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Eighty-ninth session
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VIEWS

Communication No. 1172/2003

Submitted by:	Salim Abbassi (represented by Mr. Rachid Mesli)
Alleged victim:	Abbassi Madani (his father)
State party:	Algeria
Date of communication:	31 March 2003 (initial submission)
Documentation references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 12 May 2003 (not issued in document form)
Date of adoption of Views:	28 March 2007
Subject matter:	Arbitrary detention, house arrest, fair trial, freedom of expression
Procedural issue:	Power of attorney

* Made public by decision of the Human Rights Committee.

Substantive issues:	Right to liberty and security of person; arbitrary arrest and detention; right to liberty of movement; right to a fair trial; right to a competent, independent and impartial tribunal; right to freedom of expression
Articles of the Covenant:	9, 12, 14 and 19
Articles of the Optional Protocol:	...

On 28 March 2007, the Human Rights Committee adopted the annexed draft as its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1172/2003.

[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

Eighty-ninth session

concerning

Communication No. 1172/2003*

Submitted by:	Salim Abbassi (represented by Mr. Rachid Mesli)
Alleged victim:	Abbassi Madani (his father)
State party:	Algeria
Date of communication:	31 March 2003 (initial submission)

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

Meeting on 28 March 2007,

Having concluded its consideration of communication No. 1172/2003, submitted to the Human Rights Committee by Salim Abbassi on behalf of Mr. Abbassi Madani (his father) 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, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

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 Salim Abbassi, born on 23 April 1967 in Algiers, who is submitting the communication on behalf of his father, Mr. Abbassi Madani, an Algerian citizen, born on 28 February 1931, in Sidi Okba (Biskra). The author states that his father is the victim of violations by Algeria of articles 9, 12, 14, 19, 20 and 21 of the International Covenant on Civil and Political Rights (the Covenant). He is represented by Mr. Rachid Mesli. The Covenant and the Optional Protocol entered into force for the State party on 12 December 1989.

The facts as submitted by the author

2.1 Abbassi Madani is one of the founding members and, at the time of the submission of the communication, president of the Front Islamique du Salut (Islamic Salvation Front) (FIS),[1] an Algerian political party approved by the State party as of 12 September 1989 following the introduction of political pluralism. With a view to forthcoming elections and in the wake of gains made by FIS during the local elections of 1990, the Algerian Government had to push through a new electoral law, which was unanimously condemned by all Algerian opposition parties. Protesting against this law, FIS organized a general strike along with peaceful sit-ins in public squares. After a few days of strikes and peaceful marches, the parties agreed to end the protest movement in exchange for a review of the electoral law in the near future. Despite this agreement, on 3 June 1991, the head of Government was requested to resign and public squares were stormed by the Algerian army.

2.2 On 30 June 1991, Abbassi Madani was arrested at his party's headquarters by the military police and on 2 July 1991 was brought before the investigating judge of the military court, accused of "jeopardizing State security and the smooth operation of the national economy". In particular, he was reproached for having organized a strike, which the prosecution described as subversive, since it had allegedly done serious harm to the national economy. The lawyers appointed to defend Abbassi Madani challenged the grounds for his prosecution before the military court, and the lawfulness of the investigation conducted by a military judge under the authority of the public prosecutor's office. According to the defence, the court had been established in order to remove leaders of the main opposition party from the political scene, and it was not competent to hear the case, it could only adjudicate on offences under criminal law and the Code of Military Justice committed by members of the armed forces in the performance of their duties. The competence of the military court to deal with political offences under legislation dating from 1963 had been revoked with the establishment of the National Security Court in 1971. Since the latter had been abolished following the introduction of political pluralism in 1989, the general rule of competence should therefore apply.

2.3 FIS won the first round of general elections on 26 December 1991, and the day after the official results were released, the military prosecutor was to inform defence lawyers of his intention to end the proceedings against Abbassi Madani. On 12 January 1992, however, the

[1] FIS was disbanded in 1992, as the author confirms (see paragraph 2.5).

President of the Republic "resigned", a state of emergency was declared, the general elections were cancelled and so-called "administrative internment camps" were opened in southern Algeria. On 15 July 1992, the Blida military court sentenced Abbassi Madani in absentia to 12 years' rigorous imprisonment. The application for judicial review of this decision was rejected by the Supreme Court on 15 February 1993, thereby making the conviction final.

2.4 During his detention in Blida military prison, Abbassi Madani was, according to the author, subjected to ill-treatment on numerous occasions, in particular for having claimed political prisoner status and the same treatment as other prisoners. He was subjected to particularly severe treatment, despite his perilous state of health, spending a very long period of time in solitary confinement and being barred from receiving visits from his lawyers and family.

2.5 Following negotiations with the military authorities in June 1995, he was transferred to a residence normally used for dignitaries visiting Algeria. He was returned to the Blida military prison[2] for having refused to concede to the demands of army representatives, in particular that he should renounce his political rights. He was then detained in particularly harsh conditions[3] for the following two years until his release on 15 July 1997, on one condition "that he abide by the laws in force if he wished to leave the country". Upon his release, he did not resume his political activity as president of FIS, since the party had been banned in 1992.

2.6 Initially, the authorities tried to restrict Abbassi Madani's liberty of movement, considering any peaceful demonstration of support for him a threat to public order. Subsequently, the Minister of the Interior launched a "procedure" to place him under house arrest after he had been interviewed by a foreign journalist and had sent a letter to the Secretary-General of the United Nations[4] in which he expressed his willingness to help seek a peaceful solution to the Algerian crisis. On 1 September 1997, members of the military police informed him orally that he was under house arrest and forbidden to leave his apartment in Algiers. He was also informed that he was forbidden to make statements or express any opinion "failing which he would return to prison". He was denied all means of communicating with the outside world: his building was guarded around the clock by the military police, who prevented anyone, except members of his immediate family, from visiting him. He was not allowed to contact a lawyer or to lodge any appeal against the decision to place him under house arrest, which was never transmitted to him in writing.

2.7 On 16 January 2001, a communication was submitted to the Working Group on Arbitrary Detention on behalf of Mr. Madani. On 3 December 2001, the Working Group rendered its Opinion according to which his deprivation of liberty was arbitrary and contrary to articles 9 and 14 of the Covenant. The Working Group requested the State party "to take the necessary

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[2] Exact date not provided.

[3] Conditions not explained.

[4] Exact date not provided.

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 International Covenant on Civil and Political Rights".[5] No steps were taken by the State party.

The complaint

3.1 The author claims that the facts as presented by him reveal violations of articles 9, 12, 14 and 19 of the Covenant in respect of his father, Abbassi Madani.

3.2 As far as the allegations under articles 9 and 19 of the Covenant are concerned, Abbassi Madani's arrest was arbitrary and politically motivated. The charge against him that he had jeopardized State security was political, since no specific act that could in any way be categorized as a criminal offence could be established by the prosecution. He was reproached for having started a political strike that the military, and not the civil legal authorities, had described as subversive. This strike was put down with considerable bloodshed by the Algerian army, despite its peaceful nature and the guarantees provided by the head of Government. Even if a political protest movement could be categorized as a criminal offence, which is not the case under Algerian law, the protest movement had ended following the agreement between the head of Government and the party headed by Abbassi Madani. His arrest by the military police and the charges brought against him by a military tribunal clearly served the sole purpose of removing the president of the main opposition party from the Algerian political scene, in violation of articles 9 and 19 of the Covenant.

3.3 As for the allegations relating to article 14, minimum standards of fairness were not observed. Abbassi Madani was sentenced by an incompetent, manifestly partial and unfair tribunal. The tribunal comes under the authority of the Ministry of Defence and not of the Ministry of Justice and is composed of officers who report directly to it (investigating judge, judges and president of the court hearing the case appointed by the Ministry of Defence). It is the Minister of Defence who initiates proceedings and has the power to interpret legislation relating to the competence of the military tribunal. The prosecution and sentence by such a court, and the deprivation of liberty constitute a violation of article 14.

3.4 With regard to article 9, there is no legal justification for the house arrest of Abbassi Madani. The Algerian Government justified this decision by citing "the existence of this measure in several pieces of Algerian legislation", in particular article 6, paragraph 4, of Presidential decree No. 99-44 of 9 February 1992 declaring the state of emergency, which was still in force at the time the communication was submitted. According to the Government, this decree was in conformity with article 4 of the Covenant. The Government, however, never complied with the provisions of article 4, paragraph 3, pursuant to which it should "immediately inform the other States parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated". Article 9 of the Criminal Code, which prescribes house

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

arrest as an additional penalty,[6] is applied together with article 11, which obliges a person convicted to remain within a geographical area specified in a judgement.[7] House arrest may thus only be handed down as an additional penalty in the sentence imposing the main penalty. In the case of Abbassi Madani, there is no mention of any decision to place him under house arrest in the sentence handed down by the Blida military tribunal. At any rate, article 11 of the aforementioned Act lays down five years as the maximum duration for house arrest from the moment of the release of the convicted person. Since at the time the communication was submitted Abbassi Madani had been under house arrest for considerably more than five years, it constitutes a violation of the Act itself, which the Algerian Government is invoking to justify the imposition of that penalty.

3.5 The grounds for placing Abbassi Madani under house arrest are the same as those for his arrest and conviction by the military tribunal, namely the free exercise of his political rights enshrined in the Universal Declaration of Human Rights and the Covenant. This measure therefore constitutes a violation of articles 9, 12 and 19 of the Covenant.

State party's observations on admissibility and on the merits

4.1 On 27 June 2003, the State party pointed out that there is no indication in the communication that Abbassi Madani had given anyone the authority to act on his behalf, as provided for in the rules for submitting communications to the Committee. Mr. Salim Abbassi who claims to be acting on his father's behalf has not submitted any documentary evidence of his authority to so act. The power of attorney given by Salim Abbassi to Rachid Mesli was not authenticated and should not therefore be taken into consideration. Furthermore, Rachid Mesli submitted the petition in his capacity as a lawyer, when he no longer practises as a lawyer in Algeria, having been disbarred by the disciplinary board of the Bar Association of the Tizi-Ouzou region on 3 October 2002. He is not a member of the Bar Association of the Canton of Geneva either, from where the communication was submitted. Accordingly, he is not entitled to act in this capacity. By using the title of lawyer, Rachid Mesli has acted under false pretences and wrongfully claimed a profession which he does not exercise. The State party also points out that an international arrest warrant (ref. No. 17/02) for Rachid Mesli has been issued by the investigating judge of the Sidi M'hamed court for his involvement in allegedly terrorist

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[6] Article 9, Act No. 89-05 of 25 April 1989: "Additional penalties are: (1) house arrest; (2) banishment order; (3) forfeiture of certain rights; (4) partial confiscation of property; (5) dissolution of a legal person; (6) publication of the sentence."

[7] Article 11, Act No. 89-05 of 25 April 1989: "House arrest is the obligation on a convicted person to remain in a particular geographical area, specified in a judgment. Its duration may not exceed five years. House arrest shall take effect from the day the prisoner completes his or her main sentence or upon his or her release. The conviction shall be communicated to the Ministry of the Interior, which may issue temporary permits for travel within the country."

Ordinance No. 69-74 of 16 September 1969: "A person placed under house arrest who contravenes or avoids such a measure shall be liable to a term of imprisonment from three months to three years."

activities carried out by the Groupe Salafiste de Prédication et de Combat (Salafist Group for Preaching and Combat) (GSPC), which is on the list of terrorist organizations drawn up by the United Nations.

4.2 On 12 November 2003, the State party recalled that Abbassi Madani was arrested in June 1991 following a call to widespread violence, which was launched by Abbassi Madani and others by means of a directive bearing his signature. This came in the wake of a failed uprising, which he and others had planned and organized, with a view to establishing a theocratic State through violence. It was in the context of these exceptional circumstances, and to ensure the proper administration of justice, that he was brought before a military tribunal, which, contrary to the allegations by the source, is competent to try the offences of which he is accused. Neither article 14 of the Covenant, nor the Committee's general comment on this article nor other international standards refer to a trial held in courts other than ordinary ones as necessarily constituting a violation of the right to a fair trial. The Committee has made this point when considering communications relating to special courts and military courts.

4.3 The State party also points out that Abbassi Madani is no longer being held in detention, since he was released on 2 July 2003. He is no longer subject to any restriction on his liberty of movement and is not under house arrest as the source claims. He has been able to travel abroad freely.

4.4 Abbassi Madani was prosecuted and tried by a military tribunal, whose organization and competence are laid down in Ordinance No. 71-28 of 22 April 1971 establishing the Code of Military Justice. Contrary to the allegations made, the military tribunal is composed of three judges appointed by an order issued jointly by the Minister of Justice, Garde des Sceaux, and the Minister of Defence. It is presided over by a professional judge who sits in the ordinary-law courts, is subject by regulation to the Act on the status of the judiciary, and whose professional career and discipline are overseen by the Supreme Council of Justice, a constitutional body presided over by the head of State. The decisions of the military tribunal may be challenged by lodging an appeal before the Supreme Court on the grounds and conditions set forth in article 495 ff. of the Code of Criminal Procedure. As far as their competence is concerned, in addition to special military offences, the military tribunals may try offences against State security as defined in the Criminal Code, when the penalty incurred is for terms of imprisonment of more than five years. Military tribunals may thus try anyone who commits an offence of this type, irrespective of whether he or she is a member of the military. Accordingly, and on the basis of this legislation, Abbassi Madani was prosecuted and tried by the Blida military tribunal, whose competence is based on article 25 of the aforementioned Ordinance. The State party notes that the competence of the military tribunal was not challenged by Abbassi Madani before the trial judges. It was called into question the first time with the Supreme Court, which rejected the challenge.

4.5 Abbassi Madani benefited from all the guarantees recognized under law and international instruments. Upon his arrest, the investigating judge informed him of the charges against him. He was assisted during the investigation and the trial by 19 lawyers, and in the Supreme Court by 8 lawyers. He has exhausted the domestic remedies available under the law, having filed an application with the Supreme Court for judicial review, which was rejected.

4.6 The allegation that the trial was not 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 outset, he refused to appear before the military tribunal, although he had been duly summoned at the same time as his lawyers. Noting his absence, the president of the tribunal 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. In the light of his refusal to appear, a report establishing the facts was drawn up before the president of the tribunal decided to dispense with the hearing, in accordance with the aforementioned provisions. Nevertheless, the defendant was kept abreast of all the procedural formalities relating to the hearings and relevant reports were drawn up. The trial of the accused in absentia is neither contrary to Algerian law nor to the provisions of the Covenant: although article 14 stipulates that everyone charged with a criminal offence shall have the right to be tried in his presence, it does not say that justice cannot be done when the accused has deliberately, and on his or her sole initiative, refused to appear in court. The Code of Criminal Procedure and the Code of Military Justice allow the court to dispense with the hearing when the accused persistently refuses to appear before it. This type of legal procedure is justified by the fact that justice must always be done, and that the negative attitude of the accused should not obstruct the course of justice indefinitely.

Comments by the author on the State party's observations

5.1 On 28 March 2004, counsel provided a power of attorney on behalf of Abbassi Madani, dated 8 March 2004, and informs the Committee that the order for house arrest was lifted on 2 July 2003, and that he is now in Doha, Qatar.

5.2 On the admissibility of the communication, counsel points out that rule 96 (b) of the Committee's rules of procedure allows a communication to be submitted by the individual personally or by that individual's representative. When the communication was submitted, Abbassi Madani was still under unlawful house arrest and unable to communicate with anyone except certain members of his immediate family. The house arrest order was lifted on 2 July 2003 and Abbassi Madani drew up a special power of attorney authorizing counsel to represent him before the Committee. Counsel responds to the personal attacks by the State party against him and requests the Committee to reject them.

5.3 On the merits, the house arrest order against Abbassi Madani was lifted on the expiration of his 12-year sentence to rigorous imprisonment, i.e. on 2 July 2003. Upon his release, he suffered further violations of his civil and political rights. The initial request to enjoin the State party to comply with its international obligations by lifting the house arrest order against the petitioner becomes moot. Abbassi Madani's detention in the conditions described in the initial communication constitutes a violation of the Covenant.

Additional comments by the State party

6. On 18 June 2004, the State party noted that, while acknowledging that he is no longer a lawyer, Abbassi Madani's representative nonetheless signs comments submitted to the Committee in that capacity. It also notes that the representative, instead of responding to the State party's observations on the merits, gives details of his own situation, forgetting that he is

acting on behalf of a third party. The State party notes the representative's acknowledgement that Abbassi Madani is no longer subject to any restriction order and argues, accordingly, that his request to the Committee is now moot. The communication must therefore be considered unfounded and inadmissible.

Issues and proceedings before the Committee

Admissibility considerations

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 has ascertained 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 question of the validity of the power of attorney submitted by counsel, the Committee recalls: "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, the representative stated that Abbassi Madani had been placed under house arrest on the date of the submission of the initial communication, and that he was only able to communicate with members of his immediate family. The Committee therefore considers that the power of attorney submitted by counsel on behalf of Abbassi Madani's son was sufficient for the purposes of registering the communication.[9] Furthermore, the representative subsequently provided a power of attorney signed by Abbassi Madani, expressly and unequivocally authorizing him to represent him before the Committee in the case in question. The Committee therefore concludes that the communication was submitted to it in accordance with the rules.

7.4 As far as the complaints under articles 9, 12, 14 and 19 of the Covenant are concerned, in this case, the Committee considers that the facts as described by the author are sufficient to substantiate the complaints for the purpose of admissibility. It therefore concludes that the communication is admissible under the aforementioned provisions.

7.5 As for the decision to sentence Abbassi Madani in absentia to 12 years' rigorous imprisonment, the Committee, noting that the author only cites this matter when setting out the facts and does not take it up again when stating his complaint or respond to the detailed

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

[9] See for example communication No. 699/1996, *Maleki v. Italy*, Views adopted on 15 July 1999, submitted by Kambiz Maleki on behalf of his father, Ali Maleki.

explanations furnished by the State party, considers that this aspect of the request does not constitute a claim that any of the rights enumerated in the Covenant have been violated, within the meaning of article 2 of the Optional Protocol.

7.6 The Committee notes the representative's request to restate his case, and his argument that his initial submission was made at a time when the author's father was under house arrest and before the order for house arrest had been lifted and that, although the request became moot as soon as the order for house arrest was lifted, this does not in any way affect the violation of the Covenant on the grounds of arbitrary detention. The Committee also takes note of the State party's request to deem the communication moot in the light of the representative's own admission that the author was no longer subject to any restriction order, and its call for the communication to be considered unfounded and inadmissible. The Committee considers that the lifting of the house arrest order does not necessarily mean that the consideration of the question of arbitrary detention automatically becomes moot, and therefore declares the complaint admissible.

Consideration of the merits

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

8.2 The Committee notes that Abbassi Madani was arrested in 1991 and tried by a military tribunal in 1992, for jeopardizing State security and the smooth operation of the national economy. He was released from Blida military prison on 15 July 1997. According to the author, on 1 September 1997, he was then placed under house arrest, without receiving written notification of the reasons for such arrest.

8.3 The Committee recalls that under article 9, paragraph 1, of the Covenant everyone has the right to liberty and security of person, and no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law. It further recalls that house arrest may give rise to violations of article 9,[10] which guarantees everyone the right to liberty and the right not to be subjected to arbitrary detention. The State party did not respond to the author's allegations, except to point out that Abbassi Madani is no longer being held in detention and is not under house arrest. Since the State party did not cite any particular provisions for the enforcement of prison sentences or legal ground for ordering house arrest, the Committee concludes that a deprivation of liberty took place between 1 September 1997 and 1 July 2003. The detention is thus arbitrary in nature and therefore constitutes a violation of article 9, paragraph 1.

8.4 According to article 9, paragraph 3, anyone detained must be brought promptly before a judge or other officer authorized by law to exercise judicial power and is entitled to trial within a reasonable time or to release. The Committee recalls its jurisprudence that, in order to avoid a

[10] Communication No. 132/1982, *Monja Jaona v. Madagascar*, Views adopted on 1 April 1985, paras. 13-14; and communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 15 March 2005, para. 5.4.

characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.[11] In the present case, the author's father was released from house arrest on 2 July 2003, in other words after almost six years. The State party has not given any justification for the length of the detention. The Committee concludes that the facts before it disclose a violation of article 9, paragraph 3.

8.5 The Committee notes the author's allegations that for the duration of his house arrest the author's father was denied access to a defence lawyer, and that he had no opportunity to challenge the lawfulness of his detention. The State party did not respond to those 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 the detainee if his or her detention is declared incompatible with the provisions of the Covenant, in particular those of article 9, paragraph 1. In the case in question, the author's father was under house arrest for almost six years without any specific grounds relating to the case file, and without the possibility of judicial review concerning the substantive issue of whether his detention was compatible with the Covenant. Accordingly, and in the absence of sufficient explanations by the State party, the Committee concludes that there is a violation of article 9, paragraph 4, of the Covenant.

8.6 In the light of the above findings, the Committee does not consider it necessary to deal with the complaint in respect of article 12 of the Covenant.

8.7 As far as the alleged violation of article 14 of the Covenant is concerned, 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 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 is unavoidable. 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 Abbassi Madani 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 Abbassi Madani by a military tribunal discloses a violation of article 14 of the Covenant.

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[11] Communication No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002, para. 8.2; and communication No. 1014/2001, *Baban v. Australia*, Views adopted on 6 August 2003, para. 7.2.

8.8 Concerning the alleged violation of article 19, the Committee recalls that freedom of information and freedom of expression are the cornerstones of any free and democratic society. Such societies in essence allow their citizens to seek information regarding ways of replacing, if necessary, the political system or parties in power, and to criticize or judge their Governments openly and publicly without fear of reprisal or repression by them, subject to the restrictions laid down in article 19, paragraph 3, of the Covenant. With regard to the allegations that Abbassi Madani was arrested and charged for political reasons, the Committee notes that it does not have sufficient information to conclude that there was a violation of article 19 in respect of the arrest and charges brought against him in 1991. At the same time, although the State party has indicated that the author is enjoying all his rights and has been resident abroad since that time, and notwithstanding the author's allegations in this regard, the Committee notes that it does not have sufficient information to conclude that there was a violation of article 19 in respect of the alleged ban imposed on Abbassi Madani from making statements or expressing an opinion during his house arrest.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose violations by the State party of articles 9 and 14 of the Covenant.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide an effective remedy for Abbassi Madani. The State party is under an obligation to take the necessary steps to ensure that the author obtains an appropriate remedy, including compensation. In addition, the State party is required to take steps to prevent further occurrences of such violations in the future.

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 there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to guarantee 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 it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's 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

DISSENTING OPINION BY COMMITTEE MEMBER MR. ABDELFATTAH AMOR

In this matter, the Committee, after affirming, in a style and language that it does not customarily employ, 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 Abbassi Madani by a military tribunal discloses a violation of article 14 of the Covenant*".

I cannot associate myself with the approach followed and the conclusion underlying this paragraph 8.7 of the Committee's Views. I believe that they exceed the scope of article 14 and deviate from the general comment on this article.

Article 14 is essentially concerned with guarantees and procedures for the equitable, independent and impartial administration of justice. It is exclusively in that context that the body which administers justice is cited, and then only in the first paragraph of the article: "All persons shall be equal before the courts and tribunals. … everyone shall be entitled to a fair and public hearing by a competent, independent and impartial *tribunal* established by law."

Article 14 is not concerned with the nature of the tribunals. It contains nothing which prohibits, or expresses a preference for, any particular type of tribunal. The only tribunals which may not be covered by article 14 are those which have nothing to do with the safeguards and procedures which it provides. No category of tribunal is inherently ruled out.

In order to clarify the intent and the scope of article 14, in 1984, at its twenty-first session, the Committee adopted general comment No. 13. As of the present time, namely, the end of the eighty-ninth session, at which the present Views were adopted, this comment has never been amended or updated. Paragraph 4 of the general comment is concerned, in particular, with military courts. The general thrust of this paragraph may be summarized as follows:

- The Covenant does not prohibit the setting up of military tribunals;

- Only in exceptional circumstances may civilians be tried by military courts and such trials must be held in conditions which fully respect all the guarantees set out in article 14;

- Derogations from the normal procedures required under article 14 in times of public emergency, as contemplated by article 4 of the Covenant, may not go beyond the extent strictly required by the exigencies of the situation.

In other words, and taking due account of article 14, the Committee's attention should be focused on guarantees of an equitable, impartial and independent administration of justice. It is in this context, and this context alone, that the question of the legal body - the courts - can be taken up or apprehended.

The military tribunal which tried Abbassi Madani was set up under Algerian law. Its statutory jurisdiction covers military offences, as is the case in all countries which have military forces. In general, this jurisdiction also extends to non-military co-defendants or accomplices where military offences have been committed. In certain States it covers all matters in which members of the military are implicated.

In Algeria, in addition to their statutory jurisdiction, military courts have assigned jurisdiction, specifically established by law. Thus, Ordinance No. 71-28 of 22 April 1971 vests in military tribunals the authority to try offences against State security committed by civilians which incur penalties of more than six years' imprisonment. In other words, their powers go beyond the normal competence of military courts. This represents an exception to the general rules regarding the jurisdiction of military courts.

The Committee has always believed that, while the Convention may not actually prohibit the formation of military courts, these courts should only be used for the judgement of civilians in very exceptional circumstances and such trials should be conducted in conditions which fully respect all the guarantees stipulated in article 14. *Is it really necessary to go a step further and to impose yet more conditions, requiring the State party to demonstrate (where civilians are being tried in military courts) that "the ordinary civil courts are not in a position to take such steps and that alternative forms of special civil tribunals or high security courts have not been adapted to perform this task"?*

This new condition imposed by the Committee raises some difficult legal issues. It certainly does not fall within the scope of article 14 and is not covered by general comment No. 13. Submitting the State to conditions which have not been stipulated from the outset is not an acceptable way of applying the standards stipulated by or implicit in the Covenant. At the same time, this condition is questionable. It is questionable in that, save in the event of an arbitrary judgement or obvious error, *the Committee may not replace the State in order to adjudicate on the merits of alternatives to military courts*. By which reasoning is it possible for the Committee to adjudicate on the options before the State for special civil tribunals, high security tribunals or military tribunals? In accordance with which criteria can the Committee determine whether or not the special civil courts or high security courts have been suitably modified to try civilians prosecuted for breaching State security? *The only possible yardsticks for the Committee, regardless which courts are under consideration, are and shall remain the procedures and guarantees provided in article 14*. Only here is the Committee on firm ground, protected from shifting sands and unforeseen vicissitudes.

Nor can the Committee arrogate to itself the role of adjudicating on the exceptional nature of circumstances or determining whether or not there is a public emergency. The Committee is not the right authority to be passing judgement on situations over the extent or severity of which it has no control. In this context it can only exercise a minimal monitoring function, looking out for arbitrary judgements and obvious errors. When states of emergency are declared on the basis

of article 4 of the Covenant, the Committee must make sure that the declaration has complied with the rules and that any derogations from the provisions of article 14 remain within the bounds strictly required by the exigencies of the situation and respect the other conditions stipulated in that article. It is most regrettable that, in its analysis, the Committee has cast aside all these considerations. In proceeding as it has, *the Committee has ventured into uncharted waters*.

Another fundamental issue, in addition to that of the nature of the trial body, has to do with respect for the guarantees and procedures stipulated in article 14 and clarified in general comment No. 13. When, in exceptional circumstances, civilians are tried by military courts, it is essential that the proceedings should take place in conditions conducive to an equitable, impartial and independent administration of justice. *This is a key issue, which the Committee has skirted around, when it should have made it the focus of its attention and the goal of its endeavours*. In this context, a number of questions have remained unanswered.

Raising the issue of the composition of the military court, the author states that it is made up of military officers who report directly to the Ministry of Defence, that "investigating judge and judges making up the court hearing the case are officers appointed by the Ministry of Defence" and that the president of the court, although himself a civilian judge, is also appointed by the Ministry of National Defence. In its response, on which the author makes no comment, the Algerian Government states that "the military tribunal is composed of three judges appointed by an order issued jointly by the Minister of Justice, Garde des Sceaux, and the Minister of Defence. It is presided over by a professional judge who sits in the ordinary-law courts, is subject by regulation to the Act on the status of the judiciary, and whose professional career and discipline are overseen by the Supreme Council of Justice".

In another context, the author states that "it is the Minister of Defence who initiates proceedings, even, as in the current instance, against the wishes of the head of Government" and he explains that this minister also has the power to interpret legislation relating to the competence of the military tribunal. Without commenting on these allegations, the State party makes reference, in general terms, to the application of the Criminal Code, the Code of Criminal Procedure and the Code of Military Justice.

The Committee should have given due attention to these issues, just as it should have dwelt on a number of other points, such as the reasons for Mr. Madani's arrest, which are viewed in directly opposite ways by the author and by the State party - without any supporting facts or documents - and have submitted all elements of the case file to a more rigorous examination.

In another context, the author states that "minimum standards of fairness were not observed. Abbassi Madani was sentenced by an incompetent, manifestly partial and unfair tribunal". The State party asserts the opposite, without eliciting further comments from the author. It states that the military court was created by law, that its competence was not challenged before the trial judge and was only called into question the first time with the Supreme Court, which rejected the challenge. The State also indicates that the charges laid against Mr. Madani were notified to him at the time of his arrest, that he had the assistance of counsel during the investigation and the trial, that he availed himself of the remedies provided

under law, that the trial, contrary to the allegations by the author, was public, that Mr. Madani's refusal to appear was dealt with in compliance with the procedures provided by law and that he was kept abreast of all the procedural formalities relating to the trial hearings and reports were drawn up of all such formalities.

All these arguments should similarly have been considered by the Committee and its decision to reject them on the grounds that the State has failed to demonstrate that it has developed acceptable alternatives to military courts was not the soundest decision in legal terms.

Attention is also drawn, in respect of the issue of the impartiality of justice, to the general rule that it is up to the appeal courts of States parties to the Covenant to consider the facts and the evidence in a particular case and that it is not, in principle, the business of the Committee to censure the conduct of hearings by a judge except where it might have been established that this was tantamount to a miscarriage of justice or that the judge had manifestly breached his obligation of the impartiality (see the Committee's decision in matter No. 541/1993: *Simms v. Jamaica*, April 1995, para. 6.2).

Paragraph 8.7 of the Committee's Views leaves certain essential questions unanswered. I feel duty-bound to point out that, on the one hand, the Committee has exceeded its remit in insisting that the State justify its choice of court from among a number of options available to it and, on the other, that it has not done what it was called upon to do and which was incumbent upon it with regard to determining whether or not the guarantees of full protection of the rights of the accused were duly upheld.

(*Signed*): Abdelfattah Amor

[Done in English, French and Spanish, the French 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.]

**INDIVIDUAL OPINION OF COMMITTEE MEMBER
MR. AHMED T. KHALIL**

As I have indicated in the plenary meeting of the Committee in New York on 28 March 2007, I cannot accept the views spelled out in paragraph 8.7 of the communication 1172/2003 *Abbassi Madani v. Algeria* which finds the State party in violation of article 14 of the Covenant. The reasons for taking this position on my part are based on the following considerations.

It is quite clear that the Covenant does not prohibit the establishment of military courts. Furthermore, paragraph 4 of general comment No. 13 on article 14, while clearly stating that the trial of civilians by such courts should be very exceptional, stresses, I believe more importantly, that the trying of civilians by such courts should take place under conditions which genuinely afford the full guarantees stipulated in article 14.

In that light the issue before the Committee in the case at hand is whether those guarantees were duly and fully respected. In other words the concern of the Committee, as I see it, is to ascertain whether the trial of Mr. Abbassi Madani meets the fundamental guarantees of equitable, impartial and independent administration of justice.

The author claims that the minimum standards of fairness were not observed and that Mr. Abbassi Madani was sentenced by an incompetent, manifestly partial and unfair trial.

For its part the State party informs that Mr. Abbassi Madani was prosecuted and tried by a military tribunal whose organization and competence are laid down in Ordinance No. 71-28 of April 1971 and that, contrary to the allegations by the author, a military tribunal is competent to try the offences of which Mr. Abbassi Madani was accused. The State party also points out that the competence of the military tribunal was not challenged by Mr. Abbassi Madani before the trial judges. It was called into question for the first time with the Supreme Court which rejected the challenge.

In addition the State party indicated inter alia that upon his arrest Mr. Abbassi Madani was informed by the investigating judge of the charges against him, that he was assisted during the investigation and trial and in the Supreme Court by a large number of lawyers and that Mr. Abbassi Madani has availed himself of the domestic remedies under the law, etc. It should be noted that the observations of the State party cited above did not elicit any new comments from the author.

It seems quite clear that all these questions on the part of the author as well as on that of the State party should have received the primary consideration of the Committee in its endeavour to formulate its views in respect of article 14 in the light of the guarantees spelled out therein.

Unfortunately, as it appears from paragraph 8.7 of the communication, instead of giving serious consideration to these fundamental issues the Committee has chosen to claim that in trying civilians before military courts States parties must demonstrate that the regular civilian courts are unable to undertake the trials, i.e. a condition which I believe does not constitute part

of the guarantees stipulated in article 14. The Committee found that in the present case, the failure by the State party to meet this new condition is sufficient by itself to justify a finding of a violation of article 14.

Furthermore the Committee, in the wording of paragraph 8.7, came to the conclusion that the State party's failure to demonstrate the need to rely on a military court in the case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14. It seems to me that this last contention by the Committee could be read to mean that we cannot totally exclude the possibility that had the Committee chosen, as it should have done, to examine the question of guarantees it may conceivably have found that in fact the military trial in question did meet the guarantees stipulated by article 14 of the Covenant.

For all those reasons, I find myself unable to subscribe to the views expressed by the Committee in paragraph 8.7 of the communication.

(*Signed*): Ahmed T. Khalil

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