



## International Covenant on Civil and Political Rights

Distr.: General  
19 November 2014  
English  
Original: French

### Human Rights Committee

### Communication No. 2083/2011

#### Views adopted by the Committee at its 112th session (7–31 October 2014)

<i>Submitted by:</i>	Boughera Kroumi (represented by Philippe Grant of the Swiss organization Track Impunity Always (TRIAL))
<i>Alleged victims:</i>	Yahia Kroumi (son of the author) and the author himself
<i>State party:</i>	Algeria
<i>Date of communication:</i>	28 July 2011 (initial submission)
<i>Document reference:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 12 August 2011 (not issued in document form)
<i>Date of adoption of Views:</i>	30 October 2014
<i>Subject matter:</i>	Enforced disappearance
<i>Substantive issues:</i>	Right to an effective remedy, 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 unlawful interference with the home
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Articles of the Covenant:</i>	Articles 2 (para. 3), 6 (para. 1), 7, 9, 10 (para. 1), 16 and 17
<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 (112th session)**

concerning

#### **Communication No. 2083/2011\***

*Submitted by:* Boughera Kroumi (represented by Philippe Grant of the Swiss organization Track Impunity Always (TRIAL))

*Alleged victims:* Yahia Kroumi (son of the author) and the author himself

*State party:* Algeria

*Date of communication:* 28 July 2011 (initial submission)

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

*Meeting on 30 October 2014,*

*Having concluded* its consideration of communication No. 2083/2011, submitted to the Human Rights Committee by Boughera Kroumi 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, which is dated 28 July 2011, is Boughera Kroumi, a national of Algeria who was born in 1932. He is submitting the communication on behalf of himself and of his son, Yahia Kroumi, a bachelor with no children who was born on 6 September 1967. The author claims that his son is the victim of an enforced disappearance attributable to the State party in violation of articles 2 (para. 3), 6 (para. 1), 7, 9, 10 (para. 1), 16 and 17 of the Covenant and that he himself is the victim of violations of articles 2 (para. 3) and 7 of the Covenant. He is represented by Philippe Grant of the organization TRIAL.

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\* The following members of the Committee participated in the consideration of the present communication: Yadh Ben Achour, Christine Chanet, Ahmed Amin Fathalla, Cornelis Flinterman, Yuji Iwasawa, Walter Kälin, Gerald L. Neuman, Sir Nigel Rodley, Fabián Omar Salvioli, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

In accordance with rule 90 of the Committee's rules of procedure, Lazhari Bouzid did not participate in the consideration of the communication.

1.2 On 12 August 2011, the Committee, through its Special Rapporteur on new communications and interim measures, decided to grant the protection measures requested by the author and asked the State party to refrain from invoking domestic legislation, and specifically Ordinance No. 06-01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation, against the author or his family on the grounds of the present communication. On 26 October 2011, 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 submitted by the author**

2.1 At 7 a.m. on 12 August 1994, Yahia Kroumi, the author's son, was arrested at his home in Constantine by a group of uniformed soldiers and plain clothes military security personnel who were conducting a vast search operation following the murder of two soldiers in the region of Constantine. The members of the security forces entered all the homes in the district in which Yahia Kroumi lived and ordered all the men to leave their homes with their hands raised. Those arrested were brought together outside and some of them, including Yahia Kroumi, were taken by lorry to an unknown place of detention. According to the author, who was present at his son's arrest, at no time did the security forces present an arrest warrant or invoke any grounds for the arrest of his son.

2.2 According to the author, Yahia Kroumi and his 17 fellow detainees were subjected to appalling conditions of detention: the 18 men were crammed into a cell measuring four square metres where they were forced to remain standing for lack of space in the oppressive August heat. In just one day, most of them died on account of the conditions of detention. The bodies were removed, wrapped in blankets, and loaded onto an army lorry. There were very few survivors, and the author points out that his son may have died at that time. To date, in spite of the many steps taken by Yahia Kroumi's relatives, no one knows what happened to him.

2.3 The author and his family have taken various steps, both judicial and administrative, to determine the fate of Yahia Kroumi, but these have been in vain. The author and his wife visited the different police and gendarmerie units in Constantine to enquire whether their son was being held there. On 24 December 1995 and 25 February 1996, the family filed requests for information concerning the disappearance of Yahia Kroumi with the prosecution service in Constantine. On 29 March 1997, in response to a request by the Prosecutor-General of the Constantine court, the criminal police in Constantine *wilaya* produced a statement in which it officially denied any involvement in Yahia Kroumi's arrest. During the year 2000, the author submitted a request to the Ministry of the Interior in response to which he was told that investigations concerning his son had failed to determine his whereabouts. On 26 August 2000, the author and his wife also wrote to the Prosecutor-General and to the State Prosecutor to inform them of their son's disappearance. In spite of all these requests, no thorough investigation has been carried out into the disappearance and the author has never received any information about his son's fate.

2.4 On 28 June 2000, the author also sent a registered letter to the Chairman of the National Human Rights Observatory (ONDH). On 5 December 2001, the Kroumi family received a reply from the National Consultative Commission for the Protection and Promotion of Human Rights (CNCPDH)<sup>1</sup> informing them that Yahia Kroumi was unknown to the security forces and had never been arrested by them. On 9 September 2004, the Kroumi family received an invitation from the Commission to attend a hearing held by its members for the families of disappeared persons. No information was provided on the fate of Yahia Kroumi during the hearing.

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<sup>1</sup> CNCPDH has replaced ONDH.

2.5 Having to contend with the inaction and lack of transparency of the Algerian authorities, as well as with the financial consequences of his son's disappearance, which seriously affected the transport firm they had been running together, the author resigned himself to completing the formalities required by Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation. This requires that, in order to receive compensation, the families of disappeared persons testify that the disappeared have died. Accordingly, on 2 April 2006, the author submitted to the gendarmerie in Constantine a request for information concerning Yahia Kroumi. The request led to the issuance, on 5 June 2006, of a certificate of disappearance "in the extraordinary circumstances caused by the national tragedy", which enabled the author and his wife to obtain 9,600,000 dinars.<sup>2</sup>

### **The complaint**

3.1 The author alleges that his son was a victim of an enforced disappearance attributable to the State party as defined by article 7 (para. 2 (i)) of the Rome Statute of the International Criminal Court and by article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, because he disappeared after being arrested by agents of the security forces of the State party acting in an official capacity.

3.2 The author emphasizes that it is probable that his son died in detention, possibly even during the first night, when many of those being held with him died. He considers that his son, who was held in premises unknown, was under the responsibility of the State party, which is required to guarantee the right to life of all detained persons. The fact that the State party is unable to provide any accurate and consistent information on the fate of a person under its authority indicates that it has failed to take the necessary steps to protect that person during detention, in violation of article 6 (para. 1) of the Covenant. The author maintains, moreover, that when an enforced disappearance lasts for a long period, as is the case of that of Yahia Kroumi, who disappeared more than 20 years ago, the disappearance in itself constitutes a violation of the right to life guaranteed by article 6 (para. 1) of the Covenant.<sup>3</sup>

3.3 The author recalls the Committee's jurisprudence<sup>4</sup> and maintains that enforced disappearance itself constitutes a violation of article 7 of the Covenant, because his son's abduction and disappearance, which prevented him from communicating with his family and the outside world, constitute cruel and inhuman treatment. The author emphasizes that enforced disappearance is a complex crime that comprises a broad array of human rights violations and that it may not be reduced to mere incommunicado detention, as the Committee seems to do in its most recent jurisprudence. The author considers that incommunicado detention is a separate violation of article 7 of the Covenant, but that the Committee should not retain that aspect alone.<sup>5</sup> The author recalls moreover that his son was initially detained under appalling conditions which were responsible for the death of many persons. He considers that such conditions constitute inhuman treatment far beyond a

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<sup>2</sup> Yahia Kroumi's mother died before receiving her share, and the author received only a fraction of the amount due to his wife.

<sup>3</sup> The author refers to the individual opinions of Mr. Fabián Omar Salvioli in this respect, in particular in communications No. 1780/2008 *Zarzi v. Algeria*, Views adopted on 22 March 2011, and No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010.

<sup>4</sup> Communications No. 449/1991, *Mojica v. Dominican Republic*, Views adopted on 15 July 1994, para. 5.7; No. 540/1993, *Laureano Atachahua v. Peru*, Views adopted on 25 March 1996, para. 8.5; and No. 542/1993 *N'Goya v. Zaire*, Views adopted on 25 March 1996, para. 5.5.

<sup>5</sup> *Benaziza v. Algeria*, para. 9.5; communications No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 9.6; No. 1327/2004, *Atamna v. Algeria*, Views adopted on 10 July 2007, para. 7.6; No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.8; and No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.3.

simple violation of article 10 of the Covenant as generally recognized by the Committee and that they constitute a violation of article 7.<sup>6</sup>

3.4 With reference to the Committee's jurisprudence,<sup>7</sup> the author moreover considers that he is himself a victim of a violation of article 7 of the Covenant on account of the uncertainty surrounding the circumstances of his son's disappearance and his fate, which is a source of deep and continual anxiety and suffering. The author asserts that the authorities' denial of his son's arrest, which he himself witnessed, together with their inaction and the impunity of those responsible and the obligation for the author to acknowledge his son's death without the circumstances being clarified in the context of the implementation of Ordinance No. 06-01, also constitute violations of article 7 of the Covenant in respect of the author.

3.5 The author contends that the arrest and incommunicado detention of his son, which have still not been acknowledged by the State party, constitute arbitrary arrest and detention in breach of article 9 (paras. 1 to 5) of the Covenant: the disappeared person was arrested without a warrant; he was not notified of the reasons for his arrest or of the charges against him; he was not brought before a judicial authority and was not allowed to challenge the lawfulness of his arrest. In addition, he was not able to request reparation for his arbitrary arrest and detention and no reparation has been made for them to the members of his family.

3.6 According to the author, his son was also the victim of a violation of his right to be treated with humanity and with respect for the inherent dignity of the human person during his detention, in breach of article 10, paragraph 1, of the Covenant. In this regard, the author recalls the Committee's jurisprudence that enforced disappearance constitutes a violation of article 10 of the Covenant.<sup>8</sup> The author also refers to his son's conditions of detention and concludes that the State party has violated the rights of his son as guaranteed by article 10.

3.7 The author considers that, because of his incommunicado detention, his son was not able to assert his fundamental rights, in breach of his right to recognition as a person before the law guaranteed under article 16 of the Covenant. The author refers to the Committee's established jurisprudence, according to which intentionally removing a person from the protection of the law for a prolonged period of time may constitute a denial of his or her right to recognition 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 legal remedies, have been systematically impeded. In such situations, disappeared persons are in practice deprived of the capacity to exercise their rights or to have recourse to any remedy as a direct consequence of the actions of the State, which must be interpreted as a refusal to recognize such victims as persons before the law.<sup>9</sup>

3.8 The author alleges that the circumstances in which his son was arrested at home, early in the morning, by the security forces without an arrest warrant, constitute an illegal

<sup>6</sup> The author refers to communication No.188/1984, *Portorreal v. Dominican Republic*, Views adopted on 5 November 1987, para. 11, in which the Committee considered that the conditions of detention constituted a violation of article 7 of the Covenant.

<sup>7</sup> *Benaziza v. Algeria*, para. 9.6; *Boucherf v. Algeria*, para. 9.7; *Atamna v. Algeria*, para. 7.7; *Bousroual v. Algeria*, para. 9.8; and *Sarma v. Sri Lanka*, para. 9.5.

<sup>8</sup> Communication No. 1469/2006, *Sharma v. Nepal*, Views adopted on 28 October 2008, para. 7.7.

<sup>9</sup> The author cites communication No. 1328/2004, *Cheraitia v. Algeria*, Views adopted on 10 July 2007; and *Atmana v. Algeria*.

and arbitrary interference with the home of the author, in violation of article 17 of the Covenant.<sup>10</sup>

3.9 Lastly, the author emphasizes that his son was prevented from exercising his right to an effective remedy against his detention and the alleged violations of articles 7, 9, 10 (para. 1), 16 and 17 of the Covenant, in violation of article 2, paragraph 3, of the Covenant. The author also contends that until the truth about the fate of the disappeared person has been established, the State party has the obligation by virtue of article 2, paragraph 3, of the Covenant, read in conjunction with article 6, paragraph 1, to conduct a thorough investigation into the enforced disappearance, to inform the person's family and friends of the progress and results of the investigation and to prosecute those responsible for the disappearance. The author and his family for their part have used all the avenues available to them to find out what had happened to the disappeared person, but the case was never pursued by the State party. The author considers that the absence of any investigation and the lack of due diligence by the State party in respect of the allegations of illegal detention and enforced disappearance also constitute a violation of article 2, paragraph 3, in respect of himself and his family.

3.10 The author asserts that all domestic remedies have proved unavailable, useless or ineffective and that the conditions of article 5 (para. 2 (b)) of the Optional Protocol have therefore been met. After many unsuccessful approaches to the security forces to try to obtain information on what had happened to his son, the author informed the judicial authorities several times of his disappearance and asked, in vain, for an investigation to be opened. His official complaints were all shelved.

3.11 Lastly, the author underlines that, since February 2006, the date of the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation, it has been prohibited to prosecute members of the Algerian defence and security forces. The author recalls that the Committee has declared that the Ordinance seems to promote impunity and infringe the right to an effective remedy.<sup>11</sup> The author maintains that he was thus unable to assert his right to an effective remedy.

3.12 The author asks the Committee to order the State party: (a) to release Yahia Kroumi if he is still alive; (b) to conduct a prompt, thorough and effective investigation into his disappearance; (c) to report to the author and his family on the results of the investigation; (d) to prosecute, try and punish the persons responsible for Yahia Kroumi's disappearance, in conformity with the State party's international commitments; and (e) to provide appropriate reparation to Yahia Kroumi's beneficiaries, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition, for the grave moral and material harm which they have suffered since his disappearance.

#### **State party's observations on admissibility**

4.1 On 4 October 2011, the State party submitted 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" in which it contested the admissibility of the communication. It is of the view that this communication, which incriminates public officials or other persons acting on behalf of public authorities in cases of enforced disappearance during the period in question — from

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<sup>10</sup> The author cites communication No. 687/1996, *Rojas García v. Colombia*, Views adopted on 3 April 2001, in which the Committee considered that the raid by hooded police officers in the middle of the night, entering through the roof of the house, constituted arbitrary interference with the home of the Rojas García family.

<sup>11</sup> The author refers to the Committee's concluding observations on the third periodic report of Algeria, adopted on 1 November 2007 (CCPR/C/DZA/CO/3/CRP.1), para. 7.

1993 to 1998 — should be examined taking “a comprehensive approach” and should be declared inadmissible. The State party considers that such communications should be placed in the broader context of the sociopolitical situation and security conditions that prevailed in the country during a period when the Government was struggling to combat a form of terrorism aimed at provoking the “collapse of the Republican State”. In this context, and in conformity with the Constitution (arts. 87 and 91), the Algerian Government implemented precautionary measures and informed the 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 The State party emphasizes that, in some areas characterized by the proliferation of informal settlements, civilians had trouble distinguishing the actions of terrorist groups from those of the security forces, to which they often attributed enforced disappearances. According to the State party, a large number of enforced disappearances must be seen in this context. The concept of disappearance in Algeria during the period in question actually covers six distinct scenarios. 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 had 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 missing, whereas in fact they had abandoned them, and sometimes even left the country, to escape from 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 that took into account 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 disappearances have been reported, 6,774 cases examined, 5,704 approved for compensation and 934 rejected, and 136 are 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 considers that the author has not exhausted all domestic remedies. 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 author’s complaint, he has written letters to political and administrative authorities and petitioned advisory or 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 availing himself of 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 an investigating judge. In the Algerian legal system, it is the public prosecutor who receives complaints and who institutes criminal proceedings if these are warranted. Nevertheless, in order to protect the rights of victims and their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint with the investigating judge and suing for damages. In this case, it is the victim, not the prosecutor, who institutes criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not utilized, despite the fact that it would have enabled the author to institute criminal proceedings and compel the investigating judge to launch an investigation, 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.<sup>12</sup>

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. The Ordinance also introduces a procedure for filing a judicial declaration of 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 individual or collective proceedings brought against members of any branch of Algeria's defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

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

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<sup>12</sup> The State party cites, in particular, communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.



4.8 The State party asks the Committee to note how similar the facts and situations described by the author are to those described by the authors of the previous communications concerned by the memorandum of 3 March 2009 and to take account of the sociopolitical and security context in which they occurred. It also asks the Committee to find that the author has failed to exhaust all domestic remedies; to recognize that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in these communications through measures aimed at achieving peace and national reconciliation that are consistent with the principles of the Charter of the United Nations and 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 4 October 2011, the State party also transmitted an additional memorandum to the Committee, in which it questioned the intention behind the series of individual communications to the Committee since the beginning of 2009, which, it considered, constituted rather an abuse of procedure aimed at bringing before the Committee a broad historical issue whose causes and circumstances lie outside the Committee's purview. The State party observes that all these "individual" communications dwell on the general context in which the disappearances occurred, focusing solely on the actions of the security forces, without ever mentioning those of the various armed groups that used criminal concealment techniques to incriminate the armed forces.

5.2 The State party indicates that it will not address the merits of the aforementioned communications until the issue of their admissibility has been settled. It adds that all judicial or quasi-judicial bodies have the obligation to deal with preliminary questions before considering the merits. It considers that the decision in the case in point to consider the questions of admissibility and the merits jointly and simultaneously — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications in terms of both their general nature and their intrinsic particularities. Referring to the rules of procedure of the Human Rights Committee, the State party notes that the sections relating to the Committee's procedure to determine the admissibility of communications are separate from those relating to the consideration of communications on the merits and that therefore these questions could be considered separately. 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 regarding the obligation to exhaust domestic remedies, the State party reiterates 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 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 Algeria's defence and security forces" 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 On 12 January 2012, the State party, referring to its "background memorandum on the inadmissibility of individual communications submitted to the Human Rights

Committee in connection with the implementation of the Charter for Peace and National Reconciliation” and its additional memorandum, reiterated that it contested the admissibility of the communication.

#### **Authors’ comments on the State party’s observations**

6.1 On 12 March 2012, the author submitted comments on the State party’s observations on admissibility and provided additional arguments on the merits of the complaint.

6.2 The author points out that the State party has recognized the competence of the Committee to consider individual communications. This competence is of a general nature and its exercise by the Committee is not subject to the discretion of the State party. In particular, it is not for the State party to determine whether it is appropriate for the Committee to take up a specific case. That is for the Committee to decide when it considers the communication. The author is of the view that the adoption by the State party of a comprehensive domestic settlement mechanism cannot be applied in respect of the Human Rights Committee or constitute grounds for declaring the communication inadmissible. 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.<sup>13</sup>

6.3 The author recalls that the State party’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.

6.4 The author again refers to the State party’s argument that the requirement to exhaust domestic remedies calls on the author to institute criminal proceedings by filing a complaint with the investigating judge and suing for damages, in accordance with articles 72 et seq. of the Code of Criminal Procedure. He recalls that this procedure, if it is not to be declared inadmissible, is subject to the payment of a surety or “procedural fee”, the amount of which is set arbitrarily by the investigating judge. He considers that the procedure represents a financial deterrent to the persons concerned who, furthermore, have no guarantee that it will actually result in proceedings being initiated. The author considers that, given the serious nature of the alleged offences, it was the responsibility of the competent authorities to take up the case. The author refers to the Committee’s jurisprudence in this respect.<sup>14</sup>

6.5 The author reiterates that, following the arrest of his son, he tried to find out from the security forces what had happened to him, to no avail. He also informed the prosecution services of the court of Constantine and the national judicial, governmental and human rights institutions in order for investigations to be carried out. At no time did any of these authorities ever conduct an investigation into the alleged violations. Consequently, the author and his family cannot be reproached for not having exhausted domestic remedies since it was the State party that failed to carry out the necessary investigations incumbent upon it.

6.6 The author also recalls the ban, pursuant to article 45 of Ordinance No. 06-01, on bringing any individual or collective proceedings against members of Algeria’s defence and

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<sup>13</sup> The author refers to the concluding observations of the Human Rights Committee on the third periodic report of Algeria (CCPR/C/DZA/CO/3), paras. 7, 8 and 13. He also cites *Boucherf v. Algeria*, para. 11, and to the concluding observations of the Committee against Torture on the third periodic report of Algeria (CAT/C/DZA/CO/3), adopted on 13 May 2008, paras. 11, 13 and 17. Lastly, the author refers to general comment No. 29 (2001) of the Human Rights Committee on derogations from the Covenant during a state of emergency, para. 1.

<sup>14</sup> *Benaziza v. Algeria*, para. 8.3.

security forces. He concludes that Ordinance No. 06-01 has indeed put an end to any possibility of bringing civil or criminal proceedings for crimes committed by the security forces during the civil war and that the Algerian courts are obliged to declare any such claim inadmissible.

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 rules of procedure, which permits the working group or the Special Rapporteur to decide, because of the exceptional nature of the case, to request a written reply that relates only to the question of admissibility. This prerogative does not lie with either the author of the communication or the State party but is the sole prerogative of the working group or the Special Rapporteur. The author considers that the State party was required to submit explanations or observations concerning both the admissibility and the merits of the communication.

6.8 Lastly, the author notes that, since the State party has not submitted any observations on the merits of the communication, the Committee must base its decision on the existing information, and the author's allegations must be taken as proven, given that the State party has not refuted them.<sup>15</sup>

### **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 para. 1.2 above) does not preclude their being considered separately by the Committee. Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement.

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 bring the matter before the investigating judge and sue 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 written letters to political and administrative authorities and has petitioned representatives of the prosecution service (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 also takes note of the author's argument that several complaints were lodged with the public prosecutor of the court of Constantine, but that at no time did those authorities conduct an investigation into the alleged violations. Lastly, the Committee notes that, according to the author, article 46 of Ordinance No. 06-01 provides for the punishment of any person who files a complaint pertaining to actions covered by article 45 thereof.

7.4 The Committee recalls that the State party has a duty not only to carry out thorough investigations of alleged violations of human rights, particularly enforced disappearances or

<sup>15</sup> The author cites the decision of the Committee against Torture in communication No. 207/2002, *Dragan Dimitrijevic v. Serbia and Montenegro*, adopted on 24 November 2004, para. 5.3; and communication No. 1640/2007 of the Human Rights Committee, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 4.

violations of the right to life, brought to the attention of its authorities, but also to prosecute, try and punish anyone held to be responsible for such violations.<sup>16</sup> Although the family of Yahia Kroumi repeatedly contacted the competent authorities concerning his disappearance, the State party failed to conduct a thorough and effective investigation into the events, despite the fact that a serious allegation of enforced disappearance was involved. The State party has also failed to provide sufficient information indicating that an effective remedy is available, while Ordinance 06-01 continues to be applied despite the Committee's recommendation that it should be brought into line with the Covenant.<sup>17</sup> The Committee considers that to sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for charges that should be brought by the public prosecutor.<sup>18</sup> The Committee therefore concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the communication.

7.5 The Committee considers that, for a communication to be deemed admissible, the author must have exhausted only the remedies relevant to the alleged violation – in the present case, remedies with respect to enforced disappearance.

7.6 The Committee considers that the author has sufficiently substantiated his allegations insofar as they raise issues under articles 6 (para. 1), 7, 9, 10 (para. 1), 16 and 17, read alone and in conjunction with article 2 (para. 3) of the Covenant. The Committee finds, however, that the author did not make any request for compensation to the State party's authorities for the arbitrary or illegal detention of his son and that the alleged violation of article 9, paragraph 5, is thus not admissible. The Committee therefore proceeds to consider the communication on the merits in respect of the alleged violations of articles 2 (para. 3), 6 (para. 1), 7, 9, 10 (para. 1), 16 and 17.

#### *Consideration of the merits*

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

8.2 The State party has submitted collective and general observations in response to serious allegations by the author, and has been content to argue that communications incriminating public officials, or persons acting on behalf of public authorities, in cases of enforced disappearances between 1993 and 1998 should be considered within the broader context of the sociopolitical situation and security conditions that prevailed in the country during a period when the Government was struggling to combat terrorism. The Committee recalls its jurisprudence,<sup>19</sup> according to which the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. The Covenant demands that the State party concern itself with the fate of every individual and treat every individual with respect for the inherent dignity of the human person. Ordinance No. 06-01, without the amendments recommended by the Committee, contributes to impunity and therefore cannot, as it currently stands, be considered compatible with the provisions of the Covenant.

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<sup>16</sup> See, inter alia, communications No. 1779/2008, *Mezine v. Algeria*, Views adopted on 25 October 2012, para. 7.4; No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 7.4; No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012, para. 6.4; and No. 1791/2008, *Boudjemai v. Algeria*, Views adopted on 22 March 2013, para. 7.4.

<sup>17</sup> CCPR/C/DZA/CO/3, paras. 7, 8 and 13.

<sup>18</sup> *Mezine v. Algeria*, para. 7.4; *Benaziza v. Algeria*, para. 8.3; *Berzig v. Algeria*, para. 7.4; *Khirani v. Algeria*, para. 6.4; and *Boudjemai v. Algeria*, para. 7.4.

<sup>19</sup> See, inter alia, *Mezine v. Algeria*, para. 8.2; *Berzig v. Algeria*, para. 8.2; and *Boudjemai v. Algeria*, para. 8.2.

8.3 The Committee notes that the State party has not replied to the author's claims concerning the merits of the case and recalls its jurisprudence, according to which the burden of proof should not lie solely with 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.<sup>20</sup> Consequently, and pursuant to article 4, paragraph 2, of the Optional Protocol, 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.<sup>21</sup> In the absence of any 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 the author asserts that his son, Yahia Kroumi, was arrested by soldiers in his presence on 12 August 1994 at his home and has subsequently disappeared. It also notes that, according to the author, many persons arrested at the same time died during the first night of detention on account of the appalling conditions in which they were held. The author does not exclude the possibility that his son may have died that night. The Committee notes that the State party has produced no evidence refuting the author's allegation. It 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, in effect removes that 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 the life of Yahia Kroumi. It therefore concludes that the State party has failed in its duty to protect the life of Yahia Kroumi, in violation of article 6, paragraph 1, of the Covenant.<sup>22</sup>

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, which recommends that States parties should make provisions against incommunicado detention. It notes in the case in question that Yahia Kroumi was arrested by soldiers on 12 August 1994 and that his fate is still unknown. The Committee also takes note of the author's allegations concerning the appalling conditions in which the disappeared person and the other persons arrested at the same time were detained and which caused the death of many persons during the first night of detention. In the absence of a satisfactory explanation from the State party, the Committee considers that the disappearance of Yahia Kroumi and the conditions in which the disappeared person was held during the first night constitute a violation of article 7 of the Covenant with regard to the author's son.<sup>23</sup>

8.6 The Committee also takes note of the anguish and distress caused to the author by the disappearance of his son and by the uncertainty as to his fate. It considers that the facts

<sup>20</sup> See, inter alia, *Mezine v. Algeria*, para. 8.3; *El Abani v. Libyan Arab Jamahiriya*, para. 7.4; *Berzig v. Algeria*, para. 8.3; and *Boudjemai v. Algeria*, para. 8.3. See also International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, judgment of 30 November 2010, para. 54.

<sup>21</sup> See *Mezine v. Algeria*, para. 8.3; communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3; and *Boudjemai v. Algeria*, para. 8.3.

<sup>22</sup> See *Mezine v. Algeria*, para. 8.4; and *Boudemai v. Algeria*, para. 8.4.

<sup>23</sup> See *Mezine v. Algeria*, para. 8.5; *Khirani v. Algeria*, para. 7.5; *Berzig v. Algeria*, para. 8.5; and communication No. 1295/2004, *El Alwani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 6.5.

before it disclose a violation with respect to the author of article 7 of the Covenant read alone and in conjunction with article 2, paragraph 3.<sup>24</sup>

8.7 With regard to the alleged violation of article 9, the Committee notes the author's claim that Yahia Kroumi was arrested without a warrant by soldiers on 12 August 1994, that he was not charged or brought before a judicial authority, which would have enabled him to challenge the lawfulness of his detention, and that no official information was given to his friends and family regarding his fate, despite the fact that the authorities certified that his disappearance had occurred "in the context of the national tragedy".<sup>25</sup> In the absence of a satisfactory explanation from the State party on these points, the Committee finds a violation of article 9 with regard to Yahia Kroumi.<sup>26</sup>

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 the allegations concerning the incommunicado detention of Yahia Kroumi under conditions that caused the death of many persons in a single night, 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.<sup>27</sup>

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 denial of his or her right to recognition 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. 3, para. 2), have been systematically impeded.<sup>28</sup> In the present case, the Committee notes that the State party has not furnished any explanation concerning the fate of Yahia Kroumi, despite the multiple requests addressed by the author to the State party. The Committee concludes that the enforced disappearance of Yahia Kroumi some 20 years ago removed him from 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 With regard to the alleged violation of article 17, the Committee notes that the State party did not provide any justification for or clarification of the entry of soldiers into the family home of Yahia Kroumi early in the morning without a warrant. The Committee concludes that the entry of officials into the family home of Yahia Kroumi in such circumstances constitutes unlawful interference with his home, in violation of article 17 of the Covenant.<sup>29</sup>

8.11 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

<sup>24</sup> See *Mezine v. Algeria*, para. 8.6; *Khirani v. Algeria*, para. 7.6; *Berzig v. Algeria*, para. 8.6; *El Abani v. Libyan Arab Jamahiriya*, para. 7.5; and communication No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.11.

<sup>25</sup> See paras. 2.3 and 2.5 above.

<sup>26</sup> See, inter alia, *Mezine v. Algeria*, para. 8.7; *Khirani v. Algeria*, para. 7.7; and *Berzig v. Algeria*, para. 8.7.

<sup>27</sup> See general comment No. 21 (1992) on humane treatment of persons deprived of their liberty, para. 3; *Mezine v. Algeria*, para. 8.8; *Zarzi v. Algeria*, para. 7.8; and communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2.

<sup>28</sup> *Mezine v. Algeria*, para. 8.9; *Khirani v. Algeria*, para. 7.9; *Berzig v. Algeria*, para. 8.9; *Zarzi v. Algeria*, para. 7.9; *Benaziza v. Algeria*, para. 9.8; *Atamna v. Algeria*, para. 7.8; and communication No. 1495/2006, *Madoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

<sup>29</sup> *Mezine v. Algeria*, para. 8.10.

have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, which states that 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, although Yahia Kroumi's family contacted the competent authorities, including the prosecutor of the court of Constantine, regarding his disappearance, all their efforts were in vain, and the State party failed to conduct a thorough and effective investigation into the disappearance of the author's son. Furthermore, the absence of the legal right to undertake judicial proceedings since the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation continues to deprive Yahia Kroumi, the author and his family of access to an effective remedy, because the Ordinance prohibits, on pain of imprisonment, the initiation of legal proceedings to shed light on the most serious crimes, such as enforced disappearances.<sup>30</sup> The payments made to his parents do not compensate for the failure to investigate the disappearance of the author's son (see para. 2.5 above). 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 (para. 1), 16 and 17 of the Covenant, with regard to Yahia Kroumi, and of article 2 (para. 3), read in conjunction with article 7 of the Covenant, with regard to the author and his family.

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 17 of the Covenant, and of article 2 (para. 3) read in conjunction with articles 6 (para. 1), 7, 9, 10 (para. 1) 16 and 17 of the Covenant, with regard to Yahia Kroumi. It also finds a violation by the State party of article 7, read alone and in conjunction with article 2 (para. 3), with regard to the author and his family.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under the 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 Yahia Kroumi and providing the author and his family with detailed information about the results of its investigation; (b) releasing Yahia Kroumi immediately if he is still being detained incommunicado; (c) in the event that Yahia Kroumi is deceased, handing over his remains to his family; (d) prosecuting, trying and punishing those responsible for the violations committed; (e) providing adequate compensation to the author and his family for the moral harm suffered and to Yahia Kroumi, if he is still alive, taking into account payments already made; and (f) providing appropriate satisfaction for the author and his family. 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 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

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<sup>30</sup> CCPR/C/DZA/CO/3, para. 7.

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.

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