



## STATEMENT BY UNHCR IN CASES UM 8628-08, UM 334-09, UM 133-09

### On the application of non-international armed conflict in Mogadishu

#### I. Introduction

The United Nations High Commissioner for Refugees (UNHCR) has been entrusted by the United Nations General Assembly with the responsibility of providing international protection to refugees within its mandate and of seeking permanent solutions to the problems of refugees. *The Statute of the Office, annexed to General Assembly Resolution 428 (V) of 14 December 1950*, specifies that the High Commissioner shall provide for the protection of refugees falling under the competence of the Office by, *inter alia*: “Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.”

States recognize this supervisory responsibility of the UNHCR, as provided for, in Article 35 of the *1951 Convention relating to the Status of Refugees* (hereinafter ‘the 1951 Convention’), to which Sweden became a party on 26 October 1954, which provides that Contracting States undertake to co-operate with UNHCR in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention. Furthermore, UNHCR notes that according to Article 21 of *EC Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status*, Member States shall allow the UNHCR to “present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.”

The UN General Assembly and Economic and Social Committee has subsequently extended UNHCR’s competence *ratione personae* by empowering UNHCR to protect and assist particular groups of people whose circumstances did not necessarily meet the definition in the Statute.<sup>1</sup> In practical terms, this has extended UNHCR’s mandate to a variety of situations of forced displacement resulting from conflict, indiscriminate violence or public disorder. In light of this evolution, UNHCR considers that serious (including indiscriminate) threats to life, physical integrity or freedom resulting from

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<sup>1</sup> UNHCR, *Note on International Protection*, submitted to the 45<sup>th</sup> session of the Executive Committee of the High Commissioner’s Programme, UN Doc. A/AC.96/830, 7 September 1994, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f0a935f2>, paragraphs 31-32 and note 8.

generalized violence or events seriously disturbing public order are valid reasons for international protection under its mandate.<sup>2</sup>

On this basis, UNHCR submits its statement to the Court in regard to the interpretation of Article 4(2)(2) of the Swedish Aliens' Act on the definition of a person who "needs protection because of external or internal armed conflict or, because of other severe conflicts in the country of origin, feels a well-founded fear of being subjected to serious abuses." The grounds for leave for the three cases that have been referred to the Swedish Migration Court of Appeal is whether there is a requirement for the State to have effective control of the territory in order for the definition of "internal armed conflict" to be applicable in the sense of the Aliens' Law. As all three cases pertain to applicants from Mogadishu, this statement particularly focuses on the application of non-international armed conflict to the current situation in Mogadishu.

## **II. Definition of non-international armed conflict in international law**

The definition of non-international armed conflict provided by International Humanitarian Law is based on the scope of application of Common Article 3 of the Geneva Conventions of 12 August 1949 and Article 1 of Additional Protocol II of 8 June 1977. Article 1 Additional Protocol II defines a non-international conflicts, conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." According to the ICRC Opinion Paper, it is only applicable to armed conflicts between State armed forces and other armed forces.<sup>3</sup> Somalia is however not a signatory to the Additional Protocol II and Article 1 of Protocol II is only applicable to conflicts that take place in the territory of a signatory state.<sup>4</sup>

Somalia became however a signatory to the Four Geneva Conventions in 1962, which are therefore applicable to conflicts taking place in the territory of the country. The Final Record of the Diplomatic Conference of Geneva of 1949 stipulated a number of recommendations for the application of Common Article 3 of the Geneva Conventions and made a distinction between a non-international armed conflict and low-intensity internal disturbances. In the case of a non-international armed conflict, the insurgents should have an organization purporting to have the characteristics of a State, the insurgent civil authority should exercise de facto authority over persons within a determinate portion of the national territory, the armed groups should act under the direction of an organized authority and be prepared to observe the ordinary laws of war, and the insurgent civil authority agrees to be bound by the provisions of the Geneva

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<sup>2</sup> UNHCR, *Providing International Protection Including Through Complementary Forms of Protection*, Executive Committee of the High Commissioner's Programme, Standing Committee, UN Doc. EC/55/SC/CRP.16.

<sup>3</sup> "How is the term 'armed conflict' defined in international humanitarian law?" Opinion Paper, ICRC, March 2008.

<sup>4</sup> Sassoli, M., "Transnational Armed Groups and International Humanitarian Law," Harvard University, Occasional Paper Series, 2006, No. 6, p 8-9.

Conventions. However, doctrine and practice have lowered these criteria significantly. According to Pictet, the leading authority on the interpretation of the Geneva Conventions, these conditions are not obligatory but only mentioned as an indication and, in his view, “the scope of the application of this article must be as wide as possible.”<sup>5</sup>

There is nothing in Common Article 3 that defines the parties to the conflict or the scope *ratione personae* of the Convention. There is therefore no requirement that one party in the conflict should represent the Government in order for the definition of non-international armed conflict to be applicable.<sup>6</sup> The situation in Somalia is given as the typical example in the doctrine of when an armed conflict between different armed factions in a country without a State would amount to a non-international armed conflict in the sense of Common Article 3.<sup>7</sup> The Appeal Chamber of the International Criminal Tribunal on the Former Yugoslavia confirmed in the precedent-setting case of the *Prosecutor v Tadic* that “an armed conflict exists whenever there is a resort to armed forces between the States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>8</sup> According to this definition, there is no requirement for the armed groups to have territorial control or for the Government to have to employ its armed forces.

ICRC’s authoritative interpretation of the concept in its Opinion Paper of 2008 states that a non-international conflict in the sense of Common Article 3 requires that non-governmental groups involved in the conflict must be parties to the conflict, meaning that they possess organized armed forces.<sup>9</sup> The level of organization required has been interpreted in the doctrine to mean the existence of a responsible command structure and a level of organization that enable the armed group to carry out its obligations under Article 3.<sup>10</sup> In the case of the *Prosecutor v Lubanga*, the International Criminal Court held that only “some degree of organization is required.”<sup>11</sup>

Moreover, ICRC’s Opinion Paper stipulates the requirement of a certain threshold of confrontation based on a minimum level of intensity. The level of intensity as interpreted in the *Tadic* case is measured in terms of duration of the conflict (protracted) instead of by a scale of violence. This can be compared to the recent Preliminary Ruling by the European Court of Justice (ECJ) on the interpretation of Article 15(c) of the EC Qualification Directive (*Elgafaji* case), where the Court interpreted “armed conflict” to be a situation where the degree of indiscriminate violence “reaches such a high level that

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<sup>5</sup> Pictet, J., *Commentary IV Geneva Convention*, ICRC, Geneva, 1958 p. 36.

<sup>6</sup> C.f. Moir, L., *The Law of Internal Armed Conflict*, Cambridge University Press, 2002, p. 39.

<sup>7</sup> Gasser, H.P., “International Humanitarian Law” in *An Introduction in Humanity for All: the International Red Cross and the Red Crescent Movement*, Haug, H (ed), Bern, 1993, p555, How is the term ‘armed conflict’ defined in international humanitarian law?” Opinion Paper, ICRC, March 2008, Moir p. 39.

<sup>8</sup> International Criminal Tribunal for the Former Yugoslavia Appeals Chamber, *Prosecutor v Dusko Tadic*, Case No. IT-94-1-A, Judgment of the Appeal Chamber, 15 July 1999, 38 ILM, 1518 (1999).

<sup>9</sup> “How is the term ‘armed conflict’ defined in international humanitarian law?” Opinion Paper, ICRC, March 2008.

<sup>10</sup> Moir, L., *The Law of Internal Armed Conflict*, Cambridge University Press, 2002, p.43.

<sup>11</sup> Pre-Trial Chamber of the International Criminal Court, *the Prosecutor v Thomas Lubanga Dyilo*, the Situation in Democratic Republic of Congo, ICC-01/04-01/06-803, 26 January 2009.

substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.”<sup>12</sup> The ECJ further stated that a threat to a civilian’s life or person is inherent in a general situation of armed conflict.<sup>13</sup> In the case of the *Prosecutor v Ramush Haradinaj*, the Trial Chamber of the ICTY defines the intensity of the armed conflict by a number of indicative factors including “the number, duration and intensity of individual confrontations; the type of weapons and their military equipment used; the number and caliber of munitions fired; the number of persons and types of forces partaking in the fighting; the number of casualties, the extent of material destruction and the number of civilians fleeing conflict zones.”<sup>14</sup>

### **III. Definition of non-international armed conflict in Swedish law and practice**

According to Swedish legislation, the granting of protection to persons fleeing external or internal armed conflict or who, because of other severe conflicts in the country of origin, feels a well-founded fear of being subjected to serious abuses, is regulated in Article 4(2)(2) of the Swedish Aliens’ Law (*Utlänningslagen* 2005:716).

Governmental Decision (Reg 99-04) of February 2004, clarified the interpretation of the concept of “internal armed conflict”, which was re-confirmed by a ruling of the Migration Court of Appeal (MCA) in February 2007 (MIG 2007:9). According to this definition, internal armed conflict takes place between a state’s armed forces and other organized armed groups. Furthermore, the violence has to rise above the level of sporadic or isolated acts of violence. In addition, the armed group must exercise such territorial control as to enable them to carry out military operations (MIG 2007:9). In light of the definition provided by the Court, it is worth noting that it chose not to make use of the discretionary power given to it by the Governmental Decision, according to which, the application of the concept of internal armed conflict is flexible in the sense that a less restrictive interpretation can be applied in cases where the civilians are severely affected by the conflict.

The *travaux préparatoires*, case-law from the Government, as well as, case-law from the MCA confirm, that the interpretation of Article 4(2)(2) should take into account the extent to which civilians are affected by the conflict.<sup>15</sup> Article 4(2)(2), second line, regulates situations where “the conflict may be so intensive as to render return to the asylum-seekers’ place of origin illusory, while at the same time it is practically impossible to relocate to another part of the country.”<sup>16</sup> The threshold of the violence

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<sup>12</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12). Elgafaji (C-465/07) judgment of the Court, 17 February 2008, para 35.

<sup>13</sup> *Idem*, para. 34.

<sup>14</sup> International Criminal Tribunal on the Former Yugoslavia, Trial Chamber, *the Prosecutor v Ramush Haradinaj and Others*, case IT-04-84, 3 April 2008.

<sup>15</sup> Prop. 1996/97:25 s. 99, and Reg 99-04.

<sup>16</sup> Prop. 1996/97:25 s. 99.

required was laid down by Appeal Board (Utlänningsnämnden), and later confirmed by the Government, which concluded in favor of an internal armed conflict in the case of Chechnya with reference to the civilians being “not only subjected to violence and severe assaults from the Russian troops, but also from threats and assaults from the rebels.”

In line with the intent of the legislator, the Migration Court of Appeal has concluded that “severe conflicts” in the meaning of Article 4(2)(2), second line refers to “political instability in the country of origin where the power structures are such that the legal system does not impartially protect civilians’ fundamental human rights.” As concerns the parties to the conflict, “it may involve a conflict between different groups of the population, between a group of the population in one part of the country and the government, or between on the one hand the government or a civilian group in the country and on the other side another government, which however does not reach the level of an internal armed conflict.”<sup>17</sup>

According to the *travaux préparatoires*, the types of assaults referred to in the notion of “severe conflicts in Article 4(2)(2), second line include reprisals, harassment, arbitrary or systematic assaults against which the power structure in the country prevents individuals from receiving protection or seek justification”. Furthermore, these assaults involve *inter alia* “disproportional punishment, arbitrarily imprisonment, physical abuse, sexual assaults and severe discrimination.”<sup>18</sup>

As a consequence of the definition of an internal armed conflict laid down by the Court in MIG 2007:9, only persons fleeing situations falling under the scope of Article 1(1) of Additional Protocol II fall under the definition of a non-international armed conflict as provided by Article 4(2)(2), first line. The question currently pending before this Court, i.e whether territorial control is a prerequisite for the existence of an internal armed conflict, arises as a result of the assumption that an internal armed conflict only takes place between state and non-state actors. However, as indicated above, International Humanitarian Law does not require that the State is part of a non-international armed conflict.

#### **IV. The interpretation of the situation in Somalia according to Swedish practice**

In regard to the situation in Somalia, the Swedish Migration Board (SMB) issued a Guiding Decision in December 2007, whereby it concluded that the security situation in Mogadishu had deteriorated, exemplified by references to the conflicts between TFG and armed opposition groups in the northern parts of the city that had intensified. The SMB was at the time of the view that the intensity of the violence had risen above the level of sporadic acts of violence. However, it was stated that due to the ability of TFG and the Ethiopian forces to jointly control the opposition, the latter groups operating in Mogadishu did not possess such level of territorial control that is required according to the definition of an internal armed conflict stipulated by the MCA.

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<sup>17</sup> MCA 2007:9 and Prop. 2004/05:170 s. 274.

<sup>18</sup> Prop 2004/05:170 s. 177 f.

In October 2008, the SMB revised its assessment of the security situation in Mogadishu, emphasizing the continuous serious violence in Mogadishu and the implications for civilians. The SMB concluded that the lack of control on the part of TFG, as well as, the opposition forces, over its military forces, means that the TFG cannot be characterized as a party to the conflict according to the criteria laid down by MCA in MIG 2007:9.<sup>19</sup>

## **V. The applicability of the definition of non-international armed conflict to the current situation in Mogadishu**

It can be noted that although some 62,000 internally displaced persons have returned to Mogadishu in recent months, the reason for this cannot be exclusively seen in an improvement in the security situation in Mogadishu, but also the deterioration of the situation outside Mogadishu. The majority of the IDPs who returned to Mogadishu the last couple of months were recently displaced from Mogadishu and have come from the southern and central regions, which have faced a combination of renewed conflict and severe drought. Considering the fact that an estimated 1 Million persons have been displaced as a result of violence and armed confrontations in Mogadishu since January 2007, the current number of returnees only represent some 6% of those who fled. Furthermore, new large-scale displacement was reported in the same period of time. Approximately 20,000 persons were displaced either within Mogadishu or from Mogadishu, primarily because of the continuing insecurity affecting civilians. UNHCR is not recommending returns to Mogadishu at this stage as the security situation remains volatile and the conditions are not conducive for return.<sup>20</sup> This is further exacerbated by the total collapse of the infrastructure in the city. This position has recently been articulated by the Somalia Inter-Agency Standing Committee.<sup>21</sup>

The main armed groups currently operating in Southern and central Somalia are the Transitional Federal Government (TFG) troops, the Union of Islamic Courts (UIC) and the insurgency which consists of three groups: clan militia, predominantly from the major Hawiye sub-clans, a multi-clan group of former UIC combatants and the UIC splinter faction Al-Shabaab.<sup>22</sup> Internal differences within the Islamist movement have led to tension between the insurgent groups in central and southern Somalia which have resulted in armed confrontations.<sup>23</sup> Last year, new splinter groups emerged in central Somalia, e.g the Jalalaqsi. In addition, there is a mounting conflict with the African Union forces.<sup>24</sup> According to the Monitoring Group on Somalia pursuant to Security

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<sup>19</sup> Commentary to the security situation in Mogadishu and other parts of Somalia, 2 October 2008, the Legal Unit, SMB.

<sup>20</sup> UN News Service, *Over 40,000 displaced Somalis return to capital despite clashes, says UN agency*, 27 February 2009, <http://www.unhcr.org/refworld/docid/49aff7a51e.html>.

<sup>21</sup> Inter-Agency Standing Committee (IASC) Somalia, Policy Framework on Displacement from and Return to Mogadishu (March 2009).

<sup>22</sup> "Somalia: To Move Beyond the Failed State", Crisis Group, Africa Report No. 147, 23 December 2008, p.. 10-11.

<sup>23</sup> *Ibid.* p. 13

<sup>24</sup> Voice of America, 2 February 2009, Violence Kills At Least 18 in Mogadishu, <http://www.voanews.com/english/2009-02-02-voa49.cfm>, Shabelle.net, 3 February 2009, Islamists urge holy war on AU troops, <http://www.shabelle.net/News/ViewNews.asp?NewsID=4532>.

Council resolution 1811 (2008) “[a]rmed forces on all sides are characterized by weak command and control, informal hierarchies, situational loyalties, frequent schisms and shifting alliances. Furthermore, some groups/units are declared and formed with the purpose of obscuring affiliation and leadership. Nevertheless, it is possible to identify some key leaders who exercise sufficient authority to be held accountable for the actions of their forces.”<sup>25</sup>

The UK Asylum and Immigration Tribunal concluded in October 2008 in the case of *AM & AM* that indeed there is an internal armed conflict within the meaning of international humanitarian law and Art 15 (c) of the Qualification Directive throughout central and southern Somalia.<sup>26</sup> According to the Tribunal “an armed conflict can exist even when the warring parties do not include government forces.”<sup>27</sup> The Tribunal noted that “the armed conflict taking place in Mogadishu currently amounts to indiscriminate violence at such a level of severity as to place the great majority of the population at risk of a consistent pattern of indiscriminate violence.”<sup>28</sup> It was furthermore asserted that the nature of the violence in Mogadishu “has become increasingly indiscriminate in the sense that the different armed groups involved in the fighting routinely fail to distinguish between civilians and military targets and use disproportionate methods.”<sup>29</sup>

Others reputable sources, such as, Human Rights Watch, also continue to define the situation in Central and Southern Somalia as a non-international armed conflict in accordance with International Humanitarian Law and have given detailed accounts of indiscriminate violence against civilians, including through small arms, mortar, artillery and rocket attacks and the use of civilians as shields, attacks on humanitarian workers and assaults, rapes, killings and looting.<sup>30</sup> The Independent Expert on the Situation of Human Rights in Somalia reported in February 2009 that “[i]ndiscriminate violence and frequent attacks against civilians continue, including the use of heavy artillery, mortars and roadside bombs, targeted attacks, abduction and killings of aid workers and human rights defenders [...] smuggling and human trafficking; looting and extensive property destruction; as well as sexual and gender-based violence[.] All these violations and abuses of human rights and international humanitarian law are committed with total impunity.”<sup>31</sup>

The frequency of incidents and the number of casualties among the civilian population remain high. Amnesty International reported in March 2009 of direct, indiscriminate or

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<sup>25</sup> UN Security Council, *Report of the Monitoring Group on Somalia pursuant to Security Council resolution 1811 (2008)*, 10 December 2008. S/2008/769. para. 11. UNHCR Refworld, available at: <http://www.unhcr.org/refworld/docid/494900240.html>.

<sup>26</sup> *AM & AM CG [2008] UKAIT 0009.1*

<sup>27</sup> Para. 138.

<sup>28</sup> Para.6.

<sup>29</sup> Para 175.

<sup>30</sup> “So Much fear! War Crimes and Devastation of Somalia”, Human Rights Watch, December 2008 p. 31-85..

<sup>31</sup> “Technical assistance and capacity-building. Report of Shamsul Bari, independent expert appointed by the Human Rights Council on the situation of human rights in Somalia, A/HRC/10/85, 24 February 2009, summary and para. 39.

disproportionate attacks on civilians, which in one week resulted in an estimated 40 deaths and at least 241 injuries in Mogadishu.<sup>32</sup> This was also confirmed in the report of the Secretary-General on the situation in Somalia on 9 March 2009, where he states that both the number of indiscriminate attacks against civilians and targeted killings have increased sharply since the announcement of Ethiopia of the withdrawal of its forces from Somalia.<sup>33</sup>

## VI. Conclusions

International Humanitarian Law is not directly applicable to Swedish Courts when interpreting the term “internal armed conflict” in the national context. However, the status of International Humanitarian Law as *lex specialis* and the recognition that the Geneva Conventions of 1949 represent codified customary law recognized by most states in the world, makes it an authoritative source when interpreting the specific concept of “armed conflict”. Furthermore, reputable international Courts have interpreted the term in line with International Humanitarian Law, which further fortifies the status of International Humanitarian Law as an important source of law to guide the interpretation also in Sweden.

As Somalia is not a signatory to the Additional Protocols, but only to the Geneva Convention of 1949, the applicable definition of a non-international armed conflict is that of Common Article 3 of the Geneva Conventions according to International Humanitarian Law. There is therefore no requirement that government forces be one party to the conflict, nor that any party is effectively in control of the territory. The criteria required to determine whether there is a state of non-international armed conflict are that the groups parties to the conflict have a responsible command structure and a level of organization that enable the armed group to carry out its obligations under Article 3 and that a threshold of confrontation based on a minimum level of intensity including i.a number of civilian casualties, types of weapons and numbers of persons taking part in the conflict, and the level of destruction has been reached. Based on available sources from various organizations present in Somalia these criteria are fulfilled.

UNHCR Regional Office for the Baltic and Nordic countries

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<sup>32</sup> ”Somalia: Protection of Civilians should be a paramount concern for the UN Security Council, media briefing, Amnesty International, 16 January 2009, “Somalia: Civilians pay the price of intense fighting in Mogadishu”, Amnesty International, 4 March 2009, AFR 52/002/2009.

<sup>33</sup> ”Report of the Secretary-General on the situation in Somalia,” 9 March 2009, S/2009/132, para. 85.