

COMMITTEE AGAINST TORTURE

Elmi v. Australia

Communication No 120/1998

14 May 1999

CAT/C/22/D/120/1998

VIEWS

Submitted by: Sadiq Shek Elmi [represented by counsel]

Alleged victim: The author

State party: Australia

Date of communication: 17 November 1998

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

Meeting on 14 May 1999,

Having concluded its consideration of communication No. 120/1998, 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 author of the communication is Mr. Sadiq Shek Elmi, a Somali national from the Shikal clan, currently residing in Australia, where he has applied for asylum and is at risk of expulsion. He alleges that his expulsion would constitute a violation by Australia of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The facts as submitted by the author

2.1 The author was born on 10 July 1960 in Mogadishu. Before the war he worked as a goldsmith in Mogadishu, where his father was an elder of the Shikal clan. The author states that members of the Shikal clan, of Arabic descent, are identifiable by their lighter coloured skin and discernable accent. The clan is known for having brought Islam to Somalia, for its religious leadership and relative wealth. The author claims that the clan has not been directly involved in the fighting, however it has been targeted by other clans owing to its wealth and its refusal to join or support economically the Hawiye militia. In the lead up to the ousting of President Barre in late 1990, the author's father, as one of the elders of his clan, was approached by leaders of the Hawiye clan seeking Shikal financial support and fighters for the Hawiye militia.

2.2 The author further states that upon refusal to provide support to the Hawiye militia in general, and in particular to provide one of his sons to fight for the militia, his father was shot and killed in front of his shop. The author's brother was also killed by the militia when a bomb detonated inside his home, and his sister was raped three times by members of the Hawiye militia, precipitating her suicide in 1994.

2.3 The author claims that on a number of occasions he barely escaped the same fate as his family members, and that his life continues to be threatened, particularly by members of the Hawiye clan who, at present, control most of Mogadishu. From 1991 until he left Somalia in 1997, he continuously moved around the country for reasons of security, travelling to places that he thought would be safer. He avoided checkpoints and main roads and travelled through small streams and the bush on foot.

2.4 The author arrived in Australia on 2 October 1997 without valid travel documents and has been held in detention since his arrival. On 8 October 1997, he made an application for a protection visa to the Department of Immigration and Multicultural Affairs. Following an interview with the author held on 12 November 1997, the application was rejected on 25 March 1998. On 30 March 1998, he sought review of the negative decision before the Refugee Review Tribunal (RRT), which turned down his request for a review on 21 May 1998. The author subsequently appealed to the Minister for Immigration and Multicultural Affairs who under the Migration Act has the personal, non-compellable and non-reviewable power to intervene and set aside decisions of RRT where it is in the "public interest" to do so. This request was denied on 22 July 1998.

2.5 On 22 October 1998, the author was informed that he was to be returned to Mogadishu, via Johannesburg. Amnesty International intervened in the case and, in a letter dated 28 October 1998, urged the Minister for Immigration and Multicultural Affairs to use his powers not to remove the author as planned. In addition, the same day the author submitted a request to the Minister to lodge a second application for a protection visa. In the absence of the exercise of the Minister's discretion, the lodging of a new application for refugee status is prohibited.

2.6 On 29 October 1998, the author was taken to Melbourne Airport to be deported, escorted

by guards from the Immigration Detention Centre. However, the author refused to board the plane. As a result, the captain of the aircraft refused to take him on board. The author was then taken back to the detention centre. On the same day he addressed an additional plea to the Minister in support of his previous requests not to be removed from Australia; it was rejected. On 30 October 1998, the author was informed that his removal would be carried out the following day. On the same date he sought an interim injunction from Justice Haynes at the High Court of Australia to restrain the Minister from continuing the removal procedure. Justice Haynes dismissed the author's application on 16 November 1998, in view of the fact that the circumstances did not raise a "serious question to be tried". Special leave was sought to appeal to the full bench of the High Court, but that request was also dismissed.

2.7 The author states that he has exhausted all available domestic remedies and underlines that, while he could still technically seek special leave from the High Court, his imminent removal would stymie any such application. He further indicates that the legal representatives initially provided to him by the authorities clearly failed to act in their client's best interest. As the submitted documents reveal, the initial statement and the subsequent legal submissions to RRT were undoubtedly inadequate and the representatives failed to be present during the author's hearing with the Tribunal in order to ensure a thorough investigation into his history and the consequences of his membership of the Shikal clan.

The complaint

3.1 The author claims that his forced return to Somalia would constitute a violation of article 3 of the Convention by the State party and that his background and clan membership would render him personally at risk of being subjected to torture. He fears that the Hawiye clan will be controlling the airport on his arrival in Mogadishu and that they will immediately ascertain his clan membership and the fact that he is the son of a former Shikal elder. They will then detain, torture and possibly execute him. He is also fearful that the Hawiye clan will assume that the author, being a Shikal and having been abroad, will have money, which they will attempt to extort by torture and other means.

3.2 It is emphasized that in addition to the particular circumstances pertaining to the author's individual case, Somalia is a country where there exists a pattern of gross, flagrant or mass violations of human rights. In expressing its opinion in the author's case, the Regional Office of UNHCR for Australia, New Zealand, Papua New Guinea and the South Pacific stated that "(w)hile it is true that UNHCR facilitates voluntary repatriation to so-called Somaliland, we neither promote nor encourage repatriation to any part of Somalia. In respect of rejected asylum-seekers from Somalia, this office does urge States to exercise the utmost caution in effecting return to Somalia."¹ Reference is also made to the large number of sources indicating the persisting existence of torture in Somalia, which would support the author's position that his forced return would constitute a violation of article 3 of the Convention.

State party's observations

4.1 On 18 November 1998, the Committee, acting through its Special Rapporteur on new communications, transmitted the communication to the State party for comment and

requested the State party not to expel the author while his communication was under consideration by the Committee.

4.2 By submission of 16 March 1999, the State party challenged the admissibility of the communication, but also addressed the merits of the case. It informed the Committee that, following its request under rule 108, paragraph 9, the expulsion order against the author has been stayed while his communication is pending consideration by the Committee.

A. Observations on admissibility

4.3 As regards the domestic procedures, the State party submits that although it considers that domestic remedies are still available to the author it does not wish to contest the admissibility of the communication on the ground of non-exhaustion of domestic remedies.

4.4 The State party contends that this communication is inadmissible ratione materiae on the basis that the Convention is not applicable to the facts alleged. In particular, the kind of acts the author fears that he will be subjected to if he is returned to Somalia do not fall within the definition of "torture" set out in article 1 of the Convention. Article 1 requires that the act of torture be "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". The author alleges that he will be subjected to torture by members of armed Somali clans. These members, however, are not "public officials" and do not act in an "official capacity".

4.5 The Australian Government refers to the Committee's decision in G.R.B. v. Sweden, in which the Committee stated that "a State party's obligation under article 3 to refrain from forcibly returning a person to another State where there were substantial grounds to believe that he or she would be in danger of being subjected to torture was directly linked to the definition of torture as found in article 1 of the Convention."²

4.6 The State party further submits that the definition of torture in article 1 was the subject of lengthy debates during the negotiations for the Convention. On the issue of which perpetrators the Convention should cover, a number of views were expressed. For example, the delegation of France argued that "the definition of the act of torture should be a definition of the intrinsic nature of the act of torture itself, irrespective of the status of the perpetrator".³ There was little support for the French view although most States did agree that "the Convention should not only be applicable to acts committed by public officials, but also to acts for which the public authorities could otherwise be considered to have some responsibility."⁴

4.7 The delegation of the United Kingdom of Great Britain and Northern Ireland made an alternative suggestion that the Convention refer to a "public official or any other agent of the State".⁵ By contrast, the delegation of the Federal Republic of Germany "felt that it should be made clear that the term 'public official' referred not only to persons who, regardless of their legal status, have been assigned public authority by State organs on a permanent basis

or in an individual case, but also to persons who, in certain regions or under particular conditions actually hold and exercise authority over others and whose authority is comparable to government authority or - be it only temporarily - has replaced government authority or whose authority has been derived from such persons." ⁶

4.8 According to the State party it was ultimately "generally agreed that the definition should be extended to cover acts 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". ⁷ It was not agreed that the definition should extend to private individuals acting in a non-official capacity, such as members of Somali armed bands.

B. Observations on merits

4.9 In addition to contesting the admissibility the State party argues, in relation to the merits, that there are no substantial grounds to believe that the author would be subjected to torture if returned to Somalia. The author has failed to substantiate his claim that he would be subjected to torture by members of the Hawiye and other armed clans in Somalia, or that the risk alleged is a risk of torture as defined in the Convention.

4.10 The State party points to the existing domestic safeguards which ensure that genuine applicants for asylum and for visas on humanitarian grounds are given protection and through which the author has been given ample possibilities to present his case, as described below. In the primary stage of processing an application for a protection visa, a case officer from the Federal Department of Immigration and Multicultural Affairs (DIMA) examines the claim against the provisions of the Convention relating to the Status of Refugees. When there are claims which relate to the Convention against Torture and further clarification is required, the officer may seek an interview, using an interpreter if necessary. Applicants must be given the opportunity to comment on any adverse information, which will be taken into account when their claim is considered. Assessments of claims for refugee protection are made on an individual basis using all available and relevant information concerning the human rights situation in the applicant's home country. Submissions from migration agents or solicitors can also form part of the material to be assessed.

4.11 The State party further explains that if an application for a protection visa is refused at the primary stage, a person can seek review of the decision by the Refugee Review Tribunal (RRT), an independent body with the power to grant a protection visa. RRT also examines claims against the Convention relating to the Status of Refugees. If RRT intends making a decision that is unfavourable to the applicant on written evidence alone, it must give the applicant the opportunity of a personal hearing. Where there is a perceived error of law in the RRT decision, a further appeal may be made to the Federal Court for judicial review.

4.12 DIMA provides for application assistance to be given to eligible protection visa applicants. Under this scheme, all asylum seekers in detention have access to contracted service providers who assist with the preparation of the application form and exposition of

their claims, and attend any interview. If the primary decision by DIMA is to refuse a protection visa, the service providers may assist with any further submissions to DIMA and any review applications to RRT.

4.13 The State party draws the attention of the Committee to the fact that, in the present case, the author had the assistance of a migration agent in making his initial application and that an interview was conducted with him by an officer of DIMA with the assistance of an interpreter. In addition, during the course of the review by RRT of the primary decision, the author attended two days of hearings before RRT, during which he was also assisted by an interpreter. He was not represented by a migration agent at the RRT hearing, but the State party takes the view that legal representation before RRT is not necessary, as its proceedings are non-adversarial in nature.

4.14 The State party submits that neither DIMA nor RRT was satisfied that the author had a well-founded fear of persecution, because he failed to show that he would be persecuted for a reason pertaining to the Convention relating to the Status of Refugees. In particular, although RRT accepted that the author was a member of the Shikal clan and that, at the beginning of the conflict in Somalia, his father and one brother had been killed and one sister had committed suicide, it found that the author had not shown that he would be targeted personally if returned to Somalia. It found that the alleged victim had, at times, had to flee the civil war in Somalia but that this was not sufficient to show persecution for a reason pertaining to the Convention relating to the Status of Refugees.

4.15 The alleged victim sought judicial review of the RRT decision in the High Court of Australia, on the basis that RRT had erred in law and that its decision was unreasonable. He also sought an order restraining the Minister for Immigration and Multicultural Affairs from removing him from Australia until his application was decided. On 16 November 1998, Justice Hayne of the High Court dismissed all the grounds of appeal, rejecting the argument that RRT had erred in law or that its decision was unreasonable. Further, he rejected the application to restrain the Minister of Immigration and Multicultural Affairs from removing the author. Subsequently, on 17 November 1998, the author lodged a communication with the Committee. The Committee requested the State party not to remove the author until his case had been examined. Following such request, the State party interrupted the author's removal. The State party understands that on 25 November 1998 the author applied for special leave to appeal the decision of Justice Hayne to the Full Bench of the High Court of Australia.

4.16 In addition to the procedures established to deal with claims of asylum pursuant to Australia's obligations under the Convention relating to the Status of Refugees, the Minister for Immigration and Multicultural Affairs has a discretion to substitute a decision of RRT with a decision which is more favourable to the applicant, for reasons of public interest. All cases which are unsuccessful on review by RRT are assessed by the Department of Immigration and Multicultural Affairs on humanitarian grounds, to determine if they should be referred to the Minister for consideration of the exercise of his or her humanitarian stay discretion. Cases are also referred to the Minister under this section on request by the applicant or a third party on behalf of the applicant. In the present case, the Minister was

requested to exercise his discretion in favour of the author, but the Minister declined to do so. The author also requested that the Minister exercise his discretion to allow him to lodge a fresh application for a protection visa, but, on the recommendation of DIMA, the Minister again declined to consider exercising his discretion.

4.17 The State party notes that in the course of the asylum procedure, the author has not provided factual evidence to support his claims. Furthermore, the State party does not accept that, even if those assertions were correct, they necessarily would lead to the conclusion that he would be subjected to "torture" as defined in the Convention. In making this assessment, the State party has taken into account the jurisprudence of the Committee establishing that a person must show that he or she faces a real, foreseeable and personal risk of being subjected to torture, as well as the existence of a consistent pattern of gross, flagrant or mass violations of human rights.

4.18 The State party does not deny that the attacks on the author's father, brother and sister occurred as described by the author, nor that at that time and immediately afterwards the author may have felt particularly vulnerable to attacks by the Hawiye clan and that this fear may have caused the author to flee Mogadishu (but not Somalia). However, there is no evidence that the author, at present, would face a threat from the Hawiye clan if he were returned to Somalia. Moreover, in the absence of any details or corroborating evidence of his alleged escapes and in the absence of any evidence or allegations to the effect that the author has previously been tortured, it must be concluded that the author remained in Somalia in relative safety throughout the conflict. The State party points out that it is incumbent upon the author of a communication to present a factual basis for his allegations. In the present case the author has failed to adduce sufficient evidence of an ongoing and real threat of torture by the Hawiye against him and other members of the Shikal clan.

4.19 The State party accepts that there has been a consistent pattern of gross, flagrant or mass violations of human rights in Somalia and that, throughout the armed conflict, members of small, unaligned and unarmed clans, like the Shikal, have been more vulnerable to human rights violations than members of the larger clans. However, through diplomatic channels, the State party has been informed that the general situation in Somalia has improved over the past year and, although random violence and human rights violations continue and living conditions remain difficult, civilians are largely able to go about their daily business. The State party has also been informed by its embassy in Nairobi that a small community of Shikal still resides in Mogadishu and that its members are apparently able to practise their trade and have no fear of being attacked by stronger clans. However, as an unarmed clan, they are particularly vulnerable to looters. Although the Shikal, including members of the author's family, may have been targeted by the Hawiye in the early stages of the Somali conflict, they have at present a harmonious relationship with the Hawiye in Mogadishu and elsewhere, affording a measure of protection to Shikal living there.

4.20 The State party points out that it has also considered the issue of whether the author would risk being targeted by other clans than the Hawiye. It states that it is prepared to accept that certain members of unarmed clans and others in Somalia suffer abuse at the hands of other Somali inhabitants. Further, the author may be more vulnerable to such

attacks as he is a member of an unarmed clan whose members are generally believed to be wealthy. However, the State party does not believe that the author's membership of such a clan is sufficient to put him at a greater risk than other Somali civilians. In fact, the State party believes that many Somalis face the same risk. That view is supported by the report of its embassy in Nairobi, which states that "(a)ll Somalis in Somalia are vulnerable because of lack of a functioning central government authority and an effective rule of law. [The author's] situation, were he to return to Somalia, would not be exceptional".

4.21 In the event that the Committee disagrees with the State party's assessment that the risk faced by the author is not a real, foreseeable and personal one, the State party contends that such risk is not a risk of "torture" as defined in article 1 of the Convention. Although the State party accepts that the political situation in Somalia makes it possible that the author may face violations of his human rights, it argues that such violations will not necessarily involve the kind of acts contemplated in article 1 of the Convention. For example, even though the acts of extortion anticipated by the author may be committed for one of the purposes referred to in the definition of torture, such acts would not necessarily entail the intentional infliction of severe pain or suffering. In addition, the author's claims that he will risk detention, torture and possibly execution have not been sufficiently substantiated.

4.22 Finally, the State party reiterates its reasoning as to the admissibility of the case and also as to the merits.

Counsel's comments

5.1 As regards the ratione materiae admissibility of the communication, counsel submits that despite the lack of a central government, certain armed clans in effective control of territories within Somalia are covered by the terms "public official" or "other person acting in an official capacity" as required by article 1 of the Convention. In fact, the absence of a central government in a State increases the likelihood that other entities will exercise quasi-governmental powers.

5.2 Counsel further emphasizes that the reason for limiting the definition of torture to the acts of public officials or other persons acting in an official capacity was that the purpose of the Convention was to provide protection against acts committed on behalf of, or at least tolerated by, the public authorities, whereas the State would normally be expected to take action, in accordance with its criminal law, against private persons having committed acts of torture against other persons. Therefore, the assumption underlying this limitation was that, in all other cases, States were under the obligation by customary international law to punish acts of torture by "non-public officials". It is consistent with the above that the Committee stated, in G.R.B. v. Sweden, that "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". However, the present case is distinguishable from the latter as it concerns return to a territory where non-governmental entities themselves are in effective control in the absence of a central government, from which protection cannot be sought.

5.3 Counsel submits that when the Convention was drafted there was agreement by all States to extend the scope of the perpetrator of the act from the "public official" referred to in the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to include "other person[s] acting in an official capacity". This would include persons who, in certain regions or under particular conditions, actually hold and exercise authority over others and whose authority is comparable to government authority.

5.4 According to a general principle of international law and international public policy, international and national courts and human rights supervisory bodies should give effect to the realities of administrative actions in a territory, no matter what may be the strict legal position, where those actions affect the everyday activities of private citizens. In Ahmed v. Austria, the European Court of Human Rights, in deciding that deportation to Somalia would breach article 3 of the European Convention on Human Rights, which prohibits torture, stated that "fighting was going on between a number of clans vying with each other for control of the country. There was no indication that the dangers to which the applicant would have been exposed to had ceased to exist or that any public authority would be able to protect [the applicant]." ⁸

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 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". ⁹

5.6 Counsel notes that the State party does not wish to contest admissibility on the basis of the non-exhaustion of domestic remedies, but nevertheless wishes to emphasize that the author's communication of 17 November 1998 was submitted in good faith, all domestic remedies available to the author having been exhausted. The subsequent application by the author for special leave to appeal, which is currently pending before the Full Bench of the High Court of Australia, does not provide a basis for injunctive relief to prevent the expulsion of the author. Further, following an intervention by Amnesty International in the author's case, the Minister for Immigration and Multicultural Affairs stated that "[a]s an unlawful non-citizen who had exhausted all legal avenues to remain in Australia, my Department was required under law to remove [the author] as soon as reasonably practicable".

5.7 As to the merits of the communication, the author must establish grounds that go beyond mere "theory or suspicion" ¹⁰ that he will be in danger of being tortured. As the primary object of the Convention is to provide safeguards against torture, it is submitted that the author is not required to prove all of his claims ¹¹ and that a "benefit of the doubt" principle may be applied. There is sufficient evidence that the author faces personal risk of being

subjected to torture upon his return owing to his membership of the Shikal clan and his belonging to a particular family.

5.8 Counsel contests the State party's argument that the author had in fact been able to live in Somalia since the outbreak of the war in "relative safety" and submits an affidavit from the author stating that, as an elder of the Shikal clan, his father had been prosecuted by the Hawiye clan, especially since he had categorically refused to provide money and manpower for the war. Even before the outbreak of the war there had been attempts on the author's father's life by the Hawiye clan. The family was told by the Hawiye that they would suffer the consequences of their refusal to provide support to the clan, once the Hawiye came into power in Mogadishu. The author states that he was staying at a friend's house when the violence broke out in December 1990 and he learnt that his father had been killed during an attack by the Hawiye clan. Only hours after his father's death, the Hawiye planted and detonated a bomb under the family home, killing one of the author's brothers. The author's mother, other brothers and his sisters had already fled the house.

5.9 The author also states that, together with the remaining family members, he escaped to the town of Medina, where he stayed during 1991. The Hawiye clan attacked Medina on a number of occasions and killed Shikal members in brutal and degrading ways. The author states that hot oil was poured over their heads, scalding their bodies. Sometimes, when they received warnings about Hawiye raids, the family would flee Medina for short periods of time. On one occasion, upon returning after such a flight, the author learnt that the Hawiye militia had searched the town with a list of names of people they were looking for, including the author and his family. After one year of constant fear the family fled to Afgoi. On the day of the flight, the Hawiye attacked again and the author's sister was raped for the second time by a member of the militia. In December 1992, the author heard that the United Nations was sending troops to Somalia and that the family would be protected if they returned to Mogadishu. However, the author and his family only returned as far as Medina, since they heard that the situation in Mogadishu had in fact not changed.

5.10 After another year in Medina, the family once again fled to Afgoi and from there to Ugunji, where they stayed for two years in relative peace before the Hawiye arrived in the area and enslaved the members of minority clans and peasants living there, including the author. The indigenous villagers also had pale skin, therefore the militia never questioned the author and his family about their background. However, when the family learnt that Hawiye elders were coming to the village they once again fled, knowing that they would be recognized. In the course of the following months the author went back and forth between Medina and Afgoi. Finally, the family managed to leave the country by truck to Kenya.

5.11 In addition to the grounds previously mentioned, the risk to the author is increased by the national and international publicity which his particular case has received. For example, Amnesty International has issued an Urgent Action in the name of the author; Reuters news agency, the BBC Somali Service and other international media have reported on the suspension of the author's expulsion following the request of the Committee; 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." ¹²

5.12 Counsel also submits that the danger of torture faced by the author is further aggravated owing to the manner in which the State party intends to carry out his return. According to the return plan, the author is to be delivered into the custody of private security "escorts" in order to be flown to Nairobi via Johannesburg and then continue unescorted from Nairobi to Mogadishu. Counsel submits that if the author were to arrive unescorted in North Mogadishu, at an airport which tends to be used only by humanitarian relief agencies, warlords and smugglers and which is controlled by one of the clans hostile to the Shikal, he would be immediately identifiable as an outsider and would be at increased risk of torture. In this context counsel refers to written interventions from various non-governmental sources stating that a Somali arriving in Mogadishu without escort or help to get through the so-called "authorities" would in itself give rise to scrutiny.

5.13 With reference to the State party's comments regarding the author's credibility, counsel underlines that throughout the author's application for refugee status, the credibility of the author or his claims have never been an issue. RRT accepted the author's case as claimed and clearly found the applicant a credible witness.

5.14 Counsel underlines that there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights in Somalia, although the lack of security has seriously compromised the ability of human rights monitors to document comprehensively individual cases of human rights abuses, including torture. The absence of case studies concerning torture of persons with similar "risk characteristics" as the author cannot therefore lead to the conclusion that such abuses do not occur, in accordance with reports from *inter alia* the independent expert of the Commission on Human Rights on the situation of human rights in Somalia, UNHCR, the Office for the Coordination of Humanitarian Affairs of the United Nations and Amnesty International. Counsel further underlines that the author is a member of a minority clan and hence is recognized by all sources as belonging to a group at particular risk of becoming the victim of violations of human rights. The State party's indication of the existence of an agreement between the Shikal and Hawiye clans affording some sort of protection to the Shikal is categorically refuted by counsel on the basis of information provided by reliable sources, and is considered as unreliable and impossible to corroborate.

5.15 Finally, counsel draws the attention of the author to the fact that although Somalia acceded to the Convention on 24 January 1990, it has not yet recognized the competence of the Committee to receive and consider communications from or on behalf of individuals under article 22. If returned to Somalia, the author would no longer have the possibility of applying to the Committee for protection.

Issues and proceedings before the Committee

6.1 The Committee notes the information from the State party that the return of the author has been suspended, in accordance with the Committee's request under rule 108, paragraph 9 of its rules of procedure.

6.2 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 acts the author will allegedly face if he is returned to Somalia do not fall within the definition of "torture" set out in article 1 of the Convention. The Committee, however, is of the opinion that the State party's argument raises a substantive issue which should be dealt with at the merits and not the admissibility stage. Since the Committee sees no further obstacles to admissibility, it declares the communication admissible.

6.3 Both the author and the State party have provided observations on the merits of the communication. The Committee will therefore proceed to examine those merits.

6.4 The Committee must decide whether the forced return of the author 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. Similarly, 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.

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 report¹³ 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.

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.

7. Accordingly, the Committee is of the view that, in the prevailing circumstances, the State party has an obligation, in accordance with article 3 of the Convention, to refrain from forcibly returning the author to Somalia or to any other country where he runs a risk of being expelled or returned to Somalia.

8. Pursuant to rule 111, paragraph 5, of its rules of procedure, the Committee would wish to receive, within 90 days, information on any relevant measures taken by the State party in accordance with the Committee's present views.

[Done in English, French, Russian and Spanish, the English being the original version.]

Notes

1. Letter dated 7 September 1998 addressed to the author's counsel.
2. Communication No. 83/1997, G.R.B. v. Sweden, 15 May 1998, para. 6.5.
3. Herman Burgers and Hans Danelius, The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1988).
4. Ibid.
5. Ibid.
6. Ibid.
7. E/CN.4/L.1470, 12 March 1979, para. 18.
8. Ahmed v. Austria, Case No. 71/1995/577/663, 27 November 1996.
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.
10. Communication No. 101/1997, Halil Haydin v. Sweden, 16 December 1998 (CAT/C/21/D/101/1997), para. 6.5.
11. Communication No. 34/1995, Seid Mortesa Aemei v. Switzerland, 29 May 1998 (CAT/C/18/D/34/1995), para. 9.6.
12. Oral statement on the situation of human rights in Somalia, delivered on 22 April 1999 before the Commission on Human Rights.
13. E/CN.4/1999/103, of 18 February 1999.