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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2893/2016*, **

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| <i>Communication submitted by:</i> | Malika Bendjael and Merouane Bendjael [represented by counsel, Nassera Dutour, of the Collectif des familles de disparu(e)s en Algérie] |
| <i>Alleged victims:</i> | The authors and Mourad Bendjael (son of Malika Bendjael and brother of Merouane Bendjael) |
| <i>State party:</i> | Algeria |
| <i>Date of communication:</i> | 8 April 2016 (initial submission) |
| <i>Document references:</i> | Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 12 December 2016 (not issued in document form) |
| <i>Date of adoption of Views:</i> | 27 March 2020 |
| <i>Subject matter:</i> | Enforced disappearance |
| <i>Procedural issues:</i> | Exhaustion of domestic remedies |
| <i>Substantive issues:</i> | Right to an effective remedy; cruel, inhuman or degrading treatment or punishment; liberty and security of person; human dignity; recognition as a person before the law; unlawful interference with the home; freedom of assembly |
| <i>Articles of the Covenant:</i> | 2 (2) and (3), 6, 7, 9, 10, 14, 16, 17 and 21 |
| <i>Articles of the Optional Protocol:</i> | 2, 3 and 5 (2) |

* Adopted by the Committee at its 128th session (2–27 March 2020).

** The following members of the Committee participated in the examination of the communication:
Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Christof Heyns, Bamariam Koita, Marcia V.J.
Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José
Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.



1. The authors of the communication are Malika Bendjael and Merouane Bendjael, nationals of Algeria. They claim that Mourad Bendjael, son of Malika and brother of Merouane, who was born on 12 August 1967 and is also an Algerian national, was a victim of enforced disappearance attributable to the State party, in violation of article 2 (3) as well as articles 6, 7, 9, 10 and 16 of the Covenant. The authors further claim to be victims of a violation of their rights under article 2 (2) and (3) as well as articles 7, 14, 17 and 21 of the Covenant with regard to Malika Bendjael, and of article 2 (2) and (3) as well as articles 7, 9, 10, 17 and 21 with regard to Merouane Bendjael. The Covenant and its Optional Protocol entered into force for the State party on 12 December 1989. The authors are represented by counsel, Nassera Dutour of the Collectif des familles de disparu(e)s en Algérie.

The facts as submitted by the authors

2.1 On 4 May 1994, at around 11 a.m., Mourad Bendjael and his friend A.B. were arrested in Algiers by agents of the Intelligence and Security Department. These agents were dressed in civilian clothing, were hooded and armed, and arrived in a pickup truck. They forced the two young men into their vehicle at gunpoint, without producing any official document or arrest warrant or explaining the reasons for their actions. Passers-by witnessed the scene.

2.2 On 6 May 1994 at 2 a.m., about 20 armed Intelligence and Security Department agents, dressed in civilian clothing, were deployed to the Alger Centre neighbourhood. They presented themselves at the Bendjael family home, claiming to be police officers and to be looking for Mourad Bendjael even though the Department had arrested him two days earlier. Without producing a warrant, they proceeded to search the premises, upending everything in their path. They questioned all members of the family and arrested Malika Bendjael's other two sons, Karim and Merouane.¹ On 12 May 1994, the agents returned to the Bendjael family home to carry out another search. They were accompanied by Merouane, who was wearing his missing brother's jacket. On 7 June 1994, A.B. was released. He informed Malika Bendjael that he and her son had been taken to the Châteauneuf barracks in Ben Aknoun after their arrest. He also stated that they had been tortured.

2.3 Merouane Bendjael had been held at the Châteauneuf barracks, where he was tortured for four days. On arrival he caught sight of his brother Mourad Bendjael, lying on the ground and tied to a pipe in the recess of a corridor. He was very weak and covered in bruises, having evidently been tortured. During the four days of his detention at the barracks, Merouane saw his brother Mourad every time the agents took him along the corridor to the torture room. Mourad Bendjael was always in the same place and in the same state. He was never able to talk to his brother.

2.4 A fortnight after his arrest, Merouane Bendjael was taken to the office of Officer M. along with his brother Mourad, who was unrecognizable as a result of the torture he had suffered. The officer pressed a gun to Merouane's head and threatened to kill him if Mourad continued to refuse to talk. He pulled the trigger, but the gun was not loaded. On 12 June 1994, Merouane was brought before the public prosecutor of Sidi M'Hamed Court in Algiers;² he was remanded in custody and transferred to Serkadji prison.³ The third brother, Karim, was freed on 12 June 1994 without even being brought before a court.

2.5 On 21 June 1994, the Bendjael family lawyer lodged a complaint with the chief prosecutor of the Court of Algiers.⁴ To their great surprise, following this complaint the

¹ Eleven other people from the neighbourhood were arrested that night, including two of the Bendjael brothers' friends.

² Merouane Bendjael stated that he had been tortured, but the judge took no steps to investigate this allegation.

³ On 17 November 1996, Merouane Bendjael was tried by Algiers Criminal Court for "membership of an armed terrorist group threatening the security of the State" and for theft. Despite maintaining his innocence, he was sentenced to 5 years' imprisonment. On 22 April 1999, following an application for judicial review, he was acquitted by the Supreme Court of Algiers. He provides a certificate of detention at Serkadji prison, dated 4 April 2006, which attests to his release on 22 April 1999.

⁴ The lawyer pleaded a violation of the Code of Criminal Procedure on the grounds that almost 50 days after his arrest, Mourad Bendjael had not yet been brought before a court and had had no contact with his family or his lawyer.

family received a notice from El Harrach Court, dated 28 May 1994, summoning Mourad Bendjael to a hearing on 7 June 1994 for attempted escape.⁵ On 17 November 1994, Malika Bendjael was summoned by the Bab Jdid gendarmerie brigade as part of an investigation concerning her son. Although she went to the gendarmerie station, the interview was without result and was not followed up on in any way. Malika Bendjael received fresh summonses addressed to Mourad on 23 November 1995 and 25 December 1995.

2.6 In 1999, Malika Bendjael received a statement from the chief of the Bab Jdid gendarmerie indicating that Mourad Bendjael's file had been transmitted to the prosecutor of the Court of Algiers on 22 May 1999. In 2004, she received a summons from the Bab Jdid gendarmerie, dated 17 November. On 31 August 2006, she requested a certificate of disappearance from the chief of the gendarmerie brigade in accordance with the provisions of the legislation implementing the Charter for Peace and National Reconciliation. This certificate, dated 20 September 2006, was issued to her by the gendarmerie at Blida. On 29 October 2006, she filed a new complaint with the prosecutor of the Court of Algiers. Following this complaint, she was summoned several times by the gendarmerie in the course of 2006 and 2007. On each occasion, the gendarmes asked her to take steps to obtain compensation under the Charter for Peace and National Reconciliation. The Bendjael family received two further summons for Mourad, dated 25 April 2009 and 2 May 2009.

2.7 At the end of 2011, Mourad Bendjael's sister discovered her brother's name in the records of the El Alia cemetery in Algiers. The records stated that Mourad was 19 years old at the time of death, whereas in fact he was 27 years old on the day of his arrest, that he had been shot dead by armed groups in Kouba and that he was buried in a grave set aside for terrorists. She obtained a death certificate from the town hall of Kouba, which stated that his death had been registered by an employee of the Saint Eugène morgue in Algiers. According to the employee in question, Mourad's body had been taken to the morgue on 7 June 1994 by police from the anti-banditry squad and buried on 15 August 1994 in the El Alia cemetery.⁶

2.8 Given the contradictory nature of this information, on 8 April 2013 Malika Bendjael filed a complaint with the prosecutor of Sidi M'Hamed Court, requesting the opening of an investigation. On 3 October 2013, she filed an application for the exhumation of the body with the Court of Algiers. Following this application, she was summoned by the prosecutor of Sidi M'Hamed Court on 3 November 2013, and again on 13 January and 20 February 2014. During the last of these interviews, the prosecutor informed her that he would not proceed with the exhumation request and tried to convince her to initiate the compensation procedure foreseen under the implementing legislation of the Charter for Peace and National Reconciliation. On 26 April 2014, she was summoned to the Bab Jdid gendarmerie, where the chief of brigade informed her that he had received a document from the Directorate General of the National Gendarmerie stating that Mourad Bendjael had been found dead among members of an armed group in 2006. Malika Bendjael asked for a copy of this document, but the chief of brigade told her that he could not give it to her.

2.9 Concomitant with her requests to the judicial authorities, Malika Bendjael sought the support of various non-judicial bodies. She sent several letters and submitted a file to the National Advisory Commission for the Promotion and Protection of Human Rights.⁷ On 8 April 2003, she addressed a joint application to the President of the Republic, the Head of Government, the Minister of the Interior, the Minister of Justice and, for a second time, the National Advisory Commission for the Promotion and Protection of Human Rights. On 12 August 2004, she again petitioned the aforementioned authorities, writing to the human rights adviser to the Office of the President of the Republic and once again to the National Advisory

⁵ The family received a further summons from the Chief Prosecutor of the Court of Algiers, dated 2 May 1995 and addressed to Mourad Bendjael, to attend a hearing on 23 May 1995.

⁶ Also in 2011, the officer in charge of missing persons cases at the Bab Jdid gendarmerie brigade stated that he could find no information on Mourad Bendjael.

⁷ The State institution responsible for conducting investigations into disappearance cases brought to its attention. On 19 February 2003, Malika Bendjael received, as the only reply from this institution, a document referring to events involving Mourad Bendjael which had taken place before his disappearance. Consequently, on 20 March 2003 she sent a new letter to the institution, reiterating that her son had disappeared after his arrest by Intelligence and Security Department agents in May 1994.

Commission, the Head of Government and the Minister of Justice.⁸ The Bendjael family received a statement from the police dated 19 August 2009 asking the family to follow the compensation procedure under the Charter for Peace and National Reconciliation.

2.10 Malika Bendjael states that she has often been arrested and assaulted while participating in peaceful demonstrations at the request of the association SOS Disparus. Both authors have been taken in for questioning and handled roughly several times during gatherings of families of disappeared persons, including on 8 March 2008 on the occasion of International Women's Day.

2.11 Despite the authors' best efforts, no investigation has been opened to examine the significant contradictions between the information contained in official records, the authorities' statements and the observations of witnesses, particularly those of A.B. and Merouane Bendjael. The authors point out that, following the promulgation of Ordinance No. 06-01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation, it is legally impossible for them to have recourse to judicial proceedings. Domestic remedies, which had in any case proved useless and ineffective, are thus now totally unavailable. The Charter stipulates that "reprehensible acts on the part of agents of the State, which have been punished by law whenever they have been proved, cannot be used as a pretext to discredit the security forces as a whole, who were doing their duty for their country with the support of its citizens".

2.12 The authors argue that, since Ordinance No. 06-01 prohibits recourse to judicial proceedings, on pain of criminal prosecution, the victims are relieved of any obligation to exhaust domestic remedies. Article 45 of the Ordinance in fact prohibits any complaint of disappearance or other offences, stipulating that "no individual or class action may be taken against members of any branch of the defence and security forces of the Republic for actions carried out to protect persons and property, safeguard the nation and preserve the institutions of the People's Democratic Republic of Algeria". By virtue of this provision, any allegation or complaint must be declared inadmissible by the competent legal authority. Furthermore, article 46 of the Ordinance establishes that "any person who, through his or her spoken or written statements or any other act, uses or makes use of the wounds caused by the national tragedy to undermine the institutions of the People's Democratic Republic of Algeria, weaken the State, impugn the honour of agents who served the State with dignity or tarnish the image of Algeria abroad shall be liable to a term of imprisonment of 3 to 5 years and a fine of 250,000 to 500,000 Algerian dinars. Criminal proceedings shall be automatically initiated by the public prosecutor's office. In the case of repeat offences, the penalty established in this article shall be doubled."

2.13 Merouane Bendjael has not been able to bring a complaint before the national courts either to denounce his arbitrary detention or to obtain compensation on the grounds of wrongful detention. He did not institute proceedings when he was released from prison because he was afraid of being sent back there and did not want to take any risks. Furthermore, Act No. 01-08 of 26 June 2001, which subsequently introduced into the Code of Criminal Procedure a procedure for obtaining compensation in such cases, stipulates that such requests must be submitted within six months of the dismissal of proceedings, discharge or final acquittal. Merouane Bendjael was therefore unable to benefit from this provision, which entered into force two years after his acquittal. Because of the torture he had suffered,⁹ Merouane Bendjael felt threatened and feared taking any steps that might expose him to renewed threats and to reprisals by the authorities.¹⁰ He explains that he did not raise the issue

⁸ Following these requests, on 9 December 2006 Malika Bendjael received a letter from the Head of Government informing her that her son's case was being processed by the National Advisory Commission for the Promotion and Protection of Human Rights. On 27 December 2006, she received a letter from the Office of the President advising her to apply to the court with jurisdiction over her place of residence. She had already taken such steps, to no avail.

⁹ Merouane Bendjael was thrown to the ground, kicked and hit with an iron bar. He was subjected to repeated electrocutions and waterboarding.

¹⁰ Merouane Bendjael invokes the Committee's jurisprudence, notably *Mehalli v. Algeria* (CCPR/C/110/D/1900/2009), according to which the requirement to exhaust all domestic remedies is more flexible in situations of threats and fear of reprisals.

of torture and ill-treatment upon his release from prison as no legal remedy was available to address that issue.

2.14 The authors indicate that the case of Mourad Bendjael was also submitted to the Working Group on Enforced or Involuntary Disappearances on 12 September 2007.

The complaint

3.1 The authors allege that Mourad Bendjael is a victim of enforced disappearance as defined under article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance. Although no provision of the Covenant expressly mentions enforced disappearance, such practices involve violations of the right to life, the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment and the right to liberty and security of person. In the present case, the authors are claiming that the State party has violated article 2 (2) and (3) as well as articles 6, 7, 9, 10, 14, 16, 17 and 21 of the Covenant.

3.2 The authors consider that Ordinance No. 06-01 constitutes a violation of the general obligation assumed by the State party under article 2 (2) of the Covenant, in that this provision also implies a negative obligation for States parties to refrain from adopting measures that are contrary to the Covenant. They are of the view that, in adopting the Ordinance, in particular article 45, the State party adopted a legislative measure that deprived of effect rights recognized under the Covenant,¹¹ particularly the right to have access to an effective remedy against violations of human rights. Since the promulgation of this ordinance, the authors have been prevented from instituting legal proceedings. They consider that a breach, by act or omission, of the obligation imposed by article 2 (2) of the Covenant may engage the international responsibility of the State party.¹² They claim that, despite all their efforts, after the entry into force of the Charter for Peace and National Reconciliation and its implementing legislation, their complaints remained ineffective. They therefore claim to be victims of this legislative provision that violates article 2 (2) of the Covenant.

3.3 The authors add that the provisions of Ordinance No. 06-01 are contrary to article 2 (3) of the Covenant, since they have the effect of preventing any future criminal proceedings from being brought against the alleged perpetrators of enforced disappearances when these persons are State agents. The Ordinance also prohibits, on pain of imprisonment, the use of the justice system to establish the fate of victims.¹³ Despite the many administrative and judicial processes initiated by Malika Bendjael before the adoption of the Charter for Peace and National Reconciliation, the Algerian authorities have failed to duly conduct an effective and thorough investigation into the disappearance of her son. Moreover, article 2 (3) of the Covenant requires the State party to make reparation to individuals whose Covenant rights have been violated,¹⁴ yet articles 27 to 39 of Ordinance No. 06-01 provide only for monetary compensation, conditional upon the issuance of a declaration of presumed death following an unsuccessful investigation, with article 38 excluding any other form of reparation. In practice, however, no investigation is carried out into the fate of the disappeared person, or into the perpetrators of the disappearance. The authors recall that the Committee has deemed that the right to an effective remedy must include the right to adequate reparation and the right to the truth and has recommended that the State party should undertake to ensure that disappeared persons and/or their families have access to an effective remedy and that proper follow-up is assured, while ensuring respect for the right to compensation and the fullest possible redress.¹⁵ The State party has therefore violated article 2 (3) of the Covenant not only with regard to Malika Bendjael and Mourad Bendjael, but also with regard to Merouane Bendjael, who has no access to an effective judicial procedure through which to obtain reparation for his arbitrary detention and torture.

¹¹ See, inter alia, the concurring individual opinion of Fabián Salvioli in the case of *Djebbar and Chihoub v. Algeria* (CCPR/C/103/D/1811/2008).

¹² Human Rights Committee, general comment No. 31, para. 4.

¹³ CCPR/C/DZA/CO/3, paras. 7 and 8.

¹⁴ Human Rights Committee, general comment No. 31, para. 16.

¹⁵ CCPR/C/DZA/CO/3, para. 12.

3.4 The authors recall the developments in the Committee's jurisprudence regarding enforced disappearances and consider that the mere risk of loss of a person's life in the context of enforced disappearance is enough to justify a finding of a direct violation of article 6 of the Covenant. In view of the facts surrounding the disappearance of Mourad Bendjael, they believe that the chances of finding him are growing slimmer by the day. The circumstances of his disappearance and the information obtained from the Algerian authorities suggest that he lost his life in detention. The authors therefore consider that the State party has failed in its obligations to protect Mourad Bendjael's right to life and to take steps to find out what happened to him, in violation of article 2 (3) read in conjunction with article 6 (1) of the Covenant.

3.5 Recalling the circumstances surrounding the disappearance of Mourad Bendjael, including the total lack of information on his detention, his state of health when his brother saw him at the Châteauneuf barracks and the absence of communication with his family and the outside world, the authors consider that Mourad Bendjael was subjected to inhuman or degrading treatment. They also recall that prolonged arbitrary detention increases the risk of torture and cruel, inhuman or degrading treatment. Furthermore, referring to the Committee's jurisprudence, they emphasize that the anguish, uncertainty and distress caused by Mourad Bendjael's disappearance constitute a form of inhuman or degrading treatment for his family. The authors also consider that Merouane Bendjael was the victim of inhuman and degrading treatment and torture and did not have access to an effective remedy. Consequently, the authors claim that the State party is responsible for a violation of article 7 of the Covenant with regard to Mourad Bendjael and Merouane Bendjael, and of article 7 read in conjunction with article 2 (3) with regard to Mourad Bendjael and his family.

3.6 Bearing in mind the fact that Mourad Bendjael was held incommunicado without access to a lawyer and without being informed of the reasons for his arrest or the charges against him, that his detention was not entered in the police custody register and that there is no official record of his whereabouts or fate, the authors affirm that he was deprived of his right to liberty and security of person and that the investigations were not as effective as they should have been. They therefore consider that Mourad Bendjael was deprived of the guarantees set out in article 9 of the Covenant, and notably of access to an effective remedy, which amounts to a violation of this article read alone and in conjunction with article 2 (3) in his regard.

3.7 Merouane Bendjael recalls that he too was subjected to arbitrary detention: he was arrested on 6 May 1994 without a warrant and held in incommunicado detention for 35 days, during which time he was deprived of all contact with the outside world and of access to a lawyer. Two and a half years elapsed before he was brought before a judge. He was eventually acquitted on appeal, after having served his sentence in prison, but he received no compensation for this unlawful detention, in violation of the principle set out in article 9 (5) of the Covenant. Merouane Bendjael therefore had no access to an effective remedy, in violation of article 2 (3) read in conjunction with article 9 of the Covenant.

3.8 Recalling the provisions of article 10 of the Covenant, the authors argue that, in the absence of any investigation by the Algerian authorities, Mourad Bendjael was deprived of his liberty and was not treated with humanity and dignity, which constitutes a violation of article 10 of the Covenant in his regard. They consider that the same article was violated with regard to Merouane Bendjael, who was held in incommunicado detention, then in police custody, and was eventually sentenced to 5 years' imprisonment without there being any significant evidence against him.

3.9 Recalling the provisions of article 14 of the Covenant and paragraph 9 of the Committee's general comment No. 32 (2007), Malika Bendjael states that all procedures initiated with the judicial authorities proved unsuccessful. Moreover, the Charter for Peace and National Reconciliation and article 45 of Ordinance No. 06-01 are an impediment to any legal action against State agents, preventing Malika Bendjael from having her case heard. The State party therefore violated article 14 of the Covenant in her regard.

3.10 The authors also recall article 16 of the Covenant and the Committee's 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 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 relatives to obtain access to effective remedies, including judicial remedies, have been systematically impeded. In this connection, they refer to the Committee's concluding observations on the second periodic report of Algeria under article 40 of the Covenant,¹⁶ in which the Committee established that disappeared persons who are still alive and held incommunicado have their right to recognition as persons before the law, as enshrined in article 16 of the Covenant, violated. They therefore assert that, in keeping Mourad Bendjael in detention without formally notifying his family and relatives, the Algerian authorities 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, read alone and in conjunction with article 2 (3).

3.11 Recalling that article 17 of the Covenant protects individuals from arbitrary or unlawful interference with their privacy, home or correspondence, and invoking the Committee's jurisprudence,¹⁷ the authors argue that the search of their home by military security forces, which was conducted with brutality and without a warrant two days after Mourad Bendjael's arrest, coupled with the lack of access to an effective remedy, constitute a violation by the State party of article 17 of the Covenant, read alone and in conjunction with article 2 (3), in their regard.

3.12 Lastly, the authors recall that article 46 of Ordinance No. 06-01 prohibits collective expression by the families of disappeared persons and human rights defenders, including during political meetings and demonstrations, in violation of the right of peaceful assembly set out in article 21 of the Covenant. They therefore claim that they are victims of a violation of their right of peaceful assembly.

3.13 The authors request the Committee to find that the State party has violated article 2 (3) as well as articles 6, 7, 9, 10 and 16 of the Covenant with regard to Mourad Bendjael; article 2 (2) and (3) as well as articles 7, 14, 17 and 21 of the Covenant with regard to Malika Bendjael; and article 2 (2) and (3) as well as 7, 9, 10, 17 and 21 of the Covenant with regard to Merouane Bendjael. In addition, they request that the Committee urge the State party to respect its international commitments and give effect to the rights recognized in the Covenant and in all the international human rights conventions ratified by Algeria. They also ask the Committee to request the State party to order that independent and impartial inquiries be conducted with the aim of: (a) finding Mourad Bendjael and adhering to its commitment under article 2 (3) of the Covenant; (b) bringing the instigators and perpetrators of this enforced disappearance before the competent civil authorities to face prosecution in line with article 2 (3) of the Covenant; and (c) providing Mourad Bendjael, if he is still alive, and the authors with adequate, effective and prompt reparation for the harm suffered, in accordance with article 2 (3) and article 9 of the Covenant, including appropriate compensation commensurate with the seriousness of the case, full rehabilitation and guarantees of non-repetition. With regard to Merouane Bendjael, the authors request the Committee to order the State party to provide him with adequate, effective and prompt reparation for the harm suffered, in accordance with article 2 (3) and article 9 of the Covenant. Lastly, they ask the Committee to urge the Algerian authorities to repeal articles 27 to 39, 45 and 46 of Ordinance No. 06-01.

State party's observations on admissibility

4. On 3 April 2017, the State party invited the Committee to refer to the background memorandum of the Government of Algeria on the handling of disappearances in the light of the implementation of the Charter for Peace and National Reconciliation, without appending a copy.

¹⁶ CCPR/C/79/Add.95, para. 10.

¹⁷ *Mezine v. Algeria* (CCPR/C/106/D/1779/2008), para. 8.10 and *Boudjemai v. Algeria* (CCPR/C/107/D/1791/2008), para. 8.10.

Authors' comments on the State party's observations

5.1 On 15 March 2018, the authors commented on the State party's observations on admissibility. They emphasize that these observations are addressed to the Working Group on Enforced or Involuntary Disappearances and are not a response to the present complaint. The authors further emphasize that the State party's observations do not deal at all with the admissibility of the communication, the particulars of the case or the remedies sought by the victim's family, thereby demonstrating the Algerian authorities' disregard and disdain for the procedure currently before the Committee. They also point out that the State party's observations, being dated July 2009, are obsolete.

5.2 Recalling that none of the remedies sought have led to a thorough investigation or criminal proceedings and that the Algerian authorities have failed to provide tangible evidence of any real efforts to locate Mourad Bendjael and identify those responsible for his disappearance, the authors conclude that domestic remedies have been exhausted and that the Committee should find the communication admissible.

5.3 Referring to the Committee's jurisprudence according to which the Charter for Peace and National Reconciliation cannot be used against persons who submit individual communications, the authors recall that the provisions of the Charter are certainly not a satisfactory response to the cases of disappearance, which should be based on respect for the right to the truth, justice and full redress.

State party's failure to cooperate

6. The Committee recalls that, on 3 April 2017, the State party disputed the admissibility of the communication, referring to the Government's background memorandum on the handling of disappearances in the light of the Charter for Peace and National Reconciliation. On 12 December 2016, and again on 8 October and 12 December 2018, the State party was invited to submit its observations on the merits of the communication. The Committee notes that it has not received any response and regrets the State party's failure to cooperate by sharing its observations on the present complaint. In conformity with article 4 (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 transmit to the Committee the information in its possession.¹⁸

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearance was reported to the Working Group on Enforced or Involuntary Disappearances. However, it recalls that the extra-conventional procedures and mechanisms established by the Human Rights Council, firstly, to examine the human rights situation in specific countries or territories or cases of widespread human rights violations worldwide and, secondly, to report publicly on such matters, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5 (2) (a) of the Optional Protocol.¹⁹ Accordingly, the Committee considers that the examination of Mourad Bendjael's case by the Working Group on Enforced or Involuntary Disappearances does not render the communication inadmissible under this provision.

¹⁸ *Mezine v. Algeria*, para. 8.3 and *Medjnoune v. Algeria* (CCPR/C/87/D/1297/2004), para. 8.3.

¹⁹ See, inter alia, *Tharu and others v. Nepal* (CCPR/C/114/D/2038/2011), para. 9.2; *Ammari v. Algeria* (CCPR/C/112/D/2098/2011), para. 7.2; *Zaier v. Algeria* (CCPR/C/112/D/2026/2011), para. 6.2; *Mihoubi v. Algeria* (CCPR/C/109/D/1874/2009), para. 6.2; and *Al Daquel v. Libya* (CCPR/C/111/D/1882/2009), para. 5.2.

7.3 The Committee notes that the authors consider themselves to have exhausted all available remedies in respect of the disappearance of Mourad Bendjael. It notes that, by way of disputing the admissibility of the communication, the State party has simply referred to the background memorandum on the handling of disappearances in the light of the Charter for Peace and National Reconciliation. In this regard, the Committee recalls that, in 2018, it reiterated its concern that, despite repeated requests, the State party continued to refer systematically to a general document (the “aide-memoire”) without providing specific information in response to the claims made by the authors of communications. Consequently, the Committee called on the State party, as a matter of urgency, to cooperate in good faith under the individual communications procedure by ceasing to refer to the aide-memoire and by responding individually, with specific details, to the claims made by authors of communications.²⁰

7.4 The Committee also recalls that the State party has not only a duty to carry out thorough investigations of alleged violations of human rights brought to the attention of its authorities, particularly violations of the right to life, but also a duty to prosecute, try and punish anyone held to be responsible for such violations.²¹ Mourad Bendjael’s family has repeatedly alerted the competent authorities of the State party to his enforced disappearance but the authorities have failed to conduct an effective and thorough investigation in his regard. Moreover, the State party has provided no evidence giving grounds to conclude that an effective remedy is currently available. In addition, Ordinance No. 06-01 continues to be applied even though the Committee has emphasized the need to bring it into line with the principles of the Covenant.²² In this connection, the Committee further recalls that in its concluding observations of 2018 on the State party’s fourth periodic report, it expressed regret about, in particular, the fact that there is no effective remedy available for disappeared persons or their families and that no action has been taken to uncover the truth about disappeared persons, to find them and, if they are deceased, to return their remains to their families.²³ In these circumstances, the Committee finds that it is not precluded from considering the communication under article 5 (2) (b) of the Optional Protocol.

7.5 The Committee further notes that Merouane Bendjael himself claims to have been a victim of arbitrary detention, in the course of which he was subjected to acts of torture and cruel, inhuman and degrading treatment, and to have had no access to an effective remedy to obtain compensation after his acquittal. In this regard he cites Act No. 01-08, which amended the Code of Criminal Procedure in 2001, and explains that he did not institute proceedings in the domestic courts to denounce his arbitrary detention and the acts of torture and cruel, inhuman and degrading treatment to which he was subjected because he was afraid of reprisals and because no remedy was available for this purpose.

7.6 Concerning the exhaustion of domestic remedies by Merouane Bendjael, the Committee recalls that, as stated previously, the State party has not only a duty to carry out thorough investigations of alleged violations of human rights brought to the attention of its authorities, particularly violations of the right to life, but also a duty to prosecute, try and punish anyone held to be responsible for such violations.²⁴ In this regard, the Committee recalls that in its concluding observations on the fourth periodic report of Algeria, it expressed concern that so few of the officers who committed acts of torture and ill-treatment had been prosecuted and punished and that cases of arbitrary detention seemed not to have been investigated or prosecuted.²⁵ The State party has failed to demonstrate that an effective remedy is available for persons finding themselves in situations such as Merouane Bendjael’s.

²⁰ CCPR/C/DZA/CO/4, paras. 7 and 8.

²¹ *Boudjemai v. Algeria*, para. 7.4; *Mezine v. Algeria*, para. 7.4; *Berzig v. Algeria* (CCPR/C/103/D/1781/2008), para. 7.4; and *Khirani v. Algeria* (CCPR/C/104/D/1905/2009 and Corr.1), para. 6.4.

²² CCPR/C/DZA/CO/3, paras. 7, 8 and 13 and CCPR/C/DZA/CO/4, paras. 6, 8, 12, 14 and 34.

²³ CCPR/C/DZA/CO/4, para. 29.

²⁴ *Boudjemai v. Algeria*, para. 7.4; *Mezine v. Algeria*, para. 7.4; *Berzig v. Algeria*, para. 7.4; and *Khirani v. Algeria*, para. 6.4.

²⁵ CCPR/C/DZA/CO/4, paras. 33 and 35.

In these circumstances, the Committee finds that it is not precluded from considering Merouane Bendjael's claims under article 5 (2) (b) of the Optional Protocol.

7.7 The Committee notes that the authors have also claimed a violation of article 2 (2) and (3) of the Covenant in their regard. Recalling its jurisprudence according to which the provisions of article 2 lay down general obligations for States parties and cannot, by themselves, give rise to a separate claim under the Optional Protocol because they can be invoked only in conjunction with other substantive articles of the Covenant, the Committee considers the authors' claims under article 2 (2) and (3) of the Covenant to be inadmissible under article 3 of the Optional Protocol.²⁶

7.8 The Committee notes that the authors have also claimed a violation of article 21 of the Covenant. However, it considers that the authors have failed to sufficiently substantiate their claim and notes that they do not appear to have taken any action before the domestic courts regarding the alleged attacks on their freedom to demonstrate. Consequently, this part of the communication is inadmissible under article 2 and article 5 (2) (b) of the Optional Protocol.

7.9 On the other hand, the Committee considers that the authors have sufficiently substantiated the claims under article 2 (3), article 6 (1) and articles 7, 9, 10, 14, 16 and 17 of the Covenant, for the purposes of admissibility. It therefore declares the communication admissible and proceeds with its consideration of the merits.

Consideration of the merits

8.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

8.2 The Committee notes that the State party has merely referred to its collective and general observations, which it has previously transmitted to the Working Group on Enforced or Involuntary Disappearances and the Committee in connection with other communications, in order to confirm its position that such cases have already been settled through the implementation of the Charter for Peace and National Reconciliation. The Committee refers to its jurisprudence and its concluding observations on the fourth periodic report of Algeria and recalls that the State party may not invoke the provisions of the Charter 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. In the present case, without the amendments recommended by the Committee, Ordinance No. 06-01 promotes impunity and cannot therefore, as it currently stands, be considered compatible with the provisions of the Covenant.²⁷

8.3 The Committee also notes that the State party has not replied to the authors' allegations concerning the merits of the case and recalls its jurisprudence 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.²⁸ In conformity with article 4 (2) of the Optional Protocol, the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to transmit to the Committee the information in its possession.²⁹ In the absence of any explanations from the State party in this respect, due weight must be given to the authors' allegations, provided they have been sufficiently substantiated.

²⁶ See, for example, *H.E.A.K. v. Denmark* (CCPR/C/114/D/2343/2014), para. 7.4; *Castañeda v. Mexico* (CCPR/C/108/D/2202/2012), para. 6.8; *Ch.H.O. v. Canada* (CCPR/C/118/D/2195/2012), para. 9.4; *Peirano Basso v. Uruguay* (CCPR/C/100/D/1887/2009), para. 9.4; and *A.P. v. Ukraine* (CCPR/C/105/D/1834/2008), para. 8.5.

²⁷ *Zaier v. Algeria*, para. 7.2; and *Ammari v. Algeria*, para. 8.2.

²⁸ See, inter alia, *Ammari v. Algeria*, para. 8.3; *Mezine v. Algeria*, para. 8.3; *El Abani v. Libyan Arab Jamahiriya* (CCPR/C/99/D/1640/2007), para. 7.4; and *Berzig v. Algeria*, para. 8.3.

²⁹ *Mezine v. Algeria*, para. 8.3 and *Medjnoune v. Algeria*, para. 8.3.

8.4 The Committee recalls that while the Covenant does not explicitly use the term “enforced disappearance” in any of its articles, enforced disappearance constitutes a unique and integrated series of acts that represents a continuing violation of various rights recognized in the treaty, such as the right to life, the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, and the right to liberty and security of person.³⁰

8.5 The Committee notes that Mourad Bendjael was last seen by his brother Merouane Bendjael and by his friend A.B. at the end of May 1994 while in detention at the Châteauneuf barracks in Ben Aknoun. It takes note of the many contradictory pieces of information on the purported death of Mourad Bendjael, and of the summonses that were addressed to him, suggesting that the Algerian authorities still considered him alive at a date subsequent to his alleged death, as is reflected in the certificate of disappearance issued in his name. The Committee also notes that the State party has provided no information that might serve to determine Mourad Bendjael’s fate and has never even confirmed his detention. 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, 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.³¹ In the present case, the Committee notes that the State party has produced no evidence to indicate that it fulfilled its obligation to protect the life of Mourad Bendjael. The Committee therefore finds that the State party has failed in its duty to protect Mourad Bendjael’s life, in violation of article 6 (1) of the Covenant.

8.6 Furthermore, 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, in which it recommends that States parties take steps to prohibit incommunicado detention. In the present case, it notes that after Mourad Bendjael’s brother Merouane saw him at the Châteauneuf barracks in May 1994, his family, including the authors, never again had access to even the slightest iota of information about his fate or his place of detention despite their repeated requests to the competent authorities of the State party. The Committee therefore considers that Mourad Bendjael, who disappeared on 4 May 1994 and was seen alive at the end of May 1994, was held incommunicado by the Algerian authorities for at least the intervening period of time. In the absence of any explanation from the State party, the Committee considers that the disappearance of Mourad Bendjael constitutes a violation of article 7 of the Covenant in his regard.³²

8.7 The Committee notes that Merouane Bendjael was himself also held incommunicado for 35 days. In the absence of any explanation from the State party in this regard, the Committee considers that this incommunicado detention constitutes a violation of article 7 of the Covenant with regard to Merouane Bendjael.

8.8 In view of the above, the Committee will not consider separately the claims based on the violation of article 10 of the Covenant.³³

8.9 The Committee also takes note of the anguish and distress caused to the authors and their family by Mourad Bendjael’s disappearance over 25 years ago. It considers that the facts before it disclose a violation of article 7 of the Covenant with regard to the authors.³⁴

³⁰ *Katwal v. Nepal* (CCPR/C/113/D/2000/2010), para. 11.3; *Serna et al. v. Colombia* (CCPR/C/104/D/2134/2012), para. 9.4; and *El Boathi v. Algeria* (CCPR/C/119/D/2259/2013), para. 7.4. See also the Committee’s general comment No. 36 (2018), para. 58.

³¹ *Louddi v. Algeria* (CCPR/C/112/D/2117/2011), para. 7.4; *Mezine v. Algeria*, para. 8.4; and *Boudjemai v. Algeria*, para. 8.4. See also the Committee’s general comment No. 36, para. 58.

³² *Ammari v. Algeria*, para. 8.5; *Mezine v. Algeria*, para. 8.5; *Khirani v. Algeria*, para. 7.5; *Berzig v. Algeria*, para. 8.5; and *El Alwani v. Libyan Arab Jamahiriya* (CCPR/C/90/D/1295/2004), para. 6.5.

³³ *Ammari v. Algeria*, para. 8.6.

³⁴ *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 *El Hassy v. Libyan Arab Jamahiriya* (CCPR/C/91/D/1422/2005), para. 6.11.

8.10 With regard to the alleged violation of article 9 of the Covenant, the Committee takes note of the authors' allegations that Mourad Bendjael and Merouane Bendjael were arbitrarily arrested, without a warrant, and were neither formally charged nor brought before a judicial authority, which would have enabled them to challenge the lawfulness of their detention. In the absence of any information from the State party on this subject, the Committee considers that due weight must be given to the authors' allegations.³⁵ The Committee therefore finds a violation of article 9 of the Covenant with regard to Mourad Bendjael and Merouane Bendjael.³⁶

8.11 The Committee also takes note of Malika Bendjael's allegation that her lack of access to the State party's judicial authorities constitutes a violation of article 14 of the Covenant. The Committee recalls its general comment No. 32, in which it states, inter alia, that a situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee contained in the first sentence of article 14 (1) of the Covenant. In the present case, the Committee notes that all of the procedures that Malika Bendjael initiated with the judicial authorities proved unsuccessful. It refers to its concluding observations on the fourth periodic report of Algeria, in which it expressed concern about articles 45 and 46 of Ordinance No. 06-01, which infringe the right of any person to have access to an effective remedy against violations of human rights.³⁷ This right includes the right of access to a court, as provided for in article 14 (1) of the Covenant. The Committee therefore finds that the State party has failed in its duty to provide Malika Bendjael with access to a court, in violation of article 14 (1) of the Covenant.

8.12 The Committee recalls that the intentional removal of a person from the protection of the law constitutes a denial of the right to recognition as a person before the law, particularly if the efforts of his or her relatives to obtain access to effective remedies have been systematically impeded.³⁸ In the present case, the Committee notes that the State party has not furnished any explanation concerning the fate or whereabouts of Mourad Bendjael, despite the inquiries made by his relatives and the fact that he was last seen in the custody of the authorities. The Committee finds that Mourad Bendjael's enforced disappearance more than 25 years ago removed him from the protection of the law and deprived him of his right to be recognized as a person before the law, in violation of article 16 of the Covenant.

8.13 With regard to the alleged violation of article 17 of the Covenant, the Committee notes that the State party has not provided any justification or clarification as to why military security forces forcibly entered the family home of Mourad Bendjael in the middle of the night without a warrant. The Committee concludes that the entry of officials into the family home of Mourad Bendjael in these circumstances constituted unlawful interference with their home, in violation of article 17 of the Covenant.³⁹

8.14 The authors also invoke a violation of article 2 (3), read in conjunction with articles 6, 7, 9, 16 and 17 of the Covenant, which requires States parties to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights recognized in the Covenant. The Committee recalls the importance it attaches to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of violations of the rights guaranteed under the Covenant.⁴⁰ It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it states 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.

8.15 In the present case, although Malika Bendjael repeatedly alerted the competent authorities to her son's disappearance, the State party failed to conduct a thorough and

³⁵ *Chani v. Algeria* (CCPR/C/116/D/2297/2013), para. 7.5.

³⁶ See, inter alia, *Mezine v. Algeria*, para. 8.7; *Khirani v. Algeria*, para. 7.7; and *Berzig v. Algeria*, para. 8.7.

³⁷ CCPR/C/DZA/CO/4, paras. 11–14.

³⁸ *Basnet v. Nepal* (CCPR/C/117/D/2164/2012), para. 10.9; *Tharu and others v. Nepal*, para. 10.9; and *Serna et al. v. Colombia*, para. 9.5.

³⁹ *Mezine v. Algeria*, para. 8.10 and *Boudjema v. Algeria* (CCPR/C/121/D/2283/2013), para. 8.11.

⁴⁰ *Allioua and Kerouane v. Algeria* (CCPR/C/112/D/2132/2012), para. 7.11.

effective investigation into his disappearance, nor did it apprise the authors of the progress of the search and investigation efforts undertaken or of the fate of Mourad Bendjael. Furthermore, the legal impossibility of applying to a judicial body since the promulgation of Ordinance No. 06-01 continues to deprive Mourad Bendjael and the authors of any access to an effective remedy, given that the Ordinance prohibits use of the justice system to shed light on the worst offences, including enforced disappearance.⁴¹ The Committee finds that the facts before it reveal a violation of article 2 (3), read in conjunction with articles 6, 7, 9 and 16 of the Covenant, with regard to Mourad Bendjael, and of article 2 (3), read in conjunction with articles 7 and 17 of the Covenant, with regard to the authors.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of articles 6, 7, 9 and 16 of the Covenant, and of article 2 (3) read in conjunction with articles 6, 7, 9 and 16 of the Covenant, with regard to Mourad Bendjael. It also finds a violation by the State party of articles 7 and 17, read alone and in conjunction with article 2 (3) of the Covenant, with regard to the authors, and of article 14 of the Covenant with regard to Malika Bendjael.

10. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. It is required to grant full reparation to individuals whose Covenant rights have been violated. In the present case, the State party is obliged to: (a) conduct a prompt, effective, thorough, independent, impartial and transparent investigation into the disappearance of Mourad Bendjael and provide the authors with detailed information about the results of its investigation; (b) release Mourad Bendjael immediately if he is still being held incommunicado; (c) in the event that Mourad Bendjael is deceased, hand over his remains to his family in a dignified manner, in accordance with the cultural norms and customs of the victims; (d) prosecute, try and punish those responsible for the violations committed; (e) provide the authors and Mourad Bendjael, if he is alive, with full reparation, including adequate compensation; (f) provide appropriate satisfaction for the authors; and (g) ensure that Merouane Bendjael has access to a procedure to obtain compensation for harm suffered, in view of his acquittal on 22 April 1999. 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 take all steps necessary to prevent similar violations from occurring in the future. To this end, the Committee is of the view that the State party should review its legislation in the light of its obligation under article 2 (2) of the Covenant and, in particular, repeal the provisions of the aforementioned Ordinance that are incompatible with the Covenant, to ensure that the rights enshrined in the Covenant can be enjoyed fully in the State party.

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 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 and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it is determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish them and have them widely disseminated in its official languages.

⁴¹ CCPR/C/DZA/CO/3, para. 7.