



International Covenant on Civil and Political Rights

Distr.: General
25 November 2013
English
Original: French

Human Rights Committee

Communication No. 1831/2008

Views adopted by the Working Group at its 108th session (8–26 July 2013)

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| <i>Submitted by:</i> | Djelloul Larbi (represented by TRIAL – Track Impunity Always) |
| <i>Alleged victims:</i> | Djillali Larbi (the author's father) and the author himself |
| <i>State party:</i> | Algeria |
| <i>Date of communication:</i> | 24 October 2008 (initial submission) |
| <i>Document reference:</i> | Special Rapporteur's rule 92/97 decision, transmitted to the State party on 5 December 2008 (not issued in document form) |
| <i>Date of adoption of Views:</i> | 25 July 2013 |
| <i>Subject matter:</i> | Enforced disappearance |
| <i>Procedural issues:</i> | Exhaustion of domestic remedies |
| <i>Substantive issues:</i> | Right to life, prohibition of torture and cruel or inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, recognition as a person before the law and the right to an effective remedy; unlawful interference with the home |
| <i>Articles of the Covenant:</i> | Articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1) and 16 |
| <i>Article of the Optional Protocol:</i> | Article 5 (para. 2 (b)) |



Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (108th session)

concerning

Communication No. 1831/2008*

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

Meeting on 25 July 2013,

Having concluded its consideration of communication No. 1831/2008, submitted to the Human Rights Committee by Djelloul Larbi 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:

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

1.1 The author of the communication is Djelloul Larbi, an Algerian citizen born in 1975. He claims that his father, Djillali Larbi, was the victim of violations by Algeria of his rights under articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1) and 16 of the International Covenant on Civil and Political Rights. The author claims that he himself is

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

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

An individual opinion by Mr. Salvioli and Mr. Rodríguez-Rescia is appended to the text of the present Views.

the victim of violations by Algeria of his rights under articles 2 (para. 3) and 7 of the Covenant. He is represented by counsel.

1.2 On 5 December 2008, in accordance with rule 92 of its rules of procedure, the Committee, through its Special Rapporteur on new communications and interim measures, asked the State party not to take any measure that might hinder the exercise by the author and his family of their right to submit an individual complaint to the Committee. Accordingly, the State party was requested not to invoke its national legislation, specifically Ordinance No. 06-01 concerning the implementation of the Charter for Peace and National Reconciliation, against the author and members of his family.

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

The facts as presented by the author

2.1 In the late morning of 25 May 1994, Djillali Larbi, accompanied by an employee, went by taxi to Mechraa Sfa, a village located approximately 9 kilometres from his farm, to make purchases. A gendarmerie checkpoint had been set up at the entrance to the village. After having his identity papers checked, Djillali Larbi was taken to the local gendarmerie headquarters. According to the author, the arrest was witnessed by an acquaintance of the Larbi family.

2.2 As soon as the author's paternal grandfather heard of his son's arrest, he went to Mechraa Sfa with two other sons and his grandson (the author of this communication). The gendarmes refused to tell him why his son had been arrested and, despite repeated requests, did not allow him to see his son. They did, however, agree to pass him some food and cigarettes.

2.3 On 31 May 1994, the same gendarmes told family members who had gone to visit Djillali Larbi that he had been transferred to the gendarmerie of Mellakou. Djillali Larbi's father, together with his two other sons and the author of the communication, then went to Mellakou, where they were able to see the detainee. Djillali Larbi seemed to have suffered a great deal; his face bore visible signs of blows and he complained that he had been tortured at the gendarmerie of Mechraa Sfa, but added, in the presence of the guards, that he had been well treated since his transfer. He also said that he had made a statement and had asked to be brought before a judge, whereupon he had been assured that legal proceedings would be instituted and that he would appear before the prosecutor as soon as possible. In fact, Djillali Larbi was brought before the public prosecutor of Tiaret on 8 June 1994, after 13 days in custody. Several persons saw him that day in the vehicle that was taking him to the courthouse of Tiaret. He was taken back to the same gendarmerie that same day. Members of his family were allowed to see him during the days that followed. He told them that he had waited several hours at the prosecutor's office, but had not appeared before the prosecutor, who had ordered the gendarmes to "take him back".

2.4 Djillali Larbi remained in custody in Mellakou until 13 June 1994. On 14 June, when his father went to take him food, the gendarmes refused to take it, saying that his son "had been transferred". The family has had no news of him since.

2.5 Djillali Larbi's father and his relatives never stopped searching and making every effort to find him. His father enquired at the gendarmeries and military barracks in the region. He went to Mechraa Sfa, where his son had first been held, as well as to Tiaret and Frenda, after being told that many persons were detained there. As he still had no news, Djillali Larbi's father went to the military headquarters in Oran, where he was advised to enquire at the military prison of Mers El Kebir. He went there three times during the summer and autumn of 1994. He also went to the courthouse of Tiaret, where, after very

lengthy formalities, he and the author's mother were received by the public prosecutor, to whom he delivered a written complaint.

2.6 The author's grandfather went back to the same prosecutor on several occasions during the course of 1995. Neither he, nor the author's mother, nor any of the witnesses he had cited and who were familiar with the facts of the case, were asked to appear as part of a criminal investigation. In fact, at no point in time did the prosecution service of Tiaret either order an investigation or offer any explanation as to what had happened to Djillali Larbi.

2.7 In September 1994, the author's grandfather wrote to non-governmental organizations and to the National Observatory for Human Rights, reporting his son's disappearance and petitioning them to intervene.

2.8 After his grandfather's death in 1998, the author of the communication and his mother continued the search for Djillali Larbi. On several occasions they went to the court house of Tiaret to find out what action had been taken on the many complaints they had filed. They gave up, however, after a few months, because the prosecutor refused to receive them or to tell them anything, and because they feared reprisals.

2.9 In 2004, the author wrote once more to the authorities asking for information about what had happened to his father. On 19 May 2004, he wrote to the head of police and to the *wali* (prefect) of the *wilaya* (prefecture) of Tiaret, to the president of the National Advisory Commission for the Promotion and Protection of Human Rights, and to the President of the Republic. He never received a reply. On 29 November 2006, he recounted the numerous efforts already undertaken in a letter to the President of the Republic and the public prosecutor of Tiaret. He also recalled, in a registered letter to the public prosecutor of Tiaret, the many complaints filed over the years by Djillali Larbi's father and the author's mother, to which the prosecutor had never responded. None of these letters received a reply either.

2.10 The author contends that he has not been able to take action through the courts since the promulgation of Ordinance No. 06-01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation, adopted by referendum on 29 September 2005, which prohibits any legal action against members of the Algerian defence and security services in relation to incidents that took place in the country between 1993 and 1998. The author maintains that, since all domestic remedies have proved ineffective and useless, and since Djillali Larbi's relatives are now legally deprived of their right to seek justice, he is no longer obliged to continue to seek domestic remedies and risk criminal prosecution in order to ensure that this communication is admissible before the Committee.

The complaint

3.1 The author alleges that his father was the victim of an enforced disappearance. He considers that, as 14 years have passed since his father's disappearance from the national gendarmerie post in Mellakou, the chances of finding his father alive are very slim. Given his prolonged absence and the circumstances and context of his arrest, it seems likely that he died while in custody. Incommunicado detention entails a high risk of violation of the right to life. The threat posed to the victim's life constitutes a violation of article 6 of the Covenant insofar as the State failed in its duty to protect the fundamental right to life. Moreover, the State party never made any effort to investigate the fate of the victim, which also constitutes a failure on the State's part to fulfil its obligations under article 6 of the Covenant. The author therefore considers that his father's rights were violated under article 6, in conjunction with article 2, paragraph 3, of the Covenant.

3.2 The author's father told his own father (the author's grandfather) that he had been tortured at the gendarmerie headquarters of Mechraa Sfa, where he was held in custody

following his arrest. Moreover, his face bore visible signs of blows. Also, according to the Committee's jurisprudence, the mere fact of subjection to enforced disappearance constitutes inhuman or degrading treatment. The anguish and suffering caused by indefinite detention without contact with the family or the outside world constitutes treatment in breach of article 7 of the Covenant.

3.3 The author's father was arrested by uniformed gendarmes, who did not have a warrant and did not inform him of the reasons for his arrest, which constitutes a violation of his rights under article 9, paragraphs 1 and 2, of the Covenant. He was taken to the courthouse of Tiaret 13 days after his arrest, in other words, beyond the 12-day limit established by law. However, he was never, brought before an officer authorized by law to exercise judicial power (in this case, the public prosecutor of Tiaret), in violation of article 9, paragraph 3, of the Covenant. As a victim of enforced disappearance, he was not physically able to appeal against the lawfulness of his detention, or to request a judge to order his release or even to ask an outside third party to defend him in court; this situation constitutes a violation of article 9, paragraph 4, of the Covenant.

3.4 If it is established that the author's father was the victim of a violation of article 7 of the Covenant, it cannot be argued that he benefited from the protection that article 10, paragraph 1, is intended to provide.

3.5 As the victim of an unacknowledged detention, the author's father was also reduced to the status of a non-person, in violation of article 16 of the Covenant.

3.6 As the victim of an enforced disappearance, Djillali Larbi was unable to exercise his right to challenge the lawfulness of his detention, in violation of article 2, paragraph 3, of the Covenant. His family pursued all legal avenues to discover the truth about his fate, but nothing came of its efforts.

3.7 For the author of the communication, and for the members of his family, the disappearance continues to be a paralysing, painful and distressing ordeal, in that they know absolutely nothing of the fate of Djillali Larbi, in violation of article 7,¹ read in conjunction with article 2, paragraph 3 of the Covenant.

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, 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". It submits that communications that incriminate public officials, or persons acting under the authority of government agencies, in cases of enforced disappearance that occurred during the period in question, from 1993 to 1998, should be considered in the broader context of the sociopolitical circumstances and security conditions that prevailed in the country during a time when the Government was struggling to combat a form of terrorism aimed at bringing about the "collapse of the Republican State". In this context, and in accordance with the Constitution (arts. 87 and 91), precautionary measures were implemented, and the Algerian Government informed the

¹ In that regard, the author refers, inter alia, to communication No. 107/1981, *Almeida v. Uruguay*, Views adopted on 21 July 1983; communication No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para 9.8; communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.5; communication No. 886/1999, *Schedko v. Belarus*, Views adopted on 3 April 2003, para. 10.2; and the concluding observations of the Committee on the second periodic report of Algeria (CCPR/C/79/Add.95), adopted 29 July 1998, para. 10.

Secretariat of the United Nations of its declaration of a state of emergency, in accordance with article 4, paragraph 3, of the Covenant.

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, who found it difficult to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. According to the State party, there are numerous explanations for the cases of enforced disappearance, but they cannot be blamed on the Government. According to several independent sources, including the press and human rights organizations, the general concept of disappearance in Algeria during the period in question covers six different scenarios, none of which can be blamed on the State. The first scenario concerns persons reported missing by their relatives but who in fact had chosen to go into hiding 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 scenario concerns persons who were reported missing after their arrest by the security services but who took advantage of their release to go into hiding. The third scenario concerns persons abducted by armed groups which, because they were not identified or because they had stolen uniforms or identification documents from police officers or soldiers, were mistakenly thought to belong to the armed forces or security services. The fourth scenario concerns persons whose families had reported them as missing, whereas in fact they had abandoned them, and sometimes even left the country, to escape from personal problems or family disputes. A fifth scenario involves persons reported missing by their families but who were in fact wanted terrorists who had been killed and buried in the maquis following factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. The sixth scenario mentioned by the State party concerns persons reported missing who were actually living in Algeria or abroad under a false identity provided by a network of document forgers.

4.3 The State party maintains that it was in view of the diversity and complexity of the situations covered by the general 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 enforced disappearances, taking account of — all persons who had disappeared in the context of the “national tragedy” — and under which all victims would be offered support to overcome their ordeal, and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 cases of disappearance have been reported, 6,774 examined, 5,704 approved for compensation and 934 rejected, with 136 still pending. A total of 371,459,390 Algerian dinars has been paid out as compensation to the victims concerned. In addition, a total of 1,320,824,683 dinars has been paid out in 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 formalities involving the political or administrative authorities, non-judicial remedies pursued through advisory or mediation bodies, and judicial remedies pursued through the competent courts of justice. The State party observes that, as may be seen from the authors’ statements,² the complainants have written letters to political and administrative authorities and petitioned advisory and mediation bodies as well as representatives of the prosecution service (chief prosecutors

² As the State party has provided a common reply to 11 different communications, it refers to the “authors”. This reference thus also includes the author of the present communication.

and public prosecutors), but have not actually initiated legal proceedings and seen them through to their conclusion using all available remedies of appeal and judicial review. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to the investigating judge. In the Algerian legal system, it is the public prosecutor who receives complaints and who institutes criminal proceedings where warranted. In order to protect the rights of victims and their beneficiaries, the Code of Criminal Procedure authorizes them to sue for damages by filing a complaint with the investigating judge. In this case, it is the victim, not the prosecutor, who initiates criminal proceedings by bringing the matter before the investigating judge. This remedy, provided for in articles 72 and 73 of the Code of Criminal Procedure, was not used, although it would have enabled the victims to institute criminal proceedings and compel the investigating judge to institute criminal proceedings, even if the prosecution service had decided otherwise.

4.5 The State party also notes the author's contention that the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation — in particular, article 45 of Ordinance No. 06-01 — rules out the possibility that any effective and available domestic remedies exist in Algeria to which the families of victims of disappearance could have recourse. On this basis, the author believed that he did not need to bring the matter before the relevant courts, in view of their likely position and findings regarding the application of the ordinance. The author cannot, however, invoke this ordinance and its implementing legislation as a pretext for having failed to institute the legal proceedings available to him. 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.³

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, and its 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 who is benefiting 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 introduces 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 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 engaging in political activity 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, individual or joint, brought against members of Algeria's defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

4.7 In addition to the establishment of 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

³ The State party cites, inter alia, communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, media outpourings and political score-settling. The State party is therefore of the view that the author's allegations are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.8 The State party asks the Committee to note how similar the facts and situations described by the authors are and to take into account the sociopolitical circumstances and security conditions in which they occurred; to find that the author failed to exhaust all domestic remedies; to recognize that the authorities of the State party have established a comprehensive national mechanism for processing and settling the cases referred to in these communications through a policy of peace and national reconciliation that is consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the communication inadmissible; and to request that the author seek an alternative remedy.

Additional observations by the State party on admissibility

5.1 On 9 October 2009, the State party transmitted an additional memorandum, in which it raises the question of whether the submission of a series of individual communications might not actually amount to an abuse of procedure aimed at bringing before the Committee a broad historical issue whose causes and circumstances elude them. 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 for determining the admissibility of communications are separate from those related to the consideration of communications on the merits, and that therefore these questions could be considered separately. Concerning the exhaustion of domestic remedies, the State party stresses that the author did not submit any complaints or requests for information through channels that would have allowed consideration of the case by the Algerian judicial authorities.

5.3 Recalling the Committee's jurisprudence with respect to the obligation to exhaust domestic remedies, the State party stresses that mere doubts about the prospect of success or concerns about delays do not exempt the author from the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation has ruled out the possibility of appeal, the State party replies that the failure by the author to submit his allegations to scrutiny has 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 the defence and security forces of the Republic" for actions consistent with their core duties to the Republic, namely, to protect persons and property, safeguard the nation and preserve its institutions. On the other hand, any allegations concerning actions attributable to the defence or security forces that can be proved to have taken place in any other context are subject to investigation by the appropriate courts.

5.4 In a note verbale of 6 October 2010, the State party reiterated its earlier arguments against the admissibility of the communication.

Author's comments on the State party's observations

6.1 On 24 April 2013, the author submitted his comments on the State party's observations on admissibility and provided additional arguments on the merits. He 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 on the Law of Treaties, the author considers that the State party's adoption of national legislative and administrative measures to take account of the victims of the "national tragedy" cannot be invoked at the admissibility stage to prevent individuals subject to its jurisdiction from using the procedure provided for under the Optional Protocol. Even if such measures might have an impact on the settlement of the dispute, they must be studied in relation to the merits of the communication and not to its admissibility. In the present case, the legislative measures adopted amount to a violation of the rights enshrined in the Covenant, as the Committee has previously observed.⁴

6.2 The author recalls that Algeria'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. 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. According to the author, the State party's observations on the appropriateness of the communication do not constitute a ground for inadmissibility.

6.3 The author also 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 to sue for damages with the investigating judge, in accordance with articles 72 et seq. of the Code of Criminal Procedure. He refers to an individual communication concerning the State party in which the Committee declared 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."⁵ 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, that was not done, even though members of Djillali Larbi's family tried without success, to find out what happened to him after his arrest on 25 May 1994.

⁴ The author refers to the concluding observations of the Human Rights Committee on the third periodic report of Algeria adopted on 1 November 2007, CCPR/C/DZA/CO/3, paras. 7, 8 and 13. He also refers to communication No. 1588/2007, *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 on the third periodic report of Algeria, adopted on 13 May 2008, CAT/C/DZA/CO/3, paras. 11, 13 and 17. Lastly, he refers to general comment No. 29 (2001) on derogations from the Covenant 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).

⁵ Communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 8.3.

6.4 The relatives of Djillali Larbi made enquiries at all the gendarmeries, barracks and military prisons in the region. They sent a written complaint to the public prosecutor of Tiaret, with whom they met on several occasions. They contacted the Algerian League for the Defence of Human Rights, the local chapter and the secretariat of Amnesty International and the National Human Rights Observatory. The victim's family also approached the head of police and the *wali* of the *wilaya* of Tiaret, the president of the National Advisory Commission for the Promotion and Protection of Human Rights and the President of the Republic. No reply was ever received to any of these enquiries. At the request of the victim's wife, an official certificate of his disappearance within the context of the national tragedy was issued by the National Gendarmerie on 2 March 2010. In the spring of 2005, an ad hoc committee of the National Advisory Commission for the Promotion and Protection of Human Rights had received the author's mother and told her in person that the case had been classified as an enforced disappearance. However, she never found out any more about what had happened to Djillali Larbi.

6.5 After submitting the individual communication to the Committee, Djillali Larbi's family continued to petition the Algerian authorities for information about what had happened to him. On 27 November 2010, the family sent a detailed report on his disappearance to the President of the Republic, the Minister of Justice, the Minister of the Interior and Local Government, and the Commander of the National Gendarmerie. After all these initiatives, the victim's wife was interviewed on 11 January 2011 by the public prosecutor of Tiaret. In the report on the interview, she mentions a decision handed down by the Family Affairs Section of the Tiaret public prosecution service on 1 July 2010 that declared her complaint to be admissible in terms of both form and content, which opened the way for a complete investigation into her husband's disappearance, including the hearing of witnesses. Accordingly, on 9 February 2011, two witnesses, a colleague and a neighbour of the victim, were heard by the Family Affairs Section of the Tiaret public prosecution service. They explained that there had been no sign of Djillali Larbi since 1994 and that they knew nothing about what had happened to him since then. This was corroborated by members of the victim's family who were present during the hearings. These many procedures did not lead, however, to a proper investigation, nor to the prosecution and punishment of those responsible for the enforced disappearance, nor to the victim's family obtaining reparation. Consequently, the author cannot be blamed for not having exhausted all legal remedies on the grounds that he did not sue for damages in criminal proceedings by filing a complaint with the investigating judge regarding a human rights violation of such gravity that the State party should not have ignored it.

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 author cites article 45 of Ordinance No. 06-01, which stipulates that no legal proceedings, individual or joint, may be brought against members of the defence or security forces. Any person making such a complaint or allegation is liable to a term of imprisonment of 3 to 5 years or a fine of between 250,000 and 500,000 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 imputable to agents of the Algerian State would not only be 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 similar circumstances.

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

6.8 The author recalls that, in accordance with rule 100, paragraph 1, of the Committee’s rules of procedure and with the jurisprudence of the treaty bodies, in the absence of observations from the State party on the merits, due weight must be given to the complainant’s allegations. The allegations made by the author in his communication are corroborated and substantiated by numerous reports on the security forces’ actions during the period under consideration, and by the persistent efforts of members of the victim’s family. In view of the State party’s involvement in the disappearance of his father, the author is unable to provide additional information in support of his communication, as that information is entirely in the hands of the State party. The author also maintains that the absence of comments on the merits of the communication constitutes tacit acknowledgement of the truthfulness of the allegations it contains.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 The Committee recalls that the decision by the Special Rapporteur to examine the admissibility and the merits jointly (see paragraph 1.3 above) does not preclude their being considered separately by the Committee. Examining the admissibility and the merits jointly does not mean examining them simultaneously. Consequently, before considering any claim contained in a communication, the Committee must first 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 Pursuant to article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes that, in the State party’s view, the author has not exhausted domestic remedies, since he 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 has merely sent letters to political and administrative authorities, and petitioned advisory and mediation bodies as well as representatives of the prosecution service (chief prosecutors and public prosecutors), but has not, strictly speaking, initiated legal action and seen it through to its conclusion by using all available remedies of appeal and judicial review. The Committee notes the author’s argument that the family sent a petition to the public prosecutor of Tiaret, with whom members of the family had met on several occasions, and that they contacted the Algerian League for the Defence of Human Rights, the National Observatory for Human Rights, the head of police and the *wali* of the *wilaya* of Tiaret, the president of the National Advisory Commission for the Promotion and Protection of Human Rights and the President of the Republic, without receiving any reply whatsoever. The Committee also notes that the family sent a detailed report on the disappearance of Djillali Larbi to the President of the Republic, the Minister of Justice, the Minister of the Interior and Local Government, and the Commander of the National Gendarmerie. It also notes that Djillali Larbi’s wife was interviewed on 11 January 2011 by the public prosecutor of Tiaret and that, on 9 February 2011, two witnesses were interviewed by the Family Affairs Section of the prosecution service of Tiaret, but that

there was no follow-up. The Committee also notes that the numerous procedures undertaken did not lead to a proper investigation, nor to the prosecution and punishment of those responsible for the enforced disappearance, nor to reparation being made to the victim's family. The Committee further takes note of the author's argument that Ordinance No. 06-01 prohibits and penalizes the institution of legal action against any member of the defence or security forces, which therefore releases victims from the obligation to exhaust domestic remedies.

7.4 The Committee recalls that the State party has a duty not only to thoroughly investigate alleged violations of human rights brought to the attention of its authorities, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations.⁶ Although Djillali Larbi's family repeatedly contacted the competent authorities concerning his disappearance, the State party failed to conduct a thorough and rigorous investigation into the disappearance of the author's father, even though serious allegations of enforced disappearance were involved. Moreover, the State party has failed to provide sufficient evidence to conclude that an effective remedy is de facto available, given that Ordinance No. 06-01 of 27 February 2006 continues to be applied despite the Committee's recommendations that it should be brought into line with the Covenant (CCPR/C/DZA/CO/3, paras. 7, 8 and 13). The Committee is of the view that 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.⁷ 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 about the effectiveness of filing a complaint are reasonable.

7.5 The Committee considers that, as far as the admissibility of a communication is concerned, the author is obliged to exhaust only the remedies that would effectively provide redress for the alleged violation, in this case, effective remedies for obtaining redress for an enforced disappearance. In the light of all the above considerations, the Committee concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the present communication.

7.6 The Committee finds that the author has sufficiently substantiated his allegations insofar as they raise issues under articles 6, (para. 1), 7, 9, 10, 16 and 2, (para. 3) of the Covenant, and therefore proceeds to consider the communication on the merits.

Consideration of the merits

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

8.2 The State party has provided general and collective comments on the serious allegations submitted by authors of several communications, including the author of the present communication. The State party has merely argued that communications incriminating public officials, or persons acting under the authority of government agencies, in cases of enforced disappearances between 1993 and 1998 should be considered within the broader context of the sociopolitical circumstances and security conditions that prevailed in the country during a period when the Government was struggling to combat

⁶ See, for example, communication No. 1791/2008, *Boudjemai v. Algeria*, Views adopted on 22 March 2013, para. 7.4.

⁷ See, for example, *Boudjemai v. Algeria*, para. 7.4.

terrorism. The Committee refers to its jurisprudence⁸ and recalls that the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. The Covenant requires the State party to concern itself with the fate of every individual and to treat every individual with respect for the inherent dignity of the human person. 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 jurisprudence⁹ according to which the burden of proof should not rest 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 is in possession of the necessary information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with whatever information is available to it.¹⁰ In the absence of explanations from the State party in this respect, due weight must be given to the author's allegations, provided they have been sufficiently substantiated.

8.4 The Committee notes that, according to the author, his father, Djillali Larbi, was arrested by gendarmes in the late morning of 25 May 1994 and that his father's employee and a family acquaintance were present at the time. The Committee also notes that, according to the author, the prolonged absence of his father and the circumstances and context of his arrest all suggest that he died in custody. The Committee notes that the State party has produced no evidence refuting the author's allegation. The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate of the disappeared person, removes the person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable. In the present case, the Committee notes that the State party has produced no evidence to indicate that it has fulfilled its obligation to protect Djillali Larbi's life. Therefore the Committee concludes that the State party has failed in its duty to protect Djillali Larbi'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 (1992) on prohibition of torture or cruel, inhuman or degrading treatment or punishment,¹¹ which recommends that States parties should make provision to ban incommunicado detention. It notes in the present case that Djillali Larbi was arrested by the police on 3 July 1995, that he was tortured at the gendarmerie of Mechraa Sfa, that his face bore visible signs of blows, and that his fate is still unknown. In the absence of a satisfactory explanation from the State party, the Committee considers that these facts constitute a violation of article 7 of the Covenant with regard to Djillali Larbi.¹²

⁸ See, for example, *Boudjemai v. Algeria*, para. 8.2.

⁹ See, for example, *Boudjemai v. Algeria*, para. 8.3.

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

¹¹ *Official Documents of the General Assembly, Forty-seventh session, supplement No. 40 (A/47/40)*, annex VI, section A.

¹² *Boudjemai v. Algeria*, para. 8.5.

8.6 The Committee also takes note of the anguish and distress caused to the author by the disappearance of Djillali Larbi. It considers that the facts before it disclose a violation of article 7 of the Covenant with regard to him.¹³

8.7 With regard to the alleged violation of article 9, the Committee notes the author's allegation that Djillali Larbi was arrested on 25 May 1994 by uniformed gendarmes who did not have a warrant; that he was not informed of the reasons for his arrest; and that he was not charged and was not brought before a judicial authority, which would have enabled him to challenge the lawfulness of his detention. In the absence of a satisfactory explanation from the State party, the Committee finds a violation of article 9 of the Covenant with regard to Djillali Larbi.¹⁴

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 Djillali Larbi's 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.¹⁵

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 constitute a refusal to recognize him or her 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 obstructed.¹⁶ In the present case, the Committee notes that the State party has not provided any information on the whereabouts or fate of the disappeared person despite the repeated requests made by the author and his family to the State party. The Committee concludes that Djillali Larbi's enforced disappearance since 25 May 1994 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 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 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant,¹⁷ whereby the 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 this case, the family of the victim contacted the competent authorities, including the public prosecutor of Tiaret and the prosecutor at the court of Tiaret, the head of police and the *wali* of the *wilaya* of Tiaret, the president of the National Advisory Commission for the Promotion and Protection of Human Rights and the President of the Republic, concerning his disappearance, but all these efforts were in vain, and the State party never conducted a thorough and rigorous investigation into the disappearance of the author's father. Furthermore, the absence of the legal right to undertake judicial proceedings since the promulgation of Ordinance No. 06-01 implementing the Charter for

¹³ See, for example, *Boudjemai v. Algeria*, para. 8.6.

¹⁴ See, for example, *Boudjemai v. Algeria*, para. 8.7.

¹⁵ See, for example, *Boudjemai v. Algeria*, para. 8.8.

¹⁶ See, for example, *Boudjemai v. Algeria*, para. 8.9.

¹⁷ *Official Documents of the General Assembly, Fifty-ninth Session, supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III.

Peace and National Reconciliation continues to deprive Djillali Larbi, the author and his family of any access to an effective remedy, since the ordinance prohibits, on pain of imprisonment, the initiation of legal proceedings to shed light on the most serious crimes, such as enforced disappearances (CCPR/C/DZA/CO/3, para. 7). The Committee concludes that the facts before it reveal a violation of article 2 (para. 3) read in conjunction with articles 6 (para. 1), 7, 9, 10 and 16 of the Covenant with regard to Djillali Larbi; and article 2 (para. 3), read in conjunction with article 17 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 articles 6 (para. 1), 7, 9, 10 (para. 1), 16 and 2 (para. 3), read in conjunction with articles 6 (para. 1), 7, 9, 10 (para. 1) and 16 of the Covenant with regard to Djillali Larbi. The Committee also finds a violation of articles 7 and 2 (para. 3), read in conjunction with article 17, with regard to the author.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, including by: (a) conducting a thorough and rigorous investigation into the disappearance of Djillali Larbi; (b) providing the author and his family with detailed information about the results of its investigation; (c) releasing him immediately if he is still being detained incommunicado; (d) in the event that Djillali Larbi is deceased, handing over his remains to his family; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the author and his family for the violations suffered as well as to Djillali Larbi, if he is still alive. Notwithstanding the terms of 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 disappearances. The State party is also under an obligation 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 and to have them widely disseminated in the official languages of the State party.

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

Appendix

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

1. We concur with the decision in communication No. 1831/2008, in which the Human Rights Committee found a violation of the human rights established in articles 6 (para. 1), 7, 9, 10 (para. 1), 16 and 2 (para. 3), read in conjunction with articles 6 (para. 1), 7, 9, 10 (para. 1) and 16 of the Covenant with respect to Djillali Larbi, and a violation of articles 7 and of article 2 (para. 3), read in conjunction with article 7, with respect to the author.

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

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

4. The Committee did not expressly state, as we would have wished, that the content of article 45 of the ordinance is inconsistent with the relevant part of article 14 of the Covenant that relates to the right of access to justice enabling persons to assert their rights before the courts. The Committee should also have found a violation of article 2, paragraph 2, which lays down the obligation for States parties to adapt their national legislation to the standards set by the Covenant.

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

6. It should be noted that this alleged practice is not only based on a misconception but is also applied inconsistently: the Human Rights Committee has itself on occasion applied the principle of *iura novit curia*, although it has not mentioned it explicitly in its Views. In recent years, there have been various examples of the Committee's correct application of the provisions of the Covenant on the basis of evidence, but departing from the legal arguments or the specific articles cited by the parties.^a

^a Human Rights Committee, communication No. 1390/2005, *Koreba v. Belarus*, Views adopted on 25 October 2010; Human Rights Committee, communication No. 1225/2003, *Eshonov v. Uzbekistan*, Views adopted on 22 July 2010, para. 8.3; Human Rights Committee, communication No. 1206/2003, *R.M. and S.I. v. Uzbekistan*, Views adopted on 10 March 2010, paras. 6.3, 9.2, with a finding of no violation; Human Rights Committee, communication No. 1520/2006, *Mwamba v. Zambia*, Views adopted on 10 March 2010; Human Rights Committee, communication No. 1320/2004, *Pimentel et al. v. the Philippines*, Views adopted on 19 March 2007, paras. 3, 8.3; Human Rights Committee,

7. The very existence of articles 45 and 46 of Ordinance No. 06-01, which make complainants of such offences liable to imprisonment and fines, is inconsistent with the International Covenant on Civil and Political Rights, because it establishes a framework of impunity that prevents the investigation, conviction and redress of cases of serious human rights violations, such as the enforced disappearance of Djillali Larbi (the author's father), whose whereabouts are unknown to this day. The legal prohibition on filing a complaint and, therefore, investigating the facts of this case or other similar cases fosters impunity by infringing the right of access to justice, given that the ordinance criminalizes the exercise of the right of petition when a complaint is filed against facts such as those that gave rise to this case, involving an enforced disappearance.

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

9. The provisions of articles 45 and 46 of Ordinance No. 06-01 foster impunity and prevent the victims of this type of serious offence, and their families, from exercising their right to an effective legal remedy, to know the truth, to assert their human right to justice and to petition and obtain full reparation. Even acknowledging the positive contribution of the remaining provisions of Ordinance No. 06-01 to achieving peace and national reconciliation in Algeria, this should not be at the expense of the fundamental human rights of the victims and their families who have suffered the consequences of serious offences, particularly when those families may be liable to penalties and sanctions that victimize them again for exercising their right to invoke a legal remedy, which is, moreover, one of the tools used to protect and guarantee human rights (such as the right to life or the prohibition of torture) that may not be suspended even in a state of emergency (Covenant, art. 4, para. 2).

10. The legal impossibility of initiating judicial proceedings since the promulgation of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation has deprived and continues to deprive Djillali Larbi, the author and his family of any 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.

11. The Committee should have stated explicitly that the State of Algeria, as a reparation measure aimed at ensuring that such acts do not recur, should comply with the provisions of article 2, paragraph 2, and, accordingly, adopt legislative or other measures to repeal articles 45 and 46 of Ordinance No. 06-01 that establish impediments, penalties,

communication No. 1177/2003, *Ilombe and Shandwe v. the Democratic Republic of the Congo*, Views adopted on 17 March 2006, paras. 5.5, 6.5, 9; Human Rights Committee, communication No. 973/2001, *Khalilova v. Tajikistan*, Views adopted on 30 March 2005, para. 3.7; and Human Rights Committee, communication No. 1044/2000, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 3.

sanctions and any other obstacle fostering impunity for serious offences such as enforced disappearance of persons, torture and extrajudicial killings, not only for the victims referred to in this communication but also for the victims and families in similar cases.

[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.]
