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Human Rights Committee

Communication No. 1798/2008

Views adopted by the Committee at its 108th session, 8–26 July 2013

<i>Submitted by:</i>	Taous Azouz (represented by Track Impunity Always (TRIAL))
<i>Alleged victims:</i>	Mohammed Lemmiz (the author's son) and the author
<i>State party:</i>	Algeria
<i>Date of communication:</i>	7 July 2008 (initial submission)
<i>Document references:</i>	Special Rapporteur's decision under rules 92 and 97, transmitted to the State party on 16 July 2008 (not issued in document form)
<i>Date of adoption of Views:</i>	25 July 2013
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issues:</i>	Legal capacity, exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to life, prohibition of torture and cruel or 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 and right to an effective remedy
<i>Articles of the Covenant:</i>	Articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1) and 16
<i>Articles of the Optional Protocol:</i>	Articles 1 and 5 (para. 2 (b))

[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 (108th session)

concerning

Communication No. 1798/2008*

Submitted by: Taous Azouz (represented by Track Impunity Always (TRIAL))

Alleged victims: Mohammed Lemmiz (the author's son) and the author

State party: Algeria

Date of communication: 7 July 2008 (initial submission)

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

Meeting on 25 July 2013,

Having concluded its consideration of communication No. 1798/2008, submitted to the Human Rights Committee by Ms. Taous Azouz 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

1.1 The author of the communication is Taous Azouz, widow of Mr. Lemmiz, born on 11 February 1950 in Sétif (Algeria). She argues that her son, Mohammed Lemmiz, has been the victim of violations by Algeria of his rights under article 2 (para. 3), article 6 (para. 1), article 7, article 9 (paras. 1 to 4), article 10 (para. 1) and article 16 of the International Covenant on Civil and Political Rights. The author also considers herself to be a victim of

* The following members of the Committee participated in the consideration of the communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Víctor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Lazhari Bouzid did not take part in the examination of this communication.

The text of an individual opinion by Mr. Salvioli and Mr. Rodríguez-Rescia is appended to these Views.

violations of article 2 (para. 3) and article 7 of the Covenant. She is represented by counsel.¹

1.2 On 16 July 2008, in accordance with rule 92 of its rules of procedure, the Committee, acting through the Special Rapporteur on new communications and interim measures, asked the State party not to take any measures likely to impede the author or her family from exercising their right to submit an individual communication to the Committee. The State party was therefore asked not to invoke its national law, notably Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation, against the author or members of her family.

1.3 On 12 March 2009, the Committee, through the Special Rapporteur on new communications and interim measures, decided not to consider the admissibility and the merits of the communication separately.

The facts as submitted by the author

2.1 Mohammed Lemmiz was arrested at his home by members of the Algerian National People's Army during a military raid carried out under the orders of commander M.B. on 30 April 1996 at 5.30 a.m. The author's son was reportedly taken to the Baraki military barracks. The victim was later said to have been seen at the Beni-Messous barracks. The victim had been arrested previously, along with his brother. They had both subsequently been released by the authorities. His second arrest took place in the presence of his family, including the author, and two neighbours. The family has had no news of the victim since that day.

2.2 The author made several attempts to ascertain her son's fate. Until 1998, out of fear of reprisals and given that the authorities refused to recognize any cases of enforced disappearance, the author took only official measures. She visited police stations, gendarmeries, barracks and the courts in an effort to find out about the circumstances surrounding her son's arrest.

2.3 On 25 July 1999, the author sent a letter to the prosecutor of the Blida military court, since her son had been arrested by members of the Algerian army.² She received no reply to that letter. On 28 July 1999, the author sent a letter to the Minister of Justice. After going in person to the National Human Rights Observatory in Algiers, the author sent a letter to the head of that body on 28 July 1999. A second letter was sent to the Observatory on 16 January 2001. The author had also contacted the Ministry of National Defence by means of a letter dated 25 July 1999.

2.4 The author also brought the matter before the ordinary courts, first before the El Harrach court, where the judges merely responded by saying that the victim had probably been kidnapped by criminals, even though accounts from several witnesses contradicted this. A decision that there was no case to answer was issued; the author appealed against this decision to the Algiers Court of Appeal.

2.5 The author argues that it has been impossible for her to have recourse to any judicial remedy before a court of law since the enactment of Ordinance No. 06-01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation, adopted by referendum on 29 September 2005, which bars any judicial action against members of the Algerian defence and security services in respect of events that took place in the country

¹ The Optional Protocol entered into force for the State party on 12 December 1989.

² The author had been referred to that court by the civilian courts, which did not consider themselves competent to hear allegations against military personnel regarding acts performed in the course of their duties.

between 1993 and 1998. In addition, the State authorities' silence and their denial of the facts mean that there are no available effective remedies to be pursued before State institutions.

The complaint

3.1 The fact that the author's son was arrested by army personnel in 1996, that he was taken to the Baraki barracks and that he has been missing since then leaves no doubt as to the State authorities' responsibility for his disappearance. Moreover, the threat to his life posed by this disappearance increases over time. If the victim is still in incommunicado detention, this would very clearly pose a grave threat to his right to life, as he would be at the mercy of his jailers and outside the scope of any legal oversight or monitoring mechanisms. Once he was placed in detention, the Algerian authorities should have protected his right to life by, *inter alia*, ensuring that a record was kept of his arrest, as required under article 52 of the Code of Criminal Procedure. Having failed in its duty to provide such protection, the State party has failed to fulfil its obligation under article 6, paragraph 1, of the Covenant.

3.2 In view of the fact that the authorities have not undertaken any investigation to determine the victim's fate, the State party has violated article 6, paragraph 1, read in conjunction with article 2, paragraph 3, of the Covenant.

3.3 Subjecting the victim to enforced disappearance in and of itself constitutes inhuman or degrading treatment. Moreover, the anguish and suffering caused by indefinite detention without contact with the person's family or the outside world constitute treatment in breach of article 7 of the Covenant. Despite all the family's efforts, the authorities have not conducted any investigations or proceedings, which constitutes a violation of article 7, read in conjunction with article 2, paragraph 3, of the Covenant.

3.4 The anguish and distress caused to the author by the disappearance of her son, combined with the constant uncertainty in which she lives, constitute a violation of article 7 with regard to the author and her family. The authorities' failure to act in this regard constitutes a violation of the author's rights under article 7, read in conjunction with article 2, paragraph 3, of the Covenant.

3.5 The victim was arrested at his home on 30 April 1996 by members of the National People's Army for no apparent reason and without a warrant. He has never been brought before a judicial authority and has not been able to challenge the lawfulness of his detention. The State party has therefore violated the victim's rights under article 9, paragraphs 1 to 4, of the Covenant.

3.6 If it is established that the victim suffered a violation of article 7, then a *fortiori* he suffered a violation of article 10, paragraph 1, of the Covenant.

3.7 Ever since his arrest, the author's son has been outside the protection of the law and has consequently been deprived of his legal personality. Nor has he had access to a court of law where he could have asserted his rights. The State party has therefore violated article 16 of the Covenant.

3.8 As a victim of enforced disappearance, the author's son has been prevented from exercising his right to a remedy that would allow him to challenge the lawfulness of his detention, in violation of article 2, paragraph 3, of the Covenant. His family has used all legal means to find out about his fate but has received no response.

State party's observations on admissibility

4.1 On 3 March 2009, the State party, 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, contested the admissibility of the communication and of 10 other communications submitted to the Committee. The State party is of the view that communications incriminating public officials, or persons acting on behalf of public authorities, in cases of enforced disappearance during the period in question — from 1993 to 1998 — should be considered within the broader context of the sociopolitical and security conditions that prevailed in the country during a period when the Government was struggling to combat a form of terrorism aimed at bringing about the “collapse of the Republican State”. In this context, and in accordance with the Constitution (arts. 87 and 91), protective measures were taken and the Algerian Government notified the United Nations Secretariat that it had declared a state of emergency, in accordance with article 4, paragraph 3, of the Covenant.

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 have often attributed enforced disappearances. Hence, according to the State party, while these enforced disappearances may have had many causes, they cannot be blamed on the Government. According to a variety of independent sources, including the press and human rights organizations, it may be concluded that the disappearances that occurred in Algeria during the period in question are attributable to any one of six possible scenarios, none of which can be ascribed to the State. The first scenario concerns persons who were reported missing by their relatives but who in fact had chosen to go into hiding in order to join an armed group and who instructed their families to report that they had been arrested by the security services as a way of “covering their tracks” and avoiding being “harassed” by the police. The second scenario concerns persons who were reported missing after their arrest by the security services but who took advantage of their subsequent release to go into hiding. The third scenario concerns persons abducted by armed groups which, because they were not identified or because they had stolen uniforms or identification documents from police officers or soldiers, were mistakenly thought to belong to the Armed Forces or security services. The fourth scenario concerns persons reported missing who abandoned their families, and sometimes even left the country, to escape from personal problems or family disputes. The fifth scenario concerns persons who were reported missing by their family but who were in fact wanted terrorists who had been killed and buried in the maquis following factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. The sixth scenario mentioned by the State party concerns persons reported missing who were actually living in Algeria or abroad under a false identity provided by a network of document forgers.

4.3 The State party maintains that it was in view of the diversity and complexity of the situations encompassed by the general notion 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 disappeared persons, whereby all persons who had disappeared in the course of the “national tragedy” would be cared for, all victims 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 cases of disappearance have been reported, 6,774 cases have been examined, 5,704 have been approved for compensation and 934 rejected, with 136 still pending. A total of 371,459,390 Algerian dinars has been paid out as compensation to the victims concerned. In addition, a total of 1,320,824,683 dinars has been paid out in monthly pensions.

4.4 The State party further contends 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 relevant courts of law. The State party observes that, as may be seen from the authors' statements,³ 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, strictly speaking, initiated legal action and seen it through to its 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 they are warranted. Nevertheless, in order to protect the rights of victims or their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint with the investigating judge. In this case, it is the victim, not the prosecutor, who initiates 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, has not been utilized, despite the fact that it would enable the victims to institute criminal proceedings and compel the investigating judge to initiate proceedings, even if the prosecution service had decided otherwise.

4.5 The State party also notes the author's 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 — rules out the possibility that any effective domestic remedies are available in Algeria to the families of victims of disappearances. On this basis, the author believed she did not need to bring the matter before the courts in view of what the author presumed would be the latter's position and findings regarding the application of the ordinance. However, the author cannot invoke this ordinance and its implementing legislation as a pretext for failing to institute the legal proceedings available to her. 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 that all domestic remedies be exhausted.⁴

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 maintains 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 domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, whose implementing ordinance prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for 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". Social and economic measures have also been put in place, including the provision of employment placement assistance and compensation for all persons considered to be victims of the "national tragedy". Finally, the ordinance prescribes political measures, such as a provision under which any person who exploited religion in the past in a way that

³ As the State party has provided a common reply to 11 different communications, it refers to the "authors", which include the author of the present communication.

⁴ The State party cites, in particular, communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

contributed to the “national tragedy” is barred from holding political office, and establishes the inadmissibility of any proceedings brought against individuals or groups belonging to any branch of the country’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 the establishment of a fund 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 by that tragedy. 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 political score settling. The State party is therefore of the view that the author’s 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 author are and to take into account the sociopolitical and security context in which they occurred; to find that the author failed to exhaust all domestic remedies; to recognize 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 consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the communication inadmissible; and to request that the author seek an appropriate remedy.

State party’s additional observations on admissibility

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 might not actually amount to an abuse of procedure aimed at bringing before the Committee a broad historical issue involving causes and circumstances of which the latter is unaware. The State party observes that these “individual” communications dwell on the general context in which the disappearances occurred and focus solely on the actions of the security forces, never mentioning those of the various armed groups that used criminal techniques of deception 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 to consider the admissibility and the merits of these cases 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 Committee’s rules of procedure, the State party notes that the sections relating to the Committee’s procedure for determining the admissibility of communications are separate from those relating to the consideration of the merits of communications and that these questions could therefore be considered separately. Concerning the exhaustion of domestic remedies, the State party stresses that the author did not submit any of her complaints or requests for information through channels that would have enabled the Algerian judicial authorities to examine them.

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 concerns about delays do not exempt the author from the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation has barred the possibility of appeal in this area, the State party replies that the author’s failure to submit her allegations to 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 been taken outside of that framework are subject to consideration by the appropriate courts.

5.4 The State party adds that, pursuant to articles 27 and 28 of Ordinance No. 06-01, the status of victim of the national tragedy is granted by virtue of a declaration of disappearance issued by the criminal investigation service following an unsuccessful search and is subsequently confirmed through a declaration of death issued by the competent court at the beneficiaries’ request. The State party notes that the author apparently authorized an international human rights defence organization to submit her communication to the Committee while at the same time acknowledging before the Algerian authorities that she had agreed to take advantage of the settlement procedure afforded by the domestic mechanism provided for in the Charter for Peace and National Reconciliation. The State party also notes that the author has denied before these same authorities that she sought support from TRIAL (the organization acting as counsel for the author) for the submission of her complaint to the Committee, inasmuch as she accepted the domestic settlement procedure provided for in the Charter, as a result of which a declaration of death was issued and an application for compensation was filed.

5.5 In a note verbale of 6 October 2010, the State party reiterates, in extenso, the objections regarding admissibility that it had already submitted on 3 March 2009 and 9 October 2009.

Author’s comments on the State party’s submission

6.1 On 30 September 2011, the author submitted comments on the State party’s observations on admissibility and provided additional arguments on the merits. She points out that the State party has recognized the competence of the Committee to consider individual communications. This competence is of a general nature and its exercise by the Committee is not subject to the discretion of the State party. In particular, it is not for the State party to determine whether it is appropriate for the Committee to take up a specific case. That is for the Committee to decide when it considers a communication. The author considers that the State party’s adoption of domestic legislative and administrative measures to support the victims of the “national tragedy” cannot be invoked at the admissibility stage to prevent individuals subject to its jurisdiction from using the procedure provided for under the Optional Protocol. Even if such measures could have an impact on the settlement of a dispute, they must be studied with regard to the merits of the communication rather than at the admissibility stage. In the present case, the legislative measures themselves amount to a violation of the rights enshrined in the Covenant, as the Committee has previously observed.⁵

⁵ The author refers to paras. 7, 8 and 13 of the concluding observations of the Human Rights Committee on the third periodic report of Algeria, adopted on 1 November 2007 (CCPR/C/DZA/CO/3). She also refers to para. 9.2 of communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, and para. 11 of communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006. The author also refers to paras. 11, 13 and 17 of the concluding observations of the Committee against Torture on the third periodic report of Algeria, adopted on 13 May 2008 (CAT/C/DZA/CO/3). Lastly, she cites para. 1 of general comment No. 29

6.2 The author recalls that the declaration by Algeria of a state of emergency on 9 February 1992 does not affect a person's right to submit an individual communication to the Committee. Article 4 of the Covenant allows for derogations only from certain provisions of the Covenant during states of emergency, but the exercise of rights under the Optional Protocol is not affected. According to the author, the State party's observations on the appropriateness of the communication do not constitute a valid ground for a finding of inadmissibility.

6.3 The author also refers to the State party's argument that the requirement to exhaust domestic remedies means that the author must institute criminal proceedings by filing a complaint with the investigating judge, in accordance with articles 72 et seq. of the Code of Criminal Procedure. She refers to an individual communication concerning the State party, in which the Committee stated that "the State party has a duty not only to carry out thorough investigations of alleged violations of human rights, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations. To sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor".⁶ The author therefore considers that, given the serious nature of the alleged offences, it was the responsibility of the competent authorities to take up the case. However, no action has been taken, even though members of Mohammed Lemmiz's family have been trying to make enquiries concerning his whereabouts ever since his arrest, but to no avail.

6.4 The author made use of several informal procedures. She visited police stations, gendarmeries and barracks to find out about the circumstances surrounding her son's arrest. She subsequently appealed to the judicial authorities as well as to the Ombudsman of the Republic, the National Human Rights Observatory and the Minister of Justice, without success. She therefore cannot be accused of failing to exhaust all remedies on the ground that she did not sue for damages by filing a complaint with the investigating judge concerning a human rights violation of such seriousness that the State party could not have been unaware of it.

6.5 As to the State party's argument that mere "subjective belief or presumption" does not exempt the author of a communication from the requirement to exhaust all domestic remedies, the author cites article 45 of Ordinance No. 06-01, whereby legal proceedings may not be brought against individuals or groups who are members of any branch of the defence or security forces. Any person making such a complaint or allegation is liable to a term of imprisonment of from 3 to 5 years and a fine of between 250,000 and 500,000 dinars. The State party has therefore not convincingly demonstrated how suing for damages would enable a court to receive and investigate a complaint, since in doing so it would be in violation of article 45 of the ordinance, or how the author of a complaint could be guaranteed immunity from prosecution under article 46 of the ordinance. As treaty body jurisprudence confirms, a reading of these provisions leads to the conclusion that any complaint regarding the violations suffered by the author and her son would not only be declared inadmissible, but would also be treated as a criminal offence. The State party fails to provide any example of an instance in which, despite the existence of the above-mentioned ordinance, the perpetrators of human rights violations similar to those involved in the present case have actually been prosecuted.

(2001) on derogations from the Covenant during states of emergency (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40 (vol. I)), annex VI).

⁶ *Benaziza v. Algeria*, para. 8.3.

6.6 The author notes the State party's argument in its additional observations on admissibility that the author, acting on her own behalf and that of her son, denies that she sought the support of her counsel, TRIAL, which is representing her in the case before the Committee. The State party bases this assertion on the fact that the author accepted the domestic settlement procedure under the Charter for Peace and National Reconciliation, as a result of which a declaration of death was issued and an application for compensation was filed. The author notes that the State party does not provide any evidence to prove this assertion. It does not produce any written statement by the author denying that she requested her counsel's services. Her counsel, on the other hand, has produced a written power of attorney dated 13 January 2006 authorizing it to act before the Committee on the author's behalf. This power of attorney remains valid.

6.7 The author points out that the Committee against Torture, in its concluding observations of 13 May 2008 concerning Algeria, expressed concern about Ordinance No. 06-01, as it obliges families of missing persons to certify the death of their family member in order to receive compensation, which could constitute a form of inhuman and degrading treatment (CAT/C/DZA/CO/3, para. 13). In the light of this position, acceptance of the domestic settlement procedure can hardly be interpreted as an expression of the author's desire to discontinue the procedure initiated before the Committee. In addition, waivers of prosecution do not apply under any circumstances to crimes such as torture, including rape, and enforced disappearance, which are crimes to which the statute of limitations does not apply (CAT/C/DZA/CO/3, para. 11). The State party therefore remains under an obligation to conduct an independent and impartial investigation into any allegation of international crimes with the aim of prosecuting and punishing the persons responsible, irrespective of any measures taken with a view to national reconciliation. Thus, the fact that the author accepted the domestic settlement procedure provided for in the Charter for Peace and National Reconciliation does not release the State party from its obligation to investigate and prosecute the perpetrators of her son's enforced disappearance.

6.8 With respect to the merits of the communication, the author notes that the State party has simply listed a number of scenarios according to which victims, in general, of the "national tragedy" might have disappeared. Such general comments do not refute the allegations made in the present communication. In fact, the same comments have been put forward in a series of other cases, which demonstrates the State party's continuing unwillingness to consider such cases individually.

6.9 With regard to the State party's argument that it is entitled to request that the admissibility of the communication be considered separately from the merits, the author refers to rule 97, paragraph 2, of the rules of procedure of the Human Rights Committee, which states that the working group or special rapporteur may, because of the exceptional nature of a case, request a written reply that relates only to the question of admissibility. Consequently, it is not for the author of the communication or the State party to take such decisions, which are the sole prerogative of the working group or special rapporteur. The author considers that the present case is no different from other cases of enforced disappearance and that admissibility should not be considered separately from the merits.

6.10 The author points out that the State party is required to submit "explanations or statements that shall relate both to the communication's admissibility and its merits". She also refers to the jurisprudence of the treaty bodies, which consider that, in the absence of statements from the State party on the merits, the Committee may reach a decision on the basis of the information in the case file. Numerous reports on the actions of the security forces during the period in question and the many steps taken by the victim's family members corroborate the allegations made by the author in her communication. In view of the State party's involvement in the disappearance of her son, the author is unable to provide additional information in support of her communication, as that information is

entirely in the hands of the State party. The author also asserts that the State party's failure to make any observations regarding the merits of the case is tantamount to an acknowledgement on its part that violations were committed.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 First of all, the Committee wishes to point out that the decision by the Special Rapporteur to examine the admissibility and the merits jointly (see para. 1.3 above) does not preclude their being considered separately by the Committee. The joint consideration of the admissibility and the merits does not mean they must be examined simultaneously. Consequently, before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

7.2 The State party argues that the author, acting on her own behalf and that of her son, denies that she sought the support of TRIAL to represent her in the case before the Committee based on the fact that she accepted the domestic settlement procedure provided for in the Charter for Peace and National Reconciliation, as a result of which a declaration of death was issued and an application for compensation was filed. The Committee notes the argument put forward by the author's counsel, according to which the State party has not provided any evidence to prove its assertions. The Committee notes that the present communication was registered in accordance with its rules of procedure, and more specifically rule 96, under which a communication must be submitted by the individual personally or by his or her representative. In the present case, counsel has produced a power of attorney signed by the author on 13 January 2006 authorizing it to act before the Committee. The author has never challenged the authenticity of this power of attorney before the Committee.

7.3 The Committee also takes note of the State party's statement that the author acknowledged to the Algerian authorities that she had agreed to benefit from the settlement procedure established by the domestic mechanism provided for in the Charter for Peace and National Reconciliation. The Committee is of the view, however, that acceptance of the domestic settlement procedure cannot be interpreted as an expression of the author's desire to discontinue the procedure initiated before the Committee. The Committee therefore considers the communication to be admissible under article 1 of the Optional Protocol.

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

7.5 The Committee notes that, in the State party's view, the author and her family have not exhausted domestic remedies, since they did not consider bringing up the matter with the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. The Committee also notes that, according to the State party, the author wrote letters to political and administrative authorities and petitioned representatives of the prosecution service (chief prosecutors or public prosecutors) but has not, strictly speaking, initiated legal action and seen it through to its conclusion by availing herself of all available remedies of appeal and judicial review. The Committee notes the author's argument that, after contacting police stations and gendarmeries on an unofficial basis, she approached the judicial authorities, namely the El Harrach court and the Algiers court, and then the Blida military court, which the other two courts had indicated was the one that was competent to hear the case. The Committee also notes that no proceedings or investigations were initiated as a result of all these efforts and that the author, despite the administrative and judicial actions undertaken, has not been able to obtain any official

information about the fate of her son. Lastly, the Committee notes that, according to the author, article 46 of Ordinance No. 06-01 provides for the penalization of any person who files a complaint pertaining to actions covered by article 45 thereof.

7.6 The Committee recalls that the State party has a duty not only to carry out thorough investigations of alleged human rights violations brought to the attention of its authorities, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations.⁷ The family of Mohammed Lemmiz has repeatedly contacted the competent authorities concerning his disappearance, but the State party has failed to conduct a thorough and effective investigation. The State party has also failed to provide sufficient evidence that an effective remedy is available, since Ordinance No. 06-01 of 27 February 2006 continues to be applicable despite the Committee's recommendations that it should be brought into line with the Covenant (CCPR/C/DZA/CO/3, paras. 7, 8 and 13). The Committee is of the view that suing for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor.⁸ Moreover, given the vague wording of articles 45 and 46 of the ordinance, and in the absence of convincing information from the State party about their interpretation and actual enforcement, the author's fears regarding the effectiveness of filing a complaint are reasonable.

7.7 The Committee considers that, in order for a communication to be admissible, the only remedies which the author must have exhausted are the effective remedies for the alleged violation, which in this case is an enforced disappearance. In the light of all these considerations, the Committee concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the present communication.

7.8 The Committee finds that the author has provided sufficient substantiation for her allegations insofar as they raise issues under article 6 (para. 1), article 7, article 9, article 10, article 16 and article 2 (para. 3) of the Covenant and therefore proceeds to consider the communication on the merits.

Consideration of the merits

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

8.2 The State party has provided general, collective comments on the complaints submitted by the authors of several communications, including the author of the present communication. The State party has contented itself with arguing that communications incriminating public officials or persons acting on behalf of public authorities in cases of enforced disappearances occurring between 1993 and 1998 should be considered within the broader context of the sociopolitical and security conditions that prevailed in the country during a period when the Government was struggling to combat terrorism. The Committee refers to its jurisprudence⁹ and recalls that the State party may 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. The Covenant requires the State party to show concern for the fate of each individual and to treat each person with respect for the inherent dignity of the human person. Ordinance No.

⁷ See, for example, communication No. 1791/2008, *Boudjemai v. Algeria*, Views adopted on 22 March 2013, para. 7.4.

⁸ See, for example, *Boudjemai v. Algeria*, para. 7.4.

⁹ *Boudjemai v. Algeria*, para. 8.2.

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 provisions of the Covenant.

8.3 The Committee notes that the State party has not replied to the author's allegations concerning the merits of the case and recalls that, as is established in its jurisprudence,¹⁰ the burden of proof should not rest solely on the author of a communication, especially since the author and the State party do not always have the same degree of access to evidence and since often only the State party is in possession of the necessary information. It follows from article 4, paragraph 2, of the Optional Protocol that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with the information available to it.¹¹ In the absence of explanations from the State party in this respect, due weight must be given to the author's allegations, provided they have been sufficiently substantiated.

8.4 The Committee notes that, according to the author, her son was arrested at his home by members of the Algerian National People's Army during a military raid carried out under the orders of commander M. B. on 30 April 1996 at 5.30 a.m.; that he was reportedly taken to the Baraki military barracks; that he was later said to have been seen at the Beni-Messous barracks; and that the family has had no news of him since his arrest. The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate of the disappeared person, removes the person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable. In the case at hand, the Committee notes that the State party has produced no evidence to indicate that it has fulfilled its obligation to protect Mohammed Lemmiz's life. Therefore the Committee concludes that the State party has failed in its duty to protect the victim's life, in violation of article 6, paragraph 1, of the Covenant.¹²

8.5 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 (1992) on the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment,¹³ in which the Committee recommends that States parties should make provision against incommunicado detention. It notes in the case at hand that Mohammed Lemmiz was arrested by members of the Algerian National People's Army on 30 April 1996 and that his fate remains unknown to this day. In the absence of satisfactory explanations from the State party, the Committee considers that this disappearance constitutes a violation of article 7 of the Covenant with regard to Mohammed Lemmiz.¹⁴

8.6 The Committee also takes note of the anguish and distress suffered by Mohammed Lemmiz's mother because of his disappearance. It considers that the facts before it reveal a violation of article 7 of the Covenant with regard to the author.¹⁵

8.7 Regarding the question of a violation of article 9, the Committee takes note of the author's allegations that Mohammed Lemmiz was never brought before an investigating judge so that he could challenge the legality of his detention and that no official information was given to the author or her family regarding the victim's fate. In the absence of

¹⁰ See, for example, *Boudjemai v. Algeria*, para. 8.3.

¹¹ See, for example, *Boudjemai v. Algeria*, para. 8.3.

¹² See, for example, *Boudjemai v. Algeria*, para. 8.4.

¹³ *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40, (A/47/40), annex VI, sect. A.*

¹⁴ See, for example, *Boudjemai v. Algeria*, para. 8.5.

¹⁵ See, for example, *Boudjemai v. Algeria*, para. 8.6.

satisfactory explanations from the State party, the Committee finds a violation of article 9 with respect to Mohammed Lemmiz.¹⁶

8.8 Regarding the complaint lodged under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty may 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 view of Mohammed Lemmiz's incommunicado detention and in the absence of information from the State party in that regard, the Committee finds a violation of article 10, paragraph 1, of the Covenant.¹⁷

8.9 With regard to the question of a violation of article 16, the Committee reiterates its established jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person 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 his or her relatives to obtain access to potentially effective remedies, including judicial remedies (article 2, paragraph 3, of the Covenant), have been systematically impeded.¹⁸ In the present case, the Committee notes that the State party has not provided information about the fate or whereabouts of the disappeared person despite the author's multiple requests for information from the State party. The Committee finds that Mohammed Lemmiz's enforced disappearance since 30 April 1996 has denied him the protection of the law and has deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

8.10 The author invokes article 2, paragraph 3, of the Covenant, which imposes on States parties the obligation to ensure that any person whose Covenant rights have been violated has an effective remedy. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant,¹⁹ which provides, inter alia, that a failure by a State party to investigate allegations of violations could, in and of itself, give rise to a separate breach of the Covenant. In the present case, the author contacted the competent authorities concerning the disappearance of Mohammed Lemmiz as soon as he was arrested. All the steps taken have proved futile, and the State party has failed to conduct a thorough and effective investigation into the disappearance. Meanwhile, the absence of the legal right to undertake judicial proceedings which has existed since the promulgation of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation continues to deprive Mohammed Lemmiz and the author of any access to an effective remedy, inasmuch as the Ordinance prohibits, on pain of imprisonment, the pursuit of legal remedies with a view to shedding light on the most serious crimes, such as enforced disappearances. (CCPR/C/DZA/CO/3, para. 7).

8.11 The Committee also notes that, according to the State party, the domestic settlement procedure accepted by the author, as a result of which a declaration of death was issued and an application for compensation was filed, is exclusive and therefore incompatible with the submission of a communication to the Committee concerning violations of the Covenant. In this regard, the Committee recalls what it has stated in paragraph 7.3 and stresses that States

¹⁶ See, for example, *Boudjemai v. Algeria*, para. 8.7.

¹⁷ See general comment No. 21 (1992) on the humane treatment of persons deprived of their liberty, para. 3 (*Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40*, (A/47/40), annex VI, sect. B), and, for example, *Boudjemai v. Algeria*, para. 8.8.

¹⁸ See, for example, *Boudjemai v. Algeria*, para. 8.9.

¹⁹ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (vol. I)), annex III.

have an obligation to conduct thorough and effective investigations into serious human rights violations, including enforced disappearances, irrespective of any measures taken with a view to national reconciliation. The Committee considers, in particular, that the provision of compensation must not be made contingent upon the issuance of a declaration of death in respect of a disappeared person.²⁰

8.12 In the light of the foregoing, the Committee finds that the facts before it reveal a violation of article 2 (para. 3), read in conjunction with article 6 (para. 1), article 7, article 9, article 10 and article 16 of the Covenant, with regard to Mohammed Lemmiz and of article 2 (para. 3), read in conjunction with article 7 of the Covenant, with regard to the author.

9. The Human Rights Committee, acting under article 5 (para. 4), of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of article 6 (para. 1), article 7, article 9, article 10 (para. 1), article 16 and article 2 (para. 3), read in conjunction with article 6 (para. 1), article 7, article 9, article 10 (para. 1) and article 16 of the Covenant, with regard to Mohammed Lemmiz. It also finds a violation of article 7 and of article 2 (para. 3), read in conjunction with article 7, with regard to the author.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author and her family with an effective remedy by, inter alia: (a) conducting a thorough and effective investigation into the disappearance of Mohammed Lemmiz; (b) providing the author with detailed information about the results of its investigation; (c) releasing the victim immediately if he is still being held incommunicado; (d) if Mohammed Lemmiz is deceased, handing over his remains to his family; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the author for the violations suffered — regardless of whether or not she acknowledges her son's death if that is in fact the case — and to Mohammed Lemmiz if he is still alive. Ordinance No. 06-01 notwithstanding, the State party should ensure that it does not impede enjoyment of the right to an effective remedy by victims of crimes such as torture, extrajudicial killings and enforced disappearances. The State party is also under an obligation to take steps to prevent similar violations in the future.

11. 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 when a violation has been established, the Committee wishes to receive information from the State party, within 180 days, about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

[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.]

²⁰ Communications Nos. 1917/2009, 1918/2009, 1925/2009 and 1953/2010, *Prutina and others v. Bosnia and Herzegovina*, Views adopted on 28 March 2013, para. 9.6.

Appendix

Individual opinion of Mr. Fabián Omar Salvioli and Mr. Víctor Manuel Rodríguez-Rescia

1. We concur with the decision arrived at by the Human Rights Committee concerning communication No. 1798/2008, in respect of which the Committee found violations of the human rights referred to in article 6 (para. 1), article 7, article 9, article 10 (para. 1) and article 16 and breaches of the obligations set forth in article 2 (para. 3), read in conjunction with article 6 (para. 1), article 7, article 9, article 10 (para. 1) and article 16, of the Covenant with respect to Mohammed Lemmiz, together with a violation of article 7 and of article 2 (para. 3), read in conjunction with article 7, with respect to the author.

2. However, we are concerned that, in its Views on the above-mentioned communication, the Committee did not also characterize the existence of national legal provisions that are inherently inconsistent with the Covenant, namely, articles 45 and 46 of Ordinance No. 06-01, as an additional violation of the Covenant.

3. We regret having to insist on a legal assessment that differs from that of the majority of the Committee with regard to the effects of the existence and application of articles 45 and 46 of Ordinance No. 06-01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation, adopted by referendum on 29 September 2005, which prohibit any legal action before the courts against members of the Algerian defence and security services for the offences of torture, extrajudicial killings and enforced disappearance. Under the ordinance, anyone lodging such a charge or complaint is liable to a penalty of from 3 to 5 years' imprisonment and a fine of between 250,000 and 500,000 Algerian dinars.

4. The Committee did not expressly state, as we would have wished, that the content of article 45 of Ordinance No. 06-01 is inconsistent with the provisions of article 14 of the Covenant concerning the right of all persons to have access to justice so that they may assert their rights. The Committee should also have found a violation of article 2, paragraph 2, which lays down the obligation of States parties to adapt their laws so as to give effect to the provisions set forth in the Covenant.

5. The majority of the Committee maintains the practice of refraining from finding violations of rights that are not invoked by the authors of a communication, thereby failing to apply the legal principle of *iura novit curia*. In so doing, the Committee needlessly restricts its own sphere of competence in a way that is inappropriate for an international body that protects human rights.

6. This practice is not only misguided but is also inconsistent: the Human Rights Committee has itself, on occasion, applied the principle of *iura novit curia* in its Views, although it has not said so explicitly. In recent years, there have been various instances in which the Committee has correctly applied the provisions of the Covenant on the basis of evidence before it that is not covered in the legal arguments or the specific articles cited by the parties.^a

^a Human Rights Committee, communication No. 1390/2005, *Koreba v. Belarus*, Views adopted on 25 October 2010; Human Rights Committee, communication No. 1225/2003, *Eshonov v. Uzbekistan*, Views adopted on 22 July 2010, para. 8.3; Human Rights Committee, communication No. 1206/2003, *R.M. and S.I. v. Uzbekistan*, Views adopted on 10 March 2010, paras. 6.3 and 9.2, with a finding of no violation; Human Rights Committee, communication No. 1520/2006, *Mwamba v. Zambia*, Views adopted on 10 March 2010; Human Rights Committee, communication No. 1320/2004, *Pimentel et*

7. The very existence of articles 45 and 46 of Ordinance No. 06-01, under which persons reporting any of the offences covered by its provisions are liable to imprisonment and fines, is inconsistent with the International Covenant on Civil and Political Rights because these articles establish a framework of impunity that prevents the investigation, conviction and redress of cases of serious human rights violations, such as the enforced disappearance of Mohammed Lemmiz (the author's son), whose whereabouts are unknown to this day. The legal prohibition on filing a complaint regarding the events involved in this case or other similar cases — and, hence, on investigating them — fosters impunity by infringing the right of access to justice, given that the ordinance sets out penalties for the exercise of the right of petition in respect of acts such as those that gave rise to this communication, which deals with an enforced disappearance.

8. The measures of redress recommended by the Committee with a view to preventing the recurrence of such acts in other similar cases are insufficient. In its Views, the Committee says that “the State party should ensure that it does not impede enjoyment of the right to an effective remedy by victims of crimes such as torture, extrajudicial killings and enforced disappearances” (para. 10). We consider in fact that the Committee should have stated, clearly and directly, that the explicit prohibition under Ordinance No. 06-01 of legal action to initiate investigations of cases of torture, extrajudicial killings and enforced disappearances constitutes a violation of the general obligation set out in article 2, paragraph 2, of the Covenant, according to which the State of Algeria must “take the necessary steps, in accordance with its constitutional processes and with the provisions of the [...] Covenant, *to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant*” (emphasis added).

9. Articles 45 and 46 of Ordinance No. 06-01 foster impunity and prevent the victims of this type of serious offence and their families from exercising their right to an effective legal remedy, to know the truth, to assert their fundamental right to justice, to petition and to obtain full reparation. Even if the remaining provisions of Ordinance No. 06-01 do make a contribution to the achievement of peace and national reconciliation in Algeria, this should not be done at the expense of the fundamental human rights of the victims and their families, who have suffered the consequences of such serious offences, and much less by making those families liable to punishments and fines, thereby re-victimizing them if they exercise their right to invoke a legal remedy. That right is, moreover, one of the means used to protect and guarantee other human rights (such as the right to life or the right not to be subjected to torture) that may not be suspended even in a state of emergency (Covenant, art. 4, para. 2).

10. The legal impossibility of initiating judicial proceedings since the promulgation of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation has deprived and continues to deprive Mohammed Lemmiz, the author and her family of any access to an effective remedy, since the ordinance prohibits, on pain of imprisonment, the pursuit of legal remedies with a view to shedding light on the most serious crimes, such as enforced disappearances.

11. The Committee should have stated explicitly that, as a reparation measure aimed at ensuring that such acts do not recur, Algeria should comply with the provisions of article 2,

al. v. the Philippines, Views adopted on 19 March 2007, paras. 3 and 8.3; Human Rights Committee, communication No. 1177/2003, *Ilombe and Shandwe v. the Democratic Republic of the Congo*, Views adopted on 17 March 2006, paras. 5.5, 6.5 and 9.1; Human Rights Committee, communication No. 973/2001, *Khalilova v. Tajikistan*, Views adopted on 30 March 2005, para. 3.7; and Human Rights Committee, communication No. 1044/2000, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 3.

paragraph 2, and, accordingly, such laws or other measures as may be necessary to repeal articles 45 and 46 of Ordinance No. 06-01 and thereby do away with any prohibitions, penalties, sanctions and any other obstacle that would have the effect of allowing serious offences such as enforced disappearance of persons, torture and extrajudicial killings to go unpunished, not only in respect of the victims referred to in this communication but also in respect of victims and their families in similar cases.

[Done 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.]
