



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 2028/2011

##### Views adopted by the Committee at its 113th session (16 March–2 April 2015)

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| <i>Submitted by:</i>                      | Mevlida Ičić (represented by counsel, Track Impunity Always)   |
| <i>Alleged victims:</i>                   | The author and Fadil Ičić (her son)  |
| <i>State party:</i>                       | Bosnia and Herzegovina   |
| <i>Date of communication:</i>             | 10 December 2010 (initial submission)  |
| <i>Document references:</i>               | Special Rapporteur's rule 97 decisions, transmitted to the State party on 18 February 2011 (not issued in document form)   |
| <i>Date of adoption of views:</i>         | 30 March 2015  |
| <i>Subject matter:</i>                    | Enforced disappearance and effective remedy  |
| <i>Procedural issues:</i>                 | Exhaustion of domestic remedies  |
| <i>Substantive issues:</i>                | Right to life; prohibition of torture and other ill-treatment; liberty and security of person; right to be treated with humanity and dignity; recognition of legal personality; and right to an effective remedy |
| <i>Articles of the Covenant:</i>          | 2, paragraph 3; 6; 7; 9; 10 and 16   |
| <i>Articles of the Optional Protocol:</i> | 2; and 5, paragraph 2 (b)  |



## 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 (113th session)**

concerning

#### **Communication No. 2028/2011\***

*Submitted by:* Mevlida Ičić (represented by counsel, Track Impunity Always)

*Alleged victims:* The author and Fadil Ičić (her son)

*State party:* Bosnia and Herzegovina

*Date of communication:* 10 December 2010 (initial submission)

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

*Meeting* on 30 March 2015,

*Having concluded* its consideration of communication No. 2028/2011, submitted to the Human Rights Committee by Mevlida Ičić 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 and the State party,

*Adopts* the following:

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

1. The author of the communication is Ms. Mevlida Ičić, who submits it on behalf of herself and her son, Mr. Fadil Ičić. They are nationals of Bosnia and Herzegovina, born on 5 May 1943 and 16 June 1965, respectively. The author claims that the State party has violated her son's rights under articles 6, 7, 9, 10 and 16, read in conjunction with article 2(3); and her rights under article 7, read in conjunction with article 2(3), of the Covenant. The author is represented by counsel. The Optional Protocol entered into force for the State party on 1 June 1995.

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\* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujall B. Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval. The text of an individual opinion of Committee member Anja Seibert-Fohr (concurring) and joint opinion by Committee members Olivier de Frouville, Mauro Politi, Victor Manuel Rodríguez-Rescia and Fabián Omar Salvioli (partly dissenting) is appended to the present Views.

### The facts as submitted by the author

2.1 The events took place during the armed conflict surrounding the independence of Bosnia and Herzegovina, between the Bosnian governmental forces on one side and the Bosnian Serb forces and the Yugoslav National Army on the other. The conflict was characterized by ethnic cleansing operations and other atrocities, in which thousands of persons were killed, taken to detention camps or disappeared without leaving trace.<sup>1</sup> Several of these disappearances occurred in Bosnian Krajina between May and August 1992, most prominently in the region of Prijedor. Hundreds of inhabitants of the area in and around Prijedor were brought to detention camps established by the Bosnian Serb forces, one of the most notorious the detention camp being at Omarska.<sup>2</sup> Between 3000 and 5000 civilians were imprisoned in this camp, kept under inhuman conditions, physically and psychologically abused, tortured and arbitrary killed. In general, they stayed in overcrowded places and without proper hygiene arrangements, sufficient food and water and adequate medical care.<sup>3</sup>

2.2 When the events took place, Mr. Ičić was living in Trnopolje, Prijedor. The author claims that, on 10 June 1992, he was working in a field outside his house when members of the Bosnian Serb forces apprehended him. They threatened him with guns and rifles and forced him to walk in the direction of Omarska. Along the way, Mr. S.D. was also apprehended. While walking towards Omarska, they stopped for a while in front of the house of Mr. M.S. and Mr. S.S., who could see Mr. Ičić and Mr. S.D. in the hands of the members of the Bosnian Serb army. Afterwards, they were taken to the detention camp of Omarska.

2.3 On 11 June 1992, Mr. S.D. was allowed to leave the Omarska detention camp. When he arrived in Trnopolje, he contacted the author and told her that her son, Mr. Ičić, was being held in Omarska. He also told her that her son was being held in inhuman conditions of detention and was at risk of death. Mr. Ičić's fate and whereabouts remain unknown since then.

2.4 On 17 June 1992, while the author was at home with her other four children, a soldier of the Bosnian Serb forces came, started shooting and ordered her to leave the house. They were brought to the detention camp in Trnopolje, where they stayed for one night. Then they went to Zenica, where she reported her son's disappearance to the local office of the International Committee of the Red Cross (ICRC). On 3 July 1992, the author and her children fled to Slovenia.

2.5 In August 1992, the author reported her son's disappearance to ICRC in Jasenice, Slovenia, and, in 1993, she sent a letter with pictures of him to ICRC in Croatia. Between 1995 and 1996, she approached the local office of ICRC in Slovenia and the ICRC Tracing Agency in Zagreb, without success.

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<sup>1</sup> See E/CN.4/1996/36, paras. 22, 49-60, 67-68, 85 and 88.

<sup>2</sup> See reports E/CN.4/1995/37, paras 3, 36 and 52; and E/CN.4/1997/55, paras 3, 94 and 98-106.

<sup>3</sup> See final report to the Security Council of the Commission of Experts established pursuant to Security Council resolution 780 (1992), S/1994/674/Add.2 (Vol. I). See also the jurisprudence of the International Tribunal for the Former Yugoslavia in relation to case *Prosecutor v. Radoslav Brdanin*, judgement of the trial chamber of 1 September 2004 (case No. IT-99-36-T), paras. 118 and 159; and case *Prosecutor v. Miroslav Kovčeka et al.*, judgement of the trial chamber of 2 November 2001 (case No. IT-98/30-1), paras. 18 and 28-44.

2.6 The armed conflict came to an end in December 1995, when the General Framework Agreement for Peace in Bosnia and Herzegovina entered into force.<sup>4</sup>

2.7 In 2000, the author returned to Bosnia and Herzegovina. In 2001, she went to ICRC in Ključ to report that her son was still missing. Today, Mr. Ičić continues to be registered in the ICRC database as a person “unaccounted for”. The author also joined the Association of Families of Missing Person from Prijedor (Izvor). As member of this organization, she participated in several manifestations and undertook numerous démarches to report the enforced disappearance of her son to various authorities, and requested the intervention of those authorities to establish his fate and whereabouts and to obtain justice and redress.

2.8 In 2002, the author and three of her children gave ICRC in Sanski Most DNA samples to facilitate the identification process of mortal remains of her son.

2.9 In 2004, the author reported her son’s enforced disappearance and submitted a tracing request to the Federal Commission for Tracing Mission Persons.<sup>5</sup> The author claims that ICRC has shared the information concerning the enforced disappearance of her son with the local authorities since 1992. Although they were aware of his disappearance and had access to relevant information, no ex officio effective investigation has been carried out in order to locate him, to make known his fate and whereabouts or, in the event of his death, to locate, exhume, identify and return to his family his mortal remains. Those responsible have not been summoned, indicted or convicted.

2.10 On 6 December 2006, the author obtained a decision of the Municipal Court in Sanski Most, by which her son was declared dead, fixing as the date of his death 10 June 1992. The Municipal Court noted that two witnesses had stated that he had been last seen on 10 June 1992, within the group of residents of Trnopolje that had been taken to detention camps, and that later they had learned from former inmates that the author’s son had been brought to Omarska detention camp. The author claims that she had to undergo this painful procedure, as it was the only way for her to alleviate a particularly difficult material situation. She submits that obtaining a certificate of death was de facto compulsory in order to accede to a disability pension in the Republika Srpska, pursuant to article 25 of the Law on the Protection of Civilian Victims of War and article 190 of the Law on Administrative Procedure. Against this background, she had no option but to request a declaration that her son was dead, despite having no certainty of his fate or whereabouts.

2.11 On 4 March 2008, Ms. Ičić applied to the Human Rights Commission of the Constitutional Court of Bosnia and Herzegovina, claiming violation of articles 3 (prohibition of torture) and 8 (right to respect for private and family life) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as articles II.3 (b) and (f) of the Constitution of Bosnia and Herzegovina. The Constitutional Court decided to join together several applications submitted by other members of Izvor and relatives of missing persons, and therefore dealt with them as one collective case.

2.12 On 13 May 2008, the Constitutional Court concluded that the applicants of the collective case had been relieved from exhausting domestic remedies before ordinary

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<sup>4</sup> In accordance with the Dayton Agreement, Bosnia and Herzegovina consists of two entities: the Federation of Bosnia and Herzegovina and Republika Srpska. Brčko District was formally inaugurated on 8 March 2000 under the exclusive sovereignty of the State and international supervision.

<sup>5</sup> The author has provided a copy of a certificate issued by the Federal Commission on Missing Persons on 20 February 2008 stating that her son has been registered as a missing person since 10 June 1992 and that this information was based on data that derives from, among other sources, the perpetrators themselves, ICRC, prisoners and family members.

courts, as “no specialized institution on enforced disappearance in Bosnia and Herzegovina seems to be operating effectively”.<sup>6</sup> It found a violation of articles 3 and 8 of the European Convention, owing to the lack of information on the fate of the disappeared relatives of the applicants, including the fate of Mr. Ičić. The Court ordered the Bosnian authorities concerned to provide “all accessible and available information on members of the applicants’ families who went missing during the war, ... urgently and without further delay and no later than 30 days from the date of the receipt of the decision”, and to ensure the operational functioning of the institutions established in accordance with the Law on Missing Persons, namely, the Missing Persons Institute, the Fund for Support to the Families of Missing Persons in Bosnia and Herzegovina and the Central Records of Missing Persons in Bosnia and Herzegovina, immediately and without further delay, and no later than 30 days from the date of the court order. The competent authorities were requested to submit information within six months to the Constitutional Court about the measures taken to implement the decision of the latter.

2.13 The Constitutional Court did not adopt a decision on the issue of compensation, considering that it was covered by the provisions of the Law on Missing Persons concerning “financial support” and by the establishment of the Fund. However, the author argues that the dispositions on financial support have not been implemented and that the Fund has still not been established.

2.14 On 13 March 2009, the Administrative Service, Department for Veterans and Protection of the Disabled in Prijedor granted the author a monthly “disability pension” of 149 KM.<sup>7</sup> The author claims that such a pension is a form of social assistance and cannot replace the adoption of adequate measures of reparation for the serious human rights violations suffered by her and her son.

2.15 The time limits set forth by the Constitutional Court in its decision expired and the relevant institutions neither provided any information on the fate and whereabouts of the victims, nor submitted to the Court any information on the measures taken to implement its decision. On 25 November 2010, the author sent two letters to the Missing Persons Institute and the Republika Srpska Operative Team for Tracing Missing Persons, requesting information about the measures they had adopted so far to implement the judgement of the Constitutional Court of 13 May 2008. On the same day, Ms. Ičić also applied to the Constitutional Court, requesting it to establish that the authorities had failed to enforce its decision of 13 May 2008, pursuant to article 74.6 of its rules of procedure. At the time the communication was submitted to the Committee, she had not received any reply from the Court or the other entities, and no action had been carried out by the authorities.

2.16 As to the requirement under article 5, paragraph 2 (b), of the Optional Protocol, the author argues that there was no effective remedy, and that the Constitutional Court itself admitted that Ms. Ičić and the other applicants “did not have at their disposal an effective and adequate remedy to protect their rights”.<sup>8</sup> In the light of article VI (4) of the State party’s Constitution, the Constitutional Court’s ruling of 13 May 2008 must be considered final and binding.

2.17 On the admissibility of the communication *ratione temporis*, the author submits that, even though the events took place before the entry into force of the Optional Protocol for

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<sup>6</sup> The author refers to the judgements of the Constitutional Court concerning *M.H. and others* (case No. AP-129/04), of 27 May 2005, paras. 37-40, and referred to in the judgement for the case of *Fatima Hasić and others* (case No. AP 95/07), of 29 May 2008.

<sup>7</sup> According to the author, it is equivalent to 75 euro.

<sup>8</sup> The author refers to the judgements of the Constitutional Court concerning *M.H. and others* (case No. AP-129/04), of 27 May 2005, para 37.

the State party, enforced disappearance is per se a continuing violation of several human rights<sup>9</sup> that is ongoing and continues to be committed until the victim is located. In her son's case, domestic authorities, including the Constitutional Court, have qualified Mr. Ičić as a "missing person". However, his fate and whereabouts have not been ascertained up to now. Furthermore, the authorities have not implemented the decision of the Constitutional Court of 13 May 2008 and the Office of the Prosecutor has not undertaken any measure to sanction those responsible for such failure.

### **The complaint**

3.1 The author maintains that Mr. Ičić was victim of enforced disappearance by members of the Bosnian Serb forces; that an enforced disappearance is of multi-offensive nature; and that, in his case, it amounts to a violation of articles 6, 7, 9, 10 and 16, read in conjunction with article 2, paragraph 3, of the Covenant. She points out that his fate and whereabouts have remained unknown since 10 June 1992 and that his disappearance occurred within the context of a widespread and systematic attack directed against the civilian population. The fact that he was apprehended by members of the Bosnian Serb forces and last seen alive in the hands of the guards of the detention camp in Omarska in life-threatening circumstances allows her to conclude that he was placed in a situation of grave risk to suffer irreparable damages to his personal integrity and life. She notes that this detention camp was notorious for the number of arbitrary killings of inmates followed by the removal and concealment of their mortal remains.

3.2 In spite of the author's efforts, she has not received any relevant information about the causes and circumstances of Mr. Ičić's disappearance. Although she promptly reported his disappearance to ICRC, which has shared this information with the relevant State party's authorities since 1992, no ex officio, prompt, impartial, thorough or independent investigation has been carried out to find out his fate and whereabouts; in the event of his death, his mortal remains have not been located, exhumed, identified or returned to his loved ones; and no one has been summoned, investigated or convicted for his enforced disappearance.

3.3 The State party is responsible for investigating all cases of enforced disappearance and providing information on the whereabouts of missing persons. In this respect, the author refers to a report of the Working Group on Enforced or Involuntary Disappearances that states that the primary responsibility for carrying out these tasks remains with the authorities under whose jurisdiction a suspected mass grave falls.<sup>10</sup> She argues that the State party has an obligation to conduct an ex officio, prompt, impartial, thorough and independent investigation of gross human rights violations, such as enforced disappearance, torture or arbitrary killing. The obligation to conduct an investigation also applies in cases of killings or other acts affecting the enjoyment of human rights that are not imputable to the State. In these cases, the obligation to investigate arises from the duty of the State to protect all individuals under its jurisdiction from acts committed by private persons or groups of persons which may impede the enjoyment of their human rights.<sup>11</sup>

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<sup>9</sup> The author refers to the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights; article 14.2 of the Draft articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission; the Working Group on Enforced or Involuntary Disappearances; general comment No. 9; and the International Convention for the Protection of All Persons from Enforced Disappearance, art. 8, para. 1.

<sup>10</sup> See E/CN.4/1996/36, para. 78.

<sup>11</sup> See Human Rights Committee, general comment No. 31 (2004), para. 8.

3.4 The author refers to the Committee's jurisprudence, according to which a State party has a primary duty to take appropriate measures to protect the life of a person.<sup>12</sup> In cases of enforced disappearances, the State party has an obligation to investigate and bring perpetrators to justice. In the light of the circumstances of Mr. Ičić's disappearance, the author argues that the failure of the State party to conduct an effective and thorough investigation in the present case (see paras. 3.1 and 3.2 above) amounts to a violation of his right to life, in breach of article 6, read in conjunction with article 2, paragraph 3, of the Covenant.

3.5 The author refers to the jurisprudence of the Committee, according to which enforced disappearance constitutes, in itself, a form of torture,<sup>13</sup> into which no investigation has yet been carried out by the State party in order to identify, prosecute, judge and sanction those responsible in the case under review. Therefore, Mr. Ičić's disappearance amounts to a treatment contrary to article 7, read in conjunction with article 2, paragraph 3 of the Covenant.

3.6 Mr. Ičić was also a victim of violations of his rights under article 9 of the Covenant. He was deprived of his liberty by the Bosnian Serb forces in life-threatening circumstances (see 3.1. above). However, his detention was not entered in any official record or register and his relatives have never seen him again. He was never charged with a crime, nor was he brought before a judge, or any other official authorized by law to exercise judicial power. He was unable to take proceedings before a court to challenge the lawfulness of his apprehension. Furthermore, there is no trace of his fate or whereabouts. As no explanation has been given by the State party and no efforts have been made to clarify his fate, the author considers that the State party has violated her son's rights under article 9, read in conjunction with article 2, paragraph 3, of the Covenant.

3.7 The author maintains that enforced disappearance itself constitutes a violation of article 10 of the Covenant and notes that Mr. Ičić was held in the Omarska detention camp and did not have the possibility of communicating with the outside world. She refers to the jurisprudence of the International Tribunal for the Former Yugoslavia, in which the conditions endured in Omarska were qualified as inhumane and degrading.<sup>14</sup> She considers that the failure by the State party to investigate the torture and inhuman and degrading treatment that her son suffered in detention amounts to a violation of article 10, read in conjunction with article 2, paragraph 3, of the Covenant.

3.8 The author refers to the jurisprudence of the Committee, according to which enforced disappearance may constitute a refusal to recognize the victim before the law if that person was in the hands of the authorities of the State party when last seen, and if the efforts of his/her relatives to obtain access to effective remedies have been systematically denied.<sup>15</sup> In the present case, the failure to the State party's authorities to conduct an investigation maintains Mr. Ičić outside the protection of the law since June 1992. Consequently, the State party is responsible for a continuing violation of article 16, read in conjunction with article 2, paragraph 3, of the Covenant.

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<sup>12</sup> See Communication No. 84/1981, *Dermitt Barbato v. Uruguay*, Views adopted on 21 October 1982, para. 10.

<sup>13</sup> See, for instance, Communication No. 1495/2006, *Zohra Madoui v. Algeria*, Views adopted on 1 December 2008, para. 7.4.

<sup>14</sup> See, inter alia, International Tribunal for the Former Yugoslavia, Case *Prosecutor v. Miroslav Kovčeka et al.*, para 197.

<sup>15</sup> See Communications No. 1495/2006, *Zohra Madoui v. Algeria*, Views adopted on 1 December 2008, para. 7.7; and No. 1327/2004, *Grioua v. Algeria*, Views adopted on 16 August 2007, para. 7.9.

3.9 In conclusion, the author claims that the State party has violated her son's rights under articles 6, 7, 9, 10 and 16, all read in conjunction with article 2, paragraph 3, of the Covenant.

3.10 The author alleges that she is herself a victim of a violation by the State party of article 7, read in conjunction with article 2, paragraph 3, of the Covenant. She has been subjected to deep anguish and distress owing to her son's enforced disappearance, as well as to the acts and omission of the authorities in dealing with the issues for more than 20 years. Furthermore, against her real will, she was de facto obliged to obtain a decision declaring her son dead since it was the only way to accede to a pension and alleviate her difficult material situation. Despite her efforts, her son's fate and whereabouts remain unknown and, in the event of his death, his remains have not been returned to the family, fostering her ongoing anguish and frustration in not being able to give him a proper burial. She has applied to various official authorities with enquiries, but she has never received any plausible information. The author points out that the authorities failed to implement the judgements of the Constitutional Court of 13 May 2008 and the Law on Missing Persons, in particular those concerning the establishment of the Fund for Support to the Families of Missing Persons in Bosnia and Herzegovina, leaving families of missing persons without appropriate reparations. Against this background, the attitude of indifference of the State party's authorities to her requests amounts to inhuman treatment.

3.11 The author requests the Committee to recommend the State party to: (a) order an independent investigation as a matter of urgency concerning the fate and whereabouts of her son and, in the event that his death is confirmed, to locate, exhume, identify and respect his mortal remains and return them to the family; (b) bring the perpetrators before the competent authorities for prosecution, judgement and sanction, and disseminate publicly the results of this measure; (c) ensure that she obtain integral reparation and prompt, fair and adequate compensation; and (d) ensure that the measures of reparation cover material and moral damage and measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition. Among other measures, she requests that the State party provide her with medical and psychological care immediately and free of charge, through its specialized institutions. As a guarantee of non-repetition, the State party should amend its current legal framework so that providing social benefits and measures of reparations to relatives of victims of enforced disappearance is not subjected to the obligation to obtain a municipal court's decision declaring the death of the victim. The State party should also establish as soon as possible educational programmes on international human rights law and international humanitarian law for all members of the army, the security forces and the judiciary.

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

4.1 In its note verbale of 27 April 2011, the State party submitted its observations on admissibility and merits. It refers to the legal framework that has been established for the prosecution of war crimes in the post-war period since December 1995. It states that a national strategy for war crimes was adopted in December 2008, with the objective of finalizing the prosecution of the most complex war crimes in seven years, and of "other war crimes" within 15 years of the adoption of the strategy. The State party refers to the adoption of the 2004 Law on Missing Persons, creating the Missing Persons Institute, with the aim of improving the process of tracing missing persons and identifying mortal remains. It recalls that, of the nearly 32,000 people who went missing during the war, the remains of 23,000 persons have been found and 21,000 identified.

4.2 In April 2009, the Missing Persons Institute established a regional office in Sanski Most and a field office and organizational units. The State party considers that those initiatives provide the conditions for faster and more efficient processes to search for

disappeared persons in the territory of Bosanska Krajina, including Prijedor. Their investigators are on site every day to collect information on potential mass graves and to establish contacts with witnesses. In general, since 1998, 721 graves have been exhumed and 48 other graves have been re-exhumed in this area, including the Municipality of Prijedor, where the body of Mr. Ičić could perhaps be found. The State party informs the Committee that two graves with unidentified human corpses were located in the area of Trnopolje; that there was an order of the Court of Bosnia and Herzegovina for exhumation; and that it had not been carried out yet due to weather conditions.

4.3 As part of its observations, the State party forwards to the Committee a letter from the Office of the Prosecutor of Bosnia and Herzegovina, in which the Chief Prosecutor points out that the author reported her son's disappearance to ICRC, the Federal Commission for Missing Persons and the Constitutional Court. However, she never applied to the Office of the Prosecutor requesting an investigation into her son's fate and whereabouts, although his disappearance happened during the armed conflict and involved the possible commission of a war crime. Accordingly, the Chief Prosecutor holds that it is "doubtful whether [she] has exhausted all available domestic remedies". He notes that it was only on 20 December 2010 that the author sent a letter to his office concerning Mr. Ičić's disappearance; that it had been registered as a criminal complaint and assigned a case number; and that a competent prosecutor intended to undertake an investigation on this case. Likewise, the Attorney General's Office of the Republika Srpska, Prijedor Office, stated that it had not received any request for non-pecuniary damage for the author's mental suffering due to her son's disappearance.

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

5.1 The author submitted her comments on the State party's observations on 3 June 2011. She welcomes the statement by the Office of the Prosecutor of Bosnia and Herzegovina that her letter of 20 December 2010 had been considered and registered as a criminal complaint, and considers it as a significant development. Nevertheless, she points out that this information became known to her through the State party's observations; that she had not received any official notification by the Office of the Prosecutor about the opening of an investigation on the disappearance of her son; and that she did not know whether her son's case had been or would be included as a priority case under the national strategy for war crimes.

5.2 As to the exhaustion of domestic remedies, she reiterates that she has provided information about her son's disappearance to a number of organizations since 1992. Therefore, the fact that her son was arbitrarily detained and seen alive for the last time in Omarska was largely known by the main institutions dealing with missing persons in Bosnia and Herzegovina, whose registries are available and accessible to the competent judicial authorities in charge of investigating the crimes committed at Omarska. His name remains registered as missing in the publicly accessible databases of these institutions. For instance, the online inquiry tool set up by the International Commission on Missing Persons contains his name as missing and indicates that, although DNA samples have been provided by his relatives, no match has been found. Furthermore, the name of Mr. Ičić was included in the list of the names of missing persons from Prijedor contained in the book entitled "*Ni krivi ni dužni*", which was sent to the Office of the Prosecutor by Izvor twice. Accordingly, the Office, as well as other authorities, had in its possession or could have access to sufficient information to initiate an ex officio investigation into her son's arbitrary detention and enforced disappearance.

5.3 She refers to the general comment of the Working Group on Enforced or Involuntary Disappearances on enforced disappearance as a continuous crime.<sup>16</sup> She considers that the State party's observations do not object to the admissibility of the communication and substantially acknowledge the merits the allegations formulated therein. She considers that those observations corroborate her allegations that her son remains registered as an "unaccounted for" missing person. The tracing process is, therefore, still open under the responsibility of the Bosnian authorities, who are under the obligation to establish his fate and whereabouts; in the case of his death, to search for, locate, respect and return his remains to his family; to disclose to the latter the truth regarding the circumstances of his enforced disappearance, the progress and results of the investigation on his fate; and to guarantee her redress for the ongoing violations.

5.4 The author states that, so far, neither she nor the eyewitnesses of the events that led to the enforced disappearance of her son have been contacted by personnel of the Missing Persons Institute referred to by the State party, while she considers that they would be able to provide those authorities with information that could be relevant to locating him.<sup>17</sup> She points out that the State party's observations provide general references to the existence of mass graves and lack precise information as to where her son's remains could be located. Should the Missing Persons Institute have reliable information according to which the mortal remains of her son could be located in the mass graves of Trnopolje or Prijedor, she should be informed accordingly without delay and be associated with the whole process of location, exhumation and identification of the remains.

5.5 The author argues that the high number of war crimes still requiring investigation does not relieve the State party from its responsibility to conduct a prompt, impartial, independent and thorough investigation into cases of gross human rights violations, or from regularly informing relatives of the victims on the progress and results of those investigations. Although the enforced disappearance of Mr. Ičić was promptly reported to various authorities, it was not until 20 December 2010, after she submitted her communication to the Committee, that the case was registered and assigned a file number by the Office of the Prosecutor; however, she has not been informed if an investigation is about to start (see para. 5.1 above). In this regard, the author reiterates that relatives of victims of enforced disappearance should be closely associated with the investigations. In particular, they should be regularly given information on the process of the investigations and their results, and whether trials might forthcoming.<sup>18</sup>

5.6 The author considers that the implementation of the national strategy for war crimes has been deficient, as noted by international entities, and cannot be used either by the State party as a sufficient response concerning the lack of information on the progress and results of the investigations carried out, or to justify the inactivity of the authorities concerned. She argues that the adoption of a transitional justice strategy cannot replace access to justice and redress for the victims of gross human rights violations and their relatives.

5.7 In the light of the State party's reference to the Law on Missing Persons, the author reiterates that, several years after its entry into force, some of its crucial provisions, including those concerning the establishment of the Fund for Support to the Families of Missing Persons in Bosnia and Herzegovina, have not been implemented. Furthermore, a

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<sup>16</sup> See A/HRC/16/48, paras 1-2, 7-8 and 39.

<sup>17</sup> See A/HRC/AC/6/2, paras. 53, 56 and 80-97; and general comment No. 10 of the Working Group on Enforced or Involuntary Disappearances, para. 4.

<sup>18</sup> See general comment No. 10 of the Working Group on Enforced or Involuntary Disappearances, para. 3; and A/HRC/16/48/Add.1, paras. 34 and 63-64.

number of international institutions have noted that the establishment of the Fund is not enough to guarantee the provision of an integral reparation to relatives of missing persons.<sup>19</sup>

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

6.1 On 21 June, 17 August and 12 September 2011, the State party submitted additional information and reiterated its observations, highlighting the efforts made to determine the fate and whereabouts of all missing persons in Bosnia and Herzegovina, including in the Municipality of Prijedor. According to the Missing Persons Institute, there are indications of more mass graves supposedly containing the mortal remains of victims from the Omarska detention camp. Its capacities, however, are still inadequate to dispose of all pending cases in a short period of time. The State party stated that no relevant developments had occurred in the case of Mr. Ičić.

6.2 The Ministry of Defence found no documentation either concerning the Omarska detention camp in the archive of the Army of the Republika Srpska, or relating to the detention of the author's son by members of the Army of the Republika Srpska.

6.3 The State party informs the Committee that the author can apply for legal aid to the Legal Aid Centre of the Ministry of Justice of the Republika Srpska.

6.4 On 26 April 2011, the Office of the Prosecutor of Bosnia and Herzegovina ordered the State Investigation and Protection Agency (field office in Banja Luka) to undertake all the necessary steps to find out the fate and whereabouts of the author's son and to identify those responsible for his deprivation of liberty and enforced disappearance. This order was reiterated on 23 August 2011, but no reply has been received from the Agency yet. The State party maintains that the Office of the Prosecutor has been taking all the necessary efforts to determine the circumstances of Mr. Ičić's disappearance; that, on the basis of his complexity, his case has been categorized in the group of cases that can last up to 15 years before being solved; and that the Office will regularly inform the author about the progress and result of the measures undertaken within the investigation.

6.5 The State party informs the Committee that the Law on Establishing and the Manner of Settling of Internal Debt of the Republika Srpska<sup>20</sup> establishes courts' and other authorities' competence and regulates the proceedings for granting compensation for pecuniary and non-pecuniary damages in cases of disappeared persons. In addition, the Government of the Republika Srpska has undertaken measures to accelerate the process of tracing missing persons.

6.6 The Missing Persons Institute stated that it was making efforts to trace missing persons in the territory of Bosanska Krajina and that two investigators of the regional office of Bihać and the field office of Sanski Most were in charge of tracing 1500 missing persons in this territory. In this connection, the Missing Persons Institute noted that it would contact Mr. Ičić's relatives in the future in order to provide further information on his case.

#### **Additional information submitted by the author**

7.1 On 24 August and 3 October 2011, the author provided additional information to the Committee. The author considers that the State party's further observations do not provide any substantive information concerning the admissibility and merits of her communication. As to the statement of the Ministry of Defence that no information has been found concerning the Omarska detention camp, she points out that there is publicly accessible

<sup>19</sup> See CAT/C/BIH/CO/2-5, para.18, and A/HRC/16/48/Add.1, paras. 39-48.

<sup>20</sup> Name of the Act as provided by the State party.

evidence on the existence of this camp, which in fact has already been recognized by other authorities of the State party.

7.2 The State party's further observations show that its authorities do not have any relevant information that may contribute to clarify the fate and whereabouts of the author's son or to provide meaningful indications with regard to the steps undertaken by them to fulfil the obligations contained in the Covenant.

7.3 The author informs the Committee that, on 24 August 2011, she received a letter from the Office of the Prosecutor of Bosnia and Herzegovina whereby it communicated to her the information provided to the Committee by the State party in its further observations (see para. 6.4 above). In this respect, the author expresses her concern that the State Investigation and Protection Agency has failed to reply to the requests from Office of the Prosecutor and reiterates that the State party authorities have failed to conduct an investigation on her son's disappearance for more than 20 years. Furthermore, while the investigations of crimes committed during the war may require time, 15 more years, as noted by the Office of the Prosecutor, would breach any criterion of promptness of the investigation and, therefore, represent a violation of her rights enshrined in the Covenant.

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

#### *Consideration of admissibility*

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

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee takes note of the State party's observations that, according to the Office of the Prosecutor of Bosnia and Herzegovina, the author has failed to exhaust domestic remedies since she did not report her son's disappearance to it until 20 December 2010. The Committee also takes notes of the author's allegations that the Constitutional Court itself admitted that there was no effective remedy to protect the rights of relatives of missing persons; that she reported her son's disappearance to different entities, including the Federal Commission for Missing Persons and the Constitutional Court; that, on 13 May 2008, the Constitutional Court found a violation of the author's rights because of the lack of information on the fate of Mr. Ičić; and that, however, this judgement has not been implemented by the competent authorities. The Committee observes that, more than 22 years after the alleged disappearance of the author's son, his fate and whereabouts remain unclear and the State party has failed to provide convincing arguments to justify the delay in completing an investigation. Accordingly, the Committee considers that the domestic remedies have been unreasonably prolonged and that it is not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

8.4 As all admissibility requirements have been met, the Committee declares the communication admissible and proceeds to its examination on the merits.

#### *Consideration of the merits*

9.1 The Committee has considered the case in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee takes note of the author's claims that, on 10 June 1992, Mr. Ičić was apprehended by Bosnian Serb forces soldiers in Trnopolje, Prijedor; that he was taken to the detention camp of Omarska, where he was last seen alive into the hands of the guard of this camp in life-threatening circumstances; that the apprehension occurred within the context of a widespread and systematic attack directed against the civilian population; that, according to public reports, inmates at the Omarska detention camp were kept under inhuman conditions, physically and psychologically abused, tortured and arbitrarily killed, followed by the removal and concealment of their mortal remains; and that, against this background, it is reasonable to presume that her son became a victim of enforced disappearance by the Bosnian Serb forces since June 1992. No *ex officio*, prompt, impartial, thorough and independent investigation has been carried out by the State party to clarify his fate and whereabouts and to bring the perpetrators to justice. In this respect, the Committee recalls its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, according to which a failure by a State party to investigate allegations of violations and a failure by a State party to bring to justice perpetrators of certain violations — notably torture and cruel, inhuman and degrading treatment, summary and arbitrary killings and enforced disappearances — could in and of itself give rise to a separate breach of the Covenant.

9.3 The author does not allege that the State party was directly responsible for the enforced disappearance of her son. Indeed, she alleges that the disappearance was initiated in the State party's territory by the Bosnian Serb forces. The Committee observes that the term "enforced disappearance" may be used in an extended sense, referring to disappearances initiated by forces independent of or hostile to a State party, in addition to disappearances attributable to a State party.<sup>21</sup> The Committee also notes that the State party does not contest the characterization of the events as an enforced disappearance.

9.4 The Committee notes the State party's information that it has made considerable efforts at the general level, in view of the more than 30,000 cases of enforced disappearance that occurred during the conflict. Notably, the Constitutional Court has established that the authorities are responsible for investigating the disappearance of the applicants' relatives, including Mr. Ičić (see para. 2.12 above), and domestic mechanisms have been set up to deal with enforced disappearances and other war crimes cases (see para. 4.2 above).

9.5 Without prejudice to the continuing obligation of States parties to investigate all dimensions of an enforced disappearance, including bringing those responsible to justice, the Committee recognizes the particular difficulties that a State party may face in investigating crimes that may have been committed on its territory by the hostile forces of a foreign State. Therefore, while acknowledging the gravity of the disappearances and the suffering of the author, because the fate or whereabouts of her missing son has not yet been clarified and the culprits have not yet been brought to justice, that in itself is not sufficient to find a breach of article 2, paragraph 3, of the Covenant in the particular circumstances of the present communication.

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<sup>21</sup> Compare article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court, which defines enforced disappearance as including disappearances conducted by a political organization, with articles 2 and 3 of the International Convention for the Protection of All Persons from Enforced Disappearance, which distinguishes between enforced disappearances conducted by States or by persons or groups acting with their authorization, support or acquiescence, and similar acts conducted by persons or groups acting without such authorization, support or acquiescence). See also communication No. 1956/2010, *Durić v. Bosnia and Herzegovina*, Views adopted on 16 July 2014, para. 9.3.

9.6 That being said, the author claims that, at the time of the filing of her communication, more than 18 years after the alleged disappearance of her son and more than 2 years after the judgement of the Constitutional Court of 13 May 2008, the investigative authorities had not contacted her for information regarding the disappearance of Mr. Ičić. On 25 November 2010, the author applied to the Constitutional Court and requested it to adopt a ruling establishing that the authorities had failed to enforce its decision of 13 May 2008; however the Constitutional Court has taken no decision and no effective action has been carried out by the authorities as to her son's case. The State party has provided general information as to its efforts for finding out the fate and whereabouts of missing persons and prosecuting perpetrators. Nevertheless, it has failed to provide the author or the Committee with specific and relevant information concerning the steps taken to establish Mr. Ičić's fate and whereabouts, and to locate his mortal remains, in case of his death. The Committee observes that the authorities have provided very limited and general information to the author as to her son's case. The Committee considers that authorities investigating enforced disappearances must give the families a timely opportunity to contribute their knowledge to the investigation, and that information regarding the progress of the investigation must be made promptly accessible to the families. It also takes note of the anguish and distress caused to the author by the continuing uncertainty resulting from the disappearance of her son. The Committee concludes that the facts before it reveal a violation of articles 6, 7, and 9, read in conjunction with article 2, paragraph 3, of the Covenant with regard to Mr. Ičić, and article 7, read in conjunction with article 2, paragraph 3, of the Covenant, with regard to the author.

9.7 The Committee notes that the social allowance that the author has received depended upon her agreeing to recognize her missing son as dead, while there was no certainty as to his fate and whereabouts. The Committee considers that to oblige families of disappeared persons to have the family member declared dead, in order to be eligible for compensation, while the investigation is ongoing, makes the availability of compensation dependent on a harmful process and constitutes inhuman and degrading treatment in violation of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant with respect to the author.<sup>22</sup>

9.8 In the light of the above findings, the Committee will not examine separately the author's allegations under articles 10 and 16, read in conjunction with article 2, paragraph 3, of the Covenant.<sup>23</sup>

10. 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 State party has violated articles 6, 7 and 9, read in conjunction with article 2, paragraph 3, of the Covenant, with regard to Mr. Ičić; and article 7, read alone and in conjunction with article 2, paragraph 3, with regard to the author.

11. 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 (a) strengthening its investigations to establish the fate or whereabouts of Mr. Ičić, as required by the Law on Missing Persons 2004, and having its investigators contact the author as soon as possible to obtain the information that she can contribute to the investigation; (b) strengthening its efforts to bring to justice those responsible for his disappearance, without unnecessary delay, as required by the national war crimes strategy; (c) ensuring that necessary

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<sup>22</sup> See communications No. 2003/2010, *Selimović et al. v. Bosnia and Herzegovina*, Views adopted on 17 July 2014, para. 12.7; *Durić v. Bosnia and Herzegovina*, para. 9.8; and No. 1997/2010, *Rizvanović v. Bosnia and Herzegovina*, Views adopted on 15 September 2010, para. 9.6.

<sup>23</sup> See *Rizvanović v. Bosnia and Herzegovina*, para. 9.7.

psychological rehabilitation and medical care are provided to the author for the harm referred to in paragraph 9.7; and (d) providing effective reparation to the author, including an adequate compensation and appropriate measures of satisfaction. The State party is also under an obligation to prevent similar violations in the future and must ensure, in particular, that investigations into allegations of enforced disappearances are accessible to the families of missing persons, and that the current legal framework is not applied in a manner that requires the relatives of victims of enforced disappearance to obtain certification of the death of the victim as a condition for obtaining social benefits and measures of reparation.

12. 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. Pursuant to article 2 of the Covenant, the State party has undertaken to guarantee to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy where it has been determined that a violation has occurred. The Committee therefore requests the State party to provide, within 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the present Views and to have them widely disseminated in all three official languages of the State party.

## Appendices

### Appendix I

[Original: English]

#### **Individual opinion of Committee member Anja Seibert-Fohr (concurring)**

1. I concur with the Committee's conclusion on this communication (paragraph 10) and refer to Mr. Gerald L. Neuman's and my individual opinion in *Rizvanović v. Bosnia and Herzegovina*<sup>a</sup> In the present case, the Committee again has defensibly chosen not to examine separately the allegations under articles 10 and 16, read in conjunction with article 2, paragraph 3, of the Covenant. I would like to address these claims because, in my opinion, they have not been substantiated. The author does not allege that the enforced disappearance of Mr. Ičić was attributable to Bosnia and Herzegovina, but rather to armed forces that opposed it. These forces were not acting on behalf of a State as an entity that can recognize persons under the law or deny such recognition. It is difficult to see how actors who are not agents of a State, acting without collusion by that State, could themselves negate the recognition by that State of a victim as a person before the law. Without a further basis for connecting the State party to the disappearance, the author has not substantiated a violation of article 16, which is a necessary precondition for the claimed respective right to an effective remedy.<sup>b</sup> Neither has the author substantiated her claim with respect to article 10. The State's obligations under article 10 concern the conditions of detention under its own authority, not the forms of lawless deprivations of liberty by others.<sup>c</sup> Therefore, there is no ground for finding a violation in connection to article 10 if the disappearance is not attributable to the State. The obligation to investigate the disappearance of Mr. Ičić is connected rather to articles 6, 7 and 9, which require positive measures of protection irrespective of whether the actual atrocity is connected to the State party. This provided the basis for the Committee's conclusion in paragraph 10. In support of this established approach, I refer to my separate opinion in *Hamulić v. Bosnia and Herzegovina*.<sup>d</sup>

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<sup>a</sup> See communication No. 1997/2010, *Rizvanović v. Bosnia and Herzegovina*, Views adopted on 15 September 2010, individual opinion by Committee members G. L. Neuman and A. Seibert-Fohr.

<sup>b</sup> See communication No. 2022/2011, *Hamulić v. Bosnia and Herzegovina*, individual opinion by Committee member A. Seibert-Fohr, para. 2 with further references.

<sup>c</sup> See general comment No. 21 on article 10 (humane treatment of persons deprived of their liberty) (1992), para. 2.

<sup>d</sup> See *Hamulić v. Bosnia and Herzegovina*, individual opinion by Committee member A. Seibert-Fohr, paras 5-7.

## Appendix II

[Original: French]

### **Joint opinion of Committee members Olivier de Frouville, Mauro Politi Victor Manuel Rodríguez-Rescia and Fabián Omar Salvioli (partly dissenting)**

1. In paragraph 9.8 of its Views, the Committee decided not to examine separately the author's allegations under articles 10 and 16, read in conjunction with article 2, paragraph 3, of the Covenant. The Committee seems thereby to wish to implement the principle of economy of means: "In the light of the above findings, the Committee will not examine separately ...". It considers, in other words, that the substance of the author's allegations has already been taken into account by the Committee in its review of the State party's compliance with articles 6, 7 and 9 of the Covenant, found to have been violated in the preceding paragraph (9.7). This is not, however, borne out by a reading of the conclusions of the author, who does not cite articles 10 and 16 for the sake of completeness but rather by way of a separate allegation. There are thus no grounds for applying the principle of economy of means in this instance.

2. On the merits of the claim, it could perhaps be argued that the allegation under article 10 was subsumed by the concurrent invocation of article 7. It is true that the Committee, like other international courts whose benchmarks do not contain a specific article concerning conditions of detention, increasingly tends to deal with these questions with reference to article 7 and to the condemnation of inhuman or degrading treatment. However, the authors make a clear distinction in this instance between two aspects: on the one hand, enforced disappearance, violating in itself article 7 of the Covenant (para. 3.5); and, on the other, the conditions of detention in the Omarska camp, where Mr. Ičić had been imprisoned and the atrocious and inhuman nature of which has been widely documented, notably in the judgements of the International Tribunal for the Former Yugoslavia (para. 3.7).<sup>a</sup> It would therefore have been preferable for the Committee to have found a separate violation of article 10.

3. However, it is the decision not to examine the allegation under article 16 that seems most open to criticism: on the one hand, the Committee does not contest the characterization of the facts of the case as "enforced disappearance" (para. 9.3); yet, on the other hand, it finds that there are no grounds for ruling on the allegation of violation of article 16, read in conjunction with article 2, paragraph 3, of the Covenant. In our view, these two statements are incompatible since we consider that any enforced disappearance necessarily involves a violation of article 16.

4. Article 16 recognizes the right of everyone "to recognition everywhere as a person before the law". The preparatory work for the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights makes clear that the concept of "legal personality" is not simply concerned with the capacity of individuals to act, which is accompanied by recognition of the right to enter into contracts and contractual liability, but rather with sharing with others recognition as a subject of law, enjoying individual rights

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<sup>a</sup> The author refers to the judgement of the Tribunal in *Prosecutor v. Miroslav Kvočka et al*, 2 November 2001 (case No. IT-98/30-1), para. 197.

and having obligations.<sup>b</sup> In this regard, article 16 is doubtless one of the most direct expressions in international human rights law of the principle of respect for the dignity of the human person: the very fact of being human entails the right of recognition of legal personality, irrespective of the legal capacity of the person concerned (for example, an infant has the right to recognition of legal personality even if he/she has a limited capacity that precludes the enjoyment of all rights). And, as stressed by the Working Group on Enforced Disappearances, enforced disappearances constitute a paradigmatic violation of the right to recognition of legal personality.<sup>c</sup> From its very first report, the Working Group considered that the practice of enforced disappearances violated this right, among others, and its position in this regard has never changed.<sup>d</sup> The Declaration on the Protection of All Persons from Enforced Disappearance likewise recognizes this link in its article 1, paragraph 2, which states that “[a]ny act of enforced disappearance places the persons subjected thereto outside the protection of the law ... It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law”.

5. It is true that, for a long while, the Committee did not seem inclined to take this dimension into account. It was only in 2007 that it decided, in its conclusions in response to a claimant, to find a violation of article 16 in relation to an enforced disappearance.<sup>e</sup> Its example was followed two years later by the Inter-American Court of Human Rights in *Anzualdo-Castro v. Peru*.<sup>f</sup> It was in order to encourage and further develop this line of reasoning that the Working Group decided in 2011 to adopt a general comment on the right to recognition as a person before the law in the context of enforced disappearances. In it, the Working Group established a link between the right to recognition of legal personality and one of the components of enforced disappearance: the fact of the person being “placed outside the protection of the law”.

6. The general comment adds that “[t]his means that not only the detention is denied, and/or the fate or the whereabouts of the person are concealed, but that while deprived of his/her liberty, this person is denied any right under the law, and is placed in a legal limbo, in a situation of total defencelessness”.

7. The general comment continues that:

Enforced disappearances entail the denial of the disappeared person’s legal existence and, as a consequence, prevent him or her from enjoying all other human rights and freedoms. The disappeared person may keep his or her name, at least when the birth has been registered (and except in cases when the true identity of children, who have been taken away from their parents, is falsified, concealed or destroyed), but he/she is not shown in the record of detainees; neither is the name kept in the registers of deaths. The disappeared is de facto deprived of his or her domicile. His/her properties become frozen in a legal limbo since no one, not even the next-of-kin,

<sup>b</sup> See A. Verdoodt, *Naissance et signification de la Déclaration universelle des droits de l’Homme*, Louvain-Paris, Société d’études morales, sociales et juridiques, Editions Nauwelaerts, 1964, pp. 108–111. See also Manfred Nowak, *United Nations Covenant on Civil and Political Rights. CCPR Commentary*, Kehl, N.P. Engel, 1993, pp. 282 and 283.

<sup>c</sup> See A/HRC/19/58/Rev.1, para. 42.

<sup>d</sup> See E/CN.4/1435, para. 184.

<sup>e</sup> See communications No. 1328/2004, *Kimouche v. Algeria*, Views adopted on 10 July 2007; and No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, paras. 7.8 and 7.9.

<sup>f</sup> See Inter-American Court of Human Rights, Ser. C, No. 202, judgement of 22 September 2009, paras. 90 and 91.

may dispose of that patrimony until the disappeared appears alive or is declared dead, that is a ‘non-person’.<sup>8</sup>

8. The fact of placing a person outside the law is the key element that distinguishes an enforced disappearance from certain other forms of deprivation of liberty in which the right of third parties to obtain information on the detention is subject to restrictions, sometimes substantial ones. Articles 18, 19 and 20 of the International Convention for the Protection of All Persons from Enforced Disappearance are designed to specify the legal regime of this right to information of third parties, defining in this way the contours of a kind of habeas corpus. Article 20, in particular, states:

Only where a person is under the protection of the law and the deprivation of liberty is subject to judicial control may the right to information referred to in article 18 be restricted, on an exceptional basis, where strictly necessary and where provided for by law, and if the transmission of the information would adversely affect the privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons in accordance with the law, and in conformity with applicable international law and with the objectives of this Convention. In no case shall there be restrictions on the right to information referred to in article 18 that could constitute conduct defined in article 2 or be in violation of article 17, paragraph 1. Without prejudice to consideration of the lawfulness of the deprivation of a person’s liberty, States parties shall guarantee to the persons referred to in article 18, paragraph 1, the right to a prompt and effective judicial remedy as a means of obtaining without delay the information referred to in article 18, paragraph 1. This right to a remedy may not be suspended or restricted in any circumstances.

10. This is the Gordian Knot of the Convention: how to reconcile the need, in certain cases, to restrict access to information concerning a person deprived of liberty, and thus to refuse to provide such information, and the imperative of ensuring that the person remains under the protection of the law. This dilemma reveals the centrality of the fact of “placing a person outside the protection of the law”. A violation of article 20, namely, a total denial of the right to information, amounts in practice to denying the very existence of the disappeared as a legal person.

11. It follows that to characterize enforced disappearance as a deprivation of liberty amounts to saying that the person has been placed outside the protection of the law. This removal from protection of the law manifests itself externally as a total denial of the right to information on the deprivation of liberty, which usually takes the form of a “denial” of the deprivation of liberty or else, at the very least, “concealment of the fate or whereabouts of the disappeared person” (International Convention for the Protection of All Persons from Enforced Disappearance, article 3).

12. With this denial or refusal to provide information, the person effectively becomes a “non-person”, is reduced to the state of an object in the hands of the authorities and is deprived of legal personality, which constitutes a violation of article 16 of the Convention.

13. It therefore appears to us illogical that the Committee should find that a deprivation of liberty could be characterized as enforced disappearance and that it should refrain from finding that there had been a violation of article 16.

14. The fact that, in this instance, the enforced disappearance is not the responsibility of the State party in no way affects this conclusion. Admittedly, it is alleged that the

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<sup>8</sup> See paras. 1 and 2 of the general comment on the right to recognition as a person before the law in the context of enforced disappearances (A/HRC/19/58/Rev.1, para. 42).

disappearance is due to the “hostile forces of a neighbouring State” acting on the territory of the State party. However, what is at issue here is the failure of the State to fulfil its procedural obligations under article 2. The enforced disappearance is the catalyst for the State party’s responsibility, but this responsibility is incurred as a result of its failure to act with a view, in particular, to offering the relatives of the disappeared an effective remedy. The formulation adopted by the Committee in paragraph 10 of its findings is undoubtedly misleading on this point since it is stated that the facts reveal a violation of articles 6, 7 and 9, read in conjunction with article 2, paragraph 3. In fact, it is article 2, paragraph 3, that is violated, in conjunction with all the other articles violated by the enforced disappearance (6, 7, 9 and 16). We believe that this is the way in which the Committee should have formulated paragraph 10 of its Views.

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