



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

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**Committee against Torture**

**Communication No. 368/2008**

**Decision approved by the Committee at its forty-seventh session,  
31 October–25 November 2011**

<i>Submitted by:</i>	Fatou Sonko (represented by counsel Alberto J. Revuelta Lucerga)
<i>Alleged victim:</i>	Lauding Sonko (deceased)
<i>State party:</i>	Spain
<i>Date of complaint:</i>	23 October 2008 (initial submission)
<i>Date of decision:</i>	25 November 2011

## 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-seventh session)**

concerning

#### **Communication No. 368/2008\***

<i>Submitted by:</i>	Fatou Sonko (represented by counsel Alberto J. Revuelta Lucerga)
<i>Alleged victim:</i>	Lauding Sonko (deceased)
<i>State party:</i>	Spain
<i>Date of complaint:</i>	23 October 2008 (initial submission)
<i>Subject matter:</i>	Ill-treatment by public officials; denial of entry into the country
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Torture and cruel, inhuman or degrading treatment or punishment
<i>Articles of the Convention:</i>	12; 16, paragraphs 1 and 2

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

*Meeting* on 25 November 2011,

*Having concluded* its consideration of communication No. 368/2008, 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 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. Fatou Sonko, a Senegalese national residing in Spain. She has submitted the complaint on behalf of her brother, Lauding Sonko, born on 16 October 1978. The complainant states that her brother was the victim of a violation by Spain of

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\* The text of the individual (partially dissenting) opinion of Ms. Felice Gaer, member of the Committee, is appended herewith.

article 1, paragraph 1, and article 16, paragraphs 1 and 2, of the Convention. Spain made the declaration under article 22 of the Convention on 21 October 1987. The complainant is represented by counsel Alberto J. Revuelta Lucerga.

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

2.1 On the night of 26 September 2007, a group of four African migrants (three men and one woman), one of whom was Mr. Lauding Sonko, attempted to enter the Autonomous City of Ceuta by swimming along the coast between Belionex and Benzú. Each person had a dinghy and a wetsuit. At 5.05 a.m., a vessel of the Spanish Civil Guard intercepted the four swimmers, who were pulled up alive onto the vessel. Having been taken to the vicinity of Bastiones Beach, in Moroccan territorial waters, they were made to jump into the water, at a place where they were out of their depth. Beforehand, the Civil Guard officers had punctured all the migrants' dinghies except that of the woman.

2.2 Mr. Sonko clung to the rail of the vessel, saying repeatedly that he did not know how to swim, but the Civil Guard officers forced him to let go and threw him into the sea. Mr. Sonko was calling for help and was having great difficulty in reaching the shore, so that one of the Civil Guard officers jumped into the water to help him and save him from drowning. Once on the shore, the officer began to perform heart massage on him. Mr. Sonko died shortly thereafter, despite the efforts made to revive him, and was buried in an unmarked grave in Santa Catalina cemetery.

2.3 On 28 September 2007, Examining Court No. 1 of Ceuta, in the course of a preliminary inquiry, dismissed the proceedings initiated in connection with the death of Mr. Sonko based on its finding that it was not competent to hear a case concerning events that had occurred in Moroccan territory.

2.4 On 4 and 9 October 2007, the complainant requested that the Ombudsman investigate the circumstances surrounding Mr. Sonko's death. On 12 November 2007, the Ombudsman apprised the Attorney General of the events, and on 14 December 2007, the Attorney General ordered that the necessary steps be taken to determine the facts of the matter.

2.5 On 9 May 2008, one of the immigrants who had been part of the group, Mr. Dao Touré, submitted a written statement concerning the events of September 2007 to Examining Court No. 1 of Ceuta, which appears in Preliminary Inquiry No. 1135/2007. In his statement, he said that:

“At no time did [the migrants] state that they wished to seek asylum in Spain, but [the Civil Guard officers] did not speak to them in French either, nor did they attempt to communicate with them in any way. There were only two Civil Guard officers in the vessel. They did not understand anything that the migrants said and appeared to be arguing; finally, they headed for Belionex Beach.

They stopped the boat just off Belionex Beach. They were not far from the shore, but they were not really close either. (...) With a knife [the Civil Guard officers] punctured all the migrants' dinghies, except that of the woman, and threw them into the water, at a place where they were all out of their depth. There was a group of Moroccan soldiers waiting for them on the beach. The first to be thrown into the water was the Senegalese, who grabbed the boat rail as he fell. He was very nervous and kept repeating that he did not know how to swim, but the Civil Guard officers forcibly pried his hands off the rail and threw him into the sea. (...) But the Senegalese was drowning and he kept shouting for help: ‘aide-moi, aide-moi ...’ (help me, help me ...). So then one of the Civil Guard officers jumped into the water, while the other watched from the boat. The Civil Guard officer took hold of the

Senegalese and pulled him to shore, where he immediately began to perform heart and chest massage, while the Senegalese lay face up on the shore.”

2.6 The complainant states that she has not provided a copy of the record of the proceedings including the decision handed down by Examining Court No. 1 of Ceuta on 28 September 2007, because neither her family nor her attorney, a member of the legal aid office of the Southern Branch Office of the Spanish Refugee Aid Committee (CEAR/SUR), were notified of those proceedings. The complainant further states that neither her family nor CEAR/SUR were able to be joined as a party to the proceedings initiated by the Office of the Attorney General.

### **The complaint**

3.1 The complainant contends that her brother was the victim of violations by Spain of article 1, paragraph 1, and article 16, paragraphs 1 and 2, of the Convention. The complainant alleges that, once on board the vessel of the Civil Guard, Mr. Sonko was under the Spanish flag, and the Spanish authorities were responsible for what happened on that vessel and for providing due protection for persons present under that flag.

3.2 She notes that the State party, through its police officers, used force to throw the victim into the sea, who did not know how to swim and consequently drowned. Neither the deceased nor his companions were brought before the Investigative Police Force (Cuerpo Superior de Policía) of Ceuta, which is the body responsible for dealing with immigration matters, or before any court. The complainant states that there was no administrative procedure for denial of entry, which would have involved a hearing, a decision that would be kept in the case file and the possibility of appealing any such decision. At the time that the border guards were alerted by thermal imaging cameras of the attempt being made by four foreign nationals to enter Spanish territory and gave the order to stop them, the administrative procedure for denial of entry was initiated, but was not continued.

3.3 The complainant contends that throwing the migrants overboard constituted inhuman and degrading treatment, was an offence against their personal dignity and put their lives in danger (as demonstrated by the fact that the victim did in fact die), in violation of article 16, paragraph 1, of the Convention.

3.4 The complainant also invokes violations of the International Covenant on Civil and Political Rights and of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

3.5 With respect to the admissibility of the complaint, she argues that all legal remedies were exhausted when Examining Court No. 1 of Ceuta found that it was not competent to hear the case because the events in question had occurred in Morocco and issued a dismissal of proceedings order.<sup>1</sup> The order was not challenged and became final. Consequently, domestic remedies in Spain have been exhausted.

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<sup>1</sup> According to the Criminal Procedure Act:

“Article 637. Proceedings shall be dismissed:

- a. When there is no reasonable indication that the act which gave rise to the proceedings was actually perpetrated.
- b. When the act does not constitute a criminal offence.
- c. When the persons being tried as perpetrators, accomplices or accessories after the fact appear exempt from criminal responsibility.”

**State party's observations on admissibility**

4.1 In its note verbale of 11 February 2009, the State party asserts that the complaint is inadmissible because domestic remedies have not been exhausted. It states that the events referred to in the complaint are under investigation by the Spanish judicial authorities and specifically by Examining Court No. 1 of Ceuta.

4.2 It is not true that neither the family nor CEAR could have been joined as a party to the legal proceedings initiated by the Public Prosecution Service (Ministerio Fiscal). On 28 November 2008, Examining Court No. 1 of Ceuta sent a letter rogatory to the High Court of Almería in which it requested that the relatives of the deceased be located. On 5 January 2009, Mr. Jankoba Coly, a cousin of Mr. Sonko, was notified in Vicar (Almería) of the proceedings. No family member, however, registered as a party to the proceedings.

4.3 The State party affirms that the complainant's version of the events differs in certain fundamental aspects from the facts ascertained by the State party. It attaches a copy of a report issued by the Lieutenant Colonel stationed at the Civil Guard Headquarters in Ceuta, in which he states that the dinghies were not punctured; that the aid and rescue operation was carried out in Moroccan waters; that the migrants did not speak a language that was intelligible to the officers in question; that the Civil Guard officer jumped into the water to retrieve Mr. Sonko and to try to revive him; and that no traumatic injuries were found on Mr. Sonko's body. The Civil Guard officers acted in accordance with the procedures for dealing with immigration by sea that have been established by the Civil Guard of Ceuta, the applicable special laws, and the conventions and treaties signed by the State party. According to the report, the procedures used to assist migrants found in Moroccan waters and in the vicinity of the breakwaters that mark each country's border have substantially reduced the number of deaths. Ships that rescue persons at sea who are in distress or in danger have the obligation to provide them with assistance, to take them to a "place of safety" and to treat them humanely.

**Author's comments on the State party's submission**

5.1 In her communication of 6 April 2009, the complainant maintains that all domestic remedies have been exhausted. She states that General Court No. 1 of Ceuta declared the preliminary inquiry closed and issued an order dismissing the proceedings concerning the death by drowning of Mr. Sonko. The dismissal order was not challenged by either the attorney representing the Civil Guard officers concerned or by the Office of the Attorney General of Ceuta and thus became final. The complainant states that she was unable to register as a party to the proceedings because the State party made no attempt during the judicial proceedings to locate Mr. Sonko's family. The complainant refers to domestic jurisprudence which indicates that, once an order for the dismissal of proceedings has become final, it has the force of *res judicata*.

5.2 According to the complainant, the State party's allegations do not belie the facts as initially described by the complainant and demonstrate the occurrence of torture or inhuman or degrading treatment. She reiterates that Mr. Sonko and his companions were taken on board a Spanish patrol boat and were therefore under Spain's jurisdiction. Mr. Sonko was in good health when he was on board. When he reached the beach, however, he was in a poor condition; medical assistance was required and he died. The cause-effect relationship is unquestionable.

5.3 She asserts that the principle of non-refoulement obligates States to authorize the temporary admission or entry of asylum-seekers and to provide them with access to a procedure for arriving at a substantive determination as to whether or not, if they were to be returned, they would be in grave danger of losing their lives, being deprived of their freedom or being subjected to torture or inhuman or degrading treatment. In support of her

argument, the complainant refers to the report of the Ombudsman of 3 April 2009, in which he objects to the procedure used by the Provincial Maritime Service of Ceuta for returning people to Morocco who have been intercepted in Moroccan waters near the breakwaters that mark the border between Spanish and Moroccan territory. According to that report, the decisive factor is not whether the asylum-seekers are on Spanish territory, but rather whether or not they are under the effective control of Spanish authorities; if they are, the principle of non-refoulement cannot be circumvented by arguing that the rescue took place outside Spanish territorial waters.<sup>2</sup>

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

6.1 On 15 June 2009, the State party submitted its observations on the merits of this complaint.

6.2 The State party reiterates that the events referred to by the complainant are under investigation by the Spanish judicial authorities and specifically by Examining Court No. 1 of Ceuta and that the ground for finding the complaint inadmissible set forth in article 22, paragraph 5 (b), of the Convention therefore applies. It also states that family members could have been joined as parties to the judicial proceedings but did not do so.

6.3 The State party has submitted a copy of the record of Preliminary Inquiry No. 1135/2007, which states, in part:

- On 28 September 2007, Examining Court No. 1 of Ceuta opened an inquiry to ascertain the facts. On the basis of the evidence, on that same date the judge decided to dismiss the proceedings and close the case because the events in question did not occur on Spanish territory and the acts in question are not defined as offences in the Criminal Code. The Court also ordered that samples be taken from the dead body for purposes of genetic identification and decided to refer the proceedings to the Public Prosecution Service.
- On 11 January 2008, the Office of the Attorney General requested that Examining Court No. 1 of Ceuta reopen the case in the light of new information that indicated that the events in question had taken place on board a vessel flying the Spanish flag, which would render the Spanish courts competent to hear the case. The Attorney General found that the preliminary inquiry had uncovered signs that a criminal offence had been committed, since Mr. Sonko's death occurred while he was in the

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<sup>2</sup> In the above-mentioned report, the Ombudsman states that: "In view of the foregoing, and while recognizing the necessary and effective work performed by the Civil Guard in Ceuta in order to, as noted in its report, 'save the lives of a large number of illegal immigrants who attempt to enter Spain illegally by sea, either by swimming or under precarious conditions', the procedure being used lacks any sort of support whatsoever. It also makes it impossible to detect who among the migrants of different types attempting to enter our territory illegally may be in need of international protection, in breach of article 33 of the 1951 Geneva Convention relating to the Status of Refugees, under which Spain is obligated to apply the principle of non-refoulement beyond its own borders in the event that a ship flying the Spanish flag rescues migrants outside our territorial waters and there are asylum-seekers among them."

(...)

"[U]nder the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in no event should such persons be set ashore in a territory where there exists a well-founded fear that these persons may be subjected to torture. Nor should the Spanish authorities share personal information about asylum-seekers with the authorities of the country from which they are fleeing or with others who may transmit that information to those authorities."

custody of the Civil Guard, which meant that the Civil Guard officers were responsible for protecting his life and ensuring his safety.

- On 7 February 2008, Examining Court No. 1 of Ceuta reopened the inquiry and ordered that statements be taken from the three Civil Guard officers under suspicion, from a member of the Civil Guard as witness and from Mr. Lucerga (a member of CEAR/SUR), also as witness. The statements of the three Civil Guard officers under suspicion were taken on 15 April 2008; that of the member of the Civil Guard who served as witness was taken on 13 March 2008; and Mr. Lucerga's statement on 13 May 2008.
- On 9 May 2008, an attorney from CEAR/SUR appeared before Examining Court No. 1 and submitted a statement made by Mr. Dao Touré, a Senegalese national who was one of the four African migrants who attempted to swim across the border into Ceuta. Mr. Touré confirmed the version of the events given by the complainant. He said that at no time had they stated that they wished to seek asylum in Spain and that the guards did not speak to them in French, nor did they attempt to maintain any sort of communication with them.
- On 14 May 2008, the CEAR/SUR attorney said that he had learned that Mr. Touré was going to be called as a witness to testify in court and requested that he be allowed to be present when Mr. Touré did so. On 15 May 2008, Examining Court No. 1 denied the attorney's request on the grounds that he had no official status in the case.
- On 23 May 2008, the Attorney General of Ceuta submitted a request in which he urged that the proceedings be referred to the National High Court, which he considered to be competent to hear the case, since the suspects were Spanish nationals and the events had occurred in a foreign territory.
- On 27 May 2008, Examining Court No. 1 of Ceuta withdrew from the case and turned it over to the National High Court.
- On 16 June 2008, Counsel for the State filed an application in which he opposed the reopening of the case, on the grounds that the further inquiries that had been undertaken had not furnished evidence of any circumstances other than those that had led to the dismissal of the proceedings on 28 September 2007. Counsel also contended that in no event would the central examining courts have jurisdiction over such cases on the grounds that the patrol boat constituted national territory. On 9 July 2008, Examining Court No. 1 of Ceuta reaffirmed its decision of 27 May 2008.
- On 18 July 2008, Counsel for the State lodged an appeal, in which he argued that it was improper to reopen the case because the decision to dismiss the proceedings had become final and because no new evidence had been uncovered. On 30 September 2008, the Provincial High Court of Cádiz in Ceuta partially upheld the appeal, finding that the dismissal was not final because it had not been communicated to "persons who might be adversely affected", as provided for by law. The Provincial High Court decided to set aside the decision to withdraw from the case, issued on 27 May 2008, until such time as the interested parties had been notified, which would give them the opportunity to appear in court as parties in the case and appeal against the dismissal. In its decision of 30 September 2008, the Provincial High Court notes that the records of the inquiry make reference to the existence of family members of the deceased and give the names of his parents, Malan and Fatou; they also state that the CEAR/SUR legal aid office had located a sister, a brother-in-law and a cousin.
- On 5 January 2009, Examining Court No. 1 of Ceuta sent a notification to Mr. Jankoba Coly, a cousin of the victim. On 19 February 2009, Examining Court No. 1

of Ceuta decided to withdraw from the case and to refer it to the National High Court.

- On 12 February 2009, the Chief Counsel for the State notified Examining Court No. 1 of Ceuta that a complaint had been submitted to the Committee against Torture.

6.4 The State party considers that the facts set out in the complaint do not reveal the occurrence of torture or ill-treatment, but rather an unfortunate accident that occurred when the Civil Guard patrol assisted several persons who were swimming in the sea and took them close to shore. It asserts that the events took place in Moroccan waters, that the persons picked up by the vessel were left in an area very close to the shore, that the Civil Guard officers did not puncture the dinghies of Mr. Sonko and his companions, and that Mr. Sonko was assisted by the Civil Guard officers, who used resuscitation techniques on him.

#### **Author's comments on the State party's observations**

7.1 On 3 July 2009, the complainant submitted her comments on the observations submitted by the State party.

7.2 She argues that judicial remedies have been exhausted, since Proceeding No. 1135/2007 was closed on 23 April 2009. The complainant has attached a sworn statement by Mrs. Abderrahaman, the attorney for Mr. Dao Touré, who was a witness in the proceedings initiated by Examining Court No. 1 of Ceuta concerning the death of Mr. Sonko, in which she states that the Attorney General of Ceuta informed her on 23 April 2009 that: "In relation to your submission dated 6 April 2009 [...] regarding DON DAO TOURE and his role as a witness in Summary Proceedings No. 1135/07, I hereby inform you that a final dismissal order concerning these proceedings has been issued and has not been appealed against, and there is therefore no need for you to make a court appearance."

7.3 She contends that the statements made by the State party regarding the notification of Mr. Sonko's family members are untrue. Since the opening of proceedings in October 2007, no notification has been sent to his sister, who is the person directly affected by them. The notification sent on 5 January 2009 to Mr. Jankoba Coly, a cousin of Mr. Sonko, came one and a half years after the proceedings were initiated. In this connection, the complainant invokes the second sentence of article 107, subparagraph (e), of the Committee's rules of procedure. She also contends that the competent authorities prevented the only living witness present in Spain, Mr. Dao Touré, from appearing in court and testifying.

7.4 She maintains that, under domestic law, the investigation of an offence, the initiation of legal proceedings and the task of carrying those proceedings forward are the responsibility of the State. Consequently, the State party's allegations as to the supposed obligation of the complainant to move the proceedings forward or to be in attendance at them lack legal merit.

#### **Additional observations of the State party on admissibility and on the merits**

8.1 On 28 May 2011, the State party supplied additional information concerning the current status of the judicial proceedings.

8.2 The State party adds that, in a decision issued on 28 November 2008, Examining Court No. 1 of Ceuta agreed to notify the family members of Mr. Sonko, specifically his sister, Mrs. Jankoba Coly, of the order issued on 28 September 2007.

8.3 On 31 March 2009, the National High Court declared the referral of the case to it by Examining Court No. 1 of Ceuta invalid, referring the proceedings back to the examining



court, on the grounds that since the order of dismissal filed on 28 September 2007 had not been challenged, it had become final.

8.4 On 12 May 2009, Examining Court No. 1 of Ceuta ruled that the case should be dismissed, once the order issued by the Provincial High Court of Cádiz in Ceuta regarding the notification of the injured parties (relatives of the deceased) of the proceedings had been duly carried out and the dismissal order of 28 September 2007 had not been challenged.

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

#### *Consideration of admissibility*

9.1 Before considering any complaint contained in a communication, the Committee against Torture must decide whether the complaint is admissible under article 22 of the Convention.

9.2 The Committee observes that, although the State party initially argued that the complaint was inadmissible because domestic remedies had not been exhausted, on 28 May 2011 the State party informed the Committee that Examining Court No. 1 of Ceuta had dismissed the case on 12 May 2009. Consequently, the Committee considers that there is no obstacle to consideration of the merits of the complaint under article 22, paragraph 5 (b), of the Convention.

#### *Consideration of the merits*

10.1 The Committee takes note of the State party's observations that the events in question took place in Moroccan waters, that the persons who were picked up were left in an area very close to the shore, that the Civil Guard officers did not puncture Mr. Sonko's and his companions' dinghies, and that Mr. Sonko was aided by the Civil Guard officers, who performed resuscitation techniques on him. The Committee also takes note of the complainant's allegations that an undeniable cause-effect relationship exists between Mr. Sonko's death and the actions of the Civil Guard officers, inasmuch as Mr. Sonko was in good health when on the patrol boat but, by the time he reached the beach, was in a poor condition and subsequently died.

10.2 The Committee recalls that it is not its task to weigh the evidence or to reassess the statements made regarding the facts or the credibility of the relevant national authorities. The Committee further observes that the State party's and the complainant's versions of the circumstances surrounding these events differ, but that both parties agree that Mr. Sonko and the other three swimmers were intercepted by a Civil Guard vessel and were brought on board alive. They also both assert that, upon reaching the beach, Mr. Sonko was not well and that, despite the efforts made to revive him, he died.

10.3 The Committee recalls its general comment No. 2, where it notes that a State party's jurisdiction includes any territory where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law.<sup>3</sup> This interpretation of the concept of jurisdiction is applicable in respect not only of article 2, but of all the provisions set forth in the Convention, including article 22.<sup>4</sup> In the present case, the Committee observes that the Civil Guard officers exercised control over the persons on board the vessel and were therefore responsible for their safety.

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<sup>3</sup> General comment No. 2 of the Committee against Torture on implementation of article 2 of the Convention by States parties, *Official Documents of the General Assembly, sixty-third session*, Supplement No. 44 (A/63/44), annex VI, para. 16.

<sup>4</sup> See communication No. 323/2007, *J.H.A. v. Spain*, decision of 10 November 2008, para. 8.2.

10.4 The Committee recalls that, under the Convention, the prohibition of ill-treatment is absolute and that its prevention is an effective and non-derogable measure.<sup>5</sup> The Committee considers that it falls to the State party to explain the circumstances surrounding Mr. Sonko's death, considering that he was alive when he was pulled out of the water. The Committee further considers that, regardless of whether or not the Civil Guard officers punctured Mr. Sonko's dinghy or at what distance from the shore he was expelled from the boat, he was placed in a situation that caused his death. As for the legal classification of the way in which Mr. Sonko was treated on 26 September 2007, the Committee considers that while the subjection of Mr. Sonko to physical and mental suffering prior to his death, aggravated by his particular vulnerability as a migrant, does not constitute a violation of article 1 of the Convention, it does exceed the threshold of cruel, inhuman or degrading treatment or punishment, under the terms of article 16 of the Convention.

10.5 The Committee considers that, although the complainant has alleged a violation only of articles 1 and 16 of the Convention, the present complaint concerns circumstances on which article 12 of the Convention may have a bearing as well. The Committee also observes that both the complainant and the State party have made observations regarding the judicial inquiry initiated by the State party.

10.6 In this respect, the Committee observes that the State party notified a relative of the victim 16 months after the inquiry had begun. It also observes that the complainant (and/or a family member) was not joined as a party to the legal proceedings. On other occasions, the Committee has already stated that, under the Convention, a victim is not required to lodge a formal complaint in the national courts when torture or cruel, inhuman or degrading treatment has occurred and that it is sufficient for the facts to have been brought to the attention of Government authorities.<sup>6</sup> Consequently, the Committee is of the view that it was not indispensable for the complainant (and/or another family member) to be joined as a party to the proceedings for the State party to fulfil its obligation under article 12 of the Convention, and that the obligation to investigate indications of ill-treatment is an absolute duty under the Convention and falls to the State.

10.7 The complexity of the case notwithstanding, the Committee reminds the State party that it has an obligation to undertake a prompt and full investigation whenever there are indications that acts have been committed that may constitute cruel, inhuman or degrading treatment. Such an investigation should be aimed at determining the nature of the reported events, the circumstances surrounding them and the identity of whoever may have participated in them.<sup>7</sup> The investigation of the facts was initiated on 28 September 2007 and was definitively shelved on 12 May 2009, without a prompt and impartial investigation of the facts being undertaken. The Committee is therefore of the view that the investigation conducted by the authorities of the State party did not meet the requirements set forth in article 12 of the Convention.

10.8 The Committee, acting under article 22, paragraph 7, of the Convention, considers that the information before it discloses a violation of articles 12 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

10.9 The Committee urges the State party to carry out a suitable investigation of the events that occurred on 26 September 2007, to prosecute and punish any persons found to be responsible for those acts, and to provide effective remedy, which shall include adequate

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<sup>5</sup> General comment No. 2 of the Committee (see footnote 4 above), para. 3.

<sup>6</sup> See communication No. 6/1990, *Henri Unai Parot v. Spain*, decision of 2 May 1995; and communication No. 59/1996, *Encarnación Blanco Abad v. Spain*, decision of 14 May 1998.

<sup>7</sup> See, for example, communication No. 261/2005, *Besim Osmani v. Serbia*, decision issued on 8 May 2009, para. 10.7.

compensation for Mr. Sonko's family. In accordance with rule No. 118, paragraph 5, of its rules of procedure, the Committee wishes to receive information, within 90 days from the issuance of the present decision, about any steps taken in response to the observations set out above.

[Adopted in English, French and Spanish, the Spanish 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.]

## Appendix

### **Individual opinion of Committee member Ms. Felice Gaer (partially dissenting)**

1. In the present case, the author of the communication and the State party concerned disagree fundamentally over certain key facts critical to the determination of whether or not a violation of article 16 of the Convention was committed. Without objecting to the Committee's ultimate decision in this case that a violation occurred, I respectfully disagree with the methodology it claims to have applied in resolving the dispute regarding the alleged violation of article 16.

2. In this case, the Committee is presented with an allegation by the author that officers of the Spanish Civil Guard took her brother, Lauding Sonko, and his companions on board their vessel, punctured three of the four dinghies they had previously been using, and threw them into the sea at a depth at which they could not stand, despite the protestations of her brother that he could not swim, with the result that Mr. Sonko subsequently drowned. The State party confirms that its Civil Guard officers did in fact take Mr. Sonko and his companions on board their vessel and subsequently "released them", but argues that they did so "in an area very close to the shore", and did not puncture the dinghies. Thus, the State party alleges, the death of Mr. Sonko was "an unfortunate accident" rather than an act of cruel, inhuman, or degrading treatment or punishment.

3. The Committee's task in this instance is to determine whether a violation of article 16 of the Convention occurred. Surely, the Committee cannot make this determination without assessing the facts of the case. Yet rather than engaging directly with the factual disputes at hand, the Committee's opinion instead makes the shocking pronouncement that "it is not its task to weigh the evidence or to reassess the statements made regarding the events in question or the credibility of the relevant national authorities" (see para. 10.2 above). I strongly dissent from this statement, as it conflicts both with the content of the Committee's general comment No. 1, which has guided many Committee decisions, and with the Committee's jurisprudence in a host of decisions on individual communications.

4. Paragraph 9 of the Committee's general comment No. 1 addresses this issue directly. It states:

"Bearing in mind that the Committee against torture is not an appellate, a quasi-judicial or an administrative body, but rather a monitoring body created by the States parties themselves with declaratory powers only, it follows that:

(a) Considerable weight will be given, in exercising the Committee's jurisdiction ... to findings of fact that are made by the organs of the State party concerned; but

(b) The Committee is not bound by such findings and instead has the power, provided by article 22, paragraph 4 of the Convention, of free assessment of the facts based upon the full set of circumstances in every case."<sup>a</sup>

5. In a number of cases, both where the judicial organs have made relevant findings of fact bearing on the allegations at issue and, as in this case, where the judicial organs of the

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<sup>a</sup> Committee against Torture, general comment No. 1, implementation of article 3 in the context of article 22. *Official Documents of the General Assembly, fifty-third session*. Supplement No. 44 (A/53/44 and Corr. 1), annex IX.

State have failed to conduct prompt, full investigations and thus have not made findings of fact deserving of “considerable weight”, the Committee has engaged in a “free assessment” of the facts at issue, based upon the full set of circumstances in the case. One relevant example was the decision on communication No. 257/2004, *Keremedchiev v. Bulgaria*. In that case, the Committee rejected the State party’s claim, stemming from a decision of its courts, that the State party’s police officers had used necessary and proportionate force in arresting him and had inflicted only “slight physical injury”. Instead, the Committee found that the complainant’s injuries were too great to correspond to the use of proportionate force by the officers and rejected the State party court’s finding that the injury resulting from the infliction of force was “slight”, finding instead that it amounted to cruel, inhuman or degrading treatment or punishment within article 16 of the Convention.<sup>b</sup>

6. Not only does the Committee’s statement that “it is not its task to weigh the evidence” conflict with general comment No. 1 and with its jurisprudence in individual communications; it also seems inconsistent with the Committee’s decision in this very case. For the Committee to reach a decision that a violation of article 16 of the Convention occurred, it must reject the version of the facts articulated by the State party in this case. While, as the Committee notes, Mr. Sonko was undisputedly in the custody of the State party in the moments leading to his death, this fact alone should not compel us to conclude that the State party committed cruel, inhuman, or degrading treatment. It is not the case that every death that occurs in custody constitutes a violation of the Convention; moreover, even where a State’s agents were negligent, resulting in the death of a person in their custody, and should incur liability under domestic tort law for the harm caused by their negligence, it is not necessarily the case that this negligence will also constitute “cruel, inhuman, or degrading treatment or punishment” as proscribed by the Convention. In this case, the Committee is called upon to make a finding of fact, and to resolve tensions between the accounts offered by the author and the State party, such as whether the State’s agents left Mr. Sonko in possession of his dinghy when they expelled him from the patrol vessel, and if so, how Mr. Sonko could have nevertheless drowned before reaching the shore if this was the case. The Committee has apparently determined that the State’s version of the events is not credible. It is well within its power to do so and should have stated so plainly.

(Signed) Felice Gaer

[Done in English, French and Spanish, the English 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>b</sup> Communication No. 257/2004, *Keremedchiev v. Bulgaria*, decision of 11 November 2008, para. 9.3.