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Human Rights Committee

Communication No. 1781/2008

Views adopted by the Committee at its 103rd session (17 October–4 November 2011)

Submitted by:	Fatma Zohra Berzig (represented by TRIAL – Swiss Association against Impunity)
Alleged victim:	Kamel Djebrouni (the author's son) and the author herself
State party:	Algeria
Date of communication:	8 February 2008 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 24 April 2008 (not issued in document form)
Date of adoption of Views:	31 October 2011
Subject matter:	Enforced disappearance
Substantive issues:	Right to life, prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, recognition as a person before the law and right to an effective remedy
Procedural issues:	Exhaustion of domestic remedies
Articles of the Covenant:	Article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1 to 4; article 10, paragraph 1; and article 16
Articles of the Optional Protocol:	Article 5, paragraph 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 (103rd session)

concerning

Communication No. 1781/2008*

Submitted by:	Fatma Zohra Berzig (represented by TRIAL – Swiss Association against Impunity)
Alleged victim:	Kamel Djebrouni (the author's son) and the author herself
State party:	Algeria
Date of communication:	8 February 2008 (initial submission)

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

Meeting on 31 October 2011,

Having concluded its consideration of communication No. 1781/2008, submitted to the Human Rights Committee by Fatma Zohra Berzig 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, dated 8 February 2008, is Fatma Zohra Berzig, an Algerian citizen born on 2 March 1936. She submits this communication on behalf of her son, Kamel Djebrouni, who was born on 10 July 1963 in Sidi M'hamed, Algiers. The author also submits the communication on her own behalf. The author considers that her son is the victim of violations by Algeria of article 2, paragraph 3; article 6, paragraph 1;

* The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli, Mr. Krister Thelin 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 the present communication.

The texts of two individual opinions, signed by Mr. Michael O'Flaherty, Mr. Krister Thelin, Mr. Fabián Omar Salvioli and Mr. Cornelis Flinterman, are appended to the present Views.

article 7; article 9, paragraphs 1 to 4; article 10, paragraph 1; and article 16 of the Covenant. She also considers herself to be the victim of violations of article 2, paragraph 3, and article 7 of the Covenant. She is represented by TRIAL (Swiss Association against Impunity).[1]

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

The facts as submitted by the author

2.1 On 20 November 1994 at 2 a.m., about 15 armed soldiers in uniform and wearing hoods raided the home of Kamel Djebrouni in Cité Balzac, Sidi M'hamed (Algiers) and arrested him. The soldiers had arrived in army vehicles and a small armoured truck. At first, they went to the wrong door. A neighbour who heard that the soldiers were looking for "Kamel the taxi driver" directed them to the Djebrouni family home. They woke up the author and her three sons, asked Kamel Djebrouni for his papers and car keys and forced him to accompany them. As her son was wearing only a tracksuit and tee-shirt, the author asked the soldiers to allow him time to dress. One of the soldiers replied that he would only be gone for a few minutes and that they would soon release him.

2.2 The victim has never returned home and the authorities have failed to inform his family of his fate. The only news his family has received dates from 23 February 1995, when one of the missing man's former colleagues went to the family's home to inform them that a former detainee, whose name and address he was unwilling to reveal and whom the security forces had released 17 days earlier, claimed to have shared a cell with the victim. However, the Djebrouni family was unable to speak to the fellow detainee directly.

2.3 Immediately after Kamel Djebrouni's arrest, his brother went to the local police station (in the eighth arrondissement). The officers on duty said that they could not give him any information about his brother and advised him to wait until the end of the 12-day custody period established under the anti-terrorist law. Once that period had elapsed, his family approached various courts in Algiers to find out whether Kamel Djebrouni had been brought before a prosecutor.

2.4 On 11 January 1995, the victim's brother provided the National Human Rights Observatory with details of the arrest. The official who received him told him that a request to trace the victim would be sent to the various security forces and that he would be notified in writing of the results of the investigation. The Observatory has never provided the family with any information about the victim, even though his brother followed up his visit with a number of telephone calls and wrote to them more than three years later (14 February 1998).

2.5 On 12 September 1998, gendarmes went to the family home in search of the victim. They asked the author to report the following day to the Bab Edjedid gendarmerie with her family civil-status book and two witnesses to the arrest. The author, her son and two witnesses went to the gendarmerie on 13 September 1998. The gendarmes took the son's statement first, then interviewed the two witnesses separately. They decided to record only the first witness's statement, on the ground that the second witness had seen nothing. The author and the two witnesses challenged that decision and went on, nonetheless, to record their version of events in a signed written statement authenticated by the Daira of Sidi M'hamed on 24 September 1998.

[1] The Covenant and its Optional Protocol entered into force for Algeria on 12 September 1989.

2.6 On 9 June 1999, the National Human Rights Observatory wrote to Kamel Djebrouni's family informing them that efforts to trace him had failed nor was he wanted by the security services or been arrested by them, as indicated in the report forwarded by the gendarmerie on 15 September 1998, just two days after they had interviewed the family and witness. The family was not informed of the investigative measures taken by the security forces and never received a copy of the report referred to in the letter from the National Human Rights Observatory. The author points out that the date of arrest mentioned in the letter sent to the family on 9 June 1999 is wrong. The victim was arrested on 20 November 1994 and not on 2 September 1995, as stated in the letter. On 24 August 1999, the author's son wrote to the Secretary-General of the National Human Rights Observatory drawing his attention to the error.

2.7 On 27 July 2004, the National Advisory Commission on the Promotion and Protection of Human Rights (CNCPPDH), the successor body to the National Human Rights Observatory, wrote to the Djebrouni family requesting them to report for an interview at their head office on 7 August 2004. The family appeared for the hearing and provided the Commission with all the factual elements pertaining to the victim's abduction. The family has not heard from the Commission since.

2.8 Also, having been informed of Kamel Djebrouni's disappearance by his family, Amnesty International submitted his case to the Working Group on Enforced or Involuntary Disappearances on 11 December 1995. The Working Group requested the Algerian State to initiate a search for the victim but the State party has taken no action.

The complaint

3.1 The author considers that her son has been a victim of enforced disappearance[2] in violation of article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1 to 4; article 10, paragraph 1; and article 16 of the Covenant. The author also considers herself to be the victim of a violation of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

3.2 Kamel Djebrouni's arrest by Government officials was followed by a refusal to admit that he had been deprived of liberty or to say what had happened to him. He was therefore deliberately denied the protection of the law. His prolonged absence and the circumstances and context of his arrest suggest that he died in custody. Invoking the Committee's general comment on article 6,[3] the author claims that incommunicado detention poses an unacceptable risk of a violation of the right to life, since victims are at the mercy of their jailers who, by the very nature of the circumstances, are subject to no oversight. Even in the event that disappearance does not lead to the worst, the threat to the person's life at the time constitutes a violation of article 6, insofar as the State has failed in its duty to protect the fundamental right to life.[4] The author adds that the State party's failure to comply with its obligation to guarantee Kamel Djebrouni's right to life was compounded by the fact that no effort was made to conduct an investigation into the victim's fate. The author therefore considers that the State party has violated article 6, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

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

[3] The author refers to general comment No. 6 of 27 July 1982, para. 4.

[4] The author refers to communication No. 84/1981, *Dermit Barbato v. Uruguay*, Views adopted on 21 October 1982, para. 10.

3.3 With reference to the Committee's jurisprudence, the author maintains that the mere fact of subjection to enforced disappearance constitutes inhuman or degrading treatment. Consequently, the anguish and suffering caused by the alleged victim's indefinite detention and complete lack of contact with his family and the outside world amount to treatment which is contrary to article 7 of the Covenant with respect to Kamel Djebrouni.[5] The author of the communication also considers that her son's disappearance constituted and continues to constitute for herself and the rest of her family a paralysing, painful and distressing experience given that they know nothing of his fate or, if he is in fact dead, of the circumstances of his death and where he is buried. In view of the Committee's jurisprudence on the issue,[6] the author concludes that the State party has also violated her rights under article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

3.4 The author notes that the authorities approached by the Djebrouni family failed to admit to holding the victim; that the State party explicitly denied, through the National Human Rights Observatory, that Kamel Djebrouni had been arrested by soldiers; that the Algerian authorities have still not admitted to arresting and illegally detaining him even though the arrest took place in the presence of witnesses. All of these facts reveal a violation of article 9, paragraphs 1 to 4, of the Covenant. With regard to article 9, paragraph 1, the author recalls that Kamel Djebrouni was arrested without a warrant and without being informed of the reasons for his arrest. No member of his family has seen him or been able to communicate with him since his abduction. It appears from the circumstances of Kamel Djebrouni's arrest that he was at no point informed of the criminal charges against him, in violation of article 9, paragraph 2, of the Covenant. Moreover, Kamel Djebrouni was not brought before a judge or other judicial authority such as the public prosecutor of the Court of Algiers, the town where he was arrested, which court has jurisdiction in the case, neither once the lawful period of police custody had started nor at its end. Recalling that incommunicado detention may constitute per se a violation of article 9, paragraph 3, the author concludes that this provision was violated in Kamel Djebrouni's case. In conclusion, as Kamel Djebrouni has been denied the protection of the law during the entire period of his indefinite detention, he has never been able to institute proceedings to contest the lawfulness of his detention or seek his release through the courts, in violation of article 9, paragraph 4, of the Covenant.

3.5 The author also maintains that, given his incommunicado detention in violation of article 7 of the Covenant, her son was not treated with humanity and with respect for the inherent dignity of the human person. Thus, she claims that her son was the victim of a violation by the State party of article 10, paragraph 1, of the Covenant.

3.6 The author also claims that, as a victim of enforced disappearance, Kamel Djebrouni was denied the protection of the law, in violation of article 16 of the Covenant. The author refers in this connection to the Committee's position established in its jurisprudence on enforced disappearances.

3.7 The author furthermore maintains that, since all the steps she took to discover her son's fate were fruitless, the State party did not fulfil its obligation to guarantee Kamel

[5] The author refers to the jurisprudence of the Committee, in particular communication No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.8; and communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.5.

[6] In addition to the above-mentioned jurisprudence, the author refers in particular to communication No.1044/2002, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 8.7; communication No. 959/2000, *Bazarov v. Uzbekistan*, Views adopted on 14 July 2006, para. 8.5; communication No. 1159/2003, *Sankara et al. v. Burkina Faso*, Views adopted on 28 March 2006, para. 12.2.

Djebrouni an effective remedy, since it should have conducted an in-depth and diligent investigation into his disappearance. The absence of an effective remedy is compounded by the fact that a total and general amnesty was declared following the promulgation on 27 February 2006 of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation, which prohibits, on pain of imprisonment, the pursuit of legal remedies to shed light on the most serious crimes such as enforced disappearances, guaranteeing impunity to the individuals responsible for violations. This amnesty law is in breach of the State's obligation to investigate serious violations of human rights and of the right of victims to an effective remedy. The author claims a violation of article 2, paragraph 3, of the Covenant with regard to herself and her son.

3.8 As to the exhaustion of domestic remedies, the author stresses that all her efforts and those of her family have been to no avail. By failing to initiate a prompt, serious and impartial investigation, the police officers of the eighth arrondissement were responsible for a failure not only to comply with the State party's international commitments, but also to enforce its domestic legislation, in that article 63 of the Algerian Code of Criminal Procedure states that "when an offence is brought to their attention, the judicial police, acting either on the instructions of the State prosecutor or on their own initiative, shall undertake preliminary inquiries".[7] Apart from approaches to the National Human Rights Observatory, later the National Advisory Commission on the Promotion and Protection of Human Rights, the only investigation undertaken to date is the one the gendarmerie claims to have conducted. However, that investigation was superficial and inadequate, the final report of the investigation having been sent to the Observatory just two days after the family and the only witness interviewed made their statements, although the hearing process generally marks the start of an investigation. The authorities even denied that State agencies were involved in Kamel Djebrouni's disappearance, even though the victim's entire family and some neighbours witnessed his abduction.

3.9 In the alternative, the author maintains that she no longer has the legal right to take judicial proceedings since the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation.[8] Not only did all the remedies attempted by the author prove ineffective, they are now also totally unavailable. The author therefore maintains that she is no longer obliged to keep pursuing her efforts at the domestic level, which would expose her to criminal prosecution, to ensure that her communication is admissible before the Committee.

State party's observations on admissibility

4.1 On 3 March 2009, the State party contested the admissibility of the communication and of 10 other communications submitted to the Human Rights Committee. It did so in a

[7] Ordinance No. 66-155 of 8 June 1966 implementing the Code of Criminal Procedure, as amended and supplemented.

[8] The author notes that the Charter rejects "all allegations holding the State responsible for deliberate disappearances". Furthermore, article 45 of the Ordinance, promulgated on 27 February 2006, provides that "legal proceedings may not be 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 People's Democratic Republic of Algeria. Any allegation or complaint shall be declared inadmissible by the competent judicial authority". Article 46 provides that "anyone who, through his or her spoken or written statements or any other act, uses or makes use of the wounds caused by the national tragedy to undermine the institutions of the People's Democratic Republic of Algeria weaken the State, impugn the honour of its agents who served it with dignity or tarnish the image of Algeria abroad shall be liable to a term of imprisonment of 3 to 5 years or a fine of 250,000 to 500,000 Algerian dinars".

"background memorandum on the inadmissibility of communications submitted to the Human Rights Committee in connection with the implementation of the Charter for Peace and National Reconciliation". The State party is of the view that communications incriminating public officials, or persons acting on behalf of public authorities, in enforced disappearances during the period in question — from 1993 to 1998 — should be considered in the context of the socio-political and security conditions that prevailed in the country during a period when the Government was struggling to combat terrorism.

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

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

4.4 The State party further argues that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities involving the political or administrative authorities, non-contentious remedies pursued through advisory or mediation bodies, and contentious remedies pursued through the relevant courts of justice. The State party observes that, as may be seen from the authors' statements,[9] the

[9] As the State party has provided a common reply to 11 different communications, it refers to 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 cassation. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to an investigating judge. In the Algerian legal system, it is the public prosecutor who receives complaints and who institutes criminal proceedings if these are warranted. Nevertheless, in order to protect the rights of victims and their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint with the investigating judge. In that case, it is the victim, not the prosecutor, who institutes criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not used, despite the fact that 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 for Peace and National Reconciliation and its implementing legislation — in particular, article 45 of Ordinance No. 06-01 — makes it impossible to consider that any effective and available domestic remedies exist in Algeria to which the families of victims of disappearance could have recourse. On this basis, the authors believed they were under no obligation to bring the matter before the 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 that person from the requirement to exhaust all domestic remedies.[10]

4.6 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It stresses that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, and its 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 victims of the "national tragedy". Finally, 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 Algeria's defence

"authors". This reference thus also includes the author of the present communication.

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

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

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

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

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

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

5.3 Recalling the Committee's jurisprudence regarding the obligation to exhaust domestic remedies, the State party stresses that mere doubts about the prospect of success or worries about delays do not exempt the authors from the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation has made it impossible to avail oneself of any remedy in this area, the State party replies that the failure of the authors to take any steps to submit their

allegations for examination has so far prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter. Moreover, under the ordinance in question, the only proceedings that are inadmissible are those brought against "members of any branch of the defence and security forces of the Republic" for actions consistent with their core duties to the Republic, namely, to protect persons and property, safeguard the nation and preserve its institutions. On the other hand, any allegations concerning actions attributable to the defence or security forces that can be proved to have taken place in any other context are subject to investigation by the appropriate courts.

Author's comments on the State party's submission

6.1 On 13 May 2011, the author submitted comments on the State party's observations on admissibility and provided additional arguments on the merits.

6.2 The author 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 the communication. Referring to article 27 of the Vienna Convention, 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 prohibit individuals subject to its jurisdiction from using the procedure provided for under the Optional Protocol.[11] In theory, such measures may well have an impact on the settlement of a dispute, but they must be studied with regard to the merits of the case and not to its admissibility. In the instant case, the legislative measures adopted amount to a violation of the rights enshrined in the Covenant, as the Committee has previously observed.[12]

6.3 The author recalls that Algeria's declaration of the state of emergency on 9 February 1992 does not affect people's right to submit individual communications to the Committee. Article 4 of the Covenant allows for derogations from certain provisions of the Covenant during states of emergency, but does not affect the exercise of rights under the Optional Protocol. The author therefore considers that the State party's observations on the appropriateness of the communication do not constitute a ground for inadmissibility.

6.4 The author again refers to the State party's argument that the requirement to exhaust domestic remedies calls on the author to institute criminal proceedings by filing a complaint with the investigating judge, in accordance with articles 72 et seq. (paras. 25 ff) of the Code of Criminal Procedure. She refers to the Committee's recent jurisprudence in the Daouia Benaziza case, in which it stated in its Views adopted on 27 July 2010 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

[11] Article 27 of the Vienna Convention on the Law of Treaties states that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46".

[12] The author refers to the concluding observations of the Human Rights Committee, Algeria, CCPR/C/DZA/CO/3, 12 December 2007, paras. 7, 8 and 13. The author also refers to communication No. 1588/2007, *Daouia Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 9.2; and communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11. The author further refers to the concluding observations of the Committee against Torture, Algeria, CAT/C/DZA/CO/3, 26 May 2008, paras. 11, 13 and 17. Lastly, she refers to general comment No. 29 on derogations during a state of emergency, para. 1.

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".[13] 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 was taken despite several attempts by Kamel Djebrouni's family to alert the authorities to his disappearance. All their efforts were in vain.

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 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 of the Republic. Any person making such a complaint or allegation is liable to a term of imprisonment of 3 to 5 years or a fine of 250,000 to 500,000 Algerian dinars. The State party has therefore not convincingly demonstrated how suing for damages would have enabled the competent courts to receive and investigate complaints as that would involve violating article 45 of the Ordinance, or how the author of a complaint could have been 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 be not only declared inadmissible but also treated as a criminal offence. The author notes that the State party fails to provide an example of any case which, despite the existence of the above-mentioned Ordinance, has led to the effective prosecution of the perpetrators of human rights violations in a similar case. The author concludes that the remedies mentioned by the State party are futile.

6.6 With respect to the merits of the communication, the author notes that the State party has simply listed the general scenarios in which the victims of the "national tragedy" might have disappeared. Such general observations do not dispute the allegations made in the present communication. Furthermore, the comments are listed in the same way as in a number of other cases, thus demonstrating the State party's continuing unwillingness to consider such cases individually.

6.7 With regard to the State party's argument that it is entitled to ask for the admissibility of the communication to be considered separately from the merits, the author refers to rule 97, paragraph 2, of the rules of procedure which states that the "working group or special rapporteur may, because of the exceptional nature of the 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 make such assessments; that is 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.

6.8 Lastly, the author notes that the State party has not countered her allegations. These are corroborated and substantiated by numerous reports on the security forces' actions at the time and her own persistent efforts. In view of the State party's involvement in her son's disappearance, the author is unable to provide additional information in support of her communication, as that information is solely in the hands of the State party.

[13] Communication No. 1588/2007, *Daouia Benaziza v. Algeria*, para. 8.3.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 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.

7.2 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 Kamel Djebrouni was reported to the Working Group on Enforced or Involuntary Disappearances. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, and whose mandates are to examine and report publicly on human rights situations in specific countries or territories, or cases of widespread human rights violations worldwide, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.[14] Accordingly, the Committee considers that the examination of Kamel Djebrouni's case by the Working Group on Enforced or Involuntary Disappearances does not render it inadmissible under this provision.

7.3 The Committee notes that, in the State party's view, the author has not exhausted domestic remedies, since she did not consider the possibility of bringing the matter before 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'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 for Peace and National Reconciliation. The Committee takes note of the author's argument that the day after Kamel Djebrouni disappeared his brother visited the police station in the eighth arrondissement of Algiers (Sid M'hamed) to enquire about his whereabouts; that his family subsequently approached various courts in Algiers to discover whether he had been brought before a prosecutor; and that there had been no thorough investigation of the statements given to officers from the Bab Edjedid gendarmerie by the author, her son and two witnesses on 13 September 1998. The Committee notes that, according to the author, article 63 of the Code of Criminal Procedure states that "when an offence is brought to their attention, the judicial police, acting either on the instructions of the State prosecutor or on their own initiative, shall undertake preliminary inquiries". The Committee notes the author's argument that, given the serious nature of the alleged offences, it was the responsibility of the competent authorities to take up the case, which they failed to do. It also notes that, according to the author, anyone filing a complaint of actions that fall within the scope of article 46 of Ordinance 06-01 shall be punished.

7.4 The Committee 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. The victim's family repeatedly contacted the competent authorities concerning Kamel Djebrouni's disappearance, but all their efforts were to no avail. The State party failed to conduct a thorough and effective investigation into the disappearance of the author's son, despite serious allegations of enforced disappearance. The State party has also failed to provide sufficient information indicating that an effective

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

and available remedy is available de facto, while Ordinance 06-01 of 27 February 2006 continues to be applied, notwithstanding the Committee's recommendations that it should be brought into line with the Covenant.[15] Reiterating its previous jurisprudence, the Committee considers that 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.[16] Moreover, given the vague wording of articles 45 and 46 of the Ordinance and, in the absence of satisfactory information from the State party about their interpretation and actual enforcement, the author's fears of the consequences of filing a complaint are reasonable. The Committee concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the communication.

7.5 The Committee finds that the author has sufficiently substantiated her allegations insofar as they raise issues under articles 6, paragraph 1; article 7; article 9, paragraphs 1–4; article 10; article 16; and article 2, paragraph 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 written information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.2 As the Committee has emphasized in previous communications in which the State party provided general and collective comments on the serious allegations made by the authors of such complaints, it is clear that 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. The Committee wishes to recall its concluding observations concerning Algeria of 1 November 2007,[17] as well as its jurisprudence,[18] according to which 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. 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.

8.3 The Committee notes that the State party has not replied to the author's claims concerning the merits of the case and recalls its jurisprudence,[19] according to which the burden of proof should not be solely on the author of a communication, especially given that the author and the State party do not always have the same degree of access to evidence and that often only the State party has the necessary information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with the information available to it.[20] In the absence of any

[15] Concluding observations of the Human Rights Committee, Algeria, CCPR/C/DZA/CO/3, 12 December 2007, paras. 7, 8 and 13.

[16] Communication No. 1588/2007, *Daouia Benaziza v. Algeria*, para. 8.3.

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

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

[19] See, inter alia, communication No. 1640/2007, *El Abani v. Libya*, Views adopted on 26 July 2010, para. 7.4.

[20] See communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

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 disappeared following his arrest on 20 November 1994 and that the authorities have always denied detaining him even though there were witnesses to his arrest. It notes that, according to the author, the chances of finding Kamel Djebrouni alive are shrinking by the day and his prolonged absence suggests that he died while in custody; that incommunicado detention creates an unacceptable risk of violation of the right to life, since victims are at the mercy of their jailers who, by the very nature of the circumstances, are subject to no oversight. The Committee notes that the State party has produced no evidence refuting the author's allegation. The Committee concludes that the State party has failed in its duty to guarantee Kamel Djebrouni's right to life, in violation of article 6 of the Covenant.[21]

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 on article 7, which recommends that States parties should make provision against incommunicado detention. It notes in the instant case that Kamel Djebrouni was arrested on 20 November 1994 and that his fate is still unknown. In the absence of a satisfactory explanation from the State party, the Committee considers that this disappearance constitutes a violation of article 7 of the Covenant with regard to Kamel Djebrouni.[22]

8.6 The Committee also takes note of the anguish and distress caused to the author by the disappearance of Kamel Djebrouni. It considers that the facts before it disclose a violation of article 7 of the Covenant with regard to her.[23]

8.7 With regard to the alleged violation of article 9, the information before the Committee indicates that Kamel Djebrouni was arrested without a warrant and without being informed of the reasons for his arrest; that he was at no point informed of the criminal charges against him; that he was not brought before a judge or other judicial authority to challenge the legality of his detention, which remains indefinite. In the absence of satisfactory explanations from the State party, the Committee finds a violation of article 9 with regard to Kamel Djebrouni.[24]

8.8 Regarding the complaint 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 his incommunicado detention and in the absence of information provided by the State party in that regard, the Committee finds a violation of article 10, paragraph 1, of the Covenant.[25]

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[21] Communication No. 992/2001, *Bousroual Saker v. Algeria*, Views adopted on 30 March 2006, para. 9.11; communication No. 449/1991 *Barbarin Mojica v. Dominican Republic*, Views adopted on 15 July 1994, para. 5.6; and communication No. 181/1984, *Elcida Arévalo Pérez v. Colombia*, Views adopted on 3 November 1989, para. 11.

[22] See communications Nos. 1295/2004, *El Awani v. Libya*, Views adopted on 11 July 2007, para. 6.5; 1422/2005, *El Hassy v. Libya*, note 16, para. 6.2; 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 8.5; and 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.4.

[23] See communications Nos. 1640/2007, *El Abani v. Libya*, para. 7.5; 1422/2005, *El Hassy v. Libya*, note 16, para. 6.11; 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14; and 950/2000, *Sarma v. Sri Lanka*, para. 9.5.

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

[25] See general comment No. 21 [44] on art. 10, para. 3; communication No. 1780/2008, *Mériem Zarzi v. Algeria*, Views adopted on 22 March 2011, para. 7.8; and communication No. 1134/2002, *Gorji-*

8.9 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 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.[26] In the instant case, 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 son. The Committee concludes that the enforced disappearance of Kamel Djebrouni, which has lasted almost 17 years, has denied him the protection of the law and 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 an effective remedy for all persons whose Covenant rights have been allegedly violated. 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. In the instant case, the victim's family repeatedly contacted the competent authorities regarding Kamel Djebrouni's disappearance, but all their efforts were in vain and the State party failed to conduct a thorough and effective investigation into the disappearance of the author's son. Furthermore, the absence of the legal right to take judicial proceedings since the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation continues to deprive Kamel Djebrouni and the author of access to an effective remedy, since the Ordinance prohibits, on pain of imprisonment, the pursuit of legal remedies to shed light on the most serious crimes such as enforced disappearances.[27] The Committee concludes that the facts before it reveal a violation of article 2, paragraph 3, read in conjunction with article 6, paragraph 1; article 7; article 9; and article 16 of the Covenant with regard to Kamel Djebrouni; and article 2, paragraph 3, read in conjunction with article 7 of the Covenant, with regard to the author.

9. 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 information before it discloses violations by the State party of article 6, paragraph 1; article 7; article 9; article 10, paragraph 1; article 16; and article 2, paragraph 3, read in conjunction with article 6, paragraph 1; article 7; article 9; article 10, paragraph 1, and article 16 of the Covenant with regard to Kamel Djebrouni, and of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant 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 with an effective remedy, including by (a) conducting a thorough and effective investigation into the disappearance of Kamel Djebrouni; (b) providing the author with detailed information about the results of the investigation; (c) freeing him immediately if he is still being detained incommunicado; (d) if he is dead, handing over his remains to his family; (e) prosecuting, trying and punishing those

Dinka v. Cameroon, Views adopted on 17 March 2005, para. 5.2.

[26] Communication No. 1780/2008, *Mériem Zarzi v. Algeria*, para. 7.9; communication No. 1588/2007, *Daouia Benaziza v. Algeria*, para. 9.8; communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.8; and communication No. 1495/2006, *Zohra Madoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

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

responsible for the violations committed; and (f) providing adequate compensation for the author for the violations suffered and for Kamel Djebrouni if he is alive. Notwithstanding Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for the victims of crimes such as torture, extrajudicial killings and enforced disappearance. 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 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 present Views.

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

Appendix

Individual opinion of Committee member Mr. Krister Thelin, joined by Committee member Mr. Michael O'Flaherty (dissenting)

The Committee has found a direct violation of article 6 of the Covenant, in concluding that the State party has failed in its duty to guarantee the right to life of Kamel Djebrouni and Mourad Chihoub. I disagree with this finding for the following reasons.

The Committee's long established jurisprudence in cases of enforced disappearances, where the facts do not lend themselves to an interpretation of the victim's actual death, has put the emphasis on the State Party's duty to protect and ensure effective and enforceable remedies under article 2, paragraph 3 and thus invoke art. 6, paragraph 1 only to be read in conjunction with this article. The Committee has recently confirmed this approach in two cases of enforced disappearances against the same State Party and within a similar factual frame.[a]

However, in the case before us, the Committee has without any discussion, including any reference to how the case has been argued,[b] made a finding in line with what has hitherto been advanced only by a minority, i.e. of a direct violation of art 6, paragraph 1 without any connection to art 2, paragraph 3.

This extensive interpretation of the right to life under the Covenant sets, in my view, the Committee on an uncharted course, where direct violations of art 6, notwithstanding that the victim is presumed to be alive, in the future could be found in various settings also outside the scope of enforced disappearances. De minimis, the majority should have offered reasons for its new application of art 6 violations.

(*Signed*) Krister **Thelin**

(*Signed*) Michael **O'Flaherty**

[Done in English, French and Spanish, the English 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.]

[a] Views 26 July 2010, *Benaziza v. Algeria* (No. 1588/2007) and 22 March, 2011, *Aouabdia v. Algeria* (No. 1780/2008), and, in particular, dissenting opinions in both by Committee member Mr. Fabián Salvioli.

[b] See para. 7.11 of communication No. 1780/2008.

Individual opinion of Committee member Mr. Fabián Salvioli, joined by Mr. Cornelis Flinterman (concurring)

1. I fully agree with the decision of the Human Rights Committee in the case *Djebrouni v. Algeria*, communication No. 1781/2008, concerning the finding of violations of human rights, whose victims were Kamel Djebrouni and his mother Fatma Berzig, deriving from the former's enforced disappearance.

2. However, for the reasons set out below, I consider that the Committee should also have concluded that the State party has committed a violation of article 2.2 of the International Covenant on Civil and Political Rights. Finally, the Committee should indicate that in its view, the State of Algeria must, as a guarantee of non-recurrence, rescind Ordinance No. 06-01.

(a) Competence of the Committee to find violations of articles not referred to in the complaint

3. Since I became a member of the Committee, I have maintained that it has of its own volition and incomprehensibly limited its competence to determine a violation of the Covenant in the absence of a specific legal claim. Provided the facts clearly demonstrate such a violation, the Committee can and must — in accordance with the principle of *iura novit curiae* ("the court knows the law") — examine the legal framework of the case. The legal basis and explanation of why this does not mean that States will be left without a defence may be found in paragraphs 3 to 5 of my partially dissenting opinion in the case of *Weerawansa v. Sri Lanka* to which I refer to avoid repeating them.[a]

4. It should in any case be pointed out, that in this case, *Djebrouni v. Algeria*, the author expressly claims that there has been a violation of article 2 (see, for example, paragraphs 1.1 and 3.1) although she refers to paragraph 3 thereof.

(b) The violation of article 2.2 of the Covenant

5. The international responsibility of the State may be engaged, inter alia, by an act or omission on the part of any of its branches, including, of course, the legislative branch or any other branch with legislative powers by virtue of the Constitution. Article 2.2 of the Covenant specifies: "*Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*" Although the obligation laid down in article 2.2 is of a general nature, failure to fulfil it may engage the international responsibility of the State.

6. The provision in question is of a self-executing nature. The Committee, quite rightly, has indicated in its general comment No. 31 that: "*The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level — national, regional or local — are in a position to engage the responsibility of the State Party.*"[b]

[a] *Anura Weerawansa v. Sri Lanka*, communication No. 1406/2005; partially dissenting opinion of Mr. Fabián Salvioli.

[b] General comment No. 31. The Nature of the General Legal Obligation Imposed on States Parties to

7. Just as States parties to the Covenant must adopt legislative measures to give effect to rights, they also bear a negative obligation, deriving from article 2.2, not to adopt legislative measures which violate the Covenant; if it does so, the State party commits per se a violation of the obligations laid down in article 2.2.

8. Algeria ratified the International Covenant on Civil and Political Rights on 12 September 1989; it has thus assumed the obligation to comply with the Covenant as a whole and consequently to fulfil the obligations laid down in and deriving from its article 2.2. On that same date, 12 September 1989, Algeria acceded to the Optional Protocol to the Covenant, since when it has recognized the competence of the Committee to consider communications from individuals.

9. In the case at hand, the Committee is fully competent to examine the legal framework of the case before it; on 27 February 2006, the State adopted Ordinance No. 06-01 which prohibits the pursuit of legal remedies to shed light on the most serious crimes such as enforced disappearances, guaranteeing impunity to the individuals responsible for serious human rights violations. Without any doubt, when it adopted that legislation the State introduced a law that is contrary to the obligation laid down in article 2, thereby committing, per se, a violation to which the Committee should refer in its decision, in addition to the violations found, because the author and her son have been the victims — inter alia — of that provision of the law.

10. The Ordinance applies directly to the case; accordingly, the conclusion that there has been a violation of article 2.2 in the Djebrouni case is neither abstract nor merely of academic interest: finally, it should not be overlooked that the violations found have a direct impact on any reparation which the Committee might determine when it decides each individual case.

(c) Reparation in the Djebrouni case

11. Paragraph 10 of the Committee's decision is an excellent illustration of a comprehensive approach to reparation; it orders non-pecuniary measures of restitution and satisfaction and guarantees of non-repetition (a thorough and effective investigation of the facts, freeing of the victim if he is still alive, handing over his remains if he is dead and the prosecution, trial and punishment of those responsible for the violations committed); the Committee's decision also orders pecuniary measures of reparation (adequate compensation for the author for the violations suffered and for Kamel Djebrouni if he is alive).

12. However, at the end of paragraph 10 the Committee states that "*Notwithstanding Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for the victims of crimes such as torture, extrajudicial killings and enforced disappearance. The State party is also under an obligation to take steps to prevent similar violations in the future.*"

13. That paragraph leaves no room for doubt: the Committee considers Ordinance No. 06-01 to be incompatible with the Covenant and for that reason indicates to the State that it must guarantee an effective remedy for the victims "*notwithstanding Ordinance No. 06-01*". Is the Committee thereby stating that the State's judicial branch must disregard that ordinance which makes it impossible to proceed with the investigation of acts concerning serious violations of human rights?

14. The answer to this is yes; the State's judicial branch is required to "*ascertain compatibility with treaties*" and not to apply any domestic norms that are incompatible with

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the Covenant, adopted at the 2187th meeting on 29 March 2004, paragraph 4.

the Covenant. This is essential in order not only to comply with obligations in respect of human rights, but also to avoid engaging the State's international responsibility.

15. However, not only the judicial branch is bound by the Covenant; the other branches of the State must take the steps necessary to guarantee human rights, and article 2.2 refers specifically to "*legislative measures*".

16. How is non-recurrence to be guaranteed? It is possible for the State to adopt a set of measures (human rights training for its officials, in particular police officers and members of the armed forces, adoption of effective protocols on action in response to complaints of enforced disappearance, actions to keep alive the memory of what happened, etc.). Notwithstanding the foregoing, there is no doubt that the Committee should have indicated in paragraph 10 of its views that the State of Algeria must amend the domestic legislation in question (Ordinance No. 06-01, adopted on 27 February 2006) to bring it into line with its obligations under the International Covenant on Civil and Political Rights. To keep in force a law that is per se incompatible with the Covenant is inconsistent with current international standards regarding reparation for cases of human rights violations.

(*Signed*) Fabián **Salvioli**

(*Signed*) Cornelis **Flinterman**

[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.]