



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 1804/2008

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

<i>Submitted by:</i>	Khaled II Khwildy (represented by Al-Karama for Human Rights and TRIAL)
<i>Alleged victim:</i>	Khaled II Khwildy and Abdussalam II Khwildy – the author and his brother
<i>State party:</i>	Libya
<i>Dates of communications:</i>	3 July 2008 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 19 August 2008 (not issued in document form)
<i>Date of adoption of Views:</i>	1 November 2012
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issues:</i>	State party's failure to cooperate
<i>Substantive issues:</i>	Right to life; prohibition of torture and cruel, inhuman and degrading treatment; right to liberty and security; right to recognition as a person before the law; right to an effective remedy
<i>Articles of the Covenant:</i>	2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1–4; 10, paragraph 1; 14; 16; and 17, paragraphs 1 and 2
<i>Articles of the Optional Protocol:</i>	None

## Annex

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

concerning

#### **Communication No. 1804/2008\***

*Submitted by:* Khaled Il Khwildy (represented by Al-Karama for Human Rights and TRIAL)

*Alleged victim:* Khaled Il Khwildy and Abdussalam Il Khwildy – the author and his brother

*State party:* Libya

*Dates of communication:* 3 July 2008 (initial submission)

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

*Meeting* on 1 November 2012,

*Having concluded* its consideration of communication No. 1804/2008, submitted to the Human Rights Committee by Khaled Il Khwildy 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:

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

1. The author of the communication, dated 3 July 2008, is Khaled Il Khwildy, a Libyan national born in 1972, currently residing in Switzerland. He acts on his own behalf and on behalf of his brother, Abdussalam Il Khwildy, also a Libyan national. The author claims violations by Libya of article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1–4; article 10, paragraph 1; article 14; article 16; and article 17, paragraphs 1 and 2, of the Covenant in respect of his brother and articles 2, paragraph 3, and 7 with regard to himself. He is jointly represented by the organizations Alkarama for Human

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\* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mme Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kaelin, Ms. Zonke Zanele Majodina, Ms. Iualia Antoanela Motoc, Mr. Gerald L. Neuman, Mr. Michael O’Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

The text of an individual (dissenting) opinion by Mr. Krister Thelin is attached to these views.

The text of an individual (concurring) opinion by Mr. Fabián Omar Salvioli is attached to these views.

Rights and TRIAL (Track Impunity Always). The Covenant and its Optional Protocol entered into force for Libya<sup>1</sup> on 15 August 1970 and 16 August 1989 respectively.

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

2.1 In 1996, the author fled Libya and obtained political asylum in Switzerland. In April 1998, the eldest brother of the Il Khwildy family, Djemaa Il Khwildy, was summarily and publicly executed in Benghazi. A few days later, officers of the Internal Security Agency forcibly entered the family home, ransacked it and proceeded to arrest all the males in the family, including children. They were all taken to Benghazi prison and detained for over a month, until the author's brother (Abdussalam Il Khwildy) confessed to having acted alone in helping the author flee the country. They were all subjected to varying degrees of ill-treatment. Abdussalam Il Khwildy was subjected to severe beatings and on one occasion one of his brothers witnessed him being viciously beaten until he was bleeding and severely injured.

2.2 The decision to keep Abdussalam Il Khwildy in detention was made by members of the security forces, with no judicial control. He was told by a police official: "I know you have done nothing, but you are going to stay here for five years".

2.3 The author claims that, in July 1998, another of the brothers, Mohamed Il Khwildy, who had been in hiding since the arrest of his father and brothers, was killed by security forces. Meanwhile, Abdussalam Il Khwildy was held in secret detention. In January 1999 he was transferred to Abou Salim prison in Tripoli. He was detained there until May 2003, when he was released without ever having been brought before a judicial authority. Throughout his detention, Abdussalam Il Khwildy was not allowed to be visited by or communicate with his family or a lawyer, and his whereabouts were kept a secret from his family.

2.4 Abdussalam Il Khwildy was again arrested on 17 October 2004. After an unfair trial, conducted in complete disregard of his rights, on 7 August 2006, he was sentenced to two years' imprisonment for having aided the author in fleeing the country.

2.5 After serving his sentence, Abdussalam Il Khwildy was due to be released on 17 October 2006. On 19 October 2006, he called his father to inform him that two days earlier he had been transferred from the Abou Slim prison to the El Istihara prison<sup>2</sup> and that he would probably be released without delay, pending completion of some documentation. After that day, his family heard no more about his fate or his whereabouts. The Libyan authorities did not respond to his family's requests for information until the Secretary of Prisons eventually confirmed that he was not in any other prison in the country. The security services denied still detaining him and refused to give any information other than that he had been released. In the light of the family's previous experiences with the security services they had every reason to fear for his life and physical and psychological integrity.

2.6 In May 2008, Abdussalam Il Khwildy was permitted to call his family and informed them that he was in Abou Salim prison. He was then able to receive a 45-minute visit from his parents. No news had been heard from him before that date as the Libyan authorities had sealed off outside contact with Abou Salim prison following an incident in 2006 where three prisoners died of starvation. Abdussalam Il Khwildy remained in detention until he was released on 22 August 2011.<sup>3</sup>

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<sup>1</sup> Formerly known as Libyan Arab Jamahiriya.

<sup>2</sup> A facility for prisoners who had recently completed their sentences.

<sup>3</sup> See paragraph 5 below. Abdussalam Il Khwildy was released after the regime change in Libya.

2.7 Regarding exhaustion of domestic remedies, the author recalls the Committee's jurisprudence that it is only necessary to exhaust remedies which are effective and available. Therefore, due consideration should be given to the fact that, in practice, no such remedies existed in Libya for victims of politically motivated human rights violations. Any such recourse through the judicial system is rendered ineffective and unavailable by the lack of independence of the judiciary and a generalized fear of reprisals, as well as fears arising from the particular situation of the author and his family. There was no separation of powers in Libya and the system was based on exclusion of judicial supervision. The fact that the victim was tried in a special tribunal, as well as the prison officials' threat that his father would suffer the consequences of the author's political activity abroad show that the present case was considered by the authorities to be political in nature. Considering the severe actions taken against the family merely on the basis of their association with the author, it is clear that a formal accusation against the authorities would result in even more dire consequences. It is therefore submitted that the author is excused from exhausting judicial domestic remedies. As for other kind of remedies, the author notes that the family took whatever non-judicial steps were available to them, as they made repeated enquiries to the relevant authorities without success.

### **The complaint**

3.1 The author claims that the State party violated Abdussalam II Khwildy's rights under article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1–4; article 10, paragraph 1; article 14; article 16; and article 17, paragraphs 1 and 2, of the Covenant.

3.2 The author submits that any situation of unacknowledged and incommunicado detention, such as that suffered by the victim during his first detention and during his enforced disappearance between October 2006 and May 2008, is a failure by the State party to prevent violations of the right to life by security forces, because placing the detainee entirely at the mercy of detaining officials is a situation which lends itself to serious abuses and constitutes a grave threat to the detainee's life. It has previously therefore been the view of the Committee that unacknowledged detention entails a breach of article 6, even if the detainee's death is not actually caused thereby. The authorities are under a duty to protect a detainee's right to life and allowing an enforced disappearance is in itself a failure in this duty.

3.3 Article 7 has been violated as Abdussalam II Khwildy was subjected twice to enforced disappearance. His first disappearance was for the five-year period of his first detention, when he was held in a secret location by the State party who refused to disclose his whereabouts and denied him any communication with his family or a lawyer, as well as any judicial scrutiny of his detention. His second disappearance occurred after his second detention was supposed to have ended. For 20 months he was held without any protection from the legal system or contact with the outside world, as the only persons aware that he was even being detained were the detaining officials. The extreme psychological suffering which is invariably caused by indefinite incommunicado detention constitutes a violation of article 7. Furthermore, article 7 was violated because he was subjected to severe beatings during his first detention in order to extract confessions from him and other acts of torture during the nine months of his first disappearance. In this connection, article 10, paragraph 1, was also violated, as Abdussalam II Khwildy was not treated with humanity and respect for his dignity.

3.4 The author also alleges violations of Abdussalam II Khwildy's rights not to be deprived of liberty except on such grounds and in accordance with such procedures as are established by law (art. 9, para. 1); his right to be informed, at the time of the arrest, of the reasons of his arrest and to be promptly informed of any charges against him (art. 9, para.

2); his right to be brought promptly before a judge and to be tried within a reasonable time or released (art. 9, para. 3); and his right to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful (art. 9, para. 4).

3.5 The author also claims that the criminal proceedings against Abdussalam II Khwildy violated various aspects of the right to a fair trial, in particular, those contained in articles 14, paragraphs 1 and 3 (b) and (c). His hearing was held before a special tribunal outside the regular justice system and which lacked independence, thus denying him equality before the courts; the hearings were not public; and not even the family members were allowed to attend. As regards paragraph 3, the author submits that Abdussalam II Khwildy was not represented by a lawyer of his own choosing but by a lawyer chosen for him by the court and with whom he was unable to communicate outside the courtroom. He was thus deprived of the possibility of properly preparing his defence, as he clearly could not have had adequate time and facilities to do so in such circumstances. Finally, his right to be tried without undue delay was violated, as he was held in custody for almost two years pending trial.

3.6 The author argues that Abdussalam II Khwildy's right to recognition as a person before the law was violated, due to his enforced disappearance, in violation of article 16 of the Covenant. As regards article 17, the author submits that the security forces' intrusion into Abdussalam II Khwildy's family home, as well as the State party's failure to provide a remedy for this, constitute breaches of paragraphs 1 and 2 of this provision.

3.7 The author also submits that Abdussalam II Khwildy is a victim of a violation of article 2, paragraph 3, as he was not able to obtain any redress in Libya for the violations committed against him. In addition, Libya did not comply with its duty to investigate, criminally prosecute, try and punish those responsible for the violations.

3.8 The author contends that he himself is a victim of violations of article 2, paragraph 3, and article 7 of the Covenant, as a result of stress and anguish in connection with his brother's successive disappearances and the lack of an effective remedy for these violations.

3.9 In addition, given the fact that the positive obligation to ensure rights guaranteed under the Covenant encompasses the obligation of providing effective remedies whenever a violation has occurred, the failure to take necessary measures to protect those rights established by articles 6, 7, 9, 10, 14, 16 and 17 amounts in itself to an autonomous violation of the said rights read in conjunction with article 2, paragraph 3.

#### **State party's failure to cooperate**

4. On 11 May 2009, 22 December 2009 and 24 August 2010, the State party was requested to submit information concerning the admissibility and merits of the communication. The Committee notes that this information has not been received. It regrets the State party's failure to provide any information with regard to the admissibility and/or substance of the author's claims. It recalls that, under the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by the State. In the absence of a reply from the State party, due weight must be given to those of the author's allegations that have been properly substantiated.<sup>4</sup>

<sup>4</sup> See, inter alia, communications No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 4; No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 4; No. 1208/2003, *Kurbonov v. Tajikistan*, Views adopted on 16 March 2006,

**Additional submissions by the author**

5. On 29 April 2009, the author informed the Committee that Abdussalam II Khwildy had been visited by his family twice, on 25 October 2008 and 11 March 2009. On 17 April 2012, the author submitted that Abdussalam II Khwildy was released on 22 August 2011.

**Issues and proceedings before the Committee***Consideration of admissibility*

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

6.2 The Committee notes, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement.

6.3 With respect to the question of exhaustion of domestic remedies, the Committee reiterates its concern that, in spite of three reminders addressed to the State party, no information or observations on the admissibility or merits of the communication have been received from the State party. Given these circumstances, the Committee finds that it is not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

6.4 As to the alleged violation of article 17, paragraphs 1 and 2, of the Covenant, the Committee considers that, in view of the limited information provided, the author's allegations have been insufficiently substantiated for purposes of admissibility. The Committee considers that the other allegations have been sufficiently substantiated and finds no reason to consider the rest of the communication inadmissible. The Committee thus proceeds to its consideration on the merits in respect of the claims made with respect to: (a) Abdussalam II Khwildy, under article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1–4; article 10, paragraph 1; article 14; article 16 of the Covenant; (b) the author himself, under article 2, paragraph 3; read in conjunction with article 7 of the Covenant.

*Consideration of the merits*

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

7.2 The Committee notes the failure of the State party to provide any information regarding the author's allegations and reaffirms that the burden of proof cannot rest on the author of the communication alone, especially since the author and the State party do not always have equal access to the evidence and it is frequently the case that the State party alone has the relevant information.<sup>5</sup> 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 furnish to the Committee the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider an

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para. 4; and No. 760/1997, *Diergaardt et al. v. Namibia*, Views adopted on 25 July 2000, para. 10.2.

<sup>5</sup> See *El Hassy v. Libyan Arab Jamahiriya*, para. 6.7; and communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. In the absence of any explanation from the State party in this respect, due weight must be given to the author's allegations.

7.3 Regarding the alleged secret and incommunicado detention of Abdussalam II Khwildy, the Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, in which the Committee recommends that States parties should make provision against incommunicado detention. It notes that Abdussalam II Khwildy was kept in incommunicado detention in an undisclosed location during two distinct periods: between April 1998 and May 2003, and when he was due to be released after serving two-year sentence, from October 2006 to May 2008, when his family was finally informed of his whereabouts. During these periods, he was kept in isolation, tortured and prevented from any contact with family or legal counsel.

7.4 The Committee recalls its jurisprudence under which acts leading to enforced disappearances constitute a violation of many of the rights enshrined in the Covenant, including the right to recognition everywhere as a person before the law (art. 16), the right to liberty and security of person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). They may also constitute a violation or a grave threat to the right to life (art. 6).<sup>6</sup>

7.5 The Committee notes that the State party has provided no response to the author's allegations regarding the enforced disappearance of Abdussalam II Khwildy. The Committee further notes from the information before it that Abdussalam II Khwildy was subjected to enforced disappearance from April 1998 to May 2003, and from October 2006 to May 2008. On the basis of the information at its disposal, the Committee considers that both of Abdussalam II Khwildy's enforced disappearances constitute a violation of article 7 of the Covenant.<sup>7</sup>

7.6 With regard to the author, the Committee notes the anguish and distress caused by the disappearance of his brother, Abdussalam II Khwildy. Recalling its jurisprudence, the Committee concludes that the facts before it reveal a violation of article 7 of the Covenant with regard to the author.<sup>8</sup>

7.7 Regarding article 9, the information before the Committee shows that Abdussalam II Khwildy was twice arrested without a warrant by agents of the State party, and that he was held in incommunicado detention on each occasion, first for five years and, after that, for 20 months, without access to defence counsel, without being informed of the grounds for his arrest and without being brought before a judicial authority. During these periods, Abdussalam II Khwildy was unable to challenge the legality of his detention or its arbitrary character. In the absence of any explanation from the State party, the Committee finds

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<sup>6</sup> Communications No. 1328/2004, *Kimouche v. Algeria*, Views adopted on 10 July 2007, para. 7.2; No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, para. 6.2; No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.2; and No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.3.

<sup>7</sup> See *El Awani v. Libyan Arab Jamahiriya*, para. 6.5; *El Hassy v. Libyan Arab Jamahiriya*, para. 6.2.

<sup>8</sup> See communication No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.5; *El Hassy v. Libyan Arab Jamahiriya*, para. 6.11.

violations of article 9 of the Covenant with regard to the detention of Abdussalam II Khwildy.<sup>9</sup>

7.8 The Committee has taken note of the author's allegation that Abdussalam II Khwildy was subjected to acts of torture during his detention. The Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In the absence of information from the State party concerning the treatment of Abdussalam II Khwildy in detention, the Committee concludes that the rights of Abdussalam II Khwildy under articles 7 and 10, paragraph 1, were violated.<sup>10</sup>

7.9 With respect to the author's complaint under article 14, the Committee notes, from the information before it, that on 7 August 2006 – almost 22 months after his second arrest – Abdussalam II Khwildy was sentenced to two years' imprisonment by a special tribunal. Although a lawyer was assigned to him by the judge, he was not able to meet with him outside the courtroom. All hearings were held in secret and even close relatives could not attend the court hearings. Based on the material before it and in the absence of information from the State party, the Committee concludes that the trial and sentencing of Abdussalam II Khwildy, in the circumstances described, disclose a violation of article 14, paragraphs 1 and 3 (b) and 3 (c), of the Covenant.

7.10 In respect of article 16, the Committee reiterates its established jurisprudence, according to which intentionally removing a person from the protection of the law for a prolonged period of time may constitute a refusal of recognition as a person before the law if the victim was in the hands of the State authorities when last seen and, at the same time, if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (art. 2, para. 3, of the Covenant) have been systematically impeded.<sup>11</sup> In the present case, the State party authorities failed to provide Abdussalam II Khwildy's family with relevant information on his arrest and detention. The Committee finds that the enforced disappearance and incommunicado detention of Abdussalam II Khwildy deprived him of the protection of the law during that period, in violation of article 16 of the Covenant.

7.11 The author invokes article 2, paragraph 3, of the Covenant, which requires State parties to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights recognized in the Covenant. The Committee reiterates the importance it attaches to State parties' establishment of appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on State parties to the Covenant, in which it states that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. In the present case, the information before the Committee indicates that Abdussalam II Khwildy did not have access to an effective remedy, leading the Committee to find a violation of article 2, paragraph 3, read in conjunction with articles 6; 7; 9, paragraphs 1–4; 10, paragraph 1; 14, paragraphs 1 and 3 (b) and (c); and article 16 vis-à-vis Abdussalam II

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<sup>9</sup> See *Medjnoune v. Algeria*, para. 8.5.

<sup>10</sup> See communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2; *El Abani v. Libyan Arab Jamahiriya*, para. 7.7; and *El Hassy v. Libyan Arab Jamahiriya*, para. 6.4.

<sup>11</sup> See *El Abani v. Libyan Arab Jamahiriya*, para 7.9; communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.8; and communication No. 1495/2006, *Madaoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.



Khwildy.<sup>12</sup> The Committee also finds there has been a violation of article 2, paragraph 3, read in conjunction with article 7, with regard to the author.<sup>13</sup>

7.12 The Committee notes that on two occasions the author's brother was held by the State party's authorities for prolonged periods of time, at a location unknown to his family and without the possibility of communicating with the outside world. The Committee recalls that in cases of enforced disappearance the deprivation of liberty, followed by a refusal to acknowledge that fact or by concealment of the fate or whereabouts of the disappeared persons, places such persons outside the protection of the law and puts their lives in substantial and ongoing danger for which the State is accountable. In the present case, the Committee notes that the State party has produced no evidence to indicate that it fulfilled its obligation to protect Abdussalam II Khwildy's life. Indeed, the Committee, through previous cases, is also aware that other persons held in circumstances such as those endured by the author's brother had been found to have been killed or failed to reappear alive. The Committee therefore concludes that the State party failed in its duty to protect Abdussalam II Khwildy's life, in violation of article 6, paragraph 1, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it reveal violations by the State party of articles 6; 7; 9, paragraphs 1–4; 10, paragraph 1; 14, paragraphs 1 and 3 (b) and (c); and article 16 with regard to Abdussalam II Khwildy. The Committee further finds that the State party acted in violation of article 2, paragraph 3, read in conjunction with articles 6; 7; 9, paragraphs 1–4; 10, paragraph 1; and article 16 vis-à-vis Abdussalam II Khwildy. Lastly, the Committee finds a violation of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant with regard to the author.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including (a) a thorough and effective investigation into the disappearance of Abdussalam II Khwildy and any ill-treatment that he suffered in detention; (b) providing the author and Abdussalam II Khwildy with detailed information on the results of its investigations; (c) prosecuting, trying and punishing those responsible for the disappearance or other ill-treatment; and (d) appropriate compensation to the author and Abdussalam II Khwildy for the violations suffered. The State party is also under an obligation to take appropriate and sufficient measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in the event that a violation is established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

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

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<sup>12</sup> See *El Hassy v. Libyan Arab Jamahiriya*, para. 6.9; and communication No. 1196/2003, *Boucherf v. Algeria*, para. 9.9.

## Appendix

### **Individual (dissenting) opinion of Mr. Krister Thelin**

The majority has found a violation of article 6, paragraph 1, of the Covenant. I disagree. The Committee's reasoning should, in my view, in paragraph 7.12 read as follows:

“Having reached the above conclusions, and in view of the fact that Mr. Abdussalam II Khwildy was alive upon release, the Committee will not examine separately the allegations under article 6 of the Covenant.”

[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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<sup>13</sup> See communication No. 1811/2008, *Chihoub v. Algeria*, Views adopted on 31 October 2011, para 8.11.

### Concurring opinion of Committee member Mr. Fabián Salvioli

1. I concur with the decision of the Human Rights Committee in the case of *Il Khwildy v. Libya* (communication No. 1804/2008), in which the Human Rights Committee has found that the State has violated several of the rights set forth in the International Covenant on Civil and Political Rights, to the prejudice of the victims.

2. Differences emerged within the Committee as to how to deal with so-called “secret detentions” in the light of the Covenant. In my partly dissenting vote in the case of *Aboufaied v. Libya*, I took the opportunity to draw attention to the need to avoid introducing any further requirements, in addition to those that already exist, in order to establish the enforced disappearance of a person. On that occasion, I opposed taking considerations of time into account, and after an analysis of specific provisions at the international (Declaration on the Protection of All Persons from Enforced Disappearance and International Convention for the Protection of All Persons from Enforced Disappearance) and regional levels (Inter-American Convention on Forced Disappearance of Persons), I concluded by observing that “the time dimension, in the sense of requiring a minimum duration of detention, has no place in the categorization of enforced disappearance”.

3. In my opinion “secret detention” is a euphemism that covers actual enforced disappearances of persons, reprehensible practices that violate several of the rights set forth in the International Covenant on Civil and Political Rights.

4. A careful reading of the provisions of the International Convention for the Protection of All Persons from Enforced Disappearance itself leaves no room for any other analysis; it stipulates that “no-one shall be held in secret detention”. This is consistent with the joint study on secret detention carried out by three prestigious non-treaty bodies of the United Nations human rights system.

5. The joint study expressly states that “every instance of secret detention also amounts to a case of enforced disappearance” and furthermore that “since secret detention amounts to an enforced disappearance, if resorted to in a widespread or systematic manner, such aggravated form of enforced disappearance can reach the threshold of a crime against humanity”.

6. In its decision in the case at hand, *Il Khwildy*, the Human Rights Committee has rightly found that both of the secret detentions suffered by the victim were two enforced disappearances (para. 7.12) and concludes that this was a direct violation of article 6 of the Covenant.

7. However, in its views the Committee also notes that “indeed, the Committee through previous cases is also aware that other persons held in circumstances such as those endured by the author’s brother had been found to have been killed or failed to reappear alive”.

8. This finding by the Committee adds nothing to the case. Even in the absence of previous cases, this case of *Il Khwildy* should have been settled in exactly the same manner. It is the facts of the individual case that are examined in order to determine whether there have been violations of the Covenant, and in its arguments the Committee should be careful not to tread on treacherous ground that might lead it to adopt double standards in respect of enforced disappearance, which would be regrettable.

9. If a State practices a “secret detention” it carries out an enforced disappearance; this is regardless of whether the person subsequently reappears alive or dead (the appearance of the person alive or dead merely determines the outcome of the enforced disappearance, but does not mean it has not occurred and constituted several violations of human rights); nor

should the period of time during which the person has disappeared be taken into account in determining whether there has been a disappearance (although it is important in evaluating and deciding reparations, which in the individual sphere are equivalent to the harm suffered, and in determining legislative or other measures to guarantee the non-repetition of the acts).

10. Finally, if the State has no previous history of such acts and is found to have practiced an enforced disappearance because it has subjected a person to “secret detention”, there will be no need to resort to any additional evidence that demonstrates similar acts in other cases in the past; let us assume that this is the first case received by the Committee: should it have decided differently in the absence of previous instances? To conclude that it would be regrettable, and would lead to an absurd outcome.

11. It does not matter which State is responsible or what its behaviour has been in the past in respecting and guaranteeing the rights of individuals: if it has held a person in “secret detention”, it has carried out an enforced disappearance and the Committee should find that this is the case, with all the attendant legal consequences. In analysing individual communications, the cases of all victims deserve identical respect and treatment by the Human Rights Committee.

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

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