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Communication No. 1779/2008

Views adopted by the Committee at its 106th session (15 October–2 November 2012)

Submitted by : Aïssa Mezine (represented by TRIAL – Swiss Association against Impunity)

Alleged victims : Bouzid Mezine (brother of the author) and the author himself

State party : Algeria

Date of communication : 31 March 2008 (date of initial submission)

Document references : Special Rapporteur's rule 97 decision, transmitted to the State party on 24 April 2008 (not issued in document form)

Date of adoption of Views : 25 October 2012

Subject matter: Enforced disappearance

Procedural issues : Exhaustion of domestic remedies

Substantive issues: Right to life, prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, recognition as a person before the law and right to an effective remedy

Articles of the Covenant : Article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1 to 4; article 10, paragraph 1; and article 16

Article of the Optional Protocol: Article 5, paragraph 2 (b)

Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (106th session)

concerning

Communication No. 1779/2008 *

Submitted by : Aïssa Mezine (represented by TRIAL – Swiss Association against Impunity)

Alleged victims : Bouzid Mezine (brother of the author) and the author himself

State party : Algeria

Date of communication : 31 March 2008 (date of initial submission)

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

Meeting on 25 October 2012,

Having concluded its consideration of communication No. 1779/2008, submitted to the Human Rights Committee by Aïssa Mezine, under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1.1The author of the communication, dated 31 March 2008, is Aïssa Mezine, an Algerian citizen born on 6 July 1960 in Kouba, wilaya of Algiers. The author maintains that his brother, Bouzid Mezine, of Algerian nationality, born in Kouba (Algiers) on 1 December 1963, is the victim of violations by Algeria of article 2 (para. 3), article 6 (para. 1), article 7, article 9 (paras. 1 to 4), article 10 (para. 1), article 16 and article 17 (para. 1), of the Covenant. The author also considers himself to be the victim of violations by the State party of article 2 (para. 3), article 7 and article 17 (para. 1), of the Covenant. The author and his brother are represented by TRIAL (the Swiss Association against Impunity).

1.2On 12 March 2009, the Committee, through the Special Rapporteur on new communications and interim measures, decided not to consider the admissibility and the substance of the case separately.

The facts as submitted by the author

2.1On 11 August 1996, between 1.30 and 2 a.m., a military detachment entered the Mezine family home in Algiers. They were accompanied by men wearing civilian clothes, who said they were members of the military security services. They arrested Bouzid Mezine in front of his family and neighbours. Approximately 20 agents carried out a search. At no point did they produce an arrest warrant or a search warrant. The father of the victim asked why his son was being arrested and where he would be taken. The soldiers replied that they would take the victim to the Cherarba barracks, but they set off in a different direction (towards Ben Aknoun).

2.2Since that night, the victim has never returned. No member of his family has been able to see him or contact him, and the authorities have never given any information to the family of his whereabouts, despite the repeated requests made to the competent authorities. In October 1996, a fellow prisoner who had been released said that the missing person was at the Blida military prison. This information was confirmed by a member of the army, speaking in his personal capacity.

2.3The victim's father waited 48 hours, the legal time limit for police custody. He then looked for his son in many barracks and police stations in the region. He also contacted the various courts of Algiers to find out whether the victim had been brought before a prosecutor. On several occasions, he wrote to both civil and military authorities, without receiving any reply. He contacted the President of the Observatory on Human Rights, the President of the Republic and the Minister of Justice, requesting that a search be undertaken for the missing person, information regarding his whereabouts and an explanation of the reasons for his arrest. The author also applied to the Ombudsman of the Republic with the same request. On 23 February 1997, the latter gave a reply but no information about the fate of the victim.

2.4At the same time, the victim's father asked the public prosecutor of the Court of Hussein Dey, and his superior, the chief prosecutor of the Court of Algiers, to inform him of the charges held against his son and to investigate his abduction. On 21 March 1999, the investigating magistrate of the First Chamber of the Court of Hussein Dey dismissed the case on the grounds that at that date, there was no known accused. Subsequently, the prosecutor's office of the Court of Hussein Dey informed the family that, because the victim had been arrested by members of the army, only the prosecutor of the Blida military court was competent to investigate and, if necessary, to institute legal proceedings. On 2 August 1999, a complaint was lodged with this authority.

2.5More than seven months after lodging this complaint, the victim's father informed the Civil Court of Hussein Dey that the eyewitnesses to the abduction had still not been summoned to make their statements. No investigation had been launched, even though two neighbours who were present on the night had given their version of the events in a statement, authenticated by the *wilaya* of Algiers on 12 February 1998. The victim's father also made a statement on 7 March 2000. These statements were not entered in the military court's case file. In the absence of any effective investigation, no legal proceedings were initiated, either before the civil courts or before the military courts. The family received no information from any formal investigation into the fate of the victim.

2.6The Prosecutor of the Court of Hussein Dey, who had discontinued criminal proceedings, submitted an application instituting proceedings before a civil judge, in order to register the victim as a missing person. On 28 February 2000, the victim's father was summoned to appear before a hearing of the same court that was held on 11 March 2000. He pointed out that while an investigation was being conducted by the military court, the civil court should not issue an opinion on his son's disappearance, and he therefore requested the court to defer judgement. The court granted the father's request to defer a decision.

2.7On 19 October 1998, the family submitted the victim's case to the United Nations Working Group on Enforced or Involuntary Disappearances. Algeria failed to reply to the Working Group's requests for information.

2.8The author is unable to initiate legal proceedings in view of the promulgation of Ordinance No. 06-01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation. While domestic remedies were useless and ineffective in the first place they had simply become unavailable.

The complaint

3.1Bouzid Mezine was the victim of an enforced disappearance on 11 August 1996. The author refers to article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court, and article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance. As the victim of enforced disappearance, Bouzid Mezine himself was prevented from exercising his right of appeal to challenge the lawfulness of his detention. His family used all the legal means available to find out the truth regarding his fate, but they encountered no response.

3.2As more than 15 years have passed since his disappearance at a secret detention centre, there is very little hope of finding Bouzid

Mezine alive. The author considers that incommunicado detention involves a high risk of violation of the right to life. The threat posed by enforced disappearance to the victim's life thus constitutes a violation of article 6, to the extent that the State has failed in its obligation to protect the fundamental right to life, all the more so since the State party has made no effort to investigate the fate of Bouzid Mezine. The author therefore alleges that the State party has violated article 6, read in conjunction with article 2, paragraph 3, of the Covenant.

3.3As regards the victim, merely being subjected to an enforced disappearance constitutes inhuman or degrading treatment. The anguish and the suffering caused by indefinite detention without contact with the family or the outside world constitutes treatment in breach of article 7 of the Covenant. For the author, moreover, Bouzid Mezine's disappearance resulted in a paralysing, painful and agonizing ordeal, in violation of article 7 of the Covenant.

3.4Bouzid Mezine was arrested by soldiers without a warrant, and without being informed of the reasons for his arrest. During his interrogation, he was not informed of the criminal charges against him. Furthermore, he was not promptly brought before a judge or other judicial authority, which should not take longer than a few days, while incommunicado detention can itself lead to a violation of article 9, paragraph 3. As a victim of enforced disappearance, Bouzid Mezine was not physically able to appeal against the legality of his detention, or to apply to a judge to obtain his release. These facts constitute violations of article 9, paragraphs 1 to 4, of the Covenant.

3.5If it is assumed that Bouzid Mezine has been the victim of a violation of article 7, it cannot be argued that he was ever treated in a humane manner, or with respect for the inherent dignity of the human person. Consequently, the author maintains that the State party has also violated article 10, paragraph 1, of the Covenant.

3.6As the victim of an unacknowledged detention, Bouzid Mezine was also reduced to the status of a non-person, in violation of article 16 of the Covenant. In this regard, the author notes that enforced disappearance essentially entails the negation of the right to legal personality, insofar as the refusal of the authorities to reveal the fate of the missing person or even to admit that he has been deprived of his liberty denies that person the protection of the law.

3.7State officials searched the Mezine family home in the middle of the night at 2 a.m., without producing a warrant, and consequently in violation of article 17, of the Covenant, in the sense defined by the Committee in its general comment on article 16 (1988).

3.8As a victim of enforced disappearance, Bouzid Mezine was, de facto, prevented from exercising his right to challenge the legality of his detention, as guaranteed under article 2, paragraph 3, of the Covenant. As for the author and his family, they used all legal avenues available to discover the truth about the fate of the victim, but their efforts met with no response by the State party, despite the latter's obligation to ensure an effective remedy, including the obligation to carry out a thorough and effective investigation into the case. The author therefore maintains that the State party has violated article 2, paragraph 3, with respect to Bouzid Mezine and to himself.

3.9Bouzid Mezine's family members do not know for certain whether he is still alive, and continue to hope that he may be held incommunicado somewhere. Their hope has been further strengthened by continuing reports that a number of secret detention centres remain in Algeria, both in the south and in Oued Namous, where thousands of persons had already been placed in administrative detention between 1992 and 1995, and in the north of the country, in particular in the barracks and centres belonging to the Intelligence and Security Department. The author therefore fears that, should the victim still be alive, the officials or services holding him could be tempted in the event to make him "disappear" for good. Moreover, under article 46 of the Ordinance enacting the Charter for Peace and National Reconciliation, prison sentences may be handed down against persons filing legal complaints against abuses such as those to which Bouzid Mezine was subjected. The author therefore requests that the Committee ask the Algerian Government to release Bouzid Mezine if he is still in incommunicado detention and to take all necessary measures to avoid irreparable harm to the victim, and also to refrain from applying the provisions of articles 45 and 46 of the Ordinance of 27 February 2006 enacting the Charter for Peace and National Reconciliation to the author or any of the victim's relatives, from invoking the above-mentioned articles and from threatening the author in any way with the aim of depriving him of his right to apply to the Committee.

State party's observations on the admissibility of the communication

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

4.2During that period, the Government had to fight against groups that were not coordinated among themselves. As a result, there was some confusion in the manner in which a number of operations were carried out among the civilian population, and it was difficult for civilians to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. Hence, according to the State party, while enforced disappearances may be due to many causes, they cannot be blamed on the Government. On the basis of data recorded by a variety of independent sources, including the press and human rights organizations, it may be concluded that the concept of disappearances in Algeria during the period in question covers six possible scenarios, none of which can be blamed on the State. The first scenario cited by the State party concerns persons reported missing by their relatives but who in fact had chosen to go into hiding in order to join an armed group and who instructed their families to report that they had been arrested by the security services, as a way of "covering their tracks" and avoiding being "harassed" by the police. The second scenario concerns persons who were reported missing after their arrest by the security services but who took advantage of their subsequent release to go into hiding. The third scenario concerns persons abducted by armed groups which,

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

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

4.4The State party further argues that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities involving the political or administrative authorities, non-judicial remedies pursued through advisory or mediation bodies, and judicial remedies pursued through the relevant courts of justice. The State party observes that, as may be seen from the authors’ statements, the complainants have written letters to political and administrative authorities, petitioned advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but have not, strictly speaking, initiated legal action and seen it through to its conclusion by availing themselves of all available remedies of appeal and judicial review. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to the investigating judge. In the Algerian legal system, it is the public prosecutor who receives complaints and who, if warranted, institutes criminal proceedings. Nevertheless, in order to protect the rights of victims or their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint with the investigating judge. In this case, it is the victim, not the prosecutor, who initiates criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not utilized, despite the fact that it would have enabled the victims to institute criminal proceedings and compel the investigating judge to initiate proceedings, even if the prosecution service had decided otherwise.

4.5The State party also notes the author’s contention that the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation — in particular, article 45 of Ordinance No. 06-01 — rules out the possibility that any effective and available domestic remedies exist in Algeria to which the families of victims of disappearance could have recourse. On this basis, the author believed he did not need to bring the matter before the relevant courts, in view of the latter’s likely position and findings regarding the application of the ordinance. However, the author cannot invoke this ordinance and its implementing legislation as a pretext for failing to institute the legal proceedings available to him. The State party recalls the Committee’s jurisprudence to the effect that a person’s subjective belief in, or presumption of, the futility of a remedy does not exempt that person from the requirement to exhaust all domestic remedies.

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

4.7In addition to the establishment of funds to compensate all victims of the “national tragedy”, the sovereign people of Algeria have, according to the State party, agreed to a process of national reconciliation as the only way to heal the wounds inflicted. The State party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, media outpourings and political score settling. The State party is therefore of the view that the author’s allegations are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.8The State party asks the Committee to note how similar the facts and situations described by the author are and to take into account the sociopolitical and security context in which they occurred; to find that the author failed to exhaust all domestic remedies; to recognize that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in these communications through measures aimed at achieving peace and national reconciliation consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the communication inadmissible; and to request that the author seek an alternative remedy.

Additional observations by the State party on the admissibility of the communication

5.1 On 9 October 2009, the State party transmitted a further memorandum to the Committee, in which it raises the question of whether the submission of a series of individual communications might not actually amount to an abuse of procedure aimed at bringing before the Committee a broad historical issue involving causes and circumstances of which the latter is unaware. The State party observes in this connection that these “individual” communications dwell on the general context in which the disappearances occurred, focusing solely on the actions of the security forces and never mentioning those of the various armed groups that used criminal concealment techniques to incriminate the armed forces.

5.2 The State party insists that it will not address the merits of these communications until the issue of their admissibility has been settled, since all judicial or quasi-judicial bodies have a duty to deal with preliminary questions before considering the merits. According to the State party, the decision in the cases in point to consider questions of admissibility and the merits jointly and simultaneously — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications in terms of both their general nature and their intrinsic particularities. Referring to the rules of procedure of the Human Rights Committee, the State party notes that the sections relating to the Committee’s procedure to determine the admissibility of communications are separate from those relating to the consideration of communications on the merits, and that therefore these questions could be considered separately. Concerning the exhaustion of domestic remedies, the State party stresses that for none of the complaints or requests for information he submitted, the author used channels that would have allowed consideration of the case by the Algerian judicial authorities.

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

5.4 In a note verbale dated 6 October 2010, the State party reiterated its observations regarding admissibility, which had been submitted to the Committee in a note verbale of 3 March 2009.

Author’s comments on the State party’s submission

6.1 On 23 September 2011, the author submitted comments on the State party’s observations on admissibility and provided additional arguments on the merits.

6.2 The author points out that the State party has recognized the competence of the Committee to consider individual communications. This competence is of a general nature and its exercise by the Committee is not subject to the discretion of the State party. In particular, it is not for the State party to determine whether it is appropriate for the Committee to take up a specific case. That is for the Committee to decide when it considers the communication. Referring to article 27 of the Vienna Convention, the author considers that the State party’s adoption of domestic legislative and administrative measures to support the victims of the “national tragedy” cannot be invoked at the admissibility stage to prohibit individuals subject to its jurisdiction from using the procedure provided for under the Optional Protocol. In theory, such measures may well have an impact on the settlement of a dispute, but they must be studied with regard to the merits of the case and not to its admissibility. In the present case, the legislative measures adopted amount to a violation of the rights enshrined in the Covenant, as the Committee has previously observed.

6.3 The author recalls that Algeria’s declaration of the state of emergency on 9 February 1992 does not affect the right of persons to submit individual communications to the Committee. Article 4 of the Covenant allows for derogations from certain provisions of the Covenant only during states of emergency, but does not affect the exercise of rights under the Optional Protocol. The author therefore considers that the State party’s observations on the appropriateness of the communication do not constitute a ground for inadmissibility.

6.4 The author also refers to the State party’s argument that the requirement to exhaust domestic remedies calls on the author to institute criminal proceedings by filing a complaint with the investigating judge, in accordance with articles 72 et seq. (paras. 25 ff.) of the Code of Criminal Procedure. He refers to the Committee’s recent jurisprudence in the Benaziza case, in which it stated in its Views adopted on 27 July 2010 that “the State party has a duty not only to carry out thorough investigations of alleged violations of human rights, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations. To sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor.” The author therefore considers that, given the serious nature of the alleged offences, it was the responsibility of the competent authorities to take up the case. However, no action was taken, even though members of Bouzid Mezine’s family attempted, from the date of his arrest on 11 August 1996, to make enquiries with various army barracks, the police and prosecutors in the region concerning his whereabouts, but to no avail.

6.5 The victim’s father petitioned the prosecutor of the Court of Hussein Dey and the chief prosecutor of the Court of Algiers regarding his son’s case, asking them to take the necessary steps to ascertain the facts. Then, on the advice of the Hussein Dey prosecutor, he petitioned the military prosecutor of Blida, who failed to undertake a serious investigation into Bouzid Mezine’s disappearance. In the absence of any effective investigation, no legal action was ever taken. At the same time, Bouzid Mezine’s brother and father wrote to the national authorities, including the Ombudsman of the Republic, the President of the National Observatory for Human Rights, the President of the Republic and the Minister of Justice, none of whom provided any information regarding the victim. These actions did not lead to an effective investigation, or to the prosecution and conviction of those responsible

for this enforced disappearance, or to redress for the family of the missing person. The authorities are responsible for prosecuting such cases, and the author should not therefore in the circumstances be blamed for not instigating legal proceedings.

6.6As to the State party's argument that mere "subjective belief or presumption" does not exempt the author of a communication from the requirement to exhaust all domestic remedies, the author cites article 45 of Ordinance No. 06-01, whereby legal proceedings may not be brought against individuals or groups who are members of any branch of the defence or security forces. Any person making such a complaint or allegation is liable to a term of imprisonment of 3 to 5 years or a fine of between DA 250,000 and DA 500,000. The State party has therefore not convincingly demonstrated how suing for damages would have enabled the competent courts to receive and investigate complaints, as that would involve violating article 45 of the Ordinance, or how the author of a complaint could have been guaranteed immunity from prosecution under article 46 of the Ordinance. As treaty body jurisprudence confirms, a reading of these provisions leads to the conclusion that any complaint regarding the violations suffered by the author and Bouzid Mezine would be not only declared inadmissible, but also treated as a criminal offence. The author notes that the State party fails to provide an example of any case which, despite the existence of the above-mentioned Ordinance, has led to the effective prosecution of the perpetrators of human rights violations in a similar case. The author concludes that the remedies mentioned by the State party are futile.

6.7With respect to the merits of the communication, the author notes that the State party has simply listed a number of scenarios according to which the victims of the "national tragedy" in general terms might have disappeared. Such general comments do not refute the allegations made in the present communication. In fact similar comments have been put forward in a number of other cases, which shows the State party's continuing unwillingness to consider such cases individually.

6.8With regard to the State party's argument that it is entitled to request that the admissibility of the communication be considered separately from the merits, the author refers to rule 97, paragraph 2, of the rules of procedure, which states that the "working group or special rapporteur may, because of the exceptional nature of the case, request a written reply that relates only to the question of admissibility". Consequently, it is not for the author of the communication or the State party to take such decisions, which are the sole prerogative of the working group or special rapporteur. The author considers that the present case is no different from other cases of enforced disappearance, and that admissibility should not be considered separately from the merits.

6.9Lastly, the author notes that the State party has not countered his allegations. These are corroborated and substantiated by numerous reports on the security forces' actions at the time, and by the author's own persistent efforts. In view of the State party's involvement in the disappearance of his brother, the author is unable to provide additional information in support of his communication, as that information is entirely in the hands of the State party. The author also notes that the lack of any submissions from the State party regarding the merits of the case is tantamount to the State party's acquiescence that violations were committed.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearance of Bouzid Mezine was reported to the Working Group on Enforced or Involuntary Disappearances in 1998. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, and whose mandates are to examine and report publicly on human rights situations in specific countries or territories, or cases of widespread human rights violations worldwide, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol. Accordingly, the Committee considers that the examination of Bouzid Mezine's case by the Working Group on Enforced or Involuntary Disappearances does not render it inadmissible under this provision.

7.3The Committee notes that, in the State party's view, the author has not exhausted domestic remedies, since he did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. The Committee notes that, according to the State party, the author and his father wrote letters to political and administrative authorities, petitioned advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but have not actually initiated legal proceedings and seen them through to their conclusion by availing themselves of all available remedies of appeal and cassation. The Committee notes the author's contention that Bouzid Mezine's father approached the prosecutor of the Court of Hussein Dey and the chief prosecutor of the Court of Algiers regarding his son's case, asking them to take the necessary steps to ascertain the facts. He then petitioned the military prosecutor of Blida. The author and his father also wrote to the national authorities. No information regarding the victim was provided and the actions described led neither to an effective investigation nor to the prosecution and conviction of those responsible. Lastly, the Committee notes that, according to the author, article 46 of Ordinance No. 06-01 penalizes any person who files a complaint pertaining to actions covered by article 45 thereof.

7.4The Committee recalls that the State party has a duty not only to carry out thorough investigations of alleged violations of human rights brought to the attention of its authorities, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations. Although Bouzid Mezine's family repeatedly contacted the competent authorities concerning his disappearance, the State party failed to conduct a thorough and effective investigation into the disappearance of the author's brother, despite the fact that serious allegations of enforced disappearance were involved. The State party has also failed to provide sufficient evidence that an effective remedy is de facto available, since Ordinance No. 06-01 of 27 February 2006 continues to be applicable despite the Committee's recommendations that it should be brought into line with the

Covenant. Reiterating its previous jurisprudence, the Committee considers that to sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor. Moreover, given the vague wording of articles 45 and 46 of the Ordinance and, in the absence of satisfactory information from the State party about their interpretation and actual enforcement, the author's fears regarding the possible consequences of filing a complaint are reasonable. The Committee concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the communication.

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

Consideration of the merits of the case

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

8.2 As the Committee has emphasized in connection with previous communications in which the State party provided general and collective comments on the serious allegations made by the authors of such complaints, it is clear that the State party has been content to argue that communications incriminating public officials, or persons acting on behalf of public authorities, in cases of enforced disappearance between 1993 and 1998, must be looked at in the broader context of the domestic sociopolitical and security environment that prevailed during a period in which the Government had to deal with terrorism. The Committee recalls its concluding observations concerning Algeria of 1 November 2007 as well as its jurisprudence whereby the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the provisions of the Covenant.

8.3 The Committee notes that the State party has not replied to the author's 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 holds the necessary information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with whatever information is available to it. In the absence of any explanations from the State party in this respect, due weight must be given to the author's allegations, provided they have been sufficiently substantiated.

8.4 The Committee notes that, according to the author, his brother, Bouzid Mezine, was arrested by soldiers during the night of 11 August 1996, which was the last time he was seen by his family; that in October 1996, a fellow prisoner who had been released reported that the missing person was in Blida military prison and that this information was confirmed to the family by a member of the army speaking in his personal capacity. Although Bouzid Mezine's family still hopes to find him alive, the Committee notes the author's and his family's fear that he may be deceased in view of his prolonged disappearance. The Committee notes that the State party has produced no evidence refuting the author's allegation. The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, removes the person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable. In the case at hand, the Committee notes that the State party has produced no evidence to indicate that it has fulfilled its obligation to protect Bouzid Mezine's life. Therefore the Committee concludes that the State party has failed in its duty to protect Bouzid Mezine's life, in violation of article 6, paragraph 1, of the Covenant.

8.5 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 on article 7 (1992), which recommends that States parties should make provision to ban incommunicado detention. It notes in the current case that Bouzid Mezine was arrested on 11 August 1996, and that his whereabouts have not been known since. In the absence of a satisfactory explanation from the State party, the Committee considers that this disappearance constitutes a violation of article 7 of the Covenant with respect to Bouzid Mezine.

8.6 The Committee also takes note of the anguish and distress caused to the author by Bouzid Mezine's disappearance. It considers that the facts before it disclose a violation with respect to him of article 7 of the Covenant read alone and in conjunction with article 2, paragraph 3.

8.7 With regard to the alleged violation of article 9, the Committee notes the author's statement to the effect that Bouzid Mezine was arrested on 11 August 1996 by uniformed soldiers, without a warrant, and without being informed of the reasons for his arrest (see para. 2.1); that Bouzid Mezine was not informed of the criminal charges against him and was not brought before a judge or other judicial authority, which would have enabled him to challenge the legality of his detention; and that no official information was given to the author and his family regarding the victim's whereabouts or his fate. In the absence of satisfactory explanations from the State party, the Committee finds a violation of article 9 with respect to Bouzid Mezine.

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

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

relatives to obtain access to potentially effective remedies, including judicial remedies (art. 2, para. 3 of the Covenant) have been systematically impeded. In the present case, the Committee notes that the State party has not furnished adequate explanations concerning the author's allegations that he has had no news of his brother. The Committee concludes that Bouzid Mezine's enforced disappearance 16 years ago denied him the protection of the law and deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

8.10 With regard to the alleged violation of article 17, the Committee notes that the State did not provide any justification or clarification as to the entrance of law enforcement officials into the Mezine family home in the middle of the night at 2 a.m. without producing a warrant. The Committee concludes that the entrance of law enforcement officials into the family home of Mr. Bouzid in such circumstances constitutes an arbitrary and unlawful interference with their privacy, family, and home, in violation of article 17 of the Covenant.

8.11 The author invokes article 2, paragraph 3, of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose Covenant rights have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (80) (2004), whereby the failure by a State party to investigate allegations of violations could in itself give rise to a separate breach of the Covenant. In the current case, although the victim's family repeatedly contacted the competent authorities regarding Bouzid Mezine's disappearance, including judicial authorities such as the public prosecutor, all their efforts led to nothing, or even proved dissuasive, and the State party failed to conduct a thorough and effective investigation into the disappearance of the author's brother. Furthermore, the absence of the legal right to undertake judicial proceedings since the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation continues to deprive Bouzid Mezine, the author and his family of any access to an effective remedy, since the Ordinance prohibits, on pain of imprisonment, the initiation of legal proceedings to shed light on the most serious crimes, such as enforced disappearances. The Committee concludes that the facts before it reveal a violation of article 2 (para. 3), read in conjunction with article 6 (para. 1); article 7; article 9; article 10 (para. 1), article 16 and article 17 of the Covenant with regard to Bouzid Mezine and of article 2 (para. 3), read in conjunction with article 7 and 17 of the Covenant, with respect to the author.

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

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, including by: (a) conducting a thorough and effective investigation into the disappearance of Bouzid Mezine; (b) providing the author and his family with detailed information about the results of its investigation; (c) releasing him immediately if he is still being detained incommunicado; (d) in the event that Bouzid Mezine is deceased, handing over his remains to his family; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the author for the violations suffered and to Bouzid Mezine, if he is still alive. Notwithstanding the terms of Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for crimes such as torture, extrajudicial killings and enforced disappearances. The State party is also under an obligation to take steps to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for 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 concerning the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them broadly in the official languages of the State party.

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