



# Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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## Committee against Torture

Forty-sixth session

9 May–3 June 2011

### Decision

#### Communication No. 341/2008

<i>Submitted by:</i>	Fatiha Sahli (represented by counsel, TRIAL (Track Impunity Always))
<i>Alleged victim:</i>	Djilali Hanafi (husband of the complainant)
<i>State party:</i>	Algeria
<i>Date of complaint:</i>	30 April 2008 (initial submission)
<i>Date of decision:</i>	3 June 2011
<i>Subject matter:</i>	Torture in custody resulting in the death of the victim
<i>Procedural issues:</i>	Exhaustion of domestic remedies and abuse of process
<i>Substantive issues:</i>	Torture or cruel, inhuman or degrading treatment; obligation to systematically monitor interrogation techniques and practices; right to effective remedy; right to compensation
<i>Articles of the Convention:</i>	2, paragraph 1; 11; 12; 13; 14 read in conjunction with article 1 or, alternatively, with article 16; article 22 (paras. 2 and 5 (b))
<i>Rules of procedure:</i>	107 (b) and (e)

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\* Made public by decision of the Committee against Torture.

## Annex

### **Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (forty-sixth session)**

concerning

#### **Communication No. 341/2008**

<i>Submitted by:</i>	Fatiha Sahli (represented by counsel, TRIAL (Track Impunity Always))
<i>Alleged victim:</i>	Djilali Hanafi (husband of the complainant)
<i>State party:</i>	Algeria
<i>Date of complaint:</i>	30 April 2008 (initial submission)

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

*Meeting* on 3 June 2011,

*Having concluded* its consideration of complaint No. 341/2008, submitted to the Committee against Torture by Ms. Fatiha Sahli 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 complainant, her counsel and the State party,

*Adopts* the following:

#### **Decision under article 22, paragraph 7, of the Convention against Torture**

1.1 The complainant is Ms. Fatiha Sahli, born on 28 June 1972 in Mechraâ-Sfa (Tiaret wilaya), Algeria. She contends that her husband was the victim of a violation by Algeria of article 2, paragraph 1 and articles 11, 12, 13 and 14 read in conjunction with article 1, or alternatively with article 16, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment. She is represented by TRIAL (Track Impunity Always).

1.2 On 15 September 2009 the Committee, at the request of the complainant and through its Rapporteur for new complaints and interim measures, requested the State party to refrain from invoking domestic legislation against the complainant and members of her family that might restrict their right to continue the procedure initiated in the Committee against Torture.

#### **The facts as submitted by the complainant**

2.1 On 1 November 1998 the complainant's husband went to work at his food store. He did not return home in the evening. On 2 November 1998 the family was visited by a man who informed them that Djilali Hanafi was being detained at the headquarters of the

Mechraâ-Sfa gendarmerie. The man explained that he had been released the same day, having been detained at the same facility, where he had met Djilali Hanafi. He said that they had been held in a concrete cell of two square metres that was shared by more than 10 people. Djilali Hanafi was shivering heavily and constantly vomiting following the torture to which he had just been subjected. Other detainees confirmed the conditions of detention and Djilali Hanafi's state of health. They added that they banged on the door the whole night to draw the guards' attention in the hope that they would assist the victim. It was not until late the following morning that a gendarme came to take him out of the cell to get some air. He never received medical attention.

2.2 Having heard where his son was being detained, Djilali Hanafi's father went to the Mechraâ-Sfa gendarmerie and requested to see him, asking the reasons for his detention. The chief of the gendarmerie denied his request. His father then appealed to the gendarmerie captain in charge, the chief's superior, asking him to release his son. He too denied the request. On 3 November 1998 the victim's father returned to the gendarmerie headquarters with one of his sons. The gendarmes, who the previous day had refused to give the slightest information on Djilali Hanafi, released him that evening. He was in a lamentable state and had obviously been subjected to serious ill-treatment. Unable to walk upright, he was carried to his home in a gendarmerie vehicle.

2.3 As it was already night, and because of the troubles and insecurity in the country, the family decided to wait until morning to bring Djilali Hanafi to the hospital, which was located 30 kilometres from their home. On the night of 3 November 1998, a few hours after being handed over to his family, the victim died from his injuries, in extreme agony. In his misery, he repeated time and again that the gendarmes had beaten him and had killed him. At about 8 o'clock in the morning, the gendarmes came to the family house and asked the victim's wife for the family civil-status record book so that the chief of the gendarmerie could fill in the death certificate. The complainant considers that this proves beyond any doubt to what extent the officers concerned were sure that the beatings inflicted on Djilali Hanafi while in detention would inevitably kill him.

2.4 On 4 November 1998 at around 3 p.m. the family was preparing to leave home for the cemetery to bury the deceased when gendarmes arrived and asked them to postpone the burial and transfer the victim's remains to the Youssef Damerdji hospital in Tiaret for an autopsy. According to information received verbally from members of the medical corps, the autopsy had been ordered by the Tiaret State prosecutor when signing the burial permit, noting that the death certificate had mentioned the victim's "suspicious death". An autopsy was conducted the following day, and the body was returned to the family that afternoon. They brought it home, then to the cemetery for burial. Despite numerous requests to the authorities, the family never received a copy of the autopsy report. They received only a copy of the death certificate. The causes of death were not specified, but it did contain the entry "suspicious death".

2.5 After the victim's death, his family brought the case to the attention of the office of the public prosecutor working in the competent courts for their district, both civil and military, challenging the arbitrary arrest and torture followed by the death of the victim, to no avail. On 12 January 1999 the complainant filed a case with the State prosecutor at the Tiaret court. However, she never received a reply from the authorities. Throughout 2000, the members of the victim's family also brought the case before the Tiaret prosecutor, the commander of the military sector, the commander of the national gendarmerie in Tiaret and the Ministry of Justice, but their complaints elicited no response. In 2006 the family undertook the procedure established by the Charter for Peace and National Reconciliation in order to secure State assistance for compensating the death of a family member during the time of unrest. A complete application was submitted with the Tiaret wilaya security office. Both the complainant and the victim's parents were questioned by the Mechraâ-Sfa

gendarmerie as part of the inquiry into the cause of death. By a letter dated 21 November 2007 the State security officer reported that the application had been denied. The services had concluded that the victim had died a “normal death” and that consequently the link between his death and the national tragedy had not been established. The complainant points out that the inquiry was conducted by the same gendarmerie that had arrested and tortured the victim.

2.6 On 16 February 2008 the complainant and her family once again sent a request to the Tiaret prosecutor with a view to obtaining a copy of the autopsy report. The authorities have still not replied to her request or acknowledged their responsibility in the death of the victim. Furthermore, the complainant has been legally incapable of bringing her case to court since the promulgation of Order No. 06-01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation. Domestic remedies, previously useless and ineffective, have now become unavailable.

### **The complaint**

3.1 The complainant points out that Djilali Hanafi was subjected to extremely serious ill-treatment. The victim himself told his family, before dying from his injuries, that he had been violently beaten, treatment qualified as torture by the Committee.<sup>1</sup> Furthermore, his torturers did not provide him with the necessary care, despite the fact that he was in a serious state of health. Moreover, there was clearly an intention to inflict such pain, given the state of the victim. In light of the treatment inflicted also on those detained with him, the complainant deduces that the practice was systematic, planned and coordinated at that place of detention. The complainant alleges that the aim of such treatment was to obtain information or a confession, to punish the detainee or intimidate him, or to bring pressure to bear on him because of his supposed political affiliation. As for the perpetrators, there was no doubt that they were public officials. The complainant therefore considers that the treatment constitutes torture under article 1 of the Convention, and at the very least constitutes cruel, inhuman or degrading treatment under article 16 of the Convention.

3.2 The complainant recalls that the State party has not adopted the legislative or regulatory measures required to prevent the commission of torture in its jurisdiction. It has therefore failed to fulfil the obligation set out in article 2, paragraph 1, of the Convention. It has also failed in its duty to carry out an investigation in respect of the victim. The measures set out by Order No. 06-01 of 27 February 2006 prohibiting the filing of charges against members of the Algerian security forces for serious crimes committed during the period of “national tragedy” further foster impunity. Furthermore, Algerian law contains no provisions prohibiting the use as evidence of confessions or statements extracted under torture, which does nothing to dissuade the police from using illicit means to obtain statements for later use in criminal trials against suspects or third parties. Furthermore, the Committee has cited a series of guarantees to prevent torture and ill-treatment of persons deprived of their liberty, including keeping an official register of detainees. The State party has numerous secret detention centres with no registers of detainees, and the families of the detainees have no way of locating them. Furthermore, Algerian law provides for police custody of up to 12 days with no possibility for contact with persons outside, including the family, counsel or an independent doctor. This long period of incommunicado detention exposes detainees to a greater risk of torture and ill-treatment. In such circumstances, detainees are materially unable to ensure that their rights are respected through legal proceedings.

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<sup>1</sup> Communication No. 207/2002, *Dragan Dimitrijevic v. Serbia and Montenegro*, decision adopted on 24 November 2004, para. 5.3; communication No. 269/2005, *Ben Salem v. Tunisia*, decision adopted on 7 November 2007, para. 16.4.

3.3 The complainant says that the State party is not respecting its obligation under article 11 of the Convention to keep under systematic review laws and practices related to interrogations and the treatment of persons deprived of their liberty. She refers to the various recommendations made to the State party, in particular concerning the authorized length of police custody, the lack of judicial oversight at several detention centres, the system for the treatment of detainees, the obligation to have an independent body investigate all allegations of torture and cruel, inhuman or degrading treatment and the duty to ensure that all detainees effectively have the right to counsel as soon as they are arrested. Such shortcomings in the law and in the practices of the Algerian authorities have regularly been pointed out since 1992. The fact that the same defects have been noted at 15 years' interval demonstrates that the State party has been remiss in its obligations under article 11 of the Convention.

3.4 The complainant points out that the State party did not conduct a prompt and impartial investigation of the allegations that Djilali Hanafi was the victim of torture, thus disregarding the obligation imposed by article 12 of the Convention against Torture. Despite the numerous requests made by the victim's family members bringing the facts to the attention of the various State institutions and requesting that they take action, no criminal investigation was ever ordered. The only investigation carried out was conducted as part of the procedure for the granting of assistance, and it did not take place until 2006. The officials assigned the task of investigating the circumstances surrounding the death of Djilali Hanafi were the ones responsible for his death. The investigation was thus not impartial.

3.5 The complainant points out that the State party did not offer the victim's family members the opportunity to file a complaint with a view to the prompt and impartial examination of the allegations, in violation of article 13 of the Convention. The Tiaret State prosecutor and the various authorities later seized of the matter did not follow up on the complaints filed by the family members of the victim. Their request for the report of the autopsy carried out on 5 November 1998 was denied, as was access to the results of the inquiry the State said it had conducted following the request for compensation, in 2006.

3.6 The complainant also considers that the State party violated article 14 of the Convention against Torture. On the one hand, it disregarded the right of the victim's family members to redress, as the crimes perpetrated against him went unpunished owing to the unresponsiveness of the State, and on the other hand, those entitled to adequate compensation, far from receiving it, were denied any compensation, or even State assistance, at all.

#### **State party's observations on admissibility and the merits**

4.1 On 2 March 2009 the State party submitted its observations on admissibility and the merits of the complaint. It contested the admissibility on the grounds that domestic remedies had not been exhausted as required under article 22, paragraph 5 (b), of the Convention and rule 107, paragraph 22 (e), of the Committee's rules of procedure. The State party also contests the merits of the complaint, according to which the victim, Mr. Djilali Hanafi, died between 1 and 3 November 1998 while in police custody at the Machraâ-Sfa gendarmerie in Tiaret wilaya.

4.2 The State party emphasizes that the exhaustion of domestic remedies is an essential obligation for a complaint to be admissible. In the case in question the complainant has not exhausted all remedies available under Algerian law. The State party insists on the importance of distinguishing between mere enquiries made with the political or administrative authorities, non-contentious appeals brought before advisory or mediation bodies and contentious remedies sought in the various competent judicial bodies. The State party notes that the statements made by the complainant indicate that she sent letters to the

political or administrative authorities, that she brought the case before advisory or mediation bodies and sometimes sent complaints to the prosecution services (prosecutors or State prosecutors), without initiating a legal appeals procedure and taking it to its conclusion using all available remedies, including judicial appeal and cassation proceedings. Among all the authorities in question, it was only the representatives of the public prosecutor's office who by law had the authority to initiate a preliminary police investigation and to bring the case before an investigating judge to investigate a case as part of a judicial investigation. In the Algerian judicial system the State prosecutor is the person who receives complaints and who, if necessary, initiates the public action.

4.3 The State party notes, however, that to protect the rights of the victim or his survivors, the Code of Criminal Procedure authorizes the survivors to act by claiming damages in criminal proceedings directly before the investigating judge. In such cases, it is the victim and not the prosecutor who initiates the public action by bringing the case before the investigating judge. Such a procedure, covered by articles 72 and 73 of the Code of Criminal Procedure, was not used, although it would have been sufficient to allow the complainant to initiate the public action and oblige the investigating judge to proceed with the investigation, even if the prosecution decided otherwise. Thus, a simple signed and dated complaint filed with the investigating judge by the family would have sufficed to initiate public action. That procedure, covered by articles 72 and 73 of the Code of Criminal Procedure, was subject to appeal before the indictments and cassation appeals chamber of the Supreme Court. Under article 73 the investigating judge orders that complaints filed by victims or their survivors be forwarded within five days to the State prosecutor for indictment. The prosecutor must indict within five days of receiving the communication. The charges may be brought against a person who is named or unnamed. The State party notes that there are exceptions to this procedure. The prosecutor may indeed decide not to prosecute, either because the acts in question cannot be legally prosecuted or, if the acts have been proven, if no criminal provisions relate to them. In cases where the investigating judge decides to pursue another channel, he must provide a reasoned order to that effect.

4.4 The State party emphasizes that the victim and the prosecutor are two parties in the criminal proceedings, each of which has similar and parallel prerogatives under Algerian law. The complainant and her family decided not to use that channel for redress, which offered the possibility of initiating public action without having to wait for the prosecutor to voluntarily do so. The State party considers that the victim's family had preferred to await a "hypothetical" reply from the public prosecutor's office.

4.5 The State party furthermore notes that according to the complainant, the adoption by referendum of the Charter and its implementing legislation, in particular article 45 of Order No. 06-01 of 27 February 2006, make it impossible to consider that there are effective, useful and available national remedies in Algeria for families of victims. On that basis, the complainant believed that she was exempted from the obligation to bring the case before the competent authorities, prejudging their position and their assessment of how the aforementioned article 45 would be applied, both in respect of its compliance with the Algerian Constitution and with its compatibility with the Convention against Torture. The complainant cannot invoke the Order and its implementing legislation to absolve herself from initiating the available judicial proceedings. As a State based on the rule of law, the State party is governed by the constitutional principle of the separation of powers. By arguing that the case is admissible without submitting the underlying facts to the national courts, the complainant is indirectly calling for the Committee to share her suspicion and assumptions regarding the functioning of the Algerian justice system and the independence of Algerian judges. The State party thus calls on the Committee to declare the complaint inadmissible for failure to exhaust domestic remedies, in accordance with article 22, paragraph 5 (b), of the Convention.

4.6 The State party nonetheless intends to present some information following interviews held with persons cited in the complaint, as taken down in a record. These interviews have shown that the complaint is based on false or distorted testimony — an offence — with the aim of abusing the Committee’s process, in violation of article 107, paragraph (b), of the Committee’s rules of procedure. The first witness, Mr. Boudali Benaïssa, who was arrested on 1 November 1998 by the same gendarmerie for supporting and justifying terrorism, said that he was aware of the arrest of Mr. Djilali Hanafi on 2 November 1998 and his release on 3 November 1998 at the time of the Isha night-time prayer, as the victim was suffering from stomach pains. He continued his testimony stating that he had met the victim at the gendarmerie headquarters the same day for nearly half an hour, denying that they were together during the night and stating that he had not provided any written statement to the victim’s family or any human rights organization.

4.7 The State party states that the second witness heard was Mr. Mohamed Belkacem, who said he had been arrested in 1997, that he did not know the victim at all and that he had never heard anything about him. He said that he knew nothing about the statement written in his name and enclosed with the complaint, noting that the signature was not his. The third witness was Mr. Djilali Malki. He denied having produced any testimony at all, oral or written, in the case in question. He added that Mr. Djilali Hanafi, who was with him in the provisional lock-up at the Mechraâ-Sfa local station of the national gendarmerie, had been subjected to no violence by the staff of that unit, pointing out that he had been released on 3 November 1998, at dusk, after having complained of stomach pains. He concluded that the victim had complained of such pains well before being arrested by the staff of the gendarmerie. The complainant, the victim’s widow, had stated that she had first given a power of attorney to her brother-in-law, Sahraoui Hanafi, to bring the case to the attention of the human rights league in order to obtain financial compensation. She had added that her husband had been arrested by staff of the Mechraâ-Sfa local station of the national gendarmerie on 2 November 1998, and then released the following day, on 3 November 1998, at the time of the Isha night-time prayer, and that some four hours later, he had died as a result of his illness. She had finished her testimony stating that she had not noticed any signs of physical abuse on his body.

4.8 The State party adds that the forensic medical examiner for the Tiaret health sector presented investigators with a copy of the report of the autopsy carried out on the deceased. The copy showed that the death had been due to an acute heart attack, and the report cited no signs of violence. From the investigation carried out by the State party it became clear that the witnesses unanimously denied having produced any oral or written testimony in the case, just as they stated that they had never signed any statements.

4.9 The State party notes that the complaint contains contradictions, such as the reference to the time the victim reportedly spent in police custody. The complaint states that the custody lasted three days, while the witnesses unanimously stated that it was one day long. The State party concludes from this that the complainant’s allegations are baseless and that her brother-in-law obtained false evidence and falsified the facts with the sole purpose of obtaining compensation to which they had no claim. The State party thus considers the complaint to be unfounded.

4.10 On 30 March 2009 the State party provided the Committee with a copy of the autopsy concerning the victim’s death, drawn up by the forensic medical examiner for the Tiaret health sector. The autopsy concluded that the direct cause of death was an acute heart attack and that there were no signs of a struggle or of self-defence, externally or internally.

### **Complainant’s comments**

5.1 In a letter of 29 June 2009 the complainant’s counsel informed the Committee that the brother of the victim, Mr. Sahraoui Hanafi, who had submitted the initial complaint,

wished to withdraw the communication. His request was motivated by the fact that during the time given to the State party to submit its comments, Mr. Sahraoui Hanafi and other members of his family, as well as several witnesses, had been summoned by the Algerian security forces to provide explanations on this case under interrogation. This had occurred at the beginning of 2009, at the Mechraâ-Sfa gendarmerie.

5.2 The complainant's counsel recalls in this respect that according to article 45 of Order No. 06-01 of 27 February 2006, no proceedings may be instituted individually or collectively against any of the components of the defence and security forces of the Republic for actions taken to protect persons and property, safeguard the nation and preserve the institutions of the Republic of Algeria. According to article 46 of the Order, anyone who, by statements, writings or any other act, uses or exploits the wounds caused by the national tragedy in order to attack the institutions of the Republic, undermine the State, sully the honour of the officials who have served it with dignity or tarnish Algeria's international image is subject to imprisonment of 3 to 5 years and a fine of 250,000 to 500,000 Algerian dinars. Criminal cases are automatically initiated by the prosecution services.

5.3 Counsel states that following those interrogation sessions, two witnesses reportedly withdrew their testimony, at least partially. Mr. Sahraoui Hanafi, the victim's brother, who had submitted the initial complaint, was convinced that the witnesses were afraid that they themselves would be prosecuted, and he also considered it probable that they would turn against him. For his part, he feared that criminal proceedings would be brought against him. The questions asked of him and his replies, which had been taken down in a record, a copy of which he had been unable to obtain, had been sufficiently explicit for him to view them as a real threat. For example, he was asked if he confirmed that he was filing a complaint against the gendarmerie. Another of his brothers and the complainant had been asked the same questions, followed by comments to the effect that Mr. Hanafi did not have the right to initiate such proceedings.

5.4 Counsel expressed surprise at the fact that the State party summoned the brother of the victim, the complainant and their family while the procedure was under way with the Committee, and while the same case had been closed by the Algerian authorities. That behaviour was perceived by the complainant, her family and counsel as a warning. Counsel also expressed surprise that it was only after proceedings were initiated in the Committee that the victim's family finally received the autopsy report. Lastly, the victim's brother learned that three of his cousins, who had been questioned by the Algerian secret services in a case unrelated to the complaint before the Committee, had heard that Mr. Sahraoui Hanafi was under surveillance. These were indirect threats that shook the confidence of the victim's brother that the Committee's procedure could be carried out without him being harmed.

5.5 On 13 August 2009 counsel informed the Committee that the victim's widow would replace the victim's brother as complainant in the procedure before the Committee.

#### **Additional comments by the State party**

6.1 In a note dated 30 November 2009 the State party expressed its disagreement regarding a violation of the procedure, as the Committee had unilaterally decided to extend the deadlines for the complainant and to accept a change in the name of the complainant.

6.2 The State party further recalls that, contrary to the claims made by the complainant, Order No. 06-01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation in no way prevents a member of the public from bringing claims before the treaty bodies under the provisions of their treaties and to submit communications, in compliance with their procedures, in particular the one relating to the exhaustion of

domestic remedies. The State party lastly recalls that no legal provision, including the Order mentioned above, prohibits members of the public from lodging complaints for assault committed for any reason other than to protect persons and property, safeguard the nation and preserve the institutions of the State party.

#### **Additional comments by the complainant**

7.1 On 30 December 2009, the complainant commented on the State party's observations of 2 March 2009. In respect of the admissibility of the complaint, she asserts that it was her intention not to avoid her obligation to apply to domestic bodies, but rather to learn the truth about what really happened at Mechraâ-Sfa gendarmerie between 1 and 3 November 1998. However, all the steps taken have proved fruitless. Furthermore, the procedure before the investigating judge referred to by the State party is complicated and costly, and would certainly not have produced any results, as all such procedures have become meaningless since the adoption of the Charter for Peace and National Reconciliation.

7.2 The complainant recalls the numerous legal and administrative steps taken since the death of her husband in 1998. She notes that her last registered letter submitted to the principal State prosecutor of Tiaret on 16 February 2008 has elicited no response, despite the wording "suspicious death" on the death certificate issued on 3 April 2006 and signed by the Tiaret wilaya forensic unit. The complainant therefore considers that she did not attempt to avoid her obligation to exhaust domestic remedies. Indeed, there is every indication that the complaints made would inevitably have been to no avail. The complainant refers in particular to the fact that the Tiaret prosecution service requested the autopsy in haste on the day of the burial; that it was only possible to obtain a copy of the autopsy report more than 10 years after the victim's death and only then in the context of the procedure before the Committee; that the officers in charge of questioning the witnesses to the events while the procedure was before the Committee were the same ones responsible for the death of the victim; that, after the complaint was submitted to the Committee, the complainant, members of her family and fellow detainees of the victim were summoned to appear and questioned in the gendarmerie where the victim is alleged to have been tortured; and that the victim's brother is allegedly under surveillance by the State party's authorities.

7.3 Although the State party's authorities should have acted *proprio motu* and immediately, it was in fact the family who had to take steps and file a criminal complaint on 12 January 1999. Despite that, the prosecution service did not respond, which was incomprehensible to the complainant, particularly since it was the same prosecution service that had ordered the autopsy on the day of the victim's burial. The complainant therefore believes that she is justified in mentioning the ineffectiveness and also the unavailability of domestic remedies.

7.4 The complainant considers the procedure before the investigating judge to be complicated and costly. She notes first of all that, given the victim's detention until just a few hours before his death and his worrying state of health — he was not old and had previously been in perfect health — it was the responsibility of the prosecution service, not the family of the victim, to bring criminal proceedings. The complainant quotes the Committee's previous concluding observations to the State party in which it considered that the State party should launch prompt and impartial investigations spontaneously and systematically wherever there was reasonable ground to believe that an act of torture has been committed, including in the event of the death of a detainee. The Committee added that the State party should ensure that the results of the investigation are communicated to

the families of the victims.<sup>2</sup> Despite repeated requests from the family of the victim, no investigation has been undertaken, even 11 years after the event. The complainant thus alleges not only that the State party did not fulfil its obligation to carry out a prompt and impartial investigation, but also placed the burden of proving that charges should be brought on the family of the victim.

7.5 The complainant notes that a procedure before the investigating judge was not, in any case, an available option because, under national legislation, the prosecution service had to take a decision on action to be taken on proceedings initiated to allow the investigating judge to open a case or take up a case referred. The victim's family was thus deprived of any possibility of bringing the case before the investigating judge because no decision was ever taken by the prosecution service in this case. If the prosecution service had taken a decision not to prosecute, and if the case had been referred to the investigating judge, it would, under article 73 of the Algerian Criminal Code, still have been the responsibility of the prosecution service to indict within five days. If the decision had been not to conduct an investigation, the investigating judge would have had to give a reasoned order to go against the prosecution service's decision. The complainant intends to demonstrate here that Algerian criminal procedure does not encourage instructing judges to take action where it goes against the opinion of the prosecution. The complainant argues that the State party would not be able to cite a single case in which the investigating judge had been able, in response to a claim for damages, to ignore inaction on the part of the prosecution service and instigate a prompt, efficient and independent investigation into acts of such a serious nature by State officials.

7.6 The complainant notes the expense of bringing proceedings before the investigating judge because, under article 75 of the Code of Criminal Procedure, any complainant who does not receive legal aid must pay to the registry a sum set by order of the investigating judge to cover the costs of the proceedings. She points out that, on the death of her husband, she was left alone to raise her children and was thus in a precarious financial situation. The conditions for obtaining legal aid are subject to a complex procedure initiated by a request to the State prosecutor. Given the attitude of the prosecutor in this case, the complainant believes that the request would not have been granted.

7.7 The complainant argues that article 45 of the implementing legislation of the Charter for Peace and National Reconciliation has the direct effect of depriving plaintiffs of any useful remedy, even in the event of serious violations of fundamental rules such as the prohibition of torture. The Committee has itself expressed concern at the impunity of State officials since the Charter was adopted, as it provides for amnesty from prosecution for State officials and prohibits any prosecution for acts committed by those State officials in the context of the national tragedy. The complainant recalls that the Committee found the provisions not consistent with the obligation of every State party to conduct an impartial investigation wherever there is reasonable ground to believe that an act of torture has been committed on territory under its jurisdiction, to prosecute the perpetrators of such acts and to compensate the victims.<sup>3</sup> The complainant adds that the Committee drew the State party's attention to paragraph 5 of its general comment No. 2 (2007) in which it expressed the view that amnesties or other impediments which preclude or indicate unwillingness to

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<sup>2</sup> Committee against Torture, fortieth session, Consideration of reports submitted by States parties under article 19 of the Convention. Concluding observations on Algeria, para. 14, (CAT/DZA/CO/3, 16 May 2008).

<sup>3</sup> CAT/C/DZA/CO/3, 16 May 2008, para. 11.

provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability.<sup>4</sup>

7.8 The complainant considers that the action taken by herself and her family since 1998 to shed light on her husband's death falls within the scope of article 45 of the above-mentioned implementing legislation, which is an impediment to the exhaustion of effective and useful remedies. The complainant was thus not obliged to exhaust other remedies to meet the conditions for admissibility under article 22, paragraph 5 (b) of the Convention.

7.9 On the merits, she notes the suspicious attitude of the State party's authorities in respect of the autopsy report of November 1998. The victim's family had to wait until their request was submitted to the Committee before the State party decided to give them a copy of the autopsy report. The complainant stresses that the victim was in very good health before being imprisoned at Mechraâ-Sfa gendarmerie. When he came home, however, he said that he had been severely beaten. He was vomiting blood some hours after his release. It was the authorities' responsibility to ensure that the integrity of the detainee's person was respected, and it was thus the responsibility of the prosecution service to conduct a prompt, impartial and independent investigation, as the victim's death could have been linked to his detention. Given the content of the autopsy report that the family has now received, which shows death from cardiac arrest, the complainant wonders why the authorities concealed the conclusions of the report for 11 years, if not to prevent the family requesting a second forensic opinion at the proper time.

7.10 To demonstrate that the autopsy report had not been undertaken in a serious and professional manner, the complainant asked several forensic medical examiners to analyse it. They are unanimous in the conclusion that the report was brief and terse. They consider that the cardiac examination is inadequate, and it is impossible to draw a conclusion of cardiac death from the elements noted in the report. The only information on the state of the victim's heart is the existence of "several haemorrhagic areas on the cardiac surface". According to the forensic experts consulted by the complainant, that is not specific to heart failure and cannot, by itself, lead to the conclusion that the macroscopic aspect was characteristic of acute heart failure, that being the direct cause of death. The specialists are of the opinion that the terms "cyanosis of the extremities", "foam" and "pulmonary congestion and severe pulmonary oedema" in the autopsy report are characteristic of deaths resulting from asphyxia and are not specific to acute heart attack. In any case, the examination carried out by the two doctors from the Tiaret health sector who signed the autopsy report is not sufficient to lead to a conclusion of death from cardiac arrest in a person aged 32 and in full health at the time of his detention. Professor Patrice Mangin, Director of the University Forensic Medicine Centre in Switzerland also subscribes to this analysis. The complainant also notes that the medical certificate of death issued on 3 April 2006 refers to a suspicious death, while the autopsy report submitted by the State party does not allow that conclusion to be reached. This seriously challenges the credibility of the autopsy report released 11 years after the event.

7.11 As concerns the witness statements, the complainant states that the records of the hearings of Mr. Boudali Benaissa, Mr. Mohamed Belkacem and Mr. Djilali Malki were never communicated to the Committee. That being so, the State party's arguments are not based on any tangible proof, in contrast to the signed witness statements submitted to the Committee by the complainant in her initial complaint. The absence of proof also makes it impossible to identify the persons who modified their initial statements. Even though those persons were questioned by the State party, the complainant considers the method used to be unreasonable, in that the witnesses were questioned at the place where they had been

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<sup>4</sup> Ibid.

detained and where the victim had been tortured, at a time when the procedure was before the Committee. In the event that the State party did have the right to conduct a supplementary investigation while the procedure was before the Committee, the complainant considers that special provisions should have been made to guarantee the integrity of the witness statements of those questioned. The complainant therefore considers that the hearings should have been subject to prior authorization from the Committee, which has a procedure before it. Moreover, a lawyer representing the interests of the complainant or any other person chosen by the complainant should have been present during the questioning to avoid any pressure, intimidation or constraint on the witnesses.

7.12 Finally, in respect of the allegations of contradictions in the complaint, the complainant states that she never alleged that the detention lasted for one day. That came rather from the statements of the State party. The complainant and her family always affirmed that the victim had been held for three days. Regarding the complainant's statement that she had not noticed signs of physical abuse on the victim's body, she affirms that, given her husband's state of health when he returned home, she and her family had simply laid him on a bed. He was vomiting blood before he died, and the complainant indeed did not think to check for possible bruising on his body before the corpse was taken away. The complainant emphasizes that she never had the intention of initiating proceedings to obtain unreasonable financial redress, as the State party maintains. She also states that the demand for redress for acts of torture is not unreasonable, as the State party asserts, but is justified. Such redress includes not only financial compensation, but also a recognition of violations committed.

## **Issues and proceedings before the Committee**

### **Consideration of admissibility**

8.1 Before considering any of the allegations in a communication, the Committee against Torture must decide whether or not the communication is admissible under article 22 of the Convention.

8.2 Concerning compliance with the Committee's procedure, the Committee points out that, in accordance with article 98, paragraph 2 (c), of its rules of procedure, a complaint may be submitted by the alleged victim or by a close relative of the alleged victim. In that the interests of the alleged victim are respected, there is no provision in its rules of procedure that prevents the Committee from considering the complaint. In respect of the time limits for submitting comments, the Committee wishes to recall its practice of granting extensions to deadlines for either party, on the party's request, if it considers the request valid.

8.3 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.

8.4 The Committee notes that, according to the State party, the complainant has not exhausted domestic remedies, as is required under article 22, paragraph 5 (b), of the Convention, since the complainant and her family did not consider the possibility of claiming damages in criminal proceedings before the investigating judge. The Committee notes the complainant's arguments that she and her family brought the case to the attention of the office of the public prosecutor working in the competent courts for their district, both civil and military, challenging the arbitrary arrest and torture, followed by the death of the victim, to no avail; that, on 12 January 1999, the complainant filed a complaint with the State prosecutor at the Tiaret court; that she never received a response from the authorities; that, in 2000, members of her family also brought the case before the Tiaret prosecutor, the

commander of the military base, the commander of the national gendarmerie in Tiaret, and the Ministry of Justice, but no response was ever received. The Committee notes that the complainant argues that it was the responsibility of the State party's authorities to initiate an investigation, not that of the family to claim damages in criminal proceedings before the investigating judge, who could not, in any case, have opened a case because no decision, either positive or negative, had been taken by the prosecutor.

8.5 The Committee recalls that the rule on the exhaustion of domestic remedies does not apply if it is established that application of domestic remedies has been or would be unreasonably prolonged, or would be unlikely to bring effective relief to the victim.<sup>5</sup> The Committee recalls, in this regard, its previous concluding observations to the State party, in which it underlined the need for the State party to launch prompt and impartial investigations spontaneously and systematically wherever there is reasonable ground to believe that an act of torture has been committed, including in the event of the death of a detainee.<sup>6</sup> In the case of offences as serious as those alleged, a claim for damages in criminal proceedings cannot be a substitute for the State prosecutor bringing a prosecution. The Committee concludes that the insurmountable procedural obstacles faced by the complainant as a result of the inaction of the competent authorities rendered the application of a remedy that may bring effective relief to the complainant highly unlikely.<sup>7</sup> The Committee also considers that the application of available domestic remedies was unduly prolonged, as the initial complaint was lodged on 12 January 1999 and, at the date of the Committee considering the complaint, no impartial and thorough investigation has yet been undertaken. The Committee concludes that the complaint is admissible under article 22, paragraph 5 (b) of the Convention. Finding no other obstacle to the admissibility of the complaint, it declares the complaint admissible and proceeds to its consideration of the merits.

#### Consideration of the merits

9.1 The Committee examined the complaint, taking due account of all the information provided to it by the parties, in accordance with article 22, paragraph 4, of the Convention.

9.2 The complainant alleged a violation of article 2, paragraph 1, read in conjunction with article 1, of the Convention, on the grounds that the State party failed in its duty to prevent and punish acts of torture. These provisions are applicable insofar as the acts to which the complainant was subjected are considered acts of torture within the meaning of article 1 of the Convention.<sup>8</sup> The Committee notes in this regard that, according to the complainant, the victim himself, before dying from his injuries, told his family that he had been beaten very violently while in detention; that his torturers had not then provided him with the necessary care, despite his serious state of health; and that, given the state he was in, there was a clear intention to inflict suffering on him. The Committee also notes that, according to the complainant, the aim of such treatment was to obtain information, a confession, to punish or intimidate, or bring pressure to bear on the victim because of his

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<sup>5</sup> Communication No. 133/1999, *Enrique Falcon Ríos v. Canada*, decision adopted on 23 November 2004, para. 6.

<sup>6</sup> Committee against Torture, fortieth session, Consideration of reports submitted by States parties under article 19 of the Convention, concluding observations on Algeria, para. 14 (CAT/C/DZA/CO/3, 16 May 2008).

<sup>7</sup> Communication No. 207/2002, *Dragan Dimitrijevic v. Serbia and Montenegro*, decision adopted on 24 November 2004, para. 5.2; communication No. 172/2000, *Danilo Dimitrijevic v. Serbia and Montenegro*, decision adopted on 16 November 2005, para. 6.2.

<sup>8</sup> Communication No. 291/2006, *Saadia Ali v. Tunisia*, decision adopted on 21 November 2008, para. 15.4.

supposed political affiliation; and that there is no doubt that the perpetrators of those acts were public officials. The Committee notes that all the allegations are challenged by the State party, which nevertheless has not provided any other evidence than the victim's autopsy report, which does not allow any conclusions to be drawn, and statements by fellow detainees of the victim, the records of which have not been submitted to the Committee.

9.3 The Committee considers that the elements of the complaint before it constitute torture within the meaning of article 1 of the Convention, for the following reasons. First, while in detention under the authority of public officials, the victim suffered treatment so harsh that it led to his death within a very short period of time. While the victim was still in detention, his fellow detainees allegedly alerted the authorities at the detention facility to his critical state of health and urgent need for medical treatment. Despite such action, the authorities do not seem to have called a doctor to examine him at any point. The Committee also notes that the victim died a few hours after being released, which the State party does not contest. With regard to the intention of the officials, the Committee recalls that it is the responsibility of the State party to provide evidence that the treatment of the victim in detention was not intended to be contrary to article 1 of the Convention, particularly in respect of inflicting punishment. Such evidence has not been provided, nor did the State party conduct an immediate investigation *proprio motu* to establish the circumstances of the victim's death. In fact, throughout the victim's detention, and despite concurring witness statements alleging that he had been tortured, the authorities did not carry out any investigation or request a doctor to examine him, even though his fellow detainees had alerted guards to his critical state of health. Furthermore, although the death certificate refers to the "suspicious death" of the victim, the prosecutor has not taken any action in respect of the case, a fact which the State party has not contested. The Committee therefore concludes that the treatment of the victim and his resultant death constitute a violation of article 1 and article 2, paragraph 1, read in conjunction with article 1, of the Convention.

9.4 In the light of the above finding of a violation of article 1 of the Convention, the Committee need not consider whether there was a violation of article 16, paragraph 1.

9.5 With regard to article 11, the Committee notes the complainant's arguments that the victim was held at Mechraâ-Sfa gendarmerie for three days and was in perfect health before being detained; and that on his release from detention, he was in a serious state of health and was vomiting blood. The Committee notes that, according to the State party, the victim was released on 3 November 1998 because he was suffering from stomach pains; that the complaint mentions a period of three days in detention whereas the witnesses unanimously stated that it was one day; and that the autopsy report by the forensic medical examiner of the Tiaret health sector concluded that acute cardiac failure was the direct cause of death and there were no signs of a struggle or defence in either the external or the internal examination. The Committee is surprised at the State party's statements, based on the statements of the fellow detainees of the victim, that reject the complainant's allegations concerning the length of the period of detention. The Committee is also surprised that the only medical examination of the victim that seems to have taken place was carried out after his death; that the victim was released supposedly because he was suffering from stomach pains, whereas it was the responsibility of the officials in charge of the place of detention to conduct a medical examination if such symptoms appeared during the period of detention. In this regard, the Committee recalls its previous concluding observations to the State party, in which it recommended that the State party should ensure that the right of any detainee to have access to a doctor is respected in practice, and to establish a national register of

prisoners.<sup>9</sup> Given the lack of information provided by the State party on these issues and the arguments put forward in its observations, the Committee is obliged to find that the State party has failed in its obligations under article 11 of the Convention.

9.6 In respect of the alleged violation of articles 12 and 13 of the Convention, the Committee observes that, according to the complainant, none of the authorities contacted, including the Tiaret prosecutor, told her whether an investigation was being or had been conducted as a result of the initial complaint filed in January 1999. According to the complainant, the only investigation conducted was part of the procedure concerning the allocation of assistance, and took place only in 2006; and the officials in charge of investigating the circumstances of the death of Djilali Hanafi were the people responsible for his death. The Committee notes the State party's argument that the victim's family decided to await a hypothetical reply from the public prosecutor's office rather than bring proceedings themselves. The Committee also finds that no impartial and thorough criminal investigation had been initiated to shed light on the death of the complainant's husband, even 12 years after the events, a fact not disputed by the State party. The absence of an investigation is particularly inexplicable in that the death certificate issued in April 2006 refers to the suspicious death of the victim. The Committee considers that such a delay before an investigation is initiated into allegations of torture is unreasonably long and does not meet the requirements of article 12 of the Convention, which requires the State party to proceed to a prompt and impartial investigation wherever there is reasonable ground to believe that an act of torture has been committed.<sup>10</sup> Nor has the State party fulfilled its obligation under article 13 of the Convention to ensure that the complainant has the right to complain to, and to have his or her case promptly and impartially examined by, its competent authorities.

9.7 With regard to the alleged violation of article 14 of the Convention, the Committee notes the complainant's allegations that the State party has deprived her of any form of redress by failing to act on her complaint and by not immediately launching a public investigation. The Committee recalls that article 14 of the Convention not only recognizes the right to fair and adequate compensation, but also requires States parties to ensure that the victim of an act of torture obtains redress. The Committee considers that redress should cover all the harm suffered by the victim, including restitution, compensation and measures to guarantee that there is no recurrence of the violations, while always bearing in mind the circumstances of each case.<sup>11</sup> Given the lack of a prompt and impartial investigation, despite the existence of an autopsy report and particularly of a death certificate that refers to a suspicious death, the Committee concludes that the State party was also in violation of its obligations under article 14 of the Convention.

9.8 With regard to respecting the procedure established in article 22, the Committee notes that, by letter of 29 June 2009, counsel for the complainant informed the Committee that the victim's brother, Mr. Sahraoui Hanafi, who had submitted the initial complaint, wished to withdraw his communication to the Committee; that this request was motivated by pressure brought to bear on him and on the victim's fellow detainees; and that they had allegedly been questioned by the State authorities to make them retract. The Committee notes that the State party does not contest the fact that it questioned the victim's brother and fellow detainees, and that it justifies such action by the need to demonstrate the defamatory

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<sup>9</sup> Committee against Torture, fortieth session, Consideration of reports submitted by States parties under article 19 of the Convention, concluding observations on Algeria, para. 5 (CAT/C/DZA/CO/3, 16 May 2008).

<sup>10</sup> Communication No. 269/2005, *Ali Ben Salem v. Tunisia*, decision adopted on 7 November 2007, para. 16.7.

<sup>11</sup> *Ibid.*, para. 16.8.

nature of the complainant's allegations. The Committee reaffirms that, within the framework of the procedure for individual communications set out in article 22, the State party is required to cooperate with the Committee in good faith and refrain from taking any action that might hinder this process, that it is obliged to take all necessary measures to guarantee the right of every individual to have access to the procedure under article 22, and that such access should in no circumstances be restricted or withdrawn and should be exercised freely. In this case, methods consisting of questioning former fellow detainees of the victim and the complainant herself, with the aim of persuading them to withdraw their previous statements to the Committee, constitute unacceptable interference in the procedure set out in article 22 of the Convention.

9.9 The Committee wishes to recall its concluding observations to Algeria at its fortieth session,<sup>12</sup> in which it considered that the State party should amend article 45, chapter 2, of Order No. 06-01 to specify that waivers of prosecution do not apply under any circumstances to crimes such as torture. The State party should immediately take all necessary measures to guarantee that cases of torture or ill-treatment are investigated systematically and impartially, the perpetrators of such acts are prosecuted and punished in a manner commensurate with the gravity of the acts committed and the victims and their dependents are adequately compensated. The Committee has drawn the attention of the State party to paragraph 5 of its general comment No. 2 (2007) in which it considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability. The Committee thus rejects the State party's argument that the complainant cannot invoke that Order and its implementing legislation to absolve herself from initiating the available judicial proceedings, as the obligation is not on the alleged victims but on the State party to eliminate any impediment to the proper functioning of the prosecution. Finally, the Committee reminds the State party that the fact that victims cannot file complaints in respect of actions taken to protect persons and property, safeguard the nation and preserve the institutions of the State party constitutes an amnesty in the meaning of paragraph 5 of its general comment No. 2 (2007).

10. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, considers that the facts before it disclose a violation of articles 1, 2, paragraph 1, 11, 12, 13 and 14 of the Convention.

11. Pursuant to rule 112, paragraph 5, of its rules of procedure, the Committee urges the State party to conduct an impartial investigation into the incidents in question, with a view to bringing those responsible for the victim's treatment to justice, and to inform it, within 90 days from the date of the transmittal of this decision, of the steps it has taken in response to the views expressed above, including compensation of the complainant.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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<sup>12</sup> CAT/C/DZA/CO/3, para. 11.