



## International Covenant on Civil and Political Rights

Distr.: General  
11 October 2022  
English  
Original: French

### Human Rights Committee

#### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3125/2018\*, \*\*

<i>Communication submitted by:</i>	Hacène Ferhati and Fatna Ferhati (represented by counsel, Nassera Dutour, of the Collectif des familles de disparu(e)s en Algérie)
<i>Alleged victims:</i>	The authors and Mustapha Ferhati (brother of Hacène Ferhati and son of Fatna Ferhati)
<i>State party:</i>	Algeria
<i>Date of communication:</i>	19 October 2017 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 16 February 2018 (not issued in document form)
<i>Date of adoption of Views:</i>	8 July 2022
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to an effective remedy; cruel, inhuman or degrading treatment or punishment; liberty and security of person; human dignity; Right to be recognized as a person before the law
<i>Articles of the Covenant:</i>	2 (2) and (3), 6, 7, 9, 10, 12, 14 and 16
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2)

1. The authors of the communication are Hacène Ferhati and his mother Fatna Ferhati, both of Algerian nationality. They claim that Mustapha Ferhati, the brother of Hacène and son of Fatma Ferhati, born on 26 January 1972 and also an Algerian national, is the victim of an enforced disappearance attributable to the State party, in violation of articles 6, 7, 9, 10 and 16 of the Covenant. The authors further claim to be the victims of a violation of their rights under articles 2 (2) and (3), 7, 9, 12 and 14 of the Covenant. Both the Covenant and the Optional Protocol thereto entered into force in respect of the State party on 12 December

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

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



1989. The authors are represented by a counsel of the Collectif des familles de disparu(e)s en Algérie)

### **The facts as presented by the authors**

2.1 On 9 November 1996, police officers from the Belouizdad police station (in the Hussein Dey daïra (sub-prefecture), wilaya (province) of Algiers) shot and killed Hocine Ferhati, Hacène's brother, during an armed clash in the Cervantès district of Belouizdad. On the same day, military security officers from the Ben Aknoun military centre went to the home of the Ferhati family as they wished to speak to Hocine's wife, who had witnessed the killing of her husband. As she was absent, the officers arrested Mustapha Ferhati, the younger brother of Hocine and Hacène Ferhati. Upon his release, after being detained for twenty-four hours and mistreated, a frightened Mustapha took refuge at a friend's house.

2.2 In April 1998, military security officers returned to the family home to search for Mustapha Ferhati but did not find him. On 28 May 1998, while Mustapha and a friend were in the Rue des Annassers in the commune of Kouba, Algiers, criminal investigation officers, accompanied by officers of the Intelligence and Security Department fired shots that caused a stampede. Mustapha also broke into a run. The officers then shot him, wounding him in the leg, and took him to an unknown location. His family has had no news of him since then.

2.3 The Ferhati family was never informed of Mustapha's arrest; they learned of it only through an article in the newspaper El Khabar, dated 1 June 1998, which reported on the incident on 28 May 1998, and which stated that the security services had arrested Mustapha Ferhati.<sup>1</sup> Then a neighbour, who was present at the scene of the clash on 28 May 1998, informed the Ferhati family that Mustapha had been arrested by officers of the Intelligence and Security Department and that he was injured. Two young men, who had also been arrested on the same day, testified to Mustapha's family that he had been arrested.

2.4 Thereafter the Ferhati family continued its search for Mustapha and met with contradictory statements on the part of the authorities, which considered him alive on some occasions and dead on others. For example, a summons dated 23 July 2001 was sent to the family home ordering Mustapha Ferhati to appear at the gendarmerie in the commune of El Mouradia in Algiers. However, on 20 October 2002, the National Advisory Commission for the Promotion and Protection of Human Rights informed the Ferhati family that, on 14 June 1998, the public prosecutor at the court of Hussein Dey had issued a burial certificate (No. 98/73) with Mustapha's name on it.

2.5 In addition, after the killing of Hocine Ferhati and the disappearance of Mustapha Ferhati, the authors and Hocine's wife were harassed for many months by the services of the Intelligence and Security Department. This harassment was accompanied by many arbitrary detentions and acts of torture. Officers of the Intelligence and Security Department used to seek out Hocine's wife and ask for information about Hocine and Mustapha. The authors were arrested six times in the period between 1997 and 1998. Hacène Ferhati was physically tortured during his detention at the Ben Aknoun Territorial Centre for Research and Investigation and psychologically tortured for several years. The police would arrive in the middle of the night, place the neighbourhood under tight surveillance, or surround his house and arrest him in front of his wife and children. For example, on 23 October 1997, the authors were arrested, detained for 48 hours at the Ben Aknoun Territorial Centre for Research and Investigation and tortured. In particular, Hacène Ferhati's arm was broken while he was shielding his face from a blow with a metal bar and hanging by his feet. He was released barefoot, holding up his trousers without a belt, on the motorway, at night, in the middle of the curfew. Fatna Ferhati was also subjected to physical and psychological torture. She is now very ill and still mourns her sons.

2.6 On 13 November 1999, Fatna Ferhati filed two complaints: one addressed to the public prosecutor at the court of Bir Mourad Raïs and the other to the public prosecutor at the court of Algiers. No action was taken in response to either of her complaints.

---

<sup>1</sup> According to the authors, the journalist later testified that she had based her article on an official statement from the Intelligence and Security Department.

2.7 On 10 December 2006, Hacène Ferhati filed another complaint with the public prosecutor at the court of Bir Mourad Raïs. On 3 February 2008, the police superintendent assigned to the Bir Mourad Raïs district, acting on a request from the public prosecutor dated 4 October 2007, informed Hacène Ferhati that he must follow the procedures set out in Ordinance No. 06-01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation.

2.8 On 3 January 2009, Hacène Ferhati was notified by the General Directorate of National Security that, on 16 December 2008, the public prosecutor had decided to close the file on the disappearance of Mustapha Ferhati on the grounds that he had died on 28 May 1998 in the ranks of the FIDA organization, after an exchange of fire between it and the mobile criminal police squad. After receiving this notification, Hacène Ferhati filed a complaint with the investigating judge of the court of Bir Mourad Raïs in an attempt to clarify the contradictions between the information given about his brother's death in the notification, the article in the newspaper *El Khabar* – which mentioned his arrest but not his death – and such evidence as he could obtain. No action was taken on this complaint.

2.9 In addition to these approaches to the judicial authorities, the authors sought the good offices of various non-judicial bodies on 11 occasions between 1999 and 2006. The requests were addressed to the National Human Rights Observatory, the Ministry of Justice, the President of the Republic of Algeria, the President of the French Republic, the human rights advisor of the President of the Republic, the Minister of the Interior and the Prime Minister. Apart from the above-mentioned reply of 20 October 2002 from the National Advisory Commission for the Promotion and Protection of Human Rights, the authors received only two replies dated 14 March 2007: one from the Office of the President of the Republic, which invited them to contact the court closest to their place of residence in order to follow the procedure provided for in Ordinance No. 06-01, and the other from the Office of the Prime Minister, which informed them that their request had been passed on to the two bodies competent to deal with the matter – the National Advisory Commission for the Promotion and Protection of Human Rights and the Ministry of Justice – and that they should contact those two official entities. These two responses did not therefore lead to any progress, because they merely referred the authors to authorities which had already been apprised of the case.

2.10 Hacène Ferhati has continued his fight within the association SOS Disparus to obtain truth and justice with regard to the crimes committed in the 1990s in Algeria. This work has resulted in further harassment, including anonymous telephone calls, death threats and repeated summonses to the gendarmerie of El Mouradia. On 25 March 2013, for example, when he wanted to travel to Tunisia to participate in the World Social Forum as a member of an Algerian delegation of human rights defenders, he was prevented from leaving Algerian soil by the border police in the wilaya of Tébessa. He was then notified that he was prohibited from leaving the country, without any further information. Hacène Ferhati again tried to travel to Tunisia the next day and was once more prevented from leaving the country at Algiers airport, without any explanation. On 27 March 2013, he faced the same situation. The border guards then told him to contact the Directorate General of National Security for information.<sup>2</sup>

2.11 The case of Mustapha Ferhati was also submitted to the Working Group on Enforced or Involuntary Disappearances in September 2007. The Working Group wrote to the Algerian authorities but never received a reply.<sup>3</sup>

2.12 Despite the authors' best efforts, no investigation has been undertaken by the competent State authorities. The authors point out that it is now legally impossible for them to bring judicial proceedings after the issuance of Ordinance No. 06-01. Domestic remedies, which had already proved futile and ineffective, have thus become unavailable.

2.13 The authors argue that, since Ordinance No. 06-01 prohibits recourse to judicial proceedings, on pain of criminal prosecution, victims are relieved of any obligation to exhaust domestic remedies. Article 45 of the Ordinance in fact prohibits any complaint of

<sup>2</sup> Hacène Ferhati does not state whether he contacted the Directorate General of National Security.

<sup>3</sup> The case remains pending before the Working Group on Enforced or Involuntary Disappearances.

disappearance or other offences, by providing that “no individual or class action may be taken against members of any branch of the defence and security forces of the Republic for actions carried out to protect persons and property, safeguard the nation and preserve the institutions of the People’s Democratic Republic of Algeria”. By virtue of this provision, any allegation or complaint must be declared inadmissible by the competent judicial authority. Furthermore, article 46 of the Ordinance establishes that:

Anyone who, through his or her spoken or written statements or any other act, uses or makes use of the wounds caused by the national tragedy to undermine the institutions of the People’s Democratic Republic of Algeria, weaken the State, impugn the integrity of its agents who have served it with dignity, or tarnish the image of Algeria abroad, shall be liable to a term of imprisonment of 3 to 5 years and a fine of 250,000 to 500,000 Algerian dinars. Criminal proceedings shall be automatically initiated by the public prosecutor’s office. The penalty established in the present article shall be doubled for repeat offences.

### **The complaint**

3.1 The authors allege that Mustapha Ferhati is the victim of an enforced disappearance as defined in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance. Even though no provision of the Covenant specifically mentions enforced disappearance, the practice is associated with violations of the right to life, the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment and the right to liberty and security of person. In the instant case, the authors claim that the State party has violated the rights of Mustapha Ferhati under articles 6, 7, 9, 10 and 16 of the Covenant, and their own rights under articles 2 (2) and (3), 7, 9, 12 and 14 of the Covenant.

3.2 The authors consider that Ordinance No. 06-01 constitutes a violation by the State party of the general obligation set forth in article 2 (2) of the Covenant, in that this provision also implies a negative obligation for States parties to refrain from adopting measures that are contrary to the Covenant. In adopting the Ordinance, in particular article 45 thereof, the State party adopted a legislative measure that vitiates rights recognized under the Covenant, particularly the right to have access to an effective remedy against violations of human rights.<sup>4</sup> Since the promulgation of this Ordinance, the authors have been prevented from taking legal action. They consider that a breach, by act or omission, of the obligation imposed by article 2 (2) of the Covenant may engage the international responsibility of the State party.<sup>5</sup> They maintain that, despite all their efforts, after the entry into force of the Charter for Peace and National Reconciliation and its implementing legislation, their complaints have been ineffective. They therefore deem themselves victims of this legislative provision that violates article 2 (2) of the Covenant.

3.3 The authors add that the provisions of Ordinance No. 06-01 are contrary to article 2 (3) of the Covenant, since they have the effect of preventing any future criminal proceedings from being brought against the alleged perpetrators of enforced disappearances when these persons are State agents. The Ordinance also prohibits, on pain of imprisonment, the use of the justice system to establish the fate of victims.<sup>6</sup> The authors’ approaches to the Algerian authorities before and after the Ordinance’s adoption to discover the fate of Mustapha Ferhati have proved to be to no avail, as they have received no response. This refusal hinders the effectiveness of the remedies sought by his family. Article 2 (3) requires reparation to be made to individuals whose Covenant rights have been violated.<sup>7</sup> Articles 27 to 39 of Ordinance No. 06-01 provide only for financial compensation, subject to the issuance of a declaration of death following an unsuccessful investigation, and article 38 excludes any other form of reparation. In practice, however, no investigation is carried out, either into the fate of the disappeared person or of those responsible for the disappearance. The authors recall that the Committee has considered that the right to an effective remedy necessarily

---

<sup>4</sup> See, inter alia, the concurring individual opinion of Fabián Salvioli in the case of *Djebbar and Chihoub v. Algeria* (CCPR/C/103/D/1811/2008).

<sup>5</sup> Human Rights Committee, general comment No. 31 (2004), para. 4.

<sup>6</sup> CCPR/C/DZA/CO/3, paras. 7 and 8.

<sup>7</sup> Human Rights Committee, general comment No. 31 (2004), para. 16.

includes the right to adequate reparation and the right to the truth, and it has recommended that the State party should undertake to ensure that disappeared persons and/or their families have access to an effective remedy and that proper follow-up is assured, while ensuring respect for the right to compensation and the fullest possible redress.<sup>8</sup> According to the authors, the State party has, therefore, violated article 2 (3) of the Covenant, with regard to them.

3.4 The authors recall the developments in the Committee's jurisprudence regarding enforced disappearances and consider that the mere risk of loss of a person's life in the context of enforced disappearance is enough to justify a finding of a direct violation of article 6 of the Covenant. In the absence of a thorough investigation of the disappearance of Mustapha Ferhati, the authors consider that the State party has failed in its obligation to protect his right to life and to take steps to investigate what happened to him, in violation of article 6 (1) of the Covenant.

3.5 The authors describe the circumstances surrounding Mustapha Ferhati's disappearance, namely the total lack of information about his detention and his state of health, the lack of a thorough investigation of his fate and the lack of communication with his family and the outside world. They recall that prolonged arbitrary detention increases the risk of torture and cruel, inhuman or degrading treatment. Referring to the Committee's jurisprudence, the authors also stress that the anguish, uncertainty and distress caused by Mustapha Ferhati's disappearance and by the authorities urging them to undertake the compensation procedure under the Charter for Peace and National Reconciliation constitute a form of cruel, inhuman or degrading treatment for his family. They also maintain that they themselves were victims of physical torture during their arrests and detentions between 1996 and 1998, as well as of psychological torture. Accordingly, the authors allege that the State party is responsible for a violation of article 7 of the Covenant in relation to them and to Mustapha Ferhati.

3.6 In view of the fact that Mustapha Ferhati has been detained incommunicado without access to a lawyer and without being informed of the reasons for his arrest or the charges against him, that his detention was not mentioned in police custody registers and that there is no official information as to his whereabouts or fate, the authors claim that he has been deprived of his right to liberty and security of person and that he has been unable to bring proceedings before a court. They therefore consider that Mustapha Ferhati has been deprived of the safeguards described in article 9 of the Covenant, which amounts to a violation of his rights under the article in question.

3.7 The authors consider that the six arrests to which they were subjected in the period between 1997 and 1998, without a warrant and without any reasons being stated by officers of the Intelligence and Security Department of the Ben Aknoun centre, led to detentions without trial, of 12 or 24 hours, which were therefore arbitrary. The State party has therefore also violated article 9 of the Covenant in respect of the authors.

3.8 The authors also argue that, in the absence of any investigation by the Algerian authorities, Mustapha Ferhati has been deprived of his liberty and has not been treated with humanity and dignity, in violation of his rights under article 10 of the Covenant.

3.9 With regard to article 12 of the Covenant, Hacène Ferhati argues that because of his involvement in the defence of human rights, his freedom of movement was impeded because he was prevented from leaving Algerian soil by the border police, when he wished to go to Tunisia to participate in the World Social Forum. This unjustified restriction of Hacène Ferhati's freedom of movement seems unnecessary and is plainly excessive thus constituting a violation of his rights under article 12 of the Covenant.

3.10 Recalling the provisions of article 14 of the Covenant, as well as paragraph 9 of the Committee's general comment No. 32 (2007), the authors claim that all the steps they have taken with the judicial and other authorities have been unsuccessful. They were strongly urged by the security forces of El Mouradia to follow the compensation procedure provided for in Ordinance No. 06-01, which would have meant abandoning any idea of an investigation

<sup>8</sup> CCPR/C/DZA/CO/3, para.12.

into the disappearance of Mustapha Ferhati. Moreover, the Charter for Peace and National Reconciliation and article 45 of Ordinance No. 06-01 are an impediment to any legal action against State agents, preventing the authors from having their case heard. The State party has, therefore, violated article 14 of the Covenant, with regard to them.

3.11 The authors then recall the provisions of article 16 of the Covenant and the Committee's established jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal of recognition as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of relatives to obtain access to effective remedies, including judicial remedies, have been systematically impeded. On this point, they refer to the Committee's concluding observations on the second periodic report of Algeria under article 40 of the Covenant, in which the Committee established that holding incommunicado disappeared individuals who are still alive is a violation of the right to recognition as persons before the law, enshrined in article 16 of the Covenant.<sup>9</sup> They therefore submit that, by keeping Mustapha Ferhati in detention without officially informing his family and friends, the Algerian authorities have 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.

3.12 The authors request the Committee to urge the State party to order independent and impartial investigations with a view to: (a) locating Mustapha Ferhati and fulfilling the State party's undertaking under article 2 (3) of the Covenant; (b) bringing the instigators and perpetrators of this enforced disappearance before the competent civil authorities to face prosecution in line with article 2 (3) of the Covenant; and (c) ensuring that Mustapha Ferhati, if he is still alive, and his family have access to adequate, effective and prompt reparation for the harm suffered, in accordance with articles 2 (3) and 9 of the Covenant, including appropriate compensation commensurate with the gravity of the violation, full and complete rehabilitation and guarantees of non-repetition. Lastly, they ask the Committee to urge the Algerian authorities to repeal articles 27 to 39, 45 and 46 of Ordinance No. 06-01.

#### **State party's observations**

4. On 9 April 2018, the State party invited the Committee to refer to the background memorandum of the Government of Algeria on handling the issue of disappearances in the light of the implementation of the Charter for Peace and National Reconciliation, with respect to the inadmissibility of communications submitted to the Committee in connection with the implementation of the Charter.

#### **The author's comments on the State's party's submission**

5.1 On 18 June 2018, the authors submitted their comments on the State party's observations regarding admissibility. The authors emphasize that the observations do not deal at all with the admissibility of the communication, the particulars of the case or the remedies sought by the victim's family, thereby demonstrating the Algerian authorities' disregard and disdain for the current procedure before the Committee. They also emphasize that these observations, which date back to July 2009, are obsolete.

5.2 The authors, pointing out that none of the remedies that they have sought has led to the initiation of a thorough investigation or criminal proceedings and that the Algerian authorities have not provided any tangible evidence suggesting that effective searches were conducted to locate Mustapha Ferhati and identify those responsible for his disappearance, submit that domestic remedies have been exhausted and that the complaint should be considered admissible by the Committee.

5.3 Referring to the Committee's jurisprudence that the Charter for Peace and National Reconciliation cannot be invoked against individuals submitting individual communications, the authors recall that the provisions of the Charter do not in any way represent adequate handling of the cases of the missing, which would mean respect for the right to truth, justice and full redress.

---

<sup>9</sup> CCPR/C/79/Add.95, para. 10.

### State party's failure to cooperate

6. The Committee recalls that on 9 April 2018 the State party challenged the admissibility of the communication by referring to the background memorandum of the Government of Algeria on handling the issue of disappearances in the light of the implementation of the Charter for Peace and National Reconciliation. As the Committee refused to allow the admissibility and the merits of the complaint to be considered separately on 21 September 2018 and again on 13 March and 9 November 2020, the State party was invited to submit its observations on the merits of the communication. The Committee notes that it has not received any specific response to the authors' allegations and regrets the State party's failure to cooperate by sharing its observations on the present complaint. In conformity with article 4 (2) of the Optional Protocol, the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with whatever information is available to it.<sup>10</sup>

### Issues and proceedings before the Committee

#### *Consideration of admissibility*

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

7.2 The Committee has ascertained, as required under article 5 (2) (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearance was reported to the Working Group on Enforced or Involuntary Disappearances. It recalls, however, that the special procedures and mechanisms of the Human Rights Council do not generally constitute a procedure of international investigation or settlement within the meaning of article 5 (2) (a) of the Optional Protocol.<sup>11</sup> Accordingly, the Committee considers that the examination of Mustapha Ferhati's case by the Working Group on Enforced or Involuntary Disappearances does not render the communication inadmissible under this provision.

7.3 The Committee notes that the authors claim that they have exhausted all available remedies and that, by way of disputing the admissibility of the communication, the State party has simply referred to the background memorandum of the Government of Algeria on handling the issue of disappearances in the light of the Charter for Peace and National Reconciliation. In this regard, the Committee recalls that it has reiterated, on numerous occasions, its concerns that, despite multiple requests, the State party was continuing to refer systematically to a standard document (the "aide-memoire") without responding specifically to the claims made by authors of communications.<sup>12</sup> The Committee has therefore called on the State party, as a matter of urgency, to cooperate with it in good faith under the individual communications procedure by ceasing to refer to the "aide-memoire" and by responding individually and with specifics to the claims made by authors of communications.

7.4 The Committee also recalls that the State party has not only a duty to carry out thorough investigations of alleged violations of human rights brought to the attention of its authorities, particularly violations of the right to life, but also a duty to prosecute, try and

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

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

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

punish anyone held to be responsible for such violations.<sup>13</sup> In the present case, the Committee notes that, although the authors brought the enforced disappearance of Mustapha Ferhati to the attention of the competent authorities on many occasions, the State party has not undertaken any investigations into this serious allegation. The State party has also failed to provide any specific explanation in its observations on the case of Mustapha Ferhati which would make it possible to conclude that an effective remedy is currently available, whereas Ordinance No. 06-01 continues to be applied, thereby reducing the scope of application of the Covenant, despite the Committee's recommendations to bring it into line with the Covenant.<sup>14</sup> In the circumstances, the Committee finds that it is not precluded from considering the communication under article 5 (2) (b) of the Optional Protocol.

7.5 Furthermore, since submitting a communication five years after the exhaustion of domestic remedies can amount to an abuse of the right of submission<sup>15</sup> "and even if the State party has not raised this point in the present case" the Committee recalls that the continuous nature of enforced disappearance implies a continuous obligation to investigate such cases, which in this case is made impossible by Ordinance No. 06-01 and its effects.<sup>16</sup> The Committee therefore considers that, in the special circumstances of the case, and in particular given that Ordinance No. 06-01 makes it impossible to seek an investigation into the disappearance of Mustapha Ferhati, the present communication does not constitute an abuse of the right of submission.

7.6 The Committee notes that the authors have also claimed a separate violation of their rights under article 2 (2) and (3) of the Covenant. Recalling its jurisprudence according to which the provisions of article 2 lay down general obligations for States parties and cannot, by themselves, give rise to a separate claim under the Optional Protocol, as they can be invoked only in conjunction with other substantive articles of the Covenant,<sup>17</sup> the Committee considers the authors' claims under article 2 (2) and (3) of the Covenant, invoked separately, to be inadmissible under article 3 of the Optional Protocol.<sup>18</sup>

7.7 The Committee further notes that, in invoking articles 7 and 9 of the Covenant, the authors allege that they themselves were victims of several arbitrary detentions in 1997 and 1998, during which they were subjected to acts of torture and cruel, inhuman and degrading treatment. On this issue, the State party has not provided any evidence to refute the authors' claims and making it possible to conclude that an effective and available remedy is open to the authors.<sup>19</sup> In the circumstances of the case, and in the absence of an explanation from the State party, the Committee must therefore give due weight to the authors' submissions. In the instant case, the Committee finds that it is not precluded from considering the authors' claims under article 5 (2) (b) of the Optional Protocol.

7.8 The Committee notes that the allegations submitted by Fatna Ferhati under article 7 of the Covenant regarding the acts of torture and cruel, inhuman and degrading treatment to which she was subjected have not been sufficiently substantiated. Moreover, with regard to the claim made by Hacène Ferhati under article 12 of the Covenant, the Committee notes that he did not challenge the ban on his leaving the territory before the Directorate General of National Security, as he had been advised to do by the border guards. Consequently, the

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

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

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

<sup>16</sup> *Rsiwi v. Algeria*, para. 7.6; *Berkaoui v. Algeria*, para. 7.5; *Dafar v. Algeria*, para. 5.4.

<sup>17</sup> *Ch. H.O. v. Canada* (CCPR/C/118/D/2195/2012), para. 9.4; *H.E.A.K. v. Denmark* (CCPR/C/114/D/2343/2014), para. 7.4. *Castañeda v. Mexico* (CCPR/C/108/D/2202/2012), para. 6.8. *A.P. v. Ukraine* (CCPR/C/105/D/1834/2008), para. 8.5; and *Peirano Basso v. Uruguay* (CCPR/C/100/D/1887/2009), para. 9.4.

<sup>18</sup> *Souaiene and Souaiene v. Algeria*, para. 7.5.

<sup>19</sup> *Bendjael and Bendjael v. Algeria*, para. 7.4;



Committee find this part of the communication to be inadmissible under articles 2 and 5 (2) (b) of the Optional Protocol.

7.9 The Committee considers that the authors are invoking in substance a violation of article 2 (3) of the Covenant, read in conjunction with articles 6, 7, 9, 10 and 16, in respect of Mustapha Ferhati, and of article 2 (3) of the Covenant, read in conjunction with article 7, in respect of themselves. The Committee also considers that the authors have sufficiently substantiated their other allegations for the purposes of admissibility, and therefore proceeds with its consideration of the merits of the claims under articles 6, 7, 9, 10 and 16 of the Covenant, read alone and in conjunction with article 2 (3), in respect of Mustapha Ferhati, and under articles 7 – the physical torture, anguish and distress of Hacène Ferhati and the anguish and distress of Fatna Ferhati – read alone and in conjunction with articles 2 (3) of the Covenant, and of articles 9 and 14 of the Covenant in respect of the authors.

#### *Consideration of the merits*

8.1 The Committee has considered the present communication in the light of all the written information made available to it by the parties, as provided for in article 5 (1) of the Optional Protocol.

8.2 The Committee notes that the State party has merely referred to comments which it has previously transmitted to the Committee in connection with other communications, in order to confirm its position that such cases have already been settled through the implementation of the Charter for Peace and National Reconciliation. The Committee refers to its jurisprudence.<sup>20</sup> and recalls that the State party may not apply the provisions of the Charter to persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee.<sup>21</sup> Ordinance No. 06-01, without the amendments recommended by the Committee, promotes impunity in the present case and in its current form cannot therefore be deemed compatible with the Covenant.<sup>22</sup>

8.3 The Committee notes that the State party has not replied to the authors' allegations concerning the merits of the case and recalls its jurisprudence, according to which the burden of proof should not rest solely on the author of a communication, especially given that the author and the State party do not always have the same degree of access to evidence and that often only the State party is in possession of the necessary information.<sup>23</sup> Article 4 (2) of the Optional Protocol requires the State party to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with whatever information is available to it.<sup>24</sup> In the absence of any explanations from the State party in this respect, due weight must be given to the authors' allegations, insofar as they have been sufficiently substantiated.

8.4 The Committee recalls that, while the term "enforced disappearance" does not appear expressly in any article of the Covenant, enforced disappearance constitutes a single, integrated group of acts that represents a continuing violation of various rights recognized in that treaty, including the right to life, the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment and the right to liberty and security of person.<sup>25</sup>

8.5 The Committee notes that Mustapha Ferhati was last seen by a neighbour on 28 May 1998, while he was meeting a friend in the Rue des Annassers in the commune of Kouba,

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

<sup>21</sup> The Covenant requires the State party to concern itself with the fate of every individual and to treat every individual with respect for the inherent dignity of the human person.

<sup>22</sup> *Dafar v. Algeria*, para. 6.4; *Zaier v. Algeria* (CCPR/C/112/D/2026/2011), para. 7.2; and *Ammari v. Algeria*, para. 8.2.

<sup>23</sup> See, inter alia, *Ammari v. Algeria*, para. 8.3; *Mezine v. Algeria*, para. 8.3; *Berzig v. Algeria*, para. 8.3; and *El Abani v. Libyan Arab Jamahiriya* (CCPR/C/99/D/1640/2007), para. 7.4.

<sup>24</sup> *Mezine v. Algeria*, para. 8.3; and *Medjnoune v. Algeria*, para. 8.3.

<sup>25</sup> *El Boathi v. Algeria* (CCPR/C/119/D/2259/2013), para. 7.4; *Serna et al. v. Colombia* (CCPR/C/114/D/2134/2012), para. 9.4; and *Katwal v. Nepal* (CCPR/C/113/D/2000/2010), para. 11.3. See also the Human Rights Committee's general comment No. 36 (2018), para. 58.

Algiers. Eyewitnesses informed Mustapha Ferhati's family that criminal investigation officers, accompanied by officers from the Intelligence and Security Department, fired shots that wounded Mustapha in the leg, and that they then took him to an unknown location. The Committee also takes note of the many contradictory pieces of information regarding the alleged death of Mustapha Ferhati and of the summonses that were addressed to him, such as that addressed to him on 23 July 2001, suggesting that the Algerian authorities still considered him alive after the date of his alleged death. The Committee further notes that the State party has produced no evidence to establish what happened to Mustapha Ferhati. It 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.<sup>26</sup> In the present case, the Committee observes that the State party has produced no evidence indicating that it fulfilled its obligation to protect the life of Mustapha Ferhati. The Committee therefore finds that the State party has failed in its duty to protect the life of Mustapha Ferhati, in violation of article 6 (1) of the Covenant.

8.6 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, in which it recommends that States parties take steps to prohibit incommunicado detention. In the present case, it notes that after three persons saw Mustapha Ferhati being arrested on 28 May 1998, his family, including the authors, never again received one scrap of information about his fate or his place of detention, despite their repeated entreaties to the competent authorities of the State party. The Committee also notes that the public prosecutor at the Hussein Dey court issued a burial certificate on 14 June 1998, without any autopsy or investigation having been conducted. The Committee also notes that this lack of investigation has persisted despite the authors' requests to the prosecutor for the opening of an investigation. In the absence of any explanation from the State party, the Committee considers that the disappearance of Mustapha Ferhati constitutes a violation of article 7 of the Covenant in his regard.<sup>27</sup>

8.7 In view of the above, the Committee will not consider separately the claims relating to the violation of article 10 of the Covenant.<sup>28</sup>

8.8 The Committee notes the authors' allegation that on 23 October 1997, during a 48-hour detention at the Ben Aknoun Territorial Research and Investigation Centre, Hacène Ferhati was hung by his feet and his arm was broken while he was shielding his face from a blow with a metal bar. In the absence of any explanation from the State party, the Committee considers that the treatment of Hacène Ferhati during his arrest on 23 October 1997 constitutes a violation of article 7 of the Covenant in his regard.

8.9 The Committee also takes note of the anguish and distress caused to the authors by Mustapha Ferhati's disappearance over 24 years ago. The Committee therefore considers that the facts before it reveal a violation of article 7 of the Covenant with regard to the authors.<sup>29</sup>

8.10 With regard to the claims regarding a violation of article 9 of the Covenant, the Committee takes note of the authors' allegations that they and Mustapha Ferhati were arbitrarily arrested, without a warrant, and were neither formally charged nor brought before a judicial authority, which would have enabled them to challenge the lawfulness of their detention. In the absence of any information from the State party on this subject, the

<sup>26</sup> *Louddi v. Algeria* (CCPR/C/112/D/2117/2011), para. 7.4; *Boudjemai v. Algeria*, para. 8.4; and *Mezine v. Algeria*, para. 8.4 See also the Human Rights Committee's general comment No. 36 (2018), para. 58.

<sup>27</sup> *Cherguit v. Algeria*, para. 7.6; *Bendjael and Bendjael v. Algeria*, para. 8.6; *Braih v. Algeria* (CCPR/C/128/D/2924/2016), para. 6.5; *Berzig v. Algeria*, para. 8.5; and *El Alwani v. Libyan Arab Jamahiriya* (CCPR/C/90/D/1295/2004), para. 6.5.

<sup>28</sup> *Berkaoui v. Algeria*, para. 8.7; *Dafar v. Algeria*, para. 6.7; *Rsiwi v. Algeria*, para. 8.7; and *Ammari v. Algeria*, para. 8.6.

<sup>29</sup> *Mezine v. Algeria*, para. 8.6; *Khirani et al. v. Algeria*, para. 7.6; *Berzig v. Algeria*, para. 8.6; *El Abani v. Libyan Arab Jamahiriya*, para. 7.5; and *El Hassy v. Libyan Arab Jamahiriya* (CCPR/C/91/D/1422/2005), para. 6.11.

Committee considers that due weight must be given to the authors' allegations.<sup>30</sup> The Committee therefore finds a violation of article 9 of the Covenant in respect of the authors and Mustapha Ferhati.<sup>31</sup>

8.11 The Committee is of the view that the intentional removal of a person from the protection of the law constitutes a denial of the right to recognition as a person before the law, in particular if the efforts of his or her relatives to obtain access to effective remedies have been systematically impeded.<sup>32</sup> In the present case, the Committee notes that the State party has not provided any documented substantiation of the fate or whereabouts of Mustapha Ferhati, despite the requests from his relatives and the fact that, when Mustapha Ferhati was last seen, he was in the hands of the State party's authorities. The Committee finds that the enforced disappearance of Mustapha Ferhati more than 24 years ago removed him from the protection of the law and deprived him of his right to be recognized as a person before the law, in violation of article 16 of the Covenant.

8.12 Lastly, the Committee notes that, although the authors have not expressly invoked a violation of article 2 (3), read in conjunction with articles 6, 7, 9 and 16 of the Covenant, they refer to the obligation imposed on States parties by that provision to ensure that everyone has accessible, effective and enforceable remedies for asserting the rights guaranteed by the Covenant.<sup>33</sup> The Committee attaches importance to States parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law.<sup>34</sup> It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it states that a failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.

8.13 In the present case, the authors have repeatedly alerted the competent authorities to the disappearance of Mustapha Ferhati, but the State party has not conducted any investigation into his disappearance or informed the authors of his fate. Furthermore, the legal impossibility of applying to a judicial body since the promulgation of Ordinance No. 06-01 continues to deprive Mustapha Ferhati and the authors of any access to an effective remedy, given that the Ordinance prohibits using the justice system to shed light on the most serious offences, including enforced disappearance.<sup>35</sup> The Committee finds that the facts before it reveal a violation of article 2 (3), read in conjunction with articles 6, 7, 9 and 16 of the Covenant, with regard to Mustapha Ferhati, and of article 2 (3), read in conjunction with articles 7 – the treatment to which Hacène Ferhati was subjected during his arrest and the authors' anguish and distress caused by the disappearance of Mustapha Ferhati – and 9 of the Covenant, with regard to the authors.<sup>36</sup>

8.14 In view of the above, the Committee will not consider separately the claims relating to the violation of article 14 of the Covenant.<sup>37</sup>

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

10. Pursuant to article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full

<sup>30</sup> *Chani v. Algeria* (CCPR/C/116/D/2297/2013), para. 7.5.

<sup>31</sup> See, inter alia, *Mezine v. Algeria*, para. 8.7; *Khirani et al. v. Algeria*, para. 7.7; *Bendjael and Bendjael v. Algeria*, para. 8.10; and *Berzig v. Algeria*, para. 8.7.

<sup>32</sup> *Basnet v. Nepal* (CCPR/C/117/D/2164/2012), para. 10.9; *Tharu et al. v. Nepal*, para. 10.9; and *Serna et al. v. Colombia*, para. 9.5.

<sup>33</sup> *Drif and Rafrat v. Algeria* (CCPR/C/134/D/3320/2019), para.8.11; *Adda v. Algeria* (CCPR/C/134/D/2721/2016), para. 7.6. *Cherguit v. Algeria*, para. 7.13; and *Souaiene and Souaiene v. Algeria*, para. 8.12.

<sup>34</sup> *Allioua and Kerouane v. Algeria* (CCPR/C/112/D/2132/2012), para. 7.11.

<sup>35</sup> CCPR/C/DZA/CO/3, para.7.

<sup>36</sup> *Drif and Rafrat v. Algeria* (CCPR/C/134/D/3320/2019), para.8.12.

<sup>37</sup> *Ibid.*, para. 8.13.

reparation to persons whose rights under the Covenant have been violated. In the instant case, the State party should inter alia: (a) conduct a prompt, effective, exhaustive, independent, impartial and transparent investigation into the disappearance of Mustapha Ferhati and provide the authors with detailed information about the results of this investigation; (b) release Mustapha Ferhati immediately if he is still being held incommunicado; (c) hand over the remains of Mustapha Ferhati to his family, if he is deceased; (d) prosecute, try and punish those responsible for the violations in a way that is commensurate with the gravity of the violations; (e) provide the authors and Mustapha Ferhati, should he still be alive, with adequate compensation; (f) ensure that the authors have access to a procedure to obtain compensation for the injury suffered as a result of their detention; and (g) ensure that Hacène Ferhati has access to a procedure to obtain compensation for the injury suffered during his arrest on 23 October 1997. Furthermore, the State party is also under an obligation to take measures to prevent similar violations in the future. It is also under an obligation to ensure that it does not impede enjoyment of the right to an effective remedy for such serious violations as torture, extrajudicial execution and enforced disappearance. To that end, the State party should review its legislation in accordance with its obligation under article 2 (2) of the Covenant and, in particular, repeal the provisions of Ordinance No. 06-01 that are incompatible with the Covenant in order to ensure that the rights enshrined in the Covenant can be enjoyed fully in the State party.

11. Bearing in mind that, by becoming a party to the Optional Protocol the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory 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.

---