



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3010/2017*, **

<i>Communication submitted by:</i>	Naima Boutarsa (represented by counsel from Fondation Alkarama)
<i>Alleged victims:</i>	The author and Boubekeur Fergani (the author's husband)
<i>State party:</i>	Algeria
<i>Date of communication:</i>	26 May 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 24 July 2017 (not issued in document form)
<i>Date of adoption of Views:</i>	8 July 2022
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issue:</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
<i>Articles of the Covenant:</i>	2 (2) and (3), 6, 7, 9, 10, 16 and 19
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2)

1. The author of the communication is Naima Boutarsa, a national of Algeria. She claims that her husband, Boubekeur Fergani, born in 1957 and also a national of Algeria, is the victim of an enforced disappearance attributable to the State party, in violation of articles 2 (3), 6, 7, 9, 10 and 16 of the Covenant. The author maintains that she herself is the victim of a violation of her rights under articles 2 (3) and 7 of the Covenant. Lastly, she claims that, because of its domestic legislation, the State party is in breach of its general obligation under article 2 (2) of the Covenant, read in conjunction with articles 2 (3) and 19. Both the Covenant

* Adopted by the Committee at its 135th session (27 June–27 July 2022).

** The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Imeru Tamerat Yigezu and Gentian Zyberri.



and the Optional Protocol entered into force for the State party on 12 December 1989. The author is represented by counsel from Fondation Alkarama.

The facts as submitted by the author

2.1 Boubekour Fergani, the father of five children, was a history and geography teacher at Khalid Ibn Walid secondary school in Constantine. He was arrested during a large-scale operation in the neighbourhood where his family lived in the city of Constantine. During the operation, which took place in June 1995, many people were arrested, in particular intellectuals, elected members of communal councils, deputies and Islamic Salvation Front activists and supporters. According to the testimonies of some individuals who were arrested and later released, other persons arrested by the criminal investigation police were held incommunicado for several weeks or months at the central police station in Constantine, where they were systematically tortured, and then transferred to the Territorial Centre for Research and Investigation, in military region No. 5, which is part of the Intelligence and Security Department. Those arrested by officials from the Department were taken directly to the Centre. Most of these people have disappeared.

2.2 On 22 June 1995, at about 10.45 p.m., a dozen officers from the security forces, some wearing police uniforms and others dressed in civilian clothes, arrived outside Boubekour Fergani's family home. The officers knocked loudly on the door and threatened to kill the family if they did not open up quickly. The officers were accompanied by a hooded civilian who stood in the doorway and provided information about the political activities of people in the neighbourhood. The security forces first brought out Boubekour Fergani's brother, but the hooded man shook his head. When he was shown Boubekour Fergani, the hooded man nodded. Mr. Fergani was then arrested and taken to an unknown location. The family were not given any explanation or shown an arrest warrant. Since that night, his family has never seen him again.

2.3 The day after Boubekour Fergani was arrested, the author tried to identify him among the bodies of numerous victims of summary executions strewn across the streets of the city after the violent operation conducted by the security services. Unable to find him, she also searched for him in the following days at police stations and barracks around the city, but in vain. Despite threats from members of the security services who wanted her to stop searching, the author went to the court in Constantine to ask whether her husband had been brought before judicial officials from the prosecutor's office, but her efforts were again in vain. After several months of making enquiries with the public prosecutor's office, which she informed of the enforced disappearance of her husband on several occasions, court security officials banned her from entering the building.

2.4 Four months after Boubekour Fergani's arrest, the author received information from people who had been arrested at the same time and in the same circumstances as her husband, but who had been released. They confirmed to her that they had been detained with Boubekour Fergani at the Bellevue Territorial Centre for Research and Investigation in Constantine. The author went to the Centre, but the guards at the entrance to the barracks brusquely turned her away, refused to give her any information and told her never to come back and ask about her husband again. Since then, the author has not received any information about her husband.

2.5 Having learned from families of victims that some detainees had been transferred to the central police station in Constantine in early 1996, the author went there regularly for several months, hoping to obtain news. All her efforts proved futile, as the police officers systematically sent her to other detention centres, including the premises of the gendarmerie in Koudia and the police cells in the kasbah. The author exhausted herself looking for him in all the locations she was sent to in the city, without ever obtaining any information. She did all of this against a backdrop of constant terror, fearing the reprisals with which she and her children were regularly threatened.

2.6 Following all these fruitless efforts, and with support from the wives and mothers of other disappeared persons, she initiated legal proceedings. In 1998, she again visited the public prosecutor's office in Constantine and filed a complaint in respect of the abduction and unlawful imprisonment of her husband. At her insistence, the public prosecutor

eventually met with her and took a statement from her. However, none of the witnesses the author referred to in her testimony have been contacted in connection with the complaint, including other family members present at the time of Boubekeur Fergani's arrest, neighbours who were present at the scene and persons who had been released after being arrested with Mr. Fergani and detained alongside him at Bellevue Territorial Centre for Research and Investigation. On 28 September 1998, the author filed a new complaint with an office that had been set up specifically to receive complaints from the families of disappeared persons in each *wilaya* (governorate). However, no one has been summoned to give a statement in any of the investigations.

2.7 Almost two years later, in April 2000, the author received a summons from the Mansourah brigade of the National Gendarmerie in Constantine, inviting her to attend the following day. At the meeting, she was simply told that the investigation into her husband's disappearance had been unsuccessful. She was not told of the reasons for this belated summons or which authorities had allegedly conducted the investigation, nor was she provided with any official documents.¹

2.8 In May 2000, the author received another summons from the *daira* (sub-prefecture) of Hamma Bouziane,² in connection with a matter "of specific concern to" her. She was issued with a report from the Ministry of the Interior and Local Governments informing her that the investigation "had not uncovered the whereabouts of the person concerned". The report did not specify the type of investigation carried out or the authority responsible.

2.9 In June 2000, the author was again summoned by the public prosecutor of Constantine, who criticized her for continuing to contact the authorities and for having sent a letter to the general of Constantine military region No. 5 in January 2000 requesting information on the fate of her husband, a letter to which she had never received a reply. Faced with the refusal of the Constantine public prosecutor's office to follow up on her complaint, on 6 February 2001 the author sent a registered letter with recorded delivery to the Minister of Justice, in which she reiterated her complaint in respect of the abduction and unlawful imprisonment of her husband and informed the Minister that no action had been taken on the two previous complaints. Although under Algerian law, the Minister of Justice must, when informed of an offence, order the local public prosecutor's office to open a criminal investigation, the Minister did not act on the author's request.

2.10 In June 2005, the author submitted her husband's case to the Working Group on Enforced or Involuntary Disappearances. The Working Group wrote to the Algerian authorities but never received a reply.

2.11 On 16 August 2006, no longer able to support her five children alone, the author was obliged to contact the National Gendarmerie to request an official certificate of disappearance, which would entitle her to social assistance. The same day, the chief of the gendarmerie in Constantine issued her with an "official certificate attesting to a disappearance under the circumstances arising from the national tragedy", without having even attempted to conduct an investigation.

2.12 Despite the author's efforts, no investigation has been opened. The author stresses that she is no longer legally entitled to initiate judicial proceedings following the promulgation of Ordinance No. 06-01 of 27 February 2006 on the implementation of the Charter for Peace and National Reconciliation. Domestic remedies, which had already proved useless and ineffective, are thus now totally unavailable. The Charter for Peace and National Reconciliation provides that "no one, whether in Algeria or abroad, has the right to use or make 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 integrity of all the agents who have served it with dignity, or tarnish the image of Algeria abroad", and rejects "all allegations holding the State responsible for deliberate disappearances". The Charter further provides that "reprehensible acts on the part of agents of the State, which have been

¹ According to the author, many families of disappeared persons who have filed complaints with the office in Constantine *wilaya* have been summoned in the same way and have all been told the same thing.

² Administrative district of Constantine.

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”.

2.13 According to the author, since Ordinance No. 06-01 prohibits and criminalizes the opening of legal proceedings, the victims are relieved of any obligation to exhaust domestic remedies. Article 45 of the Ordinance prohibits any complaint related to disappearance or other offences by providing 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 judicial authority. Furthermore, article 46 of the Ordinance establishes that:

Anyone 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 integrity of its agents who have served it 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. The penalty shall be doubled for repeat offences.

2.14 The author adds that the effect of this law is to grant amnesty for crimes committed in the past decade, including the most serious crimes, such as enforced disappearance. Moreover, the law prohibits, on pain of imprisonment, the use of the justice system to establish the fate of victims.³ The Algerian authorities, including the judicial authorities, are manifestly refusing to establish the responsibility of the security services, officers of which are allegedly responsible for the enforced disappearance of Boubekeur Fergani. This refusal impedes the effectiveness of the remedies sought by his family.

2.15 Lastly, the author states that she had taken approximately 10 years to submit her case to the Human Rights Committee because she had not been aware of the procedure.

The complaint

3.1 The author claims that her husband is the victim of an enforced disappearance resulting from actions by agents of the Algerian security forces and thus attributable to the State party, in accordance with the definition of enforced disappearance set forth in Article 7 (2) (i) of the Rome Statute of the International Criminal Court and article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance. In the present case, the author claims violations by the State party in respect of Boubekeur Fergani’s rights under articles 6 (1), 7, 9 (1–4), 10 (1) and 16 of the Covenant, read alone and in conjunction with article 2 (2) and (3), and in respect of her rights under article 2 (2), read in conjunction with articles 2 (3) and 19.

3.2 The author recalls the paramount nature of the right to life and the obligation of the State party not only to refrain from arbitrarily depriving an individual of the right to life, but also to prevent and punish any act involving a violation of article 6 of the Covenant, including when the perpetrator or perpetrators of such acts are agents of the State. She further points out the obligation of the State party to protect the lives of persons in detention and to investigate any cases of disappearance, as the absence of an investigation may in itself constitute a breach of article 6, including in cases where the disappearance is not the result of actions by agents of the State. Boubekeur Fergani’s family and friends have not heard from him for more than 20 years. Their chances of finding him alive are slim. He may have died in detention or as a result of torture or an extrajudicial execution. These factors, taken together with the absence of an investigation, are proof of the State party’s failure to comply with its obligations, and constitute a violation of article 6 (1) of the Covenant, read alone and in conjunction with article 2 (3), in respect of the disappeared person.

³ CCPR/C/DZA/CO/3, paras. 7–8.

3.3 The author recalls that incommunicado detention systematically creates an environment conducive to torture, insofar as the person is outside the protection of the law. According to the Committee's jurisprudence, such a practice may in itself constitute a violation of article 7 of the Covenant. The impossibility of communicating with the outside world, an inherent characteristic of incommunicado detention, results in immense psychological suffering for the detainee that is serious enough to fall within the scope of article 7 of the Covenant. The author thus argues that Boubekeur Fergani is the victim of a violation of article 7.

3.4 With regard to the author, Boubekeur Fergani's wife, the anguish, distress and uncertainty caused by his disappearance, the authorities' denials and the absence of an investigation over a period of more than 20 years constitute inhuman treatment and, consequently, a violation of her rights under article 7 of the Covenant, read alone and in conjunction with article 2 (3).

3.5 The author alleges that her husband is a victim of violations attributable to the State party: (a) under article 9 (1), because Boubekeur Fergani was arbitrarily deprived of his liberty by agents of the Intelligence and Security Department who were under the authority of the Algerian army and by members of the police; (b) under article 9 (2), because the agents who arrested him did so without communicating the reasons for the arrest or presenting a warrant and he did not receive official notification following his arrest; (c) under article 9 (3), because he was not brought before a competent judge after his arrest, nor tried or released, and 21 years have passed since his arrest, far exceeding the maximum period of 12 days of police custody set out in the Code of Criminal Procedure for terrorism-related offences; and under article 9 (4), because he was removed from the protection of the law and was thus unable to challenge the legality of his detention.

3.6 Insofar as Boubekeur Fergani was subjected to cruel, inhuman or degrading treatment in violation of article 7 of the Covenant, he was, by extension, the victim of a violation of article 10 (1), as the cruel, inhuman or degrading treatment was, by its nature, incompatible with respect for the inherent dignity of the human person. Incommunicado detention is not only likely to cause the detainee suffering serious enough to qualify as torture, but also encourages the commission of inhuman acts.

3.7 The author further claims that the incommunicado detention of Boubekeur Fergani constitutes a violation of article 16 of the Covenant attributable to the State party. In this connection, she refers to the Committee's concluding observations on the second periodic report of Algeria under article 40 of the Covenant,⁴ in which the Committee established that disappeared persons who are still alive and are being detained incommunicado were suffering a violation of their right to recognition as persons before the law, as enshrined in article 16 of the Covenant.

3.8 The author recalls that article 2 (3) of the Covenant guarantees access to effective remedies for any person claiming a violation of any of the rights protected by the Covenant. Boubekeur Fergani, as a victim of enforced disappearance, is de facto unable to exercise any remedy. Drawing on the jurisprudence of the Committee, the author recalls the obligation of the State party to investigate alleged violations of human rights and to prosecute and punish the perpetrators and considers that the lack of response from the Algerian authorities to her requests, as the victim's wife, constitutes a breach of the State party's obligations under article 2 of the Covenant. Ordinance No. 06-01, in particular article 45 thereof, constitutes a breach of the State party's obligation to ensure an effective remedy. Accordingly, the author asks the Committee to find a violation of Boubekeur Fergani's rights under article 2 (3) of the Covenant, read in conjunction with articles 6, 7, 9, 10 and 16.

3.9 Lastly, Ordinance No. 06-01 constitutes a breach of the general obligation enshrined in article 2 (2) of the Covenant, read in conjunction with articles 2 (3) and 19. In adopting the Ordinance, in particular article 45 thereof, the State party has taken a legislative measure that deprives of effect the right to an effective remedy against human rights violations, in breach of article 2 (3) of the Covenant, and has criminalized, in article 46 of the Ordinance, all peaceful expression of complaints and all public discussion of the alleged events, in

⁴ CCPR/C/79/Add.95, para. 10.

violation of the author's right to freedom of expression, as enshrined in article 19 of the Covenant. The author considers that it is also because of the existence of the Ordinance – specifically the above-mentioned articles thereof, whose incompatibility with the Covenant has been underlined by the Committee on numerous occasions – that the Committee's findings in all decisions regarding cases of enforced disappearance falling within the scope of the Ordinance have not been implemented by the State party.

3.10 The author firstly requests that the Committee find a violation of articles 2 (3), 6 (1), 7, 9 (1–4), 10 (1) and 16 of the Covenant, in respect of Boubekeur Fergani. Secondly, she requests that the Committee find a violation of articles 2 (3) and 7 of the Covenant, in respect of herself. Thirdly, she requests that it find that Ordinance No. 06-01, in particular articles 45 and 46 thereof, constitutes a breach of the general obligation under article 2 (2) of the Covenant, read in conjunction with articles 2 (3) and 19. The author also asks that the Committee request the State party to: (a) release Boubekeur Fergani if he is still alive; (b) provide her with an effective remedy in the form of a comprehensive and thorough investigation into the enforced disappearance of her husband and to inform her of the results of the investigation; (c) investigate, prosecute and punish the persons responsible for the disappearance of Boubekeur Fergani, in conformity with the State party's international commitments; and (d) provide adequate compensation to her and her husband or his dependants for the violations suffered. Lastly, she asks the Committee to urge the Algerian authorities to repeal the above-mentioned articles of Ordinance No. 06-01.

State party's observations

4. On 22 August 2017, the State party invited the Committee to refer to the background memorandum of the Government of Algeria on handling the issue of disappearances in the light of the implementation of the Charter for Peace and National Reconciliation. In the memorandum, the Government contests the admissibility of communications submitted in connection with the implementation of the Charter.

Author's comments on the State party's observations

5.1 On 8 January 2019, the author submitted comments on the State party's observations. She emphasizes that the observations are not relevant, since they refer to a standard document dated July 2009 and addressed to the Working Group on Enforced or Involuntary Disappearances, not to the Committee. The State party's observations make no mention of the specifics of the present case and provide no response with regard to the particular circumstances of Boubekeur Fergani's disappearance.

5.2 According to the author, the State party's response calls into question its obligation to cooperate in good faith with the Committee, a duty which arises – as the Committee reiterated in paragraph 15 of its general comment No. 33 (2008) – from an application of the principle of good faith to the observance of all treaty obligations. The author recalls that, in its concluding observations on the fourth periodic report of Algeria, the Committee recommended that the State party cooperate with the Committee in good faith under the individual communications procedure by ceasing to refer to the "aide-memoire" and by responding individually and with specifics to the claims made by authors of communications.⁵ The Committee also expressed its concern about the State party's practice of systematically referring to the "aide-memoire", which does not offer a substantive response to the claims made by authors concerning events relating to the period from 1993 to 1998 and, in some instances, outside that period.⁶

5.3 According to the Committee's established jurisprudence, 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.⁷ The author considers that neither the State party's adoption of the Charter nor of a "comprehensive domestic settlement mechanism" constitute

⁵ [CCPR/C/DZA/CO/4](#), para. 8.

⁶ *Ibid.*, para. 7.

⁷ *Fedsi v. Algeria* ([CCPR/C/111/D/1964/2010](#)), para. 7.2.

measures that adequately fulfil its treaty obligations to investigate, prosecute and provide reparation, and that such measures cannot be validly invoked before the Committee or constitute grounds for the inadmissibility of a communication.

5.4 In its concluding observations on the fourth periodic report of Algeria, the Committee reiterated its deep concern – already expressed several times in the past, in particular in its Views – with regard to article 45 of Ordinance No. 06-01, as that article precluded any kind of effective remedy for victims of violations of the Covenant’s provisions committed by law enforcement personnel, including the armed forces and security services, and fostered impunity. Thus, the Committee once again voiced its concern at the numerous and serious violations that had been reported but that had not yet been prosecuted or punished.⁸

5.5 The author considers that the State party’s challenge to the Committee’s competence on the grounds that it would be necessary to consider the cases of enforced disappearance dating from 1993 to 1998 through a comprehensive, non-individualized approach is devoid of any relevance, as the State party has ratified the Covenant and its Optional Protocol and has thus recognized the competence of the Committee to receive communications from individual victims of violations of the rights set forth in the Covenant. She further stresses that the declaration of the state of emergency, as provided for under article 4 of the Covenant, has no effect on the prohibition of enforced disappearance or on the exercise of the rights stemming from the Optional Protocol. She adds that it is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against all agents of the State and to transmit to the Committee the information in its possession.⁹

5.6 Lastly, the author considers that the State party has breached its general obligation under article 2 (2) of the Covenant, read in conjunction with articles 2 (3) and 19. The principal reason why remedies are ineffective in the State party is that, under article 45 of Ordinance No. 06-01, it is legally impossible for the author to lodge an appeal before the State party’s courts. The Ordinance has made it legally impossible to apply for an effective remedy within the legal framework of the State party, in violation of article 2 (3) of the Covenant, and, furthermore, has criminalized, under article 46, all peaceful expression of complaints and all public discussion of the alleged events, in violation of the author’s right to freedom of expression enshrined in article 19 of the Covenant. For as long as the above-mentioned provisions of the Charter for Peace and National Reconciliation remain applicable, the families of victims have no legal means of claiming their rights under article 2 (3) of the Covenant or even expressing themselves publicly regarding the violations suffered by their relatives, which could result in them receiving a prison sentence of up to 5 years, in violation of article 19 of the Covenant.

Lack of cooperation by the State party

6. The Committee notes that on 22 August 2017, the State party contested the admissibility of the communication, referring to the background memorandum of the Government of Algeria on handling the issue of disappearances in the light of the implementation of the Charter for Peace and National Reconciliation. On 18 December 2018 and 16 December 2020, 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 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 any relevant information in its possession.¹⁰

⁸ CCPR/C/DZA/CO/4, para. 11.

⁹ *Medjnoune v. Algeria* (CCPR/C/87/D/1297/2004), para. 8.3.

¹⁰ See, inter alia, *Rsiwi v. Algeria* (CCPR/C/130/D/2843/2016), para. 6; *Dafar v. Algeria* (CCPR/C/130/D/2580/2015), para. 4; *Mezine v. Algeria* (CCPR/C/106/D/1779/2008), para. 8.3; and *Medjnoune v. Algeria* (CCPR/C/87/D/1297/2004), para. 8.3.

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. It recalls, however, that the special procedures and mechanisms of the Human Rights Council do not generally constitute a procedure of international investigation or settlement within the meaning of article 5 (2) (a) of the Optional Protocol.¹¹ Accordingly, the Committee considers that the examination of Boubekeur Fergani's case by the Working Group on Enforced or Involuntary Disappearances does not render the communication inadmissible under this provision.

7.3 The Committee notes that the author asserts that she has exhausted all available remedies and that, to dispute the admissibility of the communication, the State party has simply referred to the background memorandum of the Government of Algeria on handling the issue of disappearances in the light of the implementation of the Charter for Peace and National Reconciliation. In this regard, the Committee recalls that it has reiterated, on numerous occasions, its concern that, despite multiple requests, the State party continued to refer systematically to a standard document (the "aide-memoire") without responding specifically to the claims made by authors of communications.¹² 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 and with specifics to the claims made by authors of communications.

7.4 Furthermore, the Committee recalls that the State party has a duty not only to carry out thorough investigations of alleged violations of human rights brought to the attention of its authorities, particularly violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations.¹³ In the present case, the Committee notes that, although the author brought the enforced disappearance of her husband to the attention of the competent authorities on many occasions, the State party has not undertaken any investigations into this serious allegation. The State party has also failed to provide any specific explanation in its comments regarding the case of Boubekeur Fergani that would make it possible to conclude that an effective remedy is currently available, especially in the light of the fact that Ordinance No. 06-01 continues to be applied, thereby reducing the scope of application of the Covenant, despite the Committee's recommendations to bring it into line with the Covenant.¹⁴ In the circumstances, the Committee considers that it is not precluded from considering the communication under article 5 (2) (b) of the Optional Protocol.

¹¹ See, inter alia, *Souaiene and Souaiene v. Algeria* (CCPR/C/128/D/3082/2017), para. 7.2; *Tharu et al. v. Nepal* (CCPR/C/114/D/2038/2011), para. 9.2; *Ammari v. Algeria* (CCPR/C/112/D/2098/2011), para. 7.2; *Al Daquel v. Libya* (CCPR/C/111/D/1882/2009), para. 5.2; and *Mihoubi v. Algeria* (CCPR/C/109/D/1874/2009), para. 6.2.

¹² *Rsiwi v. Algeria*, para. 7.3; *Berkaoui v. Algeria* (CCPR/C/130/D/2639/2015), para. 7.3; *Souaiene and Souaiene v. Algeria*, para. 7.3; *Bendjael and Bendjael v. Algeria* (CCPR/C/128/D/2893/2016), para. 7.3; *Cherguit v. Algeria* (CCPR/C/128/D/2828/2016), para. 6.3; and *Habouchi v. Algeria* (CCPR/C/128/D/2819/2016), para. 7.3.

¹³ *Boudjemai v. Algeria* (CCPR/C/107/D/1791/2008), para. 7.4; *Mezine v. Algeria*, para. 7.4; *Khirani et al. v. Algeria* (CCPR/C/104/D/1905/2009 and CCPR/C/104/D/1905/2009/Corr.1), para. 6.4; and *Berzig v. Algeria* (CCPR/C/103/D/1781/2008), para. 7.4.

¹⁴ *Rsiwi v. Algeria*, para. 7.4; *Berkaoui v. Algeria*, para. 7.4; *Souaiene and Souaiene v. Algeria*, para. 7.4; *Bendjael and Bendjael v. Algeria*, para. 7.4; *Cherguit v. Algeria*, para. 6.4; and *Habouchi v. Algeria*, para. 7.4.

7.5 Furthermore, since submitting a communication five years after the exhaustion of domestic remedies can amount to an abuse of the right of submission¹⁵ – and even though the State party has not raised this point in the present case – the Committee recalls that the continuous nature of enforced disappearance implies a continuous obligation to investigate such cases, which in the present case is made impossible by Ordinance No. 06-01 and the effects thereof.¹⁶ The Committee therefore considers that, in the circumstances of the case, and in particular given that Ordinance No. 06-01 makes it impossible to seek an investigation into the disappearance of Boubekeur Fergani, the present communication does not constitute an abuse of the right of submission.

7.6 The Committee notes the author's claim that the State party has not fulfilled its obligations under article 2 (2) of the Covenant, read in conjunction with articles 2 (3) and 19, since, in adopting Ordinance No. 06-01, the State party has taken a legislative measure that deprives of effect the right to an effective remedy against human rights violations, in breach of article 2 (3) of the Covenant, and that, moreover, criminalizes all peaceful expression or public discussion regarding the alleged events, in violation of the author's right to freedom of expression as enshrined in article 19 of the Covenant. The Committee recalls its jurisprudence¹⁷ according to which the provisions of article 2 cannot be invoked as a claim in a communication under the Optional Protocol in conjunction with other provisions of the Covenant, except when the failure by the State party to abide by its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim. In the present case, the Committee considers that the author has not provided sufficient information to explain how Ordinance No. 06-01 has been effectively applied to her from the standpoint of article 19 of the Covenant.¹⁸ Consequently, the Committee considers that these claims have not been sufficiently substantiated and therefore finds them inadmissible under article 2 of the Optional Protocol.

7.7 The Committee considers, however, that the author has sufficiently substantiated her other allegations for the purposes of admissibility, and therefore proceeds to consider the merits of her claims under articles 6, 7, 9, 10 and 16 of the Covenant, read alone and in conjunction with article 2 (3), in respect of Boubekeur Fergani, and under article 7, read alone and in conjunction with article 2 (3), in respect of the author.

Consideration of the merits

8.1 The Committee has considered the present 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 comments, which it had previously transmitted to the Working Group on Enforced or Involuntary Disappearances and to the Committee in relation to 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 jurisprudence¹⁹ 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.²⁰ As the amendments recommended by the Committee have not been introduced, Ordinance No. 06-01 contributes, in the present case,

¹⁵ Committee's rules of procedure, rule 99 (c). See also *Drif and Rafrat v. Algeria* (CCPR/C/134/D/3320/2019), para.7.5.

¹⁶ *Rsiwi v. Algeria*, para. 7.6; *Berkaoui v. Algeria*, para. 7.5; and *Dafar v. Algeria*, para. 5.4.

¹⁷ *Poliakov v. Belarus* (CCPR/C/111/D/2030/2011), para. 7.4.

¹⁸ *Rsiwi v. Algeria*, para. 7.5.

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

²⁰ 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.

to impunity and therefore cannot be considered compatible, as it currently stands, with the provisions of the Covenant.²¹

8.3 The Committee notes that the State party has not replied to the author's allegations concerning the merits of the case, and recalls its 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 is in possession of the necessary information.²² 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.²³ In the absence of any explanation from the State party in this respect, due weight must be given to the author's allegations, provided that they have been sufficiently substantiated.

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 that 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.²⁴

8.5 The Committee notes that Boubekeur Fergani was last seen by the author on 22 June 1995, when he was arrested by agents of the security forces. It notes that the State party has produced no evidence to help determine Boubekeur Fergani'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.²⁵ 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 Boubekeur Fergani. The Committee therefore finds that the State party has failed in its duty to protect the life of Boubekeur Fergani, in violation of article 6 (1) of the Covenant.

8.6 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. It notes in the present case that, four months after Boubekeur Fergani's arrest, individuals arrested at the same time and in the same circumstances as him informed the author that they had been detained with him at the Bellevue Territorial Centre for Research and Investigation in Constantine; since then, she has received no official information on his fate or place of detention despite various attempts to visit locations where he might have been detained and despite several successive requests made to the State authorities. The Committee therefore considers that it is possible that Boubekeur Fergani, who disappeared on 22 June 1995, is still being held incommunicado by the Algerian authorities. In the absence of any explanation

²¹ *Dafar v. Algeria*, para. 6.4; *Zaier v. Algeria* (CCPR/C/112/D/2026/2011), para. 7.2; and *Ammari v. Algeria*, para. 8.2.

²² See, inter alia, *Ammari v. Algeria*, para. 8.3; *Mezine v. Algeria*, para. 8.3; *Berzig v. Algeria*, para. 8.3; and *El Abani v. Libyan Arab Jamahiriya* (CCPR/C/99/D/1640/2007), para. 7.4.

²³ *Mezine v. Algeria*, para. 8.3; and *Medjnoune v. Algeria*, para. 8.3.

²⁴ *El Boathi v. Algeria* (CCPR/C/119/D/2259/2013), para. 7.4; *Serna et al. v. Colombia* (CCPR/C/114/D/2134/2012), para. 9.4; and *Katwal v. Nepal* (CCPR/C/113/D/2000/2010), para. 11.3. See also Human Rights Committee, general comment No. 36 (2018), para. 58.

²⁵ *Sharma v. Nepal* (CCPR/C/122/D/2265/2013), para. 10.6; *Louddi v. Algeria* (CCPR/C/112/D/2117/2011), para. 7.4; *Boudjemai v. Algeria*, para. 8.4; and *Mezine v. Algeria*, para. 8.4. See also Human Rights Committee, general comment No. 36 (2018), para. 58.

from the State party, the Committee considers that this disappearance constitutes a violation of article 7 of the Covenant in respect of Boubekeur Fergani.²⁶

8.7 In view of the foregoing, the Committee will not consider separately the claims based on the violation of article 10 of the Covenant.²⁷

8.8 With regard to the alleged violation of article 9 of the Covenant, the Committee takes note of the author's allegations that Boubekeur Fergani was arbitrarily arrested without a warrant and was not formally charged or brought before a judicial authority, which would have enabled him to challenge the lawfulness of his detention. In the absence of any information from the State party in this regard, the Committee considers that due weight must be given to the author's allegations.²⁸ The Committee therefore finds a violation of article 9 of the Covenant in respect of Boubekeur Fergani.²⁹

8.9 The Committee is of the view that the intentional removal of a person from the protection of the law constitutes a refusal to recognize him or her as a person before the law, particularly if the efforts of his or her relatives to obtain access to potentially effective remedies have been systematically impeded.³⁰ In the present case, the Committee notes that the State party has not provided any explanation concerning the fate or whereabouts of Boubekeur Fergani, despite the requests from his relatives and the fact that, when he was last seen, he was in the hands of the authorities of the State party. The Committee finds that the enforced disappearance of Boubekeur Fergani more than 27 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.

8.10 The Committee also takes note of the anguish and distress caused to the author and her family for more than 27 years by the disappearance of Boubekeur Fergani. In that connection, it considers that the facts before it disclose a violation of article 7 of the Covenant, read alone and in conjunction with article 2 (3), in respect of the author.³¹

8.11 The author also invokes article 2 (3) of the Covenant, read in conjunction with articles 6, 7, 9 and 16, 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.³² 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.

8.12 In the present case, although the author repeatedly alerted the competent authorities to the disappearance of her husband, the State party did not conduct an investigation into the disappearance and did not provide her with any information as to his fate. Furthermore, the fact that it is legally impossible to initiate judicial proceedings since the promulgation of Ordinance No. 06-01 continues to deprive Boubekeur Fergani and the author of access to an effective remedy, given that the Ordinance prohibits using the justice system to shed light on the most serious crimes, including enforced disappearance.³³ The Committee finds that the

²⁶ *Cherguit v. Algeria*, para. 7.6; *Bendjael and Bendjael v. Algeria*, para. 8.6; *Braih v. Algeria* (CCPR/C/128/D/2924/2016), para. 6.5; *Berzig v. Algeria*, para. 8.5; and *El Alwani v. Libyan Arab Jamahiriya* (CCPR/C/90/D/1295/2004), para. 6.5.

²⁷ *Berkaoui v. Algeria*, para. 8.7; *Dafar v. Algeria*, para. 6.7; and *Rsiwi v. Algeria*, para. 8.7; and *Ammari v. Algeria*, para. 8.6.

²⁸ *Chani v. Algeria* (CCPR/C/116/D/2297/2013), para. 7.5.

²⁹ See, inter alia, *Mezine v. Algeria*, para. 8.7; *Khirani et al. v. Algeria*, para. 7.7; and *Berzig v. Algeria*, para. 8.7.

³⁰ *Basnet v. Nepal* (CCPR/C/117/D/2164/2012), para. 10.9; *Tharu et al. v. Nepal*, para. 10.9; and *Serna et al. v. Colombia*, para. 9.5.

³¹ *Mezine v. Algeria*, para. 8.6; *Khirani et al. 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.

³² *Allioua and Kerouane v. Algeria* (CCPR/C/112/D/2132/2012), para. 7.11.

³³ CCPR/C/DZA/CO/3, para. 7.

facts before it disclose a violation of article 2 (3) of the Covenant, read in conjunction with articles 6, 7, 9 and 16, in respect of Boubekeur Fergani, and of article 2 (3) of the Covenant, read in conjunction with article 7, in respect of the author.³⁴

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, read alone and in conjunction with article 2 (3), in respect of Boubekeur Fergani. It also finds a violation of article 7 of the Covenant, read alone and in conjunction with article 2 (3), in respect of the author.

10. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. In the present case, the State party is obliged, inter alia, to: (a) conduct a prompt and thorough investigation that is effective, impartial, independent and transparent into the disappearance of Boubekeur Fergani and to provide the author with detailed information about the results of its investigation; (b) release Boubekeur Fergani immediately if he is still being held incommunicado; (c) in the event that Boubekeur Fergani 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 in a way that is commensurate with the gravity of the violations; and (e) provide adequate compensation to the author and to Boubekeur Fergani, if he is alive, and provide appropriate satisfaction. The State party is under an obligation to take steps to prevent similar violations in the future. It is also under an obligation to ensure that it does not impede enjoyment of the right to an effective remedy for such serious violations as torture, extrajudicial execution and enforced disappearance. To that end, the State party should review its legislation in accordance with its obligation under article 2 (2) of the Covenant and, in particular, repeal the provisions of Ordinance No. 06-01 that are incompatible with the Covenant in order 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 the Committee's Views and to have them widely disseminated in the official languages of the State party.

³⁴ *Drif and Rafrat v. Algeria*, para. 8.12.