

**Y.H.A. (name withheld) v. Australia, Communication No. 162/2000,
U.N. Doc. CAT/C/27/D/162/2000 (2002).**

Communication No.162/2000

Submitted by : Y.H.A (name withheld) [represented by counsel]

Alleged victim: The author

State party: Australia

Date of communication: 14 April 2000

The Committee against Torture, established under Article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 23 November 2001,

Having concluded its consideration of communication No. 162/2000, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the author of the communication, his counsel and the State party,

Adopts its Views under article 22, paragraph 7, of the Convention.

1.The petitioner of the communication is Mr. Y H A, a Somali national from the Shikal clan, currently detained in a Detention Centre in New South Wales, and seeking refugee status in Australia. He claims that forcible return to Somalia would constitute a violation, by Australia, of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel.

1.2 On 20 April 2000, the Committee forwarded the communication to the State party for comments and requested, under rule 108, paragraph 9, not to return the author to Somalia while his communication was under consideration by the Committee. The State party has acceded to this request.

Facts as submitted by the petitioner

2.1 The petitioner was born on 1 January 1967 in Mogadishu. He has a son who, at the time of his application to the Refugee Review Tribunal ("RRT"), was living

with the petitioner's father in Kenya. The petitioner's mother is dead and he has four siblings all living in Kenya with the exception of one living in Holland.

2.2 From 1980 to 1987, the petitioner lived with his family in Galkayo, in the North East of the country, where he was educated and trained as a mechanic. The family then returned to Mogadishu where the petitioner worked as a shopkeeper from 1989 to 1991.

2.3 The petitioner left Somalia in 1991 because his father, who had been a police officer in the former Siad Barre government, was being sought after by the United Somali Congress (USC) militia. In early 1991, the members of this militia came to the petitioner's family home and raped and killed his sister. The petitioner moved to Kenya, where he lived from early 1991 to late 1992 and he also spent some time there in 1994. During his time in Kenya he worked in a restaurant.

2.4 In 1992, the petitioner returned to Somalia because his wife was a member of the Hawiye clan (the same clan as the USC militia) and this offered him some protection. From 1992 to 1994, the petitioner worked for the United Nations Operation in Somalia (UNOSOM) in Mogadishu as an "informer" telling them where guns were kept. On 3 October 1993, the USC, having found out that the petitioner was giving information to the UNOSOM, killed the petitioner's wife and shot the petitioner wounding him in the kidney.

2.5 Subsequently in 1994, while the petitioner was at his father-in-law's house, the USC shot the petitioner in the shoulder and killed his sister-in-law. As his father-in-law, was a Hawiye clan member he was able to prevent any further killing but later told the petitioner he could not protect him any longer and took him to the airport where the petitioner flew to Kenya with his son.

2.6 The petitioner remained illegally in Kenya until 1997. Then he left for Zambia and subsequently South Africa where he bought a passport in a different name and used it to travel to Australia. The petitioner arrived in Australia on 16 July 1998 with no documents. On 28 July 1998 he applied for a protection visa to the Australian Department of Immigration and Multicultural Affairs ("DIMA"). On 21 August 1998, the petitioner's application was refused. The petitioner sought review of this decision by the RRT which affirmed the decision not to grant a protection visa.

2.7 The RRT expressed reservations about the veracity of the petitioner's claims but it made no finding that the events as described by the petitioner did not happen. It found that the petitioner could return to Somalia and live outside Mogadishu, in the Galkayo area in North Eastern Somalia. In making its decision, the RRT took note of independent reports that factions in the North East and North West of Somalia would not accept forced returnees. It also noted that the petitioner was not

willing to return to any area of Somalia including Galkayo. However, it considered that these factors did not convert his status into that of a refugee.

2.8 The petitioner sought judicial review of the RRT decision in the Federal Court of Australia. On 10 September 1999, the Federal Court dismissed the petitioner's application upon which the petitioner lodged an appeal to the Full Federal Court of Australia. On 10 March 2000, the Full Federal Court dismissed this appeal. The petitioner lodged an application for special leave to appeal from the decision of the Full Federal Court to the High Court of Australia. The petitioner notes that this is the final appellate court in Australia.

2.9 According to the petitioner, Somalia remains a failed state and a territory revealing a consistent pattern of gross and flagrant human rights abuses. (1) He says that the situation of the Shikal in Somalia is well-known. Amnesty International has described the Shikal as being "vulnerable to serious abuses including arbitrary killings", and has stated that it "is opposed to the return of anyone from the Shikal clan to Somalia". He states that the facts of this case are similar to those in the case of *Elmi v. Australia* (2), where the Committee found a violation of article 3 of the Convention. The petitioner also refers to relevant United Nations bodies which have made it clear that they are opposed to the involuntary repatriation of failed asylum seekers to Somalia. (3)

The complaint

3. The petitioner claims that, due to the previous attacks the petitioner has suffered at the hands of the USC, there are substantial grounds for believing that the petitioner would be in danger of being subjected to torture on return to Somalia and, therefore, Australia would be violating article 3 of the Convention if he were returned there. The petitioner points out that according to respected sources, "a consistent pattern of gross, flagrant or mass violations of human rights", prevails in Somalia, and refers in this regard to article 3(2) of the Convention. It is claimed that the petitioner himself would be personally at risk of being subjected to torture if returned to Somalia. He also says that his clan is a minority clan and, therefore, would be unable to protect him.

The State party's observations on admissibility and merits

4.1 The State party submits that this communication is inadmissible ratione materiae on the basis that the Convention is not applicable to the factual situation submitted by the petitioner. In particular, the State party contends that the treatment the petitioner may or may not endure if he is returned to Somalia, does not fall within the definition of torture as set out in article 1 of the Convention. The State party submits, that to be classified as torture, the given conduct must inflict "severe pain or suffering, whether physical or mental." The State party is of the opinion that, although past events are a guide to what may occur in the future, the

past incidents alleged by the petitioner do not indicate that it is foreseeable that he would be the subject of torture if he returned to Mogadishu. It concedes that the political situation in Somalia makes it possible that the petitioner may face violations of his human rights, but contends that such violations will not necessarily involve the kind of acts contemplated by article 1 of the Convention.

4.2 According to the State party, the petitioner alleges that the petitioner will be "at risk from members of the United Somali Congress (USC) and "in danger because he had formerly worked as an informer with the United Nations Operations in Somalia (UNOSOM)" but he does not allege that he would be at risk or danger of such acts as would contravene the Convention. In evidence presented to the RRT the petitioner stated that "he could be attacked by Hawiye clans people to extort money from him to support their militia, the USC". However, the threat of extortion does not fall within the definition of article 1 of the Convention.

4.3 According to the State party, the petitioner has not adduced substantial evidence that the petitioner is faced with a risk of torture by the USC that is over and above the risks faced by every resident of Mogadishu caught between factional fighting of armed groups. It contends that the domestic review processes expressed serious reservations as to the veracity of the petitioner's account of events, including conflicting accounts of the incident involving the death of his wife and the injury to himself. According to the State party, at the initial airport interview, the petitioner failed to provide details that either his sister had been raped and killed in 1991 or that his sister-in-law had been killed in a shooting incident in 1991 which also resulted in the petitioner being wounded. The petitioner initially stated that he had never been outside Somalia but subsequently stated that he first left Somalia in 1991. In a statutory declaration made to the RRT on 2 September 1998 the petitioner admitted that he made a number of false statements when he arrived in Sydney. The State party also states that the RRT found it implausible that UNOSOM would employ someone who had been out of the country for some period to locate arms caches in Mogadishu. The State party also referred to the RRT's finding that the petitioner had attempted to prevent the Tribunal from investigating his case through people who have first hand information regarding his situation since 1991.

4.4 Moreover, the State party submits that the acts the petitioner fears if he is returned to Somalia do not fall within the meaning of "torture" in accordance with article 1 of the Convention because they are not acts conducted by a public official or person acting in an official capacity. The State party accepts that "members of minority groups are subject to harassment, intimidation, and abuse by armed gunmen of all affiliations" (4) but does not accept that these are committed by, or at the instigation of, or with the consent or acquiescence of a public official or any other person acting in an official capacity" as required under article 1 of the Convention. It asserts that these are acts committed by individuals in a private capacity for reasons of personal gain. (5)

4.5 The State party refers to the Committee's View's in *Elmi v. Australia*, Case No. 120/1998, adopted on 14 May 1999 (6), and accepts that, although some clans may operate as quasi-governmental institutions in some areas of Somalia, this must be clearly differentiated from random acts of violence committed by individuals acting in a private capacity. There is no evidence to suggest that all members of a dominant clan at all times are acting in a quasi-governmental capacity. It would also be difficult to determine whether militia are acting under specific orders at any particular time as "security forces are unreliable, unpaid, untrained for peaceful duties and often out of control." (7) To support its argument on the necessity to consider whether acts are conducted in a public capacity or in a private capacity in order to determine whether those acts constitute torture the State party provides academic commentary and views of international and national courts and tribunals.

4.6 In addition, the State party contends that there is no evidence to suggest that the alleged acts took place as a result of either, decisions made by clan hierarchy, or orders from USC leaders. Neither is there any evidence to suggest that the alleged acts were instigated on behalf of the clan or militia or that either the clan or militia acquiesced or had any knowledge of the alleged acts. To support this argument, the State party makes the following observations on the author's description of events. With respect to the alleged rape and murder of the petitioner's sister at his family home, the State party says that the petitioner's allegation that this was at the instigation of the USC who were seeking out members of the police force of the former regime, including the petitioner's father, is not consistent with a report of the Assessment Mission to Mogadishu, in 1991. (8) The State party is of the opinion that this incident was probably a consequence of the general climate of violence described as prevalent in Mogadishu at that time, rather than the acts of persons carrying out orders by USC leaders to torture and kill families of former members of the Barre regime.

4.7 With respect to the murder of his wife and the assault on the petitioner himself, the State party points out that the petitioner gave two versions of the incident. Previously, he said that his house was struck by a bomb during fighting between Aideed's forces (USC) and UNOSOM. Subsequently, the petitioner claimed that the attack on his home followed earlier conversations with members of the Hamiye clan regarding his father's employment with the Barre regime, during which the Hawiye clan members stated that they wanted his house. In the event that his second recollection of events is correct, it does not appear that the individual concerned was acting in an official capacity. In addition, the petitioner does not say that either his wife or father-in-law recognised the members as being leaders of the clan or holding any position of authority within the clan, despite the fact that they were both members of the same clan.

4.8 With respect to the incident in his father-in-laws house where the petitioner was wounded and his sister-in-law was shot, the State party argues that although it is probable that members of the USC militia were under orders to arrest, torture or

kill UNOSOM informants at that time, there is no explanation why the sister-in-law was killed, when there was no allegation that she worked for UNOSOM, and the petitioner himself only wounded. If the USC militia was acting in an official capacity the representations made by the petitioner's father-in-law would have been ignored unless he held some position of authority within the USC or Hawiye clan. There is no evidence that this was the case.

5.1 On the merits, the State party argues that there is no evidence that the petitioner would now face a risk of torture from the government if he was returned to Somalia on the basis of either his father's former involvement with the Barre regime or his employment with UNOSOM. (9) It states that the evidence available to Australia suggests that the new government of Somalia, which has been elected along strict clan lines, is headed by an interim President who was himself a Minister in the former Barre regime. (10) The President appointed a former member of the Barre regime as his Prime Minister, who served as Ministry of Industry between 1980 and 1982. The Transitional National Assembly consisting of 245 seats, includes representatives from minority clans as well as the dominant clans in Somalia. In addition, there are currently three Shikal representatives in this Assembly who are part of the Hawiye clan allocation of representatives. These representatives were also closely linked with the former Barre regime. The fact that both the President and Prime Minister of the newly formed government were Ministers in the former Barre regime indicates that senior members of the former regime are no longer targeted, although this might have occurred immediately following the downfall of the Barre regime.

5.2 The State party also refers to the Interim President's address to the United Nations General Assembly on 19 September 2000, in which he "extended his appreciation to the UN for its efforts to alleviate the plight of the Somali people over the past 10 years and described the recent creation of Somalia's National Assembly as the beginning of a new era of peace and stability".

5.3 Although the State party does not deny that the attacks on the petitioner, his wife, his sister and sister-in-law may have occurred and that at that time and immediately afterwards the petitioner may have felt particularly vulnerable to attack by USC militia, and that this fear may have caused him to flee Somalia, this is not evidence that he would now face a threat from either of the two factions of the USC i.e. the SNA or SSA. (11) In this context the State party adds that the leader of the SSA, is also a member of the new Transitional National Assembly and has indicated that he supports the new President.

5.4 As to the petitioner's fear of torture because of his position within UNOSOM, the State party contends that there is no evidence that this was a significant position or that he was known generally as being employed by UNOSOM or contributing directly to the aims of UNOSOM. Neither is there any evidence to suggest that former employees of UNOSOM are at risk by either the SNA or SSA.

Furthermore, in the absence of any central records kept in Somalia for almost a decade it is difficult to ascertain how members of either the SNA or SSA would know about the petitioner's involvement with UNOSOM without the petitioner's own admission.

5.5 On the allegation that the petitioner is a member of a minority clan that is unable to offer him protection anywhere in Somalia, the State party observes that the petitioner did not indicate in his evidence to the Refugee Review Tribunal hearing that he feared he would be tortured because he was a member of the Shikal clan. Rather, he stated that "his clan would not be able to protect him but he could be attacked by the Hawiye clan to extort money from him to support their militia, the USC." According to the State party, this does not show how he would personally be at risk as a member of the Shikal clan.

5.6 The State party accepts that there has been a consistent pattern of gross, flagrant or mass violations of human rights in Somalia in general and that members of small, unaligned and unarmed clans, like the Shikal, have been more vulnerable to human rights violations than members of larger clans. Although there has been continued violence and upheaval, the risk is faced by the population at large and is particularly high in Mogadishu and in Southern Somalia. This does not constitute evidence that the petitioner himself is personally at risk of torture. In addition, the State party states that, although the level of violence has declined since the election of the interim government, the situation remains tense. The interim government has incorporated many of the militia into a national police force. Although some of the faction leaders in Mogadishu have refused to recognise the interim government, the Habr-Girdir sub-clan of the Hawiye clan supports the interim president. The faction leaders currently in South Mogadishu come from the Habr-Gridir sub-clan as does the interim president.

5.7 The State party observes that the domestic review processes found that even if the petitioner did face a danger of torture if he was returned to Mogadishu, he would have the alternative of settling in Galkayo, (North East Somalia) where he previously resided for a significant amount of time and learned a skill. The domestic review processes also found that the authorities in that region accepted members of other clans, that the region was still relatively stable and that the petitioner would have meaningful protection from any harm he claimed to fear. USC militia or its factions are not in control of this area which is controlled by the Somali Salvation Democratic Front (SSDF). Two reports conducted on this region have indicated that North Eastern Somalia has been an area of relative peace and stability where members of all Somali clans are welcome.

5.8 The State party submits that this finding made by the domestic review procedures, of the possibility of the petitioner relocating to Galkayo, occurred prior to the formation of a central government in Somalia, now established in Mogadishu. As the petitioner was reluctant to return to this part of the country, and

given the new political situation as described in paragraph 5.1 above, the State party submits that it is now unlikely that there would be any reason for him to find it necessary to relocate to Galkayo rather than Mogadishu.

Petitioner's comments on the State party's submission

6.1 In response to the State party, the petitioner reaffirms his claim that he faces a substantial risk of torture in Somalia because, as a member of the minority Shikal clan, he is particularly vulnerable in the lawless conditions prevailing in the whole of Somalia. He says that the RRT accepted that the petitioner was vulnerable but rejected his claim as there was no nexus between the danger he faced and his clan membership. He submits that no such nexus is required under the Convention against Torture.

6.2 In dealing with acts of torture from so-called "non-State actors" or "quasi-State actors", it is submitted that the Committee should adopt a broad conception of the reach of state responsibility. In this regard, the petitioner points to the jurisprudence on the European Convention on Human Rights. It is not necessary, according to counsel, that the persons carrying out the acts of torture be somehow "charged with" or "authorised" by some competent organ. Article 1 of the Convention against Torture extends liability for acts of torture to include "acquiescence" of the responsible person.-Furthermore, counsel argues, that as was recognised in *Elmi v. Australia*, where there has been a breakdown of government authority, private groups practicing torture are in effect "acting in an official capacity" in the area in question and article 3 relief should therefore be available.

6.3 According to the petitioner, recent peace initiatives have not ended the conflict in Somalia. In its most recent report on the situation of human rights in Somalia of 13 March 2001, the United Nations Commission on Human Rights noted that Mogadishu remains divided into fiefdoms controlled by the Transitional National Government and a variety of faction leaders. He noted that inter-faction clashes often lead to civilian casualties and loss of property, and it observed that there is a sense of lawlessness prevailing in the city. He claims that, as a member of the vulnerable clan, he would be particularly at risk in this climate. Even if he were forcibly returned to the North East, as has been suggested by Australia, he would have to pass through Mogadishu and thereby be placed at risk.

6.4 Finally, the petitioner adds that he cannot be forcibly returned to Galkayo in any event, as the material before the RRT showed that forcible returnees are not accepted in that part of Somalia. In any event, his membership of the Shikal clan leaves him just as vulnerable in the North East of Somalia as, the report to the Commission on Human Rights also noted, there continues to be serious fighting in North Eastern Somalia, particularly around Galkayo.

Issues and Proceedings before the Committee

7.1 Before considering any claims contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. In this respect the Committee has ascertained, as it is required to do under article 22, paragraph 5 (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement. The Committee also notes that the exhaustion of domestic remedies is not contested by the State party. It further notes the State party's view that the communication should be declared inadmissible ratione materiae on the basis that the Convention is not applicable to the facts alleged, since the treatment, the petitioner may or may not suffer if he is returned to Somalia does not foreseeably or necessarily amount to torture, set out in article 1 of the Convention, and would, in any event, not be inflicted by or at the instigation of or with the consent or acquiescence of a public official or person acting in an official capacity. The Committee, however, is of the opinion that the State party's argument ratione materiae raises an issue which cannot be dealt with at the admissibility stage. As the Committee sees no further obstacles to admissibility, it declares the communication admissible.

7.2 The Committee must decide whether the forced return of the petitioner to Somalia would violate the State party's obligation, under article 3, paragraph 1 of the Convention, not to expel or return (refouler) an individual to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. In order to reach its conclusion the Committee must take into account all relevant considerations, including the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. The aim, however, is to determine whether the individual concerned would personally risk torture in the country to which he or she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient grounds for determining whether the particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk. Conversely, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

7.3 The Committee notes the petitioner's claim that he faces a real risk of being tortured if returned to Somalia on the basis of his father's position as a police officer in the previous government, his own position at the UNOSOM and his vulnerability as a member of the Shikal clan. In support of his claim, he outlines past incidents of torture against himself and his family. The Committee observes that the State party does not deny that these incidents may have occurred but

argues that the petitioner has not been consistent in his description of events and that these attacks were more likely to have occurred as part of the general climate of violence in Mogadishu at the time rather than as a deliberate attempt to target the petitioner for the reasons outlined by him. The Committee also observes that the petitioner has failed to explain the inconsistencies in his description of the attacks, which raise doubts with the Committee as to his credibility.

7.4 In addition, the Committee recalls that, even if the evidence of past torture provided by the petitioner was not in question, the aim of the Committee's examination of the communication is to ascertain whether the petitioner would risk being subjected to torture now, if returned to Somalia. Given the composition of the new Transitional government, including members of the Shikal clan itself, the Committee is of the opinion that the petitioner would not now face such a risk. In light of the foregoing, and while recognising the ongoing widespread violations of human rights in Somalia, the Committee finds that the petitioner has not established that he would face a foreseeable, real and personal risk of being tortured within the meaning of article 3 of the Convention.

8. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the petitioner's removal to Somalia by the State party would not constitute a breach of article 3 of the Convention.

Notes

1. Counsel refers to the "1999 Country Reports on Human Rights Practices", Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, February 25, 2000.

2. *Case No. 120/1998, adopted on 14 May 1999.*

3. In this context, he refers to the Report on the Situation of Human Rights in Somalia, in which the Special Rapporteur noted the UNHCR policy of voluntary repatriation and the "dumping" in Somalia of asylum seekers by some Western countries which had led to problems of safety for rejected asylum seekers. He also refers to the opinion of the same Special Rapporteur who expressed alarm at a plan being considered which would make it difficult for Somalis to seek asylum in the European Union States, and stated that in the absence of recognised structures in Somalia that the international community could formally call upon for human rights protection, Somalis should not be forced to return to Somalia. See Situation of Human Rights in Somalia, Report of the Special Rapporteur, Ms. Mona

Rishmawi, submitted on accordance with the Commission on Human Rights resolution 1998/59, at paragraph 85.

4. US Department of State 1999 Country Reports on Human Rights Practices in Somalia, p.10.

5. The State party refers to the US Department of State Country Reports on Human Rights Practices from 1999 which states that "boys as young as 14 or 15 years of age have participated in militia attacks, and many youths are members of the marauding gangs known as "morian" or "parasites or maggots".

6. In *Elmi v Australia*, it was found that "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 "officials or other persons acting in an official capacity" contained in article 1".

7. Comment on Somalia's quasi-governmental institutions by the Somali Researcher, Dr Martin Hill, of the International Secretariat of Amnesty International in London.

8. A Report of the Assessment Mission to Mogadishu, Hiran, Bay, Middle Shabelle and Lower Shabelle Regions from February 23rd to March 4th, 1991 to the Inter-NGO Committee for Somalia (UK and Kenya). This report states that "there are an estimated 3,500 people on the police force at the moment" and that "police were visible mainly at the airport, and sometimes on the street". The report also says that there was a significant problem of looting, killing and assaults.

9. The State party refers the Committee to its decision in *X, Y, Z v. Sweden, Case No. 61/1996, adopted on 6 May 1998*, in which it stated that "past torture is one of the elements to be taken into account by the Committee when examining a claim concerning article 3 of the Convention, but the aim of the Committee's examination of the case is to find whether the petitioners would risk being subjected to torture *now*, it returned.

10. According to the State party, when questioned about the Barre regime the President stated the following " I was a member of Siad Barre's government. Let me state there are, right now in Somalia, there are three generations. The first generation of independence ..[t]he second generation is my generation, and practically everyone of my generation had a role in twenty years of government. That was not Siad's government, it was the nation's government. Siad was the president, the man who was leading Somalia for 20 years. Everyone who was in Somalia for 20 Years. Everyone who was in Somalia – intellectual or otherwise – served in one or other capacity in that administration. Not necessarily as a minister, but in any capacity."

11. The State party refers to the petitioner's fear that he will be subjected to torture by the USC militia. However, it submits, that the USC divided into two armed factions (the SNA and SSA) shortly after 1991 and it is unclear from the case to which faction the petitioner refers when using the term "USC". Both the SNA and SSA are dominated by rival sub-clans, the Abgal and Habr-Girdir of the Hawiye clan.