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Communication No. 2086/2011

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

<i>Submitted by:</i>	Aïcha Dehimi and Noura Ayache (represented by Philippe Grant of Track Impunity Always (TRIAL), a Swiss association against impunity)
<i>Alleged victims:</i>	Sahraoui Ayache (the authors' son and brother, respectively) and the authors themselves
<i>State party:</i>	Algeria
<i>Date of communication:</i>	27 June 2011 (initial submission)
<i>Document reference:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 17 August 2011 (not issued in document form)
<i>Date of adoption of Views:</i>	30 October 2014
<i>Subject matter:</i>	Enforced disappearance
<i>Substantive issues:</i>	Right to life; prohibition of torture and cruel or inhuman treatment; right to liberty and security of person; respect for the inherent dignity of the human person; recognition as a person before the law and the right to an effective remedy; unlawful interference with the home and right to family life
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Articles of the Covenant:</i>	Articles 2 (para. 3), 6 (para. 1), 7, 9, 10 (para. 1), 16 and 17
<i>Articles of the Optional Protocol:</i>	Article 5 (para. 2 (b))

[Annex]

GE.14-21909 (E)



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Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (112th session)

concerning

Communication No. 2086/2011*

Submitted by: Aïcha Dehimi and Noura Ayache
(represented by Philippe Grant of Track
Impunity Always (TRIAL), a Swiss
association against impunity)

Alleged victims: Sahraoui Ayache (the authors' son and
brother, respectively) and the authors
themselves

State party: Algeria

Date of communication: 27 June 2011 (initial submission)

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

Meeting on 30 October 2014,

Having concluded its consideration of communication No. 2086/2011 submitted by
Aïcha Dehimi and Noura Ayache 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 and the State party,

Adopts the following:

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

1.1 The authors of the communication, which is dated 27 June 2011, are Aïcha Dehimi, born in 1942, and her daughter, Noura Ayache, born in 1976, both Algerian nationals. They are submitting the communication on their own behalf and on behalf of Sahraoui Ayache, the authors' son and brother, respectively, born on 18 March 1970, who was a vegetable vendor in Constantine. The authors claim that Sahraoui Ayache is the victim of an enforced disappearance attributable to the State party, in violation of articles 2 (para. 3), 6, (para. 1), 7, 9, 10 (para. 1), 16 and 17 of the Covenant, and that they themselves are the victims of

* The following members of the Committee participated in the consideration of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Ahmed Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Dheerujall B. Seetulsingh, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, Ms. Margo Waterval and Mr. Andrei Paul Zlătescu. Pursuant to rule 90 of the Committee's rules of procedure, Mr. Lazhari Bouzid did not participate in the consideration of the communication.

violations of articles 2 (para. 3) and 7 of the Covenant. The authors are represented by Philippe Grant of TRIAL.

1.2 On 17 August 2011, the Committee, through its Special Rapporteur on new communications and interim measures, decided to grant the protection measures which had been requested by the authors and asked the State party to refrain from invoking national legislation, including Ordinance No. 06-01, of 27 February 2006, on the implementation of the Charter for Peace and National Reconciliation, against the authors and members of their family on the grounds of the present communication. On 7 October 2011, the Committee, through its Special Rapporteur on new communications and interim measures, decided not to examine the admissibility of the communication separately from the merits.

The facts as submitted by the authors

2.1 On 12 August 1994, at 9 a.m., Sahraoui Ayache was arrested at his home in Constantine by a group of uniformed soldiers and plainclothes military security personnel who were carrying out a large-scale operation in response to the killing of two soldiers in the Constantine region. The members of the security services entered all the homes in the neighbourhood in which Sahraoui Ayache lived and made the men leave their homes quickly, not even leaving them the time to get dressed or to put on shoes. Sahraoui Ayache's father witnessed his arrest, as well as the arrests of neighbours and family members who lived in the area. The arrested persons were rounded up outside and some of them, including Sahraoui Ayache, were taken by lorry to an unknown place of detention. The authors contend that the security services never produced an arrest warrant and did not state the grounds for Sahraoui Ayache's arrest.

2.2 The authors further contend that Sahraoui Ayache and his 17 fellow detainees were subjected to dreadful conditions of detention: 18 men were crammed into a 4 square metre cell where they were forced to remain standing for lack of space in the stifling August heat. In just one day, most of them died. The bodies were removed, wrapped in blankets and loaded onto an army lorry. There were very few survivors and the authors note that Sahraoui Ayache may have died at that time, although they cannot be sure of it. A few months after the arrest, the family received an unexpected visit from a military officer who said that Sahraoui Ayache was still alive and that he was being held in a military prison in the city, but it was impossible to verify this information. To date, no one knows his fate or his whereabouts or those of his remains.

2.3 During the weeks following the arrest of Sahraoui Ayache, his family contacted the Algerian authorities in order to find out what had happened to him. The authors went to the various police and gendarmerie units of Constantine to ask whether Sahraoui Ayache was being held there, but their enquiries led nowhere. They even went to check the morgue of the Constantine hospital but they did not find Sahraoui Ayache's body among the corpses of detainees that were being kept there. On 15 October 1994, his mother wrote to the chief of the fifth military region of Mansoura to find out whether her son was being held under its jurisdiction, but her letter was refused and returned unopened.¹

2.4 Aïcha Dehimi also made various attempts through administrative and legal channels to find out what had happened to Sahraoui Ayache. On 18 December 1994, she wrote to the wali (provincial governor) of Constantine but never received a reply. On 19 February 1995, she sent a letter to the State prosecutor. On 22 May 1995, she filed a petition with the prosecutor at the Court of Constantine, which was registered by the Court, and, on 23 July 1995, she was informed by the Directorate General of National Security that the investigation into the disappearance of her son had not produced any results. On 21 May

¹ The authors attach a copy of the acknowledgement that, on 19 October 1994, the addressee refused to accept the letter and that it had been returned to sender.

1996, she sent another letter to the State prosecutor. On 30 November 1996, she was notified by the police that, according to the information that they had gathered, her son had been arrested, not by the police, but by the military security services.² On 14 September 1998, she appealed again to the provincial governor of Constantine and the matter was consequently referred to the chief prosecutor of Constantine, who, on 19 September 1998, ordered the crime squad of the criminal investigation department to look into the disappearance. On 7 November 1998, the crime squad informed Aïcha Dehimi that the investigation had yielded no results and that Sahraoui Ayache had never been summoned by that service. In early May 2000 and in the course of July of the same year, she wrote letters to the State prosecutor, the chief prosecutor, the Minister of Justice and the President, all of which went unanswered.

2.5 In 1996 and on 26 June 2000, Aïcha Dehimi also appealed to the National Human Rights Observatory but was told that it did not have any information about her son. On 20 September 2004, the Ayache family was invited to meet with the National Consultative Commission for the Protection and Promotion of Human Rights (which replaced the National Human Rights Observatory) but the family did not learn anything about Sahraoui Ayache's fate.

2.6 On several occasions during this period, Aïcha Dehimi and her husband were summoned by the Algerian authorities in connection with their son's disappearance.³ On these occasions, they were required to answer general questions but did not learn anything more about the fate of their son.

2.7 In the face of the inaction and lack of transparency of the Algerian authorities, Aïcha Dehimi and her husband resigned themselves to completing the formalities provided for under Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation. Under the terms of the Charter, in order to be eligible for compensation, the families of disappeared persons are required to attest that the disappeared persons are deceased. On 17 May 2006, Aïcha Dehimi requested a certificate of disappearance "in the extraordinary circumstances surrounding the national tragedy", which was issued to her on 17 May 2006 by the gendarmerie of Constantine. The certificate made it possible for the author to file a request for a judicial declaration of death for her missing son. According to the judgement delivered on 28 June 2006 by the Court of Constantine, the date of Sahraoui Ayache's death was determined to be 12 August 1994, without mentioning the circumstances of the death. Sahraoui Ayache's parents then each received the sum of 960,000 dinars.

The complaint

3.1 The authors claim that Sahraoui Ayache is the victim of an enforced disappearance attributable to the State party as defined 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 because he disappeared after being arrested by agents of the military forces of the State party acting in an official capacity, as attested to by the notification of 30 November 1996.

² A copy of the written notification from the police dated 30 November 1996 which was given to the author and to the State prosecutor of the Court of Constantine are included in the file.

³ A copy of Aïcha Dehimi's summons from the Directorate General of National Security dated 10 July 1995 is included in the file. She was also summoned by the police on 10 March 1997 and by the gendarmerie on 1 November 1997 (copies of the summonses are included in the file). Her husband was summoned by the police on 7 February 2000 and by the security forces of the office of the provincial governor of Constantine on 12 August 2000 (copies of the summonses are included in the file).

3.2 The authors emphasize that it is possible that Sahraoui Ayache died in detention, perhaps during the first night, when so many of those being held with him died. They consider that Sahraoui Ayache, who was held in an unknown location, was under the responsibility of the State party, which has a duty to guarantee the right to life of all detained persons. The fact that the State party is unable to provide any accurate or coherent information about the fate of a person under its authority indicates that it failed to take the necessary steps to protect that person during his detention, in violation of article 6, paragraph 1, of the Covenant. The authors maintain that, given the circumstances surrounding his disappearance, if the State party does not provide conclusive evidence that their disappeared son and brother is still alive, the Committee has no alternative but to find that a violation of the right to life, guaranteed under article 6, paragraph 1, of the Covenant, has occurred.⁴

3.3 With reference to the Committee's jurisprudence,⁵ the authors maintain that enforced disappearance itself constitutes a violation of article 7 of the Covenant because the abduction and disappearance of Sahraoui Ayache, who was prevented from communicating with his family and the outside world, constitute cruel and inhuman treatment. The authors emphasize that enforced disappearance is a complex crime that comprises a broad array of human rights violations and cannot simply be equated with incommunicado detention. The authors consider that incommunicado detention, in and of itself, constitutes a violation of article 7 of the Covenant but feel that the Committee should not confine its deliberations to that aspect of the case.⁶ The authors recall that Sahraoui Ayache was initially detained in appalling conditions, which were responsible for the death of many persons. They consider that such conditions constitute inhuman treatment of a nature that goes far beyond a simple violation of article 10 of the Covenant as generally recognized by the Committee and constitute a separate violation of article 7 of the Covenant.⁷

3.4 With reference to the Committee's jurisprudence,⁸ the authors moreover consider that they are victims of a violation of article 7 of the Covenant because of the uncertainty surrounding the circumstances of Sahraoui Ayache's disappearance and his fate, which is a source of deep and continual anxiety and suffering. The authors assert that the authorities' denial of Sahraoui Ayache's arrest, to which his father was an eyewitness, together with their inaction, the impunity of those responsible and the fact that, by virtue of Ordinance No. 06-01, the authors were required to attest to the death of their son and brother in order to be eligible for compensation without the circumstances of his disappearance and possible death being clarified also constitute violations of article 7 of the Covenant in respect of the authors.

⁴ The authors refer to the separate opinions of Mr. Fabián Omar Salvioli in this respect, particularly those included in communication No. 1780/2008, *Zarzi v. Algeria*, Views adopted on 22 March 2011 and communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010.

⁵ See communication No. 449/1991, *Mojica v. Dominican Republic*, Views adopted on 15 July 1994, para. 5.7; communication No. 540/1993, *Laureano Atachachua v. Peru*, Views adopted on 25 March 1996, para. 8.5; and communication No. 542/1993, *N'Goya v. Zaire*, 25 March 1996, para. 5.5.

⁶ See *Benaziza v. Algeria*, para. 9.5; communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 9.6; communication No. 1327/2004, *Atamna v. Algeria*, Views adopted on 10 July 2007, para. 7.6; 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. 9.3.

⁷ The authors refer to communication No. 188/84, *Portorreal v. Dominican Republic*, Views adopted on 5 November 1987, para. 11, in which the Committee considered that the conditions of detention involved in that case constituted a violation of article 7 of the Covenant.

⁸ See *Benaziza v. Algeria*, para. 9.6; *Boucherf v. Algeria*, para. 9.7; *Atamna v. Algeria*, para. 7.7; *Bousroual v. Algeria*, para. 9.8; and *Sarma v. Sri Lanka*, para. 9.5.

3.5 The authors maintain that the arrest and incommunicado detention of Sahraoui Ayache, which have still not been acknowledged by the State party, are arbitrary and constitute a violation of article 9, paragraphs 1 to 5, of the Covenant. Sahraoui Ayache was arrested without a warrant and was not informed of the reasons for his arrest or the charges against him. He was never brought before a judicial authority and never had the opportunity to challenge the lawfulness of his detention. In addition, no compensation for his arbitrary arrest and detention were ever received by the eligible parties.

3.6 The authors state that Sahraoui Ayache is also the victim of a violation of his right to be treated with humanity and with respect for the inherent dignity of the human person while in detention, in violation of article 10, paragraph 1, of the Covenant. The authors recall the Committee's jurisprudence according to which enforced disappearance itself constitutes a violation of article 10 of the Covenant.⁹ The authors also refer to Sahraoui Ayache's conditions of detention and conclude that the State party has violated his rights under article 10 of the Covenant.

3.7 The authors state that Sahraoui Ayache was unable to enjoy his fundamental rights because he was detained incommunicado, in violation of the right to recognition as a person before the law, which is guaranteed by article 16 of the Covenant. They refer to the Committee's 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 when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies, have been systematically impeded. In such situations, disappeared persons are in practice deprived of their capacity to exercise their rights and of access to any possible remedy as a direct consequence of the actions of the State, which must be interpreted as a refusal to recognize such victims as persons before the law.¹⁰

3.8 The authors contend that the circumstances in which Sahraoui Ayache was arrested, at his home early in the morning, by security forces who entered without a search warrant, constitute unlawful and arbitrary interference with his home, in violation of article 17 of the Covenant.¹¹

3.9 Lastly, the authors consider that Sahraoui Ayache was prevented from exercising his right to an effective remedy in respect of his detention and the alleged violations of articles 7, 9, 10 (para. 1), 16 and 17 of the Covenant, in violation of article 2 (para. 3) of the Covenant. The authors also contend that, so long as the truth about the fate of Sahraoui Ayache has not been established, the State party has an obligation under article 2 (para. 3), read in conjunction with article 6 (para. 1), to conduct a thorough investigation, inform the person's family and friends of the progress and results of the investigation and prosecute anyone held to be responsible for enforced disappearance. The authors explored every avenue available to them in order to find out what had happened to Sahraoui Ayache, but none of their queries were followed up on by the State party. The authors consider that the State party's lack of diligence and failure to conduct an investigation into their claims of unlawful detention and enforced disappearance are also a violation of article 2, paragraph 3, in respect of themselves and their family.

⁹ See communication No. 1469/2006, *Sharma v. Nepal*, Views adopted on 28 October 2008, para. 7.7.

¹⁰ The authors cite communication No. 1328/2004, *Cheraitia v. Algeria*, and *Atmana v. Algeria*.

¹¹ The authors cite communication No. 687/1996, *Rojas García v. Colombia*, Views adopted on 3 April 2001, in which the Committee considered that the raid by hooded police officers, who entered the house through the roof in the middle of the night, constituted arbitrary interference in the residence of the Rojas García family.

3.10 The authors maintain that all domestic remedies have proved unavailable, useless or ineffective and that the conditions set out under article 5, paragraph 2 (b), of the Optional Protocol have therefore been met. After making numerous appeals to the security forces for information about what had happened to Sahraoui Ayache, without success, Aïcha Dehimi then informed the judicial authorities, on several occasions, of his disappearance and asked, in vain, for an investigation to be opened. No action was taken on the formal complaints that she lodged.

3.11 Lastly, the authors point out that, since February 2006, the date of the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation, the prosecution of members of the Algerian defence and security forces has been prohibited. The authors recall that the Committee has declared that the Ordinance promotes impunity and infringes the right to an effective remedy.¹² They maintain that they are therefore unable to assert their right to an effective remedy.

3.12 The authors request that the Committee instruct the State party to: (a) release Sahraoui Ayache from detention, if he is still alive; (b) conduct a prompt, thorough and effective investigation into his disappearance; (c) inform the authors and their family of the results of this investigation; (d) initiate proceedings against the persons responsible for the disappearance of Sahraoui Ayache, bring them to justice and punish them in accordance with the international obligations assumed by the State party; and (e) provide the beneficiaries of Sahraoui Ayache with appropriate reparation for the serious moral and material damage they have suffered since his disappearance, including measures of compensation, restitution, rehabilitation and satisfaction and guarantees of non-repetition.

State party's observations on admissibility

4.1 On 4 October 2011, the State party submitted a "Background memorandum of the Government of Algeria on the inadmissibility of individual communications submitted to the Human Rights Committee in connection with the implementation of the Charter for Peace and National Reconciliation" in which it contests the admissibility of the communication. It is of the view that this communication, which incriminates public officials or other persons acting on behalf of public authorities in cases of enforced disappearance during the period in question — from 1993 to 1998 — should be examined by means of "a comprehensive approach" and should be declared inadmissible. The State party considers that such communications should be placed in the broader context of the sociopolitical situation and security conditions that prevailed in the country during a period when the Government was struggling to combat a form of terrorism aimed at bringing about the "collapse of the Republican State". In this context, and in accordance with articles 87 and 91 of the Constitution, the Government of Algeria implemented precautionary measures and informed the Secretariat of the United Nations of its declaration of a state of emergency, in accordance with article 4, paragraph 3, of the Covenant.

4.2 The State party emphasizes that, in some areas where informal settlements have proliferated, civilians had trouble distinguishing the actions of terrorist groups from those of the security forces, to which they often attributed enforced disappearances. According to the State party, many enforced disappearances should be viewed from this perspective. The concept of disappearance in Algeria during the period in question actually covers six distinct scenarios. The first scenario concerns persons reported missing by their relatives but who in fact had chosen to go into hiding in order to join an armed group and 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

¹² The authors refer to the Committee's concluding observations on the third periodic report of Algeria, adopted on 1 November 2007 (CCPR/C/DZA/CO/3), para. 7.

persons who were reported missing after their arrest by the security services but who took advantage of their subsequent release to go into hiding. The third scenario concerns persons abducted by armed groups which, because they were not identified or because they had stolen uniforms or identification documents from police officers or soldiers, were mistakenly thought to belong to the armed forces or security services. The fourth scenario concerns persons reported missing who abandoned their families, and sometimes even left the country, to escape from personal problems or family disputes. The fifth scenario concerns persons reported missing by their family but who were in fact wanted terrorists who had been killed and buried in the maquis following factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. The sixth scenario mentioned by the State party concerns persons reported missing who were actually living in Algeria or abroad under a false identity provided by a network of document forgers.

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

4.4 The State party considers that the authors have not exhausted all domestic remedies. It stresses the importance of distinguishing between simple formalities involving the political or administrative authorities, non-judicial remedies pursued through advisory or mediation bodies, and judicial remedies pursued through the courts. The State party observes that the authors’ complaint indicates that they have written letters to political and administrative authorities, petitioned advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and State prosecutors), but have not, strictly speaking, initiated legal action and seen it through to its conclusion by availing themselves of all available remedies of appeal and judicial review. Of all the authorities contacted by the authors, 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 State prosecutor who receives complaints and who, if warranted, institutes criminal proceedings. Nevertheless, in order to protect the rights of victims or their beneficiaries, the Code of Criminal Procedure provides for the possibility of suing for damages by filing a complaint with an investigating judge. In this case, it is the victim, not the prosecutor, who initiates criminal proceedings by bringing the matter before the judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not utilized, despite the fact that it would have enabled the authors to institute criminal proceedings and compel the investigating judge to launch an investigation, even if the prosecution service had decided otherwise.

4.5 The State party also notes the authors’ 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 existing in Algeria to which the families of victims of disappearance could have recourse. On this basis, the authors believed that they did not need to bring the matter before the relevant courts, in view of the latter’s likely position and findings regarding the application of the Ordinance. However, the authors cannot use Ordinance No. 06-01 and its implementing legislation as a pretext 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 of exhausting all domestic remedies".¹³

4.6 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It maintains that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to helping States affected by domestic crises to build up their capacity. As part of this effort to achieve national reconciliation, the State party adopted the Charter, and its implementing ordinance prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for any person who is found guilty of acts of terrorism or who benefits from the provisions of the legislation on civil dissent, except for persons who have committed or been accomplices to mass killings, rapes or bombings in public places. The Ordinance also helps to address the issue of disappearances by introducing a procedure for filing a judicial declaration of death, which entitles beneficiaries to receive compensation as victims of the "national tragedy". Social and economic measures have also been put in place, including the provision of employment placement assistance and compensation for all persons considered victims of the "national tragedy". Lastly, the Ordinance prescribes political measures, such as a ban on holding political office for any person who in the past exploited religion in a way that contributed towards the "national tragedy". The Ordinance also 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 Republic.

4.7 In addition to the establishment of a fund to compensate all victims of the "national tragedy", the sovereign people of Algeria have, according to the State party, agreed to a process of national reconciliation as the only way to heal the wounds inflicted. The State party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, media outpourings and political score-settling. The State party is therefore of the view that the authors' allegations 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 the previous communications concerned by the memorandum of 3 March 2009 and to take account of the sociopolitical and security context in which they occurred. It also asks the Committee to find that the authors have failed to exhaust all domestic remedies; to recognize that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in these communications through measures aimed at achieving peace and national reconciliation that are consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the communication inadmissible; and to request that the authors seek an alternative remedy.

Additional observations by the State party on admissibility

5.1 On 4 October 2011, the State party also transmitted a further memorandum to the Committee, in which it questioned the intention behind the series of individual communications submitted to the Committee since the beginning of 2009, which, it considered, constituted rather an abuse of procedure aimed at bringing before the Committee a broad historical issue whose causes and circumstances lie outside its purview.

¹³ The State party cites, *inter alia*, communication No. 210/1986 and communication No. 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

The State party observes that all these “individual” communications fail to make reference to the general context in which the disappearances occurred. The State party notes that the complaints focus solely on the actions of the security forces, without ever mentioning those of all the armed groups that used criminal techniques of concealment in order to incriminate the armed forces.

5.2 The State party indicates that it will not address the merits of these communications until the issue of their admissibility has been settled. It adds that all judicial or quasi-judicial bodies have a duty to deal with preliminary questions before considering the merits. It considers that the decision in the case in point to consider the questions of admissibility and the merits jointly and simultaneously — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications in terms of both their general nature and their intrinsic particularities. Referring to the rules of procedure of the Human Rights Committee, the State party notes that the sections relating to the Committee’s procedure for determining the admissibility of communications are separate from those relating to the consideration of communications on the merits, and that, therefore, these questions could be considered separately. Concerning the exhaustion of domestic remedies, the State party stresses that the complaints and requests for information made by the authors were not submitted through channels that would have allowed for the case to be considered by the Algerian judicial authorities.

5.3 Recalling the Committee’s jurisprudence regarding the obligation to exhaust domestic remedies, the State party reiterates that mere doubts about the prospect of success or concerns about delays do not exempt the 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 barred the possibility of appeal in this area, the State party replies that the failure by the authors to submit their allegations to examination has prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter. Moreover, under the Ordinance in question, the only proceedings that are inadmissible are those brought against “members of any branch of the defence and security forces of the Republic” for actions consistent with their core duties towards the Republic, namely, to protect persons and property, safeguard the nation and preserve its institutions. On the other hand, any allegations concerning actions attributable to the defence or security forces that can be proved to have taken place in any other context are subject to investigation by the appropriate courts.

Authors’ comments on the State party’s observations

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

6.2 The authors point out that the State party has recognized the competence of the Committee to consider individual communications. This competence is of a general nature and its exercise by the Committee is not subject to the discretion of the State party. In particular, it is not for the State party to determine whether it is appropriate for the Committee to take up a specific case. That is for the Committee to decide when it considers the communication. The authors consider that the State party’s adoption of a comprehensive domestic settlement mechanism cannot be applied in respect of the Human Rights Committee or constitute grounds for declaring the communication inadmissible. In the present case, the legislative measures adopted amount to a violation of the rights enshrined in the Covenant, as the Committee has previously observed.¹⁴

¹⁴ The authors refer to the Human Rights Committee’s concluding observations on the third periodic report of Algeria (CCPR/C/DZA/CO/3), paras. 7, 8 and 13. The authors also refer to *Boucherf v. Algeria*, para. 11, and to the concluding observations of the Committee against Torture on the third

6.3 The authors recall that the State party's declaration of the state of emergency on 9 February 1992 does not affect the right of persons to submit individual communications to the Committee. Article 4 of the Covenant allows for derogations from certain provisions of the Covenant during states of emergency, but does not affect the exercise of rights under the Optional Protocol.

6.4 The authors further refer to the State party's argument that the requirement to exhaust domestic remedies calls on the author to institute criminal proceedings by filing a complaint with the investigating judge and suing for damages, in accordance with articles 72 et seq. of the Code of Criminal Procedure. They recall that this procedure, if it is not to be declared inadmissible, is subject to the payment of a surety or "procedural fee", the amount of which is set arbitrarily by the investigating judge. They consider that the procedure represents a financial deterrent to defendants who, furthermore, have no guarantee that it will actually result in proceedings being initiated. The authors consider that, given the serious nature of the alleged offences, it was the responsibility of the competent authorities to take up the case. The authors refer to the Committee's jurisprudence in this respect.¹⁵

6.5 The authors reiterate that, following Sahraoui Ayache's arrest, they tried to find out from the security forces what had happened to him, to no avail. Aïcha Dehimi also informed the prosecution services of the Court of Constantine, the national judicial, governmental and human rights institutions in order for investigations to be carried out. At no time did any of these authorities ever conduct an investigation into the alleged violations. Consequently, the authors cannot be faulted for not having exhausted all domestic remedies since it was the State party that failed to carry out the necessary investigations incumbent upon it.

6.6 The authors also recall that, under article 45 of Ordinance No. 06-01, legal proceedings may not be brought by individuals or groups against members of the defence or security forces. The authors therefore conclude that Ordinance No. 06-01 has indeed put an end to any possibility of bringing civil or criminal proceedings for crimes committed by the security forces during the civil war and that the Algerian courts are obliged to declare any such claim inadmissible.

6.7 With regard to the State party's argument that it is entitled to request that the admissibility of the communication be considered separately from the merits, the authors refer to rule 97, paragraph 2, of the rules of procedure, which permits the Working Group or the Special Rapporteur to decide, because of the exceptional nature of the case, to request a written reply that relates only to the question of admissibility. This prerogative does not lie either with the authors of the communication or the State party but is the sole prerogative of the Working Group or the Special Rapporteur. The authors consider that the State party was required to submit explanations or observations concerning both the admissibility and the merits of the communication.

6.8 Lastly, the authors note that, since the State party had not submitted any observations on the merits of the communication, the Committee must base its decision on the existing information and the authors' allegations must be taken as proven given that the State party has not refuted them.¹⁶

periodic report of Algeria (CAT/C/DZA/CO/3), adopted on 13 May 2008, paras. 11, 13 and 17. Lastly, the authors refer to general comment No. 29 (2001) on derogations from the Covenant during states of emergency, para. 1.

¹⁵ See *Benaziza v. Algeria*, para. 8.3.

¹⁶ The author cites the decision of the Committee against Torture in communication No. 207/2002, *Dragan Dimitrijevic v. Serbia and Montenegro*, decision adopted on 24 November 2004, para. 5.3;

Issues and proceedings before the Committee

Consideration of admissibility

7.1 The Committee recalls that the decision by the Special Rapporteur to examine the admissibility and the merits jointly (see para. 1.2 above) does not preclude their being considered separately by the Committee. Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

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

7.3 The Committee notes that, in the State party's view, the authors have not exhausted domestic remedies, since they did not bring the matter before the investigating judge and sue for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. The Committee also notes that, according to the State party, the authors have written letters to political and administrative authorities and have petitioned representatives of the prosecution service (State prosecutors) but have not initiated legal action and seen it through to its conclusion by availing themselves of all available remedies. The Committee notes the authors' argument that several complaints were lodged with the prosecution service of the Court of Constantine but that the authorities did not at any time conduct an investigation into the alleged violations. Lastly, the Committee notes that, according to the authors, article 46 of Ordinance No. 06-01 penalizes any person who files a complaint pertaining to actions covered by article 45 thereof.

7.4 The Committee recalls that the State party has a duty not only to carry out thorough investigations into alleged violations of human rights brought to the attention of its authorities, particularly when the allegations concern enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations.¹⁷ Although Sahraoui Ayache's family repeatedly contacted the competent authorities concerning his disappearance, the State party failed to conduct a thorough and effective investigation into the disappearance despite the fact that serious allegations of enforced disappearance were involved. The State party has also failed to provide sufficient information indicating that an effective and available remedy has been provided, while Ordinance No. 06-01 continues to be applied, notwithstanding the Committee's recommendation that it should be brought into conformity with the Covenant.¹⁸ 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 State prosecutor.¹⁹ The Committee therefore concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the communication.

and communication No. 1640/2007 of the Human Rights Committee, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 4.

¹⁷ See, inter alia, communication No. 1779/2008, *Mezine v. Algeria*, Views adopted on 25 October 2012, para. 7.4, communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 7.4, communication No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012, para. 6.4, and communication No. 1791/2008, *Boudjemai v. Algeria*, Views adopted on 22 March 2013, para. 7.4.

¹⁸ See CCPR/C/DZA/CO/3, paras. 7, 8 and 13.

¹⁹ See *Mezine v. Algeria*, para. 7.4; *Benaziza v. Algeria*, para. 8.3; *Berzig v. Algeria*, para. 7.4; *Khirani v. Algeria*, para. 6.4; and *Boudjemai v. Algeria*, para. 7.4.

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

7.6 The Committee considers that the authors have substantiated their allegations sufficiently insofar as they raise issues under articles 6 (para. 1), 7, 9, 10 (para. 1), 16 and 17, read alone and in conjunction with article 2 (para. 3) of the Covenant. The Committee observes, however, that the authors did not submit a claim for compensation to the authorities of the State party for the arbitrary or unlawful detention of their son and brother and that the claim of a violation of article 9 (para. 5) is therefore inadmissible. Consequently, the Committee will proceed to consider the communication on its merits in respect of the claimed violations of articles 2 (para. 3), 6 (para. 1), 7, 9, 10 (para. 1), 16 and 17.

Consideration of the merits

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

8.2 The State party has submitted collective and general observations in response to serious allegations by the author, and has been content to argue that communications incriminating public officials, or persons acting on behalf of public authorities, in cases of enforced disappearances between 1993 and 1998, should be considered within the broader context of the sociopolitical situation and security conditions that prevailed in the country during a period when the Government was struggling to combat terrorism. The Committee recalls its jurisprudence,²⁰ according to which the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. The Covenant demands that the State party concern itself with the fate of every individual and treat every individual with respect for the inherent dignity of the human person. Ordinance No. 06-01, without the amendments recommended by the Committee, contributes to impunity in the present case and therefore cannot, as it currently stands, be considered compatible with the provisions of the Covenant.

8.3 The Committee notes that the State party has not replied to the authors' claims concerning the merits of the case and recalls its jurisprudence, according to which the burden of proof should not rest solely on the author of a communication, especially given that the author and the State party do not always have the same degree of access to evidence and that often the State party alone has the necessary information.²¹ 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.²² In the absence of any explanations from the State party in this respect, due weight must be given to the author's allegations, provided they have been sufficiently substantiated.

²⁰ See, inter alia, *Mezine v. Algeria*, para. 8.2; *Berzig v. Algeria*, para. 8.2; and *Boudjemai v. Algeria*, para. 8.2.

²¹ See, inter alia, *Mezine v. Algeria*, para. 8.3; *El Abani v. Libyan Arab Jamahiriya*, para. 7; *Berzig v. Algeria*, para. 8.3; and *Boudjemai v. Algeria*, para. 8.3. See also International Court of Justice, case concerning Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), Judgment of 30 November 2010, para. 54.

²² See *Mezine v. Algeria*, para. 8.3; communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3; and *Boudjemai v. Algeria*, para. 8.3.

8.4 The Committee notes that the authors assert that Sahraoui Ayache was arrested on the morning of 12 August 1994 at his home by security forces and has since disappeared. It further notes that, according to the authors, many persons arrested at the same time as Sahraoui Ayache allegedly died during their first night in detention because of the very arduous conditions in which they were held. The authors do not exclude the possibility that Sahraoui Ayache may also have died that night. The Committee notes that the State party has produced no evidence refuting the authors' allegation. The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate of the disappeared person, effectively removes the person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable. In the present case, the Committee notes that the State party has produced no evidence to indicate that it has fulfilled its obligation to protect the life of Sahraoui Ayache. The Committee therefore concludes that the State party has failed in its duty to protect Sahraoui Ayache's life, in violation of article 6, paragraph 1, of the Covenant.²³

8.5 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment, which recommends that States parties should make provisions against incommunicado detention. It notes in the case in question that Sahraoui Ayache was arrested by military personnel on 12 August 1994 and that his fate is still unknown. The Committee also takes note of the author's allegations concerning the extremely arduous conditions in which the disappeared person and the other persons arrested at the same time were detained, and which caused the death of many persons during the first night of detention. In the absence of a satisfactory explanation from the State party, the Committee considers that the disappearance of Sahraoui Ayache and the conditions in which the disappeared person was held during the first night constitute a violation of article 7 of the Covenant with regard to him.²⁴

8.6 The Committee also notes the anguish and distress caused to the authors by the disappearance and the uncertainty as to the fate of Sahraoui Ayache. 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, in respect of the authors.²⁵

8.7 With regard to the alleged violation of article 9, the Committee takes note of the authors' claim that Sahraoui Ayache was arrested without a warrant by soldiers on 12 August 1994, that he was not charged or brought before a judicial authority, which would have enabled him to challenge the lawfulness of his detention, and that no official information was given to his friends and family regarding his fate, despite the fact that the authorities stated that his disappearances had occurred "in the context of the national tragedy". In the absence of a satisfactory explanation from the State party on these points, the Committee concludes that there was a violation of article 9 of the Covenant.²⁶

8.8 Regarding the complaint under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other

²³ See *Mezine v. Algeria*, para. 8.4, and *Boudjemai v. Algeria*, para. 8.4.

²⁴ See *Mezine v. Algeria*, para. 8.5; *Khirani v. Algeria*, para. 7.5; *Berzig v. Algeria*, para. 8.5; and communication No. 1295/2004, *El Alwani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 6.5.

²⁵ See *Mezine v. Algeria*, para. 8.6; *Khirani v. Algeria*, para. 7.6; *Berzig v. Algeria*, para. 8.6; *El Abani v. Libyan Arab Jamahiriya*, para. 7.5; and communication No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.11.

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

than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In view of the allegations concerning the incommunicado detention of Sahraoui Ayache under conditions that caused the death of many persons in a single night, and in the absence of information from the State party in that regard, the Committee finds a violation of article 10, paragraph 1, of the Covenant.²⁷

8.9 With regard to the alleged violation of article 16, the Committee reiterates its established jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person 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 potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3), have been systematically impeded.²⁸ In the present case, the Committee notes that the State party has not furnished any explanation concerning the fate of Sahraoui Ayache, despite the repeated requests addressed by the authors to the State party. The Committee concludes that the enforced disappearance of Sahraoui Ayache nearly 20 years ago 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.

8.10 With regard to the alleged violation of article 17, the Committee notes that the State party did not provide any justification or clarification as to the entry of soldiers into Sahraoui Ayache's home in the early morning without a warrant. The Committee concludes that the entry of State officials into Sahraoui Ayache's home in such circumstances constitutes unlawful interference in his home, in violation of article 17 of the Covenant.²⁹

8.11 The authors invoke 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 may have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, which states that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. In the present case, although the victim's family repeatedly contacted the competent authorities, including the State prosecutor of the Court of Constantine, regarding Sahraoui Ayache's disappearance, all their efforts were in vain, and the State party failed to conduct a thorough and effective investigation into the disappearance. Furthermore, the absence of the legal right to undertake judicial proceedings since the promulgation of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation continues to deprive Sahraoui Ayache, the authors and their family of any access to an effective remedy, since the Ordinance prohibits the initiation of legal proceedings in order to shed light on the most serious crimes, such as enforced disappearances.³⁰ The payments made to the parents of Sahraoui Ayache (see para. 2.7) do not compensate for the failure to carry out an investigation into his disappearance. The Committee concludes that the facts before it reveal a violation of article 2 (para. 3), read in conjunction with articles 6 (para. 1), 7, 9, 10 (para. 1), 16 and 17 of the Covenant, in

²⁷ See general comment No. 21 (1992) on the right of persons deprived of their liberty to be treated with humanity, para. 3; *Mezine v. Algeria*, para. 8.8; *Zarzi v. Algeria*, para. 7.8; and communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2.

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

²⁹ See *Mezine v. Algeria*, para. 8.10.

³⁰ See CCPR/C/DZA/CO/3, para. 7.

respect of Sahraoui Ayache and of article 2 (para. 3), read in conjunction with article 7 of the Covenant, in respect of the authors.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of articles 6 (para. 1), 7, 9, 10 (para. 1), 16 and 17 of the Covenant and of article 2 (para. 3), read in conjunction with articles 6 (para. 1), 7, 9, 10 (para. 1), 16 and 17, in respect of Sahraoui Ayache. It also finds a violation by the State party of article 7, read alone and read in conjunction with article 2 (para. 3), in respect of the authors.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors and their family with an effective remedy, which includes the following: (a) carrying out a thorough and effective investigation into the disappearance of Sahraoui Ayache; (b) providing the authors and their family with detailed information concerning the results of this investigation; (c) releasing Sahraoui Ayache immediately if he is still being detained incommunicado; (d) in the event that Sahraoui Ayache is no longer alive, returning his remains to his family; (e) prosecuting, trying and punishing those responsible for committing the violations; (f) providing adequate compensation for the moral damage suffered to the authors and to Sahraoui Ayache, if he is still alive, taking the payments already made into account; and (g) providing the authors with appropriate measures of satisfaction. Notwithstanding the terms of Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for crimes such as torture, extrajudicial killings and enforced disappearances. The State party is also under an obligation to take steps to prevent similar violations in the future.

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