Human Rights Obligations of Non-State Actors

Andrew Clapham

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Selected UN Human Rights Treaties

ANDREW CLAPHAM

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Abstract and Keywords

This chapter looks at the ‘case-law’ and practice of the UN treaty bodies and reveals the ways in which the human rights obligations of non-state actors have been addressed. It also discusses the UN Refugee Conventions. Topics include torture, racism, refugees and economic, social, and cultural rights.

Keywords: torture, racism, refugees, treaty bodies, economic rights, social rights, cultural rights

There is a temptation among international lawyers to see the question of the responsibility of the state with regard to private encroachments on human rights as a matter to be resolved through the rules on state responsibility.[1] This is understandable when one considers the state-centric nature of views about international law and the history of the protection of the individual under international law. As we have seen, the international regime for the protection of individuals evolved against the background of the diplomatic protection of nationals abroad.[2] This inter-state regime elaborated specific requirements for attributing acts to states and at the same time a substantive due diligence standard evolved with respect to state omissions. These rules were binding as rules of customary international law outside any particular treaty regime.[3] What a state is expected to do to protect foreigners on its territory under these customary standards of diplomatic protection may not be congruent with what a state is now expected to do under human rights treaty obligations with regard to everyone within its jurisdiction. Indeed, according to John Dugard, the International Law Commission's

Special Rapporteur on diplomatic protection: ‘Contemporary international human rights law accords to nationals and aliens the same protection, which far exceeds the international minimum standard of treatment for aliens set by Western Powers in an earlier era.’[4] This higher level of protection will have effects on the standard of due diligence required of states regarding human rights protection from non-state actors. In other words, human rights treaty law contains a higher level of protection than the standards developed in the context of the protection of aliens abroad in the nineteenth and twentieth centuries. Furthermore, even the rules for attribution of acts to the state may be different in the context of human rights treaties, as the aim of the treaty is the protection of the individual, rather than a mutual arrangement for **(p. 318)** resolving inter-state obligations concerning obligations owed to each other's nationals abroad. In short, I would suggest that human rights law has developed a set of state obligations that cannot be understood by the application of the primary rules of diplomatic protection of foreigners and the secondary rules of state responsibility.[5]

In fact, the history of Article 55 of the ILC's Articles on State Responsibility highlights the specific example that human rights treaties may diverge from the general rules set out in the Articles.[6] Furthermore, it is necessary not only to consider the specific human rights treaty to see if it contains better protection than the general rules of diplomatic protection and state responsibility, but we also have to examine specific human rights to gauge the extent of the obligation to protect the beneficiaries of the treaty from non-state actors. This chapter will provide a truncated overview of the contribution of some of the UN bodies charged with monitoring respect for such treaties.[7] (Full scale examination would require a whole book.) The texts produced by the these bodies mostly concentrate on the treaty obligations of states to protect the beneficiaries of human rights from infringements of their rights by non-state actors. These duties are variously referred to as responsibilities for ‘omissions’, ‘positive obligations’, ‘duties to protect’, and ‘duties of due diligence’.[8] This overview seeks to give a flavour of how **(p. 319)** the UN treaty bodies have managed to develop simultaneously the primary obligations of states to protect individuals from infringements by non-state actors, and to give some guidance as to what is expected from non-state actors in the context of these different treaties.

8.1 INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

The Racial Discrimination Convention highlights the concern that international law might demand that states regulate private behaviour and that this very regulation could in turn impinge on established private freedoms. On ratification of the treaty, the United States formulated a reservation which foresees a clash between the demand that governments regulate private conduct and the freedom of individuals in the private sphere.[9]

The wording of the treaty is confusing. Article 1 includes a reference to discrimination ‘in the political, economic, social, cultural or any other field of public life’, but Article 2(d) demands that ‘Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization’. There is now, however, little doubt that the state has a duty to ensure that non-state actors in the private sector do not engage in direct or indirect discrimination. This interpretation is illustrated by a complaint against Denmark, brought under the optional complaints procedure established by Article 14. The Committee considered the scope of the Convention with regard to a complaint by Ziad Ben Ahmed Habassi, a Moroccan, who was refused a bank loan. The Committee concluded:

> In the present case the author was refused a loan by a Danish bank on the sole ground of his non Danish nationality and was told that the nationality requirement was motivated **(p. 320)** by the need to ensure that the loan was repaid. In the opinion of the Committee, however, nationality is not the most appropriate requisite when investigating a person's will or capacity to reimburse a loan. The applicant's permanent residence or the place where his employment, property or family ties are to be found may be more relevant in this context. A citizen may move abroad or have all his property in another country and thus evade all attempts to enforce a claim of repayment. Accordingly, the Committee finds that, on the basis of article 2, paragraph (d), of the Convention, it is appropriate to initiate a proper investigation into the real reasons behind the bank's loan policy vis-à-vis foreign residents, in order to ascertain whether or not criteria involving racial discrimination, within the meaning of article 1 of the Convention, are being applied.[10]

The Danish authorities had been informed of the refusal, and were found to have failed to investigate properly the alleged discrimination by the non-state actor. The Committee found that Denmark had violated the Convention. The complaint is particularly interesting as it illustrates that, not only does the Convention extend to the private sector, but that the discrimination obligations for the non-state actor also extend to indirect discrimination. The bank did not discriminate on grounds of race as such; their policy related to nationality. Nevertheless, the complaint demanded that the bank and the authorities examine the indirect effect of the policy to ascertain whether there was racial discrimination. The complaint admits that the policy might be justified, but that it was for the private body and the public authorities to properly ensure that there were no unintended effects that would amount to racial discrimination. The communication highlighted these points:

> 3.1 Counsel claims that the facts stated above amount to violations of article 2, paragraph 1 (d), and article 6 of the Convention, according to which alleged cases of discrimination have to be investigated thoroughly by the national authorities. In the present case neither the police department of Skive nor the State Prosecutor examined whether the bank's loan policy constituted indirect discrimination on the basis of national origin and race. In particular, they should have examined the following issues: first, to what extent persons applying for loans were requested to show their passports; second, to what extent Sparbank Vest granted loans to non-Danish citizens; third, to what extent Sparbank Vest granted loans to Danish citizens living abroad.
>
> 3.2 Counsel further claims that in cases such as the one under consideration there might be a reasonable justification for permanent residence. However, if loans were actually granted to Danish citizens who did not have their permanent residence in Denmark, the criterion of citizenship would in fact constitute racial discrimination, in accordance with article 1, subparagraph 1, of the Convention. It would be especially relevant for the police to investigate whether an intentional or an unintentional act of discrimination in violation of the Convention had taken place.

(p. 321) The failure of the authorities to follow up the complaints made to them led to a finding of a violation of the Convention for action taken in the private sphere by a non-state actor.[11]

The Convention is quite specific in demanding that states parties prohibit racial discrimination in all its forms and guarantee a right of access to 'transport, hotels, restaurants, cafés, theatres and parks'.[12] In addition, there is an explicit obligation in Article 5(b) to guarantee: 'The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.'

The oblique and contradictory mention of 'public life' in Article 1 of the Convention has been the subject of academic commentary in the past,[13] but the above-mentioned opinion regarding the bank in Denmark and the Committee's General Recommendation 20 (see below) make it clear that states have obligations to deal with racism and racial discrimination perpetrated by non-state actors in the public and private spheres. The obligation therefore covers all forms of employment, housing, commercial, and financial arrangements. Because the arrangements made by private institutions could contribute to racism, or have effects which disadvantage racial groups, governments are required to introduce legislation to ensure that private individuals and institutions avoid all forms of racial discrimination. If they fail to introduce effective methods for investigation and enforcement mechanisms, they risk being found in violation of the Convention.

General Recommendation 20, adopted in 1996, states:

> The rights and freedoms referred to in article 5 of the Convention and any similar rights shall be protected by a State party. Such protection may be achieved in different ways, be it by the use of public institutions or through the activities of private institutions. In any case, it is the obligation of the State party concerned to ensure the effective implementation of the Convention and to report thereon under article 9 of the Convention. To the extent that private institutions influence the exercise of rights or the availability of **(p. 322)** opportunities, the State party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination.[14]

More recently, General Recommendation 30 on the rights of non-citizens offers particular examples of non-state actors that states should control. States are recommended to: 'Take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of "non-citizen" population

groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large.'[15] Furthermore, states should: 'Ensure the right of non-citizens, without discrimination based on race, colour, descent, and national or ethnic origin, to have access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks.'[16]

8.2 CONVENTION ON THE RIGHTS OF THE CHILD

The UN General Assembly's 1959 Declaration of the Rights of the Child called 'upon parents, upon men and women as individuals, and upon voluntary organizations, local authorities and national Governments to recognize these rights and strive for their observance by legislative and other measures progressively taken in accordance with the [principles set out in the Declaration]'.[17] Thirty years later, the Convention on the Rights of the Child included a specific reference to the need for certain non-state actors to respect the principle of decision-making in accordance with the best interests of the child. Article 3(1) states: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' The Committee on the Rights of the Child has held discussions on the role of the private sector, and in its General Comment on implementation, the Committee speaks of 'indirect obligations' for non-state actors under the Convention: 'The Committee emphasizes that States parties to the Convention have a legal obligation to respect and ensure the rights of children as stipulated in the Convention, which includes the obligation to **(p. 323)** ensure that non-State service providers operate in accordance with its provisions, thus creating indirect obligations on such actors.'[18] The Committee is very clear that, in the context of privatization, states cannot diminish their obligation to ensure the full recognition of all Convention rights for all children within the jurisdiction.[19] The Committee has therefore proposed: 'that there should be a permanent monitoring mechanism or process aimed at ensuring that all State and non-State service providers respect the Convention'.[20]

The Committee is demanding here that states ensure respect for the Convention by non-state actors. But the Committee has gone further and directly addressed non-state actors and detailed the sorts of steps it expects non-state actors to take in the context of respect for children's human rights. This rather unusual step from a UN Human Rights Treaty Body is excerpted here in its entirety:

Recommendations to non-State service providers

16. The Committee calls on all non-State service providers to respect the principles and provisions of the Convention on the Rights of the Child. It further recommends that all non-State service providers take into account the provisions of the Convention when conceptualizing, implementing and evaluating their programmes, including when subcontracting other non-State service providers, in particular the four general principles set out in the provisions concerning non-discrimination (art. 2), the best interests of the child (art. 3), the right to life, survival and development (art. 6), and the right of the child to express his or her views freely and have those views be given due weight in accordance with the age and maturity of the child (art. 12).

17. To that end, the Committee encourages non-State service providers to ensure that service provision is carried out in accordance with international standards, especially those of the Convention. It further encourages non-State service providers to develop self-regulation mechanisms which would include a system of checks and balances. To that end, the Committee recommends that, when developing self-regulation mechanisms, the following criteria be included in the process:

(i) The adoption of a code of ethics, or similar document, which should reflect the principles of the Convention and which should be developed jointly by the various stakeholders and in which the four general principles of the Convention should figure prominently;
(ii) The establishment of a system for monitoring the implementation of such a code, if possible by independent experts, as well as the development of a system of transparent reporting;
(iii) The development of indicators/benchmarks as a prerequisite for measuring progress and establishing accountability;
(iv) The inclusion of a system enabling the various partners to challenge each other regarding their respective performance in implementing the code;

- **(p. 324)**

(v) The development of an effective complaints mechanism with a view to rendering self-regulation more accountable, including to beneficiaries, particularly in the light of the general principle that provides for the right of the child to express his or her views freely and have those views be given due weight in accordance with the age and maturity of the child (art. 12).

18. Furthermore, the Committee encourages non-State service providers, particularly for profit service providers, as well as the media, to engage in a continuing process of dialogue and consultation with the communities they serve and to create alliances and partnerships with the various stakeholders and beneficiaries in order to enhance transparency and involve community groups in decision-making processes and, where appropriate, in service provision itself. Service providers should collaborate with communities, particularly in remote areas, or with communities composed of minority groups, in order to ensure that services are provided in compliance with the Convention, and in particular in a manner that is culturally appropriate and in which availability, accessibility and quality are guaranteed for all.[21]

This blueprint for non-state actor behaviour to ensure respect for the human rights in the Convention could well be adapted for use in other contexts.

8.3 INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The Committee on Economic, Social and Cultural Rights has focused on the impact of non-state actors in a series of General Comments. In the context of gender equality, the Committee is clear that this obligation extends to the private sphere and that states have an obligation to protect women from non-state actor discrimination. According to General Comment 16, states' obligations include ‘the adoption of legislation to eliminate discrimination and to prevent third parties from interfering directly or indirectly with the enjoyment of this right’.[22] The introduction of legislation is not, however, sufficient. States are obligated to monitor non-state actor behaviour: ‘States parties have an obligation to monitor and regulate the conduct of non-state actors to ensure that they do not violate the equal right of men and

women to enjoy economic, social and cultural rights. This obligation applies, for example, in cases where public services have been partially or fully privatized.'[23]

(p. 325) With regard to the right to food, the Committee stated:

> Violations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States. These include: the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to food; denial of access to food to particular individuals or groups, whether the discrimination is based on legislation or is proactive; the prevention of access to humanitarian food aid in internal conflicts or other emergency situations; adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to the right to food; and failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others, or the failure of a State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations.[24]

The Committee here suggests that non-state actors are capable of 'violating the right to food'. It refers to the 'responsibilities' of non-state actors and then concentrates on the steps that states must take to ensure that non-state actors are prevented from committing such violations:

> While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society—individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the private business sector—have responsibilities in the realization of the right to adequate food. The State should provide an environment that facilitates implementation of these responsibilities. The private business sector—national and transnational—should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society[25]

A similar approach has been taken with regard to the right to water, with the Committee focusing on the steps that states have to take to protect the right to water from interference by non-state actors in this sector:

> 23. The obligation to *protect* requires States parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems.
>
> 24. Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant and this general comment, which **(p. 326)** includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.[26]

The right to health operates in a sector where the role of non-state actors can hardly be ignored. The Committee's General Comment on ‘the right to the highest attainable standard of health’ clarifies the nature and the content of such a right. The Comment explains that the reference in Article 12.1 to ‘the highest attainable standard of physical and mental health’ is not confined to the right to health care: ‘On the contrary, the drafting history and the express wording of article 12.2 acknowledge that the right to health embraces a wide range of socioeconomic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.’[27]

The General Comment applies the Committee's approach to the duty to ‘protect’ in the context of non-state actor interferences with the right to health:

> Obligations to *protect* include, *inter alia*, the duties of States to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties; to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct. States are also obliged to ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care and family-planning; to prevent third parties from coercing women to undergo traditional practices, e.g. female genital mutilation; and to take measures to protect all vulnerable or marginalized groups of society, in particular women, children, adolescents and older persons, in the light of gender-based expressions of violence. States should also ensure that third parties do not limit people's access to health-related information and services.[28]

The General Comment also addresses itself directly to non-state actors, setting out the *responsibilities* of non-state actors with regard to the right to health:

> While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society—individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector—have responsibilities regarding the realization of the right to health. State parties should therefore provide an environment which facilitates the discharge of these responsibilities.

(p. 327) In a recent book, Nicola Jägers has taken the right to health as elaborated by the Committee and sought to determine the responsibilities of corporations with regard to the realization of this right. She follows the approach of the Committee and breaks the rights down into the familiar separate obligations to respect, protect, and fulfil the right. The following paragraphs contain her conclusions:[29]

> For a corporation the duty to respect the right to health may require that the corporation abstains from operations that may cause environmental problems that are detrimental to the health of employees and the people residing on the land where the corporation operates. Moreover where corporations knowingly market unhealthy products, a violation of the obligation to respect the right to health will occur. An example of the latter is the aggressive marketing of powdered milk by multinationals in developing States....
>
> For corporations the duty to protect the right to health will come into play especially with regard to the 'underlying determinants' of the right to health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment. The duty to protect may require a corporation to adopt guidelines in order to ensure that the activities of business partners will not lead to violations of other individuals' right to health. For example, a corporation should ensure that their subcontractors promote healthy working conditions....
>
> It is conceivable that the obligation to fulfil comes into play when a corporation operates in a remote part where the state is not capable of providing for health facilities. In such a case a corporation may be under the obligation to fulfil the right of its employees to health by providing for health care services and hospitals.

The evolving understanding of the obligations of corporations was discussed in some detail in Chapter 6. The present discussion illustrates how the work of the human rights treaty bodies is catalytic to the thinking on what human rights obligations corporations should bear. The answer lies not so much in the wording of the treaty, but rather in a sophisticated understanding of the context. As Jägers illustrates, the responsibilities of corporations may depend on the role they have assumed, as well as their capacity to bear the burden in question.

The Committee has not confined its attention to the corporate sector. It has been careful to draw attention to *obligations* of international organizations, including the World Bank and the IMF. Remaining in the context of the right to health, General Comment 14 includes a part entitled 'Obligations

of Actors Other Than States Parties'. The relevant paragraphs set out the Committee's approach to UN agencies,[30] the International Committee of the Red Cross, and non-governmental organizations. In the light of the examination of the international financial institutions in Chapter 4, one might highlight the following sentence: 'In particular, the international financial institutions, notably the World Bank and the International Monetary Fund, should pay greater attention to the **(p. 328)** protection of the right to health in their lending policies, credit agreements and structural adjustment programmes.'[31] Similar injunctions exist under the heading 'Obligations of Actors Other Than States Parties' in the context of the right to education,[32] and the right to water.[33]

8.4 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The Human Rights Committee has recently articulated its appreciation of the scope of the Covenant with regard to non-state actors. In General Comment 31, the Committee states:

> … the positive obligations on States parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights insofar as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States parties of those rights, as a result of States parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or

> degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.[34]

The Committee has, at the same time, taken a very restrictive approach to the actual responsibilities of non-state actors under the Covenant. In contrast to the other treaty bodies examined above, the Human Rights Committee goes out of its way to suggest that the Covenant does not create direct international obligations for non-state actors: 'The article 2, paragraph 1, obligations are binding on States parties and do not, as such, have direct horizontal effect as a matter of **(p. 329)** international law.'[35] The careful phrasing suggests that the Committee has left open the suggestion that international human rights obligations may be binding on non-state actors under general international law. It is just that the treaty itself does not generate these rights and obligations; the treaty, as such, merely generates obligations for the states parties.[36] What is clear, however, is that these obligations extend into the private sphere.[37]

Various General Comments have, over the years, tackled the scope of state obligations with regard to protection of individuals from non-state actors. The following discussion will only touch on a few. With respect to the right to life, the Committee referred to a number of private actions threatening human rights and the state's duty to deter such activity: the duty to prevent propaganda for war and incitement to violence (referring to the connection with Article 20); the duty to prevent and investigate disappearances; and the desirability of taking all possible measures to reduce infant mortality and increase life expectancy through the adoption of measures which eliminate malnutrition and epidemics.[38] The Committee has also mentioned in passing that the state should take measures to prevent and punish deprivation of life by criminal acts.[39]

With regard to the prohibition on torture, or cruel, inhuman, or degrading treatment or punishment, the Committee's General Comment 20 states that the Covenant covers such behaviour whether it is inflicted by a state or non-state actor. The Committee explains that it is the 'duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity'.[40] The General Comment also extends the prohibition to corporal punishment in terms which suggest that the prohibition spans the

public/private divide.[41] In addition, the Comment also demands that states should indicate the provisions of their criminal law which penalize breaches of the prohibition and specify the applicable penalties for such acts 'whether committed by public officials or other persons **(p. 330)** acting on behalf of the State, or by private persons'.[42] The references in this General Comment to 'private capacity' and 'private persons' leave no doubt that Article 7 of the Covenant covers acts committed by non-state actors.

The 1982 General Comment on Article 10 (Humane treatment of persons deprived of their liberty) referred to 'all institutions where persons are lawfully held against their will, not only in prisons but also, for example, hospitals, detention camps or correction institutions'.[43] The 1992 General Comment on the same subject was deliberately designed to cover private institutions.[44] The wording 'under their jurisdiction' was specifically rejected by the Chairman as it would have excluded private institutions. 'Within their jurisdiction' was held to cover those detained by non-state actors in the private sphere.[45] In a complaint concerning treatment in a privately run prison in Australia, the Committee explicitly took up the scope of the state's obligations towards private prisons:

> Prior to considering the admissibility of the individual claims raised, the Committee must consider whether the State party's obligations under the Covenant apply to privately-run detention facilities, as is the case in this communication, as well as State-run facilities. While this is not an argument put forward by the State party, the Committee must consider ex officio whether the communication concerns a State party to the Covenant in the meaning of article 1 of the Optional Protocol. It recalls its jurisprudence in which it indicated that a State party 'is not relieved of its obligations under the Covenant when some of its functions are delegated to other autonomous organs.' The Committee considers that the contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons does not absolve a State party of its obligations under the Covenant, notably under articles 7 and 10 which are invoked in the instant communication. Consequently, the Committee finds that the State party is accountable under the Covenant and the Optional Protocol of the treatment of inmates in the Port Philip Prison facility run by Group 4.[46]

The Committee went on to treat the complaint as if it had been brought against state agents and found that the complaint concerning the holding of the two detainees 'for an hour in a triangular "cage"' justified a finding of a violation of Article 10(1).[47]

(p. 331) With regard to freedom of expression, the Committee has simply called on states to provide further information as to steps they are taking to protect freedom of expression in the context of private mass media.[48]

Turning to the right to privacy the Committee's view is that 'this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons'.[49] Concerning the rights of children, the Committee has stated that every possible measure should be taken to prevent children 'from being exploited by means of forced labour or prostitution, or by their use in the illicit trafficking of narcotic drugs, or by other means'.[50] Furthermore: 'In cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the State should intervene to restrict parental authority and the child may be separated from his family when circumstances so require.'[51]

With regard to non-discrimination, the Committee has asked states to provide information on discrimination by non-state actors:

> When reporting on Articles 2(1), 3 and 36 of the Covenant, States Parties usually cite provisions of their constitution or equal opportunity laws with respect to equality of persons. While such information is of course useful, the Committee wishes to know if there remain any problems of discrimination in fact, which may be practised either by public authorities, by the community, or by private persons or bodies. The Committee wishes to be informed about legal provisions and administrative measures directed at diminishing or eliminating such discrimination.[52]

(p. 332) With regard to private discrimination, the Committee has had occasion to express its concern with regard to Switzerland that 'legislation protecting individuals against discrimination in the private sector does not exist in all parts of the State party's territory. The State party should ensure that legislation exists throughout its territory to protect individuals against discrimination in the private field, pursuant to articles 2 and 3 of the Covenant'.[53]

The Committee has also examined in some detail the need to protect individuals from non-state actors in the context of the protection of minority rights:

> Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a 'right' and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.[54]

The Committee has even focused on the need to prevent non-state actors from interfering with freedom of movement under the Covenant. The Committee drew particular attention to the need for states to tackle the actions of relatives who might prevent women from exercising this right:

> The State party must ensure that the rights guaranteed in article 12 are protected not only from public but also from private interference. In the case of women, this obligation to protect is particularly pertinent. For example, it is incompatible with article 12, paragraph 1, that the right of a woman to move freely and to choose her residence be made subject, by law or practice, to the decision of another person, including a relative.[55]

(p. 333) 8.5 CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The Committee on the Elimination of Discrimination against Women has been at the forefront of efforts to develop international human rights law to make it clear that states have positive duties to protect individuals from the violent acts of other individuals or groups. In its General Recommendation 19, the Committee addressed the issue of 'Violence against women'. Paragraph 9 of that General Recommendation builds on the concept of due diligence under 'general international law' to protect individuals from non-state actors, and makes it clear that the state has an obligation to prevent and punish private discrimination:

> It is emphasized, however, that discrimination under the Convention is not restricted to action by or on behalf of

> Governments (see articles 2 (e), 2 (f) and 5). For example, under article 2 (e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.[56]

The Committee recommends that: 'states parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act.'[57] The Recommendation tackles a series of obligations under the Convention which are particularly relevant to the behaviour of non-state actors. These include sexual harassment at work,[58] and family violence.[59] Subsequent Recommendations have referred to the obligations of states to tackle 'violations' by non-state actors with regard to access to health care,[60] and that in this sector states have positive obligations even where health care is provided by **(p. 334)** the private sector.[61] Furthermore, the Committee is clear that discrimination is prohibited in the public and private spheres, and this requires legislation which covers discrimination by state and non-state actors.[62]

This interpretation of women's human rights has been reflected outside the context of states parties' obligations under the treaty. For evidence of developments in the current state of general international law in this area, one might refer to the UN Declaration on Violence against Women:

> States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should: ...(c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;[63]

The references in these two texts to *due diligence* have been used to develop a set of positive obligations for states with regard to violence by non-state actors.[64] The due diligence notion has even been applied in non-

governmental monitoring to the expectations on a non-state actor, the international peace-keeping force in Kosovo (UNMIK).[65]

The influence of demands for women's rights has permeated the attitude of all monitoring bodies with regard to the state/non-state actor divide. One area which has been rapidly evolving is the scope of refugee protection for women fleeing non-state actor violence.

(p. 335) 8.6 REFUGEE LAW

Under the 1951 Convention relating to the Status of Refugees, the basic definition of a refugee covers those who: ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’[66]

Refugee law is seen to require a degree of individual persecution. For this reason, women who flee internal armed conflict for fear of being raped have often found themselves unprotected by refugee law. However, the development of temporary regimes for the duration of the armed conflict has ameliorated the harshness of a strict interpretation of ‘refugee’ in this context. The state of persecution may be found to be unwilling or unable to protect the women concerned. Although there is a divergence of state practice, the better view is that the Refugee Convention is about protection and not about accountability or state responsibility in the country of origin.[67] Nowhere is this more important than with regard to obligations to protect individuals from the conduct of non-state actors. The UN High Commissioner for Refugees explains the obligations of receiving states to non-state agents of persecution in the following terms:

> (g) Agents of persecution
>
> 65. Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive

> acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.[68]

(p. 336) This formulation builds in a requirement of state inaction in the country of persecution. One could question whether ‘persecution’ really requires such an additional passive role by the state where the persecution took place.[69] The UN High Commissioner for Refugees' Guidance may be increasingly accepted in the application of the Refugee Convention, but its requirement that there be a corresponding failure by the authorities is not coherent with the developing notion of persecution in international criminal law.[70] In that context, the international crime of persecution as a crime against humanity can attach to non-state actors (irrespective of the capacity of the state to protect the victims). If the perpetrator can be considered as a persecutor in international criminal law, why should the victim of persecution have to show a failure of a state to fall within the protected category of a victim of persecution for purposes of refugee law and the protection that offers? The answer is, of course, that states wish to limit who can claim to be a victim of persecution for the purposes of granting the individual the protection of refugee status. The logic is that states should step in when individuals have lost the ‘usual benefits of nationality’, in that they are not receiving the necessary level of protection in the state where the persecution is taking place.[71] The problem with this approach, however, is that it inevitably forces the authorities of the receiving state to make judgments about the capacities and good faith of the state of origin, and this is at variance with the need to prioritize protection over responsibility and accountability. Karen Landgren, a former Chief of Standards and Legal Advice at UNHCR, makes the point:

> Refugee protection is not concerned with attributing international responsibility for persecution. It implies no prospect of redress or reparation, and refugee law does not engage those responsible for the wrong. This would be at odds with the sensitivity to **(p. 337)** national sovereignty which prevailed at its drafting, and with its emphasis on the social and humanitarian nature of the problem of refugees…. The confusion between the individual's need for protection, and the concept of attributability as it relates to state responsibility, is unfortunate, and deprives of international protection persons unable to obtain protection in their own country. There is a

> great deal of supportive case-law and analysis, however, which needs to be disseminated and reinforced.[72]

The UNHCR Guidance quoted above is today more than a guideline. According to the UNHCR legal adviser:

> An essential element necessary to qualify for refugee status is the absence of effective national protection, irrespective of the reasons for it. In such cases, it needs to be demonstrated that the State was either unwilling or unable to provide effective protection against persecutory acts stemming from non-State agents. Such an interpretation is in line with the letter, object and purpose of the 1951 Refugee Convention. In short it is an appropriate interpretation of its Article 1.[73]

The issue of non-state actor persecution has arisen before the English courts in three contexts: women fleeing private violence, flight from a war-torn or collapsed state, and minorities fleeing racist violence. The interpretation of the Refugee Convention by the House of Lords may help to put the issue in context and highlight the dilemmas faced by national authorities with regard to those fleeing non-state actor persecution.

From the point of view of a woman fleeing threats to her safety and life, it makes no difference whether the violence emanates from the State security apparatus or from her family. To generate a state/non-state actor divide around this issue would be unfair and would itself be discriminatory against women, as they may be more likely to be the victims of private violence than are men. In situations of armed conflict, not only are societies fragmented, but people are set against each other in a cycle of violence, where civilians and women in particular may be primary targets. Furthermore, there has been a tendency in some jurisdictions to focus on the way women are seen rather than the dangers they face.[74]

(p. 338) In 1999, the House of Lords ruled in the *Islam* case that it would be contrary to the United Kingdom's international obligations under the Refugee Convention for Mrs Islam to be required to leave the United Kingdom.
Mrs Islam had fled her violent husband in Pakistan. She was a teacher in Pakistan and had intervened to break up a fight in the school where she was teaching. The boys involved were from rival political factions and one faction made allegations of infidelity against her. The allegations were made to her husband who was a supporter of the same faction. He assaulted her and she had to go to hospital on two occasions. She left her husband and tried to stay with her brother. However her brother was threatened and she eventually

sought asylum in the United Kingdom. The case was heard together with another appeal and set an important precedent. The judges who heard the case were at pains to draw a line between women fleeing domestic violence, and women who should qualify as refugees under the 1951 Convention Relating to the Status of Refugees. The speech of Lord Steyn contains a neat explanation of how they saw the dilemma:

> Notwithstanding a constitutional guarantee against discrimination on the grounds of sex a woman's place in society in Pakistan is low. Domestic abuse of women and violence towards women is prevalent in Pakistan. That is also true of many other countries and by itself it does not give rise to a claim to refugee status. The distinctive feature of this case is that in Pakistan women are unprotected by the state: discrimination against women in Pakistan is partly tolerated by the state and partly sanctioned by the state. Married women are subordinate to the will of their husbands. There is strong discrimination against married women, who have been forced to leave the matrimonial home or have simply decided to leave. Husbands and others frequently bring charges of adultery against such wives. Faced with such a charge the woman is in a perilous position. Similarly, a woman who makes an accusation of rape is at great risk. Even Pakistan statute law discriminate[s] against such women.[75]

The House of Lords judgment builds on Canadian, Australian, and US decisions and, although it is restricted to the facts in the relevant case, has opened the door for a feminization of the concept of persecution for reasons of membership of a particular social group. The speech of Lord Hoffman explained why this concept of persecution remains linked to a requirement to find the state of origin at fault. According to him, a situation where women could not be protected because marauding men are assaulting women would not qualify as persecution within the Convention: ‘The distinguishing feature of the present case is the evidence of **(p. 339)** institutionalised discrimination against women by the police, the courts and the legal system, the central organs of the State.’[76]

This teleological interpretation of the Convention was criticized by the Secretary of State for the Home Department (Jack Straw) who felt this went beyond the intentions of the drafters of the Convention.[77] The challenge of adapting the refugee regime to meet threats to individuals from non-state

actors has met with different responses in different jurisdictions and is still in a state of flux.[78]

It is becoming clear that effective protection demands that the interpretation of persecution as meaning direct persecution by the state, has given way to an interpretation that recognizes that people are fleeing life-threatening violence in situations where the state apparatus is unable or unwilling to protect the victim. This is relevant not only in the context of private violence against women but also in the context of all persons persecuted in civil wars or by racists.[79] Again, different jurisdictions have approached this question in different ways and a full discussion is beyond the scope of this book. What is important in the present context is the way in which refugee law has come to influence the application of human rights treaty law.

The House of Lords has more recently taken a restrictive approach to the scope of the European Convention on Human Rights in a case concerning a married **(p. 340)** Lithuanian couple. The husband and wife claimed that their human rights would be violated if they were returned to Lithuania. The husband was of Roma ethnic origin and the couple had been subjected to violence at the hands of the wife's brother and associates, due to the fact that the brother objected to his sister having married a man of Roma origin.[80] The issue of non-state actor persecution was dealt with as raising similar questions under refugee law and human rights law. The judgment recalled that, under the Refugee Convention, a degree of protection from non-state violence is granted where the home state is unable or unwilling to provide reasonable protection from the conduct of non-state actors. But the judgment pointedly remarked: ‘not all those party to the Refugee Convention recognise even the concept of persecution by non-state agents’.[81] The judgment suggests that the courts apply the approach developed under refugee law when faced with complaints alleging inhuman and degrading treatment under Article 3 of the European Convention on Human Rights. In this way, the judgment noted that: ‘in the great majority of cases an article 3 claim to avoid expulsion will add little if anything to an asylum claim’.[82]

This tidy result bears closer inspection. The couple were denied their claim that they were at risk of human rights violations because they had failed to show that the state of Lithuania would fail to provide them with sufficient protection. It was not enough to show that they were at serious risk of harm from a non-state actor. The reasoning relies on a strict state/non-state actor divide which may make sense in the context of transfer from one Council of

Europe member state to another, but breaks down outside this context. The judgment states that:

> In cases where the risk 'emanates from intentionally inflicted acts of the public authorities in the receiving country' (the language of para 49 of *D v United Kingdom* 24 EHRR 423, 447) one can use those terms interchangeably: the intentionally inflicted acts would without more constitute the proscribed treatment. Where, however, the risk emanates from non-state bodies, that is not so: any harm inflicted by non-state agents will not constitute article 3 ill-treatment unless in addition the state has failed to provide reasonable protection.[83]

The conceptual point is reiterated later: 'Non-state agents do not subject people to torture or the other proscribed forms of ill-treatment, however violently they treat them: what, however, would transform such violent treatment into article 3 ill-treatment would be the state's failure to provide reasonable protection against it.'[84] But this is not really the approach of human rights treaty bodies (even if it is a dominant theory in refugee law). Imagine a deportation to a country which is not a party to a human rights treaty; it would not be fair to say that the factor on **(p. 341)** which the legality of the deportation depends is whether the receiving state will fulfil positive obligations contained in Article 3. First, it would be odd to judge the situation in terms of international treaty obligations to which the receiving state is not subject, and second, the state that has to fulfil Article 3 obligations is the sending state that is party to the human rights treaty. The behaviour of the receiving state is relevant in assessing the need to protect the individual in the sending state; assessing the receiving state's compliance with international positive obligations is a near impossible task. In many cases, the receiving state will not allow for complaints to an international treaty body, and knowledge of the scope of what protection can reasonably be expected in the receiving state under general international law will be guesswork. It would be difficult for the European Court of Human Rights to divine what are the positive obligations of a developing country under the African Charter of Human and Peoples' Rights. If the receiving state has ratified no relevant human rights treaty, its obligations fall to be determined under customary international law. What can reasonably be expected in terms of protecting an individual from criminal gangs, terrorists, or rebels will depend on the resources available to the state in question. The whole ethos of humanitarian protection argues against such a judgmental approach with regard to the receiving state. It is suggested that the only criterion under human rights treaty law is whether the person will be subject

to a substantial risk of harm from the non-state actor.[85] If there is such a risk, the human rights treaty obligations on the sending state should prevent such a state from sending individuals into harm's way.

(p. 342) 8.7 CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

This Convention defines torture in a way that demands a nexus to the state. Article 1 reads:

> (1) For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
> (2) This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

The first point to note is that the definition of torture in this treaty is not confined to state actors. A non-state actor inflicting torture at the instigation of, or with the consent or acquiescence of, a state actor falls within the scope of the Convention. Moreover, the state will have all the obligations under the Convention with regard to preventing, prohibiting, and punishing such acts.[86]

The question of whether a non-state actor had the requisite *de jure* or *de facto* official capacity to be prosecuted for torture under the Convention arose in the *Zardad* case, the English criminal trial of Faryadi Zardad, chief commander of Hezb-I-Isla, concerning allegations of torture in Afghanistan. A preliminary question before the judge was whether at the time of the alleged torture, Zardad could be considered to have been acting in an

official capacity for the purposes of the Convention and the implementing legislation. The judge found that there was insufficient evidence to show that Zardad was a *de jure* public official; Zardad was actually found to be leading campaigns against the government. With reference to the claim that Zardad was a *de facto* official, the judge decided that there was enough evidence for this issue to be eventually determined by the jury, but he made the following interesting comments in coming to that decision:

> It seems to me that what needs to be looked at is the reality of any particular situation. Is there sufficient evidence that Hezb-I-Islami had a sufficient degree of organisation, a sufficient degree of actual control of an area and that it exercised the type of functions **(p. 343)** which a government or governmental organisation would exercise? It seems to me that I have to take care not to impose Western ideas of an appropriate structure for government, but to be sensitive to the fact that in countries such as Afghanistan different types of structure may exist, but which may legitimately come within the ambit of an authority which wields power sufficient to constitute an official body.[87]

Zardad was eventually found guilty of torture at the Old Bailey in London and sentenced to twenty years in prison. The case represents a concrete application of the international law of human rights to a non-state actor (here an anti-state actor). It may also have consequences for those seeking to claim protection from expulsion to countries where they fear torture from non-state actors.

In addition to the prohibition on torture and other inhuman and degrading treatment carried out in connection with officials, the Convention includes a prohibition against the transfer of individuals to other countries where they may face torture. Article 3 reads:

> (1) No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
> (2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The issue which has tested the scope of the Convention concerns protection from non-state actors in other countries, either where there is no state nexus (as the risk of torture comes from a non-state actor fighting the state rather than working with the approval of the state), or where there may be no obvious form of government.

The Committee Against Torture was faced early on with a claim concerning return to Peru, where the complainant feared torture at the hands of a non-state actor (the complainant had been abducted and raped by members of *Sendero Luminoso*). The Committee gave a restrictive reading to the protection offered by the Convention, holding: 'that the issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention'.[88] Critics of this approach have pointed to the fact that the complaint alleged that the rape had been reported to the authorities but that they 'did not show any interest in the matter';[89] it was therefore, according to McCorquodale and La Forgia, open to **(p. 344)** the Committee to see this as a case of state acquiescence. 'This approach would have required the Committee against Torture to decide whether the government of Peru had properly investigated the rape, how many rapes reported had not been investigated and whether non-State actors were able to rape due to lack of State action.'[90]

The Committee's General Comment has slightly clarified its approach. The Committee stated that the obligation in Article 3 'is confined in its application to cases where there are substantial grounds for believing that the author would be in danger of being subjected to torture as defined in article 1 of the Convention'.[91] With respect to the risk which engages the obligation, the Committee said that this should be 'personal and present',[92] to an extent that goes 'beyond mere theory or suspicion', but need not 'meet the test of being highly probable'.[93] The Committee also stressed the need for a state nexus: 'Pursuant to article 1, the criterion, mentioned in article 3, paragraph 2, of "a consistent pattern [of] gross, flagrant or mass violations of human rights" refers only to violations by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'

This approach of the Committee was further tested in an application brought by Mr Elmi against Australia, concerning a feared return to Somalia. The Committee was conscious of the fact that the case was seen as potentially

setting a precedent: ‘the independent expert of the Commission on Human Rights on the situation of human rights in Somalia has appealed in the author's case and made reference to it both in her report to the Commission on Human Rights and in oral statements, indicating that “[a] case currently pending in Australia concerning a forced return to Mogadishu of a Somali national is particularly alarming, due to the precedent it will create in returning individuals to areas undergoing active conflict” ’.[94]

The applicant alleged that, if returned to Somalia, he would be in danger of torture at the hands of armed factions. The Committee said that where, in the absence of a central government, armed factions are exercising *de facto* some of the functions normally exercised by a legitimate government, members of those factions can in this context be considered ‘public officials or other persons acting in an official capacity’. Part of their reasoning was based on the particular status of the clan leaders on the international stage. The Committee stated that:

> 5.5 In relation to Somalia, there is abundant evidence that the clans, at least since 1991, have, in certain regions, fulfilled the role, or exercised the semblance, of an **(p. 345)** authority that is comparable to government authority. These clans, in relation to their regions, have prescribed their own laws and law enforcement mechanisms and have provided their own education, health and taxation systems. The report of the independent expert of the Commission on Human Rights illustrates that States and international organizations have accepted that these activities are comparable to governmental authorities and that ‘[t]he international community is still negotiating with the warring factions, who ironically serve as the interlocutors of the Somali people with the outside world’.[95]

The Committee continued with an approach that highlights the governmental-like qualities of the clans rather than the need for protection and takes into account the UN Independent Expert's reports of gross human rights violations in the country (even in the absence of obvious state actors):

> 6.5 The Committee does not share the State party's view that the Convention is not applicable in the present case since, according to the State party, the acts of torture the author fears he would be subjected to in Somalia would not fall within the definition of torture set out in article 1 (i.e. pain or suffering inflicted by or at the instigation of or with the

consent or acquiescence of a public official or other person acting in an official capacity, in this instance for discriminatory purposes). The Committee notes that for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase ‘public officials or other persons acting in an official capacity’ contained in article 1.

6.6 The State party does not dispute the fact that gross, flagrant or mass violations of human rights have been committed in Somalia. Furthermore, the independent expert on the situation of human rights in Somalia, appointed by the Commission on Human Rights, described in her latest report[96] the severity of those violations, the situation of chaos prevailing in the country, the importance of clan identity and the vulnerability of small, unarmed clans such as the Shikal, the clan to which the author belongs.

6.7 The Committee further notes, on the basis of the information before it, that the area of Mogadishu where the Shikal mainly reside, and where the author is likely to reside if he ever reaches Mogadishu, is under the effective control of the Hawiye clan, which has established quasi-governmental institutions and provides a number of public services. Furthermore, reliable sources emphasize that there is no public or informal agreement of protection between the Hawiye and the Shikal clans and that the Shikal remain at the mercy of the armed factions.

(p. 346)

6.8 In addition to the above, the Committee considers that two factors support the author's case that he is particularly vulnerable to the kind of acts referred to in article 1 of the Convention. First, the State party has not denied the veracity

> of the author's claims that his family was particularly targeted in the past by the Hawiye clan, as a result of which his father and brother were executed, his sister raped and the rest of the family was forced to flee and constantly move from one part of the country to another in order to hide. Second, his case has received wide publicity and, therefore, if returned to Somalia the author could be accused of damaging the reputation of the Hawiye.
>
> 6.9 In the light of the above the Committee considers that substantial grounds exist for believing that the author would be in danger of being subjected to torture if returned to Somalia.

In sum, the Committee has been careful not to stretch the Convention beyond acts with a state nexus or where the direct perpetrators have a quasi-governmental function. The reticence of the Committee not to stray beyond these categories is explained by the history and wording of the Convention, which suggests a restrictive approach. Indeed, the *travaux préparatoires* were referred to by Australia to suggest that the *Elmi* case fell outside the Convention, as the Somali clans could not be accommodated in the concept of public authority as agreed at the time of the drafting.[97] The Committee's extension of the Convention's protection to people fleeing non-state actor violence in Somalia may nevertheless be seen as a crucial admission that non-state torture is covered by this Convention and, more generally, that non-state actor abuses can rise to the level of a 'consistent pattern of gross, flagrant or mass violations of human rights'. Note, however, that the Committee subsequently described the situation in the *Elmi* case as exceptional, and found that three years later the situation in Somalia had changed, so that a later complainant was not protected by the Convention.[98]

The restrictive wording of the Convention that demands a finding of official control or acquiescence is not mirrored in the regional human rights treaties. These treaties guarantee most rights, such as the right not to be tortured, without qualifications concerning the status of the perpetrator. It is to these regional Conventions that we now turn.

Notes:

(1) These rules are codified and developed in the International Law Commission's articles on responsibility of states for internationally wrongful acts, *Report of the ILC, 53rd Session*, adopted 10 August 2001, UN Doc.

A/56/10 (discussed further in Ch 6, at 6.7.1 above). The UN General Assembly took note of the articles, 'commended them to the attention of Governments', and annexed the articles GA Res. 56/83, 12 December 2001. For an explanation of the evolution of the Articles, see J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002).

(2) See C. F. Amerasinghe, *State Responsibility for Injuries to Aliens* (Oxford: Clarendon Press, 1967).

(3) For the background, see John Dugard, Special Rapporteur, ILC, First report on diplomatic protection, UN Doc. A/CN.4/506, 7 March 2000.

(4) Ibid, at para. 32.

(5) Cf R. Lawson, 'Out of Control. State Responsibility and Human Rights: Will the ILC's Definition of the "Act of State" meet the Challenges of the 21st Century?' in M. Castermans, F. van Hoof, and J. Smith (eds) *The Role of the Nation-State in the 21st Century* (The Hague: Kluwer, 1998) 91–116.

(6) Art. 55, entitled '*Lex specialis*', reads: 'These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.' The Commentary refers to the restrictive definition of the state in the Convention Against Torture and the wider rules for attribution that would probably follow from the rules in the Articles. (at para. 3 to the Commentary on Art. 55, Report of the ILC, GAOR Supp. No. 10), UN Doc. A/56/10, 358, fn 865. It is not being suggested that human rights treaties represent a 'strong' form of *lex specialis* and constitute self-contained regimes. Rather, in the expression of the Commentary, they may contain provisions, or have been interpreted, so that they differ from the scope of general obligations under the law of state responsibility. As the Commentary puts it, Art. 55 covers self-contained regimes as well as '"weaker" forms such as specific treaty provisions on a single point' (para. 5 to the Commentary on Art. 55).

(7) The Convention on the Prevention and Punishment of the Crime of Genocide is seen by many as a human rights treaty, it does not, however, have a comparable UN body to the treaty bodies examined here. See further W. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2000). The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

has entered into force but, at the time of writing, the monitoring body has only just begun its work: 'Report of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families', First session, 1–5 March 2004, GAOR Supp. No. 48, UN Doc. A/59/48. See further R. Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford: Clarendon Press, 1997).

(8) In national law, the terminology used to describe the requirements for the application of human rights law in the field of relations between non-state actors includes: *Drittwirkung*, horizontality, the state action requirement, and horizontal effect. Because national courts often interpret and apply the same human rights as those found in the international treaties, the terminology migrates from national to the international level and *vice versa.* I have referred to this elsewhere, with apologies to Jochen Frowein, as a 'dialectical development'. See A. Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993) at 270–271, 347. The situation in different national legal orders is dealt with in Ch 10 below.

(9) The reservation reads: '(2) That the Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of non-governmental activity. Individual privacy and freedom from governmental interference in private conduct, however, are also recognized as among the fundamental values which shape our free and democratic society. The United States understands that the identification of the rights protected under the Convention by reference in article 1 to fields of "public life" reflects a similar distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres of private conduct that are not. To the extent, however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of article 2, subparagraphs (1) (c) and (d) of article 2, article 3 and article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States.'

(10) Communication No. 10/1997: Denmark, 6 April 1999, UN Doc. CERD/C/54/D/10/1997, at para. 9.3.

(11) For a complaint concerning dismissal by a private employer on racist grounds, see *Yilmaz-Dogan v The Netherlands*, Opinion adopted on 10 August 1988 at the 36th Session of the Committee, GAOR 43rd Session,

Supp. No. 18, UN Doc. A/43/18, Report of the Committee on the Elimination of Racial Discrimination, annex iv, Communication 1/1984.

(12) Art. 5: 'In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights… (f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks.'

(13) It has been suggested that in conflicts between the reference to 'public life' in Art. 1(1) and the operative provisions of Art. 5, the latter should prevail. E. Schwelb, 'The International Convention on the Elimination of All Forms of Racial Discrimination' 15 *ICLQ* (1966) 996, at 1005–1006, see also T. Meron, 'The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination' 79 *AJIL* (1985) 283, at 293–295; K. Boyle and A. Baldaccini, 'A Critical Evaluation of International Human Rights Approaches to Racism' in S. Fredman (ed) *Discrimination and Human Rights, The Case of Racism* (Oxford: Oxford University Press, 2001) at 159: 'CERD practice has made it clear that these guarantees extend to employment in private enterprises, to housing provided by private owners, or admission to private clubs.'

(14) Recommendation 20, 48th Session (1996), at para. 5. The Recommendation is reproduced in 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies', UN Doc. HRI/GEN/1/Rev.7, 12 May 2004, at 211 (hereinafter document references for printed versions of Comments and Recommendations are to this 'UN Compilation'). Note also General Recommendation 14 on Art. 1, para. 1, 42nd Session (1993), which states in its para. 3: 'Article 1, paragraph 1, of the Convention also refers to the political, economic, social and cultural fields; the related rights and freedoms are set up in article 5.' 'UN Compilation' at 206. There is no reference to the phrase 'other field of public life' and it seems not to limit in any way the scope of the Convention to acts of public institutions.

(15) 'Discrimination against non-citizens', UN Doc. CERD/C/64/Misc.11/Rev. 3, 64th Session (23 February–12 March 2004), at para. 12.

(16) Ibid, at para. 38.

(17) Proclaimed by GA Res. 1386(XIV) of 20 November 1959.

(18) General Comment No. 5, 'General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)', 27 November 2003, at para. 43; 'UN Compilation', at 332.

(19) Ibid, at para. 44.

(20) Ibid, at para. 44.

(21) Recommendations following the 'Day of General Discussion on "The private sector as service provider and its role in implementing child rights"', Report on its 31st Session, September–October 2002, UN Doc. CRC/C/121, 11 December 2002, at para. 653.

(22) General Comment 16, 'Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights', UN Doc. E/C.12/2005/3, 13 May 2005 (unedited text) at para. 19.

(23) Ibid, at 20. For more detail with regard to monitoring specific rights in the private sector, see paras 22–31.

(24) General Comment 12, 'the right to adequate food (art. 11)', adopted 12 May 1999, at para. 19; 'UN Compilation', at 63.

(25) Ibid, at para. 20.

(26) General Comment 15, 'the right to water (arts. 11 and 12)' adopted 26 November 2002; 'UN Compilation', at 106.

(27) Committee on Economic, Social and Cultural Rights, General Comment 14 'the right to the highest attainable standard of health (art. 12)', adopted 11 August 2000, at para. 4, 'UN Compilation', at 86.

(28) Ibid, at para. 35.

(29) N. Jägers, *Corporate Human Rights Obligations: in Search of Accountability* (Antwerp: Intersentia, 2002) at 87 (footnote omitted).

(30) The particular connection between certain UN agencies and the Covenant is explained in detail in P. Alston, 'The United Nations' Specialized Agencies and Implementation of the International Covenant on Economic, Social, and Cultural Rights' 18 *Col JTL* (1979) 79–118.

(31) Committee on Economic, Social and Cultural Rights, General Comment 14, at para. 64.

(32) General Comment 13, ‘the right to education, art. 13’, 8 December 1999, at para. 60; ‘UN Compilation’, at 71. And see also General Comment 2, International technical assistance measures (art. 22)', 2 February 1990; ‘UN Compilation’, at 12.

(33) See General Comment 15, ‘the right to water (arts. 11 and 12)’ adopted 26 November 2002, at para. 60; ‘UN Compilation’, at 106.

(34) General Comment No. 31,'(art. 2) the nature of the general legal obligation imposed on states parties to the Covenant', 29 March 2004, at para. 8; ‘UN Compilation’, at 192.

(35) Ibid, at 192.

(36) See the discussion of the right to equality as an obligation with ‘third party effects’ by the Inter-American Court of Human Rights in Ch 9, at 9.2.3 below.

(37) For an examination of the drafting history of the Covenant on this point, see A. Clapham, ‘Revisiting *Human Rights in the Private Sphere*: Using the European Convention on Human Rights to Protect the Right of Access to the Civil Courts’ in C. Scott (ed) *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001) 513–535, esp. at 516–517.

(38) General Comment 6, ‘the right to life (art. 6)’, 30 April 1982; ‘UN Compilation’, at 128.

(39) Ibid, at para.3.

(40) General Comment 20, ‘prohibition of torture and cruel treatment or punishment (art. 7)’, 10 March 1992, at para. 2; ‘UN Compilation’, at 150.

(41) Ibid, at para. 7: the prohibition in Art. 7 ‘must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions’.

(42) General Comment 20, ‘Prohibition of torture and cruel treatment or punishment (art. 7)’, at para. 13.

(43) General Comment 21, ‘Article 10 (Humane treatment of persons deprived of their liberty)’, 10 April 1992, at para 1; ‘UN Compilation’, at 131.

(44) The author witnessed the debate during the open session of the Committee on this Comment during its 44th Session.

(45) The full paragraph reads: ‘Article 10, paragraph 1, of the International Covenant on Civil and Political Rights applies to anyone deprived of liberty under the laws and authority of the State who is held in prisons, hospitals —particularly psychiatric hospitals—detention camps or correctional institutions or elsewhere. States parties should ensure that the principle stipulated therein is observed in all institutions and establishments within their jurisdiction where persons are being held.’ At para. 2; ‘UN Compilation’, at 152.

(46) *Cabal and Pasini Bertran v Australia* (Communication 1020/2001) 19 September 2003, at para. 7.2, UN Doc. CCPR/C/78/D/1020/2001 (footnote omitted).

(47) Ibid, at para. 8.3.

(48) ‘Not all States parties have provided information concerning all aspects of the freedom of expression. For instance, little attention has so far been given to the fact that, because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression in a way that is not provided for in paragraph 3.’ General Comment 10 ‘Article 19 (Freedom of opinion)’, 29 June 1983, at para. 2; ‘UN Compilation’, at 133.

(49) General Comment 16, ‘Article 17 (Right to privacy)’, 8 April 1988, at para. 1; ‘UN Compilation’, at 142. The Comment continues (at para. 10): ‘The gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form,

whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.' For a discussion of a complaint concerning a hotel development in Tahiti, see *Francis Hopu and Tepoaitu Bessert v France* Communication 549/1993, UN Doc. CCPR/C/60/D/549/1993/Rev.1, 29 December 1997. For a detailed analysis, see C. Scott, 'Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights' in A. Eide, C. Krause, and A. Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (Dordrecht: Martinus Nijhoff, 2nd edn, 2001) 563–595, at 584–586.

(50) General Comment 17 'Rights of the child (Art. 24)', 7 April 1989, at para. 3; 'UN Compilation', at 144.

(51) Ibid, at para. 6.

(52) General Comment 18, 'Non-discrimination' 10 November 1989, at para. 9; 'UN Compilation', at 146.

(53) Concluding observations, Switzerland, UN Doc. CCPR/CO/73/CH, 12 November 2001, at para. 10.

(54) General Comment 23, 'The rights of minorities (Art. 27)', 8 April 1994, at para. 6.1; 'UN Compilation', at 158. For a discussion of how the state is implicated through its legislation in disputes within indigenous communities, see *Kitok v Sweden* Communication 197/1985, Views of the Human Rights Committee, adopted 27 July 1988, esp. at para. 9.4: 'With regard to the State party's argument that the conflict in the present case is not so much a conflict between the author as a Sami and the State party but rather between the author and the Sami community (see para. 4.3 above), the Committee observes that the State party's responsibility has been engaged, by virtue of the adoption of the Reindeer Husbandry Act of 1971, and that it is therefore State action that has been challenged. As the State party itself points out, an appeal against a decision of the Sami community to refuse membership can only be granted if there are special reasons for allowing such membership; furthermore, the State party acknowledges that the right of the County Administrative Board to grant such an appeal should be exercised very restrictively' See further Scott (2001).

(55) General Comment 27, ‘Article 12 (Freedom of movement)’, at para. 6; ‘UN Compilation’, at 173.

(56) General Recommendation 19, ‘Violence against women’, 29 January 1992, at para. 9; ‘UN Compilation’, at 248.

(57) Ibid, at para. 24(a).

(58) ‘Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.’ Ibid, at para. 18.6

(59) ‘Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.’ Ibid, at para. 23.

(60) ‘The obligation to protect rights relating to women's health requires States parties, their agents and officials to take action to prevent and impose sanctions for violations of rights by private persons and organizations.’ General Recommendation 24, ‘Article 12 of the Convention (women and health)’ at para. 15; ‘UN Compilation’, at 274.

(61) ‘States and parties cannot absolve themselves of responsibility in these areas by delegating or transferring these powers to private sector agencies. States parties should therefore report on what they have done to organize governmental processes and all structures through which public power is exercised to promote and protect women's health. They should include information on positive measures taken to curb violations of women's rights by third parties and to protect their health and the measures they have taken to ensure the provision of such services.’ Ibid, at para. 17.

(62) ‘Firstly States parties’ obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination—committed by public authorities, the judiciary, organizations, enterprises or private individuals—in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies.' (Footnote omitted.) General Recommendation 25, ‘Article 4, paragraph 1, of the Convention (temporary special measures)’, at para. 7. See also ‘Relevant legislation on non-discrimination and temporary special measures should cover governmental actors as well as private organizations or enterprises.’ para 31; ‘UN Compilation’, at 282.

(63) Art. 4, Res. 48/104, adopted by consensus by the UN General Assembly, 20 December 1993.

(64) See Amnesty International, *Making Rights a Reality: The Duty of States to Address Violence against Women*, AI Index ACT 77/049/2004. Amnesty International, *Respect, protect, fulfil—Women's human rights: State responsibility for abuses by ‘non-state actors’*, AI Index IOR 50/01/00.

(65) In the context of trafficking of women and children in Kosovo, Amnesty applies the due diligence obligation to show that states have obligations under the Convention on the Elimination of All Forms of Discrimination against Women ‘to, for example, introduce measures to criminalize trafficking (as UNMIK has done in Kosovo), effectively enforce this prohibition, provide legal assistance and remedies for victims, and take preventative action to address the underlying causes of trafficking.’ Amnesty International, *Kosovo (Serbia and Montenegro): ‘so does that mean I have rights?’ Protecting the human rights of women and girls trafficked for forced prostitution in Kosovo*, AI Index EUR 70/010/2004, at 5.

(66) Art. 1A(2).

(67) See the conclusions of the ‘Expert Workshop on Human Rights and Refugees: Human rights violations, persecution and non-state agents’, UNHCR, Athens, 17–20 December 1998: ‘the accountability view does not sufficiently take into account that the 1951 Refugee Convention already recognizes the linkage between refugee protection and human rights by referring in its preamble to the Charter of the United Nations and the Universal Declaration of Human Rights as well as to endeavours “to assure refugees the widest possible exercise of these fundamental rights and freedoms”. In this regard it is important to note that human rights case law on the prohibition of inhuman return also recognises that persons cannot be

returned to situations where they are risk of very serious harm, irrespective of the source of this harm'.

(68) *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/Rev.1 re-edited, Geneva, January 1992, UNHCR 1979.

(69) For a well-argued critique of the bias towards state responsibility in this context, see D. Wilshire, 'Non-State Actors and the Definition of a Refugee in the United Kingdom: Protection, Accountability or Culpability?' 15 *IJRL* (2003) 68–112.

(70) See Art. 7(1)(h) of the Statute of the International Criminal Court (1998), and for a further definition of persecution as a crime against humanity, see *Prosecutor v Kupreskić and ors* Case IT–95–16–T, Judgment of the International Criminal Tribunal for the former Yugoslavia, 14 December 2000, para. 621.

(71) J. C. Hathaway, *The Law of Refugee Status* (Ontario: Butterworths, 1991) at 124ff. See also G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd edn, 1996), who notes that the law of state responsibility provides illustrations of situations where a state may be internationally responsible regarding harm committed by private groups and that these circumstances would also provide a basis for fear of persecution, but states (at 73): 'The correlation is coincidental, however, not normative.' For a comparison of states that take a 'restrictive view', which requires that the state tolerates or encourages persecution, and an 'expansive view', whereby it is sufficient that the state of origin is unable to offer protection, see J.-Y. Carlier, 'The Geneva refugee definition and the "theory of the three scales"' in F. Nicholson and P. Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge: Cambridge University Press, 1999) 37–54, at 47–48. Carlier suggests (at 48) that 'whoever the agent of persecution may be and whatever the situation of the authorities in the country of origin, it is sufficient, once the risk of persecution has been established, to conclude that no adequate national protection exists in order to substitute international protection'.

(72) 'The Future of Refugee Protection: Four Challenges' 11 *Journal of Refugee Studies* (1998) 416–432, at 420.

(73) V. Türk, ‘Non-State Agents of Persecution’ in V. Chetail and V. Gowlland-Debbas (eds) *Switzerland and the International Protection of Refugees* (The Hague: Kluwer, 2002) 95–110, at 97–98.

(74) See further S. Kneebone, ‘Women within the Refugee Construct: “Exclusionary Inclusion” in Policy and Practice – The Australian Experience’ 17 *IJRL* (2005) 7–42, who concludes: ‘the jurisprudence on the Refugee Convention shows that in relation to Refugee Woman the definition is narrowly interpreted so that she is defined by her “exclusionary inclusion”. First, many harms are not recognised as coming within the meaning of “persecution”. Second, the grounds are narrowly construed as relating to civil or political status. Thus it will often be decided that Refugee Woman is not persecuted “for reasons” related to Refugee Convention grounds. The tendency is to use the social group ground to construct Refugee Woman, but to use it narrowly. If she is defined into a social group it is likely to be as a Woman at Risk in a patriarchal power relationship. It is rare for her claims to be recognised as political or as overlapping with the other grounds. In particular, decision-makers fail to define the family as a political/social group and Refugee Woman as a person with an imputed political opinion. Instead her status is often described as “private”. The social group ground is applied to construct her socially or culturally in denial of the power relationships involved. The irony of this situation is that under the umbrella of human rights protection, Refugee Woman is construed from a culturally relative perspective’. At part 5 of the online version.

(75) *R v Immigration Appeal Tribunal and another, ex p Shah (United Nations High Commissioner for Refugees intervening) Islam and ors v Secretary of State for the Home Department (United Nations High Commissioner for Refugees intervening*) [1999] 2 All ER 545, at 548.

(76) Ibid, at 566.

(77) ‘Straw wants curb on liberal judges’ *The Guardian.*, 12 October 1999, at 4. The report quotes the Home Secretary: ‘for good or ill, our courts interpret our obligations under the 1951 convention to a much more liberal degree than almost any other European country … One example is the case in which it has been held that women who are in fear of domestic violence in Pakistan may come under terms of the convention. Now I am concerned about women in fear of domestic violence in Pakistan, but there is no way it can be realistically argued that was in contemplation when the convention was put in place.’

(78) For a comparative overview, see B. Vereulen, T. Spijkerboer, K. Zwaan, and R. Ferhour, 'Persecution by Third Parties'(research paper), University of Nijmegen (1998). See also A. Macklin 'Refugee Women and the Imperative of Categories' 17 *HRQ* (1995) 213–277. A recent case in the Court of Appeal refused to extend protection to girls fearing female genital mutilation: 'although female circumcision in Sierra Leone may be condemned as a violation of Article 3 [of the ECHR] and to constitute persecution of young uncircumcised girls on that account, its practice in that country's society is not discriminatory or one that results from society having set them apart, other than by the persecution itself. There is, therefore, no factual basis upon which the Court could have resort to insufficiency of state protection against discriminatory conduct to qualify the general rule that, for the purpose of the Refugee Convention, a "particular social group" cannot be defined solely by reference to the persecution.' *Fornah v Secretary of State for the Home Department* [2005] EWCA Civ 680, at para. 44.

(79) See also *R v Secretary of State for the Home Department, ex p Adan* [1998] UKHL 15, where it was found, in the context of the clan warfare in Somalia, that it will not be enough for an asylum-seeker to show that he or she would be at risk if returned. The asylum-seeker must be able to show fear of persecution for Convention reasons beyond the risks inherent in the conflict. See also *R v Secretary of State for the Home Department, ex p Adan* and *R v Secretary of State for the Home Department ex p Aitseguer* [2000] UKHL 67. For a case looking at non-state actor violence by racist gangs, outside the situation of armed conflict, see *R v Home Secretary, ex p Horvath* [2001] 1 AC 489, where it was held that, although such non-state actor violence did not preclude the initial application of the Convention, the protection offered to Roma by Slovakia was satisfactory, and so the asylum-seekers were not entitled to protection as refugees.

(80) *R v Secretary of State for the Home Department, ex p Bagdanavicius* [2005] UKHL 38, at para. 14.

(81) *Per* Lord Brown, at para 29.

(82) Ibid, at para. 30.

(83) Ibid, at para. 24.

(84) Ibid, at para. 24.

(85) See, e.g. the Concluding Observations of the Human Rights Committee with regard to France in 1997: ‘The Committee is particularly concerned by the restrictive definition of the concept of “persecution” of refugees used by the French authorities as it does not take into account possible persecution by non-State actors. Therefore: the Committee recommends that the State party adopt a wider interpretation of “persecution” to include non-State actors.’ UN Doc. CCPR/C/79/Add.80, 4 August 1997, at para. 21. See also the discussion in 8.4 above, regarding the interpretation of the prohibition on torture in the International Covenant on Civil and Political Rights, which suggests that private actors can engage in torture and inhuman and degrading treatment and that it is the state's duty to protect individuals from such harm. The Human Rights Committee has not suggested that this rule does not apply in the context of deportations or extradition. Of course, everyone is covered by customary international law, which prohibits not only torture, inhuman and degrading treatment, but also *refoulement.* This rule has been summarized as follows: ‘No person shall be rejected, returned or expelled in any manner whatever where this would compel them to remain in or return to a territory where substantial grounds can be shown for believing that they would face a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.’ See E. Lauterpacht and D. Bethlehem, ‘The Scope and Content of the Principle of *Non-refoulement*: Opinion’ (Geneva: UNHCR, 2001) at para. 252. Note the extension of torture under customary international law to non-state actors by the Appeals Chamber of the ICTY: ‘The Trial Chamber in the present case was therefore right in taking the position that the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention.’ *Prosecutor v Kunarac, Kovać and Vuković* Case IT–96–23 and IT–96–23/1–A, Judgment of the International Criminal Tribunal for the former Yugoslavia (Appeals Chamber), 12 June 2002, para. 148.

(86) States may therefore refer to the arrangements they have made with regard to the private management of prisons in the context of periodic reviews under this Treaty, e.g. UN Doc. CAT/C/SR.607, 18 May 2004, at paras 21–22 (New Zealand).

(87) *R v Zardad*, 7 April 2004, Central Criminal Court (Treacy J) at para. 33.

(88) *G.R.B. v Sweden* UN Doc. CAT/C/20/D/83/1997, 15 May 1998, at para. 6.5. Cf the protection offered against the risk of non-state actor violence

under the European Convention on Human Rights: *Ahmed v Austria* Judgment of the European Court of Human Rights of 27 November 1996, discussed in Ch 9, at 9.1.4.2 below.

(89) *G.R.B. v Sweden* UN Doc. CAT/C/20/D/83/1997, 15 May 1998, at para. 2.3.

(90) R. McCorquodale and R. La Forgia, 'Taking off the Blindfolds: Torture by Non-State Actors' 1 *Human Rights Law Review* (2001) 189–218, at 209–210.

(91) General Comment 1 'Article 3', 21 November 1997, para. 1; 'UN Compilation', at 291.

(92) Ibid, para 7.

(93) Ibid, para. 6.

(94) *Elmi v Australia* UN Doc. CAT/C/22/D/120/1998, 25 May 1999, at para. 5.11. The Committee refers earlier, at footnote 9, to the 'Report of the independent expert of the Commission on Human Rights, Ms. Mona Rishmawi, on the situation of human rights in Somalia, E/CN.4/1999/103, 23 December 1998, para. 154', and later to 'Oral statement on the situation of human rights in Somalia, delivered on 22 April 1999 before the Commission on Human Rights'.

(95) Footnote 9 in the original reads: '9. Report of the independent expert of the Commission on Human Rights, Ms. Mona Rishmawi, on the situation of human rights in Somalia, E/CN.4/1999/103, 23 December 1998, para. 154.'

(96) Footnote 13 in the original refers to Rishmawi's report of 18 February 1999 (UN Doc. Of E/CN.4/1999/103/Add 1).

(97) *Elmi v Australia*, UN Doc. CAT/C/22/D/120/1998, 25 May 1999, at paras 4.6–4.8.

(98) Communication No. 177/2001, *H.M.H.I. v Australia*, UN Doc. CAT/C/28/D/177/2001, 1 May 2002, at para. 6.4: 'The Committee considers that, with three years having elapsed since the *Elmi* decision, Somalia currently possesses a State authority in the form of the Transitional National Government, which has relations with the international community in its capacity as central Government, though some doubts may exist as to the reach of its territorial authority and its permanence. Accordingly, the Committee does not consider this case to fall within the exceptional situation

in *Elmi*, and takes the view that acts of such entities as are now in Somalia commonly fall outside the scope of article 3 of the Convention.'