J. Communication No. 1536/2006, *Cifuentes Elgueta v. Chile* (Decision adopted on 28 July 2009, Ninety-sixth session)[*]

Submitted by:	María Cifuentes Elgueta (not represented by counsel)
Alleged victim:	José Alejandro Campos Cifuentes
State party:	Chile
Date of communication:	23 September 2006 (initial submission)
Subject matter:	Enforced disappearance of persons
Procedural issues:	Non-exhaustion of domestic remedies; admissibility *ratione temporis*
Substantive issues:	Lack of effective remedy; right to life; right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; right to liberty and security of person; and right to recognition as a person before the law
Articles of the Covenant:	2, paragraph 3; 6; 7; 9; 10; and 16
Articles of the Optional Protocol:	2; and 5, paragraph 2 (b)

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

Meeting on 28 July 2009,

Adopts the following:

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli and Mr. Krister Thelin.

The texts of individual opinions signed by Committee members Mr. Rajsoomer Lallah, Ms. Christine Chanet, Ms. Zonke Zanele Majodina, Mr. Fabian Omar Salvioli and Ms. Helen Keller are appended to the present decision.

Decision on admissibility

1.1 The author of the communication, dated 23 September 2006, is María Cifuentes Elgueta, a Chilean national, who is submitting the communication on behalf of her disappeared son, José Alejandro Campos Cifuentes, a Chilean national born in 1950. Although the author does not invoke specific articles of the Covenant, her allegations suggest potential violations of article 2, paragraph 3; taken together with article 6; article 7; article 9; article 10; and article 16 of the Covenant. The author is not represented by counsel.

1.2 The International Covenant on Civil and Political Rights entered into force for the State party on 23 March 1976 and the Optional Protocol to the Covenant on 28 August 1992.

Factual background

2.1 José Alejandro Campos Cifuentes was a nursing student and leader of the Revolutionary Left Movement (*Movimiento de Izquierda Revolucionaria* (MIR)) for the Temuco region of Chile. After several raids on his family's residence, he turned himself in to the authorities, who, the author claims, had been pursuing him because of his political opinions. On 16 October 1973, he was sentenced by a military court to 15 years in prison on charges of high treason. Following this conviction, he spent two years in jail, where he was subjected to torture. His sentence was later commuted to exile. As a result, in February 1976, he left his country for Denmark.

2.2 After spending seven years in exile, the victim requested permission from the Chilean Embassy in Denmark to return to his country, but permission was denied.

2.3 On 19 February 1981, the victim and another exile attempted to enter Chile across the Argentine-Chilean border using false identities. They were arrested by Argentine gendarmes who, on the basis of existing agreements between the security forces of the two countries, allegedly turned the victim over to the Chilean police. The victim's whereabouts since that day remain unknown. The author has unofficial information indicating that her son was killed by Chilean security forces.

2.4 On 18 July 1981, an application for *amparo* was filed on behalf of the victim before the Santiago Appeal Court (case No. 597-81). At that time, the State party declared that it had no information concerning the victim; consequently, on 3 September 1981, the application was rejected. On 30 June 2000, a brother of the victim filed a criminal complaint for aggravated kidnapping against former president Augusto Pinochet. The author provides

no information on the outcome of those proceedings. At an unspecified date the author filed a writ of habeas corpus in Argentina; in 1995 she lodged a complaint with the Office of the Under-Secretary for Human Rights of the Argentine Ministry of the Interior, without result.

2.5 On 4 July 1990, the author and a brother of the victim testified before the National Truth and Reconciliation Commission. In 1991, the Commission submitted a report (the "Rettig Report") in which the victim is listed as a disappeared detainee.

The complaint

3.1 The author claims that her son was a victim of enforced disappearance. She states that the enforced disappearance of persons violates a whole range of human rights, in particular, the right to recognition as a person before the law, the right to liberty and security of person, the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, and the right to life.

3.2 She adds that, in general, enforced disappearance violates the right to found a family, as well as various economic, social and cultural rights. The author's submissions also allege that she was not provided with an effective remedy for those violations.

State party's observations on admissibility

4.1 On 13 February 2007, the State party submitted its observations on the admissibility of the communication. It points out that the disappearance of Mr. Campos Cifuentes is under judicial investigation in connection with a criminal complaint (case No. 2182-98) lodged on 12 January 1998. The Ministry of the Interior of the State party, through its Human Rights Programme, is an intervener in the matter, in which no one has yet been charged.

4.2 The State party adds that, in May 2005, a special judge was assigned to this case, which means that one judge's time is devoted exclusively to this investigation. The State party notes that proceedings in the case are still pending and that no final judgement has yet been issued. In order to demonstrate that the proceedings are pending, the State party has attached a copy of requests for reports submitted on 15 January 2007 by lawyers of the Human Rights Programme. In view of the foregoing, the State party requests that the case be declared inadmissible for failure to exhaust domestic remedies.

Author's comments on the State party's submission

5.1 On 27 April 2007, the author submitted her comments on the State party's submission on admissibility. In relation to the exhaustion of domestic remedies, the author reports that she filed an application for *amparo* (case No. 597-81) in the Santiago Appeal Court on 18 July 1981, but that her application was rejected. She states that she sought other legal remedies, but at the height of the dictatorship there were no guarantees of due process and such remedies were unreasonably prolonged.

5.2 The author claims that, in the period from 26 June 1981 to 10 March 1990, no specific or effective measures were taken to obtain information on the disappearance of her son. With regard to the investigation currently under way (case No. 2182-98), such measures are part of a collective investigation into the disappearance of more than 500 members of the Revolutionary Left Movement and are the product of "bridging laws".

State party's observations on the merits

6.1 On 1 June 2007, the State party submitted its observations on the merits of the communication. It repeats that the enforced disappearance of the victim is being investigated in connection with case No. 2182-98, referred to as "Operation Condor". In this case, a criminal complaint was filed on behalf of the victim and is still pending. In 2005, the Interior Ministry's Human Rights Programme appointed a lawyer to pursue the victim's case. Various petitions have been submitted requesting measures to identify those responsible for the offence in question. In May 2005, the Human Rights Programme requested that the victim's death be investigated as part of the inquiry into the Neltume crimes (case No. 1675). This request was denied.

6.2 The State party maintains that there are conflicting theories regarding the victim's kidnapping and that this slows the investigation, especially if one takes into account the fact that the events in question relate solely to coordination between Latin American security agencies during the Argentine and Chilean dictatorships. The State party maintains that the victim was arrested in Argentina in February 1981 by Argentine security forces without a warrant from a competent court. Based on the foregoing, the State party argues that the case has not been unreasonably prolonged.

6.3 The State party emphasizes that, with the transition to democracy, victims of the military regime have been able to count on the full cooperation of the authorities since 1990. The Human Rights Programme has brought proceedings in cases of enforced disappearance and has obtained convictions in some cases. It has

also made considerable efforts to find evidence that will shed light on the fate of the victims and permit those responsible to be punished. In the case of disappeared detainees or executed persons whose remains have not been recovered, the Supreme Court has embraced the line of reasoning according to which they continue to be kidnapped within the meaning of article 141 of the Criminal Code. It argues that kidnapping is a continuing offence – or one whose effects are continuing – and is dealt with as such until the person is found alive or dead.

6.4 The State party points out that the acts complained of by the author occurred prior to the entry into force of the Optional Protocol for Chile in August 1992. In addition, the Optional Protocol was ratified with the following declaration: "In recognizing the competence of the Human Rights Committee to receive and consider communications from individuals, it is the understanding of the Government of Chile that this competence applies in respect of acts occurring after the entry into force for that State of the Optional Protocol or, in any event, to acts which began after 11 March 1990." The State party therefore understands that the competence of the Committee to receive and consider communications is applicable to acts that took place after 28 August 1992 or, in any event, to acts which began after 11 March 1990. In this connection, it draws attention to communications submitted to the Committee containing complaints against Chile that were declared inadmissible *ratione temporis*.[1]

Author's comments on the State party's submission

7.1 In her comments dated 6 November 2007, the author claims that she does not know the lawyers referred to by the State party and that she was not informed of any steps taken by these lawyers. The author states that the events surrounding her son's disappearance are public knowledge and that accounts of them have been published in several books. She claims that she was never called on to testify with regard to the Neltume crimes.

7.2 The author lists the human rights violations that result from the enforced disappearance of persons,[2] which is not defined as an offence in the Chilean Criminal Code.

[1] Communications No. 746/1997, *Humberto Menanteau Aceituno et al. v. Chile*, decision on admissibility adopted on 26 July 1999, and No. 1078/2002, *Norma Yurich v. Chile*, decision on admissibility adopted on 2 November 2005.

[2] See paragraphs 3.1 and 3.2.

Issues and proceedings before the Committee

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

8.2 The author claims that the disappearance of her son constitutes a violation of various provisions of the Covenant. The State party argues that the communication should be declared inadmissible *ratione temporis*, since the acts on which it is based occurred or began prior to the entry into force of the Optional Protocol for Chile. The State party also recalls that its ratification of this instrument was accompanied by a declaration restricting the Committee's competence to acts occurring after the entry into force of the Optional Protocol for Chile on 28 August 1992 or, in any event, to acts which began after 11 March 1990.

8.3 The Committee notes that the victim's disappearance occurred in February 1981, at which time the Covenant was in force for the State party. However, this was not true of the Optional Protocol to the Covenant, which entered into force for the State party on 28 August 1992 and under which the State party recognized the competence of the Committee to receive and consider communications from individuals who claimed to be victims of violations of the rights set forth in the Covenant. In accordance with the Committee's jurisprudence,[3] the Optional Protocol cannot be applied retroactively, unless the acts that gave rise to the complaint continued after the entry into force of the Optional Protocol.

8.4 The Committee must therefore determine whether the enforced disappearance of the author's son continued beyond 28 August 1992 or if, in any event, it began after 11 March 1990. In this connection, the Committee notes that the definition of enforced disappearance contained in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006 provides that: "... 'enforced disappearance' is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the

[3] Communications No. 1367/2005, *Tim Anderson v. Australia*, decision on admissibility adopted on 31 October 2006, para. 7.3; No. 457/1991, *A.I.E. v. the Libyan Arab Jamahiriya*, decision on admissibility adopted on 7 November 1991, para. 4.2; and No. 310/1988, *M.T. v. Spain*, decision on admissibility adopted on 11 April 1991, para. 5.2.

fate or whereabouts of the disappeared person, which place such a person outside the protection of the law".[4]

8.5 In the present case, the original act of deprivation of liberty and the subsequent refusal to give information about the whereabouts of the victim – both key elements of the offence or violation – occurred prior to the entry into force of the Optional Protocol for the State party, and even before 11 March 1990. In addition, the author makes no reference to any action by the State party after these dates that would constitute a perpetuation by the State party of the enforced disappearance of her son. Accordingly, the Committee considers that even though the Chilean courts, like the Committee, regard enforced disappearance as a continuing offence, the State party's invocation of its declaration *ratione temporis* requires it to take account of that declaration. It is clear that the present case concerns events that occurred before the State party's ratification of the Optional Protocol or that, in any event, began before 11 March 1990. It is therefore precisely covered by the State party's declaration. In the light of the foregoing and in accordance with its jurisprudence,[5] the Committee finds that the communication is inadmissible *ratione temporis* under article 1 of the Optional Protocol. The Committee does not deem it necessary, therefore, to address the question of the exhaustion of domestic remedies.

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 1 of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author of the communication.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

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[4] International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006, art. 2, 61/177. See also the Rome Statute of the International Criminal Court of 17 July 1998, art. 7 (2) (i), 2187 United Nations Treaty Series, p. 3; Inter-American Convention on Forced Disappearance of Persons of 9 June 1994, art. II, OAS A-60; Declaration on the Protection of All Persons from Enforced Disappearance of 18 December 1992, 47/133.

[5] Communications No. 1078/2002, *Norma Yurich v. Chile*, decision on admissibility adopted on 2 November 2005, para. 6.4; No. 746/1997, *Humberto Menanteau Aceituno and Mr. José Carrasco Vasquez. v. Chile*, decision on admissibility adopted on 26 July 1999, para. 6.4; and No. 717/1996, *Acuña Inostroza et al. v. Chile*, decision on admissibility adopted on 28 July 1999, para. 6.4.

Appendix

Individual opinion of Committee members Ms. Christine Chanet, Mr. Rajsoomer Lallah and Ms. Zonke Majodina (dissenting)

We are unable to agree with the majority decision of the Committee that this communication is inadmissible *ratione temporis*. We substantially share the reasoning already adopted by a number of members of the Committee in their dissenting opinion on this issue in communication No. 1078/2002, *Norma Yurich v. Chile*, decision of 2 November 2005. Our main reasons for dissenting may be summarized as follows:

- With regard to the phenomenon of an "enforced disappearance", the majority of the Committee relies (paragraph 8.4 of the decision) on the definition given to that phenomenon in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearances of 20 December 2006, with additional support in footnotes referring to the Rome Statute of the International Criminal Court, the Inter-American Convention on Forced Disappearance of Persons and the Declaration on the Protection of All Persons from Enforced Disappearance.
- In adopting that definition, the majority of the Committee looked only at the original acts (paragraph 8.5 of the decision) constituting "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such person outside the protection of the law". An "enforced disappearance" is not a term or concept used in the Covenant, though it clearly has a negative impact on a number of rights consecrated by the Covenant.
- In basing the thrust of their reasoning on the constituent elements of a definition which is the creation of other international instruments, the majority in the Committee unfortunately failed to appreciate the fact that it is the provisions of the Covenant and its Optional Protocol which the Committee has the mandate to apply. In this regard, the majority consequently failed to appreciate that the Committee must determine whether the State party has or

has not failed in fulfilling the obligations it has undertaken under the Covenant in relation to the violation of a number of the Covenant rights of the alleged victim.

- What are those rights in the light of the allegations of the author and, more importantly, what are the ever present and continuing obligations of the State in relation to the protection and safeguard of those rights? The Committee itself was of the view (paragraph 1.1 of the decision) that those rights and obligations relate to article 2, paragraph 3, in conjunction with articles 6, 7, 9, 10 and 16 (paragraph 3.1 of the decision), including, we would suggest, article 23 paragraph 1 (paragraph 3.2 of the decision).

- Thus, after a person is reported to have disappeared, the State continues to have an obligation under article 2 paragraph 3 to conduct diligent and serious enquiries to determine what has happened to that person, what is his present status as a human being, is he dead or alive? (article 16); if he is dead, the State has a continuing obligation to conduct effective and sustained investigations to determine who is responsible for his death or, if he is still alive, to take immediate steps to ensure that his life is not at risk (article 6). The State also has a continuing obligation to ensure that he has not been or is not being subjected to torture or inhuman or degrading treatment (articles 7 and 10) or to arbitrary detention or that he is not otherwise deprived of his liberty and security (article 9). Similarly, the State has a continuing obligation to ensure that, in his capacity as member of a family as "the fundamental group unit of society", he is given the protection which the State and society owe to him (article 23 paragraph 1). In relation to those rights, the State is, furthermore, under a basic obligation (article 2 paragraph 3 and paragraph 18 of the Committee's general comment No. 31 (2004)[6]) to ensure, in these circumstances, that the proceedings entered in 1998 or 2000 are diligent, vigorous and effective and that those eventually responsible, if any, are brought to justice to face the legal consequences of their action.

- As illustrated in the instances we have examined above, a disappearance, which the majority in the Committee appear to concede (paragraph 8.4 of the decision), inherently has continuing effects on a number of Covenant rights. It has a continuing character because of the continuing violative impact which it inevitably has on Covenant rights. The

[6] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40* (A/59/40), vol. I, annex III.

continuity of this negative impact is irrespective of at what point in time the acts constituting the disappearance itself occurred. Inevitably the State party's obligations continue in relation to those rights.

We conclude, therefore, that a communication complaining of continuing violations of the Covenant in relation to an alleged victim precludes the application of the *ratione temporis* exception and that the communication is not inadmissible on this ground.

(*Signed*) Ms. Christine **Chanet**

(*Signed*) Mr. Rajsoomer **Lallah**

(*Signed*) Ms. Zonke **Majodina**

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee members Ms. Helen Keller and Mr. Fabián Salvioli (dissenting)

1. We are regretfully unable to agree with the majority decision of the Committee regarding the inadmissibility of communication No. 1536/2006, *Cifuentes Elgueta v. Chile*. Given the complexity of this matter, a number of different topics must be addressed. One of the relevant issues concerns the Committee's views on the nature and validity of the declaration made by Chile at the time it acceded to the Optional Protocol, bearing in mind the interpretive criteria which the Committee should use to guide it in exercising its jurisdiction. Another deals with the frameworks or the precise basis for the Human Rights Committee's interpretation and application of international legal instruments. Yet another is the question of how the provisions of the International Covenant on Civil and Political Rights relate to acts constituting enforced disappearance.

I. The nature and validity of the declaration made by Chile at the time it acceded to the Optional Protocol: interpretive criteria in the Human Rights Committee's exercise of its jurisdiction

2. When, on 27 May 1992, Chile acceded to the Optional Protocol to the International Covenant on Civil and Political Rights, the Government of Chile issued a statement in which it said that it was its understanding that the competence of the Committee to consider communications from individuals applies in respect of acts occurring after the entry into force for that State of the Optional Protocol or, in any event, to acts which began after 11 March 1990.

3. By virtue of the principle of "competence-competence", which is inherent in the work of international bodies in general and international human rights bodies in particular, the Human Rights Committee is the only international organ empowered to interpret the written instrument submitted by Chile within the context of the Covenant and its Optional Protocol. There is no reason why the Committee should automatically accept a State's interpretation of the scope of its own reservations, declarations or statements of intent. As an international oversight body, it is the Committee's prerogative to evaluate them and their legal effects in the light of the aim, object and purpose of the international instruments it applies.

4. Although the statement made by Chile is entitled a "declaration", it does not appear to fit the legal definition of one, inasmuch as it does not clarify the meaning of a provision of the Protocol. Rather, its evident purpose is to exclude the Committee's competence in respect of acts which occurred before the entry into force of the Optional Protocol for Chile or which "began" before 11 March 1990.

5. It is up to the Committee to determine whether or not this "declaration" can be regarded as a reservation, or as an instrument capable of placing a time limit on its competence to consider individual cases concerning Chile, and whether or not this "declaration" is compatible with the object and purpose of the Optional Protocol and the Covenant.

6. As noted in the Protocol's preamble, its object is to achieve the purposes of the International Covenant on Civil and Political Rights and the implementation of its provisions. It was therefore deemed appropriate to enable the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.

7. The limitations on the Committee's competence to receive and consider communications from individuals are expressly set forth in the Protocol. The Committee shall consider inadmissible any communication which is anonymous, or which is an abuse of the right of submission of such communications or is incompatible with the provisions of the Covenant (article 3 of the Protocol). In addition, the Committee shall not consider any communication unless it has ascertained that the same matter has not been examined under another procedure of international examination or settlement and that all available domestic remedies have been exhausted (art. 5, para. 2).

8. Ratification or accession to the Protocol, which, in essence, constitutes a recognition of the Committee's competence, is a juridical act subject to the terms of that instrument. There is nothing in the Protocol that authorizes a State to enter "reservations" or make "declarations" for the purpose of restricting the Committee's competence under circumstances other than those expressly stated in the preceding paragraph. It can hardly be argued that the "declaration" made by Chile at the time of its accession to the Protocol is actually compatible with the aim set forth therein or with its object and purpose. It should therefore be concluded that this "declaration" may under no circumstances have the legal effect of rendering the Committee incompetent to consider a matter such as the case presented by Ms. Cifuentes Elgueta, which may involve continuing violations of some of the Covenant rights owing to the unique nature of the crime of enforced disappearance.

9. It is the obligation of an international human rights body such as the Committee to interpret a covenant as broadly as possible when it is a matter of recognizing or guaranteeing rights or the international competence to exercise oversight and to interpret it as narrowly as possible when it is a matter of restricting rights or the international competence of oversight bodies. Consequently, in the absence of any of the circumstances mentioned in paragraph 7 of this dissenting opinion, the Committee should have found the communication to be admissible and should therefore have proceeded to consider the matter on its merits.

II. Precise nature of the frameworks to be used for the interpretation and/or application of legal instruments by the Human Rights Committee

10. As is clearly stated in the dissenting minority opinion of the Human Rights Committee in *Norma Yurich v. Chile*, it is the Committee's obligation to "apply the Covenant, the whole

Covenant and nothing but the Covenant".[7] This does not, however, prevent the Committee from employing an evolutive interpretation of the International Covenant on Civil and Political Rights and enriching it by drawing upon elements of the contemporary corpus juris of international human rights law in order to accomplish its object and purpose more fully and arrive at an effective interpretation.

11. This interpretive task, which is an intrinsic function of a body belonging to a comprehensive international system for the promotion and protection of the inherent rights of each and every woman and man, should be performed on the basis of the *pro persona* principle and in line with that postulate's implications. International bodies have a responsibility to make sure that they do not end up adopting a decision that weakens standards already established in other jurisdictions. However, any new interpretation based on their own areas of competence that leads to the introduction of more protective interpretations makes a contribution to the system as a whole, creates greater safeguards for the rights of victims of human rights violations and sends a signal to States regarding their future conduct. This is without prejudice to the fact that, in any individual case, all that the Human Rights Committee has to decide is whether or not a communication is admissible and, if so, whether or not the established facts constitute one or more violations of the Covenant.

III. Enforced disappearance and its legal treatment in the International Covenant on Civil and Political Rights

12. Enforced disappearance is a grave violation of various rights set forth in the Covenant. It is important to understand the legal complexities that the temporal dimension of enforced disappearance, a continuing crime by definition, poses for an international tribunal such as the Human Rights Committee.

13. We are of the view that, for the reasons discussed in section I of this dissenting opinion, the Committee is competent to consider the facts and events constituting enforced disappearance in violation of the Covenant (starting with illegal deprivation of liberty). The consideration of possible violations of article 2, paragraph 3, read together with articles 6, 7, 9, 10, 16 and even article 23, paragraph 1, would seem to be in order.

14. We also believe that, even if the "declaration" made by Chile were to be given weight, in the *Cifuentes Elgueta* case the

[7] Communication No. 1078/2002, decision of 2 November 2005, appendix.

Committee could have considered possible violations which began after Chile acceded to the Protocol. There may well have been, for example, a violation of article 2, paragraph 3 (a), of the Covenant, which stipulates that each State party undertakes to ensure that any person whose rights or freedoms as therein recognized are violated has an effective remedy.

15. The obligation established in article 2, paragraph 3, of the Covenant entails, in our view, both obligations of means and obligations of result. As noted by the Human Rights Committee, "Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States parties must ensure that individuals also have accessible and effective remedies to vindicate those rights … Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies …" (emphasis added by the authors).[8]

16. Furthermore, paragraph 16 of general comment No. 31 states that "Article 2, paragraph 3, requires that States parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged … The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."

17. General comment No. 31 goes on to state that "Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (art. 7), summary and arbitrary killing (art. 6) and enforced disappearance (arts. 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained

[8] Human Rights Committee, general comment No. 31 (2004), "The nature of the general legal obligation imposed on States parties to the Covenant", *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40* (A/59/40), vol. I, annex III. para. 15.

concern by the Committee, may well be an important contributing element in the recurrence of the violations …" (para. 18).

18. Article 2, paragraph 3 (a), of the Covenant, which provides broad scope for seeking a remedy before competent judicial, administrative, legislative or other authorities, also clearly establishes the right to effective legal protection when one or more Covenant rights have been violated. This provision is reinforced by article 2, paragraph 3 (b), which establishes the obligation of any such authority to develop the possibilities of judicial remedy.

19. The right to effective judicial protection has evolved and developed over time and has taken on a specific meaning when applied to the Covenant rights that may have been violated. When international tribunals began to consider cases of enforced disappearance, they found that the existing general conventions (such as the International Covenant on Civil and Political Rights and other regional agreements) did not specifically address the question of enforced disappearance. This did not, however, prevent them from identifying human rights violations within their respective jurisdictions, as is apparent in the settled case law of the Human Rights Committee on the subject.

20. The practice of enforced disappearance has given rise to the formulation of new rights and their introduction, through evolutive interpretation, into these general instruments; the "right to the truth" is one example. Massive or systematic violations of fundamental human rights are an affront to the international community as a whole, generate *erga omnes* obligations and give rise to a duty to thoroughly investigate the relevant facts and events. The right to the truth thus has two different facets: an individual aspect (with the right holders being the victims of such violations and their families) and a collective one (the community). Within the United Nations, both the social dimension of the right to the truth and the individual's right to know have been fully recognized.[9] The actual exercise of the right to the truth is an important component of full reparation, but it is not in and of itself sufficient for that purpose. Revelation of the truth must be combined with the administration of justice in order to meet the requirements of contemporary international law for action against impunity.

21. The right to the truth is relevant to the work of the Human Rights Committee, which, in its consideration of reports

[9] United Nations, "Updated Set of principles for the protection and promotion of human rights through action to combat impunity" (E/CN.4/2005/102/Add.1), principles 1, 2, 4 and 5.

submitted by States parties, has said that victims of human rights violations must be allowed "... to find out the truth about those acts, to know who the perpetrators of such acts are and to obtain appropriate compensation".[10]

22. In keeping with this view, in its consideration of a number of individual communications under the Optional Protocol procedure, the Human Rights Committee stated that the author in a case concerning the enforced disappearance of her daughter had the right to know what had happened to her.[11]

23. Where does the "right to the truth" figure in the Covenant? Clearly it arises in connection with the right to an effective remedy (art. 2, para. 3 (a)), read in conjunction with the general obligation to respect and to ensure to all individuals the rights recognized in the Covenant, without distinction of any kind (art. 2, para. 1).

24. Under the Covenant, the right to the truth entails the right to obtain a clarification from the competent State bodies of the events constituting violation(s) and the persons responsible for them. Accordingly, the State must undertake an effective investigation of enforced disappearances in order to identify, prosecute and punish the perpetrators and instigators of such violations.

25. In *Nidia Erika Bautista de Arellana v. Colombia*, the Committee noted that States parties have a duty to thoroughly investigate human rights violations and to try and punish those deemed responsible for such violations.[12] This duty applies a fortiori in cases in which the perpetrators have been identified. This jurisprudence has been upheld in subsequent cases.[13]

26. In the light of the individual and social right to truth, the duty to investigate and try offences such as enforced disappearance has gradually been making the transition from being an obligation of means to being an obligation of result. A distinction should therefore be drawn among the different components of this State obligation.

27. The obligation to investigate refers to the pursuit of an exhaustive investigation by all means at the State's disposal, and

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[10] Human Rights Committee, "Concluding observations of the Human Rights Committee: Guatemala" (CCPR/C/79/Add.63), para. 25.

[11] Human Rights Committee, communication No. 107/1981, *Elena Quinteros v. Uruguay*, para. 14.

[12] Communication No. 563/1993, Views adopted on 27 October 1995.

[13] Human Rights Committee, communication No. 612/1995, *José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v. Colombia*, Views adopted on 29 July 1997, para. 8.8.

the State must do away with any legal or material obstacle that would hinder or limit that investigation. This obligation cannot be discharged merely through the adoption of formal measures or general actions. In order to fulfil its duty to investigate, the State must ensure that all public institutions extend all necessary facilities to the trial court. This means that they must furnish any information and documentation that the court requests, bring before the court any persons it designates, and take any steps that they are instructed to perform in that regard. The Committee should have examined the facts of the *Cifuentes Elgueta* case in this light, especially if the required parameters call for nothing more than a collective investigation as a consequence of the so-called "bridging laws". Investigations are supposed to establish the truth about what occurred and lead to the identification of the responsible parties so that they may be brought to justice.

28. There is an obligation to try alleged violators once they have been identified. The trial of such persons should be conducted in such a way as to fully uphold all the guarantees and rights set forth in the Covenant.

29. The obligation to make the whereabouts of disappeared persons known when the State is responsible for their disappearance is, in our view, an obligation of result. When the State has been responsible, it is not only ethically but also legally unacceptable for it to fail to provide family members with the answers they need to be able to mourn, as is their right, disappeared persons who have been extrajudicially executed. An "effective remedy" within the meaning of article 2, paragraph 3 (a), should be understood as a remedy that fulfils the purpose for which it was created, and in the case of an enforced disappearance, an effective remedy is one that allows the victim's whereabouts to be established. If the State has managed to "disappear" someone, then it should be able to explain how it did so and where that person is, or where his or her remains are to be found.

30. Another violation that may occur in this type of case, although it was not alleged in the communication submitted by Ms. Cifuentes Elgueta, is the one occasioned by the cruel or inhuman treatment experienced by a family member of someone who has disappeared as the result of an act or omission for which the State is responsible when the State withholds all information regarding the disappeared person's fate. In *Norma Yurich v. Chile*,[14] the Committee had the opportunity to express its views on that line of argument. Unfortunately, the majority opinion does not explain

[14] Note a above.

why that alleged violation was not explored from a legal standpoint.

31. In fact, the anguish suffered by someone with emotional ties to a disappeared person (e.g., a close relative, such as the person's mother) who does not know the victim's fate constitutes, in the absence of evidence to the contrary demonstrating a lack of genuine affection, a violation of article 7 of the Covenant. If the person has died, family members must be allowed to exercise their right to mourn the person so that they may try to continue on as best as they can under such tragic circumstances, and the State should guarantee them that right.

IV. Concluding remarks

32. Given the complexity of cases of enforced disappearance, it is incumbent upon the Human Rights Committee to pay very close attention to the time when the possible human rights violations were committed in deciding whether or not it is competent to consider a case. It must be understood that there are instances in which the point in time when an act constituting an autonomous violation of the Covenant was committed may be subsequent to the time when the person was deprived of his or her liberty.

33. International human rights law has clearly been evolving towards a point where justice can be effectively rendered to victims of aberrant violations such as enforced disappearances. We have moved beyond the false dichotomy of truth and justice, and attempts to render effective material justice should be staunchly supported by international human rights bodies to the extent that their terms of reference allow them to do so.

34. Crimes against humanity do serious harm to international society as a whole and are not to be tolerated under contemporary international law. The investigation and punishment of persons responsible for such crimes are ethical imperatives that place upon States an obligation to deploy all possible efforts to put an end to impunity and learn the truth about what happened.

35. It is our hope that in the future the Human Rights Committee's jurisprudence may move forward along the line of reasoning outlined in this dissenting opinion based on a sincere understanding that not only is it legally compatible with the International Covenant on Civil and Political Rights and its Optional Protocol, but that this is also the most effective interpretation of the object and purpose of these instruments.

(*Signed*) Ms. Helen **Keller**

(*Signed*) Mr.
Fabián **Salvioli**

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]