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Human Rights Committee

Communication No. 1811/2008

Views adopted by the Committee at its 103rd session (17 October–4 November 2011)

Submitted by:	Taous Djebbar and Saadi Chihoub (represented by TRIAL – Swiss Association against Impunity)
Alleged victims:	Djamel and Mourad Chihoub (their children, born in 1977 and 1980 respectively) and the authors
State party:	Algeria
Date of communication:	25 August 2008 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 18 September 2008 (not issued in document form)
Date of adoption of Views:	31 October 2011
Subject matter:	Enforced disappearance of two persons detained incommunicado for the past 15 years
Procedural issues:	Exhaustion of domestic remedies
Substantive issues:	Right to life, prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, recognition as a person before the law, prohibition of unlawful and arbitrary intrusions into one's family life, right to family life, right to protection for minors

Articles of the Covenant:	Article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1 to 4; article 10, paragraph 1; article 16; article 17; article 23, paragraph 1; and article 24
Articles of the Optional Protocol:	Article 5, paragraphs 2 (a) and 2 (b)

[Annex]

Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (103rd session)

concerning

Communication No. 1811/2008*

Submitted by:	Taous Djebbar and Saadi Chihoub (represented by TRIAL – Swiss Association against Impunity)
Alleged victims:	Djamel and Mourad Chihoub (their children, born in 1977 and 1980 respectively) and the authors
State party:	Algeria
Date of communication:	25 August 2008 (initial submission)

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

Meeting on 31 October 2011,

Having concluded its consideration of communication No. 1811/2008, submitted to the Human Rights Committee by Taous Djebbar and Saadi Chihoub under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication,

Adopts the following:

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

1.1 The authors of the communication dated 25 August 2008 are Taous Djebbar and Saadi Chihoub, both Algerian nationals. They submit the communication on behalf of their two sons, Djamel and Mourad Chihoub, born on 8 January 1977 in Hussein Dey (Algiers) and 29 September 1980 in El Harrach (Algiers) respectively. The authors claim that Djamel Chihoub and Mourad Chihoub are victims of enforced disappearance by Algeria, in violation of article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1 to 4; article 10, paragraph 1; article 16; article 17 and article 23, paragraph 1, of the Covenant.

* The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

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

The text of the two individual opinions signed by Michael O'Flaherty, Krister Thelin, Fabián Omar Salvioli and Cornelis Flinterman is appended to these Views.

They also claim that Mourad Chihoub is the victim of a violation of article 24, paragraph 1, of the Covenant. The authors further claim that they themselves are victims of a violation of article 2, paragraph 3; article 7; article 17 and article 23, paragraph 1, of the Covenant. They are represented by TRIAL (Swiss Association against Impunity). The Covenant and its Optional Protocol entered into force in Algeria on 12 September 1989.

1.2 On 12 March 2009, the Special Rapporteur for new communications, acting on behalf of the Committee, rejected the State party's request, dated 3 March 2009, that the Committee should consider the admissibility of the communication separately from the merits.

The facts as submitted by the authors

2.1 Djamel, unemployed, single, and Mourad, a high school student, were both living at their parents' residence in Baraki, Algiers. The authors claim that on 16 May 1996 at 8 a.m., a group of members of the Algerian army appeared at the family residence in Baraki. The group included about 20 soldiers from the barracks in Baraki dressed in paratrooper uniforms, accompanied by 2 agents from the Research and Security Department (DRS) dressed in civilian clothes and a hooded militiaman. The soldiers had with them a list of names and photos. The commander[1] showed Saadi Chihoub a photo of his eldest son, Saïd Chihoub, who had left the family home about a year and a half earlier, and asked where he was. Saadi Chihoub said that he did not know. The soldiers then seized Djamel Chihoub, saying "when Saïd gives himself up, then we will free Djamel". Saadi Chihoub and his youngest son Mourad tried to intervene, but the soldiers hit Mourad, who fell to the ground. After snatching Djamel away from his father, the soldiers left the premises, taking the young man away with them. These events occurred in the presence of the authors, their five daughters and their son Mourad, who were in the apartment at the time. Several neighbours also witnessed the scene.[2]

2.2 The authors allege that the abduction of their son Djamel was part of a raid conducted jointly by various branches of the army, during which several persons from the same neighbourhood were also arrested. Djamel Chihoub was allegedly first taken to the barracks of the Research and Security Department, then to the operational command headquarters (*poste de commandement opérationnel*) in Châteauneuf, according to a fellow prisoner who was later freed. According to other unconfirmed sources, he was said to have later been transferred to the barracks of the Research and Security Department in Beni Messous. His family has never seen him since. His elder brother, Saïd Chihoub, whom the soldiers were looking for when they entered the family home, was subsequently shot dead in the street by security forces during a clash on 27 June 1996. Yet, Djamel Chihoub, who, according to the officer responsible for his arrest himself, was taken hostage in connection with the search for his brother Saïd, was never freed.

2.3 On 13 November 1996 at around 11 p.m., about a dozen soldiers from the Baraki barracks broke down the door of the authors' residence and arrested their youngest son, Mourad Chihoub, then 16 years old, without showing any arrest warrant or even providing any explanation. The same commander who led the arrest of Djamel Chihoub also led this operation, assisted by two lieutenants and two non-commissioned officers. The soldiers were also accompanied by at least one militiaman who lived in the neighbourhood, was well-known by the residents, and often took part in similar operations. Mourad Chihoub was arrested in the presence of the authors and his five sisters. Several neighbours were

[1] The authors indicate the name of the commander in question.

[2] The authors append the testimonies of two neighbours, who testify that they saw Djamel Chihoub being arrested.

also present.[3] His father, Saadi Chihoub, was nearly killed while trying to intervene. The commander spoke to Saadi Chihoub and confirmed that he did not have any evidence that the victim was in any way involved in illegal activities.

2.4 Mourad Chihoub was allegedly first brought to the Baraki barracks along with other arrested persons. His family later learned from fellow prisoners who had subsequently been released that Mourad Chihoub had allegedly been detained there for three months before being transferred to the operational command headquarters in El Madania (Salembier) and then to the Research and Security Department Centre in Ben Aknoun. Since then, no one from his family has seen him or heard any news of him.

2.5 The Chihoub family, and the authors in particular, have made ceaseless efforts to find their children. Following the arrest of Djamel and then of Mourad Chihoub, the authors immediately attempted to find out what had happened to their sons and where they were being detained. They made enquiries with various barracks, police stations and gendarmerie posts in the region and with the public prosecutor's office of El Harrach, with no success.

2.6 On 15 July 1996, Saadi Chihoub wrote a letter to the President of the National Human Rights Observatory (ONDH) asking him to shed light on the fate of his son Djamel. He also wrote a letter to the President of the Republic on 26 July 1996, and to the Minister of Justice the following day. Saadi Chihoub then wrote two letters dated 7 September 1996 to formally petition the public prosecutor of the Supreme Court of Algiers regarding the abduction of his son Djamel Chihoub. He did not receive any reply. On 16 March 1997, Saadi Chihoub addressed a second letter to the President of the Republic and a letter to the Ombudsman, asking them to intervene to shed light on the disappearance of his two sons. On 4 June 1997, he wrote again to the Minister of Justice, but there was still no response.

2.7 It was not until 10 months after Saadi Chihoub reported the disappearance of Djamel Chihoub to the Ombudsman that the latter confirmed receipt of Saadi Chihoub's petition, on 18 January 1998. In that letter, the Ombudsman replied that all he could do was report the case to the competent authorities, which the family had already done. On 4 July 1998, Taous Djebbar wrote a letter to the President of the Republic requesting his help regarding the disappearance of her two sons. She received no reply to that letter.

2.8 On 13 November 1999, that is, two and a half years after the family had petitioned the National Human Rights Observatory regarding their son Djamel Chihoub, that body informed the family that, according to the results of an investigation conducted by a unit of the national gendarmerie, Djamel Chihoub was not wanted by the authorities and the security services had not issued a warrant for his arrest, and that in any case the investigation had not shed any light on his fate. According to the letter, the national gendarmerie drafted a report dated 18 January 1997 following its investigation of the matter. However, the authors were never granted access to this document, which might have provided answers about the concrete steps undertaken regarding the disappearance of Djamel Chihoub. The family was not informed of the opening or the developments of this investigation while it was under way and were only apprised of its closure nearly two years later by the National Human Rights Observatory.

2.9 On 9 October 1999, Saadi Chihoub filed a formal complaint with the investigating judge of El Harrach regarding the abduction and disappearance of his son Mourad Chihoub, who was a minor at the time of his arrest. Taous Djebbar, for her part, filed a complaint on 22 December 1999 with the public prosecutor of Algiers regarding the abduction of her two sons. On the same date, she also wrote again to the Minister of Justice asking whether her

[3] The authors append the testimony of a neighbour who states that he knew about the arrest of Mourad Chihoub.

sons were alive, and if so, where they were being held. Taous Djebbar also brought her sons' case to the attention of the President of the Republic in a letter dated 23 May 2004.

2.10 Since they had received no response from the authorities they had contacted, the family turned to the United Nations Working Group on Enforced or Involuntary Disappearances. The case of the Chihoub brothers was submitted to the Working Group on 19 October 1998. Nonetheless, the State party has not apprised the Working Group of the brothers' fate.

2.11 Beginning in 1998, the authors were summoned on several occasions to give statements before various national authorities, including the gendarmerie, the military prosecutor's office, the investigating judge of El Harrach, the police of the Daïra of Baraki, the principal public prosecutor's office of Algiers, and the National Consultative Commission for the Protection and Promotion of Human Rights (which replaced the National Human Rights Observatory). The family does not know under what proceedings these statements were taken, as that information was not specified in the related summons. Furthermore, the authors were not aware of any other investigative steps being taken. In particular, to the authors' knowledge the individuals who participated in the abduction of their disappeared sons were never questioned or otherwise called to account. Also, the neighbours who witnessed the two abductions were never summoned to give statements as part of these proceedings. None of the steps taken by the authors resulted in a court decision, or even in a diligent, reasonably complete investigation. The only judicial authority to decide on the matter was the investigating judge of El Harrach, who discontinued the proceedings in a dismissal of action dated 3 April 2000, of which the family was notified in a brief, handwritten note that gave no reasons for the decision. The family has never received a copy of the formal dismissal of action.

The complaint

3.1 The authors maintain that the facts show that their sons Djamel and Mourad Chihoub were victims of enforced disappearance[4] from the moment they were arrested by agents of the State party on 16 May 1996 and 13 November 1996 respectively. Since their arrest, the State party has refused to acknowledge the deprivation of their liberty or to disclose their fate, thereby deliberately removing them from the protection of the law.[5] The authors stress that incommunicado detention entails too high a risk of a violation of the right to life, since the victim is at the mercy of his or her jailers, who, by the very nature of the situation, are completely unsupervised. Even in cases where the disappearance does not lead to the worst outcome, the threat to the victim's life at that moment constitutes a violation of article 6, insofar as the State party has not fulfilled its duty to protect the fundamental right to life.[6] The authors add that the State party has compounded its failure to guarantee the right to life of the two victims by making no effort to inquire into their fate. Pointing out, moreover, that the chances of finding Djamel and Mourad Chihoub are remote now that 12 years[7] have passed since their disappearance in a secret detention facility, and referring to the Committee's general comment No. 14 (1984) on article 6, the authors claim

[4] The authors refer to the definition of "enforced disappearance" in article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court and in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

[5] The authors add that the State party's practice with regard to enforced disappearances can be considered a crime against humanity to the extent that it is systematic and widespread.

[6] The authors refer to communication No. 84/1981, *Guillermo Ignacio Dermit Barbato and Hugo Haroldo Dermit Barbato v. Uruguay*, Views adopted on 21 October 1982, para. 10.

[7] Now 15 years.

that their two sons suffered a violation of their rights guaranteed under article 6, read alone and in conjunction with article 2, paragraph 3, of the Covenant.[8]

3.2 The authors also claim that the enforced disappearance of Djamel and Mourad Chihoub, and the resulting anguish and suffering, constitute treatment violating article 7 of the Covenant with regard to the two victims.[9]

3.3 With regard to themselves, the authors maintain that the disappearance of Djamel and Mourad Chihoub was and remains a paralysing, painful and distressing experience given that they know nothing of the fate of their two sons or, if they are dead, of the circumstances of their deaths or in the event of their place of burial. This uncertainty, which continues to cause the whole family great suffering, has lasted since their arrests in May and November 1996. Since that time the authorities have never sought to relieve the family's distress by conducting effective investigations. The authors claim that the State party has thereby acted in violation of article 7 of the Covenant with regard to themselves, read alone and in conjunction with article 2, paragraph 3, of the Covenant.[10]

3.4 With regard to article 9 of the Covenant, the authors recall that their sons were arrested by members of the Armed Forces of the State party without a warrant and without being told the reasons for their arrest. None of their family members have seen them or been able to communicate with them since their arrest. It was only through third parties who had been in detention with the two victims that, in the absence of official communication from the State party, the family became aware that Djamel Chihoub had been held at the operational command headquarters of Châteauneuf and at the Research and Security Department barracks in Beni Messous, and that Mourad Chihoub had been interned at the Baraki military barracks and at the operational command headquarters in El Madania (Salembier). All subsequent attempts by the authors to learn news about their sons were unsuccessful. According to the authors, this constitutes gross failure by the State party to meet its obligations under article 9, paragraph 1, with regard to Djamel and Mourad Chihoub.[11]

3.5 The authors add that, as their sons were never informed of the criminal charges against them, article 9, paragraph 2, of the Covenant was also violated with regard to the two victims. Concerning Djamel Chihoub in particular, in reference to whom the commander leading his arrest allegedly said "when Saïd gives himself up, then we will free Djamel", it appears that the only motive for his arrest was to put pressure on his brother Saïd, in violation of the principles of legality and justice. Furthermore, as the commander who arrested Djamel admitted himself, there was no evidence that the latter had been involved in any illegal activity. As for Mourad, there was no apparent reason for his arrest in November 1996 other than deliberate persecution of the family, given that his brother Saïd Chihoub had been killed one month before. The authorities of the State party would also later confirm that Mourad Chihoub had not been wanted by the authorities and that

[8] The authors also refer to communication No. 84/1981, *Dermit Barbato v. Uruguay*, supra, para. 10.

[9] The authors refer to communication No. 440/1990, *Youssef El-Megreisi v. The Libyan Arab Jamarihiya*, Views adopted on 24 March 1994, para. 5.4; communication No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.8; and communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.5.

[10] The authors refer, inter alia, to communication No. 107/1981, *María del Carmen Almeida de Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14, and to the Committee's concluding observations on its consideration of the second periodic report of Algeria, CCPR/C/79/Add.95, 18 August 1998, para. 10.

[11] The authors refer to communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.5, and communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 7.5.

there had been no warrant for his arrest.[12] Consequently, article 9, paragraph 2 was violated with regard to the two victims.

3.6 Given that Djamel and Mourad Chihoub were not promptly brought before a judge or other judicial authority, the authors maintain that article 9, paragraph 3 was also violated with regard to the victims.[13] Lastly, the authors maintain that Djamel and Mourad Chihoub are also victims of a violation of article 9, paragraph 4, given that they were detained incommunicado since 1996 and deprived of all contact with the outside world, and that it was therefore physically impossible for them to contest the legality of their detention or ask a judge to set them free.

3.7 The authors further maintain that, given that their sons Djamel and Mourad Chihoub were detained incommunicado, they were not treated humanely or with respect for the inherent dignity of a human person. Thus, they claim, their sons were victims of a violation by the State party of their rights guaranteed under article 10, paragraph 1, of the Covenant.

3.8 The authors also claim that, as victims of enforced disappearance, Djamel and Mourad Chihoub were denied the right to be recognized as having rights and obligations – in other words, were reduced to the status of "non-persons", in violation of article 16 of the Covenant, by the State party.[14]

3.9 The authors further maintain that, given that the Armed Forces of the State party burst into their home without any arrest warrant for their two sons, going so far as to break down the door to arrest Mourad Chihoub, and to threaten his father, this constitutes arbitrary interference in the authors' private life and home in violation of article 17 of the Covenant.[15] They add that since their two sons Djamel and Mourad lived at their parents' home, they are also victims under article 17.[16]

3.10 Through the enforced disappearances of their sons Djamel and Mourad, and the death of their eldest son Saïd, the authors lost three of their children. As a result, they claim that through their actions the authorities of the State party have destroyed their family life, in violation of their obligation to protect the family as set out in article 23, paragraph 1, of the Covenant.[17]

3.11 Pointing out that Mourad Chihoub was 16 years old when he was arbitrarily arrested at his parents' home and placed in incommunicado detention, the authors maintain that the State party acted in violation of article 24, paragraph 1 with regard to him.[18]

[12] Supra, para. 2.8.

[13] The authors refer, inter alia, to the Committee's general comment No. 8 [16] of 8 July 1982, para. 2; communication No. 1128/2002, *Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.3; communication No. 1196/2003, supra, para. 7.6; and communication No. 992/2001, supra, para. 9.6.

[14] The authors refer to communication No. 1328/2004, *Kimouche v. Algeria*, Views adopted on 10 July 2007, para. 7.9; and communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.9.

[15] The authors refer to communication No. 687/1996, *Rafael Armando Rojas García v. Colombia*, Views adopted on 3 April 2001, para. 10.3.

[16] The authors invoke communication No. 778/1997, *José Antonio Coronel et al v. Colombia*, Views adopted on 24 October 2002, para. 9.7.

[17] The authors refer to communication No. 962/2001, *Marcel Mulezi v. The Democratic Republic of the Congo*, Views adopted on 8 July 2004, para. 5.4.

[18] The authors refer to communication No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003, para. 9.7; and communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 8.7.

3.12 The authors also maintain that, since all the steps they took to shed light on the fate of their two sons were fruitless, and since their sons were prohibited from exercising their right to contest the legality of their detention, the State party did not fulfil its obligation to guarantee Djamel and Mourad Chihoub an effective remedy, given that it should have conducted an in-depth and diligent investigation into their disappearance. They also contend that the absence of an effective remedy is compounded by the fact that a total and general amnesty has legally been declared, guaranteeing impunity to the individuals responsible for violations. As the State party did not take the necessary measures to protect the rights set out in articles 6, 7, 9, 10, 16, 17, 23 and 24, the authors are of the view that the State party acted in independent violation of article 2, paragraph 3, of the Covenant with regard to Djamel and Mourad Chihoub.[19]

3.13 With regard to the issue of exhaustion of domestic remedies, the authors maintain that all the authorities they petitioned failed to launch an adequate investigation. Judicial, governmental and administrative authorities were all solicited, to no avail.[20] The authors therefore maintain that all the available remedies were proven to be useless and ineffective. Subsidiarily, they add that they have no longer had the legal right to initiate judicial proceedings since the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation, which prohibits, on pain of imprisonment, the pursuit of legal remedies to shed light on the most serious crimes such as enforced disappearances.[21] Consequently, the authors maintain that they are no longer obliged to keep pursuing their efforts at the domestic level, which would expose them to criminal prosecution, in order to ensure that their communication is admissible before the Committee.

State party's observations on admissibility

4.1 On 3 March 2009 the State party contested the admissibility of the communication and of 10 other communications submitted to the Human Rights Committee. It did so in a "background memorandum on the inadmissibility of communications submitted to the Human Rights Committee in connection with the implementation of the Charter for Peace and National Reconciliation". The State party is of the view that communications incriminating public officials, or persons acting on behalf of public authorities, in enforced disappearances during the period in question — from 1993 to 1998 — should be considered in the context of the socio-political and security conditions that prevailed in the country during a period when the Government was struggling to combat terrorism.

4.2 During that period the Government was obliged to combat groups that were not formally organized. Civilians often attributed enforced disappearances to the security forces. There are numerous explanations for cases of enforced disappearance, but they

[19] The authors refer to communication No. 612/1995, *José Vicente et al v. Colombia*, Views adopted on 29 July 1997; the Committee's general comment No. 20 [40] of 10 March 1992, para. 15; and general comment No. 31 [80] of 29 March 2004, para. 18.

[20] Supra, paras. 2.5 to 2.11.

[21] The authors point out that the Charter rejects all allegations that hold the State responsible for deliberate disappearances. Furthermore, Ordinance No. 06-01 of 27 February 2006 prohibits the opening of legal proceedings, under penalty of criminal prosecution, and thereby frees victims of the obligation to exhaust domestic remedies. The Ordinance prohibits the lodging of complaints against the security and defence forces for disappearance and other crimes (art. 45). The author adds that according to the Ordinance any allegation or complaint must be declared inadmissible by the competent legal authority, and that furthermore legal action can be taken against anyone who, through his or her spoken or written statements or any other act, uses or takes advantage of the wounds of the national tragedy to attack State institutions, weaken the State, impugn the honour of its agents or tarnish Algeria's international reputation (art. 46).

cannot be blamed on the Government. Data documented by many independent sources, including the press and human rights organizations, indicate that the concept of disappearance in Algeria during the period in question covers six distinct scenarios, none of which can be blamed on the Government. The first scenario concerns persons reported missing by their relatives who in fact had gone into hiding of their own accord in order to join armed groups and had asked their families to state that they had been arrested by the security services as a way of "covering up" and avoiding "harassment" by the police. The second scenario concerns persons who were reported missing after their arrest by the security services and who took advantage of their release to go into hiding. The third scenario concerns persons abducted by armed groups who, because they were not identified or had stolen uniforms or identification documents, were incorrectly thought to be members of the armed forces or security services. The fourth scenario concerns persons who were reported missing by their families but who had in fact decided to abandon their families and in some cases even to leave the country because of personal problems or family disputes. The fifth scenario concerns wanted terrorists who were killed and buried in the bush following factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. Lastly, the sixth possibility mentioned by the State party concerns persons reported missing who were in fact living in Algeria or abroad under false identities created via a network of document forgers.

4.3 The State party points out that it was in view of the diversity and complexity of the situations covered by the general concept of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, recommended a comprehensive approach to the issue of the disappeared, whereby the cases of all persons who had disappeared during the "national tragedy" would be dealt with, all victims would be offered support to overcome their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 disappearances have been reported, 6,774 cases examined, 5,704 approved for compensation and 934 rejected, with 136 still pending. A total of 371,459,390 Algerian dinars (DA)[22] has been paid out as compensation to all the victims concerned. In addition, DA 1,320,824,683[23] has been paid out in the form of monthly pensions.

4.4 The State party further argues that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities involving the political or administrative authorities, non-contentious remedies pursued through advisory or mediation bodies, and contentious remedies pursued through the relevant courts of justice. As may be seen from the authors' statements,[24] the complainants have petitioned political and administrative authorities, advisory or mediation bodies and representatives of the prosecution service (chief prosecutors and public prosecutors), but have not actually initiated legal proceedings by availing themselves of all available remedies of appeal and cassation. Only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to an investigating judge. In the Algerian legal system, the public prosecutor receives complaints and institutes criminal proceedings if these are warranted. Nevertheless, in order to protect the rights of victims and their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint directly with the investigating judge. In that case, it is the victim, not the prosecutor, who institutes criminal proceedings by bringing the matter before the

[22] Approximately US$ 5,241.

[23] Approximately US$ 18,636.

[24] As the State party has provided a common reply to 11 different communications, it refers to the "authors". This reference thus also includes the authors of the present communication.

investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not used, despite the fact that all the victims needed to do was to launch criminal proceedings and oblige the investigating judge to disclose information, even if the prosecution service had decided otherwise.

4.5 The State party further notes that the authors mistakenly believed they were under no obligation to bring the matter before the relevant courts by virtue of article 45 of Ordinance No. 06-01. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility of a remedy does not exempt that person from the requirement to exhaust all domestic remedies.[25]

4.6 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It stresses that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, the implementing ordinance of which prescribes legal measures for the extinction of criminal proceedings and the commutation or remission of sentences for any person who is found guilty of acts of terrorism or who benefits from the provisions of the legislation on civil dissent, except for persons who have committed or been accomplices in mass killings, rapes or bombings in public places. This ordinance also helps to address the issue of disappearances by introducing a procedure for filing an official finding of presumed death, which entitles beneficiaries to receive compensation. Social and economic measures have also been put in place, including the provision of employment placement assistance and compensation. Finally, the ordinance prescribes political measures, such as a ban on holding political office for any person who exploited religion in the past, and establishes the inadmissibility of any proceedings brought against individuals or groups who are members of Algeria's defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

4.7 In addition to the establishment of a fund to compensate the victims, the people of Algeria have, according to the State party, agreed to a process of national reconciliation. The authors' allegations are covered by this comprehensive domestic settlement mechanism.

4.8 The State party asks the Committee to note how similar the facts and situations described by the authors are and to take into account the socio-political and security context at the time; to note that the authors failed to exhaust all domestic remedies; to note that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in these communications through measures aimed at achieving peace and national reconciliation that are consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the above-mentioned communications inadmissible; and to request the authors to avail themselves of the appropriate remedy.

Additional observations by the State party on admissibility

5.1 On 9 October 2009, the State party transmitted an additional memorandum to the Committee, in which it reiterates that the communications submitted to the Committee

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

relate to a broad historical issue involving causes and circumstances of which the Committee cannot be aware.

5.2 The State party states that it will not address the merits of these communications until the issue of their admissibility has been settled, and that all judicial or quasi-judicial bodies have a duty to deal with preliminary questions before considering the merits. According to the State party, the decision in the cases in point to consider questions of admissibility and the merits jointly and simultaneously — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications in terms of both their general nature and their intrinsic particularities. Referring to the rules of procedure of the Human Rights Committee,[26] the State party notes that the sections relating to the Committee's procedure to determine the admissibility of communications are separate from those relating to the consideration of communications on the merits, and that these questions may therefore be considered separately. With regard, in particular, to the question of the exhaustion of domestic remedies, the State party points out that none of the communications submitted by the authors was channelled through the domestic courts for consideration by the Algerian judicial authorities. Only a few of the communications that were submitted reached the indictments chamber, a high-level investigating court with jurisdiction to hear appeals.[27]

5.3 Recalling the Committee's jurisprudence regarding the obligation to exhaust domestic remedies, the State party stresses that mere doubts about the prospect of success or worries about delays do not exempt the authors from the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation has made it impossible to avail oneself of any remedy in this area, the State party replies that the failure of the authors to initiate any procedures has so far prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter. Moreover, under the ordinance in question, the only proceedings that are inadmissible are those brought against "members of any branch of the defence and security forces of the Republic" for actions consistent with their core duties to the Republic, namely, to protect persons and property, safeguard the nation and preserve its institutions. Any allegations concerning actions attributable to the defence or security forces that allegedly took place in any other context are subject to investigation by the appropriate courts.

5.4 Lastly, the State party reiterates its position with regard to the pertinence of the settlement mechanism established by the Charter for Peace and National Reconciliation.

Authors' comments on the State party's submission

6.1 On 22 July 2011, the authors submitted comments on the State party's observations on admissibility and provided additional arguments on the merits of the communication.

6.2 Regarding the Committee's material competence, the authors point out that by ratifying the Covenant and the Optional Protocol, which entered into force for the State party on 12 December 1989 — prior to the events that led to this communication — the State party has recognized the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by the State Party of a right set forth in the Covenant. This competence, which is general in nature, is not subject to the State party's discretion. In particular, it is not up to the Government of the State party to decide whether or not it is appropriate for a specific

[26] Rules 93–98 (Procedure to determine admissibility) and 99–101 (Procedure for the consideration of communications on the merits) of the rules of procedure of the Human Rights Committee.

[27] The State party does not specify to which communications it is referring.

situation to be referred to the Committee. Rather, that decision is to be made by the Committee when it decides on its material competence by determining whether the alleged events constitute a violation of the rights protected under the Covenant. Likewise, the Algerian Government's adoption of domestic administrative and legislative measures to deal with the victims of the "national tragedy" cannot be invoked at the admissibility stage to prohibit individuals subject to the Committee's jurisdiction from exercising their right under article 5 of the Optional Protocol. Even if such measures might affect the resolution of the dispute, they must be analysed with regard to the merits of the case rather than its admissibility. The authors also emphasize that the State party's arguments are surprising in the case at hand, because, as the Committee has already pointed out, the legislative measures adopted are themselves in violation of the rights protected under the Covenant.[28]

6.3 The authors recall that the declaration of a state of emergency by Algeria on 9 February 1992 does not in any way affect the right of individuals to submit individual communications to the Committee. Article 4 of the Covenant stipulates that only certain provisions of the Covenant may be derogated under a public emergency, which thus does not affect the exercise of the rights set out in the Optional Protocol. The authors thus consider that the State party's observations on the appropriateness of the communication do not constitute a valid ground for it to be declared inadmissible.

6.4 With regard to the argument that the authors did not exhaust all domestic remedies, because they did not institute criminal proceedings by bringing the matter before an investigating judge while suing for damages, the authors refer to the Committee's recent jurisprudence in the *Benaziza* case,[29] in which the Committee took the view that "the State party has a duty not only to carry out thorough investigations of alleged violations of human rights, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations. To sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor".[30] The authors are therefore of the view that in the case of events as serious as those that allegedly took place, it was for the competent authorities to initiate proceedings. In the present case, all the steps taken by the family were futile, including the criminal complaints submitted and the communications addressed to the Ministry of Justice, the President of the Republic and the National Human Rights Observatory. Although both the police and the public prosecutor were aware of the disappearance of Djamel and Mourad Chihoub, no investigation was ordered, no court inquiry was launched, and none of the persons involved in the disappearance were called to account. The authors should therefore not be blamed for failing to exhaust domestic remedies in the case of a violation that is of such import that the State party should not have been unaware.

6.5 With regard to the State party's argument that a mere subjective belief or presumption does not exempt the author of a communication from the requirement to exhaust all domestic remedies, the authors refer to article 46 of Ordinance No. 06-01 of 27 February 2006, according to which any individual or collective accusation or complaint against members of the defence and security forces of the Republic must be declared

[28] The authors refer to the concluding observations of the Human Rights Committee (Algeria), CCPR/C/DZA/CO/3, 12 December 2007, paras. 7, 8 and 13; communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 9.2; and communication No. 1196/2003, *Boucherf v. Algeria*, supra, para. 11. The authors also refer to the concluding observations of the Committee against Torture (Algeria), CAT/C/DZA/CO/3, 16 May 2008, paras. 11, 13 and 17. Lastly, they cite general comment No. 29 (2001) on derogations during a state of emergency, para. 1.

[29] See communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, supra.

[30] Ibid., 8.3.

inadmissible by the competent judicial authority. The submission of such a complaint or accusation is subject moreover to a penalty of 3 to 5 years' imprisonment and a fine of between DA 250,000 and DA 500,000. The State party has thus not convincingly explained how suing for damages would have enabled the competent courts to accept and investigate any complaint submitted, given that such a complaint would have violated article 45 of the Ordinance, nor has it explained how the authors could have been immune from the application of article 46 of the Ordinance. An objective reading of the provisions in force thus shows that not only would any complaint regarding the violations of the rights of Djamel and Mourad Chihoub have been declared inadmissible, it would also have been criminally punished. The authors conclude that the remedies to which the State party refers would have been futile.

6.6 With regard to the merits of the communication, the authors note that the State party merely lists the sort of situations in which victims of the "national tragedy" might have disappeared. These general observations do not in any way respond to the claims set out in the present communication and are repeated in exactly the same way in answer to a whole series of other cases, thereby showing that the State party does not wish to deal with these affairs individually or respond to the authors' complaints and the suffering they have endured.

6.7 The authors note that, in accordance with the Committee's rules of procedure, State parties do not have any right to request that the admissibility of a communication be considered separately from the merits. Rather, this is an exceptional privilege that pertains exclusively to the Committee. There is nothing distinguishing the present case from the other cases of enforced disappearance considered by the Committee that would justify separate consideration of its admissibility.

6.8 In brief, the authors are of the view that the State party has not refuted their allegations. Referring to the Committee's jurisprudence,[31] they maintain all the facts put forward in their communication, noting that many reports on the actions of the security forces during the period in question and the many steps undertaken corroborate and add weight to their allegations. Given that the State party is responsible for the disappearance of the authors' sons, about whom they have not had any news for more than 15 years, the authors are not in a position to provide further evidence to support their communication, as only the State party holds such evidence. In conclusion, the authors renew their request that the Committee proceed to consider the communication on the merits, on the grounds that their allegations have been sufficiently substantiated. In their view, the absence of any response by the State party on the merits of the communication further constitutes its tacit acceptance of the accuracy of the facts alleged by the authors, which the Committee should therefore consider as proven.

[31] According to which, in cases where "the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information exclusively in the hands of the State party, the Committee may consider an author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party" (communication No. 1422/2005, *El Hassy v. The Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.7).

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearances of Djamel Chihoub and Mourad Chihoub were reported to the Working Group on Enforced or Involuntary Disappearances. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, and whose mandates are to examine and report publicly on human rights situations in specific countries or territories, or cases of widespread human rights violations worldwide, do not constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.[32] Accordingly, the Committee considers that the examination of the cases of Djamel and Mourad Chihoub by the Working Group on Enforced or Involuntary Disappearances does not render the communication inadmissible under this provision.

7.3 The Committee notes that, according to the State party, the authors have not exhausted domestic remedies, since they did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings. The Committee notes, however, that on 9 October 1999 Saadi Chihoub filed a formal complaint with the investigating judge of El Harrach regarding the abduction and disappearance of his son Mourad Chihoub. The Committee also takes note of the many steps the authors took to shed light on the fate of their sons Djamel and Mourad Chihoub, including petitions to politicians, the public prosecutor's office of El Harrach, the investigating judge and the competent administrative authorities. The Committee recalls its jurisprudence to the effect that authors must avail themselves of all legal remedies in order to fulfil the requirement of exhaustion of all available domestic remedies, insofar as such remedies appear to be effective in the given case and are de facto available to the authors.[33] The Committee is of the view that the State party has not provided evidence to suggest that such a remedy was de facto available to the authors, when Ordinance No. 06-01 of 27 February 2006 is still being applied despite the Committee's recommendations regarding its compliance with the Covenant.[34] The Committee therefore concludes that article 5, paragraph 2 (b), of the Optional Protocol is not a barrier to the admissibility of the communication.

7.4 The Committee finds that the authors have sufficiently substantiated their allegations insofar as they raise issues under articles 6, paragraph 1; 7; 9, paragraphs 1–4; 10; 16; 17; 23; 24 and 2, paragraph 3, of the Covenant. It therefore proceeds to consider the communication on the merits.

[32] Communication No. 540/1993, *Celis Laureano v. Peru*, supra, para. 7.1.

[33] Communication No. 1003/2001, *P.L. v. Germany*, decision on admissibility adopted on 22 October 2003, para. 6.5. See also communication No. 433/1990, *A.P.A. v. Spain*, decision on admissibility adopted on 25 March 1994, para. 6.2.

[34] CCPR/C/DZA/CO/3, supra, 12 December 2007, paras. 7, 8 and 13.

Consideration of the merits

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

8.2 The Committee notes that the State party prefers to maintain that communications incriminating public officials, or persons acting on behalf of public authorities, in enforced disappearances between 1993 and 1998, must be considered in the broader context of the domestic socio-political and security environment that prevailed during a period in which the Government was struggling to fight terrorism and that, consequently, they cannot be considered by the Committee under the individual complaints mechanism. The Committee wishes to recall once again its concluding observations addressed to Algeria at its ninety-first session,[35] as well as its jurisprudence,[36] according to which the State party should 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 might submit communications to the Committee. As emphasized in its concluding observations,[37] the Committee can only repeat that Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the Covenant.

8.3 The Committee refers to its observations in earlier cases[38] and notes that the State party has not replied to the claims set out by the authors of the present communication concerning the merits of the case. It also emphasizes that the burden of proof should not rest solely on the authors of a communication, especially given that the authors 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.[39] It is implicit in article 4, paragraph 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 it and its representatives and to provide the Committee with the information available to it.

8.4 The Committee notes that Djamel Chihoub was arrested on 16 May 1996 by members of the army of the State party. As for Mourad Chihoub, he was allegedly arrested on 13 November 1996 at the age of 16 by military officers from the Baraki barracks under orders from the same commander who had led the arrest of Djamel Chihoub a few months earlier. Allegedly, no one from his family has seen him or heard from him since. According to the authors, the chances of finding Djamel and Mourad Chihoub alive 15 years after their disappearance are negligible, and their prolonged absence, as well as the context and circumstances of their arrest, suggest that they died in detention. The Committee notes that the State party has not provided any information to refute these allegations, and concludes

[35] CCPR/C/DZA/CO/3, supra, para. 7 (a).

[36] See communication No. 1780/2008, *Aouabdia v. Algeria*, Views adopted on 22 March 2011, para. 7.2; communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 9.2; and communication No. 1196/2003, *Boucherf v. Algeria*, supra, para. 11.

[37] CCPR/C/DZA/CO/3, para. 7.

[38] See communication No. 1780/2008, *Aouabdia v. Algeria*, supra; communication No. 1588/2007, *Benaziza v. Algeria*, supra; and communication No. 1640/2007, *El Abani v. The Libyan Arab Jamahiriya*, Views adopted on 26 July 2010.

[39] Ibid. See also communication No. 1422/2005, *El Hassy v. The Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.7; communication No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2; and communication No. 1297/2004, *Medjnoune v. Algeria*, supra, para. 8.3.

that the State party has failed in its duty to guarantee the right to life of Djamel and Mourad Chihoub, in violation of article 6 of the Covenant.[40]

8.5 Concerning the claim that Djamel and Mourad Chihoub were detained incommunicado, 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 article 7, which recommends that States parties should make provisions against incommunicado detention. The Committee concludes, on the basis of the material before it, that the incommunicado detention of Djamel Chihoub and Mourad Chihoub since 1996 and the fact that they were prevented from communicating with their family and the outside world constitute a violation of article 7 of the Covenant in their regard.[41]

8.6 With regard to the authors, Taous Djebbar and Saadi Chihoub, the Committee acknowledges the anguish and distress caused to them by the disappearance of their two sons, of whom they have had no news for 15 years, without any effective investigation being conducted to establish the victims' fate, despite the many steps the authors have taken since the arrest of their two sons. The Committee is therefore of the opinion that the facts before it reveal a violation of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant with regard to the authors.[42]

8.7 Regarding the complaint of a violation of article 9, the information before the Committee shows that Djamel and Mourad Chihoub were arrested by agents of the State party without a warrant, then detained incommunicado without access to defence counsel and without being informed of the grounds for their arrest or the charges against them. The Committee recalls that, in accordance with article 9, paragraph 4, judicial review of the lawfulness of detention must provide for the possibility of ordering the release of the detainee if the detention is declared incompatible with the provisions of the Covenant, in particular those of article 9, paragraph 1. As the State party authorities themselves admitted that there were no charges against Djamel Chihoub and no warrant for his arrest,[43] and in the absence of any further explanation by the State party, the Committee concludes that the detention of Djamel Chihoub and Mourad Chihoub was in violation of article 9.[44]

8.8 Regarding the authors' complaint under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty, and that they must be treated with humanity and respect for their dignity. Noting that Djamel and Mourad Chihoub were detained incommunicado for 15 years, and were consequently deprived of all contact with their family and the outside world, and pointing out the absence of any

[40] Communication No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.11; communication No. 449/1991, *Mojica v. Dominican Republic*, Views adopted on 15 July 1994, para. 5.6; and communication No. 181/1984, *Elcida Arévalo Pérez v. Colombia*, Views adopted on 3 November 1989, para. 11.

[41] See communication No. 1780/2008, *Aouabdia v. Algeria*; supra; communication No. 1640/2007, *El Abani v. The Libyan Arab Jamahiriya*; and communication No. 1588/2007, *Benaziza v. Algeria*, supra. See also communication No. 1295/2004, *El Awani v. The Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 6.5; communication No. 1422/2005, *El Hassy v. The Libyan Arab Jamahiriya*, supra, para. 6.2; communication No. 540/1993, *Celis Laureano v. Peru*, supra, para. 8.5; and communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.4.

[42] See communication No. 1640/2007, *El Abani v. The Libyan Arab Jamahiriya*, supra, para. 7.5; communication No. 1422/2005, *El Hassy v. The Libyan Arab Jamahiriya*, supra, para. 6.11; communication No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14; and communication No. 950/2000, *Sarma v. Sri Lanka*, supra, para. 9.5.

[43] Supra, para. 2.8.

[44] See, inter alia, communication No. 1297/2004, *Medjnoune v. Algeria*, supra, para. 8.5.

information from the State party regarding the treatment they were given during their detention in various military establishments, the Committee finds a violation of article 10, paragraph 1, of the Covenant with regard to the two victims.[45]

8.9 In respect of article 16, the Committee reiterates its established jurisprudence, according to which intentionally removing a person from the protection of the law for a prolonged period of time may constitute a denial of their right to recognition as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of their relatives to obtain access to effective remedies, including legal remedies, have been systematically impeded.[46] In the present case, in which the State authorities were petitioned on multiple grounds regarding the disappearance of Djamel and Mourad Chihoub and yet did not provide the authors with any information about them, the Committee concludes that the enforced disappearance of Djamel and Mourad Chihoub for 15 years denied them the protection of the law for the same period and deprived them of their right to recognition as persons before the law, in violation of article 16 of the Covenant.

8.10 The Committee is of the view that the facts before it show that, given that the State party arrested Mourad Chihoub at the age of 16 when he was still a minor, without an arrest warrant or any explanation, and then detained him incommunicado and deprived him of all contact with his family for 15 years, the State party did not ensure the special protection required for children under 18 years of age. Consequently, the Committee finds a violation of the rights guaranteed under article 24 with regard to Mourad Chihoub.[47]

8.11 The authors also invoke article 2, paragraph 3, of the Covenant, which requires States parties to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights enshrined in the Covenant. The Committee reiterates the importance that it accords to States parties' establishment of appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its general comment No. 31 (2004), which states that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.[48] The Committee also recalls that any act of enforced disappearance constitutes a violation of a number of rights enshrined in the Covenant and may also constitute a violation of or a grave threat to the right to life.[49] In the present case, the information before the Committee shows that the parents of Djamel and Mourad Chihoub did not have access to an effective remedy, as all the steps taken to shed light on their fate were futile. Furthermore, the denial of the legal right to take judicial proceedings following the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation continues to deprive them of any access to an effective remedy, given that the Ordinance prohibits, on pain of imprisonment, the pursuit of legal remedies to shed

[45] See general comment No. 21 [44] on art. 10, para. 3; communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2; and communication No. 1422/2005, *El Hassy v. The Libyan Arab Jamahiriya*, supra, para. 6.4.

[46] See communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.8; and communication No. 1495/2006, *Zohra Madaoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

[47] See, for example, communication No. 1069/2002, *Bakhtiyari v. Australia*, supra, para. 9.7.

[48] Paras. 15 and 18.

[49] Communication No. 1328/2004, *Kimouche v. Algeria*, Views adopted on 10 July 2007, para. 7.2; communication No. 1295/2004, *El Awani v. The Libyan Arab Jamahiriya*, supra, para. 6.2; communication No. 992/2001, *Bousroual v. Algeria*, supra, para. 9.2; and communication No. 950/2000, *Sarma v. Sri Lanka*, supra, para. 9.3. See also article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

light on the most serious crimes such as enforced disappearances.[50] The Committee therefore concludes that the facts before it reveal a violation of article 2, paragraph 3, of the Covenant, read in conjunction with articles 6, paragraph 1; 7; 9; 10, paragraph 1; and 16 of the Covenant with regard to Djamel and Mourad Chihoub, and read in conjunction with article 24 of the Covenant with regard to Mourad Chihoub. The Committee also finds there has been a violation of article 2, paragraph 3, read in conjunction with article 7, with regard to the authors.

8.12 Having found a violation of article 7 of the Covenant, the Committee will not consider the complaint related to the violation of articles 17 and 23 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of article 6, paragraph 1; article 7; article 9; article 10, paragraph 1; and article 16 with regard to Djamel and Mourad Chihoub. It also finds that there was a violation of article 24 of the Covenant with regard to Mourad Chihoub. The Committee further finds that the State party acted in violation of article 2, paragraph 3, read in conjunction with article 6, paragraph 1; article 7; article 9; article 10, paragraph 1; and article 16 with regard to Djamel and Mourad Chihoub, and in violation of article 2, paragraph 3, read in conjunction with article 24 with regard to Mourad Chihoub. Lastly, the Committee finds a violation of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant with regard to the authors (the victims' parents).

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including by (i) conducting a thorough and effective investigation into the disappearance of Djamel and Mourad Chihoub; (ii) providing their family with detailed information about the results of the investigation; (iii) freeing Djamel and Mourad Chihoub immediately if they are still being detained incommunicado; (iv) if they are dead, handing over their remains to their family; (v) prosecuting, trying and punishing those responsible for the violations committed; and (vi) providing adequate compensation for the authors and their family for the violations suffered, and for Djamel and Mourad Chihoub if they are still alive. Moreover, and notwithstanding Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for the victims of crimes such as torture, extrajudicial killings and enforced disappearance. The State party should also take steps to prevent similar violations from occurring in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views.

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

[50] CCPR/C/DZA/CO/3, supra, para. 7.

Appendix

Individual (dissenting) opinion of Krister Thelin, joined by Michael O'Flaherty

The Committee has found a direct violation of article 6 of the Covenant, in concluding that the State Party has failed in its duty to guarantee the right to life of Djamel and Mourad Chihoub. I disagree with this finding for the following reason.

The Committee's long established jurisprudence in cases of enforced disappearances, where the facts do not lend themselves to an interpretation of the victim's actual death, has put the emphasis on the State Party's duty to protect and ensure effective and enforceable remedies under article 2, paragraph 3 and thus invoke art. 6, paragraph 1 only to be read in conjunction with this article. The Committee has recently confirmed this approach in two cases of enforced disappearances against the same State Party and within a similar factual frame.[1]

However, in the case before us, the Committee has without any discussion, including any reference to how the case has been argued,[2] made a finding in line with what has hitherto been advanced only by a minority, i.e of a direct violation of art 6, paragraph 1 without any connection to art 2, paragraph 3.

This extensive interpretation of the right to life under the Covenant sets, in my view, the Committee on an uncharted course, where direct violations of art 6, notwithstanding that the victim is presumed to be alive, in the future could be found in various settings also outside the scope of enforced disappearances. *De minimis*, the majority should have offered reasons for its new application of art 6 violations.

(*Signed*) Krister **Thelin**

(*Joined by*) Michael **O´Flaherty**

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

[1] Communication No. 1588/2077, *Benaziza v. Algeria*, Views adopted on 26 July 2010, and communication No. 1780/2008, *Aouabdia v. Algeria*, Views adopted on 22 March 2011, and, in particular, dissenting opinions in both cases by Mr. Salvoli.

[2] See para 7.11 of communication No. 1780/2008 *Aouabdia v. Algeria*, supra.

Individual (concurring) opinion of Fabián Salvioli, joined by Cornelis Flinterman

1. I fully agree with the decision of the Human Rights Committee in the case of *Chihoub v. Algeria*, communication No. 1811/2008, and with the finding of violations of the human rights of Djamel and Mourad Chihoub and of their parents Taous Djebbar and Saadi Chihoub resulting from the enforced disappearance of the former.

2. However, for the reasons set out below, I consider that the Committee should also have concluded that the State has committed a violation of article 2.2 of the International Covenant on Civil and Political Rights. The Committee should have indicated that, in its view, the State of Algeria should amend Ordinance No. 06-01 to ensure the non-repetition of such acts.

(a) Competence of the Committee to find violations of articles not referred to in the complaint

3. Since I became a member of the Committee, I have taken the view that the Committee has, of its own volition, incomprehensibly restricted its competence to determine a violation of the Covenant in the absence of a specific legal claim. Provided that the facts clearly demonstrate such a violation, the Committee can and must, in accordance with the principle of *iura novit curiae*, examine the legal framework of the case. The legal basis and explanation of why this does not mean that States will be left without a defence may be found in paragraphs 3 to 5 of my partially dissenting opinion in the case of *Weeramansa v. Sri Lanka*, to which I refer to avoid repeating them.[1]

4. In any event, it should be pointed out that, in the present case, *Chihoub v. Algeria*, the authors of the communication expressly allege a violation of article 2 (see, for instance, paragraphs 1.1 and 3.12), albeit referring to paragraph 3 of that provision.

(b) Violation of article 2.2 of the Covenant

5. The international responsibility of the State may be engaged, inter alia, by an act or omission of any of its branches, including, of course, the legislative branch or any other branch with legislative powers in accordance with the Constitution. Article 2.2 of the Covenant specifies: “Where not already provided for by existing legislative or other measures, each State party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” Although the obligation laid down in article 2.2 is of a general nature, failure to fulfil it may engage the international responsibility of the State.

6. The provision in question is a self-executing one. In its general comment No. 31 (2004), the Committee rightly indicated that: “The obligations of the Covenant in general and article 2 in particular are binding on every State party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level — national, regional or local — are in a position to engage the responsibility of the State party.”[2]

[1] *Anura Weerawansa v. Sri Lanka*, communication No. 1406/2005; partially dissenting opinion of Mr. Salvioli.

[2] General comment No. 31 [80] on the nature of the general legal obligation imposed on States parties

7. Just as States parties to the Covenant must adopt legislative measures to give effect to rights, they also bear a negative obligation, deriving from article 2.2, not to adopt legislative measures contrary to the Covenant; if it does so, the State commits per se a violation of the obligations laid down in article 2.2.

8. Algeria ratified the International Covenant on Civil and Political Rights on 12 September 1989; by so doing, it entered into a commitment in respect of the entire Covenant, and hence undertook to fulfil the obligations established and deriving from article 2. On the same date, 12 September 1989, the State acceded to the Optional Protocol, recognizing the competence of the Human Rights Committee to receive individual communications.

9. In the present case, the Committee is fully competent to examine the legal framework of the facts laid before it: on 27 February 2006, the State promulgated Ordinance No. 06-01, which prohibits recourse to the courts to shed light on the most serious crimes such as enforced disappearances, thereby ensuring impunity for individuals responsible for serious violations of human rights. There is no doubt that, through this legislation, the State adopted a regulation directly contrary to the obligation laid down in article 2.2 of the Covenant and constituting per se a violation which the Committee should have pointed out in its decision in addition to the violations established, since the authors and their sons have been victims, inter alia, of the legislative provision concerned.

10. The regulation is directly applicable in the present instance, and therefore a conclusion of violation of article 2.2 in the Chihoub case is not an abstract or purely academic matter. It must not be overlooked that the violations found have a direct bearing on the reparation for which the Committee has to provide when deciding on an individual complaint.

(c) Reparation in the Chihoub case

11. Paragraph 10 of the Committee's decision is an excellent example of a comprehensive approach to reparation: it prescribes non-pecuniary measures of restitution and satisfaction and guarantees of non-repetition (conducting a thorough investigation of the facts, freeing the victims if they are still alive or handing over of their remains to the family if they are dead, and prosecuting, trying and punishing those responsible for the violations committed). The Committee's decision also provides for pecuniary measures of reparation (adequate compensation for the authors for the violations committed and for their two sons if they are still alive).

12. Nevertheless, at the end of paragraph 10, the Committee states that, notwithstanding Ordinance No. 06-01, the State party should also ensure that it does not infringe the right to an effective remedy for the victims of crimes such as torture, extrajudicial executions and enforced disappearances and that, moreover it is under an obligation to take steps to prevent similar violations in the future.

13. This paragraph leaves no room for doubt that, in the Committee's View, Ordinance No. 06-01 is incompatible with the Covenant, and for that reason it indicates that the State must guarantee an effective remedy for the victims notwithstanding that provision. Is the Committee therefore saying that the State judiciary should ignore this regulation, which impedes progress in the investigation of acts involving serious violations of human rights?

14. The answer is "yes". The judiciary has a duty to monitor conformity with treaties, and not to apply an internal regulation that is incompatible with the Covenant. This is

to the Covenant, adopted at the 2187th meeting on 29 March 2004, paragraph 4.

essential not only to fulfil human rights obligations, but also to avoid engaging the international responsibility of the State.

15. However, not only is the judiciary bound by the Covenant, the other branches of government also have to adopt relevant measures to guarantee human rights, and article 2.2 specifically mentions legislative measures.

16. It has been the consistent practice of the Committee to adopt general wording indicating that the State should prevent similar acts in the future, and this has also been done at the end of paragraph 10 of its decision. How can the non-repetition of such acts be guaranteed? There are a series of measures that the State can take (training in human rights for public officials, especially members of the police and the armed forces, adoption of effective action procedures to deal with complaints of enforced disappearance, commemorative measures, etc.). Without prejudice to such steps, the Committee should undoubtedly have indicated in paragraph 10 of its Views that the State of Algeria should amend the domestic legislation challenged (Ordinance No. 06-01 promulgated on 27 February 2006), so as to bring in into line with its obligations under the International Covenant on Civil and Political Rights. To keep in force a law that is per se incompatible with the Covenant is inconsistent with current international standards regarding reparation for cases of human rights violations.

(*Signed*) Fabián **Salvioli**

(*Joined by*) Cornelis **Flinterman**

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