



International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 1796/2008

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

<i>Submitted by:</i>	Ahmed Zerrougui (represented by Track Impunity Always (TRIAL))
<i>Alleged victims:</i>	Benattia Zerrougui (the author's brother) and the author
<i>State party:</i>	Algeria
<i>Date of communication:</i>	18 June 2008 (initial submission)
<i>Document references:</i>	Special Rapporteur's decision under rules 92 and 97, transmitted to the State party on 1 July 2008 (not issued in document form)
<i>Date of adoption of Views:</i>	25 July 2013
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issue:</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 right to an effective remedy
<i>Articles of the Covenant:</i>	Articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1) and 16
<i>Article of the Optional Protocol:</i>	Article 5 (para. 2 (b))

[Annex]

GE.13-49526 (E)



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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. 1796/2008*

Submitted by: Ahmed Zerrougui (represented by Track Impunity Always (TRIAL))

Alleged victims: Benattia Zerrougui (the author's brother) and the author

State party: Algeria

Date of communication: 18 June 2008 (initial submission)

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

Meeting on 25 July 2013,

Having concluded its consideration of communication No. 1796/2008, submitted to the Human Rights Committee by Ahmed Zerrougui under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

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

1.1 The author of the communication is Ahmed Zerrougui. He states that his brother, Benattia Zerrougui, was the victim of violations by Algeria of his rights under article 2 (para. 3), article 6 (para. 1), article 7, article 9 (paras. 1 to 4), article 10 (para. 1) and article 16 of the International Covenant on Civil and Political Rights. The author also considers

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

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

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

himself to be a victim of violations of article 2, paragraph 3, and article 7 of the Covenant. He is represented by counsel.

1.2 On 1 July 2008, in accordance with rule 92 of its rules of procedure, the Committee, acting through the Special Rapporteur on new communications and interim measures, asked the State party not to take any measures likely to impede the author and his family from exercising their right to submit an individual complaint to the Committee. The State party was therefore asked not to invoke its national law, notably Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation, against the author or members of his family.

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

The facts as submitted by the author

2.1 Benattia Zerrougui was first arrested by the police on 11 February 1992, while he was serving as secretary-general of the elected municipal council of Tiaret. The author's brother suffered a great deal of abuse during his interrogation (slaps, blows with the butt of a rifle) at the hands of a police officer. When he was brought before the tribunal of Tiaret, he was sentenced to 4 months' imprisonment.

2.2 On 1 June 1995, towards midday, Benattia Zerrougui arrived at Tiaret taxi station from the town of Oran, where he was working as a merchant. His brother Ahmed, the author of the communication, was waiting for him at the station. Benattia Zerrougui was arrested there by armed and hooded police officers wearing the uniform of the *wilaya* (governorate) security services, who had set up a roadblock. They then took him to the police station a few hundred metres away.

2.3 The author informed their mother, who hurried to the police station. She went there almost every day for 15 days in search of her son. On 15 June 1995, a police officer confirmed that her son was still being held there. She asked him about her son's health. As the police officer was preparing to take her to see the victim, a senior officer prevented him from doing so, definitively barring any contact between arrested persons and their relatives. Each time that the mother went to the police station after that, she was told that her son was not being held there.

2.4 The family was able to get news of the detainee through a police officer who was a former schoolmate of the arrested man and a woman employee at the police station. It seems that he was hospitalized on two occasions in Youcef Damerdji Hospital in Tiaret. A medical technician at the hospital also confirmed that the victim had been there. On 19 July 1995, the same police officer informed the family that the military security services had transferred Benattia Zerrougui to the Tiaret *wilaya* military sector.

2.5 The family was also in contact with a military police officer who had managed to locate the prisoner in Tiaret and who also said he had seen the arrest report. He gave the family information about Benattia Zerrougui's situation from time to time, particularly when he was transferred from one place of detention to another. In June 1996, the officer apparently even met with him in person. At the end of 1998, the family learned from a source within the Tiaret military sector that their son had been transferred to the Eckmühl military police secret detention centre in Oran. In 1999, he was again transferred to Tiaret. In June 1999, a member of the security services confirmed to the family that Benattia Zerrougui was still being held incommunicado in the Tiaret military sector, and in November 2000 a former inspector of police told them that he had once again been transferred to Oran, without saying, however, exactly where he was being held. According to the information that the family has been able to gather, between 1995 and 2000 Benattia

Zerrougui was detained most of the time in the Tiaret military sector, apart from when he was held in Oran. However, his family never received confirmation of that unofficial information from the authorities.

2.6 During 1995, Benattia Zerrougui's wife and mother wrote several letters to various institutions. His wife applied in writing to the head of the Tiaret *wilaya* police department on 24 June 1995, and his mother applied to the president of the tribunal of Tiaret on 15 October 1995, asking for information about the situation and particularly about where the victim was being held. There has been no response to these letters. In January 1996, the victim's mother and the author of the communication went to the National Human Rights Observatory in Algiers and filed an application concerning Benattia Zerrougui's disappearance. They never received any response, despite reminders from his mother, who filed another application on the subject in the *wilaya* office in 1998.

2.7 On 12 May 1997, the victim's mother submitted a request for assistance to the Ombudsman. The Ombudsman's response indicated that the matter had come to his attention and that measures would be taken. On 16 August 1998, having not received any further news, the victim's mother wrote to the public prosecutor to ask where her son was being held and why he had never been brought before a court. She was summoned by the police services on several different occasions in 1998. However, after explaining the circumstances of her son's arrest, she did not receive any response. From 1998 onward, she was summoned several times to the headquarters of the Dark Al Watani brigade in Tiaret, including on 4 October 1998 and 24 November 2000. She explained the circumstances of her son's arrest but did not receive any response.

2.8 The victim's mother wrote to the chief prosecutor on 4 September 2000 and to the public prosecutor on 8 April 2001 asking them to find her son. She also wrote to the Office of the President of the Republic. The latter, in two letters dated 4 May and 14 July 2004, informed her that her letters, dated 27 March and 29 May 2004, had been transmitted to the National Advisory Commission for the Promotion and Protection of Human Rights, the successor to the National Human Rights Observatory. However, the family has never been informed of any action taken and has never received an answer from the Commission.

2.9 The victim's mother finally retained a lawyer to file a complaint with the public prosecutor of the tribunal of Tiaret in which she asked to have her son located; the complaint was lodged on 21 December 2004 but the family has never received a response. However, as a result of these complaints, persons claiming to be members of the security services did come to the family home on several occasions to ask the victim's mother to acknowledge, in writing, that her son had joined up with armed groups; she refused to do so.

2.10 The author argues that it has been impossible for him to have recourse to any judicial remedy before a court of law since the enactment of Ordinance No. 06-01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation, adopted by referendum on 29 September 2005, which bars any judicial action against members of the Algerian defence and security services in the context of the events that took place in the country from 1993 to 1998. In addition, the State authorities' silence and their denial of the facts mean that there are no available and effective remedies to be exercised before State institutions.

The complaint

3.1 The author claims that his brother became a victim of enforced disappearance on 1 June 1995. He invokes article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court and article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

3.2 He considers that, as 13 years have passed since his brother's disappearance at a secret detention centre, there is very little hope of finding him alive. His brother's prolonged absence, together with the circumstances surrounding his arrest, suggest that he died in detention. Incommunicado detention entails a high risk that the right to life may be violated. The threat posed to a victim's life at the time of an enforced disappearance constitutes a violation of article 6 of the Covenant insofar as the State party has not fulfilled its duty to protect the fundamental right to life. The State has, moreover, not fulfilled its duty to guarantee the right to life, in that it has made no effort to conduct an effective investigation into what happened to the victim.

3.3 As regards the victim, the mere fact of being subjected to enforced disappearance constitutes inhuman or degrading treatment. The anguish and the suffering caused by indefinite detention without contact with the person's family or the outside world constitute treatment in breach of article 7 of the Covenant.

3.4 The victim was arrested by two police officers, without a warrant and without being informed of the reasons for his arrest, in violation of his rights under article 9, paragraphs 1 and 2, of the Covenant. Furthermore, he was not brought promptly before a judge or other judicial authority, which should not take longer than a few days, while incommunicado detention can itself lead to a violation of article 9, paragraph 3. As a victim of enforced disappearance, he was not physically able to appeal against the legality of his detention, or to apply to a judge to obtain his release, nor even to ask a third party who was at liberty to take over his defence, which is in violation of article 9, paragraph 4.

3.5 If it is established that he has been the victim of a violation of article 7, it can no longer be argued that he was ever treated in a humane manner or with respect for the inherent dignity of the human person in accordance with article 10, paragraph 1, of the Covenant.

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

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

3.8 The author of the communication believes himself to be the victim of a violation of his rights under article 7 of the Covenant in that the disappearance of his brother constitutes a paralysing, painful and distressing ordeal.

State party's observations on admissibility

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

4.2 During that period, the Government had to fight against groups that were not formally organized. As a result, there was some confusion in the manner in which a number of operations were carried out among the civilian population, and it was difficult for civilians to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. Hence, according to the State party, while enforced disappearances may be due to many causes, they cannot be blamed on the Government. According to a variety of independent sources, including the press and human rights organizations, it may be concluded that the concept of disappearances in Algeria during the period in question covers six possible scenarios, none of which can be blamed on the State. The first scenario concerns persons who were reported missing by their relatives but who in fact had chosen to go into hiding in order to join an armed group and who instructed their families to report that they had been arrested by the security services as a way of “covering their tracks” and avoiding being “harassed” by the police. The second scenario concerns persons who were reported missing after their arrest by the security services but who took advantage of their subsequent release to go into hiding. The third scenario concerns persons abducted by armed groups which, because they were not identified or because they had stolen uniforms or identification documents from police officers or soldiers, were mistakenly thought to belong to the Armed Forces or security services. The fourth scenario concerns persons reported missing who had abandoned their families, and in some cases even left the country, because of personal problems or family disputes. The fifth scenario concerns persons reported missing by their family but who were in fact wanted terrorists who had been killed and buried in the maquis following factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. The sixth scenario mentioned by the State party concerns persons reported missing who were actually living in Algeria or abroad under a false identity provided by a network of document forgers.

4.3 The State party maintains that it was in view of the diversity and complexity of the situations 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 disappeared persons, whereby all persons who had disappeared in the context of the “national tragedy” would be dealt with, all victims would be offered support to overcome their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 cases of disappearance have been reported, 6,774 cases have been examined, 5,704 have been approved for compensation and 934 rejected, with 136 still pending. A total of 371,459,390 Algerian dinars has been paid out as compensation to all the victims concerned. In addition, a total of 1,320,824,683 dinars has been paid out in monthly pensions.

4.4 The State party further contends that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities involving the political or administrative authorities, non-judicial remedies pursued through advisory or mediation bodies, and judicial remedies pursued through the relevant courts of justice. The State party observes that, as may be seen from the authors’ statements,¹ the complainants have written letters to political and administrative authorities, petitioned advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but have not, strictly speaking, initiated legal action and seen it through to its conclusion by availing themselves of all available remedies of appeal and judicial review. Of all these authorities, only the representatives of the

¹ As the State party has provided a reply to 11 different communications, it refers to the “authors”, which includes the author of the present communication.

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, if these are warranted. Nevertheless, in order to protect the rights of victims or their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint with the investigating judge. In this case, it is the victim, not the prosecutor, who initiates criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not utilized, despite the fact that it would have enabled the victims to institute criminal proceedings and compel the investigating judge to initiate proceedings, even if the prosecution service had decided otherwise.

4.5 The State party also notes the author's contention that the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation — in particular, article 45 of Ordinance No. 06-01 — rules out the possibility that any effective and available domestic remedies exist in Algeria to which the families of victims of disappearance could have recourse. On this basis, the author believed he did not need to bring the matter before the relevant courts, in view of the latter's likely position and findings regarding the application of the ordinance. However, the author cannot invoke this ordinance and its implementing legislation as a pretext for failing to institute the legal proceedings available to 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.²

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 is found guilty of acts of terrorism or who benefits from the provisions of the legislation on civil dissent, except for persons who have committed or been accomplices in mass killings, rapes or bombings in public places. This ordinance also provides for a procedure for filing an official finding of presumed death, which entitles beneficiaries to receive compensation as victims of the "national tragedy". Social and economic measures have also been put in place, including the provision of employment placement assistance and compensation for all persons considered victims of the "national tragedy". Finally, the ordinance prescribes political measures, such as a ban on holding political office for any person who exploited religion in the past in a way that contributed to the "national tragedy", and establishes the inadmissibility of any proceedings brought against individuals or groups who are members of any branch of Algeria's defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

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

² The State party cites in particular communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

settling. The State party is therefore of the view that the author's allegations are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

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

State party's additional observations on admissibility

5.1 On 9 October 2009, the State party transmitted a further memorandum to the Committee, in which it raises the question of whether the submission of a series of individual communications might not actually amount to an abuse of procedure aimed at bringing before the Committee a broad historical issue involving causes and circumstances of which the latter is unaware. The State party observes 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, 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 Committee's rules of procedure, the State party notes that the sections relating to the Committee's procedure to determine the admissibility of communications are separate from those relating to the consideration of communications on the merits, and that therefore these questions could be considered separately. Concerning the exhaustion of domestic remedies, the State party stresses that the author did not use channels that would have allowed consideration of the case by the Algerian judicial authorities for any of the complaints or requests for information he submitted.

5.3 Recalling the Committee's jurisprudence regarding the obligation to exhaust domestic remedies, the State party stresses that mere doubts about the prospect of success or concerns about delays do not exempt the author from the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation has barred the possibility of appeal in this area, the State party replies that the failure by the author to submit his allegations to examination has so far prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter. Moreover, under the ordinance in question, the only proceedings that are inadmissible are those brought against "members of any branch of the defence and security forces of the Republic" for actions consistent with their core duties to the Republic, namely, to protect persons and property, safeguard the nation and preserve its institutions. On the other hand, any allegations concerning actions attributable to the defence or security forces that can be proved to have 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 reiterates, in extenso, its objections regarding admissibility, which it had already submitted on 3 March 2009 and 9 October 2009 (see paras. 4.1 and 5.1).

Author's comments on the State party's submission

6.1 On 30 September 2011, the author submitted comments on the State party's observations 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 domestic legislative and administrative measures to support the victims of the "national tragedy" cannot be invoked at the admissibility stage to prevent individuals subject to its jurisdiction from using the procedure provided for under the Optional Protocol. Even if such measures might have an impact on the settlement of a dispute, they must be studied with regard to the merits of the communication and not at the admissibility stage. In the present case, the legislative measures themselves amount to a violation of the rights enshrined in the Covenant, as the Committee has previously observed.³

6.2 The author recalls that the State party's establishment of the 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 only 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 valid 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 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 stated that "the State party has a duty not only to carry out thorough investigations of alleged violations of human rights, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations. To sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor."⁴ The author therefore considers that, given the serious nature of the alleged offences, it was the responsibility of the competent authorities to take up the case. However, no action was taken, even though members of Benattia Zerrougui's family

³ 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 also 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 cites general comment No. 29 (2001) on derogations from the Covenant during states of emergency, para. 1 (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40, Vol. I (A/56/40 (Vol. I)), annex VI*).

⁴ Communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 8.3.

had been trying from the date of his arrest by the Tiaret police on 1 June 1995 to make enquiries concerning his whereabouts, to no avail.

6.4 Between 1995 and 2000, the family never received any official information about Benattia Zerrougui's fate. All the information obtained was from unofficial sources. They thus found out that he had spent 19 days in custody at Tiaret police station before being detained incommunicado in the Tiaret military sector. Immediately after the arrest, his mother had gone to Tiaret police station, but was not able to elicit any information. She appealed to the public prosecutor of the tribunal of Tiaret and the chief prosecutor of the court of Tiaret. It was not until three years later, after many reminders from several members of the family, that the gendarmerie summoned the victim's mother to take her statement. At the same time, the victim's wife and mother sought help by writing to various authorities such as the Ombudsman, the Head of Government, the President of the Republic, the Minister of the Interior, the Minister of Justice and the National Human Rights Observatory, with no result. The author therefore cannot be accused of failing to exhaust all remedies on the ground that he did not sue for damages by filing a complaint with the investigating judge concerning such a grave human rights violation, which the State party should not have ignored.

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

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

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

6.8 The author points out that the State party is required to submit "explanations or statements that shall relate both to the communication's admissibility and its merits". He

also refers to the jurisprudence of the treaty bodies, which consider that, in the absence of statements on the merits by the State party, the Committee may decide on the basis of the information in the case file. The many reports on the actions of the security forces during the period in question and the many steps taken by the victim's family members corroborate the allegations made by the author in his communication. In view of the State party's involvement in the disappearance of his brother, 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 notes that the lack of any statements by the State party regarding the merits of the case is tantamount to an acknowledgement by the State party that violations were committed.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

7.3 The Committee notes that, in the State party's view, the author and his family have not exhausted domestic remedies, since they did not consider bringing up the matter with the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. The Committee also notes that, according to the State party, the author wrote letters to political and administrative authorities and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but has not, strictly speaking, initiated legal action and seen it through to its conclusion by availing himself of all available remedies of appeal and judicial review. The Committee notes the author's argument that his mother went to Tiaret police station to ask for news of the victim and also appealed to the public prosecutor of the tribunal of Tiaret and the chief prosecutor of the court of Tiaret, but that it was not until three years later, after numerous reminders from different members of the family, that the gendarmerie summoned the victim's mother to take her statement, with no result. It further notes that the victim's wife

⁵ See, for example, communication No. 1779/2008, *Mezine v. Algeria*, Views adopted on 25 October 2012, para. 7.2; communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 7.2; and communication No. 540/1993, *Atachahua v. Peru*, Views adopted on 25 March 1996, para. 7.1.

and mother also wrote to various national authorities, including the Ombudsman, the Head of Government, the President of the Republic, the Minister of the Interior, the Minister of Justice and the National Human Rights Observatory; and his mother also retained a lawyer at the Supreme Court to file a complaint with the public prosecutor of the tribunal of Tiaret. The Committee also notes that no proceedings or investigations were initiated as the result of all these efforts and that the author, despite the administrative and judicial actions undertaken, has not been able to obtain any official information that could clarify the fate of his brother. Furthermore, the Committee takes note of the author's argument that Ordinance No. 06-01 prohibits, under penalty of criminal prosecution, the initiation of legal proceedings against any member of the defence or security forces and thereby frees victims of the obligation to exhaust domestic remedies.

7.4 The Committee recalls that the State party has a duty not only to carry out thorough investigations of alleged violations of human rights 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 The family of Benattia Zerrougui has repeatedly contacted the competent authorities concerning his disappearance, but the State party has failed to conduct a thorough and effective investigation into the disappearance of the author's brother, despite the fact that serious allegations of enforced disappearance were involved. The State party has also failed to provide sufficient evidence that an effective remedy is available, since Ordinance No. 06-01 of 27 February 2006 continues to be applicable despite the Committee's recommendations that it should be brought into line with the Covenant (CCPR/C/DZA/CO/3, paras. 7, 8 and 13). The Committee is of the view that suing for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor.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 regarding the effectiveness of filing a complaint are reasonable.

7.5 The Committee considers that, for the purposes of admissibility of a communication, the author must exhaust only the effective remedies for addressing the alleged violation, which in the present case consist of the effective remedies for addressing the enforced disappearance. In the light of all these considerations, the Committee concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the present communication.

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

Consideration of the merits

8.1 The 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 made by the authors of several communications, including the author of the present communication. The State party has been content to argue that communications

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.

incriminating public officials or persons acting on behalf of public authorities in cases of enforced disappearances from 1993 to 1998 should be considered within the broader context of the sociopolitical and security conditions that prevailed in the country during a period when the Government was struggling to combat 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 show concern for the fate of each individual and to treat each person with respect for the inherent dignity of the human person. Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the provisions of the Covenant.

8.3 The Committee notes that the State party has not replied to the author's allegations concerning the merits of the case, and recalls 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 holds the necessary information. Article 4, paragraph 2, of the Optional Protocol indicates that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with the information available to it. 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 brother, Benattia Zerrougui, was arrested on 1 June 1995 around midday by armed and hooded police officers wearing the uniform of the *wilaya* security services, who had set up a roadblock, and that the author was present during the arrest. The Committee also notes that, according to the author, the prolonged absence of his brother, as well as the circumstances surrounding his arrest, strongly suggest that he died in detention. The Committee notes that the State party has produced no evidence refuting such an 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 case at hand, the Committee notes that the State party has produced no evidence to indicate that it has fulfilled its obligation to protect Benattia Zerrougui's life. Therefore the Committee concludes that the State party has failed in its duty to protect Benattia Zerrougui's life, in violation of article 6, paragraph 1, of the Covenant.¹⁰

8.5 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment,¹¹ which recommends that States parties should make provision to ban incommunicado detention. It notes in the case at hand that Benattia Zerrougui was arrested by the police on 1 June 1995 and that his fate remains unknown to this day. In the absence of satisfactory explanations from the State party, the Committee considers that this

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. 8.4.

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

disappearance constitutes a violation of article 7 of the Covenant with regard to Benattia Zerrougui.¹²

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

8.7 Regarding the complaint of a violation of article 9, the Committee takes note of the author's allegations that Benattia Zerrougui was arrested on 1 June 1995 by police officers wearing the uniform of the *wilaya* security services without a warrant and without being informed of the reasons for his arrest; that he was not informed of the criminal charges against him and was not brought before a judge or other judicial authority so that he could challenge the legality of his detention; and that no official information was given to the author or his family regarding Benattia Zerrougui's fate. In the absence of satisfactory explanations from the State party, the Committee finds a violation of article 9 with respect to Benattia Zerrougui.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 Benattia Zerrougui's incommunicado detention and in the absence of information from the State party in that regard, the Committee finds a violation of article 10, paragraph 1, of the Covenant.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 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.¹⁶ In the present case, the Committee notes that the State party has not provided information about the fate or whereabouts of the disappeared person despite the author's multiple requests to the State party. The Committee concludes that Benattia Zerrougui's enforced disappearance since 1 June 1995 denied him the protection of the law and deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

8.10 The author invokes article 2, paragraph 3, of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose Covenant rights have been allegedly violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant,¹⁷ which provides, *inter alia*, that a failure by a State party to investigate allegations of violations could, in and of itself, give rise to a separate breach of the Covenant. In the present case, the victim's family

¹² See, for example, *Boudjemai v. Algeria*, para. 8.5.

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

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

¹⁵ See general comment No. 21 (1992) on the humane treatment of persons deprived of their liberty, para. 3 (*Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. B), and, for example, *Boudjemai v. Algeria*, para. 8.8.

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

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

contacted the competent authorities, including the public prosecutor at the tribunal of Tiaret and the chief prosecutor at the court of Tiaret, regarding Benattia Zerrougui's disappearance, but all the steps taken have proved futile, and the State party has failed to conduct a thorough and effective investigation into the disappearance of the author's brother. Furthermore, the absence of the legal right to take judicial proceedings since the promulgation of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation continues to deprive Benattia Zerrougui, 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 (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 article 6 (para. 1), article 7, article 9, article 10 and article 16 of the Covenant, with regard to Benattia Zerrougui and of article 2 (para. 3) read in conjunction with article 7 of the Covenant, with regard to the author.

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

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, including by: (a) conducting a thorough and effective investigation into the disappearance of Benattia Zerrougui; (b) providing the author and his family with detailed information about the results of its investigation; (c) releasing Benattia Zerrougui immediately if he is still being detained incommunicado; (d) in the event that Benattia Zerrougui is deceased, handing over his remains to his family; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the author for the violations suffered and to Benattia Zerrougui 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 by victims of crimes such as torture, extrajudicial killings and enforced disappearances. The State party is also under an obligation to take steps to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive 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. 1796/2008, in which the Human Rights Committee found a violation of the human rights established in article 6 (para. 1), article 7, article 9, article 10 (para. 1), article 16 and article 2 (para. 3), read in conjunction with article 6 (para. 1), article 7, article 9, article 10 (para. 1) and article 16 of the Covenant with respect to Benattia Zerrougui, and a violation of article 7 and of article 2 (para. 3), read in conjunction with article 7, with respect to the author.

2. However, we are concerned that the Committee's Views on the communication concerned 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

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 Benattia Zerrougui (the author's brother), 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 by victims of crimes such as torture, extrajudicial killings and enforced disappearances" (para. 10). We consider in fact that the Committee should have stated clearly and directly that the explicit prohibition under Ordinance No. 06-01 of legal action to initiate investigations of cases of torture, extrajudicial killings and enforced disappearances 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 Benattia Zerrougui, 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

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, communication No. 1177/2003, *Ilombe and Shandwe v. 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. 1044/2002, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 3.

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, 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.

12. In that way, the Committee would also be acting consistently with the concluding observations it adopted on Algeria in 2007 (CCPR/C/DZA/CO/3, paras. 7, 8 and 13), in which it stated unequivocally that Algeria should bring Ordinance No. 06-01 into line with the Covenant. Otherwise, the Committee is going to keep receiving similar individual communications, since the root cause of the failure to investigate and pass sentence on serious violations of this kind will not have been removed.

[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.]
