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Communication No. 1753/2008

Views adopted by the Committee at its 105th session, 9–27 July 2012

Submitted by:	Yamina Guezout and her two sons, Abderrahim and Bachir Rakik (represented by TRIAL – Swiss Association against Impunity)
Alleged victims:	Kamel Rakik (respectively the son and brother of the authors) and the authors themselves
State party:	Algeria
Date of communication:	22 November 2007 (initial submission)
Document reference:	Special Rapporteur's rule 97 decision, transmitted to the State party on 23 January 2008 (not issued in document form)
Date of adoption of Views:	19 July 2012
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 issue:	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
Article 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 (105th session)

concerning

Communication No. 1753/2008*

Submitted by:	Yamina Guezout and her two sons, Abderrahim and Bachir Rakik (represented by TRIAL – Swiss Association against Impunity)
Alleged victims:	Kamel Rakik (respectively the son and brother of the authors) and the authors themselves
State party:	Algeria
Date of communication:	22 November 2007 (initial submission)

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

Meeting on 19 July 2012,

Having concluded its consideration of communication No. 1753/2008, submitted by Yamina Guezout and her two sons, Abderrahim and Bachir Rakik, 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 authors of the communication and the State party,

Adopts the following:

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

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

The text of an individual (concurring) opinion by Mr. Walter Kälin is attached to these views.

The text of an individual (dissenting) opinion by Mr. Michael O'Flaherty, Mr. Krister Thelin and Mr. Rafael Rivas Posada is attached to these views.

The text of an individual (concurring) opinion by Mr. Fabián Omar Salvioli is attached to these views.

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

1.1 The authors of the communication, dated 22 November 2007, are Yamina Guezout, an Algerian citizen born on 23 September 1936, Abderrahim Rakik, a British citizen, and Bachir Rakik, an Algerian citizen born on 8 December 1959. They have submitted the communication on behalf of Kamel Rakik, son of Yamina Guezout and brother to Abderrahim and Bachir Rakik, born on 23 March 1963 in Hussein-Dey (Algiers). The authors maintain that their son and brother, Kamel Rakik, is the victim of violations by Algeria of article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1, 2, 3 and 4; article 10, paragraph 1; and article 16 of the Covenant. They also consider themselves to be the victims of violations by the State party of article 2, paragraph 3, and article 7 of the Covenant. They are represented by TRIAL (the Swiss Association against Impunity).[1]

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

The facts as submitted by the authors

2.1 On 6 May 1996, at 4.30 p.m., plain-clothes police officers arrived in a number of unmarked vehicles (make: Peugeot J5 and J9) at the home of Kamel Rakik, in Ouled Moussa, a small rural village in the commune of Reghaïa (Boumerdes *wilaya*). First, they surrounded the whole building and told the neighbours to go home. Kamel Rakik was, at that time, at home with his wife and her sister, who had come to visit them. The police burst into the apartment. Kamel Rakik then ran into one of the bedrooms. To force him to come out, the policemen fired shots, used Kamel Rakik's wife as a human shield and threatened to kill the family. They then broke down the door and shot at Kamel Rakik, wounding him in the hands and the abdomen. Kamel Rakik was taken away, as were his wife and sister-in-law, separately, to the Châteauneuf Police Training Centre, also known as the Châteauneuf Operational Headquarters, a notorious torture and secret detention centre, where they were interrogated.

2.2 After 5 days in detention, the two women were transferred to another cell, where they were reunited with Kamel Rakik. He told them that, although he was wounded, he had been subjected to torture as soon as he had arrived at the Châteauneuf Operational Headquarters, that he had lost consciousness a number of times and had woken up at the military hospital in Blida, to which he had been admitted under a false name. When he had regained consciousness, the torture had resumed and had included beatings, electric shocks and use of the "rag technique".

2.3 Kamel Rakik, who was unable to move or meet his basic needs, had been placed together with his wife and members of her family[2] in the same cell, with no toilet or sanitation facilities, and where they had to sleep on the bare concrete floor. Once they had all been placed in the same cell, however, their situation had improved, as Kamel Rakik and the members of his family were no longer interrogated or tortured. After 35 days of incommunicado detention, Kamel Rakik's wife and sister-in-law were taken away in a van and dropped off in the street in one of Algiers' outer suburbs. A few moments before they were removed from the detention centre, one of their captors had suggested, in an ironic tone, that they should say goodbye to Kamel Rakik, whom the torturers were about to take

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

[2] During the interrogation process, Kamel Rakik's wife and her sister encountered other members of their family in detention, all accused of belonging to "a family of terrorists".

into the adjoining room. Since that day, there has been no news of the latter, despite repeated efforts by his father, Tahar Rakik, to find him, starting on the day of his son's disappearance until the time of his own death on 5 February 2003.

2.4 Tahar Rakik made every possible effort to contact the authorities to find out what had happened to his son. In the days following Kamel Rakik's arrest, his father contacted the police of the Algiers and Bourmerdes *wilayas*, who simply denied that Kamel Rakik had ever been arrested, saying that he was not wanted by the police. Tahar Rakik then repeatedly called for the public prosecutor attached to the court in Boudouaou to intervene. One of his letters was eventually registered with the public prosecutor's office, on 8 December 1996, but was not followed up. On 24 June 1998, the prosecutor sent Tahar Rakik a letter dated 21 February 1998, in which he informed him that his son had been "arrested by members of the security services and taken to the Algiers police station". The prosecutor, however, refused to open an investigation, maintaining that Tahar Rakik's complaint was not "legal". Thereupon the victim's father approached a lawyer in order to lodge a formal complaint of abduction with the public prosecutor's office, in accordance with articles 292 ff. of the Algerian Criminal Code. This complaint was filed with the registrar of the Boudouaou court on 25 March 2000. The prosecutor, however, refused to pursue the case on the grounds that "it was unthinkable that a complaint could be filed against the police". In order to appeal against the prosecutor's decision, the victim's father asked for an order stating that the case had been closed. The prosecutor refused this request and warned the lawyer engaged by Tahar Rakik of the dire consequences he might face if he continued to pursue the case. In fact, the complaint lodged on 25 March 2000 was never followed up.

2.5 Tahar Rakik then contacted various national institutions, including the Ministry of Justice, the Ministry of the Interior, the President of the Republic and the Ombudsman. Only the latter responded and registered Tahar Rakik's request, although he indicated that, in view of the situation in the country and the scope of his mandate, as established by Presidential decree, he could only inform him that his case had been referred to the relevant institutions for consideration. On 19 October 1998, Kamel Rakik's case was submitted to the United Nations Working Group on Enforced or Involuntary Disappearances.

2.6 In the course of 2006, Yamina Guezout was instructed by the Algiers security services to take the administrative steps necessary to obtain compensation under the provisions of the Ordinance of 27 February on implementing legislation for the Charter for Peace and National Reconciliation.[3] She rejected the advice, however, as she refused to apply for a death certificate for her son until she could be sure what had happened to him.

2.7 Despite all the efforts made by the victim's family, no investigation was ever opened by the State, and the family has received no news at all since of Kamel Rakik's fate. The authors are no longer entitled, moreover, to initiate judicial proceedings following the enactment of Ordinance No. 06-01 of 27 February 2006 on implementing legislation for the Charter for Peace and National Reconciliation. While domestic remedies were already futile and ineffective, they have now simply become unavailable.

The complaint

3.1 On 6 May 1996, Kamel Rakik was the victim of enforced disappearance, following his arrest by police officials; his arrest had been followed by a refusal to acknowledge deprivation of liberty and by concealment of his fate. The authors refer to article 7,

[3] As noted in paragraph 3.2 below, the authorities also told the victim's mother to take the necessary steps to obtain a death certificate.

paragraph 2 (i), of the Rome Statute of the International Criminal Court, and to article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

3.2 As more than 11 years have passed since his disappearance at a secret detention centre,[4] there is very little hope of finding Kamel Rakik alive. All the facts point to the conclusion that he died in prison – not only his prolonged absence and the circumstances and context of his arrest, but also the fact that the law enforcement services have instructed his mother to initiate the procedure to obtain a death certificate. The authors contend that incommunicado detention entails a high risk of the violation of the right to life. The threat posed by enforced disappearance to the victim's life thus constitutes a violation of article 6, paragraph 1, to the extent that the State has failed in its duty to protect the fundamental right to life, all the more so since the State party has made no effort whatsoever to investigate the fate of Kamel Rakik. The authors therefore allege that the State party has violated article 6, paragraph 1, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

3.3 Being subjected to an enforced disappearance in itself constitutes inhuman or degrading treatment. In addition, when making the arrest, the police officers used their firearms even though they had no reason to believe that the victim was armed. The injuries and suffering caused by this illegitimate and disproportionate use of force by the police constitute a serious violation of the rights guaranteed under article 7 of the Covenant. Kamel Rakik was also subjected to torture during his interrogation, a fact that he reported to his wife and her sister shortly before they saw him for the last time.

3.4 For the authors, Kamel Rakik's disappearance, was — and continues to be — a paralysing, painful and agonizing ordeal, in violation of article 7 of the Covenant.

3.5 Kamel Rakik was arrested by the police without a warrant and without being informed of the reasons for his arrest. During his interrogation he was at no point informed of the criminal charges against him. In addition he was not promptly brought before a judge or other judicial authority. Moreover, as a victim of enforced disappearance, he was physically unable to appeal against the legality of his detention or to apply to a judge to request his release. The authors note that it was not until 1998 that the prosecutor finally acknowledged that Kamel Rakik had indeed been arrested, but he still did not let them know where Kamel Rakik was being held or what had happened to him. These facts constitute violations of article 9, paragraphs 1, 2, 3 and 4, of the Covenant.

3.6 If it is assumed that Kamel Rakik was the victim of a violation of article 7, it cannot be argued that he was ever treated in a humane manner or with respect for the inherent dignity of the human person. Consequently, the authors maintain that the State party has also violated article 10, paragraph 1, of the Covenant.

3.7 As a victim of an unacknowledged detention, Kamel Rakik was also reduced to the status of a non-person, in violation of article 16 of the Covenant. In this respect, the authors note that enforced disappearance essentially entails the negation of the right to be recognized as a person before the law, insofar as the refusal of the authorities to reveal the fate of the missing person or the place of detention, or even to admit that he has been deprived of his liberty, places that person outside the protection of the law.

3.8 As a victim of enforced disappearance, Kamel Rakik was de facto prevented from exercising his right to challenge the legality of his detention, as guaranteed under article 2, paragraph 3, of the Covenant. The authors, for their part, have used all legal avenues

[4] Or 16 years, at the time of consideration by the Committee of the case.

available to them to find out the truth about the fate of their son and brother, but the case was never pursued by the State party, despite its obligation to ensure an effective remedy, including the duty to carry out a thorough and diligent investigation into the case. The authors therefore contend that the State party has violated article 2, paragraph 3, with respect both to Kamel Rakik and to themselves.

3.9 The members of Kamel Rakik's family do not know for certain that he is deceased, and they continue to hope that he is still being held incommunicado. Their hope has been further strengthened by persistent reports that several secret detention centres still remain in Algeria, both in the south and in Oued Namous, where thousands of persons had already been placed in administrative detention between 1992 and 1995, and in the north of the country, in particular in the barracks and centres run by the Intelligence and Security Department. The authors therefore fear that, if the victim is still alive, the agents or services holding him could be tempted in the circumstances to make him disappear for good. Moreover, under article 46 of the Ordinance setting forth implementing legislation for the Charter for Peace and National Reconciliation, any person who files a legal complaint of abuses such as those to which Kamel Rakik was subjected is liable to receive a prison sentence. The authors therefore request that the Committee urge the Algerian Government to release Kamel Rakik if he is still being held incommunicado, to take all necessary steps to prevent him from suffering irreparable harm, and to refrain from applying the provisions of articles 45 and 46 of Ordinance No. 06-01 of 27 February 2006 on implementing the Charter for Peace and National Reconciliation to the authors or any of the victim's relatives, from invoking the above-mentioned articles and from threatening them in any way with the aim of depriving them of their right to contact the Committee.

State party's observations on admissibility

4.1 On 3 March 2009, the State party, in a background memorandum on the inadmissibility of communications submitted to the Human Rights Committee in connection with the implementation of the Charter for Peace and National Reconciliation, has contested the admissibility of the present communication and of 10 other communications submitted to the Human Rights Committee. The State party is of the view that communications incriminating public officials, or persons acting on behalf of the public authorities, in cases of enforced disappearances during the period in question, that is, between 1993 and 1998, should be dealt with within the broader context of the sociopolitical and security conditions that prevailed in the country during a period when the Government was struggling to combat terrorism.

4.2 During that period the Government was obliged to combat a variety of uncoordinated groups, with the result that a number of confused operations were conducted among the civilian population, and it was not easy for the public to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. Enforced disappearances were due to many causes, which cannot, however, according to the State party, be blamed on the Government. According to information documented by many independent sources, including the press and human rights organizations, generally speaking the disappearances that occurred in Algeria during the period in question corresponded to six distinct scenarios, none of which can be blamed on the Government. The first scenario cited by the State party concerns persons reported missing by their relatives who in fact had chosen to go underground in order to join armed groups and had asked their families to declare 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 subsequent release to go into hiding. The third scenario concerns persons abducted by armed groups who, because the latter were not identified or were using uniforms or identification documents

taken from police officers or soldiers, were mistaken for 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 case concerns persons reported missing by their families who were actually wanted terrorists who had been killed and buried in the bush following factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. Lastly, the sixth scenario mentioned by the State party concerns persons reported missing who were in fact living in Algeria or abroad under false identities provided by a vast network of document forgers.

4.3 The State party maintains that it was in view of the diversity and complexity of the situations covered by the general notion of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, had decided to pursue a comprehensive approach to the issue of disappeared persons, whereby all persons who had disappeared during the "national tragedy" would be cared for, all those victims would be offered support in overcoming 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 were 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, added to a total of DA 1,320,824,683 in the form of 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 applications to political or administrative authorities, non-contentious remedies pursued through advisory or mediation bodies, and contentious remedies pursued through the competent courts. The State party observes that it emerges from the authors' statements[5] that the complainants have written letters to political or administrative authorities, petitioned advisory or mediation bodies and lodged a complaint with representatives of the prosecution service (chief prosecutors and public prosecutors), but have not, strictly speaking, 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 to 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 where necessary. However, 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 proceedings by bringing a matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, has not been used in the event, 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, useful 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 did not need to bring the matter before the relevant courts, in view of the latter's likely position and understanding regarding the application of the ordinance. However, the authors cannot

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

invoke the ordinance and its implementing legislation as a reason for not instituting 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.[6]

4.6 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It maintains that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, whose implementing ordinance prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for any person who has been found guilty of acts of terrorism or to whom the legislation on civil dissent applies, 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, such as the provision of employment placement assistance or compensation for all persons considered to be 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 declares inadmissible any individual or collective proceedings against members of any branch of Algeria's defence and security forces 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 undertake 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 situations of 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 sociopolitical and security context in which they occurred; to find that the authors failed to exhaust all domestic remedies; to recognize that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in these communications through measures aimed at achieving peace and national reconciliation that are consistent with the principles of the Charter of the United Nations and related covenants and conventions; to find the above-mentioned communications inadmissible; and to request the authors to seek alternative remedies.

Additional observations by the State party on admissibility

5.1 On 9 October 2009, the State party transmitted an additional memorandum to the Committee, in which it raises the question of whether the submission of the series of individual communications to the Committee might not rather be an abuse of procedure

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

aimed at bringing before the Committee a broad historical issue whose causes and circumstances lie outside the scope of the Committee. The State party observes in this connection that these "individual" communications dwell on the general context in which the disappearances occurred and focus solely on the actions of the security forces, without ever mentioning those of all the armed groups that used criminal techniques of concealment in order to incriminate the armed forces.

5.2 The State party asserts that it will not address the merits of the aforementioned communications until the issue of their admissibility has been settled, arguing that all judicial or quasi-judicial bodies have the obligation to deal with preliminary questions before considering the merits. According to the State party, the decision in the present cases to insist on the consideration of questions of admissibility and the merits jointly and concomitantly — 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 may be considered separately. With regard, in addition, 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 points out that mere doubts about the prospect of success or concerns about delays do not exempt the authors from the obligation to exhaust such remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation has barred the possibility of appeal in this area, the State party replies that the 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 or security forces of the Republic" for actions consistent with their core republican duties, namely, to protect persons and property, to safeguard the Nation and to 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 outside of that framework are subject to investigation by the appropriate courts.

5.4 In a note verbale dated 6 October 2010, the State party reiterated the observations regarding admissibility which it had submitted to the Committee in a note verbale of 3 March 2009.

Authors' comments on the State party's observations

6.1 On 23 September 2011, the authors submitted comments on the State party's observations on admissibility and provided additional arguments on the merits.

6.2 The authors note 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 to refer any specific case before the Committee. That is for the Committee to decide when it examines the communication. Referring to article 27 of the Vienna Convention, the authors consider that the State party's adoption of domestic legislative and administrative measures to assist

the victims of the "national tragedy" cannot be invoked at the admissibility stage to prevent individuals subject to its jurisdiction from using the procedure provided for under the Optional Protocol.[7] In theory, while such measures may well have an impact on the settlement of a dispute, they must be considered with regard to the merits of the case rather than its admissibility. In the case at hand, the legislative measures adopted themselves constitute a violation of the rights enshrined in the Covenant, as the Committee has previously observed.[8]

6.3 The authors recall that the Government's declaration of a state of emergency on 9 February 1992 does not affect the right of persons to submit individual communications to the Committee. Under article 4 of the Covenant, the declaration of a state of emergency may allow for derogations from only certain provisions of the Covenant but does not affect the exercise of rights under the Optional Protocol. The authors therefore consider that the State party's observations on the validity of the communication do not constitute a ground for inadmissibility.

6.4 The authors further refer to the State party's argument that the requirement to exhaust domestic remedies means that the authors must institute criminal proceedings by filing a complaint and suing for damages with the investigating judge, in accordance with articles 72 et seq. (paras. 25 ff.) of the Code of Criminal Procedure. They cite the Committee's recent jurisprudence in the *Daouia Benaziza* case, in which it stated in the 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 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."[9] The authors therefore consider that, given the serious nature of the alleged offences, it was the responsibility of the competent authorities to take up the case. Nevertheless, no action was taken, even though several attempts were made by Kamel Rakik's family, starting from the date of his disappearance on 6 May 1996, to make enquiries with the police concerning his whereabouts, but to no avail.

6.5 When he learned that his son was arbitrarily being held in detention at the Châteauneuf Operational Headquarters, the victim's father contacted the public prosecutor attached to the court in Boudouaou and asked him to intervene and to place his son under the protection of the law. When the prosecutor failed to take any action, another letter was sent to him. That letter was filed in the registry of the office of the public prosecutor at the court in Boudouaou but did not result in any investigation. The family of the victim subsequently filed a number of complaints with this authority. In March 2000, the lawyer engaged by Kamel Rakik's father submitted an official complaint, alleging abduction, to the office of the general prosecutor. The prosecutor did not pursue this complaint and even

[7] 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."

[8] The authors refer to the concluding observations of the Human Rights Committee concerning Algeria (CCPR/C/DZA/CO/3), 12 December 2007, paras. 7, 8 and 13. They also refer 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 authors further refer to the concluding observations of the Committee against Torture concerning Algeria (CAT/C/DZA/CO/3), 26 May 2008, paras. 11, 13 and 17. Lastly, they refer to general comment No. 29 on derogations during a state of emergency, para. 1; *Official documents of the General Assembly, fifty-sixth session, Supplement No. 40, vol. I (A/56/40) (Vol. I), annex VI.*

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

refused to issue an order stating that the case had been closed, which would have opened the way to other legal remedies. Moreover, he also threatened the lawyer in question. In fact, the case was not pursued. The authors add that Kamel Rakik's family had also approached government institutions such as the Ministry of Justice, the Ministry of the Interior, the President of the Republic and the Ombudsman. The authorities are responsible for prosecuting such cases, and the authors should not therefore in the circumstances be criticized for not bringing criminal indemnification proceedings.

6.6 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 authors cite article 45 of Ordinance No. 06-01, whereby no legal proceedings may be brought against individuals or groups who are members of the defence or security forces. Any person making such a complaint or allegation is liable to a term of imprisonment of between 3 and 5 years and a fine of between DA 250,000 and DA 500,000.[10] The State party has therefore not convincingly demonstrated how suing for damages would have enabled the competent courts to receive and investigate a complaint, as that would have involved violating article 45 of the ordinance, or how the authors of a complaint could have been guaranteed immunity from prosecution under article 46 of the ordinance. As treaty body jurisprudence confirms, in the light of these provisions it may be concluded that any complaint regarding the violations suffered by the authors and Kamel Rakik would be not only declared inadmissible, but also treated as a criminal offence. The authors note 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 case similar to the one under consideration. The authors conclude that the remedies mentioned by the State party are futile.

6.7 With respect to the merits of the communication, the authors note that the State party has merely enumerated a number of scenarios according to which victims of the "national tragedy" might have disappeared. Such general observations do not answer the allegations made in the present communication. Furthermore, the comments are enumerated identically in a series of other cases, which shows that the State party is still unwilling to consider such cases individually.

6.8 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 authors refer 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". This means that it is neither for the authors of the communication nor for the State party to take such decisions, which are the sole prerogative of the working group or special rapporteur. The authors consider that the present case is no different from other cases of enforced disappearance and that its admissibility should not be considered separately from the merits.

6.9 Lastly, the authors note that the State party has not refuted their allegations, which are corroborated and substantiated by numerous reports on the security forces' actions at the time and by the authors' own persistent efforts. In view of the State party's involvement in Kamel Rakik's disappearance, the authors are unable to provide any further evidence in support of their communication, since such evidence is entirely in the hands of the State party. The authors also point out that the lack of any submissions from the State party regarding the merits of the case is tantamount to the State party's acquiescence that the violations have indeed been committed.

[10] At the time of adoption of these Views, equivalent to a fine of between US$ 3,136 and US$ 6,272.

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 Rakik was reported to the Working Group on Enforced or Involuntary Disappearances in 1998. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, whose mandates are to examine and report publicly on human rights situations in specific countries or territories or on cases of widespread human rights violations, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.[11] Accordingly, the Committee considers that the examination of Kamel Rakik's case by the Working Group on Enforced or Involuntary Disappearances does not render it inadmissible under this provision.

7.3 The Committee notes the State party's argument to the effect that the authors have not exhausted domestic remedies, on the ground that they 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 notes further that, according to the State party, the authors wrote letters to political or administrative authorities, petitioned advisory or mediation bodies and lodged a complaint with representatives of the prosecution service (chief prosecutors and public prosecutors), but have not, strictly speaking, initiated legal proceedings and seen them through to their conclusion by availing themselves of all available remedies of appeal and cassation. The Committee also notes the authors' argument that, when he learned that his son was arbitrarily being held in detention at the Châteauneuf Operational Headquarters, the victim's father contacted the public prosecutor attached to the court in Boudouaou and asked him to intervene and to place his son under the protection of the law; that in the absence of any action on the part of the prosecutor, another letter was sent to him; that this letter was filed in the registry of the office of the public prosecutor at the court in Boudouaou, but did not result in any investigation; that a number of complaints were subsequently filed with this authority by the victim's family; and that the office of the public prosecutor received an official complaint in March 2000 alleging abduction lodged by the lawyer engaged by the victim's father. The Committee notes the authors' statement that the prosecutor did not pursue this complaint and even refused to issue an order stating that the case was closed, which would have opened the way to other legal remedies; and that the lawyer representing the victim's father was reportedly threatened if he pursued the case further. Lastly, the Committee notes that, according to the authors, article 46 of Ordinance No. 06-01 penalizes any person who files a complaint pertaining to actions covered by article 45 thereof.

7.4 The Committee recalls that the State party has a duty not only to carry out thorough investigations into alleged violations of human rights brought to the attention of its

[11] See, inter alia, communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 7.2; and communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 7.1.

authorities, such as enforced disappearances, violations of the right to life and torture, but also to bring those responsible for such violations to justice.[12] However, the victim's family repeatedly contacted the competent authorities concerning Kamel Rakik's disappearance, and the State party itself acknowledged that it had detained the victim in a letter dated 21 February 1998, in which the prosecutor informed Kamel Rakik's father that his son had been "arrested by members of the security services and taken to the Algiers police station". Despite these elements, the State party failed to conduct a thorough and effective investigation into the disappearance of the son and brother of the authors, despite the serious allegations of enforced disappearance. The State party has also failed to produce any convincing indication that an effective remedy is de facto available while Ordinance No. 06-01 of 27 February 2006 continues to be applicable notwithstanding the Committee's recommendations that it should be brought into line with the Covenant.[13] 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 to be a substitute for the charges that should be brought by the public prosecutor.[14] Moreover, given the unclear wording of articles 45 and 46 of the ordinance and, in the absence of satisfactory information from the State party about their interpretation and their enforcement in practice, the author's fears regarding the possible 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 authors have sufficiently substantiated their allegations insofar as they raise issues with respect to article 6, paragraph 1; article 7; article 9; article 10; article 16; and article 2, paragraph 3, of the Covenant and therefore proceeds to consider the communication on its merits.

Consideration of the merits

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

8.2 As the Committee has emphasized in previous communications in which the State party has provided general, collective observations in response to the serious allegations made by the authors of those complaints, it is clear that the State party has been content to maintain that communications incriminating public officials or persons acting on behalf of public authorities in cases of enforced disappearance during the period in question, that is, between 1993 and 1998, must be considered in the broader context of the domestic sociopolitical and security environment that prevailed during a period in which the Government had to deal with terrorism. The Committee wishes to recall its concluding observations concerning Algeria of 1 November 2007,[15] as well as its jurisprudence,[16]

[12] See, inter alia, communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 7.4; communication No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012, para. 6.4; and general comment No. 31 (2004) on article 2 of the Covenant, on the nature of the general legal obligation imposed on States parties to the Covenant, para. 18, *Official documents of the General Assembly, fifty-ninth session, Supplement No. 40, vol. I (A/59/40) (Vol. I), annex III*.

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

[14] Communication No. 1588/2007, *Daouia Benaziza v. Algeria*, op. cit., para. 8.3; communication No. 1781/2008, *Berzig v. Algeria*, op. cit., para. 7.4; and communication No. 1905/2009, *Khirani v. Algeria*, op. cit., para. 6.4.

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

[16] Communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11;

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 authors' allegations concerning the merits of the case and recalls its jurisprudence,[17] according to which the burden of proof should not rest solely upon the authors of a communication, especially given that the authors and the State party do not always have the same degree of access to evidence and that often only the State party holds 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 whatever information is available to it.[18] In the absence of any explanation from the State party in this respect, all due weight must be given to the authors' allegations, provided they have been sufficiently substantiated.

8.4 The Committee notes that, according to the authors, their son and brother, Kamel Rakik, was arrested on 6 May 1996 and was last seen by his wife and her sister at the Police Training Centre in Châteauneuf 35 days after his arrest and that the prosecutor at the court in Boudouaou acknowledged that Mr. Rakik had been arrested by members of the security services and taken to the Algiers police station. Despite repeated requests from the family, the Algerian authorities have never provided information on Kamel Rakik's fate. The Committee notes that the State party has acknowledged its involvement in the victim's arrest but has been unable to explain what has happened to him since then. The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty, followed by a refusal to acknowledge that fact or by concealment of the fate or whereabouts of the disappeared persons, removes such persons from the protection of the law and places their lives at serious and constant risk, for which the State is accountable. In the case at hand, the Committee notes that the State party has produced no evidence to indicate that it has fulfilled its obligation to protect Kamel Rakik's life. The Committee therefore concludes that the State party has failed in its duty to protect Mr. Rakik's life, in violation of article 6, paragraph 1, of the Covenant.

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, in which it recommends that States parties should make provisions against incommunicado detention. It notes that, in the present case, Kamel Rakik was arrested on 6 May 1996 and that his whereabouts have been unknown since his wife and her sister last saw him in detention, 35 days after his arrest. 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 respect to Kamel Rakik.[19]

communication No. 1588/2007, *Benaziza v. Algeria*, op. cit., para. 9.2; communication No. 1781/2008, *Berzig v. Algeria*, op. cit., para. 8.2; and communication No. 1905/2009, *Khirani v. Algeria*, op. cit., para. 7.2.

[17] See, inter alia, communication No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.4; and communication No. 1781/2008, *Berzig v. Algeria*, op. cit., para. 8.3.

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

[19] Communication No. 1905/2009, *Khirani v. Algeria*, op. cit., para. 7.5; communication No. 1781/2008, *Berzig v. Algeria*, op. cit., para. 8.5; communication No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 6.5.

8.6 The Committee also takes note of the anguish and distress caused to the authors by Kamel Rakik's disappearance. It considers that the facts before it indicate that they are the victims of a violation of article 7 of the Covenant.[20]

8.7 With regard to the alleged violation of article 9, the Committee notes the author's statement to the effect that Kamel Rakik was arrested on 6 May 1996 by plain-clothed police officers, without a warrant, and without being informed of the reasons for his arrest; that according to the victim's wife and her sister, Kamel Rakik was not informed of the criminal charges against him and was not brought before a judge or other judicial authority with whom he could challenge the legality of his detention; and that it was only in 1998 that the prosecutor finally acknowledged Kamel Rakik's arrest, but did not inform the authors of the victim's whereabouts or his fate. In the absence of satisfactory explanations from the State party, the Committee finds a violation of article 9 with respect to Kamel Rakik.[21]

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 Kamel Rakik's incommunicado detention and 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.[22]

8.9 With regard to the alleged violation of article 16, the Committee reiterates its established jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may be deemed to constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (article 2, paragraph 3, of the Covenant), have been systematically impeded.[23] In the present case, the Committee notes that the State party has not furnished adequate explanations concerning the authors' allegations that they have had no news of their son and brother. The Committee concludes that Kamel Rakik's enforced disappearance for the past 16 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 authors invoke 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 may have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing complaints of rights violations. It refers to its general comment No. 31 (80), which provides, inter alia,

[20] See communication No. 1905/2009, *Khirani v. Algeria*, op. cit., para. 7.6; communication No. 1781/2008, *Berzig v. Algeria*, op. cit., para. 8.6; communication No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, op. cit., para. 7.5; and communication No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, op. cit., note 16, para. 6.11.

[21] See, inter alia, communication No. 1905/2009, *Khirani v. Algeria*, op. cit., para. 7.7; and communication No. 1781/2008, *Berzig v. Algeria*, op. cit., para. 8.7.

[22] See general comment No. 21 [44] on article 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-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2.

[23] Communication No. 1905/2009, *Khirani v. Algeria*, op. cit., para. 7.8; communication No. 1781/2008, *Berzig v. Algeria*, op. cit., para. 8.8; communication No. 1780/2008, *Mériem Zarzi v. Algeria*, op. cit., para. 7.9; communication No. 1588/2007, *Daouia Benaziza v. Algeria*, op. cit., 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 Madaoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

that a failure by a State party to investigate allegations of violations could in itself give rise to a separate breach of the Covenant. In the present case, the victim's family contacted the competent authorities several times regarding Kamel Rakik's disappearance, including judicial authorities such as the public prosecutor. However, all their efforts were in vain or even proved dissuasive, and the State party has failed to conduct a thorough and effective investigation into the disappearance of the authors' son and brother. Furthermore, the legal prohibition on undertaking judicial proceedings following the promulgation of Ordinance No. 06-01, which sets forth implementing legislation for the Charter for Peace and National Reconciliation, continues to deprive Kamel Rakik and the authors 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.[24] 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; article 10, paragraph 1; and article 16 of the Covenant with respect to Kamel Rakik and of article 2, paragraph 3, read in conjunction with article 7 of the Covenant, with respect to the authors.

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 respect to Kamel Rakik and of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant, with respect to the authors.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors with an effective remedy by, inter alia: (a) conducting a thorough and effective investigation into the disappearance of Kamel Rakik; (b) providing the authors with detailed information about the results of the investigation; (c) releasing him immediately if he is still being detained incommunicado; (d) in the event that Kamel Rakik is deceased, handing over his remains to his family; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the authors for the violations suffered and to Kamel Rakik, if he is still alive. Ordinance No. 06-01 notwithstanding, the State should further ensure that it does not hinder victims of crimes such as torture, extrajudicial killings and enforced disappearances from exercising their right to an effective remedy. 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 for 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 is found to have occurred, the Committee wishes to receive from the State party, within 180 days, information concerning the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them broadly in the official languages of the State party.

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

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

Appendix

Individual (concurring) opinion of Mr. Walter Kälin

In this case, the Committee came to the conclusion that the State party has failed in its duty to protect Mr. Rakik's life, in violation of article 6, paragraph 1, of the Covenant, by placing his life in substantial and ongoing danger for which it is accountable (para. 8.4). I welcome this approach to addressing the issue of the right of life as raised by the authors of the communication, who still hope that Mr. Rakik is alive. Experience shows that the number of those among the victims of prolonged disappearances who die or are killed while held in secret detention is very high. Thus, already in 1981, the 24th International Conference of the Red Cross considered that enforced disappearances imply "violations of fundamental human rights such as the right to life …".[25]

The 1992 Declaration on the Protection of all Persons from Enforced Disappearance[26] recognized that such disappearance "… constitutes a grave threat to the right to life". Taking into account the seriousness of the risk and the fact that it is an inherent part of a situation created by the State, it is accurate to qualify the prolonged exposure of disappeared individuals to such threat as a violation of the duty to protect the life of persons even in cases where the victim might still be alive.

[Adopted 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.]

[25] 24th International Conference of the Red Cross, Manila, 7–14 November 1981, res. II.

[26] 1992 Declaration on the Protection of all Persons from Enforced Disappearance adopted by General Assembly resolution 47/133 of 18 December 1992, article 1 (2).

Individual (dissenting) opinion of Mr. Michael O'Flaherty, Mr. Krister Thelin and Mr. Rafael Rivas Posada

The majority has found a direct violation of article 6, paragraph 1. We respectfully disagree.

In the Committee's long established jurisprudence in cases of enforced disappearances, violation of article 6, paragraph 1, has only been found when the victim has been assumed not to be alive.[27] However, recently, what has been a minority opinion has been embraced by the majority expanding the interpretation to also include instances where the victims' death has not been established.[28] In the case before us, the majority holds that the mere risk or danger of loss of life, in the enforced disappearance setting, is enough for a finding of a direct violation of article 6, paragraph 1. This new course may have far-reaching consequences.

If the mere risk to loss of life, in specific circumstances for which the State would be responsible, is the new test for direct application of article 6, paragraph 1, it would suggest that also cases where capital punishment is an issue may be covered; victims, languishing on death row awaiting execution of their death sentence, are certainly in danger of losing their life. We note, while in no way endorsing the death penalty, that an extensive interpretation of article 6, in light of the majority's jurisprudence, would certainly benefit the individual, but it would arguably blur the line of cases falling under article 6, paragraph 2, of the Covenant. Other cases, which could be difficult to reconcile with the new broad interpretation, are all those where the State is ultimately responsible for various social and economic conditions. Life-threatening circumstances abound in many places in the world. To apply article 6, paragraph 1, to those cases, and in essence try to regulate the quality of life, would bring our Covenant into an area, for which other international instruments are better suited.

For these reasons, we find that in the case before us the Committee should have found, in line with its earlier established jurisprudence, that there is a violation of article 2, paragraph 3, read in conjunction with article 6, paragraph 1.

[Adopted 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.]

[27] Communication No. 30/1978, *Bleier v. Uruguay*, Views of 29 March 1982; communication No. 563/1993, *Bautista v. Colombia*, Views of 27 October 1995; communication No. 540/1993, *Laureano v. Peru*, Views of 25 March 1996; and communication No. 612/1995, *Arhuaco v. Colombia*, Views of 29 July 1997.

[28] Communication No. 1780/2008, *Aouabdia v. Algeria*, Views of 22 March 2011; communication No. 1781/2008, *Berzig v. Algeria*, Views of 31 October 2011, and communication No. 1905/2009, *Khirani v. Algeria*, Views of 26 March 2012.

Individual (concurring) opinion of Mr. Fabián Salvioli

1. I agree with the decision of the Human Rights Committee in the *Guezout v. Algeria* case, communication No. 1753/2008, concerning the human rights violations referred to in the Views, affecting Kamel Rakik, Yamina Guezout and her two sons, Abderrahim and Bachir Rakik (respectively the mother and brothers of Kamel Rakik).

2. However, for the reasons given below, I feel obliged to place on record my thoughts regarding three issues which are extremely important for the consideration of cases of enforced disappearance, such as this one, namely the violation of article 6 of the Covenant, the violation of article 2, paragraph 2, of the Covenant, and the reparation provided.

The violation of article 6 of the Covenant in the case in hand and in cases of enforced disappearance

3. The Committee's jurisprudence has gradually evolved. In the beginning, a State's international responsibility for a violation of the right to life in cases of enforced disappearance was recognized only in cases of proven or presumed death.[29] This position — which was already untenable in view of the manner in which international human rights law had developed — was reasonable because it was among the first measures of an international body confronted with a new and complex phenomenon, namely enforced disappearances.

4. Later, the Committee decided to pursue a more logical reasoning, whereby a State cannot benefit from a legal decision that arises from a situation it has itself brought about. The Committee therefore decided to give further thought to the scope of the guarantee (or protection) obligation, even though, in the *Aouabdia v. Algeria* case, instead of interpreting this obligation in the light of article 6 of the Covenant, it unduly restricted its scope, and adopted a mistaken approach to violations of the right to life by limiting them to the mere fact that the State was providing no effective remedy (art. 2.3). This led me to adopt a partially dissenting opinion in the *Aouabdia v. Algeria* case, where I explained what in my view should be the scope of the guarantee of the right to life, in particular in cases of radical and complex human rights violations, such as enforced disappearance (a line of argument to which I would refer to save repeating it in the present instance[30]).

5. Subsequently, in the *Chihoub v. Algeria* case, the Committee found a direct violation of article 6 of the Covenant arising from the enforced disappearance of two persons, a finding with which I naturally agreed. Even though the specific reasoning of the finding rested on the fact that certain elements of the case appeared to suggest that the victims were deceased,[31] in the section concerning remedies the State was ordered to release the two persons immediately if they were still being detained incommunicado.[32] The Committee was implicitly adopting a more advanced position concerning the right to guarantee (or protection), and I did not therefore feel the need to give a specific opinion on this point, although I had done so for other aspects of the Views.

6. It is only recently, in the present Guezout case, that to my mind the Committee has fully grasped the brutal phenomenon of enforced disappearances in the light of the

[29] Communication No. 30/1978, *Bleier v. Uruguay*, Views adopted on 29 March 1982.

[30] Communication No. 1780/2008, *Aouabdia v. Algeria*, Views adopted on 22 March 2011; individual partially dissenting opinion of Mr. Fabián Salvioli, paras. 2–9.

[31] See, for example, communication No. 1811/2008, *Chihoub v. Algeria*, Views adopted on 31 October 2011, para. 8.4.

[32] Communication No. 1811/2008, *Chihoub v. Algeria*, Views adopted on 31 October 2011, para. 10.

obligation of guarantee referred to in article 6 of the Covenant. This is clearly stated in the Views that "… The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty, followed by a refusal to acknowledge that fact or by concealment of the fate or whereabouts of the disappeared persons, removes such persons from the protection of the law and places their lives at serious and constant risk, for which the State is accountable. In the case at hand, the Committee notes that the State party has produced no evidence to indicate that it has fulfilled its obligation to protect Kamel Rakik's life. The Committee therefore concludes that the State party has failed in its duty to protect Mr. Rakik's life, in violation of article 6, paragraph 1, of the Covenant …".[33]

7. The Committee referred to the obligation to guarantee the right to life in the case of enforced disappearances, which is not necessarily applicable to other possibilities, which are not considered in this case. With enforced disappearances, it is not a question of events that give rise to a "simple risk or danger of loss of life" but of a deliberate and intentional wish on the part of the State radically to breach its human rights obligations, by acting unequivocally as a violator rather than a guarantor, depriving the person of all protection.

8. It should not be difficult, in cases of enforced disappearance, to establish whether or not the obligation to protect the right to life has been violated by the State party; what is difficult, on the other hand, is to establish that the right to protection would be covered simply by offering an effective remedy. If one supposes that a habeas corpus remedy is available for six months after a person has been the victim of an enforced disappearance and that the person can therefore be released alive, can it really be argued that the State has fulfilled its duty to protect the right to life of that person during the six months that it deprived the person of minimum guarantees, while freely enjoying a power of life or death over its detainees?

9. The Committee's current approach, which leads to the conclusion that there has been a direct violation of article 6 of the Covenant in cases of enforced disappearance because the State has failed in its duty of protection (or duty of guarantee), represents an advance which must be preserved in the future, takes due account of the human rights violation that arises with enforced disappearance, and covers the duty of guarantee in its most logical sense, without reducing it to the availability or application of a simple judicial remedy.

The violation of article 2.2 of the Covenant in the case in hand and in cases where standards incompatible with the Covenant have been adopted

10. In the case in hand, the Committee should also have concluded that the State was responsible for a violation of article 2, paragraph 2, of the International Covenant on Civil and Political Rights with respect to the victims.

11. Ever since I joined the Committee, I have maintained that, quite incomprehensibly, the Committee has restricted its own competence to find a violation of the Covenant in the absence of a specific legal claim. Whenever the facts disclosed by the parties clearly establish a violation, the Committee can and should — by virtue of the principle of *iura novit curiae* — document the violation in proper legal form. The legal basis for this position and the reasons why neither the States nor the complainant end up without a proper defence are given in the partially dissenting opinion that I drafted in the *Weeramansa v. Sri Lanka* case, to which I refer.[34]

[33] Communication No. 1753/2008, *Guezout v. Algeria*, Views adopted on 19 July 2012, para. 8.4.

[34] Communication No. 1406/2005, *Weeramansa v. Sri Lanka*, Views adopted on 17 March 2008; individual partially dissenting opinion by Mr. Fabián Salvioli, paras. 3–5.

12. In the case in hand, both parties have referred extensively to the provisions of Ordinance No. 06-01, implementing the Charter for Peace and National Reconciliation. The author for her part considers that some of the provisions of this ordinance are incompatible with the Covenant (see paragraphs 2.7 and 3.9 of the Committee's Views), while the State, which also refers to Ordinance No. 06-01, implementing the Charter for Peace and National Reconciliation, arrives at the opposite conclusion. It considers that the ordinance is perfectly compatible with current international law (see in particular paragraphs 4.5 and 4.6 of the Committee's Views).

13. In other words, the parties have sufficiently expounded their diverging points of view before the Committee with regard to Ordinance No. 06-01's compatibility or incompatibility with the Covenant. It is then up to the Committee to resolve the issue in accordance with the law but without necessarily following the legal reasoning of the parties, which may be accepted in whole or in part or rejected by the Committee, in the light of its own line of legal reasoning.

14. In the individual opinions I expressed previously with regard to Algeria, I explained the reasons why the Committee should deal with the question of the incompatibility of Ordinance No. 06-01 with the Covenant in the light of article 2, paragraph 2, and I explained why the application of this ordinance to the victims constituted a violation of these provisions of the Covenant in the case under review.[35] The situation is similar in the present case: the Committee is fully competent to give legal form to the facts before it, considering that the State on 27 February 2006 enacted Ordinance No. 06-01, barring any legal remedy to shed light on the most serious crimes, such as enforced disappearances, which in effect guarantees impunity for those responsible for serious human rights violations.

15. By enacting that ordinance, the State established a provision which ran contrary to its obligation under article 2, paragraph 2, of the Covenant, which in itself constitutes a violation that the Committee should have pointed out in its decision, in addition to the established violations. The authors and Mr. Kamel Rakik himself were the victims — inter alia — of that legislation; therefore finding a violation of article 2, paragraph 2, in the present case is neither an abstract nor a rhetorical issue: in the end, it must not be forgotten that violations arising from a State's international responsibility directly affect the reparation that the Committee must request in each of its Views.

Reparation in the present case

16. As far as reparation in cases like this one is concerned, the Committee has recently made some progress, by expressing its intention to consider the matter in depth and to spell out the obligation to ensure that similar violations do not reoccur: I gave a detailed appreciation of the progress achieved in my separate opinions concerning the *Djebrouni*, *Chihoub* and *Ouaghlissi* cases (all three against Algeria), while I expressed the need to progress still further in order to dispel any residual ambiguity:[36] the Committee must take a clear stand against the maintenance of legislation that is per se incompatible with the

[35] Communication No. 1811/2008, *Chihoub v. Algeria*, Views adopted on 31 October 2011; individual (concurring) opinion by Mr. Fabián Salvioli, paras. 5–10; communication No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012; individual (concurring) opinion by Mr. Fabián Salvioli, paras. 10 and 11.

[36] Communication No. 1781/2008, *Djebrouni v. Algeria*, Views adopted on 31 October 2011; individual (concurring) opinion of Mr. Fabián Salvioli, paras. 11–16; communication No. 1811/2008, *Chihoub v. Algeria*, Views adopted on 31 October 2011; individual (concurring) opinion of Mr. Fabián Salvioli, paras. 11–16; and communication No. 1905/2009, *Khirani v. Algeria*; individual (concurring) opinion of Mr. Fabián Salvioli, paras. 10 and 11.

Covenant, since it does not meet current international standards with regard to reparation for human rights violations.

17. In the *Ouaghlissi v. Algeria* case, the Committee used the same wording: "… 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."[37]

18. The obligation to respect the rights established in the Covenant applies to all the powers of a State party. In this as in the previous cases, apart from warning the State not to apply Ordinance No. 06-01 (which undoubtedly extends to both the judicial and the executive branch), the Committee should have notified the State quite clearly that it needed to amend Ordinance No. 06-01, by repealing the clauses which were per se incompatible with the Covenant; that would have been in line with the concluding observations the Committee transmitted to Algeria after considering its third periodic report, in which it stated that: "The State party should repeal any provision of Ordinance No. 06-01 enacting the Charter for Peace and National Reconciliation, in particular article 46, which infringes freedom of expression and the right of any person to have access, at the national and international levels, to an effective remedy against violations of human rights …".[38]

19. In individual communications concerning a State party, cross-references to concluding observations issued by the Committee concerning the same State party prove extremely useful, especially when it comes to adding practical substance to the guarantee of non-recurrence. In the case in hand, one of the most important reparation measures would entail amending the provision which is incompatible with the Covenant. In that respect in particular, that Committee has once again lost a good opportunity to specify the reparation that was expected and thus to help States meet their obligations under the Covenant and the Optional Protocol more effectively.

[Adopted 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.]

[37] Communication No. 1905/2009, *Khirani v. Algeria*, para. 9.

[38] See CCPR/C/DZA/CO/3 (ninety-first session); concluding observations concerning Algeria, para. 8.