



International Covenant on Civil and Political Rights

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Views

Communication No. 1588/2007

<i>Submitted by:</i>	Nedjma Benaziza (represented by counsel, Nasseria Dutour of the Collectif des Familles de Disparus en Algérie)
<i>Alleged victim:</i>	Daouia Benaziza, her sons and the author (granddaughter of the victim)
<i>State party:</i>	Algeria
<i>Date of communication:</i>	13 March 2007 (initial submission)
<i>Document reference:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 22 August 2007 (not issued in document form)
<i>Date of adoption of Views:</i>	26 July 2010
<i>Subject matter:</i>	Enforced disappearance
<i>Substantive issues:</i>	Prohibition of torture and cruel, inhuman or degrading treatment or punishment; right to liberty and security of person; arbitrary arrest and detention; right to recognition as a person before the law; right to an effective remedy
<i>Procedural issues:</i>	Failure to exhaust domestic remedies
<i>Articles of the Covenant:</i>	7; 9; 16; and 2, paragraph 3
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

On 26 July 2010, the Human Rights Committee adopted the annexed draft as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1588/2007.

[Annex]

* Made public by decision of the Human Rights Committee.

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 (ninety-ninth session)

concerning

Communication No. 1588/2007*

<i>Submitted by:</i>	Nedjma Benaziza (represented by counsel, Nasseria Dutour of the Collectif des Familles de Disparus en Algérie)
<i>Alleged victim:</i>	Daouia Benaziza, her sons and the author (granddaughter of the victim)
<i>State party:</i>	Algeria
<i>Date of communication:</i>	13 March 2007 (initial submission)

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

Meeting on 26 July 2010,

Having concluded its consideration of communication No. 1588/2007, submitted by Nedjma Benaziza 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 Ms. Nedjma Benaziza, an Algerian citizen born on 31 December 1976. She claims that her grandmother, Ms. Daouia Benaziza, born in Chemora, Algeria, in 1929, was the victim of violations by Algeria of articles 7, 9, 16 and 2, paragraph 3, of the Covenant. She claims that she herself, her father and her uncles are victims of a violation of article 7 and article 2, paragraph 3, of the Covenant. The Covenant and the Optional Protocol entered into force for Algeria on 12 December 1989. The author is represented by counsel, Ms. Nasseria Dutour of the Collectif des Familles de Disparus en Algérie (CFDA) (Coalition of Families of the Disappeared in Algeria).

* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Majoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

The text of an individual opinion signed by Committee member Mr. Fabián Omar Salvioli is appended to the present Views.

1.2 On 12 March 2009, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, rejected the State party's request, dated 3 March 2009, that the Committee consider the issue of admissibility separately from the merits.

The facts as submitted by the author

2.1 Daouia Benaziza was the grandmother of the author, Nedjma Benaziza. Born in 1929, Daouia Benaziza was arrested on 2 June 1996 by military security officers. Shortly before the arrest, which occurred at around 10 p.m., military security officers, most of whom were hooded and armed, some in uniform and some in plain clothes, entered the building where Daouia Benaziza lived, looking for her son, Ali, who lived at the same address. Finding no sign of Ali, the officers took Daouia aside into one of the rooms of the apartment for questioning. As the security officers were preparing to take her away, one of her sons, Slimane, came upstairs to the apartment and tried to dissuade them from doing so, citing as reasons her advanced age (68 at the time of the events) and poor health. The officers replied that they would not keep her for questioning for more than two hours, after which she could return home.¹ Before taking her away, the military security officers asked her to remove her jewellery and were careful to take the telephone with them. The arrest took place not only in front of her children but also in front of her neighbours. Daouia Benaziza has not been seen again since that day. One month earlier, her home had been visited and searched on two occasions by officers from the same service. For reasons that remain unknown, the officers were looking for her son, Ali Benaziza.

2.2 The day following Daouia Benaziza's arrest, one of her sons went to the police station, where the police officers told him that they had not arrested his mother. Later, her sons were informed that their mother had been taken to the barracks in the centre of Constantine, across from the office of the *wali* (equivalent of the prefect). When Ali Benaziza returned to the city on 4 June 1996, he and two of his brothers, Abdelkader and Mohamed, paid a visit to the prosecutor of the military court in the fifth military region of Constantine. Ali Benaziza proposed that he should take his mother's place in order to allow her release. He was arrested by the soldiers but released following an identity check. The soldiers promised him that Daouia Benaziza would be released soon.

2.3 Still without news of their mother, the victim's four sons, Ali, Mohamed, Abdelkader and Slimane, filed a series of written petitions with the military, civil, judicial and administrative bodies concerned in order to find out why their mother had been arrested and to obtain information or secure her release. In all 17 of the petitions that they filed with these bodies, the victim's sons mentioned her advanced age, her poor health, the incongruity of any possible charges against an elderly woman and their failure to understand why the authorities were unable to provide them with any information on their mother's fate. The first letter from the four sons is dated 14 July 1996, one month and a half after the arrest of Daouia Benaziza. It was addressed to the Secretary-General of the Ministry of Defence, with copies to the Office of the President of the Republic, the Head of Government, the Minister of Justice, the then Speaker of Parliament, the head of the fifth military region, the presidents of the two human rights leagues and the Ombudsman.

2.4 In September 1996, the Benaziza family hired an attorney, who filed a complaint for abduction against a person or persons unknown with the Court of Constantine. On 16 August 1997, nearly a year after filing the complaint, the family was summoned to the police station in the 13th police district of the *wilaya* (prefecture) of Constantine, where

¹ Her son Slimane and his wife were present at the time of the events. It would appear that the author was not present.

they were handed a copy of a decision to discontinue proceedings which indicated that the persons or services responsible for the victim's arrest had not been identified. Between 1996 and 1998, members of the Benaziza family met with the chief prosecutor of the fifth military region of Constantine on several occasions (4 June 1996, 5 June 1996 and 30 July 1996). During the first two meetings with the prosecutor, they tried to find out what had happened to their mother. After learning from unofficial sources that their mother had died, the brothers filed a formal petition with the prosecutor. In the absence of any news from his office, they returned on 30 July 1996 in order to submit complete documentation. The same petition was submitted to the regional director of military security and to the president of the Algerian League for the Defence of Human Rights, who forwarded it to the Ministry of Justice. This led to a series of meetings at the following offices: the Office of the Prime Minister, where the brothers had a meeting on 11 August 1996; the Office of the President, which opened an inquiry in October 1996; the Ministry of Justice, where meetings were held on 21 and 25 August 1996; the Constantine gendarmerie, where they had a meeting on 23 November 1996 in connection with the inquiry led by the Office of the President; the Directorate-General of National Security, where they had a meeting on 4 April 1997 in connection with an investigation led by the Constantine prosecution service; and the National Human Rights Monitoring Centre, where they had meetings on 14 July 1996 and in October 1997. Some of these petitions were submitted several times to the same authorities every few months or so. Despite all these efforts and the opening of a number of investigations, none of the petitions has yielded any results.

2.5 In the course of its inquiries, the Benaziza family received — from sources that remain confidential — conflicting reports on the fate of Daouia Benaziza. According to some reports, Daouia Benaziza died as a result of a ruptured spleen caused by beatings. According to others, she died of a heart attack a few days after her detention. However, the family has received no definitive proof of her death and no news on her fate, as none of the investigations has determined her whereabouts. The Benaziza family next contacted the association SOS Disparus (SOS Disappearances) and the Collectif des Familles de Disparus en Algérie, which, among other things, organized demonstrations to ensure that the cause of the disappeared was not forgotten. The family also contacted Ms. Simone Veil, a member of the Constitutional Council of France. On 12 December 1997, the Benaziza family brought the case concerning Daouia Benaziza's disappearance to the attention of the United Nations Working Group on Enforced or Involuntary Disappearances.

2.6 The adoption of the Charter for Peace and National Reconciliation on 29 September 2005, and the publication of its implementing legislation on 28 February 2006, ended all hope of the Benaziza family having access to effective and available domestic remedies that would enable them to discover the fate of the author's grandmother.

The complaint

3.1 The author notes that the arrest of Daouia Benaziza was carried out without a warrant, that her detention was not entered in the police custody register, that there is no official record of her whereabouts or fate and that no judicial guarantees apply to her detention. The author therefore considers that the detention was arbitrary and violated the right to liberty and security of person guaranteed by article 9 of the Covenant.

3.2 The author also argues that the refusal to reveal the fate or whereabouts of Daouia Benaziza or to admit that she has been deprived of liberty removes her from the protection of the law, thereby violating her right to recognition everywhere as a person before the law, as guaranteed by article 16 of the Covenant.

3.3 The author further argues that the circumstances surrounding the disappearance of Daouia Benaziza themselves constitute a form of inhuman or degrading treatment and that prolonged arbitrary detention increases the risk of torture. Furthermore, at the time of her

disappearance, Daouia Benaziza was elderly and suffered from serious health problems that required medical care which she probably did not receive during her detention. The treatment to which the victim was likely to have been subjected is thus contrary to article 7 of the Covenant. The author also contends that the uncertainty with which members of Daouia Benaziza's family have had to live, which prevents them from finding closure, constitutes inhuman or degrading treatment of them within the meaning of article 7 of the Covenant.

3.4 The author points out that there has been no acknowledgment of Daouia Benaziza's detention and that, consequently, she has been deprived of her right to an effective remedy, as guaranteed by the Covenant. The Benaziza family, too, has been deprived of an effective remedy, since the numerous petitions it has filed have been met with silence and inaction by the authorities. The author explains that section IV of the Charter for Peace and National Reconciliation states that the Algerian people reject all allegations that hold the State responsible for deliberate disappearances. According to article 45 of Ordinance No. 06-01 of 27 February 2006, which implements the Charter: "Legal proceedings may not be brought against individuals or groups who are members of any branch of the defence or security forces of the Republic for actions undertaken to protect persons and property, safeguard the nation or preserve the institutions of the Republic. Any such allegation or complaint shall be declared inadmissible by the competent judicial authority." The Ordinance also renders the families of the disappeared liable to heavy fines and harsh prison sentences if they speak of or report these crimes. The Charter has therefore deprived the family of its right to institute proceedings. Ten years after Daouia Benaziza's disappearance, her family still does not know what happened to her. The author is therefore of the view that the State has failed to meet its obligations under article 2, paragraph 3, of the Covenant.

3.5 This lack of an effective remedy has made it impossible for the author and her family to exhaust domestic remedies within the meaning of article 5, paragraph 2 (b), of the Covenant. With regard to the fact that the victim's family has brought the matter before the Working Group on Enforced or Involuntary Disappearances, the author cites the jurisprudence of the Human Rights Committee, in particular the case of *Celis Laureano v. Peru*, according to which "extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Economic and Social Council, and whose mandates are to examine and publicly report on human rights situations in specific countries or territories, or on major phenomena of human rights violations worldwide, do not, as the State party should be aware, constitute a procedure of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol".² The author therefore considers that the communication is admissible.

State party's observations on admissibility

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

² Communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 7.1.

4.2 During that period, the Government had to fight against groups that were not organized among themselves. As a result, there was some confusion in the manner in which a number of operations were carried out among the civilian population, and it was difficult for civilians to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. Hence, cases of enforced disappearance may be of numerous origins but cannot, according to the State party, be attributed to the Government. On the basis of documented data compiled by a variety of independent sources, including the press and human rights organizations, it can be concluded that the concept of disappearances in Algeria during the period in question covers six distinct scenarios, none of which can be attributed to the State. The first scenario cited by the State party concerns persons who were reported missing by their relatives but who in fact chose to return secretly in order to join an armed group and who asked their family 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 and who took advantage of the situation to go into hiding when they were released. 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 who were reported missing but who had actually abandoned their families, and sometimes even left the country, to escape 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 thanks to the existence of a vast network of document forgers.

4.3 The State party stresses that it was in view of the diversity and complexity of the situations covered by the concept of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, had recommended a comprehensive approach to the issue of the disappeared under which the cases of all persons who had disappeared during the national tragedy would be dealt with, all victims would be offered support to overcome their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 disappearances have been reported, 6,774 cases examined, 5,704 approved for compensation and 934 rejected, with 136 still pending. A total of 371,459,390 Algerian dinars (DA) has been paid out as compensation to all the victims concerned. In addition, a total of DA 1,320,824,683 has been paid out in monthly pensions.

4.4 The State party further argues that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between the simple formalities involving the political or administrative authorities, or non-judicial remedies pursued through advisory or mediation bodies, and judicial remedies pursued through the relevant courts of justice. 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 actually initiated legal proceedings and seen them through to their conclusion by availing themselves of all available remedies of appeal and judicial review. Of all these authorities, only the representatives of the

³ In its memorandum, the State party refers to the “authors”, as it has provided a common reply to 11 different communications. This reference thus also includes the author of the present communication.

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, if warranted, institutes criminal proceedings. 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 that case, it is the victim, not the prosecutor, who institutes criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not utilized, despite the fact that it would have enabled the victims to institute criminal proceedings and compel the investigating judge to initiate an investigation, even if the prosecution service had decided otherwise.

4.5 The State party also notes the authors' contention that the adoption by referendum of the Charter and its implementing legislation — in particular, article 45 of Ordinance No. 06-01 — makes it impossible to consider that any effective and available domestic remedies exist in Algeria to which the families of victims of disappearance could have recourse. On this basis, the authors believed they were under no obligation to bring the matter before the relevant courts, thereby prejudging the position and findings of the courts on the application of the ordinance. However, the authors cannot invoke this ordinance and its implementing legislation to absolve themselves of responsibility for failing to institute the legal proceedings available to them. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility of a remedy does not exempt them from the requirement to exhaust all domestic remedies.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 stresses that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by internal crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter. The ordinance implementing the Charter prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for 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 victims of the national tragedy. Lastly, the ordinance prescribes political measures, such as a ban on holding political office for any person who exploited religion in the past in a way that contributed to the national tragedy, and establishes the inadmissibility of any proceedings brought against individuals or groups who are members of any branch of the defence and security forces of the Republic for actions undertaken to protect persons and property, safeguard the nation and preserve the institutions of the Republic.

4.7 In addition to the establishment of funds to compensate all victims of the national tragedy, the sovereign people of Algeria have, according to the State party, agreed to a process of national reconciliation as the only way to heal the wounds inflicted. The State party insists that the proclamation of the Charter reflects a desire to avoid confrontation in the courts, media outpourings and political score settling. The State party is therefore of the

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.

view that the authors' allegations are covered by the comprehensive internal settlement mechanism provided for in the Charter.

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

Additional observations by the State party on 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 to the Committee might not actually be an abuse of procedure aimed at bringing before the Committee a broad historical issue involving causes and circumstances of which the Committee is unaware. The State party observes in this connection that these "individual" communications dwell on the general context in which the disappearances occurred, focusing solely on the actions of the security forces and never mentioning those of the various armed groups that used criminal concealment techniques to incriminate the armed forces.

5.2 The State party insists that it will not address the merits of these communications until the issue of their admissibility has been settled, since all judicial or quasi-judicial bodies have a duty to deal with preliminary questions before considering the merits. According to the State party, the decision in the cases in point to consider questions of admissibility and the merits jointly and simultaneously — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications in terms of both their general nature and their intrinsic particularities. Referring to the rules of procedure of the Human Rights Committee,⁵ the State party notes that the sections relating to the Committee's procedure to determine the admissibility of communications are separate from those relating to the consideration of communications on the merits, and that therefore these questions could be considered separately. With regard, in particular, to the question of the exhaustion of domestic remedies, the State party stresses that none of the communications submitted by the authors was channelled through the domestic courts for consideration by the Algerian judicial authorities. Only a few of the communications that were submitted reached the Indictments Chamber, a high-level investigating court with jurisdiction to hear appeals.⁶

5.3 Recalling the Committee's jurisprudence regarding the obligation to exhaust domestic remedies, the State party stresses that mere doubts about the prospect of success or worries about delays do not exempt the authors from the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter has made it impossible to avail oneself of any remedy in this area, the State party replies that the failure of the authors to take any steps to submit their allegations for examination has so far prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter. Moreover, under the ordinance in question, the only

⁵ Rules 93–98 (Procedure to determine admissibility) and 99–101 (Procedure for the consideration of communications on the merits) of the rules of procedure of the Human Rights Committee.

⁶ The State party does not cite the communications to which it refers.

proceedings that are inadmissible are those brought against “members of any branch of the defence and security forces of the Republic” for actions consistent with their core duties to the Republic, namely, to protect persons and property, safeguard the nation and preserve its institutions. On the other hand, any allegations concerning actions attributable to the defence or security forces that can be proved to have taken place in any other context are subject to investigation by the appropriate courts.

5.4 Lastly, the State party reiterates its position with regard to the pertinence of the settlement mechanism established by the Charter for Peace and National Reconciliation. It points out in this regard that it is surprising that some of the authors of the above-mentioned communications have filed for an official finding of the presumed death of a relative, which entitles them to receive compensation, while at the same time they condemn the system.

Author’s comments on the State party’s submission

6.1 On 29 April 2010, the author, through counsel, contested the State party’s arguments relating to admissibility. Before addressing the questions of the exhaustion of domestic remedies, the scope of article 45 of the ordinance or the scope of the Charter for Peace and National Reconciliation, the author notes that, by formulating general observations on the admissibility of 12 communications concerning Algeria that are currently before the Committee, the State party fails to satisfy the Committee’s requirement that States parties must provide specific responses and pertinent evidence in reply to the author’s contentions.⁷

6.2 The author explains that all the summonses received by Abdelkader Benaziza, son of the victim, were written summonses. Nonetheless, Mr. Benaziza was not able to keep all of them, since the services concerned retained them when he arrived for his appointments. It did not occur to Mr. Benaziza to keep a copy of these documents, which did not specify the purpose of the summons and indicated only the date and time of the appointment and the fact that the summons concerned the case of Ms. Daouia Benaziza. However, such copies as were in the author’s possession are included in the dossier submitted to the Committee.

6.3 Regarding the State party’s objection to admissibility on the grounds that the victim’s family should have availed itself of the procedure set out in articles 72 and 73 of the Code of Criminal Procedure, the author maintains that the victim’s son did not need to avail himself of that procedure, since the many petitions submitted and the complaint lodged against person or persons unknown with the public prosecutor at the Court of Constantine resulted in, respectively, an investigation by the judicial police and an order for dismissal issued by the investigating judge of the First Chamber of the Court of Constantine. In the present case, the petitions filed by Mr. Benaziza with the prosecutor of the military court of Constantine, the Office of the President and various ministries in June and July 1996 apparently led to the opening of an investigation by the judicial police at the request of the public prosecutor of the Court of Constantine, acting on instructions from the Ministry of Justice. On 16 August 1997, Abdelkader Benaziza was summoned to the police station in the 13th police district of the *wilaya* of Constantine, where he was handed a document indicating that the inquiries made had proved fruitless and that it had not been possible to identify the persons responsible for the disappearance of Daouia Benaziza.

6.4 In September 1996, in parallel with the steps mentioned previously, Mr. Benaziza filed a complaint for abduction against a person or persons unknown with the public prosecutor at the Court of Constantine. It is clear that, as a result, a judicial investigation was opened at the request of the prosecutor, as attested to by the dismissal order dated 4

⁷ Communication No. 8/1977, *Weismann and Perdomo v. Uruguay*, Views adopted on 3 April 1980, para. 15.

April 2010 issued by the First Investigating Chamber of the Court of Constantine, which Mr. Benaziza collected on Monday, 26 April 2010 after being notified of the decision on 21 April 2010. The dismissal order of 4 April 2010 indicates that, pursuant to a request dated 17 February 1999 to open an investigation into the disappearance of Daouia Benaziza, gendarmes went to the Court of Constantine on 11 April 1999. The conclusions of the gendarmerie's investigation were submitted to the public prosecutor at the Court of Constantine, who apparently proceeded to open a supplementary investigation. On completion of the judicial investigation, the investigating judge of the First Chamber of the Court of Constantine concluded that the results of the investigation and an analysis of the case file showed that the perpetrators of the disappearance remained unknown and that, in the circumstances, it was pointless to pursue the investigation; hence the decision to terminate the proceedings. Thus, according to the facts set out above and as indicated in the dismissal order, a judicial inquiry was opened into the disappearance of Daouia Benaziza by the investigating judge at the request of the public prosecutor. In the circumstances, it was completely pointless for the Benaziza family to initiate the procedure set out in articles 72 and 73 of the Code of Criminal Procedure, which would merely have ensured that the case was investigated in the same way as before.

6.5 In the author's opinion, the State party has failed to respect its obligation under article 2, paragraph 3, of the Covenant to provide the Benaziza family with an effective remedy by conducting a thorough and diligent investigation.⁸ In the present case, there was a failure to respect reasonable time limits for the investigation and to conduct an impartial, thorough and diligent investigation. The fact is that 10 years elapsed between the request for an investigation, which was dated 17 February 1999, and the dismissal order, which was dated 4 April 2010. Furthermore, Mr. Benaziza received notification of the decision by registered letter on 21 April 2010 – 17 days after the decision was handed down. As he was not notified of the court's decision and dismissal order, Mr. Benaziza could take no further steps, since the Code of Criminal Procedure provides for complainants to appeal only against court orders issued by an investigating judge (Code of Criminal Procedure, arts. 168, 172 and 173). In addition, apart from the complainants' hearings, the family was not informed about any aspect of the investigation. Ms. Benaziza's sons received no information about any examinations of suspects or other witnesses or about the outcome of the investigation. Lastly, during the hearings, Mr. Benaziza was repeatedly asked to prove that the security services were responsible for the disappearance of his mother, which raises serious doubts about the effectiveness and impartiality of the investigation.

6.6 With regard to actions that can be brought against State officials on behalf of the victims of disappearances, the author maintains that, contrary to the assertions of the State party, such remedies have not been available since the adoption of article 45 of Ordinance No. 06-01. The last line of this provision clearly establishes that any charge or complaint filed against State officials for actions undertaken to protect persons and property, safeguard the nation and preserve the institutions of the People's Democratic Republic of Algeria are automatically deemed inadmissible. The author claims that the three situations described in article 45 of Ordinance No. 06-01 are formulated so broadly as to encompass all circumstances in which State officials have engaged in serious acts of violence against persons, such as disappearances, extrajudicial killings and even torture. Accordingly, many of the families of disappeared persons who have lodged complaints through the courts against a person or persons unknown or who have requested an investigation into the fate of the disappeared person have been directed to the *wilaya* commission charged with implementing the Charter for Peace and National Reconciliation in order to carry out the

⁸ Communications No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 9; and No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11.

necessary steps to obtain compensation. The author maintains that, since 2006, the application of the Charter for Peace and National Reconciliation and the compensation procedure has been the only response of the authorities to all the demands for the truth addressed by the families to the relevant judicial and administrative bodies. Hence, on 21 April 2010, the very day that Abdelkader Benaziza received notification of the dismissal order, representatives of the national gendarmerie paid a visit to the former residence of Daouia Benaziza (maiden name Gat) at 17 rue Belaib Mohamed, Constantine. During this visit, the gendarmes asked the Benaziza family to pay a visit to the national gendarmerie headquarters in Sidi Mabrouk, Constantine, which Abdelkader Benaziza did the very next day. He then discovered that the purpose of the meeting was to convince the Benaziza family to initiate the procedure to request compensation for Daouia Benaziza. During this meeting, Abdelkader Benaziza reiterated his desire for the authorities to conduct a genuine investigation to ascertain the fate of his mother and refused to initiate the compensation procedure. Abdelkader Benaziza requested a copy of the minutes of the meeting, but his request was denied.

6.7 Lastly, the author notes that the legislation implementing the Charter requires the families of disappeared persons to obtain a finding of presumed death in order to claim financial compensation. Moreover, this procedure does not include any provision for the police or judicial authorities to carry out an effective investigation to ascertain the fate of the disappeared person. In these circumstances, the legislation implementing the Charter constitutes, in the author's view, an additional violation of the rights of the families of disappeared persons and is certainly not a satisfactory response to the problem of disappearances, which should be based on respect for the right to the truth, justice, full redress and the preservation of the memory of the events.

Additional observations by the State party

7. In additional observations submitted on 12 April 2010, the State party reiterated, point by point, the comments it had formulated previously regarding the admissibility of the communication.

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearance of the author's grandmother was reported to the Working Group on Enforced or Involuntary Disappearances in 1997. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Economic and Social Council, and whose mandates are to examine and report publicly on human rights situations in specific countries or territories, or on major phenomena of human rights violations worldwide, do not constitute a procedure of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.⁹ Accordingly, the Committee considers that the examination of Daouia Benaziza's case by the Working

⁹ *Celis Laureano v. Peru* (note 2 above), para. 7.1.

Group on Enforced or Involuntary Disappearances does not render it inadmissible under this provision.¹⁰

8.3 The Committee notes that, according to the State party, the author has not exhausted domestic remedies, since the author and her family did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings. The Committee notes the author's argument that the complaint filed with the public prosecutor in 1996 against a person or persons unknown led to the issuance of a dismissal order by the investigating judge of the First Chamber of the Court of Constantine on 4 April 2010; that, at the request of the public prosecutor, the investigating judge opened a judicial investigation into the disappearance of Ms. Benaziza; and that, in the circumstances, it was completely pointless for the Benaziza family to initiate the procedure set out in articles 72 and 73 of the Code of Criminal Procedure, which would merely have ensured that the case was investigated in the same way as before. The Committee recalls its jurisprudence to the effect that authors must avail themselves of all judicial remedies in order to fulfil the requirement of exhaustion of all available domestic remedies, insofar as such remedies appear to be effective in the given case and are de facto available to the author.¹¹ The Committee also recalls 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. The 17 judicial and non-judicial petitions lodged by the family of the victim over a two-year period failed to result in a trial or thorough investigation, and the complaint lodged against a person or persons unknown resulted, after 10 years' time, in the dismissal of the case, which leads the Committee to conclude that the application of available domestic remedies was unduly prolonged. The Committee therefore finds that the author and her family have exhausted all domestic remedies, in conformity with article 5, paragraph 2 (b), of the Optional Protocol.

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

Consideration of the merits

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

9.2 Clearly, the State party prefers to maintain that communications incriminating public officials, or persons acting on behalf of public authorities, in enforced disappearances during the period in question, that is, from 1993 to 1998, must be considered in the broader context of the domestic socio-political and security environment that prevailed during a period in which the Government was struggling to fight terrorism and that, consequently, they should not be considered by the Committee under the individual complaints mechanism. The Committee wishes to recall the concluding observations that it addressed to Algeria at its ninety-first session,¹² as well as its jurisprudence,¹³ according to which the

¹⁰ Ibid.

¹¹ Communication No. 1003/2001, *P.L. v. Germany*, decision on admissibility adopted on 22 October 2003, para. 6.5. See also communication No. 433/1990, *A.P.A. v. Spain*, decision on admissibility adopted on 25 March 1994, para. 6.2.

¹² CCPR/C/DZA/CO/3, para. 7 (a).

State party should not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. As emphasized in its concluding observations concerning Algeria,¹⁴ the Committee considers that Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the Covenant. The Committee rejects, furthermore, the argument of the State party that the author's failure to take any steps to submit her allegations for examination has so far prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter.

9.3 The Committee recalls the definition of enforced disappearance set forth in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006, which states that “‘enforced disappearance’ is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”.¹⁵ Any such act of disappearance constitutes a violation of numerous rights enshrined in the Covenant, such as the right to recognition as a person before the law (art. 16), the right to liberty and security of person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7) and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). It may also constitute a violation of the right to life (art. 6) or a serious threat to this right.¹⁶

9.4 The Committee recalls its settled jurisprudence according to which the burden of proof does not rest solely on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information.¹⁷ It is implicit in 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. In cases where the author has submitted allegations to the State party that are supported by credible evidence, such as the 17 petitions submitted to the administrative and judicial authorities, and where further clarification, such as the replies provided by these same authorities, depends on information exclusively in the hands of the State party, the Committee may

¹³ *Boucherf v. Algeria* (note 8 above), para. 11.

¹⁴ CCPR/C/DZA/CO/3, para. 7.

¹⁵ General Assembly resolution 61/177. See also the Rome Statute of the International Criminal Court, of 17 July 1998, art. 7, para. 2 (i), *United Nations Treaty Series*, vol. 2187, No. 38544, p. 3; Inter-American Convention on Forced Disappearance of Persons, of 9 June 1994, art. 2, Organization of American States (A-60); Declaration on the Protection of All Persons from Enforced Disappearance, of 18 December 1992 (see General Assembly resolution 47/133).

¹⁶ Communications No. 1328/2004, *Kimouche v. Algeria*, Views adopted on 10 July 2007, para. 7.2; No. 1295/2004, *El Alwani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2006, para. 6.2; No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.2; and No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.3. See article 1, paragraph 2, of the Declaration on the Protection of All Persons from Enforced Disappearance (note 15 above).

¹⁷ Communications No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2; *Bousroual v. Algeria* (note 16 above), para. 9.4; and No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

consider these allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party.¹⁸

9.5 In the present case, the Committee notes that the author's grandmother, who was 68 years old at the time of the events, was reportedly arrested on 2 June 1996 by military security officers, most of them hooded and armed, some wearing uniforms and others in plain clothes. The author, her father and her uncles, as well as the neighbours, witnessed the scene. Despite the fact that, the following day, the police security services officially denied having arrested the author's grandmother, the military officers present at the office of the prosecutor of the military court in the fifth military region of Constantine, for their part, reportedly acknowledged having arrested her, adding that she would be released shortly thereafter. The Committee notes that the State party has not furnished any explanation concerning these allegations, thus making it impossible to shed the necessary light on the events of 2 June 1996 or subsequent events. The Committee recognizes the degree of suffering entailed in being detained indefinitely and deprived of all contact with the outside world. In this connection, the Committee recalls its general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, in which it recommends that States parties should make provisions against incommunicado detention.¹⁹ In the absence of a satisfactory explanation from the State party concerning the disappearance of the author's grandmother, the Committee considers that this disappearance constitutes a violation of article 7 of the Covenant with regard to Ms. Daouia Benaziza.

9.6 The Committee also takes note of the anguish and distress caused by the disappearance of the author's grandmother to her close family members, including her sons, since 2 June 1996. It therefore considers that the facts before it reveal a violation of article 7 of the Covenant with regard to them.²⁰

9.7 With regard to the alleged violation of article 9, the information before the Committee indicates that the author's grandmother was arrested by military security officers and that the office of the prosecutor of the military court in the fifth military region of Constantine confirmed that the author's grandmother was being held in a barracks located in the centre of Constantine. The Committee notes that the State party has not responded to this allegation but has merely stated that the concept of disappearances in Algeria during the period in question covers six distinct scenarios, none of which can be attributed to the State. The State party has offered no explanation, other than the scenarios referred to above, to absolve itself of responsibility for the disappearance of the author's grandmother or for finding the perpetrators of her disappearance. In the absence of adequate explanations from the State party concerning the author's allegations that her grandmother's apprehension and subsequent incommunicado detention were arbitrary or illegal, the Committee finds a violation of article 9 with regard to Ms. Daouia Benaziza.²¹

9.8 With regard to the alleged violation of article 16, the Committee reiterates its settled 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

¹⁸ Communication No. 1439/2005, *Aber v. Algeria*, Views adopted on 13 July 2007, para. 7.2.

¹⁹ *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 11.

²⁰ Communication No. 107/1981, *Almeida de Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14; *Sarma v. Sri Lanka* (note 16 above), para. 9.5; *Bousroual v. Algeria* (note 16 above), para. 9.8; *Grioua v. Algeria* (note 8 above), para. 7.7.

²¹ *Medjnoune v. Algeria* (note 17 above), para. 8.5.

seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3) have been systematically impeded.²² In the present case, the author indicates that her grandmother was arrested on 2 June 1996 by State security officers, some of whom were in uniform. To date, she has received no news of her grandmother's fate, and the 17 petitions filed with the authorities have all proved fruitless. The Committee notes that the State party has not furnished adequate explanations concerning the author's allegations that she has had no news of her grandmother. It considers that when a person is arrested by the authorities, if there is subsequently no news on their fate and no investigation is carried out, this omission on the part of the authorities amounts to removing the disappeared person from the protection of the law. The Committee concludes that the facts before it in the present communication disclose a violation of article 16 of the Covenant with regard to Ms. Daouia Benaziza.

9.9 The author invokes article 2, paragraph 3, of the Covenant, which confers on States parties the obligation to ensure that all persons have accessible, effective and enforceable remedies in order to exercise these rights. 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, 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.²³ In the present case, the information before the Committee indicates that the author did not have access to an effective remedy. The Committee therefore concludes that the facts before it disclose a violation of the rights of the author's grandmother under article 2, paragraph 3, of the Covenant, read in conjunction with article 6, paragraph 1, and articles 7, 9 and 16, and a violation of the rights of the author and her family under article 2, paragraph 3, of the Covenant, read in conjunction with article 7.

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 facts before it disclose a violation of the rights of the author's grandmother under articles 7, 9 and 16, and article 2, paragraph 3, of the Covenant, read in conjunction with article 6, paragraph 1, and articles 7, 9 and 16, and a violation of the rights of the author, her father and her uncles under article 7 and article 2, paragraph 3, of the Covenant, read in conjunction with article 7.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, in particular by conducting a thorough and diligent investigation into her grandmother's disappearance, duly informing her of the outcome of the investigation and paying appropriate compensation to the author, her father and her uncles. The Committee considers the State party duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and acts of torture, but also to prosecute, try and punish the culprits.²⁴ The State party is also under an obligation to prevent similar violations in the future.

²² *Grioua v. Algeria* (note 8 above), para. 7.8; and communication No. 1495/2006, *Zohra Madoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

²³ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (vol. I)), annex III, para. 15.

²⁴ *Boucherf v. Algeria* (note 8 above), para. 11; *Medjnoune v. Algeria* (note 17 above), para. 10; and *Madoui v. Algeria* (note 22 above), para. 9.

12. 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 whenever a violation has been established. The Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

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

Appendix

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

1. I have generally concurred with the Committee's decision on the case of *Benaziza v. Algeria* (communication No. 1588/2007), but regret to say that I must dissent from some of its views and conclusions regarding certain points relating to admissibility and to its treatment and assessment of possible violations of the International Covenant on Civil and Political Rights. In what follows I will expound the reasons that have led me to issue this partially dissenting opinion.

I. The “victim” status of the family of Ms. Daouia Benaziza under the Optional Protocol and the accreditation of counsel

2. The Committee, correctly in my opinion, has stated that there has been a violation of the rights established in article 7 and in article 2, paragraph 3, read in conjunction with article 7, not only of the author of the communication, but also of her father and her uncles, who are the granddaughter and sons, respectively, of Ms. Daouia Benaziza, the victim of an enforced disappearance. According to the Committee's consistent and settled jurisprudence, the enforced disappearance of a person in itself constitutes a violation of the rights of that person's immediate family.^a The concept of family that is used in applying an international human rights instrument need not necessarily coincide with the definitions used in national legal systems, as this would result in different standards being applied according to the nature of domestic legislation. The notion of family in international human rights cases refers to the presence of an actual “emotional bond” between the victim of the enforced disappearance and the persons with whom the victim lived or family members with whom the victim had close emotional ties.

3. According to the Optional Protocol and the Committee's interpretation of the Protocol, those submitting an individual communication must do so as the victim of a violation or in representation of the victim. Article 2 of the Protocol must be analysed in the light of the object and purpose of the Protocol and of the International Covenant on Civil and Political Rights itself with a view to ensuring the “useful effect” of these instruments. The system for the submission of individual communications to the Human Rights Committee precludes, of course, the possibility of a class action; it is also clear that the system aims to render inadmissible any petitions presented on behalf of persons who do not wish the matter to be submitted to international jurisdiction and have consequently not given their authorization for this to be done.

4. It should not be presumed that this is the situation, however, when the person submitting the communication is a direct relative, as in this case, in which the author is acting on behalf of her father and uncles in response to the enforced disappearance of their mother, her grandmother. The evidence submitted by the author and subsequently highlighted in the Committee's decision includes descriptions of various actions taken by

^a Communications No. 107/1981, *Almeida de Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14; No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.5; No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.8; and No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.7.

the Benaziza family in their desperate search for news of Ms. Daouia Benaziza. In fact, her sons presented themselves before the prosecutor of the military court in the fifth military region of Constantine, whereupon one of them even offered to take his mother's place in captivity. I fail to understand how the Committee could deny these family members the status of victims merely because of the absence of a power of attorney or similar written document authorizing the case to be pursued at the international level.

5. Fortunately, on this point, the Committee did not assume such a position, which, for the sake of fulfilling mere formalities and with a total disregard for the circumstances surrounding the case, would have ignored or run counter to the object and purpose of the Covenant and its Protocol. As long as the adversarial principle is respected, and each party thus has the possibility of responding fully to the arguments adduced by the other, and provided that the respondent State has access to a proper defence, the Committee cannot and should not undermine the administration of justice or the fulfilment of the Covenant's purposes. In the *Benaziza* case, the respondent State has never questioned the author's right to present her father and uncles as victims, and, under those circumstances, all that remains for the Committee to do is to verify whether they do indeed have the status of victims, in other words, whether in their case one or more of the rights contained in the Covenant has been violated.

6. The situation would be different if the complaint were being filed by someone outside the family or, in this case, if there were insufficient evidence to claim that the family was genuinely concerned and truly suffered because of Ms. Daouia Benaziza's disappearance. An international body may exercise flexibility in its assessment of the evidence. Moreover, its workings should not resemble the handling of cases in national courts, where the administration of formal justice often ends up at cross-purposes with material justice.

II. The capacity of the Committee to establish violations under articles not referred to in the petition

7. As I have maintained ever since I joined the Committee,^b the Committee should not, in the absence of a specific allegation by the author of a communication that one or more articles have been violated, restrict its own capacity to find other possible violations of the Covenant that are supported by the established facts. Under the Committee's rules of procedure,^c a respondent State can submit statements relating to both the admissibility and the merits of the complaint set forth in the communication; since the adversarial principle is fully respected in the procedure established by the first Optional Protocol for dealing with individual communications, neither party's right of defence is breached.

8. The principle of *iura novit curia*, which is universally and uncontroversially followed in international jurisprudence in general^d and especially in human rights law,^e gives the Human Rights Committee scope to look beyond the legal claims made in a complaint when the facts disclosed and established in adversarial proceedings clearly reveal

^b See *Weerawansa v. Sri Lanka*, communication No. 1406/2005, partially dissenting opinion of Mr. Fabián Salvioli.

^c Rule 91.

^d Permanent Court of International Justice, *The Case of the S.S. "Lotus"*, Judgment No. 9, *PCIJ*, Series A, 1927, No. 10, p. 31.

^e European Court of Human Rights, *Handyside v. United Kingdom*, Judgement of 7 December 1976, Series A, No. 24, para. 41; Inter-American Court of Human Rights, *Godínez-Cruz v. Honduras*; Series C N, para. 172; Judgement of 20 January 1989.

the violation of a provision not cited by the complainant. Should this be the case, the Committee must set the proper legal frame of reference for the violation.

9. Likewise, to ensure that all the purposes of the Covenant are achieved, the Committee's protective powers authorize it to rule that a State party found to be at fault must put a stop to all the effects of the violation, effectively guarantee that such a thing will not recur, and make reparation for the damage caused in the particular case concerned.

10. It is in this sense that I dissent, without prejudice to the actual decision itself, from section 8.4 of the decision in this case. I do so because it should specifically state that the complaint raises issues related to article 6 of the Covenant. I do not see how an enforced disappearance such as the one reported in this case, which occurred in 1996, could fail to raise issues related to the right to life when no news has been received of the victim since her arbitrary detention 14 years ago.

11. Over the years, the Committee's actions have been contradictory in this regard, and this inconsistency is particularly apparent in the present case. On the one hand, the Committee has omitted any reference to a possible violation of article 6 of the Covenant because this violation was not alleged by the author. On the other, it concludes that there was a violation of the rights of Ms. Daouia Benaziza under article 2, paragraph 3, of the Covenant, read in conjunction with article 6, paragraph 1, and articles 7, 9 and 16, and a violation of the rights of the author and her family under article 2, paragraph 3, of the Covenant, read in conjunction with article 7 (para. 9.9).

12. The author did not allege many of these "related violations", which were identified by the Committee, of article 2, paragraph 3; instead, the author alleged an autonomous violation of the provisions set forth in that paragraph. Up to what point, then, does the Committee have the power to "reinterpret" the legal arguments of the parties?

13. Another issue which must be clarified as regards the Committee's deliberations is its varying interpretation of its capacity to apply the Covenant as law in the absence of a legal argument, according to whether the author of a communication is represented by counsel or not. All petitions should receive the same treatment from the Committee, and it is not up to the Committee to speculate about the extent of the legal knowledge possessed by those who appear before it. If the facts disclosed constitute clear evidence of torture, for example, and this is proven to be the case in the proceedings even though it was not legally argued by the petitioner, then, regardless of whether the petitioner is represented by counsel or not, the Committee ought to take the matter up under article 7. This does not breach the State party's right of defence: the State party can respond to the statements made and the evidence presented and make its observations about the legal argument; it is the Committee that has the non-transferable power to apply the law and, specifically, the Covenant.

14. Legal assistance in international human rights cases can take many different forms, depending on the situation and the actual international expertise available. It is not for the Committee to speculate about this matter; each petition should be treated the same, regardless of whether the author has legal assistance or not. What the Committee cannot disregard is the evidence submitted by the author of a communication. At the same time it must give due consideration to the State party's response to that same evidence. The non-transferable duty of the Committee is to decide whether the facts of the case have been proven and, if so, whether they represent one or more violations of the Covenant.

15. As long as the Committee fails to use this approach, it will continue to act inconsistently: at times analysing rights violations that have not been presented, as has occurred recently; at times, as in this case, inexplicably limiting its powers merely because legal arguments have not been advanced, even though all the facts clearly point to possible violations of article 6 of the Covenant.

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

16. Having established that the Committee has the power to set the legal frame of reference for the matter before it, regardless of the legal claims made by the parties, I maintain that in the *Benaziza* case the Committee should have concluded that the State party was responsible for violating the rights of Ms. Daouia Benaziza under article 6 of the Covenant.

17. The Committee's general comment No. 6 (1982) on the right to life states that States parties should take specific and effective measures to prevent the disappearance of individuals and should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.^f These specific measures ought to consist not only of the application of effective legal remedies in response to arbitrary detentions, but also, in the light of the duty to guarantee the right to life, of the prevention of any action by State agents that could result in enforced disappearances.

18. In this case, the author claims that her grandmother was arrested by State security officers, some of whom were in uniform, on 2 June 1996; that she has not received any news of her grandmother's fate; and that none of the 17 petitions presented to the authorities has produced results. Given that the State party has not provided satisfactory explanations regarding the allegations made by the author, who asserts that she has still not received any news of her grandmother, the Committee should have found that the facts before it disclosed a violation of paragraph 1 of article 6, inasmuch as the State party failed to meet its obligation to guarantee the right to life of Ms. Daouia Benaziza.

19. The duty to guarantee the rights established in the Covenant is referred to in three ways: firstly, article 2, paragraph 1, establishes the duty to guarantee the rights of all persons without distinction of any kind, thus embodying (obviously) the principle of non-discrimination in the enjoyment of rights; secondly, article 2, paragraph 3, refers to the effective remedy to which all persons are entitled when any of the rights enshrined in the Covenant are violated; and thirdly, there is the duty to guarantee each right in itself.

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

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

22. Consequently, in the case at hand, article 6, paragraph 1, was violated because the State party did not guarantee the right to life of Ms. Daouia Benaziza; in no way does this necessarily imply that the victim has died, as there is no evidence of this in the file. The State party must restore the right and, consequently, take the necessary steps to ensure that

^f *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, para. 4.*

the victim is released alive. In the meantime, the family must be allowed to file the pertinent civil action suits, including those regarding succession- and assets-related matters arising from the enforced disappearance of Ms. Daouia Benaziza rather than from her presumed death.

23. In the course of its decisions, in several cases of enforced disappearance the Committee has found that the victims' rights under article 6 of the Covenant had been violated,^g even though it was not entirely clear what had happened to them. Regrettably, however, in other cases, including the case of Ms. Benaziza, the Committee has not followed this line of reasoning.^h The development of human rights law is progressive by nature, and this logically obliges the international bodies responsible for applying that law not to make legal interpretations that are regressive in relation to established standards of protection. It is to be hoped that the Committee will return to the use of more guarantee-oriented criteria in applying interpretations of the Covenant that are in accordance with its object and purpose, both in matters of procedure and in matters of substance. This would help ensure that States parties, in good faith, adopt the measures required to make adequate reparation for violations committed, in fulfilment of the commitments they have assumed as part of the international community.

(Signed) Mr. Fabián Salvioli

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

^g *Bousroual v. Algeria* (note a above); communications No. 449/1991, *Barbarín Mojica v. Dominican Republic*; No. 181/1984, *Arévalo Pérez v. Colombia*; and No. 030/1978, *Bleier v. Uruguay*.

^h Communications No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*; and No. 1469/2006, *Sharma v. Sri Lanka*.