



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

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COMMITTEE AGAINST TORTURE
Twenty-third session
(8-19 November 1999)

IEWS

Communication No. 60/1996

Submitted by: Khaled Ben M'Barek
Alleged victim: Faisal Baraket
State party: Tunisia
Date of communication: 6 November 1996
Date of adoption of Views: 10 November 1999

* Made public by decision of the Committee against Torture.

Annex

VIEWS OF THE COMMITTEE AGAINST TORTURE UNDER ARTICLE 22,
PARAGRAPH 7, OF THE CONVENTION AGAINST TORTURE AND
OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR
PUNISHMENT - TWENTY-THIRD SESSION

concerning

Communication No. 60/1996

Submitted by: Khaled M'Barek
Alleged victim: Faisal Baraket (deceased)
State party: Tunisia
Date of communication: 6 November 1996

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

Meeting on 10 November 1999,

Having concluded its consideration of communication No. 60/1996, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

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

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

1. The author of the communication is Mr. Khaled Ben M'Barek, a Tunisian national currently residing in France, where he enjoys refugee status. He submits a written authorization from Jamel Baraket, the elder brother of Faisal Baraket (deceased), to act on his behalf. He claims that Faisal Baraket and his family are victims of violations by Tunisia of articles 2, 11, 12, 13 and 14 of the Convention.

The facts as submitted by the author

2.1 The author affirms that Faisal Baraket, together with others, was arrested on the morning of 8 October 1991 by members of the Criminal Investigation Brigade of the Nabeul National Guard. Mr. Baraket was an activist in the Tunisian General Students' Union and a member of Al-Nahda, an unofficial political party. He knew that the police were looking for him and had therefore gone into hiding. After his arrest, during which he was beaten, he was brought to the headquarters of the Brigade where he was taken to the office of Captain Abdelfattah Ladib, the officer in charge.

2.2 The author affirms that, according to the account given by fellow detainees of Faisal Baraket whom he reportedly met subsequently, in the presence of the captain and the police officers Abdelkrim Zemmali, Mohamed Kabbous and Mohamed Moumni, as well as Fadhel, Salah and Taoufik (last names unknown to the author), Faisal Baraket's hands and feet were immediately bound and he was suspended between two chairs on a big stick, with his head down and the soles of his feet and his buttocks exposed, in what is commonly called the "roast chicken" position. He was then beaten. Some of the officers later threw him out into the corridor after bringing another detainee into the office. Faisal Baraket was in a very bad way and seemed to be dying. The officers nevertheless prohibited the 30 or so detainees present, including his own brother Jamel, from giving him assistance.

2.3 After half an hour, in view of the fact that he was no longer moving, two detainees were permitted to lay him on a bench and untie him. When they discovered that he was dead, they told the guard who then informed his superior. The detainees were then separated from the victim and confined to one side of the corridor. Finally, two male nurses from Nabeul University Hospital arrived, accompanied by the general superintendent of the hospital, who supervised the removal of the corpse.

2.4 On 17 October 1991, Hedi Baraket, the father of Faisal Baraket, was taken to Tunis by the Chief of the Traffic Brigade and was informed that his son had died in a car accident. At the Charles Nicole Hospital, he was asked to identify the body. He noted that the face was disfigured and difficult to recognize. He was not permitted to see the rest of the body. He was made to sign a statement acknowledging that his son had been killed in an accident. His other son, Jamel, was still in prison at that time. At the funeral, the police brought the coffin and supervised its interment without it being opened.

2.5 The author has provided the Committee with a copy of the autopsy report drawn up by Doctors Sassi and Halleb, surgeons at Nabeul Hospital. According to the report:

“We the undersigned, [...] appointed under order No. 745 of 11 October 1991 by the Chief of the Traffic Unit of Menzel Bouzelfa in order to undertake an examination and autopsy of the corpse of an unknown person to determine the cause of death:

- “- Bilateral mydriasis
- “- Presence of bruises [*illegible*] the left cheek bone, the lower lip and the chin
- “- Small haematoma under the scalp on the left temple
- “- Bruising and oedema on the right hand and the back of the right forearm
- “- Bruising and abrasion of the left forearm
- “- Extensive bruises with major oedema on the buttocks
- “- Bruises and abrasion on both knees
- “- The left leg displays two puncture wounds with no underlying osteal lesions
- “- Bruising and abrasions on the left leg
- “- Bruising on the soles of both feet

“On autopsy:

- “* Cranium: absence of any fracture of the cranium, absence of any intracranial or intracerebral haematoma
- “* No flooding of the cerebral ventricles or brain displacement
- “* Lungs: pulmonary congestion affecting the entirety of both lungs, leaving only two segments of the upper lobe of the left lung operational
- “* Systolic cardiac arrest; heart displays no vascular or valvular lesions
- “* Stomach distended, contains no food
- “* Small haematoma of the pelvis with perforation of the rectosigmoid junction

“Conclusion:

“Death would appear to have resulted from acute respiratory insufficiency related to the extensive pulmonary congestion.”

2.6 The author has also provided the Committee with a copy of the report drawn up in February 1992 by Mr. Derrick Pounder, Professor of Forensic Medicine at the University of Dundee (United Kingdom) at the request of Amnesty International, which had taken an interest in the case. That report, which was prepared on the basis of the autopsy report, indicated, inter alia, that:

“The pattern of injuries described in the autopsy report is inconsistent with the deceased having died in a road traffic accident as a pedestrian, pedal cyclist, motor cyclist or vehicle occupant.

“The pattern of injuries indicates that they were the result of a systematic beating by one or more other persons.

“The type and pattern of injuries excludes the possibility of deliberate self-infliction.

“The autopsy report describes a ‘small haematoma of the pelvis with perforation of the rectosigmoid junction’. Such an injury would be unlikely to occur in a road traffic accident and then only in association with severe fractures of the pelvic bones, which were not present in this instance. An injury of this type is typically the result of the insertion of a foreign object into the anus. The production of this injury would have required the forcible insertion of a foreign object for a length of 6 inches or more.

“The perforation of the rectosigmoid junction ... may cause sudden death as the result of shock and an induced abnormality of heart rhythm. Associated with a sudden death by this mechanism would be extensive pulmonary congestion (blood overloading of the lungs), as seen in this case [...].

“The autopsy report describes no injury other than perforation of the rectosigmoid junction and no natural disease which might otherwise account for the death. There were bruises on the soles of both feet. Such injuries would be unusual in a road traffic death [...]. The only plausible explanation for the bruising of the soles of the feet is repeated blows using a heavy instrument [...].

“The autopsy report describes extensive bruising with major oedema (i.e. swelling) of the buttocks. Such an injury pattern would be extremely unusual in a road traffic accident and, if present, would invariably be associated with fractures of the underlying bones, which were not present in this instance. The only plausible explanation for the bruising to the buttocks is repeated blows [...].

“In summary, the autopsy report reveals that this man died as the result of the forceful insertion of a foreign object at least 6 inches into the anus. Prior to his death, he had been beaten about the soles of his feet and buttocks. Other scattered injuries to the body are

consistent with further blows. The entire pattern of injury is that of a systematic physical assault and very strongly corroborates the allegation of ill-treatment and torture that has been made. The injury pattern as a whole and the injuries to the anus, feet and buttocks in particular are incompatible with involvement in a road traffic accident and this explanation for the death has no credibility in the light of the autopsy findings.”

2.7 The author states that he visited the two principal witnesses to Faisal’s death (names provided) some months after the incident. They said that Faisal had died in their arms at the Brigade’s headquarters. The author, a trade unionist, was himself subsequently arrested on 15 May 1992 by the same Brigade and was detained at the same location as the victim. He was sentenced to five months’ imprisonment. He states that his detention gave him the opportunity to meet witnesses to Faisal’s death, who corroborated what the first witnesses had said, namely that Faisal had died under torture. After his release, while he was still under house arrest, the author left Tunisia and was granted asylum in France.

2.8 The author has provided a copy of a report dated 13 July 1992 by the Higher Committee for Human Rights and Fundamental Freedoms (Driss Commission) containing the following reference to the Baraket case:

“The investigating commission had concluded, in its report dated 11 September 1991, that a number of deaths had occurred in obscure and suspicious circumstances.

[...]

“two other cases came to light after the Investigating Commission had completed its work.

“- concerning Faisal Baraket, the record of the preliminary investigation indicates that he met his death in a road accident. This was reported by the police to the prosecutor’s office, which entrusted an investigation (No. 13458) to the examining magistrate attached to the Court of First Instance at Grombalia.

[...]

“We think that these two incidents also occurred in suspicious circumstances and that, in spite of the fact that the two corresponding cases have been closed, it appears that new evidence has emerged which warrants the opening of a new inquiry on the matter in accordance with article 36 of the Code of Criminal Procedure.”

2.9 The author claims that the victim’s family cannot avail itself of the domestic remedies offered to it in Tunisia because it fears retaliation by the police. On 11 December 1991, the author sent an anonymous letter to the Prosecutor of the Republic in the town of Grombalia in which he reported the crime, identified the victim and the police officers responsible and specified the circumstances in which the victim died. He also wrote to the Minister of Justice, his deputies and the national and international media. However, the death of Faisal Baraket was never investigated.

2.10 From October 1991 onwards, non-governmental organizations such as Amnesty International,¹ the World Organization against Torture, Action of Christians for the Abolition of Torture (France) and the Association for the Prevention of Torture (Switzerland) also requested the Tunisian Government to investigate the death. However, the Government has always maintained that the death resulted from a road accident.

2.11 In a judgement dated 2 October 1996, the Tunis Appeal Court awarded damages amounting to 12,000 dinars to the Baraket family in compensation for Faisal's death in a road accident. The content of the verdict was communicated to the family by a lawyer, Mohamed El Marhoul, who affirmed in his letter that it was the father of Faisal Baraket who had initially commissioned him to act in that matter. However, the author emphasizes that, contrary to the said lawyer's affirmation, the Baraket family had never instituted proceedings in that regard.

The complaint

3.1. The author claims that the Tunisian Government has violated the following articles of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

Article 2, paragraph 1: The State party not only failed to take effective measures to prevent torture, but also concealed the facts and denied that acts of torture had been committed.

Article 11: The Authorities used their supervisory powers not to prevent torture but to hide the truth.

Article 12: The State party claims that the investigation into Faisal Baraket's death was closed and, although it promised in 1992 that it would reopen the case, no investigation has been conducted.

Article 13: The State party forced the victim's father to sign a statement acknowledging that his son died in an accident, while keeping his other son Jamel in detention for six months after his brother's death.

Article 14: The State party still denies that Faisal Baraket died under torture; his family therefore cannot claim compensation.

3.2 The author also affirms that the police officers who tortured Faisal Baraket have remained in their posts and some of them have even been promoted.

3.3 The author repeatedly expresses his concern about the safety not only of the Baraket family but also of the witnesses and their families following incidents which he considers to be related to the presentation of the communication to the Committee.

Proceedings before the Committee

4.1 In its decision of 5 May 1995, the Committee declared the author's communication No. 14/1994 inadmissible on the ground that he had not submitted sufficient evidence to establish his right to act on behalf of the alleged victim.² However, the decision stipulated that the Committee could receive and consider a new communication submitted by any person whose right to act had been duly established.

4.2 On 6 November 1997, the author submitted a new communication, which the Committee transmitted to the State party on 23 January 1997 under No. 60/1996 in which the Committee requested the State party to ensure that the author and his family, the alleged victim's family and the witnesses and their families were not subjected to any ill-treatment.

Observations of the State party concerning admissibility

5.1 The State party maintains that the communication contains comments that are insulting and injurious to the Tunisian State and its institutions and are obviously politically motivated, thereby constituting an abuse of the right to submit such communications. It further indicates that the domestic remedies have not been exhausted.

5.2 The State party objects to the Committee's request to take measures to protect Mr. Jamel Baraket and his family, considering that request as implying that the Committee has already taken a decision on the question of the admissibility of the communication.

5.3 The State party expresses doubts concerning the authenticity of the power of attorney granted to the author by Jamel Baraket, the alleged victim's brother. In that regard, it points out that, in his first communication, the author submitted a power of attorney from the alleged victim's father although the latter had made an authenticated statement to the Government in which he denied having granted such power of attorney.

5.4 The State party submits that the author's undeclared aims are political and that he belongs to an extremist movement, on account of which he was sentenced to three months' imprisonment in Tunisia.

5.5 Concerning the exhaustion of domestic remedies, the State party disputes the author's claim that remedies either do not exist or are ineffective. According to the Penal Code, the statutory time limit for criminal prosecution is 10 years and the public right of action is therefore not extinguished. Moreover, that time limit can also be suspended or reset whenever a new investigation is opened. The Office of the Public Prosecutor had, on its own initiative, twice reopened a judicial investigation and could order a reopening of the investigation at any time whenever it was notified of new evidence or developments that might help to discover the truth.

5.6 The State party indicates that the alleged victim's father brought a civil action for damages in connection with his son's death in a hit-and-run accident. The claimant in that case was represented by Mr. Mohamed Ahmed El Marhoul. In a judgement dated 9 October 1995, the Court of First Instance at Grombalia ordered the Chief of the State Litigation Department (as the legal representative of the Compensation Fund for the Victims of Traffic Accidents) to pay a

sum of 10,000 dinars to the alleged victim's father in compensation for the mental pain and anguish that he had suffered. On 2 October 1996, the Court of Appeal upheld that judgement and increased the amount of compensation to 12,000 dinars.

5.7 The State party maintains that the alleged victim's beneficiaries are completely free to avail themselves of the domestic remedies before the Tunisian courts without the risk of any threat or act of reprisal, contrary to the author's allegations. However, although they instructed a lawyer to defend their interests before the Tunisian courts, they have shown no interest in taking this matter outside the domestic channels of recourse.

Comments by the author

6.1 The author refers to the Committee's request to the State party to ensure the safety of the witnesses and their families and notes that the wife of one of the witnesses has been in prison since 23 May 1996 on political charges relating to meetings allegedly held in 1989, even though she is a simple housewife.

6.2 The author denies belonging to an extremist movement or acting on behalf of anyone except Jamel Baraket and his family. He has presented the Committee with a power of attorney dated 5 December 1994, signed by the victim's father and confirmed on 7 November 1995 by the brother when the father's health had deteriorated. He maintains that Jamel Baraket is the person legally responsible for his family, that he has a close relationship with him, that Jamel's letters are authentic and that the State party has not proved the documents to be forgeries.

6.3 The author emphasizes the fact that domestic remedies cannot be exhausted because of the risk of reprisals. He refers to the inquiries that have been opened and subsequently closed by the Office of the Public Prosecutor and claims that no serious criminal proceedings were ever instituted.

6.4 With regard to the civil proceedings, the author points out that, by law, in order to lodge an appeal against the State Litigation Department under the terms of the legislation concerning the Compensation Fund for the Victims of Road Accidents, anyone filing a complaint against an unidentified culprit must first of all: (i) have filed a claim for damages with the Fund not later than one year after the accident in question; (ii) have reached a settlement with the Fund or, failing such settlement, have filed a complaint against it. In the case in question, in the absence of a complaint or a judgement no prosecution was possible.

6.5 He also claims that the father did not commission any lawyer and that the family, including his client Jamel Baraket, never recognized the action for damages that was brought on behalf of Mr. Hedi Baraket. However, they were forced to put up with it in order to protect themselves against the reactions of those who had brought the action in their name with a view to presenting it to the Committee as an operative domestic remedy. The author notes that, in practice, proceedings of that type very rarely succeed and, when they do, it is only after many years. However, the Baraket case was heard in two years, including the appeal, which is astonishing.

Decision of the Committee on admissibility

7.1 The Committee considered the admissibility of the communication at its nineteenth session and by its decision of 17 November 1997 found it to be admissible.

7.2 The Committee referred to article 22, paragraph 1, of the Convention and to rule 107, paragraph 1 (b), of its rules of procedure, which allow a communication to be submitted on behalf of an alleged victim if the author can justify acting on his behalf. The Committee found that the author, having submitted a written authorization signed by the brother of the alleged victim, had duly established his right to represent the alleged victim's family before the Committee. In this regard, the Committee noted that the State party had expressed doubts about the genuineness of the written authorization but had not presented sufficient evidence to conclude that the document signed by the alleged victim's brother was a forgery.

7.3 Concerning the exhaustion of domestic remedies, the Committee found that the State party had not given sufficient details about the criminal proceedings that could be taken in order to establish whether the remedies would be effective. It noted that, although criminal proceedings had been initiated, the file had been closed. It also noted that the reports to the effect that the Tunisian courts had awarded damages to the family in compensation for the accident of which Faisal Baraket was a victim placed in doubt the existence of an effective remedy based on a complaint of torture. The Committee therefore found that it was not prevented from considering the communication by article 22, paragraph 5 (b), of the Convention.

7.4 The Committee had ascertained, as it was required to do under article 22, paragraph 5 (a), of the Convention, that the same matter had not been and was not being examined under another procedure of international investigation or settlement.

State party's observations on the merits of the communication

8.1 The State party regrets the Committee's decision to find the communication admissible and notes the questionable nature of the arguments advanced to justify this decision. Faisal Baraket's family consists of his mother and five brothers, including Jamel Baraket. As has already been observed, Faisal Baraket's father, while he was still alive, refused to authorize the author of the communication to bring legal proceedings of any kind. The legal representation which is required in a matter as serious as alleged murder necessitates that authority to bring proceedings before the Committee should be granted by all of the alleged victim's next of kin. An allegation made by one person out of eight is not sufficient to raise serious doubt about the cause of death.

8.2 Moreover, it appears that the Committee is prepared to admit that the author of the communication is not entitled to bring proceedings unless the Tunisian Government can prove that the power of attorney signed by the alleged victim's brother is a forgery. Such a requirement is inconsistent with the smooth operation of an objective procedure designed exclusively to discover the truth on the basis of solid and corroborating evidence. In this instance, the Committee itself would seem to be in the best position to verify the authenticity of the documentation transmitted to it.

8.3 The State party has submitted the following facts concerning the death of Faisal Baraket on a number of occasions.

8.4 On 11 October 1991 an anonymous telephone caller informed the National Guard station at Menzel Bouzelfa that there had been a road traffic accident on route 26 between Ghrabi and Grombalia. Police officers found the victim alive at the scene. He was taken to Nabeul regional hospital but died the same day. His identity remained a mystery for four days, until fingerprint identification on 15 October 1991 revealed him to be Faisal Baraket. The autopsy report found the cause of death to be acute respiratory insufficiency related to extensive pulmonary congestion.

8.5 Following referral of the case, the Public Prosecutor's Office began a manslaughter investigation against X on 6 November 1991 in connection with the hit-and-run road traffic accident. On 30 March 1992, given the impossibility of identifying the culprit, the examining magistrate ordered the case to be closed until further notice.

8.6 On 15 October 1992 the Tunisian Ministry of Foreign Affairs sent a letter to Amnesty International stating that "with regard to the case of Faisal Baraket ... the reopening of which had been requested by the 'Driss Commission' and your own organization, the Tunisian authorities have forwarded to the Public Prosecutor attached to the Court of First Instance at Grombalia the medical report which you transmitted to the Government". The Public Prosecutor's Office ordered the case to be reopened on 22 September 1992.

8.7 Pursuant to the examining magistrate's decision to order a new expert medical opinion, three professors of forensic medicine including Dr. Ghachem were appointed to examine the content of the autopsy report and the conclusions put forward by Professor Pounder. Their report, a copy of which has been forwarded to the Committee, states that "the autopsy report fails to mention the presence of any traumatic lesion to the anus itself. Yet the forced introduction of a foreign body unavoidably leaves lesions in the area of the anus and sphincter. The autopsy report [...] refers to the presence of superficial lesions and a visceral lesion. None of the lesions described in the report permits the cause of injury to be accurately determined. The description of the lesions is very vague and incomplete and does not help to determine their origin. The conclusions reached by Professor Pounder cannot therefore be substantiated since they are not based on objective facts, the lesions referred to in the report being of a very imprecise nature". Once again, the case was closed for lack of evidence.

8.8 Following the submission of communication No. 14/1994 to the Committee, the Public Prosecutor's Office attached to the Court of First Instance at Grombalia ordered the case to be reopened. The examining magistrate immediately proceeded to examine the persons named by the author. Mr. Hedi Baraket stated that he did not know the author, nor had he ever met him; he also denied the allegations contained in the communication. A deposition to this effect was signed by Mr. Hedi Baraket and forwarded to the Committee. Three so-called witnesses who, according to the author, were purportedly present at the death of Faisal Baraket have denied knowing either the author or the alleged victim, and they further deny having witnessed scenes of torture. A fourth individual stated that he was bribed by the author. In exchange for a sum of money, he agreed to make a tape recording of a text prepared by the author. Finally, the general

superintendent at Nabeul Hospital stated that he had never gone to the police station to help the victim. The examining magistrate therefore decided that there were no grounds for pursuing the matter.

8.9 Faisal Baraket's relatives have never sued for damages in civil proceedings. For this reason, they have never contested the two decisions to close the case. Furthermore, article 5 of the Tunisian Code of Criminal Procedure stipulates that the statutory time limit for criminal prosecution is 10 years from the date of commission of the offence charged. This period may be suspended or reset whenever a new inquiry is opened. Relatives are entitled to submit new material of any kind in order to persuade the Public Prosecutor's Office to reopen the judicial investigation.

8.10 The State party indicates that on 16 November and 10 December 1991 Faisal Baraket's parents filed separate applications with the Grombalia Public Prosecutor's Office challenging the arbitrary detention and disappearance of their son Jamel Baraket. Both of these applications were successful. Given they were able to take such steps without incurring the reprisals predicted by the author, by the same token they were entirely at liberty to raise the matter of Faisal Baraket had they been convinced that he had been tortured to death. But no complaint of torture has ever been filed with the Tunisian courts. The criminal investigations to discover the truth in this matter have been initiated by the Public Prosecutor's Office.

8.11 The State party reports that the Ministry of Foreign Affairs has requested the Ministry of Public Health to commission a second report from Professor Ghachem on the conclusions of his initial report. This second report, a copy of which has been sent to the Committee, states that: "While it is true that the description of the lesions referred to in the autopsy report is imprecise and their origin is not explained, it is nevertheless the case that the conclusions reached by Professor Pounder are not based on objective forensic evidence. This is because the forced introduction of a foreign body into the anus leaves obvious marks in this area [...]. The autopsy report makes no mention of any traumatic lesions to the anus. [...] Nevertheless, I am also of the opinion that an exchange of views and a discussion with Professor D.J. Pounder and Professor S. Sassi regarding this case would be very useful".

8.12 The State party has also provided a French translation of an excerpt from a sworn deposition made by Dr. Sassi before the examining magistrate. The relevant passage reads: "It has been ascertained that there was a rupture of the large intestine in the area of the pelvis and the infiltration of waste products from the large intestine into the body caused a blood infection which in turn led to insufficiency of the respiratory apparatus, the direct cause of death. Dr. Sassi explained to us that the rupture of the large intestine was due to an acute traumatism which could have resulted from the collision between the victim and a solid body. This could have been the result of a road traffic accident involving a motor vehicle".

8.13 Regarding the question of civil proceedings, the State party emphasizes that Faisal Baraket's father did indeed bring a civil action for damages in connection with his son's death in a road traffic accident; from March 1995 he was represented in this action by Mr. Ahmed El Marhouf. The judgement in this case became final and enforceable following an appeal by the parties. Counsel proceeded to enforce the judgement. The author has provided no

convincing explanation as to why one of the beneficiaries has received the sum due to him, thereby unambiguously indicating that Mr. Marhoul has performed his proper function.

8.14 The State party takes issue with the Committee's contention in its decision on admissibility that insufficient details were provided regarding the criminal proceedings that may be taken. The State party stresses that it has submitted detailed records of the proceedings and investigations conducted on two occasions by the competent examining magistrate. It is astonished to find that, in the Committee's view, the remedy for alleged torture cannot be considered "effective" unless it results in a trial and subsequent conviction. If this were the case, investigative procedures - an indispensable component of criminal proceedings - would simply be a means to realize this end, whereas it is well established both in fact and in law that the examining magistrate must conduct his investigations with a view to indictment or acquittal.

Comments by the author

9.1 The author recalls that in 1992 the Higher Committee for Human Rights and Fundamental Freedoms transmitted a report to the President of the Republic in which it expressed the view that the death of Faisal Baraket had occurred in suspicious circumstances and that, in spite of the case being closed, new evidence had seemingly come to light which would warrant the opening of a new inquiry. The State party has not indicated what evidence led the official Government commission to form this view.

9.2 The author has transmitted to the Committee a copy of a letter dated 20 July 1994 which was sent to the President of the Movement against Racism and for Friendship among Peoples, a foreign non-governmental organization which has taken an interest in the case, via the Tunisian ambassador to France. The ambassador did not mention the road traffic accident hypothesis and placed the case in the context of promoting human rights and strengthening democratic structures in Tunisia. The author notes that the State party has not provided an explanation for this letter.

9.3 The State party claims to have reopened the Baraket case following the transmission of communication No. 14/1994, and to have summoned for questioning the witnesses named by the author. In fact, the police officers concerned have never been questioned or involved with the inquiry in any way, despite the fact that the author has indicated their name and rank.

9.4 With regard to the witness who the State party says has been bribed, the author claims that the witness is a wealthy businessman and asks where he could have found the money to offer a bribe, since he himself has no money to give. This same witness informed the author that, when he was questioned after the reopening of the case, he was detained for over a week and the police officers involved in the Faisal Baraket case were present during his detention. This is the witness whose wife was arrested in 1996.³ Finally, the general superintendent at Nabeul Hospital is unknown to the author and has never been named by him as a "witness".

9.5 The author rejects the State party's contention that there is no connection between the imprisonment of the wife of one of the witnesses and the case under consideration. The State party has not explained to the Committee why proceedings were instituted against the wife in question. It has also failed to explain why she has been transferred to a prison far away from her family, and why her counsel is prohibited from talking to her without the presence of witnesses.

9.6 The author has forwarded a letter from Professor Pounder in which the latter states his opinion on the report compiled by Professor Ghachem and two other experts. Professor Pounder notes that the State party has not provided the text of the report⁴ and states that, on the basis of the sentences which the State party has excerpted, he has not changed his opinion, namely that a road traffic accident could not explain the type of injuries which led to the death of Faisal Baraket. He reconfirmed that, in his opinion, the injury to the rectum could only have been received as a consequence of a foreign body being inserted into the anus. Furthermore, it is perfectly possible that such an injury could have been produced without causing a lesion to the anus itself.

9.7 The author has provided three other reports commissioned by Amnesty International from three professors of forensic science who evaluated the report prepared by the three experts and Professor Pounder's report. They all concur with Professor Pounder's opinion. The first, dated 6 October 1994, was drawn up by Professor Knight of the University of Wales, and states that:

"I have studied the translation of the very short autopsy report from the Regional Hospital of Nabeul, Tunisia concerning an unnamed deceased person. I have also read the report of Professor Derrick Pounder and the extract from the Tunisian Government's response.

"I must begin by saying that I agree in every particular with Professor Pounder's report and reject the government response, including the further opinion of three professors of legal medicine in Tunisia, whose comments are unacceptable.

"This was a 25-year-old man and therefore in the absence of evidence to the contrary, would be expected at that age to be free of natural disease, especially in the rectum and sigmoid.

"The cause of death given on the autopsy report (which must surely be only a brief summary, as no judicial autopsy report can possibly be this short) is useless and gives no true information at all about the underlying pathology leading to the death - it is merely a statement of the terminal mode of death, not the cause and is thus of no value whatsoever.

"The autopsy reveals bruising of the soles of both feet, a perforation of the large intestine at the rectosigmoid junction, extensive bruising and oedema of the buttocks, various other bruises on the face, arms, head and legs. The only potentially fatal injury is perforation of the rectosigmoid junction. The only cause for this, in the absence of any serious stated disease such as cancer, severe colitis etc., is a perforating injury. This can only be caused, in the absence of gross abdominal injury, by an object being introduced into the rectum. This could occur without any damage to the anal margin, if a thin, pointed object, such as a thin rod was slid into the anus. Thus the objections of the three professors are unfounded, if they base their denial on the absence of anal damage. The bruising of the soles of the feet can only occur from beating in falanga. The bruising and oedema of the buttocks is typical of a beating in that area.

“I entirely concur with Professor Pounder and agree that this cannot be a ‘traffic accident’, but is a deliberate injury to the lower intestine by the introduction of a thin weapon into the rectum, in a man who has been beaten on the feet and buttocks.”

9.8 The second report, prepared by Professor Fournier of the Université René Descartes in Paris on 10 October 1994, indicates that:

“[The autopsy report], which may be described as very succinct, furnishes no evidence as to the true cause of death. [...] Most of the lesions described could be ascribed to a road accident. However, two factors rule out this hypothesis:

- “- The perforation of the rectosigmoid junction, which cannot be accounted for in terms of a mechanism of sharp deceleration and cannot be linked to an osteal lesion of the pelvis.
- “- The lesions on the soles of both feet, which are difficult to imagine in such circumstances.

[...]

“The hypothesis of death by inhibition is compatible with the observations made during examination with the naked eye. This type of death, which may be observed when violence is applied but also sometimes independently of any context of violence or torture, has been described on the occasion of vaginal or rectal examination, various punctures (of the pleura, the lumbar region, etc.), or injury to the testicles, the solar plexus region or the neck. The exact mechanism of death is not known, but pulmonary congestion is usually observed. As the dossier stands, and in the absence of more precise data concerning the prior clinical state and the toxicological context, the hypothesis of death by inhibition following the deliberate and traumatic introduction of a foreign body into the rectum appears to be highly likely.”

9.9 Lastly, the third report, prepared by Professor Thomsen of the University of Odense on 11 November 1994, states in relation to the autopsy report:

“The above pattern of injury is not consistent with any known type of road traffic accident. The pattern of injury is much more consistent with having been inflicted deliberately by the use of blunt violence. Thus the haemorrhages of the foot soles are very indicative of the type of torture known as phalanga (or falaca) inflicted by the beating of the soles of the feet with clubs or similar instruments. A perforation of the rectosigmoid junction is very rarely seen without a pelvic fracture and is much more indicative of torture by the insertion of an object through the anal canal. The rest of the lesions are all consistent with the use of blunt violence in the form of beating by one or more other persons.

“The stated cause of death is almost meaningless, as congestion of the lungs is always secondary to some other pathologic state.

“Based on the available brief autopsy report it is much more likely that the cause of death was the described perforation of the bowel wall.”

9.10 With regard to the civil proceedings, the legal time limits for admissibility were largely exceeded by the time proceedings were brought. The Court of Appeal not only confirmed the admissibility of the case, but also increased the damages payable to the beneficiaries. The Chief of the State Litigation Department specifically stated before the Court of Appeal that the decision of the court of first instance in favour of the victim’s father had violated the law in that the alleged victim of a road traffic accident caused by an unidentified culprit must file, in writing and no more than one year from the date of the accident, a request to reach an amicable agreement with the Compensation Fund for the Victims of Road Accidents. In this case, the authorities were only apprised of the accident on 30 May 1995, or three years and five months after it occurred, thereby involving the statute of limitation.

9.11 The author states that Faisal Baraket’s younger brother is the only member of the family to have been paid his share of the compensation for the road traffic accident. Jamel Baraket, who is legally responsible for the family, has instructed the author to inform the Committee that this was done without his knowledge, his brother did not act spontaneously and it has not affected the family’s position. This remains unchanged, in spite of the fact that the sums awarded are sizeable in proportion to the standard of living in Tunisia and the family’s very modest material situation. The family has always refused to have any dealings with the lawyer Mr. Mohamed Ahmed El Marhoul, particularly with regard to his persistent appeals that they should come to his office and collect the money. At the request of the President of the Court of First Instance, Mr. Ahmed El Marhoul should long ago have filed a warrant authorizing remittance of the sums in question to the Treasury.

9.12 The author reaffirms that the victim’s parents never brought criminal proceedings because they knew for a fact that their son did not die in a road traffic accident. They also knew that the State party was acting in bad faith when it reopened and closed the same case three times in less than three years, entrusting the same people with the investigation on each occasion.

Further observations by the State party

10.1 Concerning the medical opinions advanced by Dr. Knight, Dr. Thomsen and Dr. Fournier, the State party affirms that these are not medical evaluations but comments prepared on the basis of an alternative report, which was in turn drawn up on the basis of Dr. Sassi’s initial report, and which purely and simply endorsed the conclusions reached by Dr. Pounder.

10.2 The State party considers it unacceptable that the author should accuse the Tunisian judicial authorities of distorting the procedure by questioning witnesses and not suspects. A suspect becomes a suspect only when there is credible and consistent evidence and proof which may be revealed by witnesses, inter alia. From the standpoint of criminal procedure,

examination of witnesses is necessary, before the possible questioning of the “real” suspects. In addition, the examination of witnesses is carried out exclusively before the competent examining magistrate, in his office and without any criminal investigation officer being present.

10.3 As regards civil procedure, the State party points out a flagrant contradiction on the part of the author. On the one hand, he considers Jamel Baraket as being “legally responsible” for the entire Baraket family, while at the same time he mentions that Mohamed El Hedi is 27 years old. In Tunisia the age of majority is 20. Consequently, Jamel Baraket cannot be legally responsible for adult relatives, except where the courts have declared them legally incompetent by reason of insanity. He is not even the legal representative of his close relatives, as to date he has not cited a legally valid authorization.

10.4 The lawyer Mohamed Ahmed El Marhoul did not appear “out of the blue” in the civil proceedings, as the author claims. The father of the late Faisal Baraket, who has since died, engaged him to pursue an action for compensation following a road accident, on his behalf and on behalf of all the other heirs. None of the heirs had recourse to the law to challenge his authority. In any event, the relations between a lawyer and his clients fall within the sphere of private law and are not subject to any supervision on the part of the Government. If not all those entitled to compensation have yet received it, that is not because they have been subjected to pressure by the lawyer, but because they are being manipulated by the author of the communication.

10.5 Lastly, as regards the situation of the wife of one of the “witnesses”, she has been prosecuted in keeping with normal legal procedures for offences under the ordinary law.

Consideration on the merits

11.1 The Committee has considered the communication in the light of all information made available to it by the parties concerned, in accordance with article 22, paragraph 4, of the Convention.

11.2 It also notes that the author of the communication claims that the State party has violated articles 2, 11, 12, 13 and 14 of the Convention.

11.3 Regarding articles 11 and 14, the Committee considers that the documents communicated to it furnish no proof that the State party has failed to discharge its obligations under these provisions of the Convention.

11.4 As regards article 12 of the Convention, the Committee notes first that study of the information forwarded by the parties points to the following established facts:

- The victim Faisal Baraket did indeed die no later than 11 November 1991, the date of the order for an autopsy; dying, according to the author of the communication, as a result of his arrest, or, according to the State party, as a result of a road accident caused by an unknown person.

- In October 1991, the State party received allegations that Faisal Baraket died as a result of torture from the following non-governmental organizations: Amnesty International, World Organization against Torture, Action of Christians for the Abolition of Torture (France) and Association for the Prevention of Torture (Switzerland).
- On 13 July 1992, a report prepared by the Higher Committee for Human Rights and Fundamental Freedoms, an official Tunisian body, had considered Faisal Baraket's death to be suspicious and had suggested that an inquiry should be begun under article 36 of the Code of Criminal Procedure.

11.5 However, only on 22 September 1992 was an inquiry ordered into these allegations of torture - over 10 months after the foreign non-governmental organizations had raised the alarm and over 2 months after the Driss Commission's report.

11.6 In a similar case,⁵ the Committee had considered delays of three weeks and more than two months on the part of the competent authorities in reacting to allegations of torture to be excessive.

11.7 The Committee is of the view that the State party did not comply with its obligation under article 12 of the Convention to proceed to a "prompt ... investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction" and that there was consequently a violation of the Convention.

11.8 Concerning the investigation carried out by the competent authorities of the State party, the following acts may be regarded as having been established:

- The examining magistrate, who was entrusted with the case by the Public Prosecutor's Office on 22 September 1992, ordered a new medical evaluation, which found that it was impossible to determine the mechanism by which the lesions observed on the victim had arisen, or their origin, and dismissed the case.
- Assigned the case once again, following communication No. 14/1994, the magistrate examined the persons mentioned by the author of the communication. However, as all these persons denied the slightest knowledge of the alleged events, the magistrate again dismissed the case.

11.9 The Committee notes in this regard that, among other things, the examining magistrate had at his disposal the results of other important investigations which are customarily conducted in such matters, but made no use of them:

- First, notwithstanding the statements made by the witnesses mentioned, and in particular bearing in mind the possibility of incomplete recall, the magistrate could have checked in the records of the detention centres referred to whether there was any trace of the presence of Faisal Baraket during the period in question, as well as that, in the same detention centre and at the same time, of the two persons mentioned by the author of the communication as having been

present when Faisal Baraket died. It is not without relevance to note in this regard that in pursuance of principle 12 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted on 9 December 1988,⁶ as well as article 13 bis of the Tunisian Code of Penal Procedure,⁷ a record must be left of every person detained.

- Next, the magistrate might have sought to identify the accused officials, examine them and arrange a confrontation between them and the witnesses mentioned as well as the complainant.
- Lastly, in view of the major disparities in the findings of the forensic officials as to the causes of some of the lesions observed on the victim, the Committee considers that it would have been wise to order the exhumation of the body in order at least to confirm whether the victim had suffered fractures to the pelvis (confirming the accident hypothesis) or whether he had not (confirming the hypothesis that a foreign object had been introduced into his anus); this should have been done, as far as possible, in the presence of non-Tunisian experts, and more particularly those who have had occasion to express a view on this matter.

11.10 The Committee considers that the magistrate, by failing to investigate more thoroughly, committed a breach of the duty of impartiality imposed on him by his obligation to give equal weight to both accusation and defence during his investigation, as did the Public Prosecutor when he failed to appeal against the decision to dismiss the case. In the Tunisian system the Minister of Justice has authority over the Public Prosecutor. It could therefore have ordered him to appeal, but failed to do so.

12. Consequently, the State party breached its obligation under articles 12 and 13 of the Convention to proceed to an impartial investigation wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

13. In pursuance of rule 111, paragraph 5, of its rules of procedure, the Committee calls on the State party to inform it, within 90 days from the date of the communication provided for in rule 111, paragraph 3, of its rules of procedure, of the steps it has taken in response to the observations made above.

[Done in French (original text) and translated into English, Russian and Spanish.]

Notes

¹ A summary of the allegations relating to the Baraket case appears in Amnesty International document MDE 30/04/92 dated March 1992.

² CAT/C/14/D/14/1994.

³ See above, para. 6.1.

⁴ The full text of the report was subsequently transmitted to the Committee.

⁵ Encarnación Blanco Abad v. Spain (CAT/C/20/D/59/1996).

⁶ Principle 12 reads:

“1. There shall be duly recorded:

“(a) The reasons for the arrest;

“(b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;

“(c) The identity of the law enforcement officials concerned;

“(d) Precise information concerning the place of custody.

“2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.”

⁷ In its comments on the conclusions and recommendations of the Committee following its consideration of Tunisia’s second periodic report the Government stated that “All departments with responsibility for places of detention are obliged to keep a special numbered register including the identities of all persons held in custody and indicating the time and date that the custody period begins and ends (article 13 bis of the Code of Criminal Procedure).” [A/54/44, para. 105]
