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HUMAN RIGHTS COMMITTEE
Ninetieth session
9-27 July 2007

**VIEWS**

**Communication No. 1173/2003**

| | |
|---|---|
| *Submitted by*: | Mr. Abdelhamid Benhadj (represented by counsel, Mr. Rachid Mesli) |
| *Alleged victim*: | Ali Benhadj (the author's brother) |
| *State party*: | Algeria |
| *Date of communication*: | 31 March 2003 (initial submission) |
| *Document references*: | Special Rapporteur's rule 97 decision, transmitted to the State party on 14 July 2003 (not issued in document form) |
| *Date of adoption of Views*: | 20 July 2007 |
| *Subject matter*: | Arbitrary detention |
| *Procedural issues*: | Power of attorney |

* Made public by decision of the Human Rights Committee.

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| *Substantive issues*: | Right to liberty and security of person; arbitrary arrest and detention; right to be treated with humanity and with respect for the inherent dignity of the human person; right to a fair hearing; a competent, independent and impartial tribunal; right to freedom of expression |
| *Articles of the Covenant*: | 7, 9, 10, 12, 14 and 19 |
| *Articles of the Optional Protocol*: | - |

On 20 July 2007, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1173/2003.

**[ANNEX]**

**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**

**Ninetieth session**

**concerning**

**Communication No. 1173/2003***

| | |
|---|---|
| *Submitted by*: | Mr. Abdelhamid Benhadj (represented by counsel, Mr. Rachid Mesli) |
| *Alleged victim*: | Ali Benhadj (the author's brother) |
| *State party*: | Algeria |
| *Date of communication*: | 31 March 2003 (initial communication) |
| *Date of adoption of Views*: | 20 July 2007 |

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

*Meeting* on 20 July 2007,

*Having concluded* its consideration of communication No. 1173/2003, submitted to the Human Rights Committee by Abdelhamid Benhadj on behalf of Ali Benhadj (his brother) under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

*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, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

The texts of two individual opinions signed by Committee members Mr. Abdelfattah Amor and Mr. Ahmed Tawfik Khalil are appended to the present document.

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

1. The author of the communication, dated 31 March 2003, is Abdelhamid Benhadj, who is submitting the communication on behalf of his brother, Ali Benhadj, born on 16 December in 1956 in Tunis. The author claims that his brother is a victim of violations by Algeria of articles 7, 9, 10, 12, 14 and 19 of the International Covenant on Civil and Political Rights (the Covenant). He is represented by Mr. Rachid Mesli. The Covenant and its Optional Protocol entered into force for the State party on 12 December 1989.

### The facts as submitted by the author

2.1 Ali Benhadj is one of the founding members and, at the time of submission of the communication, the Vice-President of the Front Islamique du Salut (Islamic Salvation Front - FIS), an Algerian political party registered by the State party on 12 September 1989, following the introduction of political pluralism. In the context of upcoming elections and following the gains made by FIS in the 1990 local elections, the Algerian Government was to adopt a new electoral law which was unanimously condemned by all the Algerian opposition parties. In protest against this law, FIS organized a general strike, accompanied by peaceful sit-ins in public squares. After several days of strikes and peaceful marches, the parties agreed to end the protests in exchange for a revision of the electoral law in the near future. However, on 3 June 1991, the Head of Government was asked to resign and the public squares were stormed by the Algerian army.

2.2 On 29 June 1991, Ali Benhadj was arrested by military security officers at the State television headquarters, where he had gone to present his party's position. On 2 July 1991, he was brought before the military prosecutor of Blida and charged with "crimes against State security" and "jeopardizing the proper functioning of the national economy". In particular, he was accused of having organized a strike, which the prosecution characterized as subversive, since it had allegedly caused serious damage to the national economy. Ali Benhadj's counsel challenged the validity of the proceedings before the military tribunal and the lawfulness of the investigation led by a military judge subordinate to the prosecuting authority. According to the defence,[1] the tribunal had been established to remove the leaders of the main opposition party from the political scene and did not have jurisdiction to hear the case, being competent only to try offences against the Criminal Code and the Code of Military Justice committed by military personnel in the performance of their duties or by civilians acting as accomplices to an offence of which the main perpetrator is a member of the armed forces. The jurisdiction of military tribunals to try political offences, pursuant to a law of 1963, had been de facto abolished with the establishment, in 1971, of a special National Security Court to deal with this type of offence. That court had been dissolved after the introduction of political pluralism in 1989, and thus the general rules on jurisdiction should apply.

[1] Counsel submitted the defence statement dated 18 July 1992, denouncing serious irregularities in the proceedings.

2.3 FIS won the first round of parliamentary elections on 26 December 1991; the day after the official results were announced, the military prosecutor was supposed to inform the defence lawyers of his intention to discontinue proceedings against Ali Benhadj. However, on 12 January 1992, the President of the Republic "resigned", a state of emergency was declared, parliamentary elections were cancelled, and "administrative internment" camps were installed in southern Algeria. On 15 July 1992, the military court of Blida sentenced Ali Benhadj in absentia to 12 years' rigorous imprisonment. The appeal against this decision was rejected by the Supreme Court on 15 February 1993, whereupon the sentence became final.

2.4 At the time of submission of the communication, Mr. Benhadj was still in prison. All his co-defendants were released after serving part of their sentences. During his time in detention, he was held in different forms of confinement and was treated differently according to whether he was considered by the military authorities to be a political interlocutor. From July 1991 to April 1993, he was detained in the military prison of Blida, where he was subjected to physical violence, in particular for having asked to be treated in accordance with the law and the prison regulations, and for having rejected political overtures by the military authorities. He was subsequently transferred to the civilian prison of Tizi-Ouzou, where he was held in solitary confinement on death row for several months. He was transferred back to Blida military prison, where he was held until political negotiations broke down and he was transferred, on 1 February 1995, to a military barracks in the far south of Algeria. There he was held incommunicado for four months and six days and confined to a tiny punishment cell without ventilation or sanitary facilities. He was then transferred to a State residence normally reserved for dignitaries visiting Algeria, new negotiations having begun between a "national commission" chaired by General Liamine Zeroual and the FIS leaders.

2.5 On the day on which negotiations broke down - which General Zeroual attributed to Mr. Benhadj - the latter was again transferred to a secret place of detention, probably a military security barracks, in the far south of Algeria. He was kept in complete isolation in a tiny punishment cell[2] with no opening onto the outside, except for a hatch in the ceiling, and there he lost all sense of time. He was confined there for two years. He was permitted to write to all the official authorities (the President, the Head of Government, the Minister of Justice, the military authorities) and was assured that his letters would reach the addressees. He went on numerous hunger strikes, which were brutally suppressed by his guards. He was not allowed visits by his family, much less his lawyers.

2.6 In the autumn of 1997, he was again transferred to Blida military prison, where he was held incommunicado and subjected to ill-treatment for almost two years. Thus, over a period of four years, his family did not know where he was being detained and whether he was still alive. Only in 1999 was his family informed of his place of detention and authorized to visit him. In January 2001, his family noted that his conditions of detention had again deteriorated, after he had written to the President of the Republic. On 16 January 2001, Mr. Mesli referred the case of Mr. Benhadj to the Working Group on Arbitrary Detention. On 3 December 2001, the Working Group found that the deprivation of his liberty was arbitrary and in contravention of articles 9 and 14 of the Covenant. The Working Group requested the State party to "take the necessary

[2] It was too small for him to be able to stand up or lie down.

steps to remedy the situation and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the [...] Covenant".[3] No such steps have been taken by the State party.

**The complaint**

3.1 The author claims that the facts as submitted by him reveal violations of articles 7, 9, 10, 12, 14 and 19 of the Covenant in respect of his brother, Ali Benhadj.

3.2 As regards the allegations concerning articles 9, 12 and 19 of the Covenant, the indictment of Ali Benhadj for crimes against State security is politically motivated: no specific acts which could be classified as offences were proven by the prosecution. Mr. Benhadj was accused of having initiated a political strike described as subversive by the military authorities, not the civil judicial authorities. That strike was brutally suppressed by the Algerian army, despite its peaceful nature and the guarantees given by the Head of Government. Even assuming that an act of political protest could be described as a criminal offence, which is not the case under domestic legislation, the protest came to an end once an agreement between the Head of Government and the party co-chaired by Ali Benhadj had been reached. The sole aim of his arrest by the military security services at the State television headquarters, where he had gone to explain his position, and of his indictment before a military court, was clearly to remove one of the main leaders of an opposition party from the Algerian political scene.

3.3 With regard to the allegations concerning article 14, the minimum requirements of a fair trial have not been observed. Ali Benhadj was convicted for purely political reasons by an incompetent, partial and unfair court. No public hearing was held. At the beginning of the trial, his counsel requested that the trial be held in public and that the hearings be open to the public. The court turned down the request without stating the legal grounds or explicitly ordering an in-camera hearing. Some of the defence lawyers were denied access to the courtroom by military personnel who blocked all the access routes.[4] From the beginning of the trial, Ali Benhadj was prevented from speaking by the military prosecutor who, in violation of the law, enforced order during the proceedings and imposed his decisions on the president of the court. The trial of Ali Benhadj was conducted in his absence, following his forcible expulsion from the courtroom, by order of the military prosecutor, for having protested against the conditions in which he was being held.

3.4 Lastly, the military court, which had no jurisdiction, could be neither fair nor impartial. The court depended on the Ministry of Defence and not on the Ministry of Justice, and was composed of officers who depended hierarchically on that Ministry (the investigating judge, magistrates and the president of the court were appointed by the Minister of Defence). It is the

[3] Opinion No. 28/2001 of the Working Group on Arbitrary Detention.

[4] According to a defence statement, the defence lawyers were unable to communicate with Ali Benhadj before the hearing held on 18 July 1992, and "no legal document allows any civil or military authority to restrict access to a tribunal or a courtroom in which any person, whether an Algerian citizen or a foreigner, is on trial".

Minister of Defence who initiates legal proceedings and has the power to interpret the law on the jurisdiction of military courts. The proceedings and sentence by such a court and the deprivation of liberty constitute a violation of article 14.

**State party's observations on admissibility and the merits**

4.1 On 12 November 2003, the State party recalled that Ali Benhadj had been arrested in June 1991 following a call for mass violence issued in part by Ali Benhadj by means of a directive that he had signed. That call followed a failed attempted uprising which he had helped to organize with a view to establishing a theocracy by violent means. In view of this exceptional situation, and in order to ensure the proper administration of justice, he was brought before a military court, which, contrary to the author's allegations, was competent under Algerian law to try the offences of which Ali Benhadj is accused. Neither article 14 of the Covenant, nor the Committee's general comment on that article, nor other international standards deem that a trial before a court other than an ordinary court necessarily constitutes per se a violation of the right to a fair trial. The Committee has recalled this point when considering communications concerning special courts and military tribunals.

4.2 The State party submits that Ali Benhadj is no longer being held in detention, since he was released on 2 July 2003. His freedom of movement is no longer restricted in any way and he is not under house arrest as the author claims.

4.3 Ali Benhadj was prosecuted and tried by a military court, the organization and jurisdiction of which are specified in Ordinance No. 71-28 of 22 April 1971 establishing the Code of Military Justice. Contrary to the allegations, a military court is composed of three judges appointed by a joint order of the Minister of Justice and the Minister of National Defence. It is presided over by a professional judge of the ordinary courts, who is legally bound by the Judicature Act and whose career and discipline are overseen by the Supreme Council of the Judicature, a constitutional body presided over by the Head of State. Decisions of a military court can be appealed before the Supreme Court on the grounds and under the conditions laid down in articles 495 et seq. of the Code of Criminal Procedure. As regards jurisdiction, in addition to special military offences, the military courts can try offences against State security, as defined by the Criminal Code, for which the penalty exceeds five years' imprisonment. In that case, the military courts can try anyone who commits such an offence, irrespective of whether that person is a member of the armed forces. It is in accordance with, and on the basis of, this legislation that Ali Benhadj was prosecuted and tried by the military court of Blida, the jurisdiction of which is based on article 25 of the above-mentioned Ordinance. The State party points out that the issue of lack of jurisdiction of the military court was not raised before the trial judges. It was raised for the first time before the Supreme Court, which dismissed it.

4.4 Ali Benhadj enjoyed all the guarantees afforded to him by the law and international instruments. As soon as he was arrested, the investigating judge informed him of the charges against him. He was assisted by 19 lawyers during the investigation and trial, and by 8 lawyers before the Supreme Court. He utilized the available legal remedies, as he filed an application for judicial review with the Supreme Court, which rejected it.

4.5 The allegation that the hearing was not held in public is inaccurate and suggests that he was not allowed to attend his trial or to defend himself against the charges brought against him. In fact, from the very beginning of the trial, he refused to appear before the military court, even though he and his lawyers had been duly summoned. Noting his absence at the trial, the president of the court issued a summons for him to appear, which was served on him in accordance with article 294 of the Code of Criminal Procedure and article 142 of the Code of Military Justice. A record of his refusal to appear was drawn up and the president of the court then decided to proceed with the hearing in accordance with the above-mentioned provisions. Nevertheless, the accused was duly informed of all the procedural steps concerning the hearing and a record of the hearing was made. Trial in absentia is contrary neither to national law nor to the provisions of the Covenant: although article 14 stipulates that everyone charged with an offence shall be entitled to be tried in his presence, it does not state that justice cannot be rendered when the defendant, solely on his or her own initiative, deliberately refuses to appear at the court hearings. The Code of Criminal Procedure and the Code of Military Justice authorize the courts to proceed with hearings when a defendant persistently refuses to appear. This type of legal procedure is justified by the fact that justice must be done under all circumstances and the negative behaviour of the accused should not obstruct the course of justice indefinitely.

**The author's comments on the State party's observations**

5.1 On 19 May 2004, Mr. Mesli provided a power of attorney, dated 13 March 2004, on behalf of Mr. Ali Benhadj. With regard to the admissibility of the communication, he points out that no objections were raised by the State party.

5.2 Ali Benhadj was released on 2 July 2003. The day before his release, he was asked to renounce all activities of any kind. He refused to sign a document to that effect, which amounted to a renunciation of his civil and political rights. The day after his release, he was informed, through a joint official press release by the military authorities and the Ministry of the Interior, that he was prohibited from exercising his most basic rights,[5] on the pretext that such prohibitions were an accessory penalty to the main penalty of imprisonment. On several occasions Ali Benhadj was stopped for questioning, and told not to engage in any activities. He continues to be threatened and harassed.

5.3 The State party confines itself to reiterating that the proceedings before the military court were lawful and that the court had jurisdiction to hear political offences. It also claims that the issue of lack of jurisdiction of the military court was not raised by the defendants before the court. Mr. Mesli points out that the issue of jurisdiction was the subject of a petition to declare the military court incompetent addressed to the indictments chamber presided over by the

[5] For example, he is not allowed "to vote or to stand for election; to hold meetings; to found a political, cultural, charitable or religious association; to join or participate in the activities of political parties, or any other civil, cultural, social, religious or other associations, whether as a member, a leader or a supporter". He is also prohibited from "attending, addressing, or having his views expressed, in any capacity or through any medium, in any public or private meeting and, in general, from participating in any political, social, cultural, religious, national or local event, whatever the reason for it or the occasion".

president of the military court. The petition was rejected and submitted again *in limine litis* in the form of written submissions filed at the beginning of the trial. The petition was not examined by the president of the military court, who said that it would be considered in conjunction with the merits of the case. Following the physical abuse suffered by Ali Benhadj, in the presence of his lawyers, counsel for the defence withdrew in protest. With regard to the composition of the military court, although the court is indeed presided over by a professional ordinary judge, the latter is appointed by a joint decision of the Minister of Defence and the Minister of Justice. The court also comprises two military assessors, who are neither qualified nor competent in judicial matters and who are appointed by, and subordinate to, the Minister of National Defence alone. These two assessors each have a vote when decisions are taken by a majority vote. Thus, during the trial, the military court of Blida was composed of the presiding judge and two members of the armed forces in active service, both subject to the orders of their superior, the Minister of National Defence. It is obvious to counsel that in the aftermath of a military coup d'état, and in the context of the declaration of the state of emergency on 12 February 1992, the military court of Blida could be neither independent nor impartial.

5.4 If the Committee does not consider that a trial before a military court necessarily entails a violation of the right to a fair trial, this is to be understood in the context of an independent system of justice based on effective separation of powers in a democratic society. With regard to trials of civilians before military courts, the Committee states, in its general comment No. 13 (para. 4), that "in some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights". The Committee has also considered that the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception.[6] On the public nature of the trial, counsel has submitted a statement issued by the 19 defence lawyers on 18 July 1992, at the end of the trial, which lists a number of violations.

5.5 Mr. Mesli points out that the State party does not comment on the ill-treatment of Ali Benhadj during his detention, on his detention incommunicado over a period of four years, or on his detention in a military barracks of the intelligence and security department during at least two years.[7] The treatment to which Ali Benhadj was subjected constitutes a violation of articles 7 and 10 of the Covenant.

**Additional observations by the State party**

6.1 On 27 September 2004, the State party submitted that the power of attorney which Ali Benhadj gave to Mr. Mesli was not authenticated and therefore cannot be considered. The Committee has defined the conditions for admissibility of communications, which must be submitted either by the victim himself or, when he is unable to do so, by a third party, who must prove that he is authorized to act on the victim's behalf. This condition has not been met in the

[6] Counsel is quoting communication No. 263/1987, *González del Río v. Peru*, Views adopted on 28 October 1992.

[7] The duration of his incommunicado detention varies in the different submissions from counsel.

present case, since, in the absence of authentication of the power of attorney presented by Mr. Mesli, there is no evidence that Ali Benhadj authorized Mr. Mesli to act on his behalf. Therefore, the Committee should take note of the lack of authentication of the power of attorney and reject the communication on grounds of form.

6.2 On the merits, and with regard to the conduct of the trial, the State party considers that it has provided sufficient information for a decision to be taken. It requests the Committee to find in its favour. With regard to the "new violations" that Ali Benhadj allegedly suffered, he was sentenced to rigorous imprisonment and was subject to a number of prohibitions, which are in fact what are known as accessory penalties to the main penalty and are provided for under article 4, paragraph 3, and article 6 of the Criminal Code. These accessory penalties do not have to be read out and apply automatically to the convicted person; thus, they do not violate the fundamental rights of Ali Benhadj. The allegations of ill-treatment of Ali Benhadj during his detention are not substantiated.

**Issues and proceedings before the Committee**

**Consideration of admissibility**

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

7.3 On the issue of the validity of the power of attorney presented by Mr. Mesli, the Committee recalls that "normally, the communication should be submitted by the individual personally or by that individual's representative; a communication submitted on behalf of an alleged victim may, however, be accepted when it appears that the individual in question is unable to submit the communication personally".[8] In the present case, Mr. Mesli indicated that Ali Benhadj was in detention on the date of the initial submission. The Committee therefore considers that the power of attorney presented by Mr. Mesli on behalf of the brother of Ali Benhadj is sufficient for the submission of the communication.[9] In addition, Mr. Mesli has since provided a power of attorney signed by Ali Benhadj, expressly and unequivocally authorizing him to represent him before the Committee. The Committee therefore concludes that the communication was submitted to it in accordance with the rules.

[8] Rule 96 (b), Rules of Procedure of the Human Rights Committee (CCPR/C/3/Rev.8).

[9] Communication No. 8/1977, *Weismann and Perdomo v. Uruguay*, Views adopted on 3 April 1980, para. 6.

7.4 With regard to the claim under article 12 of the Covenant, the Committee considers that the facts submitted by the author fail to demonstrate how they infringe the right to move freely within the State party's territory, and decides that the evidence is not sufficient to substantiate his claim for purposes of admissibility. With regard to the claims under articles 7, 9, 10, 14 and 19 of the Covenant, the Committee considers that in the present case, the evidence provided by the author is sufficient to substantiate these claims for purposes of admissibility. Thus, the Committee concludes that the communication is admissible with regard to the above-mentioned articles.

**Consideration of the merits**

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

8.2 The Committee notes that Ali Benhadj was arrested in 1991 and sentenced by a military court on 15 July 1992 to 12 years of rigorous imprisonment for jeopardizing State security and the proper functioning of the national economy. He was released on 2 July 2003. The Committee recalls the allegation that Ali Benhadj was held in a secret place of detention for four months and six days, beginning on 1 February 1995, and for four additional years up until March 1999. During that time, his family did not know where he was being detained or whether he was still alive. The Committee notes that the State party has not challenged the author's allegations on the incommunicado detention of Ali Benhadj.

8.3 The Committee recalls[10] that the burden of proof cannot rest solely on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant 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 transmit to the Committee the information in its possession. In cases where the author has communicated detailed allegations to the Committee and where further clarification depends entirely on information the State party alone possesses, the Committee may consider the allegations substantiated if the State party fails to refute them by providing evidence and satisfactory explanations.

8.4 The Committee takes note of the author's allegation that, during several years of incommunicado detention, Ali Benhadj was denied access to counsel and was unable to challenge the lawfulness of his detention. The State party has not replied to these allegations. The Committee recalls that, in accordance with article 9, paragraph 4, judicial review of the lawfulness of detention must provide for the possibility of ordering the release of a detainee if

[10] Communications No. 146/1983, *Baboeram-Adhin and others v. Suriname*, Views adopted on 4 April 1985, para. 14.2; No. 107/1981, *Elena Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983, para. 11; No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.4; No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

his or her detention is declared incompatible with the provisions of the Covenant, in particular those of article 9, paragraph 1. In the present case, Ali Benhadj was detained in several prisons and held in secret places of detention three times for over four years, without the possibility of obtaining a judicial review of the compatibility of his detention with the Covenant. Consequently, and in the absence of sufficient explanations from the State party, the Committee concludes that there has been a violation of article 9, paragraph 4, of the Covenant.

8.5 With regard to the alleged violation of article 10 of the Covenant, the Committee notes that, according to the author, Ali Benhadj was subjected to physical abuse on several occasions during his detention and that he was held on death row for several months. Moreover, according to the author, during the first period of incommunicado detention he was confined to a tiny punishment cell without ventilation or any sanitary facilities, and subsequently, he was kept in a punishment cell that was too small for him to stand or to lie down. 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; they must be treated in accordance with, inter alia, the Standard Minimum Rules for the Treatment of Prisoners.[11] In the absence of concrete information from the State party on the conditions of detention of Ali Benhadj, the Committee concludes that the rights set forth in article 10, paragraph 1, of the Covenant, were violated. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to consider separately the claims arising under article 7. The Committee is also of the view that it is not necessary to consider separately the other claims arising under article 9 of the Covenant.

8.6 With regard to the alleged violation of article 14 of the Covenant, the author has argued that the composition of the court violated the requirements of a fair trial; that Ali Benhadj's trial was closed to the public, without any legal justification being provided or an in-camera trial being ordered; and that some of his lawyers were not allowed to appear before the court.

8.7 With regard to the jurisdiction of the military court to hear the case, the State party points out that military courts can try offences against State security when the penalty exceeds five years of imprisonment, in accordance with article 25 of Ordinance No. 71-28 of 22 April 1971. The Committee notes that Ali Benhadj was represented before the military court and that he filed an application for judicial review with the Supreme Court, which upheld the military court's decision. With regard to the fact that the trial was not public, the Committee notes that the State party did not respond to the author's allegations other than by stating that the allegation was "completely inaccurate". Lastly, as regards the allegation that some of the lawyers were unable to attend the trial, the State party submitted that Ali Benhadj and his co-defendants were assisted by 19 lawyers during the investigation and trial, and by 8 lawyers before the Supreme Court.

8.8 With regard to the alleged violation of article 14 of the Covenant, the Committee recalls its general comment No. 13, in which it states that, while the Covenant does not prohibit the trial of civilians in military courts, nevertheless such trials should be very exceptional and take place

[11] General comment No. 21 [44] on article 10, paras. 3 and 5; communication No. 1134/2002, *Fongum Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2.

under conditions which genuinely afford the full guarantees stipulated in article 14. It is incumbent on a State party that does try civilians before military courts to justify the practice. The Committee considers that the State party must demonstrate, with regard to the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high-security civilian courts are inadequate to the task and that recourse to military courts ensures the full protection of the rights of the accused pursuant to article 14. The State party must further demonstrate how military courts ensure the full protection of the rights of the accused pursuant to article 14. In the present case the State party has not shown why recourse to a military court was required. In commenting on the gravity of the charges against Mr. Benhadj, it has not indicated why the ordinary civilian courts or other alternative forms of civilian court were inadequate to the task of trying him. Nor does the mere invocation of domestic legal provisions for the trial by military court of certain categories of serious offences constitute an argument under the Covenant in support of recourse to such tribunals. The State party's failure to demonstrate the need to rely on a military court in this case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14. The Committee concludes that the trial and sentence of Mr. Benhadj by a military court discloses a violation of article 14 of the Covenant.

8.9 With regard to the fact that Ali Benhadj was sentenced in absentia to 12 years' rigorous imprisonment, in proceedings which he refused to attend, the Committee recalls that the guarantees enshrined in article 14 cannot be construed as necessarily ruling out trial in absentia irrespective of the reasons for the defendant's absence. Proceedings in absentia in certain circumstances (for example, when a defendant who has been given sufficient advance notice of a hearing refuses to be present) are permissible in the interest of justice.[12] In the present case, the Committee notes that, according to the State party, Ali Benhadj and his lawyers were duly summoned, that the court issued Ali Benhadj a summons to appear, and that it was at this stage that the president of the court decided to proceed with the hearing. The Committee notes that the author has not responded to the State party's explanations, and concludes that the trial in absentia of Ali Benhadj does not disclose a violation of article 14 of the Covenant.

8.10 With regard to the alleged violation of article 19, the Committee recalls that the freedoms of information and expression are cornerstones in any free and democratic society. It is the essence of such societies that citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticize or openly and publicly evaluate their Governments without fear of interference or punishment by the Government, subject to certain restrictions set out in article 19, paragraph 3, of the Covenant. With regard to the allegations that Ali Benhadj's arrest and indictment were politically motivated, and that the restrictions imposed on him since his release are not provided for by law, the Committee notes that it does not have sufficient information to conclude that article 19 has been violated.

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 facts before it reveal violations by the State party of articles 9, 10 and 14 of the Covenant.

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[12] Communication No. 16/1977, *Mbenge v. Zaire*, Views adopted on 25 March 1983, para. 14.1; No. 699/1996, *Maleki v. Italy*, Views adopted on 15 July 1999, paras. 9.2 and 9.3.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide Ali Benhadj with an effective remedy. The State party is under an obligation to take appropriate measures to ensure that the author obtains appropriate redress, including compensation for the distress suffered by his family and himself. In addition, the State party is required to take measures to prevent further occurrences of such violations.

11. Bearing in mind that, by becoming a State 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 guarantee to all individuals within its territory and 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 90 days, information about the measures taken to give effect to its Views. It also requests the State party to publish the Committee's Views.

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

## Appendix

### Individual opinion of Committee member Mr. Abdelfattah Amor (dissenting)

The Committee, in paragraph 8.7 of the present Views, after stating that:

> "The State party's failure to demonstrate the need to rely on a military court in this case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14",

concludes that:

> "the trial and sentence of Mr. Benhadj by a military court discloses a violation of article 14 of the Covenant".

The Committee thus returns, but in a more customary style, to its position on the same subject in the *Madani* case, which I consider to be legally flawed (communication No. 1172/2003 and my dissenting opinion and that of Mr. Ahmed Tawfik Khalil).

I would like to refer to my dissenting opinion in the *Madani* case and uphold its terms and content which apply perfectly to the present case, and to add the following remarks:

1. As in the *Madani* case, the Committee applied, before its adoption, new general comment No. 32 on article 14, which replaced general comment No. 13, when in fact the Committee's Views in the *Benhadj* case were adopted on 20 July 2007, prior to the adoption of the new general comment on 25 July 2007, which makes the Committee's position highly questionable. Apart from matters of principle regarding retroactivity, there is a more specific matter; namely, that the State party, having not been advised in advance of the "rule" to be applied, was not in a position to develop its argument in that connection.

2. In reality, the Committee did not simply engage in interpretation, as its implicit competence entitles it to do, but rather ventured into creation, by invoking a new "rule" that cannot be justified under the Covenant. This raises a fundamental question concerning the extent of the Committee's competence to determine its own jurisdiction, taking into account the obligations and commitments that the States parties to the Covenant have undertaken.

3. Even if one were to accept the Committee's logic, it is obvious that the Committee itself did not pursue that same logic. In the Committee's View, "The State party has not shown why recourse to a military court was required." Nevertheless, the State has shown that an "exceptional situation" arose following an "attempted uprising" and that Mr. Benhadj was tried by a military court in order to ensure the proper administration of justice and that the court is legally established in order to deal, in addition to special military offences, with offences against State security, for which the penalty is over five years' imprisonment, with respect for the guarantees afforded by the law and international instruments. The Committee could, or rather should, have examined the State party's arguments intended to demonstrate the justification of recourse to a military court,

and rejected them if they were deemed to be inadequate. Its failure to do so sawed off the very branch on which it intended to sit. Neither did it consider it necessary to determine whether the guarantees enshrined in article 14 had or had not been respected, which it should have done.

All in all, reservations about military courts and special courts, which I fully share with many Committee members, do not entitle the Committee to derogate from the legal rigour on which its reputation is built and which consolidates its credibility. Neither do they authorize it to exceed its remit or use the nature of the court hearing the case as an excuse not to ascertain whether all the guarantees and procedures spelled out in article 14 of the Covenant were respected or not. Legal flexibility can only be a source of enrichment and progress if law is not reduced to meta-law.

(*Signed*): Abdelfattah Amor

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

**Individual opinion of Committee member Mr. Ahmed T. Khalil (dissenting)**

I wish to put on record that I cannot accept the views expressed in paragraph 8.8 on communication No. 1173/2003, *Benhadj v. Algeria* in which the Committee finds a violation by the State party of article 14 of the Covenant.

The reasons for taking this position on my part are based on the same considerations spelled out in detail in my dissenting opinion on communication No. 1172/2003, *Abbassi Madani v. Algeria*.

(*Signed*): Ahmed T. Khalil

[Done 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.]

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