United Nations CCPR/C/101/D/1780/2008

International Covenant on Civil and Political Rights

Distr.: Restricted*
19 May 2011
English
Original: French

Human Rights Committee
101st session
14 March–1 April 2011

Views

Communication No. 1780/2008

Submitted by:	Mériem Zarzi (represented by TRIAL – Swiss Association against Impunity)
Alleged victim:	Brahim Aouabdia (the author's husband), the author herself, and their six children, Mohamed Salah Aouabdia (31), Abderaouf Aouabdia (30), Abdelatif Aouabdia (25), Seif Eddine Aouabdia (24), Shoaïb Aouabdia (19) and Sabah Aouabdia (18)
State party:	Algeria
Date of communication:	29 October 2007 (initial submission)
Document reference:	Special Rapporteur's rule 97 decision, transmitted to the State party on 24 April 2008 (not issued in document form)
Date of adoption of Views:	22 March 2011
Subject matter:	Enforced disappearance of a person detained for nearly 17 years
Procedural issues:	Exhaustion of domestic remedies
Substantive issues:	Right to life, prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, recognition as a person before the law
Articles of the Covenant:	Article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1–4; article 10;

* Made public by decision of the Human Rights Committee.

article 16

Articles of the Optional Protocol: Article 5, paragraphs 2 (a) and (b)

On 22 March 2011, the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1780/2008.

[Annex]

Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (101st session)

concerning

Communication No. 1780/2008**

Submitted by:	Mériem Zarzi (represented by TRIAL – Swiss Association against Impunity)
Alleged victim:	Brahim Aouabdia (the author's husband), the author herself, and their six children, Mohamed Salah Aouabdia (31), Abderaouf Aouabdia (30), Abdelatif Aouabdia (25), Seif Eddine Aouabdia (24), Shoaïb Aouabdia (19) and Sabah Aouabdia (18)
State party:	Algeria
Date of communication:	29 October 2007 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 March 2011,

Having concluded its consideration of communication No. 1780/2008, submitted to the Human Rights Committee by Mériem Zarzi under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 29 October 2007, is Mériem Zarzi, an Algerian national. She submits this communication on behalf of her husband, Brahim Aouabdia, who was born on 8 July 1943 in Aïn Mlila and formerly worked as a tailor in

** The following members of the Committee participated in the examination of the present communication: Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Krister Thelin and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Mr. Lazhari Bouzid did not participate in the adoption of the Views.

The texts of individual opinions signed by Committee members Mr. Rafael Rivas Posada and Mr. Fabián Omar Salvioli are appended to the present decision.

Constantine. The author also submits the communication on behalf of herself and the couple's six children, Mohamed Salah Aouabdia (31), Abderaouf Aouabdia (30), Abdelatif Aouabdia (25), Seif Eddine Aouabdia (24), Shoaïb Aouabdia (19) and Sabah Aouabdia (18). The author claims that her husband is the victim of violations by Algeria of articles 2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1–4; 10; and 16 of the Covenant. She is represented by TRIAL (Swiss Association against Impunity). The Covenant and its Optional Protocol entered into force for Algeria on 12 September 1989.

1.2 On 12 March 2009 the Special Rapporteur for New Communications, acting on behalf of the Committee, decided to reject the request by the State party of 3 March 2009 that the Committee consider the admissibility of the communication separately from the merits.

The facts as submitted by the author

2.1 The author claims that her husband, Brahim Aouabdia, was arrested at his workplace on 30 May 1994 at 9 a.m. by police officers in uniform who asked him to get into his own car along with three of the officers. These police officers did not present an arrest warrant and did not inform him of the reasons for the arrest. Many other people, including members of local councils, representatives elected in the latest cancelled parliamentary elections, militants and supporters of the Front Islamique du Salut (Islamic Salvation Front) (FIS), a banned political party, had been arrested in Constantine in the previous days or would be on the following days in the course of an extensive police operation.[1] All these people were taken to the central police station of Constantine and at least some of them were transferred, after being held incommunicado for some days or weeks, to the Centre territorial de recherches et d'investigations (Territorial Centre for Research and Investigation) (CTRI) of military area No. 5, under the Département de la recherche et de la sécurité (Research and Security Department) (DRS), the army's intelligence service. All these people vanished after being arrested. Brahim Aouabdia was arrested in front of numerous witnesses, but they left the scene swiftly, fearing that they would also be taken away. An employee at the tailoring shop where the victim worked and his brother-in-law stayed on the scene and were later able to describe the circumstances of the arrest to the author.

2.2 Later the same day, after learning of her husband's arrest, the author went to Coudiat police station, judicial police headquarters for the *wilaya* (governorate) of Constantine, hoping to see her husband or get news of him but not daring to enter. She saw her husband's vehicle parked in front of the police station, which confirmed that he was in fact being held there. For several days, alone or with her children, she went regularly to stand in front of the police station, hoping that her husband would be released. His vehicle remained parked nearby. The author's children also claimed that they regularly saw plain-clothes police officers driving through the city's streets in their father's car.

2.3 After waiting for two weeks, the author began to visit the courthouse regularly, hoping that her husband would be brought before the public prosecutor and thus placed under the protection of the law. In June she asked the registrar at the court of Constantine on a number of occasions when her husband might appear in court. At the end of June 1994 she wrote to the public prosecutor of the court of Constantine, who had jurisdiction, asking

[1] The author names 10 other individuals who were allegedly arrested in the course of this operation, one of whom is the subject of communication No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006. She also mentions some one thousand victims of abductions and arrests in the region, by various security forces that have been catalogued by the Association of Families of Disappeared Persons of Constantine and submitted to the Working Group on Enforced or Involuntary Disappearances.

to know the reasons why her husband was being held in incommunicado detention given that the legal time limit for police custody was 12 days for the most serious crimes of subversion and terrorism.[2] The public prosecution service refused to record her request on the grounds that it was not a formal complaint; however, when the author formally submitted a new complaint for abduction and unlawful imprisonment, she did not receive a reply.

2.4 The author nevertheless continued to contact all the official bodies that might be able to intervene in order to shed light on what had happened to her husband. She wrote to the Minister of the Interior, the Minister of Justice and the President, but to no avail. She also wrote to the National Human Rights Observatory, a government body responsible for overseeing and promoting human rights, and was told that it had no information concerning her husband.

2.5 Only on 29 March 1997, nearly three years after her husband's arrest and disappearance, was the author summoned by a police officer to the central police station of Constantine, where she was handed a report according to which Brahim Aouabdia had been "brought to the police and then handed over to the CTRI in military area No. 5 of Constantine on 13 July 1994". The report does not mention the date of the arrest or the reasons for it. The author therefore went to the CTRI barracks to enquire about her husband's fate and was told that he had never been seen there. She again applied to the public prosecutor to follow up on the report, but to no avail. She would learn later that her husband and 22 other individuals, most of whom had been arrested and had disappeared during the same period and under the same circumstances, had been sentenced to death in absentia by the criminal court of Constantine[3] on 29 July 1995. She asked the prosecution service for information concerning this sentence but received no reply. Furthermore, the public prosecution service refused to provide her with a copy of the judgement.

2.6 The author did succeed in obtaining a copy of the decision by the indictments chamber of Constantine of 6 June 1995, ordering Brahim Aouabdia and 22 other accused persons to be brought before the criminal court as they were all considered to be fugitives, and issuing a warrant for their arrest. According to the decision they were all wanted for crimes allegedly committed in the region, following a request by the public prosecutor of Constantine dated 12 July 1994 to open criminal proceedings. The author maintains that this information, according to which Brahim Aouabdia was a fugitive on that date, is inconsistent with the report she received on 29 March 1997, according to which he had been handed over to the CTRI on 13 July 1994 and was thus still being held at the police station on 12 July 1994.

2.7 The author maintains that as she herself submitted a criminal complaint and informed the public prosecutor at the end of June 1994 that her husband was being detained by the police at the central police station, the prosecutor could not be unaware of her husband's incommunicado detention at the police station for 43 days and his subsequent transfer to the DRS, after which he had disappeared. All the more so as the public prosecutor is, under the Code of Criminal Procedure, the legal authority with oversight of police custody. The author maintains that the public prosecutor should have requested a judicial investigation or ordered an investigation as soon as he was presented with evidence of abduction and unlawful imprisonment. Although the prosecution service finally requested the police to provide the author with a written notice of detention, it never took action as required by law on the basis of that document.

[2] Article 22 of the Counter-Terrorism Act of 30 September 1992.

[3] The author refers to *Bousroual v. Algeria*, supra, note 1, para. 6.

2.8 While the author and her children have never stopped looking for her husband and trying to learn the truth regarding his fate, because of the red tape associated with his disappearance she was obliged to launch a procedure to obtain an official finding of presumed death under Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation (27 February 2006). She requested a "disappearance report", which was issued on 19 March 2007 by the police of the *wilaya* (governorate) of Constantine under article 28 of the Ordinance, which states: "Mr. Brahim Aouabdia is considered to have disappeared following the investigation and unsuccessful searches conducted by this service." The author stresses that the services which provided her with this report are the very services behind Brahim Aouabdia's disappearance. On the basis of this report, the author received a finding of presumed death from the court of Constantine dated 23 May 2007. A death certificate was issued thereafter. The author notes that the date of death to which the judge refers (30 May 1994) is the date of Brahim Aouabdia's arrest by the police, even though according to the police report he had been handed over to the CTRI on 13 July 1994 and was therefore still alive on that date.[4] Despite the court decision, the author maintains that she and her children have not been able to find peace of mind or properly grieve for their father and husband. Although time has passed, they still believe that Brahim Aouabdia may be alive and may be held incommunicado in some camp. The author adds that his disappearance has had incalculable psychological and material consequences for the family.

The complaint

3.1 The author claims that the facts supporting her petition demonstrate that her husband has been a victim of enforced disappearance[5] since his arrest on 30 May 1994 and that he remains so to date. He was arrested by Government officials, who then refused to admit that he had been deprived of liberty or to say what had happened to him. Thirteen years[6] since his disappearance, the chances of finding Brahim Aouabdia alive are shrinking by the day, and the fact that a declaration of disappearance has been issued makes the author fear that her husband died as a result of the enforced disappearance that followed his arrest. Noting that in this particular case the State party has not made any effort to shed light on his fate, and with reference to the Committee's general comment on article 6, the author claims that Brahim Aouabdia was the victim of a violation of article 6 of the Covenant, read alone and in conjunction with article 2, paragraph 3.

3.2 The author also claims that the enforced disappearance of Brahim Aouabdia and the resultant suffering and distress constitute treatment violating article 7 of the Covenant.

3.3 With regard to herself and her children, the author claims that the disappearance of Brahim Aouabdia was and is a paralysing, painful and distressing experience as they know nothing of his fate and, if he is in fact dead, of the circumstances of his death or where he is buried. This uncertainty, which continues to cause the whole family deep suffering, has lasted since 29 May 1994. Since that date, the authorities have at no point sought to relieve the family's suffering by conducting effective investigations. The author claims that the State party has thereby acted in violation of article 7 of the Covenant with regard to the author and her children.

[4] Supra, para. 2.5.

[5] The author refers to the definition of "enforced disappearance" in paragraph 2 (i) of article 7 of the Rome Statute of the International Criminal Court and in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

[6] Now almost 17 years.

3.4 With regard to article 9 of the Covenant, the author recalls that her husband was arrested by the Constantine police without a warrant and without informing him of the reasons for his arrest. He has not been seen since. He was then detained arbitrarily and incommunicado from 30 May to 13 July 1994 — a total of 43 days — by the police before being handed over to the DRS, which also detained him for an unknown period. The author maintains that the State party thereby acted in violation of the provisions of article 9, paragraph 1, in respect of Brahim Aouabdia.

3.5 She adds that as he was at no point informed of the criminal charges against him and was tried and found guilty in absentia, when he had never been released, article 9, paragraph 2, of the Covenant was also violated. Furthermore, despite the legal proceedings instituted against him, Brahim Aouabdia was not brought promptly before a judge or other judicial authority and was detained incommunicado. The author therefore maintains that her husband was also the victim of a violation of article 9, paragraph 3. Lastly, the author claims that Brahim Aouabdia was also the victim of a violation of article 9, paragraph 4, having been deprived of the right to contest the lawfulness of his detention as he was deprived of all contact with the outside world during his detention, first at the police station and then at the DRS from 13 July 1994, and therefore could not contest the legality of his detention or ask a judge to set him free.

3.6 Furthermore, the author maintains that her husband, who was detained incommunicado in violation of article 7 of the Covenant, was not treated with humanity or with respect for the inherent dignity of the human person. She therefore claims that he was the victim of a violation by the State party of article 10, paragraph 1, of the Covenant.

3.7 In addition, the author claims that, as a victim of enforced disappearance, Brahim Aouabdia was denied the right to be recognized as having rights and obligations – in other words, was reduced to the status of "non-person", in violation of article 16 of the Covenant, by the State party.

3.8 The author furthermore maintains that as all the steps she took to shed light on her husband's fate were unsuccessful, the State party did not fulfil its obligation to guarantee Brahim Aouabdia an effective remedy, since it should have conducted a thorough and diligent investigation into his disappearance. She claims that the absence of an effective remedy is compounded by the fact that a total and general amnesty has been declared guaranteeing impunity to the individuals responsible for violations. By so doing, in her view, the State party acted in violation of article 2, paragraph 3, of the Covenant with regard to her husband.

3.9 Concerning the issue of exhaustion of domestic remedies, the author stresses that after 13 years,[7] all her efforts have been in vain: the authorities have never conducted an investigation into her husband's disappearance or reacted to the serious accusations against the police officers responsible for his disappearance. The letters she has sent regularly since 1994 to the highest levels of State authority have prompted no action. Moreover, she maintains that she no longer has the legal right to take judicial proceedings since the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation, which prohibits under penalty of imprisonment the pursuit of legal remedies to shed light on the most serious crimes such as enforced disappearances.[8] Not only did all

[7] Now almost 17 years.

[8] The author points out that the Charter rejects "all allegations holding the State responsible for deliberate disappearances". Furthermore, the fact that Ordinance No. 06-01 of 27 February 2006 prohibits the pursuit of legal remedies under penalty of criminal prosecution frees victims of the obligation to exhaust domestic remedies. According to the Ordinance, it is prohibited to file any complaints against the security and defence forces for disappearance and other crimes (art. 45). The

the remedies attempted by the author prove ineffective, they are now also totally unavailable. The author therefore maintains that she is no longer obliged to keep pursuing her efforts at the domestic level in order to ensure that her communication is admissible before the Committee as doing so would expose her to criminal prosecution.

State party's observations on the admissibility of the communication

4.1 On 3 March 2009 the State party contested the admissibility of the present communication and 10 other communications submitted to the Human Rights Committee. It did so in a "background memorandum on the inadmissibility of communications submitted to the Human Rights Committee in connection with the implementation of the Charter for Peace and National Reconciliation". The State party is of the view that communications incriminating public officials, or persons acting on behalf of public authorities, in enforced disappearances during the period in question, namely, from 1993 to 1998, must be considered in the wider domestic socio-political and security context that prevailed during a period in which the Government was struggling to fight terrorism.

4.2 During that period the Government had to fight against groups that were not formally organized. As a result, there was some confusion in the manner in which a number of operations were carried out among the civilian population, and it was difficult for civilians to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. Thus there are numerous cases of enforced disappearance but, according to the State party, they cannot be blamed on the Government. Data documented by many independent sources, including the press and human rights organizations, indicate that the concept of disappearance in Algeria during the period in question covers six distinct scenarios, none of which can be blamed on the Government. The first scenario concerns persons who were reported missing by their relatives when in fact they chose to return secretly in order to join an armed group and asked their families to report that they had been arrested by the security services as a way of "covering their tracks" and avoiding "harassment" by the police. The second concerns persons who were reported missing after their arrest by the security services and who took advantage of their release to go into hiding. The third scenario concerns persons abducted by armed groups who, because they were not identified or had taken uniforms or identification documents from police officers or soldiers, were incorrectly identified as members of the armed forces or security services. The fourth scenario concerns persons who were reported missing but who had actually abandoned their families and in some cases even left the country because of personal problems or family disputes. The fifth scenario concerns persons reported missing by their families who were actually wanted terrorists who had been killed and buried in the maquis after factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. The sixth scenario concerns persons reported missing who were in fact living in Algeria or abroad under false identities created via a vast network of document forgers.

4.3 The State party stresses that it was in view of the diversity and complexity of the situations covered by the concept of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, recommended a comprehensive approach to the issue of the disappeared under which the cases of all persons who had disappeared during the national tragedy would be dealt with, all victims

author adds that according to the Ordinance, any allegation or complaint must be declared inadmissible by the competent legal authority and, moreover, that legal action can be taken against anyone who, "through his spoken or written statements or any other act, uses or makes use of the wounds caused by the national tragedy to undermine national institutions, weaken the State, impugn the honour of its agents (...) or tarnish Algeria's international reputation" (art. 46).

would be offered support to overcome their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 disappearances have been reported, 6,774 cases examined, 5,704 approved for compensation and 934 rejected, with 136 still pending. A total of 371,459,390 Algerian dinars (DA) has been paid out as compensation to all the victims concerned. In addition, a total of DA 1,320,824,683 has been paid out in monthly pensions.

4.4 The State party further argues that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities involving the political or administrative authorities, non-judicial remedies pursued through advisory or mediation bodies, and judicial remedies pursued through the competent courts of justice. The State party observes that, as may be seen from the authors' statements,[9] the complainants have written letters to political and administrative authorities, petitioned advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but have not actually initiated legal proceedings and seen them through to their conclusion by availing themselves of all available remedies of appeal and judicial review. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to an investigating judge. In the Algerian legal system, it is the public prosecutor who receives complaints and who institutes criminal proceedings if these are warranted. Nevertheless, in order to protect the rights of victims and their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint with the investigating judge. In that case, it is the victim, not the prosecutor, who institutes criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not used, despite the fact that that would have enabled the victims to institute criminal proceedings and compelled the investigating judge to launch an investigation, even if the prosecution service had decided otherwise.

4.5 The State party also notes the authors' contention that the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation — in particular, article 45 of Ordinance No. 06-01 — makes it impossible to consider that any effective and available domestic remedies exist in Algeria to which the families of victims of disappearance could have recourse. On this basis, the authors believed they were under no obligation to bring the matter before the competent courts, thereby prejudging the position and findings of the courts on the application of the ordinance. However, the authors cannot invoke this ordinance and its implementing legislation to absolve themselves of responsibility for failing to institute the legal proceedings available to them. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility of a remedy does not exempt that person from the requirement to exhaust all domestic remedies.[10]

4.6 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It stresses that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by internal crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter. The ordinance implementing the Charter prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for

[9] As the State party has provided a common reply to 11 different communications, it refers to the "authors". This reference thus also includes the author of the present communication.

[10] The State party cites, in particular, communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

any person who is found guilty of acts of terrorism or who benefits from the provisions of the legislation on civil dissent, except for persons who have committed or been accomplices in mass killings, rapes or bombings in public places. This ordinance also helps to address the issue of disappearances by introducing a procedure for filing an official finding of presumed death, which entitles beneficiaries to receive compensation as victims of the national tragedy. In addition, social and economic measures have been put in place, including the provision of employment placement assistance and compensation for all persons considered victims of the national tragedy. Lastly, the ordinance prescribes political measures, such as a ban on holding political office for any person who in the past exploited religion in a way that contributed to the national tragedy, and establishes the inadmissibility of any proceedings brought against individuals or groups who are members of any branch of Algeria's defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

4.7 In addition to establishing funds to compensate all victims of the national tragedy, the sovereign people of Algeria have, according to the State party, agreed to a process of national reconciliation as the only way to heal the wounds inflicted. The State party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, media outpourings and the settling of political scores. The State party is therefore of the view that the authors' allegations are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.8 The State party asks the Committee to note how similar the facts and situations described by the authors are and to take into account the socio-political and security context at the time; to note that the authors failed to exhaust all domestic remedies; to note that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in these communications through measures aimed at achieving peace and national reconciliation that are consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the above-mentioned communications inadmissible; and to request the authors to avail themselves of the appropriate remedy.

Additional observations by the State party on the admissibility of the communication

5.1 On 9 October 2009, the State party transmitted a further memorandum to the Committee in which it raises the question of whether the submission of a series of individual communications to the Committee might not actually be an abuse of procedure aimed at bringing before the Committee a broad historical issue involving causes and circumstances of which the Committee is unaware. The State party observes in this connection that these "individual" communications dwell on the general context in which the disappearances occurred, focusing solely on the actions of the security forces and never mentioning those of the various armed groups that used criminal concealment techniques to incriminate the armed forces.

5.2 The State party insists that it will not address the merits of these communications until the issue of their admissibility has been settled, since all judicial or quasi-judicial bodies have a duty to deal with preliminary questions before considering the merits. According to the State party, the decision in the cases in point to consider questions of admissibility and the merits jointly and simultaneously — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications in terms of both their general nature and their intrinsic particularities. Referring to the rules of procedure of the Human Rights Committee, the State party notes that the sections relating to the Committee's procedure to determine the admissibility of communications are separate from those relating to the consideration of communications on the merits, and that therefore these questions could be considered separately. With regard,

in particular, to the question of the exhaustion of domestic remedies, the State party stresses that none of the communications submitted by the authors was channelled through the domestic courts for consideration by the Algerian judicial authorities. Only a few of the communications that were submitted reached the Indictments Chamber, a high-level investigating court with jurisdiction to hear appeals.

5.3 Recalling the Committee's jurisprudence regarding the obligation to exhaust domestic remedies, the State party stresses that mere doubts about the prospect of success or worries about delays do not exempt the authors from the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation has made it impossible to avail oneself of any remedy in this area, the State party replies that the failure of the authors to take any steps to submit their allegations for examination has so far prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter. Moreover, under the ordinance in question, the only proceedings that are inadmissible are those brought against "members of any branch of the defence and security forces of the Republic" for actions consistent with their core duties to the Republic, namely, to protect persons and property, safeguard the nation and preserve its institutions. On the other hand, any allegations concerning actions attributable to the defence or security forces that can be proved to have taken place in any other context are subject to investigation by the appropriate courts.

5.4 Lastly, the State party reiterates its position with regard to the pertinence of the settlement mechanism established by the Charter for Peace and National Reconciliation. It points out in this regard that the author is taking advantage of the procedure enabling her to have her husband officially declared dead, which entitles her to receive compensation, yet at the same time condemns the system.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearance of Brahim Aouabdia was reported to the Working Group on Enforced or Involuntary Disappearances. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, and whose mandates are to examine and report publicly on human rights situations in specific countries or territories, or cases of widespread human rights violations worldwide, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.[11] Accordingly, the Committee considers that the examination of Brahim Aouabdia's case by the Working Group on Enforced or Involuntary Disappearances does not render it inadmissible under this provision.

6.3 The Committee notes that, according to the State party, the author has not exhausted domestic remedies, since she did not consider the possibility of bringing the matter before

[11] Communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 7.1.

the investigating judge and bringing a civil action. The Committee notes that at the end of June 1994, the author wrote to the public prosecutor of the court of Constantine to enquire about the reasons for her husband's incommunicado detention and then lodged a formal complaint for the crimes of abduction and unlawful imprisonment, but that this complaint was not taken up. On 29 March 1997 she was provided with a report according to which her spouse had been brought to the police and then handed over to the Territorial Centre for Research and Investigation (CTRI) of military area No. 5, Constantine, on 13 July 1994. Her attempts to follow up on this report with the public prosecutor were in vain. Allegedly an arrest warrant had been issued for her husband and he had been condemned to death in absentia. Nevertheless, the author had not been able to obtain any confirmation of the sentence or an official copy of the judgement. The Committee recalls its jurisprudence to the effect that authors must avail themselves of all legal remedies in order to fulfil the requirement of exhaustion of all available domestic remedies, insofar as such remedies appear to be effective in the given case and are de facto available to the author.[12] Under the circumstances, the Committee considers that bringing a civil action for offences as serious as those alleged in the present case cannot be considered a substitute for the proceedings that should have been brought by the public prosecutor, especially given that the author had filed a criminal complaint with the prosecutor regarding her husband's disappearance. Hence, the Committee considers that article 5, paragraph 2 (b), of the Optional Protocol does not constitute an impediment to the admissibility of the communication.

6.4 The Committee finds that the author has sufficiently substantiated her allegations insofar as they raise issues under articles 6, paragraph 1; 7; 9, paragraphs 1–4; 10; 16; and 2, paragraph 3, of the Covenant and therefore proceeds to consider the communication on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the written information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.2 Clearly, the State party prefers to maintain that communications incriminating public officials, or persons acting on behalf of public authorities, in enforced disappearances during the period in question — that is, from 1993 to 1998 — must be considered in the broader context of the prevailing domestic socio-political and security conditions during a period when the Government was struggling to fight terrorism and that, consequently, they should not be examined by the Committee under the individual complaints mechanism. The Committee wishes to recall the concluding observations that it addressed Algeria at its ninety-first session,[13] as well as its jurisprudence,[14] according to which the State party should not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. As emphasized in its concluding observations concerning Algeria,[15] the Committee considers that Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the Covenant. The Committee

[12] Communication No. 1003/2001, *P.L. v. Germany*, decision on admissibility adopted on 22 October 2003, para. 6.5. See also communication No. 433/1990, *A.P.A. v. Spain*, decision on admissibility adopted on 25 March 1994, para. 6.2.

[13] CCPR/C/DZA/CO/3, para. 7 (a).

[14] Communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11; and communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 9.2.

[15] CCPR/C/DZA/CO/3, para. 7.

rejects, furthermore, the argument of the State party that the author's failure to take any steps to submit her allegations for examination has so far prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter.

7.3 The Committee recalls its Views in previous communications[16] and notes that the State party has provided no response to the author's allegations on the merits. It further reaffirms that the burden of proof cannot rest on the author of a communication alone, especially since an author and a State party do not always have equal access to the evidence, and that it is frequently the case that the State party alone has the relevant information.[17] It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities and to furnish to the Committee the information available to it.

7.4 Concerning the claim that the author's husband was detained incommunicado, the Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 on article 7, which recommends that States parties should make provisions against incommunicado detention. It notes that Brahim Aouabdia was arrested on 30 May 1994, taken to the central police station of Constantine and then transferred to the CTRI of military area No. 5. This was officially confirmed to the author in a police report of 13 July 1994. During this whole period Brahim Aouabdia was held incommunicado. Allegedly he was sentenced to death in absentia by the criminal court of Constantine on 29 July 1995, but the author has never been able to obtain confirmation of this sentence.

7.5 The Committee concludes, on the basis of the material before it, that the incommunicado detention of Brahim Aouabdia since 1994 and the fact that he was prevented from communicating with his family and the outside world constitute a violation of article 7 of the Covenant in his regard.[18]

7.6 Regarding his wife, Mériem Zarzi, and their six children, the Committee acknowledges the suffering and distress caused to them by the disappearance of Brahim Aouabdia, of whom they have had no news for almost 17 years. Although they learned indirectly that Brahim Aouabdia had been sentenced to death in absentia, they have never been able to obtain official confirmation of this but had to decide to request a "disappearance report" and then a declaration of death without any effective investigation being conducted to establish the victim's fate. The Committee therefore considers that the facts before it reveal a violation of article 7 of the Covenant, read alone and in conjunction with article 2, paragraph 3, with regard to the author and her six children.[19]

[16] See, inter alia, communication No. 1640/2007, *El Abani v. Libya*, Views adopted on 26 July 2010, para. 7.3.

[17] See communications No. 1422/2005, *El Hassy v. Libya*, supra, note 16, para. 6.7; No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2; and No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

[18] See communications No. 1295/2004, *El Alwani v. Libya*, Views adopted on 11 July 2007, para. 6.5; No. 1422/2005, *El Hassy v. Libya*, supra, note 16, para. 6.2; No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 8.5; and No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.4.

[19] See communications No. 1640/2007, *El Abani v. Libya*, supra, note 16, para. 7.5; No. 1422/2005, *El Hassy v. Libya*, supra, note 16, para. 6.11; No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14; and No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 31 July 2003, para. 9.5.

7.7 With regard to the alleged violation of article 9, the information before the Committee shows that Brahim Aouabdia was arrested without a warrant by agents of the State party, then detained incommunicado without access to defence counsel and without being informed of the grounds for his arrest or the charges against him. He was allegedly sentenced to death in absentia on 29 July 1995 by the criminal court of Constantine. The Committee recalls that, in accordance with article 9, paragraph 4, judicial review of the lawfulness of detention must provide for the possibility of ordering the release of the detainee if their detention is declared incompatible with the provisions of the Covenant, in particular those of article 9, paragraph 1. In the absence of any appropriate explanation by the State party, the Committee finds the detention of Brahim Aouabdia to be a violation of article 9.[20]

7.8 Regarding the author's complaint under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty must not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In the absence of State party information on the treatment of Brahim Aouabdia during his incommunicado detention at the central police station of Constantine and the CTRI of military area No. 5, the Committee finds a violation of article 10, paragraph 1, of the Covenant.[21]

7.9 In respect of article 16, the Committee reiterates its established jurisprudence, according to which intentionally removing a person from the protection of the law for a prolonged period of time may constitute a denial of their right to recognition as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of their relatives to obtain access to effective remedies, including judicial remedies, have been systematically impeded.[22] In the present case, the State authorities, despite having acknowledged Brahim Aouabdia's detention by providing his wife with a report stating that he had been arrested by the police, held under their control and then transferred to the CTRI of military area No. 5, have not given the family any other information. The Committee therefore concludes that the enforced disappearance of Brahim Aouabdia for nearly 17 years denied him the protection of the law for the same period and deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

7.10 The author also invokes article 2, paragraph 3, of the Covenant, which requires States parties to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights enshrined in the Covenant. The Committee reiterates the importance that it attaches to States parties' establishment of appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its general comment No. 31, which states that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.[23] In the present case, the information before the Committee indicates that Brahim Aouabdia did not have access to an effective remedy, in that the State party failed in its obligation to protect his life, and the Committee therefore concludes that the facts before it reveal a violation of article 6 of the Covenant, read in conjunction with article 2, paragraph 3.

[20] See communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.5.

[21] See general comment No. 21 [44] on art. 10, para. 3 and communications No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2; and No. 1422/2005, *El Hassy v. Libya*, supra, note 16, para. 6.4.

[22] See communications No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.8; and No. 1495/2006, *Zohra Madaoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

[23] Paras. 15 and 18.

7.11 Having adopted a decision on the violation of article 6 of the Covenant, read in conjunction with article 2, paragraph 3, the Committee does not consider it necessary to examine separately the complaints relating solely to article 6.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations by the State party of article 6, read in conjunction with article 2, paragraph 3; article 7; article 9; article 10, paragraph 1; and article 16 of the Covenant with regard to Brahim Aouabdia. Moreover, the facts reveal a violation of article 7 alone and read in conjunction with article 2, paragraph 3, with regard to the author (the victim's wife) and their six children.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including by (i) conducting a thorough and effective investigation into the disappearance of Brahim Aouabdia; (ii) providing his family with detailed information about the results of the investigation; (iii) freeing him immediately if he is still being detained incommunicado; (iv) if he is dead, handing over his remains to his family; (v) prosecuting, trying and punishing those responsible for the violations committed; and (vi) providing adequate compensation for the author and her children for the violations suffered, and for Brahim Aouabdia if he is alive. The State party is also under an obligation to take steps to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy should it be established that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the present Views.

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

Appendix

Individual opinion of Committee member Mr. Rafael Rivas Posada (partially dissenting)

In paragraph 7.11 of its Views on *Zarzi v. Algeria* the Human Rights Committee states that having adopted a decision on the violation of article 6 of the Covenant, read in conjunction with article 2, paragraph 3, the Committee does not consider it necessary to examine separately the complaints relating solely to article 6. In paragraph 7.10, however, it states that since the victim Brahim Aouabdia did not enjoy the protection of the right to life to which he was entitled by the State party, the latter directly violated article 6 of the Covenant, read in conjunction with article 2, paragraph 3. Furthermore, in paragraph 8, the Committee again finds a violation of article 6, to which it refers in the same terms.

I disagree with the Committee's jurisprudence which leads to the conclusion that cases of enforced disappearance should be qualified as direct violations of article 6 of the Covenant in cases of enforced disappearance where the State party has not fulfilled its obligation to protect the right to life of the individuals concerned and has not duly investigated the circumstances of their disappearance but where there is no conclusive evidence of the victim's death. In my opinion, the interpretation of article 6 as applying even to cases where there has not been deprivation of life is a misinterpretation that unduly extends the scope of article 6. There is no doubt that there must be a connection between a violation by the State party and the right to life, but not necessarily in order to conclude that there has been a direct violation of this right if the death of the victim has not been proved.

For the above reason, I consider that paragraph 8 of the Committee's decision should have been worded as follows: "is of the view that the facts before it disclose violations by the State party of article 2, paragraph 3, of the Covenant, read in conjunction with article 6", and not the wording "violations by the State party of article 6, read in conjunction with article 2, paragraph 3" currently used by the Committee.

In all other respects I agree with the Committee's Views.

(*Signed*) Mr. Rafael **Rivas Posada**

[Done 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.]

Individual opinion of Committee member Mr. Fabián Omar Salvioli (partially dissenting)

1. I generally concur with the Committee's decision in the case of *Aouabdia v. Algeria* (communication No. 1780/2008). Nevertheless, in view of the arguments put forward in the decision, I feel obliged to set out some thoughts on the violation of article 6 of the International Covenant on Civil and Political Rights with regard to the enforced disappearance of persons, elaborating on the partially dissenting opinion that I expressed in the case of *Benaziza v. Algeria* (communication No. 1588/2007). I will also take this opportunity to raise some issues relating to redress in cases where a legal norm is applied that the Committee considers to be incompatible with the Covenant.

I. Enforced disappearances and article 6 of the International Covenant on Civil and Political Rights

2. In my view, the Committee should have concluded that the State party was responsible for a violation of article 6 of the International Covenant on Civil and Political Rights in respect of Mr. Brahim Aouabdia without needing to refer, in this connection, to article 2.

3. In its general comment No. 6, the Committee says that States parties should take specific and effective measures to prevent the disappearance of individuals and should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.[24] These specific measures ought to consist not only of the application of effective legal remedies in response to arbitrary detentions, but also, in light of the duty to guarantee the right to life, of the prevention of any action by State agents that could result in enforced disappearances.

4. In the present case, the Committee has taken as proven a series of allegations made by the author that have not been refuted or denied by the State party, namely that Brahim Aouabdia was arrested at his workplace by police officers in uniform and taken away by them in his own car, which was parked outside the police station and was even used by police officers. The author was later officially informed in writing that Brahim Aouabdia had been taken into police custody and subsequently transferred to the Territorial Centre for Research and Investigation of military area No. 5, Constantine, on 13 July 1994.

5. In cases such as this, where the responsibility of the State for the detention of the victim has been demonstrated, the burden of proof regarding the guarantee to the right to life rests with the State. Brahim Aouabdia is still missing 17 years later, and so it seems logical to conclude, from the perspective of contemporary international law on the protection of human rights, that the facts of the case as submitted reveal a violation of article 6, paragraph 1, inasmuch as the State party failed to guarantee the right to life of Brahim Aouabdia.

6. I have already argued in my individual opinion in the case of *Benaziza v. Algeria* that the duty to guarantee the rights established in the Covenant is referred to in three ways: firstly, article 2, paragraph 1, establishes the duty to guarantee the rights of all persons without distinction of any kind, thus embodying (obviously) the principle of non-discrimination in the enjoyment of rights; secondly, article 2, paragraph 3, refers to the

[24] General comment No. 6 (1982), para. 4.

effective remedy to which all persons are entitled when any of their rights under the Covenant are violated; and, thirdly, there is the duty to guarantee each right in itself.

7. I must stress that there is no need for the provisions pertaining to each right recognized in the Covenant to begin with a statement that it must be guaranteed by the State. It would be absurd to say that the duty to guarantee those rights refers only to the obligation to not discriminate or to the obligation to provide a remedy in the case of a violation. The duty to guarantee, in itself, is not established in article 2, paragraph 2, of the Covenant either. That paragraph refers to legislative or other measures to give effect to the rights established in the Covenant and embodies the principles that human rights are self-executing and have useful effect, both of which are intrinsically related to the general duty to guarantee those rights but which do not fully characterize it.

8. Logic dictates that there is a duty to guarantee all the rights established in the Covenant for each person under a State party's jurisdiction. This duty to guarantee is in itself legally enshrined in the specific provision on each right established in the Covenant.

9. Consequently, in the case at hand, article 6, paragraph 1, was violated because the State party did not guarantee the right to life of Brahim Aouabdia; in no way does this necessarily imply that the victim has died, as there is no evidence of this in the file. The State party must restore the right and, consequently, take the necessary steps to ensure that the victim is released if still alive, as the Committee rightly indicates in paragraph 9 of its Views. In the meantime, the family must be allowed to file the pertinent civil action suits, including those regarding succession- and assets-related matters arising from the enforced disappearance of Brahim Aouabdia rather than from his presumed death.

II. Redress in cases where a legal norm that is incompatible with the Covenant is applied

10. Since joining the Committee, I have been concerned about the need to be more specific about redress in order to help States fulfil their obligations under the Covenant.

11. In the present case, of *Aouabdia v. Algeria*, the Committee has rightly indicated that the State party should not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. I am of the view that the Committee should also have indicated that some of the provisions of the aforementioned Charter are clearly incompatible with the Covenant, which constitutes a violation of article 2 of the Covenant read in conjunction with other provisions. Consequently, the Committee should have clearly affirmed that redress must include the amendment by the State party of the Charter for Peace and National Reconciliation, in fulfilment of its obligation to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the Covenant and to prevent a repetition of incidents like those which gave rise to the communication under consideration. A decision of this nature undoubtedly falls within the remit of the Committee, and aims both to improve the protection of individuals and to give due effect to the provisions of the Covenant.

(*Signed*) Mr. Fabián Omar **Salvioli**

[Done 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.]