of non-refoulement of any kind. IHL is solely an aid to construction of key terms arising in Article 15(c). But whether the effect of the provision is, as we think, to create a (limited) new type of non-refoulement obligation for Member States is an entirely separate matter.

61. In the second place, endowing key terms in Article 15(c) with an IHL meaning does not necessarily mean accepting that this provision has the same material scope as IHL or customary international law as a whole - or even simply common Article 3 of the 1949 Geneva Conventions. (We emphasise this point because one of the earlier drafts of Article 15(c) did appear to see its material scope as the same as the 1949 Geneva Convention IV.) As we have mentioned already, there are at least three respects in which the scope of Article 15(c) is narrower than these other bodies of law. First, it only protects civilians. Second it only protects civilians in respect of their "life or person" and not, for example, in respect of their "objects" (possessions or property). Third it is concerned only with protecting against threats that arise by reason of "indiscriminate violence". If an answer is sought as to why the drafters did not decide to equate the material scope of this provision with IHL as a whole, then there is a clear one to hand: that Member States were concerned not to create too broad a limb of protection. From the preparatory Asile documents there are several references to concerns being expressed by some Member States about the need to avoid undue widening of the scope of this subparagraph.

62. Nor (contrary to Mr Husain's submissions) does adopting an IHL reading entail acceptance of the view that the Directive itself must be read as embodying any particular prior practice of any particular State. Mr Husain asked us to derive such a conclusion from recital 25 read in conjunction with the reference in chapter 3 of the Explanatory Memorandum to "draw[ing] from the disparate Member State systems and …attempt[ing] to adopt and adapt the best ones"; and, in addition, he asked us to assume that "best" practice always means "practice most generous to applicants". However, we have no way of ascertaining what the Explanatory Memorandum authors understood by "best" practices and it is abundantly clear that, whatever the aspirations expressed in the Explanatory Memorandum, later compromises were made, in part to avoid Article 15(c) having a wide or liberal application. So far as concerns Mr Husain's submission that a liberal approach to Article 15(c) is necessitated by the TEC Art 61(b) obligation relating to the "safeguarding [of] the rights of nationals of third countries", we do not see that the interpretation which we give to this provision breaches this obligation and, in any event, the Directive was made under Article 63(1(c), 2(a) and 3(a), not under Article 61(b).

<u>Drafting history</u>

63. It is not necessary for us to consider the drafting history in detail but in the light of the submissions made to us two features require specific comment.

64. The original wording of the article was:

> "a threat to his or her life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalised violations of their human rights".

65. Pointing out that this wording was based heavily on the Temporary Protection Directive of 2001 (EU Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced

persons on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof), Mr Husain urged us to view Article 15(c) as intending to treat that Directive's protection regime as a "template".

66. It is beyond doubt that the original wording cited above closely modelled itself on part of the definition given to protection to persons fleeing armed conflict or endemic violence in the Temporary Protection Directive. We know that from what was stated in the Explanatory Memorandum when commenting on the above wording, viz. that "[t]he definition of this sub-paragraph is drawn from Article 2(c) of the Council Directive on minimum standards for giving temporary protection in the event of a mass influx".

67. Article 2(c) of the Temporary Protection Directive protects persons:

> "who have had to leave their country or region or origin or have been evacuated…and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular: (i) persons who have fled areas of armed conflict or endemic violence; (ii) persons at serious risk of, or who been the victims of, systematic or generalised violations of their human rights".

68. The difficulty we have with Mr Husain's submission is that it can be seen that the eventual wording of Article 15(c)) is markedly different in meaning from that in the Temporary Protection Directive; as a result we find any suggestion that that Directive represents a template or model, unhelpful.

The constituent elements of Article 15(c).

69. We turn then to look at the essential components of Article 15(c) bearing in mind that several key terms mirror the wording of the 1949 Geneva Conventions not only in the reference to "international or non-international armed conflict" (in 15(c) "…internal armed conflict") but also in the reference, already noted, to "civilian" and "life and person" (in 15(c) "life or person"). Common Art 3 prohibits, inter alia:

> "(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture".

The term "indiscriminate" also holds a special meaning within IHL.

70. It is of course vital that we bear in mind the context of Article 15(c) as a whole and recognise that its different elements are to a certain extent interrelated. But one way or another we must still examine each of its main elements. We doubt that the best order in which to do so is that in which they appear. The key terms in Article 15(c) fall into two main categories: one is person-specific; the other, the more general, is situational. That being so, it makes better sense to deal with the more general first, so that we look first at "situations of international or internal armed conflict" and "by reason of indiscriminate violence" and leave until last looking at the individual-specific terms: "civilian's life or person"; and "serious and individual threat". If that

becomes nearly a case of taking the order of appearance of terms backwards, it nevertheless reflects the process which the decision-maker should usually adopt when analysing an individual claim.

"International or internal armed conflict"

71. Two initial points should be made. First, it appears from Dr McAdam's account (supra, pp.70-78) that the reference to "international or internal" armed conflict featured from the second draft onwards. Second, Art 15(c) is the only subcategory of serious harm which requires conditions in the country of origin to be of a particular kind. To apply there must in the country of origin be "situations of international or internal armed conflict".

"Armed conflict"

72. The term "armed conflict" is not defined in any international instruments but in Tadic (Jurisdiction) at para 70 it is stated that:

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

73. The case law of the ITFY and other international criminal tribunals since Tadic has reaffirmed this formulation, which has become known as the "Tadic test": see e.g. Prosecutor v Kunarac et al., IT-96-23/1-A, Judgement, 12 June 2002 para 56.

74. Since in this case it is not suggested by either party that there is in this case a country in a state of international armed conflict (presumably because the MNF-I are in Iraq with the consent of the GOI), we can limit ourselves to simply noting that: (i) for there to be an "international armed conflict" there must be an inter-State element; (ii) an inclusive approach is to be taken both to the temporal and geographical scope of international armed conflict (see Tadic (Jurisdiction) at paras 84, 70, Prosecutor v Blaskic, IT-95-14, judgement, 3 March 2000, Prosecutor v Kordic & Cerkez, IT-95-14/2-T, judgement, 26 February 2001 and Prosecutor v Naletilic et al, IT-98-34-T, Judgement, 31 March 2003); and (iii) the principal rules applicable to "international armed conflicts" include the "law of the Hague" (the 1899 and 1907 Hague Conventions respecting the Laws and Customs of War on Land) together with the 1949 Geneva Conventions and its 1997 Additional Protocol I, plus miscellaneous treaties dealing with, for example, chemical and biological warfare and landmines

75. As regards internal armed conflict, the upshot of the respondent's concession made in the course of the hearing - that Iraq as a whole is in a state of internal armed conflict for the purposes of IHL and that the GOI is one of the parties to the conflict - renders it unnecessary to do anything more than identify very basic features of this concept in IHL.

76. As regards the territorial scope of the rules governing internal armed conflict, the established formulation as found, once again, in Tadic (Jurisdiction) at para 70 states that " *in the case of internal conflicts* [it is]… *the whole territory under the control of a party, whether or not actual combat takes place there*." (emphasis added). In the light of the clear distinction drawn here between the territorial scope of international armed conflict (the whole territory of the relevant state(s)) and the territorial scope of internal armed conflicts (" the whole territory under the control of a party"), we would reject the submission made by both parties that in internal armed conflicts the territorial scope is also (as a matter of definition) the whole of the territory of the state. It may well be that as applied to the facts of most contemporary armed conflicts, the Tadic test will entail a finding that the IHL rules governing armed conflict apply to the whole territory of the affected state (and indeed that is the agreed position between the parties in relation to Iraq). That reflects the frequent reality that, between them, the territories controlled by parties to a conflict normally account for the entire territory of the state. But as can be seen from the discussion of Somalia in HH and others, paras 329-335, 341, there can be exceptions, where for example there are parts of a state under the control of authorities who are not in any effective sense parties to the armed conflict.

77. The Tadic approach to territorial scope has been widely followed, e.g. by: the same Tribunal in Prosecutor v Kunarac (paras 57- 58); the International Criminal Tribunal for Rwanda in Prosecutor v Akayesu, Case No. ICTR-96-4-T,Trial Chamber Judgement, 2 September 1998, paras 619-21; the Special Court for Sierra Leone (Prosecutor v Brima et al, Case No. SCSL-04-16-T, Trial Chamber, Special Court for Sierra Leone, judgement, 20 June 2007, paras 343-50; and the International Criminal Court in Prosecutor v Lubanga, ICC-01/04-01/06-803, Pre-Trial Chamber I, International Criminal Court, Decision on the Confirmation of the Charges, 29 January 2007, para 233). Underscoring the point made in Tadic, in Prosecutor v Kunaric at para 57 the Tribunal's Appeal Chamber stated: "[t]here is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war ... ".

78. The minimum standards contained in common Article 3 of the 1949 Geneva Conventions were considered by the ICJ in Military and Paramilitary Activities against Nicaragua (Nicaragua v United States of America) Merits, Judgment of 27 June 1986 [1986] ICJ Reports 14 to constitute norms of customary international law applicable in all types of armed conflict. However, common Article 3 does not represent the entirety of the rules of customary international law applicable to all armed conflicts, as can be gleaned from the summary by the Appeals Chamber in the Tadic (Jurisdiction) judgement of the customary rules governing internal conflicts as including:

> "protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities" (para 127).

79. In the case of an internal armed conflict in which the state on whose territory it occurs has ratified Additional Protocol II, the IHL rules that apply may additionally include those set out in this Protocol (which confer additional protection on civilians). Whether they apply will depend on whether the armed conflict concerned is one which involves armed groups under "responsible command"; and exercising "such a degree of control over a part of [the state's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol". It must be borne in mind, however, that significant parts of Additional Protocol II are seen to reflect customary international law and also to shed light on the threshold that needs to be reached for there to be an internal conflict as distinct from an internal disturbance.

80. Common article 3 contains the requirement that the armed conflict must be one in which there are "[p]arties". "The Tadic test for whether there exists an armed conflict has been seen by the ICTY to call for an examination of essentially two elements only: (1) the organisation of the parties to the conflict and (2) the intensity of the conflict (see Tadic Trial Judgement, para 562; Limaj Trial Judgement para 54; and Trial Chamber in Prosecutor v Milosevic, para 17). However, from the examinations which the ICTY and other international criminal tribunals conduct, it is clear that these two criteria sub-divide further, depending on the factual scenario, so that in Milosevic for example "intensity of the conflict" is analysed under four sub-heads: length or protracted nature of the conflict and seriousness and increase in armed clashes; spread of clashes over the territory; increase in number of governmental forces sent to Kosovo; weapons used by both parties (see paras 25-31). Further, the ICTY along with other international criminal tribunals has continued to conduct examination of these two elements by reference to the non-exhaustive non-obligatory criteria for common Article 3 set out in the Pictet Commentary.

81. From the above it would seem that the principal criteria for an internal armed conflict being found to exist can be summarised under the following main heads: "parties to the conflict"; "degree of organisation" (only "some degree of organisation" is required: Prosecutor v Lubanga, ICC-01/04-01/06-803, the Pre-Trial Chamber I, International Criminal Court, Decision on the Confirmation of the Charges, 29 January 2007, Prosecutor v Milosevic, Case No. IT-02-54-T, Trial Chamber, International Criminal Tribunal for the former Yugoslavia, Decision on Motion for Judgment of Acquittal, 16 June 2004); "level of intensity" (which has to be higher than "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature" (Article 1(2) of Additional Protocol II)); "protraction" (see Milosevic, paras 16-19); and "other relevant factors".

82. Prominent among other relevant factors is whether it has been formally considered of concern to the UN. The wording given in the Pictet Commentary is "[t]hat the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of

the peace, or an act of aggression": see e.g. Limaj, Trial Chamber Judgement, para 55; HH and others, para 338.

83. Although strictly only an evidential consideration, it is also clear that any official views expressed by the ICRC would be of significance, for the reason that, as was put by the ITFY in Tadic (Jurisdiction) at para 73:

> "[o]n account of the unanimously recognised authority, competence and impartiality of the ICRC, as well as its statutory mission to promote and supervise respect for international humanitarian law, it is inconceivable that, even if there some doubt as to the nature of the conflict, the ICRC would promote and endorse an agreement [that of 22 May 1992] contrary to a basic provision of the Geneva Conventions. The conclusion is therefore warranted that the ICRC regarded the conflicts governed by the agreement in question as internal."

84. In light of the above we consider that in any case in which the issue arises as to whether a country has "situations of armed conflict" within its territory, it will always be highly relevant for the parties to seek to obtain and produce evidence as to whether the ICRC has expressed a view on this question.

"by reason of indiscriminate violence"

85. This provision incorporates a dual requirement: for Article 15(c) to apply there must exist "indiscriminate violence" and the "serious and individual threat" faced must be caused by the indiscriminate violence. A number of commentators (including McAdam, supra at p.72) have found great difficulty with the reference to "indiscriminate violence", since it would appear to denote violence which is by definition random, arbitrary and haphazard. If that is the meaning to be ascribed to the term, then it would appear to negate the possibility of the situation ever being one where there could be a "serious and individual threat", since the latter appears to import some notion of being a target for the threat of violence, i.e. of there being some act which differentiates the victim from people at random. We would agree that if that meaning is given, then the provision of Article 15(c) is beset with difficulties of application. However, we remind ourselves that under EU law principles we must strive to interpret the provisions of a Directive so as to conform with the object and purposes of the Directive and the clear concern expressed by recital 26 that the Directive furnishes guidance on the proper approach to risks that affect the population or sections of the population as a whole. Given that we know the drafters saw IHL as one source for drawing up criteria governing eligibility for subsidiary protection, it is salient to consider what meaning the word "indiscriminate" has in an IHL context. Whilst IHL does not refer to "indiscriminate violence" as such, the adjective "indiscriminate" is used to designate attacks which fail to differentiate between military and civilian targets and Article 49(1) of 1977 Additional Protocol I to the 1949 Conventions (API) expressly defines the term "attacks" as "acts of violence against the adversary, whether in offence or in defence". Article 51(4) of the same Protocol provides that:"[i]ndiscriminate attacks are prohibited". The provision goes on to define indiscriminate attacks as being:

> "(a) Those which are not directed at a specific military objective;

(b) Those which employ a method or means of combat which cannot be directed at a specific military objective;
(c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;
And consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction".

86. Article 51(5) states:

> "Among others, the following types of attacks are to be considered as indiscriminate:
>
> (a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
> (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

87. Article 8(2)(b)(xx) of the Rome Statute of the International Criminal Court proscribes

> "Employing weapons, projectiles and materials and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict,…"

88. The above provisions only apply to parties to an international armed conflict, but they have been seen to reflect the prohibition on indiscriminate attacks is seen to be part of customary international law. J Henckaerts and L Doswald-Beck, Customary International Law, Vol.1 2005, state the rules as follows:

> "Rule 12. Indiscriminate attacks are those:
>
> (a) which are not directed at a specific military objective;
> (b) which employ a method or means of combat which cannot be directed at a specific military objective; or
> (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law."

89. Virtually identical wording is employed in the ICRC publication, The Law of Armed Conflict: Basic Knowledge (2002 edition).

90. So it is a general principle of IHL that parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such, nor civilian persons shall be the object of attack. Attacks shall be directed solely at military objectives. The principle underlying the concept of "indiscriminate" deployed in the above sources is sometimes expressed as "the principle of distinction" ("distinction" itself being a word quite opposite to "indiscriminate" in the ordinary sense).

91. Henckaerts and Doswald-Beck (supra, at pp.41-2) note that the case law of international criminal tribunals has further clarified the scope of the prohibition on indiscriminate attacks. And we have already cited para 127 of the Tadic (Jurisdiction) judgement in which the Trial Chamber noted that, notwithstanding the limitation of existing rules under IHL treaties governing civil strife:

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

92. In international law indiscriminate violence also includes violence using means and methods which are in themselves abhorrent, e.g. chemical weapons or poisoning of water wells. Indiscriminate violence of this sort can affect combatants as well as civilians. But under Article 15(c) the focus must be on indiscriminate violence affecting civilians.

93. In the light of the above the concept of "indiscriminate violence" (affecting a civilian's life or person) within Article 15(c) is best understood as denoting violence which, by virtue of failing to discriminate between military and civilian targets, violates peremptory norms of IHL.

94. So conceived, the notion of "indiscriminate violence" is still a relatively broad one. It is capable of covering violence targeted against civilians directly, because that in itself demonstrates that it is not directed at a specific military objective. It further covers violence where the means and methods (e.g. chemical weapons) disproportionately affects civilians. It is also capable of encompassing untargeted (or random) violence where that amounts to a failure to discriminate between military and civilian targets. But in relation to both types of violence it can only cover them where the violence concerned is closely related, or has a nexus to, the conduct of military operations: we shall return to this qualification shortly.

95. It follows from the approach we adopt to the meaning of "indiscriminate violence" that Article 15(c) is not intended to cover threats that are by reason of all kinds of violence. It does not cover purely criminal violence. It does not cover domestic violence or indeed any other type of non-military violence; rather it is violence inflicted by combatants and which is indiscriminate in one or more of the ways identified earlier.

96. One consequence of this interpretation is, we accept, that Article 15(c) would not as such assist a civilian in a situation of armed conflict who faced a serious and individual threat from criminal gangs who were exploiting the law and order vacuum caused by the armed conflict to threaten the lives of many residents: take the example of a criminal gang who in the course of stealing oil from a pipeline during an armed conflict killed innocent civilians indiscriminately. It might be said that such

exclusion would be unjustified because armed conflicts, particularly internal armed conflicts, are often accompanied by significant levels of violent criminal activity and lowered levels of protection. However, we come back to the underlying purpose of Article 15(c) which in our view is to protect civilians against certain violations of IHL. Criminal acts would, of course, be capable of being sufficiently punished within the framework of domestic criminal law of the country (although this may not necessarily happen in practice), like any other criminal acts. There is nothing in the text of the Directive or in the preparatory documents to indicate that protection against criminal or "domestic" violence (as opposed to violence of particular international concern) was intended. Recital 26, by making clear that risks to which the population are generally exposed are not normally enough, reinforces the view which we have taken. (This is the only point at which, with the benefit of fuller submissions than were available to the Tribunal in HH & others, we depart from its general conclusions on Article 15(c).)

97. That said, it will not always be possible to draw an easy distinction between military and criminal activities. We know all too well from the evidence before us in this case, that the line between insurgents and opportunistic criminals is often blurred and the examples from background evidence we were given on Iraq, of insurgents stealing oil from pipelines to fund their armed actions and of police checkpoints which turn out to be manned by criminals in fake police or military uniforms, are two vivid illustrations of how hard it may be to draw the line in some cases. Once again, however, we believe that assistance in developing workable criteria can be drawn from IHL and in particular the case law of the international criminal tribunals. In general terms civilians only lose that status if they take an "…active part in the hostilities" (see common Article 3(1)) and do acts that are closely related to the conflict. The ITFY in Prosecutor v Kunarac had to consider this question in the context of the second of the two general conditions for the applicability of Article 3 of its Statute (that the acts of the accused must be closely related to the armed conflict). Explaining what was meant by "closely related to the conflict" the Tribunal stated at paras 58-9:

> "58. What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict - in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict…
>
> 59. In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, inter alia, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrators' official duties".

98. The Chamber in Lubanga referred to the need for there to be a "nexus" between the armed conflict and the alleged war crime and stated at para 287:

> "In this respect, the Chamber follows the approach of the jurisprudence of the ICTY, which requires the conduct to have been closely related to the hostilities occurring in any part of the territories controlled by the parties to the conflict. The armed conflict need not be considered the ultimate reason for the conduct and the conduct need not have taken place in the midst of battle. Nonetheless, the armed conflict must play a substantial role in the perpetrators' decision, in his or her ability to commit the crime or in the manner in which the conduct was ultimately committed".

99. Whilst these decisions apply the "nexus" test under their relevant Statutes (ITFY and International Criminal Court respectively), there is no reason to think that it is not a feature of the law of armed conflict generally. The above approach leaves open that acts or threats which are culpable in international criminal law (including acts or threats of indiscriminate violence) can be committed by criminals, but it makes it clear that that will only arise when their acts are closely related to the armed conflict. The indiciae set out in para 59 of Kunarac above appear to suggest that in the main those whose acts or threats are covered will be mainly combatants who use the existence of an armed conflict to carry out opportunistic crimes, for example rape, but it would appear that under certain circumstances civilians whose criminal conduct amounts to active involvement in the armed conflict will also be culpable. In the analysis we go on give as to how Article 15(c) is to be applied in practice - and in our assessment of the situation in Iraq - we think it prudent to take an inclusionary view of the extent to which violence perpetrated by criminals can be "closely related" to the armed conflict.

100. To the extent that in any particular case a decision-maker is looking at whether civilians *per se* face a serious and individual threat to their life or person by reason of indiscriminate violence, what the above approach requires is that the fact-finder look at the evidence relating to the scale and frequency and geographical distribution of indiscriminate violence. It is not the overall level and degree of violence in the country or the relevant area of the country which is key, although that will be a relevant factor. It is the extent of the violence of a particular kind and (bearing in mind the confinement of the personal scope of Article 15(c) to civilians) the violence which disproportionately threatens the life or person of civilians. In general, the level and degree of *targeted* violence should not be taken into account, subject to the proviso that what is meant here by "targeted violence" is violence which is conducted within the IHL rules of armed conflict. If, however, the "targeted violence" turns out to consist in acts carried out in the course of hostilities in a way which disproportionately affects civilians, then it should also be taken into account. Mortar attacks carried out without warning targeted on an army post close to a crowded market would likely be included, whereas similar attacks carried out with due warning would likely not be included.

"civilian's life or person"

101. This provision, which concerns the focus of the threat, went through five drafting amendments. Dr McAdam (supra at p.75) notes that the original phrase "life, safety or freedom" was, along with subsequent formulations based around the concept of freedom, eventually deleted due to concern by some Member States that it would unduly widen the scope of the Directive.

102. Given the strong reasons for applying an IHL reading to the terms "international or internal armed conflict" and "indiscriminate violence", the phrase "violence to life and person" should also be approached in the same way. Once again, there is a rational basis for such an approach, since the phrase "life and person" occurs in common Article 3 of the 1949 Conventions. That is not exactly the same as the wording in Article 15(c) (which refers not to "violence", but to "serious and individual threat to…"; and also to a "civilian's life *or* person"), but what is clear from the drafting is that there was concern to place certain limits on those aspects of a civilian's existence which could be protected.

103. In our view there are three obvious limits imposed by the phrase "life or person". One is that it clearly is not apt to cover anything to do with civilian *objects*. The latter is defined by The UK Ministry of Defence <u>Manual of the Law of Armed Conflict</u> (at p.391) as including the following: "dwellings, shops, schools and other places of non-military business, places of recreation and worship, means of transportation, cultural property, hospitals and medical establishments and units". We say that because IHL as a whole does, of course, protect - to a degree - "civilian objects". The <u>Manual</u> further explains that attacks on any of these objects are prohibited unless they are being used for military purposes and they describe the prohibition on directing attacks against civilian objects as contrary to customary IHL: see paras 15.16.

104. Mindful, however, that "life or person" is to be given a broad meaning, we would accept that the phrase must encompass the means for a person's survival: see the <u>Manual</u> at 15.19.1.

105. The second limit is clear from the differentiation within common Article 3(1) of (a) violence to "life and person" on the one hand and (c) "outrages upon personal dignity, in particular humiliating and degrading treatment" on the other. This juxtaposition shows that within the IHL context the material scope of the phrase "life and person" cannot extend to threats which amount to inhuman and degrading treatment. The inherent limitation of the concept of "life or person" within IHL is further indicated by the fact that in Additional Protocol II (by which time it was felt that the protection of civilians should be given a wider material scope) the wording used was more expansive. Article 4 (2) (a) proscribes:

> "violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment, such as torture, mutilation or any form of corporal punishment".

106. We reject Mr Husain's contention that this new formulation "life, health and physical and mental well-being of persons" was simply a spelling out of what was implicit in

the notion of "person". If that were so, we see no reason why Article 4(2)(e) would contain a separate proscription of "outrages upon personal dignity…".

107. Mr Husain also submitted that "life or person" embraces moral as well as physical integrity. He argued that this provision gave effect to the "right to respect for the person", a phrase which appears in Article 27 Geneva Convention IV (which states that "[p]rotected persons are entitled, in all circumstances, to respect for their persons…") and which the Commentary to this article states is a phrase which "must be understood in its widest sense: it covers the rights of the individual, that is, the rights and qualities which are inseparable from the human being by the very fact of his existence and his mental and physical powers" ((p.201). We have the greatest difficulty in accepting that submission. It would require reading the phrase "life and person" out of context and divorced from the evident coverage of moral integrity aspects of a civilian's life in a separate common Article 3 subcategory (Article 3(c)). So far as the phrase "right to respect for the person", as found in Geneva Convention IV is concerned, it relates solely to the status of "protected persons". So far as concerns the use of the phrase in Additional Protocol II, is clear from the ICRC Commentary on it that this Protocol was intended to "strengthen" i.e. to extend the contents of protection from that afforded by common Article 3 (see e.g. paras 4530 and 4532).

108. The third limit is that the phrase "civilian's life or person" is clearly specific to the civilian in question. It does not extend, for example, to threats to family members. What happens to a family member may well be a breach of IHL, but the claimant must show a threat to his or her *own* life and person. Having said that, it may often be that family members, merely due to their relation with another civilian victim, will normally be vulnerable to acts of serious harm in the same manner (compare recital 27).

109. We turn to the phrase "serious and individual threat", which itself needs breaking down into its separate components.

"serious"

110. It should not necessarily be thought that the notion of "serious" should be the subject of precise definition. It seems to us that it is a descriptor which must take its meaning from the nouns it prefaces: "threat" and "… life or person".

111. The adjective "serious" qualifies the concept of threat. The most obvious meaning in that context is that "serious" is intended to say something about the efficacy of the threat and to convey that it is a threat which is not to be taken lightly. In other words, it imports that the threat is one which is credible or cogent in the sense that it is to be taken seriously. Mr Husain's objection to this definition is that it would amount to imposing a double-testing of credibility: not only would a person have to show (under Article 2(e)) substantial grounds for believing that there is a real risk; he would also have to show that there was a real risk of a credible threat. We agree with Mr Husain that it would be wrong to blur the different functions of Article 2(e),

which is to define the standard of proof, and Article 15, which is to define certain types of harm. But we do not consider that this understanding of "serious" incorporates a credibility test. It is not saying what the standard is in relation to what has to be proved, but rather something about the form which the harm has to take.

112. Mr Husain submitted that "serious" denoted the gravity of the harm and therefore qualifies the phrase "life or person". The principal difficulty with this is that the threat which the paragraph designates is to a civilian's "life or person". It is not easy to follow how a threat to life could be anything less than grave, by its very nature. Whatever "serious" means it must apply equally to threats to the civilian's "life" on the one hand and to the "person" on the other. A further difficulty with the argument that "serious" qualifies the gravity of the harm is that would mean accepting that a threat could only consist in something capable of causing actual (and grave) consequences. It would exclude regarding a person who threatens to kill someone with what turns out to be a fake gun as having made a "serious threat". We consider that in the context of protection of civilians such a definition would be too restrictive. We bear in mind that it is a feature of modern internal armed conflicts that the protagonists often seek to achieve their ends by instilling fear or terror (whether or not they intend to follow through with the threat) as much as by causing actual harm. We adopt the obvious meaning of the word as adumbrated in the previous paragraph.

"individual "

113. We note from the Danish Presidency Note (12148/02 ASILE 2002/43) that "the vast majority of Member States supported the "individual" requirement on the grounds that this would avoid "an undesired opening of the scope of this subparagraph".

114. The concept of "individual" within Art 15(c) is clearly the focus of recital 26: ("Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves *an individual threat* which would qualify as serious harm" (emphasis added)).

115. Mr Husain, echoing the UNHCR among others, urged us to either "read down" or pay scant regard to this recital. However, there is no gainsaying the influential role of the recital or preambular parts to an EU Directive (see above para 26) , albeit they must yield in the face of any contrary provision of the directive.

116. We may begin by rejecting several possible interpretations of "individual".

117. It might be suggested that the term "individual" is not to be given full effect by virtue of the fact that although during the drafting stages virtually all Member States were in favour of including it, when it came to implementation some Member States, including Belgium (Lois modifiant la loi du 15 decembre 1980 sur l'access au territoire, le sejour, l'etablissement et l'eloignement des etrangers (15 September 2006) new art 48/4(2)(c)), and Lithuania (Law on the Legal Status of Aliens, 29 April 2004, No IX-2206, Official Gazette No 73-2539, 3 April 2004, art 87) chose not to

include it. According to "UNHCR Statement: Subsidiary protection under the EC Qualification Directive for people threatened by indiscriminate violence", January 2008, that is also true of Austria, Finland, Portugal and Sweden. However, it is a basic principle of treaty law (as codified by Article 31(1) of the 1969 Vienna Convention on the Law of Treaties which states that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose") and also of EU law that interpretation of the provisions of a Directive must give full effect to their wording. In any event, the position in the UK is that we are bound to apply the law as it has been implemented in para 339C unless its text is plainly contrary to the Directive. But the two texts are indistinguishable in this particular respect.

118. Another suggestion bases itself on the fact that according to the Commission's September 2001 Explanatory Memorandum a source of inspiration for the creation of Art 15(c) was the notion of protection afforded by the Temporary Protection Directive whose definition of "displaced persons" at Article 2(c) covered, inter alia, "persons who have fled areas of armed conflict or endemic violence" without imposing any requirement of individual threat. This suggestion, which we have already commented on, maintains that Art 15(c) should be interpreted to reflect the same broad approach. But that simply ignores that the Directive does impose such a requirement and that the two Directives serve different purposes: the Qualification Directive applies to all situations giving rise to protection needs on the part of third country nationals and stateless persons and requires an individual assessment; the Temporary Protection Directive only applies when collectively Member States have decided that there is a situation of mass influx enabling persons to qualify on the basis of generic criteria.

119. It has been argued that Art 15(c), read together with recital 26, imposes – or risks being interpreted as imposing - a requirement that individuals show they have been "singled out" for the relevant type of serious harm. If so that would be reminiscent of an approach to the analogous concept of persecution which in R v Secretary of State for the Home Department ex parte Jeyakumaran [1994] Imm AR 45 was found by Taylor J to erect far too high a threshold. There is no reason to think that, in order for a threat to be "individual", it must be one which is solely directed at the person concerned or exclusively affects only him or her or must be based on a completely personalised set of facts.

120. It has been argued that Article 15(c) read with recital 26 effectively imposes a requirement that, in order to show a relevant threat, an applicant must be able to show that he or she would be at "greater risk" than is faced by the population of a country or a section of it. Indeed that would appear to be the position taken in decisions of the German courts: see Asylum in the European Union: a study of the implementation of the Qualification Directive,UNHCR, November 2007 pp.73-74.

121. However, the wording of recital 26 is defeasible (…do normally not create…") and clearly allows for the possibility of an individual threat being created by general risks in cases outside the normal run of cases. In any event, the "greater risk" criterion is

only erroneous if the real risk being compared is one shared by all members of the relevant class: as in the Article 3 ECHR case of Salah Sheekh v Netherlands, Application No 1948/04, Judgement of 11 January 2007, which concerned a person who was from a Somali minority clan, the Ashraf. Having found on the evidence before it that being an unprotected Ashraf was enough to give rise to a real risk, the ECtHR stated at para 148:

> "It cannot be required of the applicant that he establishes that further distinguishing features, concerning him personally, exist in order to show that he was, and continues to be, personally at risk…it might render the protection offered by that provision illusory if, in addition to the fact that he belongs to the Ashraf…the applicant be required to show the existence of further special distinguishing features".

122. (For the Tribunal's more recent assessment of the Ashraf, see HH & others, paras 306-308). It has also been argued (including by UNHCR in its 'Note on Key Issues of Concern to UNHCR on the Draft Qualification Directive' (March 2004)) that Article 15(c) effectively precludes the possibility of group persecution or collectively-experienced serious harm. Once again, that argument overlooks the defeasible nature of recital 26, which clearly allows for the possibility that in certain (albeit abnormal) situations a relevant threat can be one which is at once general and individual.

123. Nevertheless, it seems to us that "individual" does require that it be shown that the threat is personal to the applicant. It seems to us that in combination with "serious" this word creates a high threshold directly analogous to the well-established high threshold required under the Refugee Convention and the Human Rights Convention. HH & others at para 331 states that "the concept of an "individual" threat requires there to be some form of "differential impact", of the kind recognised by the House of Lords for the purposes of the 1951 Convention in Adan [1999] 1 AC 293 and by the ECtHR for the purposes of Article 3 in Vilvirajah…". The approach we take is consistent with that since on our view (unless civilians generally face a real risk of serious harm personal to them –and so differentiating them - all) merely being a civilian will not suffice; something more, relating to the person's specific characteristics or profile or circumstances, must be shown.

"threat"

124. As already noted, when considering Article 15(c) as a whole it is apparent that the type of harm specified in Article 15(c) is different in character from that specified in Article 15(a) and (b). The term "threat" shows that, so long as it is a threat which is serious (and individual), the danger alone (if of a relevant kind) can be sufficient. If it had been intended only to cover the real risk of the proscribed ill treatment itself, then we are confident that different wording would have been used, as in sub-paragraphs (a) and (b).

125. Equally, however, the threat can only constitute "serious harm" if it is one which takes a particular form viz, one which amounts to a "serious and individual" threat and in circumstances arising by reason of indiscriminate violence in situations of armed conflict.

126. So far as the IHL context is concerned, it is noteworthy that there is strong recognition of the ability of threats to give rise to serious violations. Thus Article 2 of Additional Protocol II prohibits at any time and in any place whatsoever (a) violence to the life, health and physical or mental well-being of persons' including at (h) "*threats* to commit any of the foregoing acts"; Article 13 of the same Protocol prohibits "acts or *threats* of violence the primary purpose of which is to spread terror among the civilian population" (emphasis added). Henckaerts and Doswald-Beck (supra) identify threats as well as acts of various kinds as contrary to international humanitarian law: see Rule 2. Indeed, it is a commonplace observation that many types of terrorist attack (whether or in the context of an armed conflict or not) depend for their effect less on actual harm than on the perceived threat of repetition.

127. It seems to us that the only sustainable argument in favour of the view that Article 15(c) has any "added value" or scope additional to Article 15(b) derives from this fact: that it is constructed around what in itself is a lesser form of harm than actual harm: a threat of harm. We note in this regard that whilst our view broadly accords with that expressed by H Battjes in European Asylum Law and International Law at pp.239-240 we think his reliance upon a difference between the "real risk" criterion and the "serious threat" criterion is problematic. The latter, he says, is more lenient than the former. That, it seems to us, is to confuse the Article 2(e) requirement that there must exist a "real risk" of serious harm with the concept of serious harm (of which the "serious and individual threat" provision is one component). But the point he makes about the difference between the real risk of *actual harm* and the real risk of a *threat of harm* remains in our view a valid one.

128. In our view the above analysis of the constituent elements of Article 15(c) ensures that the provision has *effet utile* whilst paying due regard to the restrictions arising from the wording chosen.

Application of Article 15(c)

129. Having analysed the constituent elements of Article 15(c) we need to consider how the provision is to be applied in practice.

130. If the claimant's country of origin is clearly free of situations of armed conflict, then there will be no need to consider his claim under Article 15(c). He or she may have a claim under Article 15(b) or (less commonly) 15(a), but Article 15(c) can be excluded.

131. If, however, the claimant's country is one in which it might be said that there are situations of armed conflict, then (unless an appellant succeeds under Article 15(b) in any event) Article 15(c) must be considered. Precisely in which order the requirements of Article 15(c) are best taken and in what detail (if any) will depend very much on the circumstances of the particular case. If the person concerned is plainly not a civilian (e.g. a soldier who on return faces punishment for breaches of military discipline), then he is outside the scope of Article 15(c) in any event. In

certain cases it may be obvious that even if the claimant can meet all the other requirements of the paragraph he or she cannot show a "serious and individual threat"; if that is so, then there would be little point in making findings on the other requirements. But where that is not the case, then the most logical ordering is to consider first (as we have done when analysing the law) whether there exists a situation of "international or internal armed conflict", next whether it is "by reason of indiscriminate violence" and finally whether there arises a "serious and individual threat to a civilian's life or person". So far as concerns the question of whether there exists an "internal or internal armed conflict", we have already noted the practical utility of parties to appeals seeking first to ascertain whether the ICRC has taken a view on whether for IHL purposes there exists in the particular country concerned situations of international or internal armed conflict.

132. As already noted, what has to be examined is whether there are "substantial grounds for believing that the person concerned, if returned …would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) [the exclusion clauses] do not apply and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country": see Article 2(e) and the mirroring provisions of para 339C of the Immigration Rules.

Risk to civilians per se

133. A prominent feature of this case is that the appellant has asked us to find that he qualifies under Article 15(c) solely by virtue of the fact that he is a civilian from Iraq. It is only if we refuse him on that basis that he asks us to go on to consider whether he can qualify by virtue of other characteristics (being male, from Kirkuk, of mixed (Sunni) Arab/Kurdish ethnicity).

134. Before we embark on evaluating the risk to civilians in Iraq as a whole, it is important that we consider what type of evidence could be expected to show such a generic risk.

135. It is settled law that where it is claimed that a class of persons faces a real risk it is necessary to show that there is evidence of a consistent pattern of serious harm being faced by that class of persons so as so meet the "generally or consistently happening" test set as approved in AA (Zimbabwe) [2007] EWCA Civ 149, paras 21-23.

136. Applying this principle to a class consisting of civilians, we consider that in order to show that mere membership of such a broad class of person places one at real risk of serious harm it would not suffice to point to evidence of the mere - or even common - occurrence (or likely occurrence) of acts or incidents of indiscriminate violence. One would have to show that they were happening on a wide scale and in such a way as to be of sufficient severity to pose a real risk of serious harm (including a real risk of a serious and individual threat within the meaning of Article 15(c)) to civilians generally. Only if such violence is generally happening in this way can one treat it as a strong indicator that the individuals who make up the class of civilians will face a real risk of being exposed to a serious harm which all in general share. Only too if

such indiscriminate violence is generally happening in this way will it be possible to justify treating the situation as an exception to the general rule set out in recital 26, that "[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm".

137. As already noted, by virtue of the meaning we attach to "indiscriminate violence" the focus of the assessment of the nature and scale of the violence in a particular country or area must be on violence with is closely related to, or has a nexus to, the conduct of military operations, albeit we think it prudent to take a broad view of these requirements so as not to discount criminal violence which can be said to be substantially linked to the conduct of operations by combatants.

The home area

138. When considering whether a person can qualify for refugee or Article 3 ECHR protection the normal focus will be on whether the appellant is able to show a risk in his or her home area or the part of the country in which he or she lives: see AG and others [2006] EWCA Civ 1342. We see no reason why the approach should be any different when it comes to considering whether he or she can qualify under Article 15.

139. Where it is suggested that a person can qualify under Article 15(c) merely by virtue of being a civilian, in our view the principal question that must be examined is whether the evidence as to the situation in his or her home area shows that indiscriminate violence to civilians there is (likely to be) generally happening in the way described above. Obviously assessing the nature and extent of the indiscriminate violence in the home area will require some consideration of the situation in the country as a whole, but if there is not a consistent pattern of indiscriminate violence in the home area, then such a person will not be able to show a real risk merely because he or she is a civilian.

140. Our analysis leaves open the possibility that a person may be able to show (when it comes to considering his or her "personal circumstances") that he or she faces a real risk of a serious and individual threat to his or her life or person even though violations of IHL of this kind are not generally happening in his or her home area. But in this situation he or she will have to identify specific characteristics or circumstances personal to him/her. Sometimes such characteristics may be shared by a class of persons, e.g. if he or she is disabled and faces return to an area of conflict where civilians are normally given relatively short notice to leave their dwellings before mortar attacks; but more usually, they will be factors arising from the individual's personal history of difficulties at the hands of combatants in that area.

141. Bearing in mind that a person is only eligible for subsidiary protection if he or she is not a refugee, it will be important in cases brought under Article 15(c) based in whole or part on claims regarding discrimination on grounds of race, sex, nationality, political opinion etc to demonstrate that it is the (serious) threat of the harm

(indiscriminate violence) rather than the actuality of it which gives rise to the individual risk.

Internal protection (relocation)

142. For reasons given below we did not need to address the issue of whether the appellant would have a viable internal protection alternative because we did not find that he faced a real risk of serious harm in his home area (Kirkuk). We wish to make only one observation about the relocation issue arising out of one question raised during the hearing. This concerned the position of a person facing return to a *country* in a state of internal armed conflict but in which there are parts of the country that are entirely peaceful. Does it make sense to say that such a person can bring himself within the scope of Article 15(c)? We see nothing at all absurd in saying that he would at least be able to show he met the Article 15(c) “armed conflict” requirement. But if it is safe and reasonable for him to relocate to a peaceful area, then he will almost certainly be unable to meet the other requirements of Article 15(c), namely that he shows he will face a serious individual threat to his life or person by reason of indiscriminate violence. Thus there will be no substantial grounds for believing the presence of a real risk to him of “serious harm”.

143. For completeness we would note that we saw no merit in Mr Saini's submission (based on Dr McAdam's views) that the standard of proof set out in Article 2(e) of the Directive - is higher than the standard contained within Art 1A(2) of the Refugee Convention (“well-founded fear”). The wording contained in Article 2(e) – “substantial grounds for believing…” – is precisely the same as arises under Strasbourg jurisprudence on Article 3 of the ECHR as applied in asylum and expulsion cases. In relation to the latter there is binding authority which states that the standard of proof is the same as under Article 1A(2) of the Refugee Convention: see Kacaj* [2001] INLR 354, Bagdanavicius [2005] UKHL 38, [2005] INLR 422, HL.

The background evidence

144. The background country materials which the parties produced for this case were voluminous. Inevitably our decision fails to refer to many by name but we would emphasise that this does not mean we have not taken all into account. Given the unusual number of academic authorities also placed before us, we list those in a separate appendix.

The disclosure application

145. Before turning to the background evidence we should mention that during the hearing Mr Husain renewed his application (refused previously) that the Tribunal order disclosure of materials relating to the situation in Iraq which were (or were believed to be) in the possession of one or more government departments. Given the concession made by Mr Saini on behalf of the Secretary of State mid-way through the hearing that she accepted Iraq was in a state of internal armed conflict for the purposes of IHL (albeit not for the purposes of Article 15(c)), it may be that some of Mr Husain’s concerns became superfluous. But in any event we had no hesitation in

rejecting his application. The Tribunal has no disclosure-ordering powers equivalent to those in the Special Immigration Appeals Commission (Procedure) Rules 2003 (as amended). Despite being informed prior to the hearing that the Tribunal's relevant power under the Asylum and Immigration Tribunal (Procedure) Rules 2005 was limited to issuing a Rule 50(1) witness summons, the appellant's representatives took no steps to request such a summons. Having regard to the "Schedule" of materials which were sought, we consider that the application was nothing more than a request for authority to embark on a fishing expedition. There is a general expectation that the Secretary of State will not keep any relevant materials from the Tribunal, but we saw no reason to think that had occurred in this case. Indeed it is apparent that both parties went to enormous lengths to ensure that, between them, we were supplied with all relevant materials.

146. In summarising the background evidence before us we draw principally on the following documents: the US State Department Report of 6 March 2007, the UNHCR paper, "Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers", August 2007, together with its Addendum of December 2007, the expert reports of Dr Glen Rangwala of 21 January 2008 and Dr Eric Herring of 21 and 30 January 2008 (the latter a supplementary report), recent UN Security Council Reports of the Secretary General on Iraq up to and including that of 14 January 2008 and the Border and Immigration Agency COI Report on Iraq of 8 January 2008. We highlight these because they are all relatively recent and their contents taken as a whole broadly reflect the much wider body of materials which were placed before us. In respect of the UNHCR Guidelines we remind ourselves that at para 135 they state:

> "In the context of Central and Southern Iraq where extreme violence and acts of serious human rights violations by state and non-state actors is rife, the overall situation is such that there is a likelihood or reasonable possibility of serious harm. While there are reports that widespread human rights violations are perpetrated by the authorities including through use of militias, large numbers of religious and political groups commit extreme forms of violence on a daily basis. Ordinary civilians are often the targets of violence, which includes car bombs, suicide attacks and improvised explosive devices. These methods of violence are usually targeted at chosen areas where civilians of specific religious or ethnic groups gather, including places of worship, market places and neighbourhoods. As clarified above, even where an individual may not have personally experienced threats or risks of harm, events surrounding his or her areas of residence or relating to others, may nonetheless give rise to a well-founded fear. There is also more specific targeting of individuals by extremist elements of one religious or political group against specific individuals of another, through kidnappings and execution-style killings. Rape is also increasingly being used as a means of persecution. Due to the vast number of actors who could perpetrate violence, an asylum-seeker's failure to identify the perpetrator of violence should not be considered as detrimental to his/her credibility.
>
> … the international protection needs of Iraqi asylum-seekers from the three Northern Governorates should be assessed individually based on the criteria of the 1951 Convention. In particular, given reports of Kurdish political efforts to dominate and "kurdify" the traditionally mixed areas of the Governorates of Kirkuk, Ninewa, Salah Al- Din and Diyala, applicants of non-Kurdish origin, who claim discriminatory treatment in these areas should have their claims assessed to determine if the impact of treatment they or others experienced or fear experiencing, would constitute harm amounting to persecution.

In addition, there are indications of growing political tensions and the overall situation remains tenuous and unpredictable. Assessing the international protection needs of asylum seekers from the three Northern Governorates should thus take into account a situation which may change suddenly and dramatically."

147. The respondent having conceded that Iraq is in a state of internal armed conflict for IHL purposes, we may confine ourselves here to simply identifying the principal characteristics of that armed conflict. These are summarised by Dr Herring in his report as follows:

> "3.5 There are currently multiple protracted armed conflicts in Iraq between MNF-I/GoI forces and organised armed groups and between those groups (principally but not solely the Kurdish peshmerga; the Badr Organisation; the Mahdi Army; the Fadila Party militia; the tribal, insurgent and local militias that make up the Awakening Councils; the groups in the Reform and Jihad Front; and the groups under the Islamic State of Iraq umbrella).
>
> 3.6 Those protracted armed conflicts are at their most intense in central and northern Iraq, especially in Salah al Din, Ninewa and Diyala provinces and is part of an extended multi-year and multi-dimensional armed political struggle between organised actors with recognisable continuities in identity, goals and strategies, personnel, internal structure and territorial control.
>
> 3.7 The various strands of violence in Baghdad, Kirkuk, Anbar and Basra provinces should still be categorised as protracted armed conflict even if they are comparatively less intense, because the violence is still substantial at present, has been much higher recently and has the potential to become at least as high again. Furthermore, those provinces are part of long-term and multi-dimensional armed political struggles between organised actors with discernible identities, goals and strategies, personnel, internal structures and territorial control.
>
> 3.8 The remaining provinces of southern Iraq (Karbala, Babil, Najaf, Qadisyah, Wasit, Muthanna and Maysan) are integrated politically, economically and militarily into and affected by those protracted armed struggles in terms of violence and other forms of serious harm which occur there."

148. From this and other sources we can deduce the following. The first and most obvious point is that there are clearly state and non-state parties to the conflict in Iraq. The state party is the Government of Iraq (GoI), whose military arm is the Iraqi Security Forces (ISF). The ISF numbers (excluding the KRG figures) are estimated at around 115,000 men. The ISF includes the Iraqi army (which falls under the Ministry of Defence)) and the Iraqi police (which falls under the Ministry of Interior (MOI)) (January 2008 COI, paras 11.03, 10.03). Acting under the consent of the GoI is the Multi-National Forces in Iraq (MNF-I). The MNF-I, which comprises forces from 26 countries, currently totalling around 182,000 personnel, operates under Security Council Resolution 1546 adopted in June 2004. Under the Constitution, although the Kurdish Armed Forces which operate in the KRG areas are a separate organisation, they are part of the armed forces of the Government of Iraq. The peshmerga are thought to consist of around 100,000 men and the KRG police numbers are around 60,000 (COI, para 10.67). Thus total ISF figures appear to be around 215,000: that roughly accords with the statement at 10.04 of the January 2008 COI that by May 2006 the ISF was said to have 263,400 trained and equipped men.

149. As regards non-state parties, estimates of their overall numbers are hard to come by, but it appears to be accepted that in total they are roughly commensurate with MNF-I/ISF strength levels. For example the Badr Brigade numbers alone are said to consist of 20,000 men (COI, supra, 12.37). It is clear that the resistance/insurgent movements in Iraq post-28 June 2004 are fragmented. Equally clearly, however, they are composed of various armed groups (including the Sunni fighters in the "Sunni Triangle" North and West of Baghdad and the Shi'a fighters of the Mehdi Army in the South and the Badr Organisation (which is the armed wing of SCIRI)). However, some of the armed violence in certain regions is not attributable to any party to an armed conflict.

150. The second point is that the parties to the conflict view their use of violence as part of a struggle to take power at the centre or the region or to change government policies (see Dr Rangwala's report, para 32).

151. The third point is that the armed conflict is one in which the main armed groups involved have a significant level and degree of organisation. The organised character of ISF and MNF-I armed forces speaks for itself. As regards insurgents, they have been sufficiently coordinated, organised and equipped to successfully carry out regular armed attacks and thus to pose an ongoing threat to the coalition forces and the civilian population. In Dr Rangwala's words, there has been "a generally high degree of internal organisation within many of the armed Iraqi groups that remain in existence in 2007. The groups have leaders and hierarchies of officials." (para 10). As also noted by this expert, "there is a generally high level of access to advanced weaponry and military expertise among combatant groups".

152. A further point is that, despite fluctuations, the conflict has always been at significant levels of intensity. To repeat Dr Herring's words at para 3.6:

> "Those protracted armed conflicts are at their most intense in central and northern Iraq, especially in Salah ad Din, Ninewa and Diyala provinces and is part of an extended multi-year and multi-dimensional armed political struggles between organised actors with recognisable continuities in identity, goals and strategies, personnel, internal structure and territorial control."

153. Dr Herring notes that the violence has affected all of Iraq's ethnic groups and communities, including minority groups (8.13). We deal later with figures for violent deaths, but it suffices here to note that the scale of casualties is well in excess of the benchmarks set by all established bodies who study armed conflict (see e.g. the reference in Dr Rangwala's report at para 31 to the University of Michigan benchmark of 1,000 war-related deaths per year). Even taking the lowest estimate of casualties in Iraq (that by the US Department of Defence (DoD), the current number of violent deaths is 8 times higher than this benchmark.

154. A further point (going to intensity) is that the conflict has sometimes involved de facto control over territory by one or other or more of the parties to the conflict. As Dr Rangwala notes at para 10:

> "At various times, non-state groups have secured control over considerable stretches of territory. For much of the period since 2004, most of al-Anbar governorate, the towns of Ba'qubah (in Diyal governorate) and Tal Afar (in Ninewa governorate), considerable parts of the city of Mosul, the eastern Baghdad suburbs (the so-called Sadr City) and Adhamiya in eastern Baghdad have been under the control of forces hostile to the central government". (para 10).

155. Further indicative of the level of intensity of the conflict is that it has seen large-scale movements of population within and out of Iraq, with around 1.9 - 2.2 million displaced within its borders and an additional two million who have fled to countries in the surrounding region: see para 31.01 of the January 2008 COI.

156. Another notable feature is that the conflict has been persistent, having begun nearly five years ago and having been, to varying degrees, continuous.

157. Another obvious point is that there has been (and continues to be) extensive UN Security Council oversight of the conflict in Iraq.

Violence in Iraq

158. In order to analyse the nature and extent of indiscriminate violence in Iraq we must first of all look at what the background evidence reveals about the broader question of violence of all kinds in Iraq. It is not in dispute that overall the situation has for some time been marked by significant and widespread levels of violence and that the violence has an important degree of interconnectedness. As Dr Rangwala notes in his report, the incidents of violence "are to be understood not as a set of separate local conflicts, but are instead strongly connected because the armed groups in Iraq are fighting in one way or another for the same goal, which is control over the Iraqi state."

159. It is also evident that the high levels of violence which have been a feature of Iraqi affairs for the past five years are considered by many commentators as likely to persist for some time. As stated by Dr Herring at para 4.6:

> "The interaction of ethnic, religious, sectarian, tribal, class, strategic and political factors with long and violent histories means that there is strong propensity to resort to organised violence in Iraq by a variety of actors. This propensity means that stabilisation to the point at which serious levels of targeted and indiscriminate violence become improbable is unlikely in the short and medium term."

160. One of the most conspicuous features of this high level of violence generally is the alarming figures given for civilian casualties. As was emphasised by Dr Rangwala, there is no single source of reliable statistics on the number of fatalities and injuries caused by violence in Iraq since 2003. The main studies differ considerably (para 19; see also Dr Herring's report para 5.3ff). Whereas the study published in the Lancet in October 2006 estimated that there had been 601,000 violent deaths in Iraq from March 2003 to July 2006, figures compiled by the Iraq Family Health Survey (IFHS) Study Group published in January 2008 estimated that 151,000 individuals had died violent deaths over the same period (March 2003 - June 2006). The Iraq Body Count

(IBC), focussing on confirmed civilian deaths, has estimated that between the invasion up to the end of December 2007 there were 80,000-87,000 violent civilian deaths. The UNAMI report dated 1 November - 31 December 2006 stated that during 2006 a total of 34,452 civilians died through violence (averaging 94 civilians killed per day) with 36,685 wounded. Dr Herring notes that official figures produced by the GoI Iraqi government include the estimate from the Iraqi Health Minister in November 2006 that 150,000 civilians had died up to that point since the invasion, while the Iraqi Health Ministry put the total figure of deaths for 2006 at 22,950 (para 5.3). Dr Herring's report also includes the US data as contained in the US Department of Defence (DoD) quarterly report to Congress, Measuring Security and Stability in Iraq, 14 December 2007 (based on MNF-I figures) as well as the figures given by the UK-based opinion poll agency Opinion Research Business (ORB) and press releases from mainly Sunni Arab Iraqi insurgent groups for March 2007. At para 5.7 Dr Herring also highlights the view expressed by the high profile bipartisan US Congress Iraq Study Group (ISG) which in its 2006 report states that:"[t]here is significant underreporting of the violence in Iraq".

161. According to the UK Opinion Research Business (ORB) in a survey reported by Aljazeera.net on 31 January 2008, more than one million Iraqis have died as a result of the conflict started by the US-led invasion of Iraq in 2003. As a tangible way of describing the levels of violence to civilians in Iraq Dr Herring (see para 5.19) compares 2005/2006 figures for homicide in the UK and the US (in the UK there being a two in 80,000 annual probability of being the victim of homicide). By contrast, he states, the figures for the rates of violent civilian deaths in Iraq during roughly the same period ranged (depending on which of the main estimates is used) from 17 - 545 times higher than in the UK.

162. Another significant statistic (albeit it has to be considered against the background that a significant portion of the Iraqi population live in the larger cities) is that according to the UNHCR report for October 2005, approximately one out of every five Iraqis lives within one kilometre of areas highly contaminated by the explosive remnants of war (landmines, unexploded ordnance (UXO and depleted uranium (DU)) (COI, supra, 29.13- 29.16).

163. As one would expect, the precise picture varies from area to area. The worst affected areas are those with mixed populations. These include Baghdad, the towns of Balad, Dujeil and Samrra in the Salah-ad-Din governorate, the towns of Baquba and Muqdadiya in Diyala governorate, Al-Anbar governorate, Basra and the northern towns of Kirkuk and Mosul (COI, supra, 8.02). The 2007 Mid-Year Review, published by IOM on 17 July 2007 stated that:

> "Instability due to sectarian violence, military operations, and targeted attacks was worst in Anbar, Diyala, Salah al-Din, Baghdad, Ninewa, Basrah, and Kirkuk. In Anbar, military coordination between MNF-I/IF and local tribes shifted displacement dynamics, stabilizing some areas and destabilizing others. Major MNF-I/IF operations in Diyala produced new displacement mid-2007. On 13 June 2007, the Samarra Al-Askari Mosque was bombed again, further escalating sectarian tension." **[**111b] (p3**)** **(**COI, supra, 8.10)

164. In terms of civilian deaths, the Centre for Strategic Studies (CSIS) stated in its 22 June 2006 report that:

> "Almost 80% of civilian deaths occurred in 12 cities. Baghdad accounted for almost half of the civilian deaths during this period. The other cities included Fallujah, Nasiriya, Kerbala, Najaf, Mosul, Basra, Kirkuk, Hilla, Tikrit, Baquba and Samarra [63b] (p112 and 115)" (COI, supra, 8.22).

165. One matter that was specifically addressed by the two experts was the significance of the reduction in violence in the last quarter of 2007 and early 2008. The respondent referred us to evidence indicating that in the last half of 2007 there had been both a marked decrease in civilian casualties and an improved security situation, traceable to the US-initiated Operations 'Fardh-al-Qanun and Phantom Thunder - commonly known as the "surge" policy – commencing in early 2007. The respondent also pointed to reports of a significant number of Iraq refugees in surrounding countries who have begun returning. Dr Herring made three main points about this. First, that he considered that the improvement is "tenuous" and has a limited relationship to the Bush administration's new security strategy: it was more a function of calculations and decisions by other protagonists, in particular the (contingent) suspension of most armed conflicts by Moqtada al-Sadr's Mahdi Army from August 2007 onwards, an Iranian government decision to rein in its support for Shi'a militias, the alliance of some tribal and insurgent leaders in Western Iraq with the US and GoI against AQI and the pragmatic decision of the Awakening Councils to work with the Coalition and GoI. Secondly, that even if the strands of violence are presently less intensive, "the violence is still substantial at present, has been much higher recently and has the potential to become at least as high again" (para 3.7). He also maintained (thirdly) that the refugees who have returned should be regarded as having been effectively forced to return by the governments of surrounding countries.

166. All commentators agree that the armed conflict in Iraq is taking place against a backdrop of varying levels of generalised violence in which criminal organisations take advantage of the weak security situation. Dr Herring notes this at paras 9.01-9.06. The August 2007 UNHCR Guidelines state at para 44(3):

> "3. Criminal Groups
> Criminal groups are also capitalizing on Iraq's instability. It is increasingly difficult to distinguish common criminals from insurgents and militias, as all engage in kidnappings and extra-judicial killings and illegal activities such as trafficking in weapons, drugs and oil to fund their activities. According to the Iraq Study Group, "some criminal gangs cooperate with, finance, or purport to be part of the Sunni insurgency or a Shi'ite militia in order to gain legitimacy".
>
> Criminal activities often reveal a sectarian dimension. At times, criminal gangs abduct victims in order to sell them to sectarian groups. Accordingly, criminal groups are fuelling sectarian violence and causing displacement. Increasingly, criminal gangs are working in collusion with or have infiltrated the ISF, leaving victims without access to protection."

167. As already noted, the violence in Iraq is commonly described (and was so described by both the experts) as made up of two main kinds. One is targeted violence. The

other is indiscriminate violence. (For the remainder of this section we confine ourselves to the usage made of these terms by the experts and background reports.)

Targeted violence

168. The expert reports and background sources see targeted violence as including a number of phenomena. It includes targeted violence carried out by armed insurgent groups on MNF-I/ISF military targets. From the January 2008 COI Report we learn that those targeted by violence at the hands of insurgents or militias (and sometimes militia-infiltrated ISF and criminals) include (more widely): civil servants and Government officials and members of the security forces (7.08,7.09,7.12,7.18, 8.108-8.112), politicians, professionals, intellectuals, journalists, doctors, lawyers, judges, professors, teachers, students, police officers, artists, gold/silversmiths, jewellers, Shi'a bakers, liquor sellers, music shop owners, ex-military officers, translators, contractors, drivers, cleaners, barbers, media organisation workers, wealthy people, those working with the MNF-I and foreign construction companies, political, tribal and religious leaders, those suspected of giving information to foreign governments, women and girls, minorities, religious minorities (e.g. Christians and the Sabean-Mandeans) and Palestinian refugees (8.108, 7.07, 7.09). Dr Herring's report likewise highlights deliberate targeting of civilians by insurgent groups.

169. Dr Herring's report tells us that the targeted violence includes sectarian and intra-sectarian violence and violence based on conflict between political parties and ad hoc militia groups (8.10, 8.42, 21.14, 21.ff). It is motivated by terrorist, sectarian considerations and criminal activity (8.13).

170. Targeted violence also includes counterinsurgency attacks on insurgent groups by the MNF-I and the ISF. The total of MNF-I personnel is currently around 182,000. As regards MNF-I and ISF targeted violence, at para 5.11 Dr Herring states:

> "Neither the Coalition nor the GoI provide systematic specific or aggregate data on their attacks. The US Government reported that it quadrupled its rate of air strikes in the first nine months of 2007, making 1,140, compared to 229 in all of 2006. IBC indicate at least 394 civilians confirmed in the media as killed in 2006 by US forces with no other combatants involved, and at least 669 in 2007, mainly from air strikes leaving at least 88 children dead in 2007. IBC collated news reports of 23 civilians killed by US forces in the first two weeks of January 2008 (Appendix 4). US air strikes continue in January 2008, such as the dropping of 40,000 pounds of bombs on the town of Arab Jabour near Baghdad."

171. Dr Herring goes on to cite the Global Policy Forum, a group of around 32 NGOs, which in a highly critical report summarised the risks of death and serious injury from Coalition action as of June 2007 by reference to the use of indiscriminate and especially injurious weapons (including napalm-type incendiary weapons, white phosphorous munitions and cluster bombs); detention of tens of thousands without trial or charge in poor physical conditions for long periods and abuse, torture and death of some of those prisoners; handing over of prisoners to GoI forces despite serious violations of human rights in Iraqi prisons; attacks on cities (including Falluja, al-Qaim, Tal Afar, Samarra, Haditha) which cut off access to food, water and medicine and with large-scale bombardment; permissive rules of engagement for US

soldiers which prioritise US force protection, enabling them to fire when they suspect threat such as a vehicle travelling too close to a convoy or due to its behaviour in the vicinity of checkpoints; shootings by private security contractors employed by the Coalition; atrocities such as the massacre, murder and/or rape by US soldiers in Haditha in November 2005 and Mahmoudiya in March 2006; reconstruction policies which have failed to act sufficiently against fraud, waste and mismanagement among international and Iraqi contractors, so that Iraqis are denied vital resources at a time of great need; and displacement due to such action and fear of such action indicated above.

Indiscriminate violence

172. As Dr Herring's report notes (para 8.3), an important feature of the violence in Iraq is that a significant proportion affects civilians disproportionately:

> "The majority of killings do not seem to be during combat if that is defined as both sides shooting simultaneously. However, one-sided attacks are the norm for what is variously labelled unconventional, guerrilla, insurgent and counter-insurgent warfare, with terrorism (defined as political violence targeted against civilians at least partly aimed at wider intimidation) a frequent tactic, as the irregular forces seek to avoid being targeted by the superior firepower of the regular forces."

173. The two experts and the major reports clearly consider that indiscriminate violence is still occurring at significant levels. The Report of the UN Secretary General of 15 October 2007 at para 36 notes that:

> "Ongoing violence in Iraq continues to pose human rights challenges to the Government of Iraq in its efforts to bring under control acts of violence motivated by terrorism, sectarian considerations and criminal activity. Iraqi law enforcement personnel are under relentless attack by insurgent groups and both Sunni and Shiite armed groups have carried out systematic and widespread attacks against civilians through suicide bombings, abductions and extrajudicial executions, making no distinction between civilians and combatants…"(8.13)

174. These levels of indiscriminate violence have fluctuated but remain high by reference to any date since 2004. During 2006 the US State Department Report of 6 March 2007 noted a significant increase in the number of deliberate attacks by insurgent groups on Iraqi civilians as well as counterinsurgency attacks by the MNF-I and the ISF. This report contains a subsection headed: "g.Use of Excessive Force and Other Abuses in Internal Conflicts" which states in part:

> "Militia and terrorist killings were the main source of violence in the country. Former regime elements, local and foreign fighters, terrorists, and militias waged guerrilla warfare and campaigns of violence. According to government data, 627 army soldiers were killed during the year. Bomb attacks by Sunni terrorist groups against the government and densely populated Shi'a areas were common and frequently prompted retaliatory attacks by Shi'a militias. Executions of military-age Sunni males became common after the Samarra Mosque bombing.
>
> Government military and police forces under government control killed armed fighters or persons planning or carrying out violence against civilian or military targets. According to personal accounts and numerous press reports, these forces caused inadvertent civilian deaths. Treatment of detainees under government authority was poor in a number of cases.

Insurgents and terrorists typically targeted individuals whose death or disappearance would advance their cause, particularly those who were suspected of being connected to government-affiliated security forces. Bombings, executions, killings, kidnappings, shootings, and intimidation were a daily occurrence throughout all regions and sectors of society. Al Qa'ida in Iraq claimed responsibility for a number of these attacks, although other insurgent and terrorist groups played a role."

175. In terms of overall figures, we have already noted the need for caution when analysing available statistics which contain significant variations and do not lend themselves easily to precision. As Dr Rangwala has emphasised, allowance needs to be made for underreporting. According to him just over 50% of the deaths by violence in Iraq can be considered as indiscriminate in character. He states at para 23:

> "Overall, in the period up to March 2005, the IBC found that 53% of all civilian deaths by violence were caused by explosive devices: missiles, suicide attacks, conventional and improvised bombs, artillery and air strikes. This form of attack can in general be considered as a form of indiscriminate violence, in that the attacks are not designed to only cause harm to specific person or persons. No comparable study has been conducted since 2005, but there is no reason to believe that the proportion of Iraqis being killed in an indiscriminate way will have changed since that year. "

176. A related matter which the experts and background materials treat as of some importance (and which bears directly on the issue of indiscriminate violence) concerns the extent to which the armed violence in Iraq has been directed against military as opposed to civilian targets. As one aspect of this, Dr Rangwala and Dr Herring in their book, <u>Iraq in Fragments</u> had estimated that figures then available showed most attacks to be on Coalition forces. Dr Herring's report of 21 January 2008, however, noted a change of view since their book. At para 8.6 he states:

> "Data that became available after the publication of our book (Paragraphs 5.7-5.8) suggest the possibility that a higher proportion of attacks have been against non-Coalition actors (civilian and non-civilian) than we had reason to believe previously at the time of writing our book. The data have always anyway shown complexity in that, even if the view that most attacks have been on Coalition forces, most casualties have been Iraqi civilians (Paragraphs 5.3-5.16) as they are generally more vulnerable and grouped in larger numbers (e.g. in markets) than Coalition armed forces. Furthermore, all sources agree, and I concur, that the recognisably sectarian dimension of attacks (as opposed to attacks on Coalition forces, or attacks on to disrupt the state to undermine the Coalition project) escalated dramatically during the first half of 2007 in Baghdad and the rest of central Iraq and to a lesser extent in northern Iraq (Paragraphs 6.17-6.40). In southern Iraq, even the official British figures show that from the beginning of September to the end of October 2007, the number of attacks on Coalition forces had dropped by around 90%, while the number of attacks on Iraqi civilians remained roughly the same and about five times those on Coalition forces (Paragraph 6.51). On these UK Ministry of Defence attack data, the conflict in southern Iraq is overwhelmingly civil armed conflict."

177. This is not easily reconcilable with Dr Herring's reference earlier in the same report to press releases from mainly Sunni Arab Iraqi insurgent groups in March 2007 stating that around 60%-80% of such attacks were directed against the Coalition Forces (see Appendix 2 of Dr Herring's report), but we are prepared nevertheless to accept that there has been such a change.

178. Dr Herring's report and other sources highlight violence directed at civilian locations. For example the January 2008 COI Report notes the UNAMI report, dated 1 September -31 October 2006 as stating that:

> "Terrorist attacks and deliberate targeting of civilians continued to take place in several parts of the country. The purpose of the targeted attacks has mainly been to eliminate prominent members of a community, seek reprisal for the death of a family or sect member, often sparking sectarian violence, thus perpetuating the vicious cycle of revenge killings. Many of those attacks were random, and targeted mosques, crowded markets, restaurants, bakeries, bus stations and areas where labourers gather to search for work. Assassinations by drive-by shootings were frequently recorded as well. Some of these attacks appear to be directed towards a specific group, for instance in mixed areas where the militants use the attacks to intimidate the members of the unwanted group so as to force them to leave." [39e] (p6) (8.24)

179. It also appears that the position of civilians varies somewhat depending on the intensity of the sectarian violence in particular. The ICRC report covering 2006 entitled "Civilians Without Protection: the ever-worsening humanitarian crisis in Iraq", noted that:

> "The IBC details from December 2007 alone (Appendix 3) show that people are at risk from indiscriminate violence:
>
> - if they are in markets, schools, buses, their homes, police stations, detention centres and in transit between locations (effectively in most public or private places);
> - from drive by targeted gunfire, cross-fire, 'friendly' fire, snipers, car bombs, truck bombs, roadside bombs, suicide bombs, mortars, heavier artillery, unexploded ordnance from cluster bombs, booby traps and air strikes;
> - from harm by insurgents, militias, criminals, GoI forces, Coalition forces (conducting raids, protecting convoys and engaged in combat) and Turkish forces."

180. Having referred to the fact that an estimated 11,220 civilians were killed and a further 23,878 injured in 2007, OCHA in a December 2007 update stated:

> "Civilians continue to suffer disproportionately in the climate of violence, criminality and instability. Lack of distinction between civilians and combatants in armed security operations claims civilian victims, who in addition are deliberately targeted by armed groups and subjected to suicide attacks, targeted assassinations, abductions and extrajudicial killings. Targeting of civilians create a climate of fear aimed at destabilising and displacing civilian populations. The Human Rights Office of UNAMI reiterates that such systematic and widespread attacks may constitute "crimes against humanity and violate the laws of war, and their perpetrators are subject to persecution (UNAMI Human Rights Report, 1 April -30 June 2007)".

<u>Indiscriminate violence and the GOI and MNF-I</u>

181. It is clear that the background evidence read as a whole perceives the majority of indiscriminate violence to emanate from non-state parties to the conflict and/or criminal elements. But it is not to be thought that all violence of this type has emanated solely from such quarters. As Dr Rangwala emphasises, indiscriminate violence has been used by all major protagonists in the ongoing conflict (para 53).

182. The January 2008 COI Report at 10.75 states:

> "Whilst the UNAMI report, dated 1 September-31 October 2006, states that "Military operations by MNF-I, particularly in Al-Anbar, continued to cause severe suffering to the local population who also find themselves in the midst of cross-fire among rival insurgent and criminal groups and the security forces."… UNHCR's August 2007 paper concurs "The armed conflict between the Multi-National Forces (MNF)/ISF and the Sunni-led insurgency has resulted in civilian deaths, destruction of property and displacement." …".

183. There have been a number of incidents of abuse of detainees, and deliberate killing of civilians by MNF–I forces, although the numbers are relatively small (10.76-10.82). Private security companies have also been implicated in human rights abuses (10.83-10.86).

184. Whilst, of course, the laws of armed conflict do not treat the killing of civilians in the course of military operations as necessarily illegitimate, it is clear that a significant number of civilians have been killed during military operations of the multinational forces against insurgents or militia (8.29) and it may not be an unreasonable inference that in some incidents (whether or not intentionally) the impact on civilian life has been disproportionate. There have been large-scale military operations in all areas of Baghdad, in Al Anbar Province in the eastern region and in Diyala, Wasit, Tamim and Salah Ad Dine provinces (8.36).

185. Dr Rangwala's report notes that since at least 2004 there has been "no clear dividing line between the official security forces of the Iraqi state and the paramilitary forces of non-state actors" (para 6). That view is supported by other sources. There are various reports (as noted by the January 2008 COI Report) that the ISF have experienced infiltration by militias and criminal gangs and political parties, depending on the area in which they operate (10.02). The UNHCR advisory paper, dated 18 December 2006, noted that: "[the] Ministry of Interior have been repeatedly accused of employing militia members who commit gross human rights violations against those suspected of belonging to the insurgency." (10.12). This concern was repeated in the August 2007 UNHCR Guidelines document (10.14-10.16). The use by members of the ISF of torture is said to be extensive (10.50; its prevalence has been widely acknowledged as a major problem by Iraqi officials (10. 54). The ISF is said to be responsible for "numerous civilian deaths and casualties in Iraq" (10.60). Available figures as given by the IBC data estimated that civilian deaths directly attributable to US forces totalled 669-756 in 2007.

186. Account must also be taken of the character of the military activities of insurgents and other armed groups directed at the multinational forces and the ISF. The targeting involved has often been essentially military: e.g. military bases and buildings associated with the Iraq Government, attacks on helicopters (12.22). Some of the targeting appears to be part-military, part-governmental and part-civilian, as in the case of the frequent attacks by armed groups on the international zone (Green Zone). Checkpoints, police stations and recruitment centres are frequent targets (10.47). However, whilst figures are lacking it can safely be assumed that a significant amount of this violence, by virtue of the forms which it has taken, which has

included e.g. summary executions, beheading of captured army and police personnel (10.48), suicide bombings, torture and ill-treatment, has been and is contrary to IHL (12.01). 80-90% of Iraq's suicide bombings are thought to have been carried out by AQI (12.17). Car bombs, even when directed against MNF-I/ISF/KRG military targets (and often the site is purely civilian, being a mosque, shrine, church, bus station or other public gathering spot), tend to result in substantial civilian casualties (12.20).

187. The COI report also highlights the fact that use by insurgents of kidnapping and hostage taking continues to be a serious problem in Iraq (9.07-9.15), although it would seem that a significant proportion of such incidents are wholly if not entirely the work of opportunist criminal gangs.

Kirkuk

188. With around 750,000 people, Kirkuk is Iraq's fourth largest city, behind Baghdad, Basra and Mosul. The fall of Saddam saw the oil-rich region of Kirkuk (or more precisely Taween Province), previously dominated by the Arabs and Turkomen, fall under the control of Kurdish security forces. Taween Province is outside the KRG but, as Dr Rangwala notes, it has roughly equal numbers of Kurds and non-Kurds. The city of Kirkuk currently has a Kurdish minority of around 40% (para 44). The Kurdish parties have been encouraging the 'Arabisation Arabs' to leave Kirkuk, sometimes through intimidation, and have also been encouraging Kurds to move into the city. This is supported by the January 2008 COI report which notes that during 2006 nearly 100,000 Kurds had returned to Kirkuk (8.86). The city has become a theatre of conflict between various armed groups, including jihadis. The insistence of the Kurds in proceeding with the planned referendum on the region's status, bitterly proposed by the Arabs and Turkomen, has given jihadis a permissive environment (8.90). As a result security continues to be unstable (8.92). The same COI report at para 8.91 states:

> "The UNHCR's Addendum to its August 2007 paper, published December 2007, stated that: "Various groups are vying for control over the disputed territory, in particular oil-rich Kirkuk. Extremists continue to stir sectarian violence among Arabs, Kurds and, in areas such as Kirkuk and Tal Afar, Turkmen. Under pressure from the MNF-I/ISF and tribal alliances in Baghdad, Al-Anbar, and parts of Babel, Diyala and Salah Al-Din Governorates, AQI has regrouped in areas of Kirkuk and Ninewa Governorates. Violence in these areas has been increasing. On 5 November 2007, the MNF-I/ISF launched a major security operation ('Operation Iron Hammer') in the Governorates of Ninewa, Kirkuk, Salah Al-Din and Diyala to counter Al-Qa'eda there."… Car bombings, suicide attacks, shootings, targeted kidnappings and assassinations of government officials, politicians, religious and tribal figures, members of minority groups, journalists, persons affiliated with the MNF-I/ISF, humanitarian workers, and members of the former regime all occur at a regular frequency in Kirkurk. … Civilian deaths as a result of MNF-I/ISF military offences and raid and search operations have also been reported in Kirkurk…."

189. Explaining the need to set the analysis of Kirkuk in a national context, Dr Herring at para 6.6 of his report states:

> "The level of violence in Kirkuk, as captured for example in DoD attack data, increased in 2007 in comparison with 2005 and 2006 and has remained roughly at that raised level. Furthermore, it is not generally appreciated that, per capita, Kirkuk has been among the most dangerous provinces in Iraq. Violence in Kirkuk is strongly influenced by politics at the national level over its status and in relation to the movement of insurgents from central Iraq as they seek to evade attack."

190. Having analysed the latest position as regards the proposed referendum on the final status of Kirkuk provided for in article 58 of the Transitional Administrative Law (TAL), now postponed until June 2008, Dr Herring goes on to conclude that:

> "The current level of violence is high, is likely to continue as a result of Kirkuk's unresolved status and ironically is likely to escalate massively should an effort be made to resolve its status" (para 6.14).

191. Dr Herring adds (para 7.14) that the surge has had little impact on Kirkuk:

> "There was a search of Kirkuk in November 2007 by 3,500 Iraqi soldiers and hundreds of US soldiers for suspected insurgents, but that has not stopped the violence (Appendices 3, 4). Similarly, the US Provincial Reconstruction Teams (PRT), doubled as part of the surge has had only modest goals for economic reconstruction, mainly in training. Kirkuk's provincial council was limited in what it could do because it has been boycotted by its Arab and Turkmen members since autumn 2006, although the Kirkuk PRT brokered an end to that boycott a year later and brokered the deal among the political, ethnic and tribal groups to delay the referendum.

His report contains appendices 3 and 4 listing violent civilian deaths reported in the media and collated by Iraq Body Count, covering the last quarter of 2007 and early 2008. Both give incidents by reference to areas of Iraq including Kirkuk. In his appendix 5, taken from the US Department of Defence figures on average daily attacks by Province, July-November 2007, Tamim Province is fifth in terms of rate of average attacks per day; a note to the bar chart states that the first four provinces (Baghdad, Salah ad Din, Ninewa and Diyala) "have approximately 42% of the population but account for 80% of all attacks".

192. The January 2008 COI Report states that Kirkuk is one of the areas in which kidnappings were reported to occur particularly (along with Baghdad, Ninewa and Basrah governorates) (9.15).

193. The same report at 22.05 notes that the USSD report 2006 records:

> "During the year [2006], discrimination against ethnic minorities was a problem. There were numerous reports of Kurdish authorities discriminating against minorities in the North, including Turkmen, Arabs, Christians, and Shabak. According to these reports, authorities denied services to some villages, arrested minorities without due process and took them to undisclosed locations for detention, and pressured minority schools to teach in the Kurdish language. Ethnic and religious minorities in Kirkuk frequently charged that Kurdish security forces targeted Arabs, Turkmen, and Shabak." …."

194. Dr Rangwala states that according to the International Crisis Group, the Kurdish parties who control the security of the city have staffed the security and intelligence

forces with members of their militias (the Peshmerga) and (in his words) "have shown themselves to engage in persistent acts of discrimination and persecution of the Arab population" (para 46).

195. At para 47 of his report Dr Rangwala notes that according to the US Department of Defence there was an average of six violent attacks per day by 'enemy' actors in Tamin governorate in the period from July to November 2007. "There is", he states, "persistent violence on a medium scale, which occasionally becomes severe". He predicts that violence will escalate considerably as the date of the referendum - now scheduled for June 2008 - approaches.

196. Dr Herring's assessment of the risk to the appellant (merely as a civilian) arising from the violence is stated at para 10.5 as follows:

> "Detail of the steady stream of indiscriminate and targeted violence in Kirkuk is set out above …. The most commonly identified media-confirmed means of killing has been gunshot with car bombs, suicide bombs, roadside bombs and US raids also killing people in Kirkuk in the last three months. In other words, there is a substantial risk in Kirkuk of death and injury from indiscriminate as well as targeted violence to all civilians there. In Kirkuk province 80-90% were unable to state that they felt safe outside of their own neighbourhood and yet such travel can be required for basic things such as employment: 20-30% were unable to say they felt safe even in their own neighbourhood …."

Our decision on the factual issues

The expert reports

197. Before turning to evaluate the situation in the light of this evidence, we need to comment briefly on the two experts, Drs Rangwala and Herring. Theirs were not the only expert reports or opinions we had in the materials, e.g. there was the oral evidence of Dr Dodge and Professor Zubaida before the House of Commons Defence Committee in June 2007, but it was only the former two who produced reports for this hearing. Their credentials as authoritative writers and commentators on Iraq are impressive. Although we considered we should attach considerable weight to their opinions, we had several important reservations.

198. To explain our reservations, we begin by pointing out that neither purports to have any expertise in matters of asylum-related or international law. It would not appear, for example, that when in their co-authored book, Iraq in Fragments, 2006, they state that the conflict in Iraq "has remained primarily an international conflict throughout" (see Dr Herring's report, para 8.6), they do not mean to assert that as a matter of IHL law Iraq (post-June 2004) is in a state of international armed conflict; or, if they do, in their reports neither of them has given any reasons for classifying it as such.

199. This (understandable) feature of their reports is of some importance in relation to the their own assessments of risks in Iraq, which sometimes use the same or similar terms as are used in actual decision-making on asylum and asylum-related claims. For example, Dr Rangwala concludes that the appellant (and also Mr HH) "would be

at serious risk of attack if they were to be returned to Iraq wherever they were to relocate" (para 53). At para 46 he states that the Peshmerga-dominated security forces in Kirkuk city "have shown themselves to engage in persistent acts of discrimination and persecution of the Arab population". Dr Herring's report refers at para 5.26 to Iraqi civilians being at "serious risk of death, injury and other serious harm in private or public places due to the use of indiscriminate violence as well as persecution by a wide range of parties using a multitude of means". At para 3.10 he says there are "substantial grounds for thinking that [the appellant] would be at real risk from indiscriminate violence, targeted violence and other serious harm (most notably human rights abuses and health risk) were he to be returned to Iraq."

200. Two aspects of the use they make of such language concern us. One is that whatever meaning they attach to terms such as "serious risk" and "persecution" (particularly the latter term) their reports contain no guidance or reference point for what those terms might mean and it would appear they use them in a very loose fashion. For example, Dr Rangwala's statement at para 46 concerning the "persecution" of the Arab population of Kirkuk city (as distinct from discrimination to which they are subjected) is sourced to two articles only: one a relatively obscure article dated December 2005; the other a July 2006 International Crisis Group (ICG) piece dated 18 July 2006. Surprisingly the footnote does not refer to the more recent and more detailed report by the ICG, "Iraq and the Kurds: Resolving the Kirkuk Crisis", No 64, 19 April 2007, which says nothing to support Dr Rangwala's sweeping view: see e.g. the analysis of the treatment of the *Wafadin* at pp 2-4. Dr Rangwala's statement is not echoed in any of the major country reports. Dr Herring's supplementary report at 2.16 states that he considers that persons of mixed Arab/Kurdish ethnicity currently face "persecution" in Baghdad, yet the documentation he refers to in support relates to persons who have entered mixed marriages, not persons of mixed ethnicity; and his reasoning appears to rely unduly on speculation as to how authorities and other actors in Baghdad would perceive someone of mixed ethnicity from Kirkuk in view of the upcoming referendum on Kirkuk's future status. So in comparison with the evidence cited in support, there is sometimes looseness in the terminology used.

201. The other aspect is that whilst we take fully into account such assessments, we have to decide the issues before us by reference to the legal criteria contained in the relevant legal texts. We must bear in mind case law which highlights that the requisite thresholds to show the relevant harm are high.

202. The terminology of their reports posed a particular problem for us when deciding what weight to give to their opinions regarding the nature and extent of indiscriminate violence in Iraq and Kirkuk. Both refer to two main types of violence: "targeted violence" and "indiscriminate violence" neither defining what they mean by either term. For the most part they seem to adopt an IHL meaning to the term "indiscriminate violence": see e.g. what Dr Rangwala states at para 15 of his report and what Dr Herring states at para 2.11 and para 4.3 (fourth bullet point) of his report. But, consistent with that, some of what they identify as "targeted violence" appears to include fighting between combatants which is not obviously connected

with indiscriminate violence contrary to the rules of armed conflict. Further, contrary to Dr Rangwala's own opinion as expressed in para 53 of his report, some of what he (and Dr Herring) mean by "indiscriminate violence" appears to relate to methods and means of warfare (e.g. artillery and air strikes) which are not in themselves indiscriminate, even when confining matters to the effects on the civilian population. Their usage of this term also appears to include some violence unconnected with the conduct of military/combatant operations. In addition, despite referring to these two types of violence in tandem, neither of their reports clearly analyses the nature and contents of each type separately.

203. Doubtless this in part mirrors the approach of some of their sources: e.g. the Report of the UN Secretary-General of 14 January 2008 states at para 53 that "[i]ndiscriminate and targeted violence continued to claim civilian victims, even though the overall numbers of reported attacks and casualties had declined". In part too it may reflect difficulties inherent in trying to distinguish, on the basis of imperfectly sourced and categorised data, legitimate and illegitimate (in IHL terms) uses of violence in Iraq. For example, the IBC figures of "violent *civilian* deaths" (emphasis added) covering the last quarter of 2007 show a very significant number of attacks/killings of policemen, who are formally part of the GoI and the ISF. There is also mention of killings of security officers and Awakening Council members. But the result of the experts' lack of clarity about terminology is that we cannot assume that what they mean by indiscriminate violence is the same as what is meant by applying IHL criteria. Given our earlier conclusion that in applying Article 15(c) the focus must be on the nature of extent of indiscriminate violence in the IHL meaning of that term, the experts' use of different meanings and distinctions does not assist.

General remarks

204. Our decision that in the context of Article 15(c) the phrase "international or internal armed conflict" is to be given an IHL law meaning simplifies our task considerably. During the hearing Mr Saini stated that the Secretary of State accepted that for IHL purposes Iraq was in a situation of internal armed conflict, that this situation embraced the whole territory of the state of Iraq, including the KRG, and that the GOI was one of the parties to the conflict. It follows, therefore, since we have rejected his contention that we should apply a different "pragmatic" approach to the notion of "internal armed conflict", that we can proceed on the basis that Iraq is in a state of internal armed conflict. We can also treat the Secretary of State's concession as rendering superfluous any response by us to her request that we make clear that our decision on this matter has "no wider ramifications".

205. As a result of the respondent's concession we can treat all nationals of Iraq who have applied for international protection as able to satisfy the requirement of Article 15(c) that they face return to a country in which there are "situations of …internal armed conflict". Given the approach taken by IHL to the territorial and geographical application of the law governing internal armed conflicts, it is clear from the evidence before us that all parts of Iraq are under the control of one of the parties to the armed conflict there: the vast majority of it is under the control of the

Government (central or devolved). The remaining parts not under Government control are under the control of local armed groups who are also parties to the conflict. (The position in Iraq is not, therefore, like that in Somalia where large northern parts of the state (Somaliland and Puntland) appear to be under the control of governments who are not party to the internal armed conflict(s) taking place in southern Somalia). Neither the US nor Iraq are State Parties to the 1997 Additional Protocol II, so that in relation to "internal armed conflict", the only applicable rules are those of common Article 3 together with others which form part of customary international law.

Conclusions on indiscriminate violence in Iraq

206. In order to qualify under Article 15(c) a claimant must also show he faces a serious and individual threat *by reason of indiscriminate violence* in situations of armed conflict. Our principal focus must be whether he faces such serious harm in his or her home area. However, since being able to evaluate the situation there requires an understanding of the situation in the country as a whole, it is salient that we set our several general conclusions about Iraq as a whole. Drawing together the various strands we consider that although indiscriminate violence is indisputably at high levels in Iraq, the evidence does not show that it poses a real risk of serious harm (within the meaning of Article 15(c)) to civilians in general. In reaching that view we take into account the following factors in particular. First, indiscriminate violence is only part of the overall violence which afflicts Iraq; it does not include, for example, targeted violence which combatants direct against each other which is not contrary to IHL norms. Nor does it include criminal violence except where that is closely related to the armed conflict.

207. We emphasise the importance of properly approaching the question of the extent of indiscriminate violence because it lies behind why we find ourselves unable to accept Dr Herring's evidence that over 50% of the deaths by violence in Iraq can be considered as indiscriminate in character (para 23 of his report). Contrary to what he states, there is nothing in international law which makes armed violence in the form of "… missiles … conventional bombs, artillery and air strikes" as such indiscriminate. Whether the attacks using these means are or are not sufficiently (in his words) "designed to only cause harm to specific persons" is a question of fact; it cannot be deduced from the mere fact that such means have been employed. The means mentioned are in this respect unlike chemical or biological weapons or cluster bombs, which are regarded by IHL as inherently indiscriminate. Further, at least as regards the use of "missiles … conventional bombs, artillery and air strikes" by the MNF-I, we have already noted that the January 2008 COI report states available figures as given by the IBC data as estimating civilian deaths directly attributable to US forces to total 669-756 in 2007.

208. Secondly, without setting any particular store by the recent reduction (since mid-2007) in the levels of violence and the numbers of civilian casualties (because they may prove temporary), we do not consider that the levels of indiscriminate violence are at significantly high levels throughout Iraq. As already noted, the evidence in

June 2006 was that almost 80% of civilian deaths occurred in twelve cities and we have seen no evidence which suggests that this pattern has been the subject of any major change. Thirdly, even in the cities where the levels of indiscriminate violence are highest (including Baghdad), the evidence does not demonstrate that it is on such a scale or at such a level of frequency that it could be said that merely being there as a civilian places one at real risk of suffering serious harm caused by the threat of such violence.

209. In our view much the same considerations as led the Tribunal in previous country guidance cases, for instance, NS (Iraq: perceived collaborator: relocation) Iraq CG [2007] UKAIT 00046, to decide that for the purposes of the Refugee Convention and Article 3 ECHR more is needed to show qualifying harm over and above being merely a civilian, apply here, subject only to giving effect to the different character of the Article 15(c) test (which treats as a qualifying harm a ("serious and individual) *threat*" caused by "indiscriminate violence"). On the evidence before us, however, there is one particular aspect of the recent evidence which requires specific attention. This concerns the number of returns that have been taking place to Iraq by "refugees" or displaced persons. The parties expressed opposed views about its significance.

The significance of returns of displaced persons/"refugees"

210. That there have been significant numbers of returns (side-by-side with significant numbers of continuing displacements) is evident from the UNHCR December 2007 Addendum note which at para 7(b) states:

> "Although uncertainty about the number of returnees to Central Iraq exists, there have been reports that many IDPs and refugees have returned to their former place or area of residence, primarily to Baghdad [a footnote refers to Prime Minister Al-Maliki's reference to 7,000 families having returned to Baghdad]. The absence of accurate baseline data and the lack of monitoring, information and reporting about the routes of return and areas of return make it extremely difficulty to establish the extent to which current movements have been safe, dignified or voluntary [a further footnote here notes that according to the MoDM the Government of Iraq, some 3,460 IDP families have returned to Baghdad between February and November 2007…and a further 6,000 families are awaiting registration. Concerning refugees, the MoDM believes that approximately 30,000 families have returned to Syria].
>
> Despite notable improvements in the security situation in the past few months, the ongoing conflict in many parts of the country and the fluctuating levels of violence raise questions about the safety of the current returns and their sustainability. The Iraqi government and the UN are stepping up efforts to address the immediate needs of these returnee families, given the prevailing situation in Iraq."

211. We have no reason to query UNHCR's assessment and we are prepared to accept that not all of these returns can be assumed to be voluntary, given the evidence relating for example to the pressures placed by the Syrian authorities on Iraqis who had fled to that country. However, what is equally clear is that UNHCR, along with other international agencies, is assisting in Iraq in programmes devoted to assisting such returnees and that there has been no UNHCR statement (except in relation to Palestinian refugees) suggesting or declaring that such persons should be considered as having returned to face persecution or serious harm. If such persons were facing

persecution or serious harm on return we would have expected that UNHCR would have been the very first body to have said so, for otherwise they would be acting contrary to their own mandate and contrary to their supervisory responsibilities under both their own Statute and the Refugee Convention. Hence in our view such evidence is a significant consideration in examining the likely situation under Article 15 of persons facing return to Iraq.

Violence on the basis of gender

212. Dr Herring's report also identified the issue of the extent to which the risk to ordinary civilians was higher for adult males. At para 10.2 he states:

> "Males face vastly higher risk of death and injury from violence and human rights abuses related to the armed conflict. While systematic data are not available on this, some illustrative data are available. According to the official Iraqi data gathered by the UN (Paragraph 5.12), out of 36,185 Iraqi civilians wounded in the violence in 2007, 33,684 were adult males, a ratio of 11 to 1 for adult males compared with adult women and children of both sexes. According to Hamit Dardagan of IBC, adult civilian males are vastly more likely than adult civilian women to be killed violently due to the fact that they tend be in public places much more often and also are targeted specifically as potential combatants. This drastically different rate of violent death is confirmed in my trawl IBC data for the first two weeks of 2008 (Appendix 4). On the basis only of the cases where the individual is explicitly identified as an adult male or female, the civilians reported killed violently were 38 male and 6 female, a ratio of 6:1. This ratio sets aside even those cases where the person occupying the position was not specified as male but almost certainly was (e.g. Awakening Council member). The category of 'military-age male' has been used as justification by Coalition forces for killing or detaining Iraqi adult males…"

213. Whilst we do not doubt these figures, we note first of all that they cover both indiscriminate violence and violence used by (predominantly male) combatants in the conduct of military operations; and, secondly, that, even confining ourselves to male civilians, we do not see that they demonstrate that the levels and extent and geographical distribution of indiscriminate violence are such as to give rise to a real risk of serious harm to persons in this subcategory generally.

Conclusions regarding indiscriminate violence in Kirkuk

214. The background sources do not always differentiate between Kirkuk meaning the Province (Tamim) and Kirkuk meaning the city: for example, some of Dr Herring's references to the levels of violence and danger in Kirkuk appear to relate to the Province. But taking that difficulty into account and considering the evidence relating to both the city and the Province of Kirkuk, we reach the following conclusions. First, the level of incidents of violence in both Tamim and in Kirkuk city is significantly lower than in Baghdad, Salah ad Din, Ninewa and Diyala: the latter provinces between them are considered to account for a high percentage of attacks in Iraq (possibly as high as 80% if one takes US Department of Defence Figures). By contrast, Dr Rangwala at para 47 found the violence there "persistent … on a medium scale" and noted that according to the US Department of Defence there was an average of six violent attacks per day by 'enemy' actors in Tamin governorate in the period from July to November 2007. Of course that information only relates to violence by insurgents, but, even so, we do not consider it a striking figure relative to the size of population. Secondly, we must bear in mind (as with Iraq as a whole) that

not all the violence taking place in Tamim and Kirkuk city (or likely to take place there) is comprised of indiscriminate violence: some is targeted violence between different armed groups, not all of which is indiscriminate in nature. Thirdly, we are not persuaded that the levels of indiscriminate violence occurring in that province and that city, in the context of the conduct of fighting between combatants, is widespread or can be described as generally happening.

215. That, we accept, is contrary to the opinion of Dr Herring whose report appears to consider that even leaving to one side targeted violence and confining oneself to the risk from indiscriminate violence, the appellant, just by virtue of being a civilian in the province or city of Kirkuk, would be at risk. At para 3.10 he states:

> "Once in Kirkuk [the appellant] would be at substantial risk of kidnap, arbitrary detention, torture or death from indiscriminate violence by MNF-I, GoI, insurgent and criminal groups … ".

216. However, this assessment appears to aggregate targeted and indiscriminate violence and, in any event, we have to consider the evidence before us as a whole, including the UNHCR December 2007 Addendum at pp.68-7 and those items contained in his own appendices regarding attacks and incidents in recent months. We have also to bear in mind the size of the civilian population of the Province and the city of Kirkuk (the latter whose population is around 750,000). Considering matters thus, we do not find that the incidents of indiscriminate violence can be said to be widespread or as forming a consistent pattern.

217. In reaching the above conclusions we have taken into account the experts' opinion that the forthcoming (postponed) referendum on the future of Kirkuk is likely to lead to a serious worsening of the armed conflict in the Province and city. Whilst we are prepared to accept that this factor is causing and may cause increased levels of violence - and indiscriminate violence - in the city in the next period, we do not find that the evidence as a whole shows that such levels will result in indiscriminate violence causing a real risk for the civilian population of Kirkuk (province or city) as a whole. Hence an appellant cannot meet the requirements of Article 15(c) merely by establishing he is a civilian whose home area is Kirkuk (province or city). Nor do we find the evidence to establish that a real risk would arise in the case of (Sunni) Arab civilians in Kirkuk or Kurdish civilians in Kirkuk.

Return via Baghdad

218. We do not consider that the facts of this case require us to make any findings on the issue of the safety of internal travel within Iraq. The appellant is from Kirkuk. The Secretary of State has indicated that - if and when returned - the appellant will be returned via Baghdad. She has also confirmed that currently no involuntary returns are taking place to Baghdad. However, she has made no removal directions against the appellant as yet and in our view the route of travel (in the appellant's case, from Baghdad to Kirkuk) is properly to be regarded as a contingent factor outside our jurisdiction when deciding if the appellant faces a real risk of serious harm on return: see AG and others v Secretary of State for the Home Department [2006] EWCA Civ

1342. Whilst we recognise that in that case Hooper LJ noted the desirability of the Tribunal giving its opinion on such matters in the context of country guidance, we do not consider that he intended that such opinion should be given in all circumstances. We bear in mind also, to paraphrase Hooper LJ's comment at para 15 of the same judgment that "a week is not only a long time in politics but it is also a long time in the life of a country as sad and war torn as [Iraq]". Further, although we did have evidence specific to this issue, most notably the detailed supplementary report from Dr Herring, the parties did not address the issue specifically in their skeleton arguments and their submissions during the hearing treated it as an incidental issue. We would add that we do not take Mr Husain to have suggested that on any return to Baghdad the GoI authorities would consider that the appellant was of adverse interest simply because he was of mixed Arab/Kurdish ethnicity and from Kirkuk. In any event, the appellant's asylum and Article 3 grounds in this case have fallen away and so risk from the authorities at the point of return in Baghdad would only be relevant, in terms of *obiter* comment from us, in the context of deciding whether a returning civilian in transit from Baghdad to Kirkuk would face a serious and individual threat by reason of indiscriminate violence.

<u>Internal relocation</u>

219. It is unnecessary for us to consider whether the appellant in this case would have a viable internal relocation alternative because we have not found he faces a real risk of serious harm in his home area.

220. In the light of our earlier analysis of the law (see paras 142-143), we would only add this. It has been conceded by the respondent that for IHL purposes the nature of the internal armed conflict in Iraq is such that it exists throughout the whole territory of the state, including the KRG. It follows in our view that an Iraq national who is found to face a real risk of serious harm in his home area of Central or Southern Iraq would be entitled to contend that the KRG would not be a safe place of internal protection (relocation) because of the existence of such an internal armed conflict. Whether, however, such a person could also show that in the KRG there is indiscriminate violence and that he or she as a civilian faces a serious and individual threat to his or her life or person as a result, will depend on the particular circumstances of the case.

The Appellant's appeal: conclusions

221. As noted earlier, the only issue before us in the appellant's appeal is whether he is eligible for subsidiary protection under Article 15(c) (humanitarian protection under para 339C(iv)) by virtue of fearing a real risk of a "serious and individual threat to [his] life or person by reason of indiscriminate violence in situations of international or internal armed conflict". As noted earlier, the appellant's asylum and human rights grounds of appeal have already been rejected. Given also that the appellant has been found not credible, his position stands to be assessed solely on the basis that he is a civilian, who is male, from Kirkuk of mixed (Arab/Kurdish) ethnicity who (in the Immigration Judge's words, " might may have faced dangerous and violent

situations" and [had] "members of his family or his acquaintances [who] may well have been killed in the general military and civilian upheaval in Iraq".

222. Earlier we reached a finding that Iraq is in a situation of internal armed conflict within the meaning of the Directive, informed by the respondent's concession that Iraq is in a situation of internal armed conflict within the meaning of IHL.

223. We also found that the situation in Iraq as a whole is not such that merely being a civilian establishes that a person faces a "serious and individual threat" to his or her "life or person".

224. From our earlier findings it will also be apparent that the appellant cannot succeed merely on the basis of being an Iraqi civilian whose home area is Kirkuk: the nature and level of indiscriminate violence there is not sufficient to establish the requisite threat set out in para 339C(iv). That is true of both males and females and of both Arabs and Kurds in Kirkuk.

225. It remains to consider whether the appellant is nevertheless entitled to succeed by virtue of his personal history and/or characteristics. It seems to us that here we should begin by examining the appellant's situation at the time he left Kirkuk. Leaving aside his claim to have been threatened by insurgents (which has been found not credible) the appellant in his statement of 18 December 2006 made no mention of any difficulties he faced as a result of his mixed ethnicity. He described his schooling and his family life without reference to any discrimination on the basis of his mixed ethnicity. The only difficulties he mentioned arising out of his work as a taxi driver related to the general incidence of "explosions and terrorist activities". It was not accepted that he worked as a police officer but, even on his own account regarding this, he described going to cafes and markets in different areas of Kirkuk without mention of any incidents or difficulties. In his oral evidence before the Immigration Judge he described "mix[ing] generally with the population and then report[ing] his findings to the police station in Almas". Nowhere in his screening interview, his statement, his grounds of appeal or in his oral evidence at the hearing is there any mention of any past difficulties arising out of his mixed ethnicity. Nor has the appellant sought by way of a Rule 32(2) notice to say that, even though he made no mention of such difficulties in the past, he would face such difficulties now.

226. In our view these considerations point heavily to a conclusion that the appellant's own circumstances, past and present, do not indicate that such difficulties would apply to him.

227. This assessment of the appellant's situation is disputed by Mr Husain and specific reliance is placed on the opinion of Dr Herring at para 10.5 headed "Insecurity in Kirkuk" that:

> "Presuming that [the appellant's] family have not come to harm, accepting that cannot reasonably be taken as proof that [the appellant] would be safe or indeed that [his] family are or will continue to be safe, as it implies that serious harm must have occurred to them for it to be

accepted that there is a serious risk of harm. This is not reasonable. If the issue is substantial risk of death or serious harm, then they are at risk and he would be at risk, in Kirkuk. Detail of the steady stream of indiscriminate and targeted violence in Kirkuk is set out above…"

228. In the previous paragraph (10.4) he had also highlighted risk arising to the appellant as a result of his mixed ethnicity:

> "**Risk due to ethnicity.** With an Arab father and Kurdish mother in a patriarchal society and speaking fluent Arabic but not fluent Kurdish, [the appellant] would be most readily identifiable as an Arab and would face a serious risk of persecution by Kurdish actors. Arabs per se may be persecuted as potential anti-Kurdish insurgents or by those seeking to secure a Kurdish majority ahead of the anticipated referendum on the future status of Kirkuk. The risk of harm may escalate dramatically in Kirkuk for [the appellant] due to the dispute over its unresolved status (Paragraphs 6.6-6.21). Ironically, [the appellant] may also be at risk because of his mixed ethnicity. Ethnic conflicts per se are focused on establishing and maintaining ethnic purity and ethnic boundaries, and so someone whose identity mixes ethnicities is automatically liable to be treated with suspicion by extremists on either side of the ethnic boundary. Earlier in this report (Paragraph 5.25), I detailed the vulnerability of Coalition and GoI electronic information management to abuse that would facilitate such persecution."

229. Despite Dr Herring's reference in para 10.5 to the appellant's individual and family circumstances, it seems to us that his reasoning relies exclusively on the general insecurity in Kirkuk, not on anything specific to the appellant's individual family circumstances there. In our view the fact that the appellant made no mention of any past difficulties faced by his family (apart from those at the hands of insurgents, which were found not credible) is a very relevant consideration in assessing the appellant's current situation on the assumption he is back with his family in Kirkuk. We have already rejected the view that for civilians in Kirkuk such insecurity is in general sufficient to establish the requisite risk under Article 15(c).

230. As to Dr Herring's observations on the appellant's mixed ethnicity, we note (in addition to the point that the appellant made no mention of any difficulties arising from his mixed ethnicity prior to his departure from Iraq) that his family also has residence in what is described by Dr Herring as a Kurdish area of Kirkuk, where previously he had no difficulties and where it can be assumed he will be recognised on return as a former inhabitant (as distinct from an outsider). On the appellant's own account (albeit this was not found credible) he was offered and obtained employment at the local police station, which is not easily squared with the view that he would be perceived as a potential anti-Kurdish insurgent. We would next note that Dr Herring's own language here is significantly more tentative than in other areas of his report: he refers more than once to what "may" be the case, rather than by reference to any words suggesting reasonable degree of likelihood.

231. The assertion by Dr Herring that persons identifiable as Arabs or Sunni Arabs would be "per se" at risk of persecution by virtue of being perceived as potential anti-Kurdish insurgents, is not supported by any references in the major country reports and, in our view, is unduly speculative. Whilst the background evidence (and in this context we consider that the 9 April 2007 ICG report mentioned at para 200 above is a particularly well-informed and balanced report) demonstrates that such persons

experience discrimination and that attempts to reverse the arabisation process have resulted in substantial amounts of violence, it falls well short of establishing that there is generic persecution or that Kirkuk Arabs generally have been fleeing from Kirkuk to escape a threat of persecution. Insofar as it is an assertion about what is foreseeable, we note that it envisages a threat of persecution of a very large proportion (indeed a majority) of the population of Kirkuk. On the available evidence it is reasonably likely that there will be a significant increase in levels of violence as a result of the pending referendum issue, but it is not reasonably likely that it will lead to a major escalation in the level of armed conflict there or cause threats of persecution of the kind predicted by Dr Herring.

232. For the above reasons we substitute a decision that the appellant's appeal be dismissed. Not only has he failed to show an asylum or human rights basis for his claim but he has not shown that he is eligible for humanitarian protection. He cannot succeed under Article 15(c) of the Qualification Directive or under para 339C of the Immigration Rules.

Signed

Senior Immigration Judge Storey

APPENDIX I: LIST OF ACHEDEMIC SOURCES BEFORE THE TRIBUNAL APPEAL NUMBER: AA/14353/2006

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5.	2004	International and Comparative Law Quarterly: *Subsidiary Protection and Primary Rights –(2004) 53, p.109, fn13 -* R Piotrowicz & C van Eck
6.	July 2004	ECRE: *Complimentary/Subsidiary Forms of Protection in the EU Member States, An Overview*
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8.	2005	*"Subsidiary Protection under the EC Qualification Directive" –* C Costello
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10.	May 2006	*The Humanization of Humanitarian Law, T* Meron (94 AJIL 239, 260)
11.	June 2006	The European Union Qualification Directive: *The Creation of a Subsidiary Protection Regime –, IARLJ/ILPA London Conference, section 2.2, J McAdam. June 2006*
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13.	November 2006	*Convention Refugee Status and Subsidiary Protection Working Party First Report (IARLJ 7th World Conference), J* McAdam
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15.	2007	*The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States – K Zwaan (ed.)*
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APPENDIX II: LIST OF BACKGROUND MATERIALS BEFORE THE TRIBUNAL APPEAL NUMBER: AA/14353/2006

1.		Ancestery.com: *'Hamed' Name Meaning and Origin*
2.		Committee to Protect Journalists (CPJ): *Middle East and North Africa News Alerts, Letters, Reports, Country Summaries, Archives.*
3.		Correlates of war
4.		Extract AIT Practice Directions
5.		Foreign and Commonwealth Office: *Departmental Report 2006/07 – SP3 Preventing and resolving conflict through a strong international neighbourhood*
6.		Foreign and Commonwealth Office: *Overview of Human Rights in Iraq, see FCO Human Rights Annual Report 2006 (pp. 66-77*
7.		Foreign and Commonwealth Office: *Statement in response to ICRC report on Civilians without Protection*
8.		Foreign and Commonwealth Office: *Iraq neighbours Conference.*
9.		Herring and Rangwala: *Iraq in Fragments (p.53)*
10.		House of Commons Foreign Affairs Committee: *Third Report Session 2006-07: Annual Report on Human Rights 2006*
11.		House of Commons Foreign Affairs Committee: *Eighth Report 2006 – 07: Iraq*
12.		Home Office: *'"Homicide" – Long-term National Recorded Crime Trend'.*
13.		Iraq Body Count (IBC): *Civilian Deaths. On maxima and minima*
14.		Iraq Body Count: *'Documented civilian deaths from violence'*
15.		Iraq Coalition Casualties: *Coalition Casualty Count*
16.		Middle East Transference: *Iraq's Governing Council*
17.		Oxford Dictionary: *Extracts – "War" and "Zone"*
18.		Terrorism Knowledge Base (TKB): *Memorial Institute for the Prevention of Terrorism (MIPT) – 'Group Profile – Mujahideen Shura Council*
19.		UK Border and Immigration Agency: *Immigration Rules Paragraph 339C*
20.		UNHCR: *Iraq Situation Supplementary Appeal*
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23.	Circa 2003	Middle East Journal: *'The United States and Shi'ite religious factions in post Ba'thist Iraq'*
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27.	13 December 2003	Daily Star: *'Baghdad blast brings sectarian divide to surface'*

28.	Circa 2004	ICRC: *Annual Report 2004 'Iraq'*
29.	Circa 2004	Middle East Report: *'Castles built of sand: U.S. governance and exit strategies in Iraq'*
30.	7 January 2004	Middle East Report Online: *The Spectre of Sectarian and Ethnic Unrest in Iraq*
31.	1 February 2004	BBC News: *'Twin Blasts Slaughter Iraqi Kurds'*
32.	19 February 2004	Al-Zaman
33.	7 March 2004	Chicago Tribune: *'Ethnic strains imperil Kirkuk: As Kurds stake a claim to their former city, Arabs and Turkmens are ready to fight back'*
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35.	10 March 2004	The Times: *'Ethnic tension threaten to erupt in oil-rich Kirkuk'*
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65.	Circa 2005	Iraq Body Count: *‘A dossier of civilian causalities, 2003-2005’*
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69.	4 January 2005	Times Online: *‘Iraqi Insurgence Now Outnumber Coalition Forces’*
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72.	16 March 2005	House of Commons Defence Committee: *‘Iraq: An initial assessment of post conflict operations’, Sixth Report of Session 2004-2005, Volume 1*
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75.	9 June 2005	Council on Foreign Relations: *‘Iraq: Militia Groups’*
76.	20 June 2005	Al-Mada: *‘Karbala governor: the interior minister did not order the governorates chief of police to stay in his post’*
77.	22 June 2007	McClatchy Washington Bureau: *‘Chilling Stories from the Mahdi Army’*
78.	27 June 2005	Los Angeles Times: *‘Islamic law controls the street of Basra’*
79.	July 2005	Ministry of Defence: *Manual of the Law of Armed Conflict (pp.27-33, 381-408)*
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106.	28 March 2006	Terrorism Focus: *'Mujahideen Shura Council in Iraq'*
107.	20 March 2006	Middle East Online: *'Iraq in low-intensity civil war'*
108.	1 May 2006	Time Online: *'Militias Steal New Recruits With Better Pay and Perks'*
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