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Communication No. 1905/2009

Views adopted by the Committee at its 104th session, 12–30 March 2012

Submitted by:	Farida Khirani (represented by the Alkarama for Human Rights foundation)
Alleged victims:	Maamar Ouaghlissi (her husband), Mériem Ouaghlissi and Khaoula Ouaghlissi (her daughters) and the author herself
State party:	Algeria
Date of communication:	1 July 2009 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 6 October 2009 (not issued in document form)
Date of adoption of Views:	26 March 2012
Subject matter:	Enforced disappearance
Substantive issues:	Right to life, prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, right of persons deprived of their liberty to humane treatment, right to recognition as a person before the law and right to an effective remedy
Procedural issue:	Exhaustion of domestic remedies
Articles of the Covenant:	2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1 to 4; 10, paragraph 1; and 16
Article of the Optional Protocol:	5, paragraph 2 (b)

Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (104th session)

concerning

Communication No. 1905/2009*

Submitted by:	Farida Khirani (represented by the Alkarama for Human Rights foundation)
Alleged victims:	Maamar Ouaghlissi (her husband), Mériem Ouaghlissi and Khaoula Ouaghlissi (her daughters) and the author herself
State party:	Algeria
Date of communication:	1 July 2009 (initial submission)

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

Meeting on 26 March 2012,

Having concluded its consideration of communication No. 1905/2009, submitted to the Human Rights Committee by Farida Khirani under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1.1 The author of this communication, dated 1 July 2009, is Farida Khirani, born on 25 August 1963 at Ouargla, Algeria. She is submitting the communication on behalf of her husband, Maamar Ouaghlissi, born on 23 October 1958 at Constantine, Algeria. She claims that he has been a victim of violations by the State party of article 2, paragraph 3; article 6, paragraph 1; article 7; article 9; article 10, paragraph 1; and article 16 of the Covenant. The author is also acting on behalf of herself and of her two daughters, Mériem and Khaoula Ouaghlissi, born respectively on 25 November 1988 and 1 May 1990 at Jijel, Algeria. The

* The following members of the Committee participated in the consideration of the present communication: Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kaelin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabían Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval. In accordance with article 91 of the rules of procedure, Mr. Lazhari Bouzid did not participate in the consideration of the communication. The text of the individual opinion (concurring) of Mr. Krister Thelin and Mr. Walter Kaelin is appended to the present Views. The text of the individual opinion (concurring) of Mr. Fabían Salvioli is appended to the present Views.

author and her daughters consider that they are victims of a violation of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant. The author is represented by the Alkarama for Human Rights foundation.[1]

1.2 On 17 December 2009, the Special Rapporteur on new communications, acting on behalf of the Committee, decided to reject the State party's request of 25 November 2009 that the Committee consider the admissibility of the communication separately from the merits.

Background facts as submitted by the author

2.1 According to testimony from his co-workers, Maamar Ouaghlissi was arrested on 27 September 1994 while he was at work at the national railways company (SNTF), where he was employed as a quantity surveyor in the Infrastructure Department. No fewer than three plain clothes officers, claiming to be from the security services (Al-Amn), arrived at the SNTF Headquarters at around midday in a white Nissan Patrol four-wheel drive vehicle. This type of vehicle is regularly used by the criminal investigation police and the army's Intelligence and Security Department (DRS). Failing to find Maamar Ouaghlissi, they decided to wait for him and prevented his colleagues from leaving the premises, probably for fear that they might warn him. When the victim returned from his lunch break, at around 1 p.m., they asked him to follow them in his own vehicle, accompanied by two officers; they provided no explanation, nor did they show a warrant.

2.2 The author points out that over the previous few days and throughout the whole month there had been numerous arrests and abductions in Constantine particularly of members of local councils and deputies as well as people who were just activists and supporters of the Islamic Salvation Front (FIS). According to numerous witnesses, all the persons arrested by the police were held incommunicado for several weeks or months at the police headquarters in Constantine, where they were systematically tortured before being transferred to the Centre territorial de recherches et d'investigations (Territorial Centre for Research and Investigation) (CTRI) in the 5th military region, under the Intelligence and Security Department (DRS). Those persons abducted by DRS were taken directly to the Centre (CTRI) and many of them disappeared. Maamar Ouaghlissi was probably arrested as part of this operation, which was coordinated and planned by the police and DRS in Constantine.

2.3 Following the arrest, the SNTF head of personnel notified the management, which lodged a complaint with the 5th military region in Constantine. In addition, immediately after the arrest, family members went to the police headquarters in Constantine, gendarmerie brigades and various barracks in the city. As early as October 1994, the victim's father approached the court in Constantine to ascertain whether the victim had been brought before the public prosecutor. As these efforts proved fruitless, he lodged a complaint with the prosecution service about his son's disappearance and abduction. However, the Constantine public prosecutor never agreed to initiate investigations or to act on the complaint and the prosecution service refused to give the father the reference number under which the complaint was registered.

2.4 Eight months after the arrest, the author learned from a former detainee that her husband was being held at the Mansourah barracks, in the 5th military region, which is run by the Intelligence and Security Department (DRS). Maamar Ouaghlissi's father went to the barracks in May 1995 but was sent away by the soldiers, who denied that they were holding his son. Up until the end of 1995, the author or her relatives received a number of

[1] The Covenant and the Optional Protocol entered into force for Algeria on 12 September 1989.

reports from army conscripts or released prisoners that her husband was being held in one or other of the DRS barracks. Another report provided by a soldier in 1996 indicated that her husband was still alive at that time. Since then, the family have had no news of him.

2.5 In 1998, the author of the communication lodged a complaint with the public prosecutor in Constantine about her husband's abduction and disappearance. However, no investigation seems to have been conducted, given that none of the witnesses was ever questioned. As she had heard that offices had been opened in each *wilaya* (prefecture) to register complaints from the families of people who had disappeared, she went to one on 28 September 1998 to lodge another complaint. That complaint was registered, however, no investigation appears to have been conducted.

2.6 On 23 April 2000, the author was summoned by the gendarmerie and was told that the investigations into her husband's disappearance had produced no results. In May 2000, she was again summoned, this time by the *daïra* (subprefecture) of Hamma Bouzinae, an administrative area in Constantine; she was given an official report from the Ministry of the Interior and Local Authorities informing her that "the investigations carried out have not been able to determine the whereabouts of the person concerned". She was given no indication as to what investigations had been carried out, or by what authority. After receiving a further summons in June 2000 from the public prosecutor in Constantine, the author was criticized for continuing with her enquiries with different authorities, in particular for the letter that she had sent on 15 January 2000 to the general in command of the 5th military region, in which she requested information on her husband's disappearance; the letter remained unanswered. On 6 February 2001, the author also sent a registered letter to the Minister of Justice. However, there has been no response to it.

2.7 In 2006, as a result of her efforts to obtain an official certificate of disappearance from the gendarmerie so that she could receive welfare support for her family, she was given an "official certificate attesting to a disappearance under the circumstances arising from the national tragedy", although no investigation had been carried out by the gendarmerie that issued the certificate.

2.8 On 27 June 2005, the author brought her case to the attention of the United Nations Working Group on Enforced or Involuntary Disappearances; however, given the refusal of the Algerian authorities to clarify the case, that initiative also proved fruitless. Lastly, the author has been violently rebuked and beaten by the police on several occasions during peaceful gatherings in front of the local office of the National Consultative Commission for the Protection and Promotion of Human Rights.

The complaint

3.1 The author considers that her husband has been a victim of enforced disappearance, in violation of article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1 to 4; article 10; and article 16, read alone and in conjunction with article 2, paragraph 3, of the Covenant. In addition, the author considers that the suffering caused to her daughters and herself by the disappearance of Maamar Ouaghlissi and the lack of information about his fate constitute a violation of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

3.2 The author points out that both the prolonged absence of Maamar Ouaghlissi and the circumstances in which he was arrested give reason to think that he died in detention. With reference to the Committee's general comment No. 6, the author alleges that incommunicado detention creates an exceedingly high risk of a violation of the right to life, since the victims are at the mercy of their jailers, who, by the very nature of the circumstances, are subject to no oversight. Moreover, even if a disappearance does not have a fatal outcome, the threat that it poses to the victim's life constitutes a violation of article

6, inasmuch as the State has failed to carry out its duty to protect the fundamental right to life. The State party has failed all the more so in its duty to protect the life of Maamar Ouaghlissi, because it has made no effort to investigate his fate. Consequently, the author considers that the State party has violated article 6, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

3.3 With reference to the Committee's jurisprudence, the author alleges that the mere fact of being subject to an enforced disappearance constitutes inhuman or degrading treatment. Hence, the anxiety and suffering caused by the indefinite detention of Maamar Ouaghlissi, cut off from his family and the outside world, amount to treatment with respect to Maamar Ouaghlissi that is contrary to article 7 of the Covenant. The author also considers that her husband's disappearance has been, and continues to be, for herself and for her close relatives, a paralysing, painful and harrowing ordeal, because the family is completely ignorant of the victim's fate and, if he has died, of the circumstances of his death and his place of burial. In addition, one of Maamar Ouaghlissi's daughters, Khaoula Ouaghlissi, who is now 18 years old, was particularly affected by her father's disappearance and suffers to this day from chronic psychotic disorders that require constant and regular medical treatment. With reference to the relevant jurisprudence of the Committee, the author concludes that the State party has also violated her rights and those of her daughters, Mériem and Khaoula Ouaghlissi, under article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

3.4 Furthermore, the author points out that the Algerian authorities have yet to admit to having illegally arrested and detained Maamar Ouaghlissi and have deliberately concealed the truth about his fate. These facts also disclose a violation of article 9, paragraphs 1 to 4, of the Covenant. In respect of article 9, paragraph 1, the author draws attention to the fact that Maamar Ouaghlissi was arrested without a warrant and without being informed of the reasons for his arrest. None of his family have seen him again or been able to communicate with him since his abduction. Besides, it is clear from the circumstances of his arrest, as his co-workers, who were present when he was arrested, can attest that Maamar Ouaghlissi was at no time informed of the reasons for his arrest or served with a warrant in which the reasons were set out; this is a violation of article 9, paragraph 2, of the Covenant. Furthermore, Maamar Ouaghlissi was never brought before a judge or any other judicial authority such as the public prosecutor in Constantine, within whose jurisdiction the case falls, either during the legally prescribed period of custody or at its conclusion. The author points out that incommunicado detention may entail, per se, a violation of article 9, paragraph 3, of the Covenant, and concludes that this article has been violated. Lastly, given that he has been beyond the protection of the law for the entire duration of his detention — which remains indefinite — Maamar Ouaghlissi has never been able to challenge the lawfulness of his arrest or to apply to a judge for his release or even to ask a third party who is at liberty to make such an appeal or to take over his defence. This is a violation of article 9, paragraph 4, of the Covenant.

3.5 The author also maintains that, given that he has been held in incommunicado detention, in violation of article 7 of the Covenant, her husband has never been treated with humanity or with respect for the inherent dignity of the human person. Consequently, he has been a victim of a violation of article 10, paragraph 1, of the Covenant.

3.6 As a victim of enforced disappearance, Maamar Ouaghlissi has been deprived of the protection of the law by reason of the refusal of those responsible for his disappearance to reveal his fate and whereabouts and to admit that he has been deprived of his liberty. This is a violation of article 16 of the Covenant. In this connection, the author refers to the position adopted by the Committee in its jurisprudence on enforced disappearances.

3.7 The author also maintains that, as a victim of enforced disappearance, Maamar Ouaghlissi was materially unable to exercise his right to challenge the lawfulness of his

detention. As the State party has taken no action in response to all the efforts made by his relatives, it has failed in its obligation to guarantee an effective remedy, consisting in a thorough and diligent investigation into the victim's disappearance and fate, and to keep the family informed of the outcome of its investigation. The absence of an effective remedy is compounded by the fact that a full and general amnesty was legally declared following the promulgation, on 27 February 2006, of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation. The Ordinance prohibits, on pain of imprisonment, the pursuit of legal remedies to shed light on the most serious crimes such as enforced disappearances, thereby guaranteeing impunity to the individuals responsible for violations. This amnesty law is in breach of the State's obligation to investigate serious violations of human rights and of the right of victims to an effective remedy. The author concludes that the State party has violated article 2, paragraph 3, of the Covenant with regard to her husband, her daughters and herself.

3.8 Lastly, the author points out that, since the obligation to provide an effective remedy in cases of violations is a vital element of the positive obligations to guarantee the rights enshrined in the Covenant, the failure to take the necessary measures to protect the rights set forth in articles 6, 7, 9, 10 and 16 constitutes per se an autonomous violation of the rights enumerated in article 2, paragraph 3, of the Covenant.

3.9 With regard to the exhaustion of domestic remedies, the author stresses that all her efforts and those of her family have been to no avail. The police, the courts, and the other authorities have failed to initiate a proper investigation. Hence, they have failed to meet not just the State party's international obligations but also the requirements of domestic legislation, since article 63 of the Code of Criminal Procedure states that "when an offence is brought to their attention, the criminal investigation police, acting either on instructions from the State prosecutor or on their own initiative, shall undertake preliminary inquiries".[2] Despite having received a formal complaint, on two occasions, the public prosecutor in Constantine refused to launch an investigation, in keeping with his legal obligations. On the contrary he went so far as to reproach the author for continuing to make enquiries with the military authorities. Moreover, the office set up to receive the families of disappeared persons and tasked, according to the authorities, to help them find their relatives by conducting thorough investigations did not help the victim's father to obtain any further information either. No investigation was carried out, and the office has never interviewed the victim's beneficiaries or the witnesses.

3.10 The author maintains that she has no longer had the legal right to take judicial proceedings following the promulgation of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation.[3] Not only did all the remedies attempted by the author prove ineffective, they are now no longer available to her.

[2] Ordinance No. 66-155 of 8 June 1966 on the implementation of the Code of Criminal Procedure, as amended and supplemented.

[3] The author notes that the Charter rejects "all allegations attributing responsibility to the State for deliberate disappearances". Furthermore, article 45 of the Ordinance promulgated on 27 February 2006 provides that "legal proceedings may not be brought against individuals or groups who are members of any branch of the defence and security forces of the Republic for actions undertaken to protect persons and property, safeguard the nation and preserve the institutions of the People's Democratic Republic of Algeria". Article 46 provides that "anyone who, through his or her spoken or written statements or any other act, uses or exploits the suffering caused by the national tragedy to undermine the institutions of the People's Democratic Republic of Algeria, weaken the State, impugn the honour of its representatives who served it with dignity, or tarnish the image of Algeria abroad shall be liable to a term of imprisonment of from 3 to 5 years or a fine of from 250,000 to 500,000 Algerian dinars. Criminal proceedings shall be automatically initiated by the prosecution service."

State party's observations on admissibility

4.1 On 25 November 2009, the State party contested the admissibility of the communication 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" which was accompanied by an additional note.

4.2 In its memorandum, the State party expresses the view that communications attributing blame to public officials or persons acting on behalf of public authorities in cases of enforced disappearance during the period in question — from 1993 to 1998 — should be considered in the context of the sociopolitical and security conditions prevailing in the country at a time when the Government was struggling to combat terrorism. During that period, the Government was obliged to combat groups that were not formally organized. Hence, there was some confusion in the manner in which a number of operations were carried out among the civilian population. It was difficult for civilians to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. There are numerous explanations for cases of enforced disappearance, but they cannot, according to the State party, be blamed on the Government. Documented information from many independent sources, including the press and human rights organizations, indicates that in Algeria during the period in question the term "disappearance" referred to six distinct scenarios, none of which can be blamed on the Government. The State party cites the case of persons reported missing by their relatives when in fact they had chosen to return in secret in order to join an armed group. They asked their families to report that they had been arrested by the security services as a way of "covering their tracks" and avoiding "harassment" by the police. The second scenario concerns persons who were reported missing after being arrested by the security services but who took advantage of their release to go back into hiding. There were also cases of persons abducted by armed groups who were incorrectly identified as members of the Armed Forces or security services, because they were not identified or had taken uniforms or identification documents from police officers or soldiers. The fourth scenario concerns persons who were reported missing but who had actually abandoned their families and, in some cases, even left the country, because of personal problems or family disputes. The fifth scenario concerns persons reported missing by their families who were actually wanted terrorists and who were killed and buried in the maquis after factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. Lastly, the State party draws attention to a sixth scenario, where persons reported missing were in fact living in Algeria or abroad under false identities.

4.3 The State party stresses that, given the diversity and complexity of the situations covered by the concept of disappearance, the Algerian legislature decided, following the referendum on the Charter for Peace and National Reconciliation, to recommend that a comprehensive approach should be taken to the issue of the disappeared. Under that approach, 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, and 136 are still pending. A total of 371,459,390 Algerian dinars (DA) has been paid out in compensation to all the victims concerned. In addition, a total of DA 1,320,824,683 has been paid out in monthly pensions.

4.4 The State party further contends that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities undertaken vis-à-vis the political or administrative authorities, non-contentious remedies involving advisory or

mediation bodies, and contentious remedies pursued before the relevant courts of justice. The complainants have written letters to political and administrative authorities, contacted advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but have not actually initiated legal proceedings and seen them through to their conclusion by availing themselves of all available remedies of appeal and cassation. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to an investigating judge. In the Algerian legal system, it is the public prosecutor who receives complaints and who institutes criminal proceedings, if these are warranted. Nevertheless, in order to protect the rights of victims and their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint with the investigating judge. In that case, it is the victim, not the prosecutor, who institutes criminal proceedings by bringing the matter before an investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not used, even though the authors of the communication could simply have instituted proceedings and compelled an investigating judge to initiate an investigation, even if the prosecution service had decided otherwise.

4.5 The State party also notes the author's contention that the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation — in particular, article 45 of Ordinance No. 06-01 — rules out the possibility of any effective and available domestic remedies being provided in Algeria for the families of victims of disappearance. On this basis, the authors believed that they were under no obligation to bring the matter before the relevant courts, thereby prejudging the position and findings of the courts on the application of the ordinance. However, the authors cannot invoke the ordinance and its implementing legislation to absolve themselves of responsibility for failing to institute the legal proceedings available to them. 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.

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 establishes legal measures for the termination of criminal proceedings and the commutation or remission of sentences in respect of any person found guilty of acts of terrorism and anyone who benefits from the provisions on civil dissent, except for those 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 obtaining an official pronouncement of presumed death that opens the way for beneficiaries to receive compensation as victims of the "national tragedy". Social and economic measures put in place include assistance with job placement and compensation for all persons considered victims of the "national tragedy". Lastly, the ordinance establishes political measures such as banning any person who exploited religion in the past in such a way as to contribute to the "national tragedy" from holding political office. It also establishes the inadmissibility of any proceedings brought by individuals or groups against members of any branch of the Algerian 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 compensation funds for all victims of the "national tragedy", the sovereign people of Algeria, according to the State party, have

agreed to a process of national reconciliation as the only way to heal the wounds that have been inflicted. The State party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, venting in the media and political score settling. The State party is therefore of the view that the allegations in the communication are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.8 The State party asks the Committee to note how similar the facts and situations described by the authors are to those described by the authors of other communications; to take into account the sociopolitical and security context at the time; to note that the authors have 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 declare the communication inadmissible; and to instruct the authors to take proceedings in the proper courts.

4.9 Moreover, in the additional note to the memorandum, the State stresses that it has taken into account the notes verbales informing it of the Committee's decision to consider the question of admissibility of the communication jointly with the merits of the communications and requesting it to submit its comments on the merits and any additional comments on admissibility. In this connection, the State party raises the question of whether the submission of a series of individual communications to the Committee might not actually constitute an abuse of procedure aimed at bringing the Committee's attention to a broad historical issue involving causes and circumstances of which the Committee is unaware. These "individual" communications dwell on the general context in which the disappearances occurred, focusing solely on the actions of the security forces and never mentioning those of the various armed groups that used criminal concealment techniques to put the blame on the Armed Forces.

4.10 The State party insists that it will not address the merits of these communications until the issue of their admissibility has been settled, since all judicial or quasi-judicial bodies have a duty to deal with preliminary questions before considering the merits. According to the State party, the decision in the cases in point to consider questions of admissibility and the merits jointly and simultaneously — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications both overall and in terms of their intrinsic characteristics. Referring to the rules of procedure of the Human Rights Committee, the State party notes that the sections on the Committee's procedure for considering the admissibility of communications are separate from those on the consideration of communications on the merits, and that therefore these questions could be considered separately. With regard, in particular, to the question of the exhaustion of domestic remedies, the State party stresses that none of the communications passed through the domestic courts to allow 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.

4.11 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 absolve the authors of the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation precludes access to any remedies in this domain, the State party replies that the failure of the authors to take any steps to submit their allegations for consideration has so far prevented the Algerian authorities from taking a position on the scope and limits of the applicability of the Charter. Moreover, under the ordinance in

question, the only proceedings that are inadmissible are those brought against "members of any branch of the defence and security forces of the Republic" for actions consistent with their core duties to the Republic, namely, to protect persons and property, safeguard the nation and preserve its institutions. On the other hand, any allegations concerning actions by the defence or security forces that can be proved to have taken place in any other context can be investigated by the appropriate courts.

4.12 Lastly, the State party reiterates its position in respect of the settlement mechanism introduced by the Charter for Peace and National Reconciliation.

Authors' comments on the State party's observations on admissibility

5.1 On 6 January 2012, the author submitted comments on the State party's observations on admissibility and provided additional arguments on the merits.

5.2 The author maintains that it is not up to the State party to decide whether it is appropriate to bring a particular situation to the attention of the Committee. Furthermore, the adoption by the Algerian Government of a global domestic settlement mechanism or of any other legislative or other measure should not constitute grounds for declaring the communication inadmissible. Moreover, the Committee has already noted that those domestic measures adopted by the Algerian authorities are themselves a violation of the rights enshrined in the Covenant.[4]

5.3 The author also recalls that the declaration by Algeria of a state of emergency on 9 February 1992 does not affect the right to submit individual communications to the Committee. Article 4 of the Covenant provides for derogations only from certain provisions of the Covenant during states of emergency, but does not affect the exercise of rights under the Optional Protocol. Besides, the application of that measure for almost two decades constituted per se a violation of article 4, paragraph 3, of the Covenant, since the State failed to comply with its international obligations and in particular to immediately inform the other States parties of the provisions from which it had derogated and the reasons for such measures.[5] Accordingly, the author considers that the State party is not justified in invoking its own violations of the international obligations by which it is bound to have the present communication declared inadmissible.

5.4 With regard to the argument that the author did not exhaust all domestic remedies, because she did not institute criminal proceedings by bringing the matter before an investigating judge, the author points out, first of all, that for such a procedure payment of a security or a "procedural fee" is required, failing which the complaint will be declared inadmissible. Under article 75 of the Algerian Code of Criminal Procedure, the amount of the security is set arbitrarily by the investigating judge and in practice turns out to be financially prohibitive because, in addition, litigants have no guarantee that a procedure involving members of the security services will actually lead to a prosecution.

5.5 Furthermore, given the numerous steps taken by Maamar Ouaghlissi's employer and family members, the military, judicial and administrative authorities were aware of his abduction and disappearance and were therefore legally obliged to act upon the report of abduction and arbitrary detention. Those crimes are covered and punished by the Algerian Criminal Code, particularly articles 107, 108, 109, 291 and 292, and the prosecution service

[4] The author refers here, inter alia, to the concluding observations of the Human Rights Committee on Algeria, CCPR/C/DZA/CO/3, 12 December 2007, paras. 7, 8 and 13.

[5] The author quotes general comment No. 29 (2001), relating to article 4 on derogations in case of a state of emergency, para. 1. *Official Records of the General Assembly, fifty-sixth session, Supplement No. 40, Vol. I* (A/56/40 (Vol. I)), annex VI.

is obliged to open an immediate judicial investigation and to hand the perpetrators over to the criminal courts. However, no investigation has been ordered and none of the persons implicated in Maamar Ouaghlissi's disappearance have been brought to book. Consequently, the State has failed in its duty to investigate and establish the facts about the crimes committed.

5.6 The author insists on the impossibility of initiating criminal proceedings against the perpetrators of human rights violations when imputable to the security services. Under article 45 of Ordinance 06-01, any complaint or accusation made individually or collectively against members of any branch of the defence or security forces of the Republic must be declared inadmissible by the competent judicial authority. Article 46 of the ordinance states, furthermore, that anyone who submits such a complaint is liable to a penalty of from 3 to 5 years' imprisonment and a fine of between DA 250,000 and DA 500,000. This legislation thus "infringes freedom of expression and the right of any person to have access, at the national and international levels, to an effective remedy against violations of human rights".[6]

5.7 With regard to the merits, the author notes that the State party appears to dispute the very fact that massive and systematic enforced disappearances occurred in Algeria. The State party paints a set of scenarios involving enforced disappearance, all of which exclude the responsibility of agents of the State. However, paradoxically it recognizes that it has compensated 5,704 beneficiaries of victims out of the 8,023 persons registered as having disappeared.

5.8 The authorities attempt to account for these disappearances by invoking the national tragedy and the context that is naturally created by terrorist crime. In this way, the Government persists in its failure to acknowledge the responsibility of its agents and presents them as the artisans of the country's salvation.

5.9 The author notes that, in accordance with the Committee's rules of procedure, States parties have no 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, while the State, for its part, is required to submit "explanations or statements that shall relate both to the communication's admissibility and its merits". Furthermore, referring to well-established jurisprudence of the Committee, the author points out that, in the absence of comments on the merits of the communication, the applicant's allegations must be taken fully into account.

5.10 The author affirms the facts put forward in her communication and stresses that the refusal of the State party to reply to her allegations and to deal with the present communication in its own right is motivated by the involvement of the security services in the abduction and disappearance of Maamar Ouaghlissi. Therefore, according to the author, the absence of any response from the State party on the merits of the communication also constitutes tacit acceptance by the State party of the accuracy of the facts alleged, which the Committee should therefore consider as proven.

[6] The author quotes the concluding observations of the Human Rights Committee, CCPR/C/DZA/CO/3, para. 8.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 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.

6.2 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 disappearance of Maamar Ouaghlissi has been 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 with mandates to examine and issue public reports on human rights situations in specific countries or territories or cases of widespread human rights violations worldwide do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.[7] Accordingly, the Committee considers that the examination of Maamar Ouaghlissi's case by the Working Group on Enforced or Involuntary Disappearances does not render it inadmissible under this provision.

6.3 The Committee notes that, in the State party's view, the author has not exhausted domestic remedies, since she did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. The Committee also notes the author's contention that, after the victim's abduction, the management of the national railway company lodged a complaint with the 5th military region in Constantine; that the victim's relatives went immediately after his arrest to police headquarters in Constantine as well as to the gendarmerie brigades and other barracks in the town; that the victim's father took steps to find out from the court in Constantine whether the victim had been brought before the public prosecutor, lodged a complaint with the prosecution service about his son's abduction and disappearance and went to the DRS barracks in Mansourah to enquire about his son's whereabouts; that the author lodged a complaint with the prosecutor in Constantine about her husband's abduction and disappearance, as well as with the office established in each *wilaya* (prefecture) to receive complaints from the families of the disappeared; that she has also requested information on her husband's disappearance from the general in command of the 5th military region; that she also sent a registered letter to the Minister of Justice to reiterate her complaint and to inform him that no action had been taken on her previous complaints to the prosecution service in Constantine; and that she also approached the national gendarmerie to request an official certificate of disappearance. The Committee notes that, according to the author, article 63 of the Code of Criminal Procedure states that "when an offence is brought to their attention, the criminal investigation police, acting either on instructions from the State prosecutor or on their own initiative, shall undertake preliminary inquiries". The Committee notes the author's contention that, given the serious nature of the alleged offences, it was the responsibility of the competent authorities to take up the case, which they failed to do. It also notes that, according to the author, under article 46 of Ordinance 06-01, anyone filing a complaint for actions that fall within the scope of article 45 shall be punished.

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

[7] *Celis Laureano v. Peru*, communication No. 540/1993, Views adopted on 25 March 1996, para. 7.1.

violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations. The victim's family repeatedly contacted the competent authorities concerning Maamar Ouaghlissi's disappearance, but all their efforts were to no avail. The State party has also failed to provide sufficient information indicating that an effective and available remedy is available de facto, while Ordinance 06-01 of 27 February 2006 continues to be applied, notwithstanding the Committee's recommendations that it should be brought into line with the Covenant.[8] Reiterating its previous jurisprudence, the Committee considers that to sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor.[9] Moreover, given the vague wording of articles 45 and 46 of the Ordinance, the lack of satisfactory information from the State party about their interpretation and actual enforcement and the fact that the State has provided no examples illustrating the effectiveness of this remedy, the author's fears of the consequences of filing a complaint are reasonable. The Committee concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the communication.[10]

6.5 The Committee finds that the author has sufficiently substantiated her allegations insofar as they raise issues under articles 6, paragraph 1; article 7; article 9; article 10; article 16; and article 2, paragraph 3, of the Covenant and therefore proceeds to consider the communication on the merits.

Consideration of merits

7.1 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.

7.2 As the Committee has emphasized in respect of previous communications in which the State party provided general and collective comments on the serious allegations made by the authors of complaints, it is clear that the State party prefers to maintain that communications attributing responsibility to public officials or persons acting on behalf of public authorities for enforced disappearances during the period in question, that is, from 1993 to 1998, must be considered in the broader context of the domestic sociopolitical and security environment that prevailed during a period in which the Government was struggling to combat terrorism. The Committee wishes to recall its concluding observations concerning Algeria of 1 November 2007,[11] as well as its jurisprudence, according to which the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. 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.[12]

7.3 The Committee notes that the State party has not replied to the author's claims concerning the merits of the case and recalls its jurisprudence,[13] according to which it is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty

[8] Concluding observations of the Human Rights Committee, Algeria, CCPR/C/DZA/CO/3, paras. 7, 8 and 13.

[9] *Benaziza v. Algeria*, communication No. 1588/2007, Views adopted on 26 July 2010, supra., para. 8.3.

[10] *Djebrouni v. Algeria*, communication No. 1781/2008, Views adopted on 31 October 2011, paras. 7.3 and 7.4.

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

[12] See, inter alia, *Djebrouni v. Algeria*, supra note 10, para. 8.2.

[13] Ibid., para. 8.3.

to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with the information available to it. In the absence of any explanations from the State party in this respect, due weight must be given to the author's allegations, provided that they have been sufficiently substantiated.

7.4 The Committee notes the author's claim that her husband disappeared following his arrest on 27 September 1994; that the authorities have always denied detaining him, even though there were witnesses to his arrest; and that the authorities themselves acknowledged the disappearance by issuing an "official certificate attesting to a disappearance under the circumstances arising from the national tragedy". It notes that, according to the author, the chances of finding Maamar Ouaghlissi alive are shrinking by the day; that his prolonged absence suggests that he died while in custody; and that incommunicado detention creates an exceedingly high risk of violation of the right to life, since victims are at the mercy of their jailers who, by the very nature of the circumstances, are subject to no oversight. The Committee notes that the State party has produced no evidence refuting the author's allegation. The Committee concludes that the State party has failed in its duty to protect Maamar Ouaghlissi's right to life, in violation of article 6 of the Covenant.

7.5 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 on article 7, which recommends that States parties should make provision against incommunicado detention. It notes in the instant case that Maamar Ouaghlissi was arrested on 27 September 1994 and that his fate is still unknown. In the absence of a satisfactory explanation from the State party, the Committee considers that this disappearance constitutes a violation of article 7 of the Covenant with regard to Maamar Ouaghlissi.[14]

7.6 The Committee also takes note of the anguish and distress caused to the author and her daughters by the disappearance of Maamar Ouaghlissi. It considers that the facts before it disclose a violation of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant with regard to them.[15]

7.7 With regard to the alleged violation of article 9, the information before the Committee indicates that Maamar Ouaghlissi was arrested without a warrant and without being informed of the reasons for his arrest; that he was at no point informed of the criminal charges against him; that he was not brought before a judge or other judicial authority to challenge the legality of his detention, which remains indefinite. In the absence of satisfactory explanations from the State party, the Committee finds that a violation of article 9 has been committed with regard to Maamar Ouaghlissi.[16]

7.8 Regarding the complaint under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In view of his incommunicado detention and in the absence of information provided by the State party in that regard, the Committee finds a violation of article 10, paragraph 1, of the Covenant.[17]

7.9 With regard to the alleged violation of article 16, the Committee reiterates its established jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities

[14] Ibid., para. 8.5.
[15] Communication No. 1811/2008, supra, para. 8.6.
[16] Communication No. 1781/2008, supra, para. 8.7.
[17] Ibid., para. 8.8.

when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3) have been systematically impeded.[18] In the instant case, the Committee notes that the State party has not furnished adequate explanations concerning the author's allegations that she has had no news of her husband. The Committee concludes that the enforced disappearance of Maamar Ouaghlissi, which has lasted over 17 years, has denied him the protection of the law and deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

7.10 The author invokes article 2, paragraph 3, of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose Covenant rights have been allegedly violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004), which provides, inter alia, that a failure by a State party to investigate allegations of violations could, in and of itself, give rise to a separate breach of the Covenant. In the instant case, the victim's family repeatedly contacted the competent authorities regarding Maamar Ouaghlissi's disappearance, but all their efforts were in vain and the State party failed to conduct a thorough and effective investigation into the disappearance of the author's husband. Furthermore, the absence of the legal right to take judicial proceedings since the promulgation of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation continues to deprive Maamar Ouaghlissi, the author, and her daughters of access to an effective remedy, since the Ordinance prohibits, on pain of imprisonment, the pursuit of legal remedies to shed light on the most serious crimes such as enforced disappearances. The Committee concludes that the facts before it reveal a violation of article 2, paragraph 3, read in conjunction with article 6, paragraph 1; article 7; article 9; article 10; and article 16 of the Covenant with regard to Maamar Ouaghlissi and of article 2, paragraph 3, read in conjunction with article 7 of the Covenant, with regard to the author and her daughters.[19]

8. 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; article 16; and article 2, paragraph 3, read in conjunction with article 6, paragraph 1; article 7; article 9; article 10, paragraph 1; and article 16 of the Covenant with regard to Maamar Ouaghlissi, and of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant with regard to the author and her daughters.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including by (i) conducting a thorough and effective investigation into the disappearance of Maamar Ouaghlissi; (ii) providing the author with detailed information about the results of the investigation; (iii) freeing him immediately if he is still being detained incommunicado; (iv) if Maamar Ouaghlissi is dead, handing over his remains to his family; (v) prosecuting, trying and punishing those responsible for the violations committed; and (vi) providing adequate compensation for the author and her daughters for the violations suffered and for Maamar Ouaghlissi if he is alive. 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

[18] Ibid., para. 8.9.
[19] Ibid., para. 8.10.

of crimes such as torture, extrajudicial killings and enforced disappearance. The State party is also under an obligation to take steps to prevent similar violations in the future.[20]

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

[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.]

[20] Ibid., para. 10.

Appendix

Individual Opinion of Committee member Mr. Fabián Salvioli (concurring)

1. I concur fully with the decision of the Human Rights Committee in the case of *Ouaghlissi v. Algeria* (Communication No. 1905/2009) and with its findings of violations of the human rights of Maamar Oughlissi, his wife Farida Khirani and his daughters Meriem Ouaghlissi and Khaoula Ouaghlissi as a result of the enforced disappearance of Mr. Maamar Oughlissi.

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

3. Since becoming a member of the Committee, I have taken the view that the Committee has, inexplicably restricted its own competence to determine violations of the Covenant in the absence of a specific legal claim. Provided that the evidence submitted by the parties clearly demonstrates that a violation has occurred, the Committee can and must — in accordance with the principle of *iura novit curiae* ("the court knows the law") — examine the legal aspects of the case. The legal basis for this position and an explanation as to why this does not mean that States will be left without a defence may be found in paragraphs 3 to 5 of my partly dissenting opinion in *Weerawansa v. Sri Lanka*, to which I refer to avoid repeating them.[1]

4. In the Ouaghlissi case, both parties have made numerous references to Ordinance No. 06/01 on the implementation of the Charter for Peace and National Reconciliation; the author considers some of its provisions to be incompatible with the Covenant (see paragraphs 3.7, 3.10 and 5.6 of the Committee's Views), with specific reference to article 2, paragraph 3.

5. For its part, the State party has also invoked Ordinance No. 06/01, but draws the opposite conclusion. In its view, the ordinance is perfectly compatible with the applicable international standards (see in particular paragraphs 4.6 and 4.8 of the Committee's Views).

6. Consequently, the parties have provided sufficient arguments on their different views as to whether or not Ordinance No. 06/01 is in conformity with the provisions of the Covenant. It is for the Committee to resolve the matter by applying the law, without necessarily accepting the parties' legal arguments, which it may completely or partially accept or reject depending on its own legal analysis.

7. In my individual opinions on similar cases regarding Algeria, I have explained why the Committee should address the question of the incompatibility of Ordinance No. 06/01 with the Covenant from the perspective of article 2, paragraph 2, and I have explained why the application of the ordinance to victims constitutes a violation of that provision of the Covenant in the case in question.[2]

[1] *Weerawansa v. Sri Lanka*, communication No. 1406/2005, Views adopted on 17 March 2009, partly dissenting opinion of Committee member Mr. Fabián Salvioli.

[2] *Chihoub v. Algeria*, communication No. 1811/2008, Views adopted on 31 October 2011, partly dissenting opinion of Committee member Mr. Fabián Salvioli, paras. 5–10.

8. This reasoning is relevant to the Ouaghlissi case, in which the Committee is fully competent to examine the legal issues relating to the facts laid before it: on 27 February 2006, the State party adopted Ordinance No. 06/01, which prohibits the pursuit of legal remedies to shed light on the most serious crimes such as enforced disappearances. This guarantees impunity to the individuals responsible for serious human rights violations.

9. With this piece of legislation, the State party introduced a law that is contrary to the obligations laid down in article 2, paragraph 2, thereby committing, per se, a violation to which the Committee should refer in its decision, in addition to the violations it has found. The authors and Mr. Ouaghlissi himself have been the victims — inter alia — of that provision of the law; therefore, the conclusion that there has been a violation of article 2, paragraph 2, in the present case is neither an abstract issue nor merely of academic interest. Lastly, it should not be overlooked that violations relating to the international responsibility of the State have a direct impact on any reparation which the Committee may call for when deciding on each communication.

10. As regards reparation in cases such as this, the Committee has made some progress recently in terms of requiring a guarantee of non-repetition: in the Benaziza and Aouabdia cases, for example, the Committee's decisions contain only a general statement that "the State party is under an obligation to take steps to prevent similar violations in the future",[3] without specifying how this should be done.[4] More recently, in the Djebourni case, the Committee stated as follows: "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 is also under an obligation to take steps to prevent similar violations in the future."[5] Lastly, the Committee adopted a decision along very similar lines in the Chihoub case.[6]

11. Progress has undoubtedly been made. As I pointed out in my individual opinions on the two cases cited (the Djebourni and Chihoub cases), the relevant paragraphs are an example of a comprehensive approach to reparations. However, a little more progress is needed, as there remains some ambiguity about the guarantee of non-repetition; in particular, the Committee should make a firm statement declaring its opposition to the continued applicability of a legislative text that is per se incompatible with the Covenant, since it does not meet current international standards for reparation in cases of human rights violations.[7] In *Ouaghlissi v. Algeria*, the Committee reiterates the formula: "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 is also under an obligation to take steps to prevent similar violations in the future" (para. 9).

12. The Committee's reasoning and decisions need to be more coherent; with regard to the question of reparation, a clear and unequivocal ruling is required – in the instant case, on the need for the State party to amend Ordinance No. 06/01 by repealing the articles that

[3] *Benaziza v. Algeria*, communication No. 1588/2007, Views adopted on 26 July 2010, para. 11; and *Aouabdia v. Algeria*, communication No. 1780/2008, Views adopted on 22 March 2011, para. 9.

[4] I have drawn attention to this problem in several individual opinions, especially on *Aouabdia v. Algeria*, supra note 3, partly dissenting opinion of Committee member Mr. Fabián Salvioli, paras. 10–11.

[5] *Djebourni v. Algeria*, communication No. 1781/2008, Views adopted on 31 October 2011, para. 10.

[6] *Chihoub v. Algeria*, communication No. 1811/2008, Views adopted on 31 October 2011, para. 10.

[7] *Djebourni v. Algeria*, partly dissenting opinion of Committee member Mr. Fabián Salvioli, paras. 11–16 and *Chihoub v. Algeria*, partly dissenting opinion of Committee member Mr. Fabián Salvioli, paras. 11–16.

are per se incompatible with the Covenant, so as to provide an effective guarantee of non-repetition of some of the acts examined in the communication.

[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.]

Individual Opinion of Committee member Mr. Krister Thelin, Mr. Walter Kaelin and Mr. Michael O'Flaherty (concurring)

1. The majority has found a violation of article 6, paragraph 1, although it has not been acknowledged that the victim is deceased. I do not disagree with this finding but consider the reasons offered in para 7.4 to be too brief.

2. The underlying premise for the majority's finding is the new jurisprudence of the Committee as expressed in Communication No. 1781/2008, *Berzig v. Algeria* in October 2011. As pointed out in my dissenting opinion to that decision, the Committee in the Berzig case, without any discussion, departed from its long-standing jurisprudence in cases of enforced disappearance, where the facts do not lend themselves to an interpretation of the victim's death, and found a direct violation of article 6, paragraph 1, without any connection to article 2, paragraph 3. The old approach was confirmed in a case against the same State party as late as in March 2011, and within a similar factual frame.[1]

3. In the case before us, the victim, born in 1958, has not been seen alive for the last 17 years. Given the circumstances of his arrest, the author indicates that her husband probably died in detention (see paragraph 3.2). The Algerian authorities have themselves acknowledged the disappearance by issuing an "official certificate testifying to a disappearance under the circumstances arising from the national tragedy". Finally, the State party has produced no evidence refuting the author's submissions, including that the victim died in detention.

For these reasons, the most probable scenario is that the victim is no longer alive. Under these circumstances, the Committee's findings of a violation of article 6, paragraph 1, are correct – as the majority should have stated, instead of relying only on the new, broad interpretation of article 6 in the Berzig case, which the Committee has yet to explain.

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

[1] *Aouabdia v. Algeria*, supra, note 3, in particular, the dissenting opinion of Mr. Fabián Salvioli.