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Views

Communication No. 1640/2007

Submitted by:	Abdelhakim Wanis El Abani (El Ouerfeli) (represented by Al-Karama for Human Rights)
Alleged victims:	Wanis Charef El Abani (El Ouerfeli) (the author's father), the author, and the author's mother and seven brothers and sisters
State party:	Libyan Arab Jamahiriya
Date of communication:	15 October 2007 (initial submission)
Document reference:	Special Rapporteur's rule 97 decision, transmitted to the State party on 5 December 2007 (not issued in document form)
Date of adoption of Views:	26 July 2010
Subject matter:	Unlawful arrest, incommunicado detention, torture and ill-treatment, arrest without a warrant, right to a fair trial, enforced disappearance
Procedural issues:	State's failure to cooperate
Substantive issues:	Right to life; prohibition of torture and cruel and inhuman treatment; right to liberty and security of the person; arbitrary arrest and detention; respect for the inherent dignity of the human person; right to a fair trial; recognition as a person before the law

* Made public by decision of the Human Rights Committee.

Articles of the Covenant:	2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1 to 4; 10, paragraph 1; 14, paragraphs 1 and 3 (a) to (d); and 16
Article of the Optional Protocol:	5, paragraph 2 (b)

On 26 July 2010, the Human Rights Committee adopted the annexed draft as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1640/2007.

[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 (ninety-ninth session)

concerning

Communication No. 1640/2007*

Submitted by:	Abdelhakim Wanis El Abani (El Ouerfeli) (represented by Al-Karama for Human Rights)
Alleged victims:	Wanis Charef El Abani (El Ouerfeli) (the author's father), the author, and the author's mother and seven brothers and sisters
State party:	Libyan Arab Jamahiriya
Date of communication:	15 October 2007 (initial submission)

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

Meeting on 26 July 2010,

Having concluded its consideration of communication No. 1640/2007, submitted to the Human Rights Committee by Abdelhakim Wanis El Abani (El Ouerfeli), 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,

Adopts the following:

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

1. The author of the communication, dated 15 October 2007, is Abdelhakim Wanis El Abani (El Ouerfeli), a Libyan national, born in 1977 and currently residing in Benghazi, Libyan Arab Jamahiriya. He is acting on behalf of his father, Wanis Charef El Abani (El Ouerfeli), on his own behalf, and on behalf of his mother and his brothers and sisters, whose names he prefers not to disclose. The author claims that his father is a victim of violations by the Libyan Arab Jamahiriya of article 2, paragraph 3; article 6, paragraph 1;

* The following members of the Human Rights Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Mr. Mahjoub El Haiba, Mr. Ahmed Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

The texts of individual opinions signed by Committee members Mr. Abdelfattah Amor and Mr. Fabián Omar Salvioli are appended to the present Views.

article 7; article 9, paragraphs 1 to 4; article 10, paragraph 1; article 14, paragraphs 1 and 3 (b) and (c); and article 16, of the Covenant. He also states that his mother, his brothers and sisters, and he are victims of a violation of article 7, read in conjunction with article 2, paragraph 3, of the Covenant. He is represented by Al-Karama for Human Rights. The Covenant and its Optional Protocol entered into force for the Libyan Arab Jamahiriya on 15 August 1970 and 16 August 1989, respectively.

The facts as presented by the author

2.1 The author, Abdelhakim Wanis El Abani, is the son of the victim, Wanis Charef El Abani, judge at the court of first instance in Benghazi. Wanis Charef El Abani, born in 1948, was employed as a judge at the Benghazi court of first instance for several years, during which time he received several warnings from the Ministry of Justice, followed by threats of dismissal for not deferring to instructions from his superiors concerning the judgements he issued. On 19 April 1990, together with two other members of the judiciary, he was summoned for disciplinary reasons by the Minister of Justice to the Ministry's headquarters in Tripoli and was received by the Minister in his office. After reprimanding him for his attitude, the Minister indicated that he was under arrest. Members of the internal security services proceeded to arrest him in the Minister's office, without a warrant and without informing him of the legal grounds for his arrest. Wanis Charef El Abani was then held incommunicado and tortured with extreme cruelty for three months before being taken to Abu Salim prison in Tripoli.

2.2 All the steps that his family took to ascertain what had happened to him and where he was being held proved fruitless; it was not until June 1996 that his wife learned that he was being held in Abu Salim prison, although she was not able to obtain any official confirmation of that fact. When she requested permission to visit her husband at the prison, the authorities denied that he was being held there. For the first six years of his detention, Mr. El Abani was held in complete isolation in a special part of the prison and had contact only with his jailers. He was transferred to a group cell just a few days before the events of 28 and 29 June 1996, when several hundred prisoners were reportedly killed by the internal security services at the prison. Having survived that massacre, he was once again held in complete isolation in an individual cell for several more years, still without any communication with the outside world or the other prisoners and without any family visits or contact with a lawyer.

2.3 On 19 April 2001, 11 years after his arrest, he was, for the first time, officially notified by the Military Prosecutor-General that he was charged with "having been in telephone contact with opponents abroad" and with "not having informed the authorities of that fact". It was not until 15 December 2001, when he was to appear before a military examining magistrate, that he was able, for the first time in 11 years, to speak with his wife, who had been given exceptional permission by the magistrate to communicate with him for one quarter of an hour before his hearing.

2.4 Brought before a military court on 1 January 2002, he was sentenced to a total of 13 years in prison: 10 years for "failure to report" and 3 years for "possession of explosives". The latter accusation was made known to him for the first time as the sentence was being read out.

2.5 On 13 May 2002, ruling on an appeal by the military prosecutor, the court of appeal (the Higher Court of the Armed People) set aside the first judgement and sent the case to a different military court. On 29 September 2002, that court confirmed the judgement of the court of first instance. Despite their requests, the author's family was not able to obtain the above-mentioned decisions or to secure copies of them, with the exception of that of 13 May 2002.

2.6 On 19 April 2003, the author's father had served his full sentence. However, he was not released and continued to be held after that date, in the same prison and under the same conditions, while his family awaited his release. During 2005, his family submitted an application for his release to the People's Court, which rejected it on the grounds that the military prosecutor did not acknowledge that he was detained in Abu Salim prison.

2.7 Having received confirmation from several released prisoners that Mr. El Abani was still being held at that prison, his family engaged two lawyers to file a complaint against the prison officials. The lawyers told his wife that it was not possible to file a criminal complaint against State officials or the security services for either abduction or kidnapping and that all they could do was to try to bring civil proceedings to ascertain whether Mr. El Abani was indeed still being held in Abu Salim prison. Ms. El Abani thus asked for an expert to be appointed to ascertain whether her husband was in the prison. In September 2006, the prison administration refused the court-appointed expert access to the prison. Mr. El Abani's family continued, however, to receive information that he was still being held in the same prison up until the beginning of January 2007. During that month, they learned that the internal security services had removed him from the prison.

2.8 On 5 April 2007, the Chairperson of the Working Group on Enforced or Involuntary Disappearances sent an urgent appeal to the State party authorities.[1]

2.9 Mr. Wanis El Abani was released by the State party authorities on 9 April 2008, 18 years after his arrest.

The complaint

3.1 The author claims that his father is a victim of a violation of article 2, paragraph 3, of the Covenant. He claims that, as a victim of enforced disappearance, his father was in fact prevented from exercising his right of appeal to contest the legality of his detention. Held incommunicado, he was not materially able to lodge a complaint in court. Moreover, none of the steps taken by his family produced any results. The author claims that the State party failed in its obligation to thoroughly investigate his father's disappearance and to prosecute those deemed responsible,[2] thereby violating article 2, paragraph 3, of the Covenant.

3.2 The author also asserts that his father was a victim of enforced disappearance between the time of his arrest in 1990 and the time when his family first received news of him in 2001, that is, for 11 years, and then again from the time when the authorities again denied that he was being held after he had finished serving his sentence in 2003 until his release in April 2008. He believes that this enforced disappearance constituted a serious threat to his father's right to life. He notes that, even though the State party was officially informed of his father's disappearance in multiple appeals, no follow-up was given to the case; his family remained in complete ignorance of his fate for nearly 12 years and then again for several years before he was released. Referring to the Committee's general comment No. 6 (1982) on the right to life, the author contends that the serious threat to his father's right to life that resulted from his enforced disappearance is a violation by the State party of article 6, paragraph 1, of the Covenant.

[1] See the report of the Working Group on Enforced or Involuntary Disappearances (A/HRC/7/2), para. 201.

[2] The author refers to communication No. 612/1995, *Arhuacos v. Colombia*, Views adopted on 29 July 1997, para. 8.8.

3.3 The author further contends that his father's enforced disappearance also constitutes inhuman or degrading treatment,[3] in violation of article 7 of the Covenant. He also asserts that his father was subjected to physical and psychological torture during the first three months of his incommunicado detention in the facilities of the internal security services. The author claims that his father's disappearance was a paralysing, painful and agonizing ordeal for his family, as they had no information whatsoever concerning his fate for the first 11 years of his detention and then again found themselves in this position from the time that he had completed his sentence until he was released in 2008. This uncertainty was a source of profound and continuous anguish for nearly 12 years for Mr. El Abani's wife and children, who also consider themselves victims of a violation by the State party of article 7, read in conjunction with article 2, paragraph 3, of the Covenant.[4]

3.4 The author claims that his father's arrest on 19 April 1990 by the internal security services, without a warrant and without informing him of the legal grounds for his arrest, was carried out in complete disregard of the guarantees set forth in article 9, paragraphs 1 and 2, of the Covenant. He asserts that the incommunicado detention of his father until he was formally charged on 19 April 2001 was also a violation of article 9, paragraph 1. He was not brought before a judge until 11 years after his arrest, in flagrant violation of the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power, as guaranteed under article 9, paragraph 3. Moreover, the fact that his detention was not acknowledged and that the authorities continued to hold him incommunicado and concealed his fate from his family from the time that he had finished serving his sentence in 2003 until his release in April 2008 is also arbitrary within the meaning of article 9 of the Covenant.[5]

3.5 The author also asserts that, because his father was held incommunicado for nearly 12 years and was tortured, he was not treated with humanity or respect for the inherent dignity of the human person. He therefore claims that his father was victim of a violation by the State party of article 10, paragraph 1, of the Covenant.

3.6 With respect to article 14, the author notes that his father was brought before a military court 11 years after his arrest and was sentenced after a closed trial to 13 years' imprisonment. He was never given access to his criminal case file, and a lawyer was appointed by the military court to assist him. He adds that his family had no knowledge of this procedure until the military court had taken its decision. The author asserts that the fact that his father did not appear in court until 11 years after his arrest constitutes a particularly serious violation of his right to be tried without undue delay. He further states that the fact that his father was not able to choose his own attorney runs counter to the principle of free choice of defence counsel.

3.7 The author also asserts that the fact that his father was tried by a military court even though he was a civilian, having served as a civil judge at the Benghazi court of first instance, means that the court was not competent to try or sentence him and cannot be

[3] The author refers to communications No. 449/1991, *Barbarín Mojica v. the Dominican Republic*, Views adopted on 15 July 1994; No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996; and No. 542/1993, *Katombe L. Tshishimbi v. Zaire*, Views adopted on 25 March 1996.

[4] The author refers to communication No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983.

[5] The author refers to *Arhuacos v. Colombia* (note 2 above); *Katombe L. Tshishimbi v. Zaire* (note 3 above); *Celis Laureano v. Peru* (note 3 above); communications No. 563/1993, *Nydia Bautista de Arrellana v. Colombia*, Views adopted on 27 October 1995; No. 181/1984, *Arévalo v. Colombia*, Views adopted on 3 November 1989; No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985; No. 8/1977, *Weismann and Perdomo v. Uruguay*, Views adopted on 3 April 1980; and No. 56/1979, *Casariego v. Uruguay*, Views adopted on 29 July 1981.

considered impartial or independent, as it consisted of military judges working under the authority of the Minister of Defence. The author asserts that the State party cannot supply any reason why his father was tried and sentenced by a military court, nor can it demonstrate how the military court in Tripoli could have guaranteed full protection of his rights as an accused person.[6] Given those circumstances, he believes that his father is also a victim of a violation by the State party of article 14 of the Covenant.

3.8 The author further points out that, as a victim of enforced disappearance, his father was denied the right to be recognized as the subject of rights and obligations, in other words, as a human being deserving of respect. He adds that, as a victim of enforced disappearance, he was deprived of the protection of the law, and his right to recognition as a person before the law was denied, in violation by the State party of article 16 of the Covenant.[7]

3.9 As to the question of the exhaustion of domestic remedies, the author claims that his family approached numerous government departments, notably in the headquarters of the Ministry of Justice, starting from the day after his father was arrested. The family members also approached his former colleagues, judges and members of the Benghazi Office of the Public Prosecutor, but, upon encountering repeated refusals to entertain their applications, soon realized that none of the legal authorities was prepared to take action to obtain the victim's release. None of the lawyers from the Benghazi or Tripoli bars whom the family approached in an effort to take legal action was prepared to lodge a complaint against the judicial authorities or the security services for fear of reprisals. Moreover, the application for release filed with the People's Court was dismissed by the judge on the grounds that the military prosecutor did not concede that the author's father was detained in Abu Salim prison. The civil proceedings that were initiated so that an expert could be appointed to establish the presence of the author's father in the prison were also obstructed (see paragraph 2.7 above). Under those circumstances, the author claims that domestic remedies are, clearly, neither available nor effective, and asserts that he is thus no longer obligated to pursue action or proceedings at the domestic level in order for his communication to be admissible before the Committee.

State party's failure to cooperate

4. On 15 September 2008, 20 January 2009 and 24 July 2009, 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 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.[8]

[6] The author refers to the Committee's general comment No. 13 (1984) on the administration of justice.

[7] The author refers here to communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007.

[8] See communications No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 4; No. 1295/2004, *El Alwani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 4; No. 1208/2003, *Kurbonov v. Tajikistan*, Views adopted on 16 March 2006, para. 4; and No. 760/1997, *Diergaardt et al. v. Namibia*, Views adopted on 25 July 2000, para. 10.2.

Additional submission by the author

5. On 28 May 2010, the author, through his counsel, informed the Committee that his father had been released by the State party's authorities on 9 April 2008. The author added that his father had expressed the hope that proceedings before the Committee in respect of his case should continue. In the same submission, the author observed that the requests he had made to the Committee in his initial communication of 15 October 2007 in respect of a recommendation by the Committee that the State party should give him news of his father, release him immediately and allow him to communicate with his family were no longer applicable. The author stated, however, that he wished to maintain the remainder of the communication in its entirety.

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 to the Covenant.

6.2 Under article 5, paragraph 2 (a), of the Optional Protocol to the Covenant, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the case was submitted to the United Nations Working Group on Enforced or Involuntary Disappearances in 2007. However, it observes that extra-conventional procedures or mechanisms established by the former Commission on Human Rights or the Economic and Social Council, and whose mandates are to examine and publicly report on human rights situations in specific countries or territories or on major phenomena of human rights violations worldwide, do not constitute procedures of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.[9] Accordingly, the Committee is of the view that the submission of Mr. El Abani's case to the Working Group on Enforced or Involuntary Disappearances does not render it inadmissible under that provision.

6.3 With respect to the question of the 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. The Committee finds no reason to consider the communication inadmissible and thus proceeds to its consideration on the merits in respect of the claims made under article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1 to 4; article 10, paragraph 1; article 14, paragraphs 1 and 3 (a) to (d); and article 16. It also notes that issues may arise under article 7, read in conjunction with article 2, paragraph 3, with respect to the author, his mother and his brothers and sisters (that is, with respect to the wife and children of the victim).

Consideration of the merits

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

[9] *Celis Laureano v. Peru* (note 3 above), para. 7.1.

7.2 As to the alleged incommunicado detention of the author's father, 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) concerning the prohibition of torture and cruel treatment or punishment, in which the Committee recommends that States parties should make provision against incommunicado detention. It notes that the author's father was detained incommunicado at Abu Salim prison from the time of his arrest on 19 April 1990, virtually without interruption,[10] until 15 December 2001, when he was brought before a military examining magistrate and was able to speak with his wife for the only time that he was allowed to do so during his detention in Abu Salim prison. Moreover, although the author's father had completed his sentence on 19 April 2003, he remained in detention in the same prison, while the military prosecutor denied that he was being held there.

7.3 The Committee recalls the definition of enforced disappearance set forth in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006, which states: "For the purposes of this Convention, 'enforced disappearance' is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."[11] Any act leading to such a disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to recognition 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). It may also constitute a violation of, or a grave threat to, the right to life (art. 6).[12]

7.4 The Committee notes that the State party has provided no response to the author's allegations regarding the enforced disappearance of his father, nor to his claim that the latter was subjected to acts of torture during the first three months of his incommunicado detention. It reaffirms that the burden of proof cannot rest on the author of a communication alone, especially since an author and a State party do not always have equal access to the evidence, and that it is frequently the case that the State party alone has the relevant information.[13] It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has a 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

[10] The author mentions that his father was briefly transferred to a communal cell in 1996, but does not specify the length of time for which he was transferred.

[11] General Assembly resolution 61/177, annex. See also the Rome Statute of the International Criminal Court of 17 July 1998, art. 7, para. 2 (i), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 689; Inter-American Convention on Forced Disappearance of Persons, of 9 June 1994, art. 2, Organization of American States, A-60; Declaration on the Protection of All Persons from Enforced Disappearance, of 18 December 1992, General Assembly resolution 47/133.

[12] 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*, Views adopted on 11 July 2006, 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 31 July 2003, para. 9.3. See also the Declaration on the Protection of All Persons from Enforced Disappearance, art. 1, para. 2.

[13] See *El Hassy v. Libyan Arab Jamahiriya* (note 8 above), para. 6.7; *Conteris v. Uruguay* (note 5 above), para. 7.2; and communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

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 author's allegations to be substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. In the absence of any explanations from the State party in this respect, due weight must be given to the author's allegations. On the basis of the information at its disposal, the Committee concludes that to have exposed the author's father to acts of torture, to have kept him in captivity for a total of nearly 18 years and to have prevented him from communicating with his family and the outside world constitute a violation of article 7 of the Covenant in respect of Mr. El Abani.[14]

7.5 With regard to the author and the rest of his family, the Committee notes the anguish and distress caused by the disappearance of his father from the time of his arrest in April 1990 until December 2001, when Ms. Abani was able to speak with her husband. After he had served his full sentence, Mr. El Abani's fate remained unknown to his family, who were not able to obtain confirmation that he was being held in Abu Salim prison until his release in April 2008. The Committee is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant, read in conjunction with article 2, paragraph 3, with regard to the author, his mother and his brothers and sisters.[15]

7.6 Regarding the complaint concerning a violation of article 9, the information before the Committee shows that the author's father was arrested without a warrant by agents of the State party, was then held incommunicado without access to defence counsel and was not informed of the grounds for his arrest or the charges against him until he was charged by the Military Prosecutor-General on 19 April 2001, 11 years after his arrest. 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 held in detention until he was brought before a judge in 2001. Although he had served his sentence in full by April 2003, he was not released until April 2008. The author's father was never able to challenge the legality of his detention. In the absence of any explanation from the State party, the Committee finds a violation of article 9 of the Covenant.[16]

7.7 Regarding the author's complaint under article 10, paragraph 1, that his father was held incommunicado for an initial period of 12 years and subjected to torture, 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 the author's father in Abu Salim prison, the Committee concludes that his rights under article 10, paragraph 1, were violated.[17]

[14] See *El Awani v. Libyan Arab Jamahiriya* (note 12 above), para. 6.5; *El Hassy v. Libyan Arab Jamahiriya* (note 8 above), para. 6.2; *Celis Laureano v. Peru* (note 3 above), para. 8.5; and communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.4.

[15] See *El Hassy v. Libyan Arab Jamahiriya* (note 8 above), para. 6.11; communication No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14; and *Sarma v. Sri Lanka* (note 12 above), para. 9.5.

[16] See *Medjnoune v. Algeria* (note 13 above), para. 8.5.

[17] See general comment No. 21 (1992) on humane treatment of persons deprived of their liberty, para. 3; communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2; and *El Hassy v. Libyan Arab Jamahiriya* (note 8 above), para. 6.4.

7.8 As to the author's allegations under article 14, the Committee observes that the author's father was tried 11 years after his arrest and was sentenced after a closed trial to 13 years' imprisonment. He was never given access to his criminal case file, and a lawyer was appointed by the military court to assist him. The Committee also notes that Mr. El Abani was tried by a military court even though he was a civilian, having served as a civil judge at the Benghazi court of first instance. The Committee recalls its general comment No. 32 (2007), in which it states that, while the Covenant does not prohibit the trial of civilians in military courts, nevertheless such trials should be exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. It is incumbent upon 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 not up to the task and that recourse to military courts ensures the full protection of the rights of the accused pursuant to article 14.[18] In the present case, the State party has failed to comment on the need to have recourse to a military court. The Committee therefore concludes that the trial and sentencing of the author's father to 13 years' imprisonment by a military court discloses a violation of article 14, paragraphs 1 and 3 (a) to (d), of the Covenant.

7.9 In respect of article 16, the Committee reiterates its established case law, according to which intentionally removing a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person before the law if the victim was in the hands of State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (art. 2, para. 3, of the Covenant) have been systematically impeded.[19] In the present case, the author alleges that his father was arrested on 19 April 1990 without a warrant and without being informed of the legal grounds for his arrest. He was then taken to an unknown place where he was subjected to acts of torture, before being taken to Abu Salim prison. None of the steps taken by his family produced any results until he was formally charged, tried and sentenced in 2002. The Committee also observes that the author's father disappeared once again after having served his full sentence. The State party authorities denied that he was in Abu Salim prison but did not carry out any inquiry to ascertain his fate and have him released. The Committee finds that the enforced disappearance of the author's father for nearly 12 years, in the absence of any inquiry, deprived the author's father of the protection of the law during that period, in violation of article 16 of the Covenant.

7.10 The author also invokes article 2, paragraph 3, of the Covenant, under which States parties are required to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights recognized in the Covenant. The Committee reiterates the importance which it attaches to States 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 States 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.[20] In the present case, the information before the Committee indicates that the author's father did not have access to an effective remedy, and the Committee therefore

[18] See communication No. 1173/2003, *Benhadj v. Algeria*, Views adopted on 20 July 2007, para. 8.8.

[19] *Grioua v. Algeria* (note 7 above), para. 7.8; and communication No. 1495/2006, *Zohra Madaoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

[20] See paras. 15 and 18.

concludes that the facts before it reveal a violation of article 2, paragraph 3, read in conjunction with article 6, paragraph 1, and article 7.[21]

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 article 2, paragraph 3, read in conjunction with article 6, paragraph 1, and article 7; article 7 standing alone; article 9; article 10, paragraph 1; article 14, paragraphs 1 and 3 (a) to (d); and article 16, of the Covenant with regard to the author's father. The facts also reveal a violation of article 7, read in conjunction with article 2, paragraph 3, with regard to the author, his mother and his brothers and sisters.

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, which would include a thorough and diligent investigation into the disappearance of the author's father, adequate information on the results of its investigations and appropriate compensation for the author's father, as well as for his mother and his brothers and sisters, for the violations suffered. The Committee considers the State party duty-bound to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and acts of torture, and to prosecute, try and punish those responsible for such violations.[22] The State party is also under an obligation to take 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 Committee's Views.

[Adopted 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.]

[21] See *El Hassy v. the Libyan Arab Jamahiriya* (note 8 above), para. 6.9; and communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 9.9.

[22] See *El Hassy v. Libyan Arab Jamahiriya* (note 8 above), para. 8; *Boucherf v. Algeria* (note 21 above), para. 11; and *Medjnoune v. Algeria* (note 13 above), para. 10.

Appendix

Individual opinion of Committee member Mr. Abdelfattah Amor

This opinion is limited to certain legal aspects relating to the admissibility of the communication.

The communication was submitted by Mr. Abdelhakim Wanis El Abani (El Ouerfeli), on his own behalf and on behalf of his father, Mr. Wanis Charef El Abani (El Ouerfeli), who was being held in prison without any contact with his family at the time of the submission of the communication — 15 October 2007 — and who was released on 9 April 2008. The communication was also submitted on behalf of the author's mother and his seven brothers and sisters.

The locus standi of the son as a victim is not debatable in the present case, either at the time of the submission of the communication, for which purpose he duly empowered his attorney, or following the release of his father.

The locus standi of the father as a victim is not debatable either. It was not debatable while he was in detention, and it was not debatable following his release, since he expressed the hope that proceedings before the Committee in respect of his case should continue.

The question of the admissibility of the communication does arise, however, with respect to the mother, the two sisters and the five brothers. I think that the Committee should have declared the communication inadmissible in relation to them, for two reasons. The first relates to the anonymity of the communication and the second to the lack of power of attorney.

Regarding the first reason, article 3 of the Optional Protocol establishes that: "The Committee shall consider inadmissible any communication […] which is anonymous." Rule 96 (a) of the rules of procedure contains the same provision. The author seeks to act on behalf of his brothers and sisters, whose surnames, forenames and ages are not indicated for their protection. He has consequently preferred not to reveal the names of his mother and his brothers and sisters, which renders them anonymous and may raise problems with respect to their legal capacity and, therefore, their representation in legal proceedings. The Committee should have taken into account the clear distinction between anonymity and confidentiality. Unquestionably, anonymity renders the communication inadmissible. Surnames, forenames, ages and other specific circumstances can be kept in confidence, and the Committee has often done so pursuant to rule 102, paragraph 4, of the rules of procedure, which establishes that: "When a decision has been taken on the confidentiality pursuant to paragraph 3 above, the Committee, the Working Group established pursuant to rule 95, paragraph 1, or the Special Rapporteur designated pursuant to rule 95, paragraph 3, may decide that all or part of the submissions and other information, such as the identity of the author, may remain confidential after the Committee's decision on inadmissibility, the merits or discontinuance has been adopted."

It therefore appears that the Committee has overlooked the requirement of non-anonymity set forth in article 3 of the Optional Protocol and has not taken it upon itself to invite the author to provide the necessary information while availing himself of the rules on confidentiality.

Nor has the Committee taken it upon itself to ensure compliance with the rules of representation. Rule 96 (b) of the rules of procedure states 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."

Was the author empowered to act on behalf of his mother and his brothers and sisters, who may be adults and presumably legally capable? Does he have any authorization to legally represent his brothers and sisters if they are minors? The case file contains no power of attorney or any other authorization to act in a representative capacity. Nor does it contain any explanations regarding the inability referred to in rule 96 (b) of the rules of procedure. In a letter sent the day before the Committee considered the communication, the author's counsel indicated that he had not been able to obtain a power of attorney from the author's seven brothers and sisters owing, in particular, to fear of reprisals from the authorities. That is "the reason why, in the interest of protecting them, he [the author] did not want their surnames and forenames to be cited in the proceedings". The counsel added that "most of the people we deal with believe, rightly or wrongly, that they are under police surveillance and that their phone calls and e-mails are intercepted". In short, these are reasons which do not directly address the requirements of rule 96 (b) of the rules of procedure and which falls more into the domain of meta-law than of the law itself. Possibly it is because he is aware of the limitation of the explanations provided that the counsel accepts "that the communication may be considered on behalf of only the author and his father, the victim".

Nevertheless, the Committee considered that the communication was also admissible with respect to the mother and the brothers and sisters. This is a legally questionable position to which I cannot subscribe, particularly since it is likely to encourage further slippage towards *actio popularis*, which the Optional Protocol does not recognize.

(*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. Fabián Omar Salvioli

1. With my affirmative vote, I have concurred with the Committee's conclusions concerning communication No. 1640/2007, submitted by Mr. Abdelhakim Wanis El Abani against the Libyan Arab Jamahiriya. Nevertheless, I feel obliged to set down my thoughts on an issue about which, regrettably, my views differ from those of the majority of the Committee members. The issue in question is the scope of military jurisdiction within the framework of the International Covenant on Civil and Political Rights.

2. Paragraph 7.8 of the decision on communication No. 1640/2007 states that: "The Committee recalls its general comment No. 32 (2007), in which it states that, while the Covenant does not prohibit the trial of civilians in military courts, nevertheless such trials should be exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. It is incumbent upon a State party that does try civilians before military courts to justify the practice."

3. I must state unequivocally that the treatment of this point in general comment No. 32 is highly regrettable. In its decision on the *El Abani* case, the Committee missed a clear opportunity to declare that the trial of civilians by military courts is incompatible with article 14 of the Covenant and to correct this regressive aspect of human rights law.

4. It is true, as the Committee states, that "the Covenant does not prohibit the trial of civilians in military courts"; but does that mean that it permits the practice? A close reading of article 14 would indicate that the Covenant does not go so far as even to suggest that military justice might be applied to civilians. Article 14, which guarantees the right to justice and due process, does not contain a single reference to military courts. On numerous occasions — and always with negative consequences as far as human rights are concerned — States have empowered military courts to try civilians, but the Covenant is completely silent on the subject.

5. The Committee's reasoning in drafting general comment No. 32 should have been the exact opposite: as the trial of civilians by military courts is an exceptional exercise of jurisdiction (the trial of non-members of the military in the military justice system) and moreover takes place within an exceptional venue (as military justice represents an exception to ordinary justice), it is a doubly exceptional exercise of competence and, as such, would have had to have been explicitly provided for in the Covenant in order for it to be compatible with the Covenant, since it obviously removes civilians from the purview of those who are their natural judges.

6. Lest we forget, exceptions and restrictions to rights (in this case, a restriction on the right to be judged by a "natural judge" as part of the right to justice and due process) must in their turn be interpreted restrictively and should not be so readily deemed to be compatible with the Covenant.

7. It would therefore have been far more reasonable for the Committee to point out that the Covenant does not authorize the trial of civilians by military courts, rather than to state, while giving no further explanation, that the Covenant does not prohibit such trials.

8. The idea is not — nor is it the Committee's role — to adapt the interpretation of the Covenant to take account of actual practices on the part of States that in fact entail proven human rights violations, but rather to help States parties to meet modern standards of due process by explicitly indicating what modifications, if any, must be made to domestic legislation in order to bring it into line with the Covenant.

9. Military jurisdiction, as applied — with tragic results — throughout the world since the Second World War, has led, without exception, to the entrenchment of impunity for military personnel accused of serious mass violations of human rights. Moreover, when the military criminal justice system is applied to civilians, the outcome is convictions obtained on the basis of proceedings vitiated by abuses of all kinds in which not only does the right to a defence become a chimera, but much of the evidence is obtained by means of torture or cruel and inhuman treatment.

10. The Covenant does not prohibit the use of military courts, nor is it the intention of this opinion to call for their elimination. The jurisdiction of the military criminal justice system should, however, be contained within suitable limits if it is to be fully compatible with the Covenant: *ratione personae*, military justice should apply to serving military personnel, never to civilians or retired military personnel; *ratione materiae*, military courts should be competent to try disciplinary offences, never ordinary offences and certainly not human rights violations. Only under these conditions can military jurisdiction be compatible with the Covenant.

11. General comment No. 32 is an important legal document with respect to the human right to due process, but its treatment of the issue under discussion here is highly regrettable. Three years have passed since it was adopted, and the Committee should take steps to correct the notion that military courts may try civilians; its current position is completely out of step with modern standards of international human rights protection and with the most enlightened doctrine on the subject.

12. The Committee does not need to draft a new general comment in order to move forward *pro homine* on this particular point, but merely to take account of developments in the system of human rights protection. Individual communications under the Optional Protocol involving cases before the Committee in which, as in the *El Abani* case, a civilian is tried by a military court and concluding observations on States' reports under article 40 of the Covenant also provide appropriate opportunities to perform this indispensable legal task and thereby contribute to the better fulfilment of the object and purpose of the Covenant.

13. As soon as this position is adapted, the States parties, as members of the international community, will in good faith adjust their domestic legislation, and military courts with the power to try civilians will become part of a sad past that has happily been left behind.

14. Throughout its history, the Committee has made notable contributions to international human rights law and has been a source of inspiration to other international and regional jurisdictions. On the issue addressed in this opinion, however, the Committee is moving in the exact opposite direction.

15. As has been seen in thousands of cases and, regrettably, once again here, in the *El Abani* case, the abolition of military courts' jurisdiction over civilians is still an outstanding issue that impatiently awaits a clear and appropriate response from the Human Rights Committee.

(*Signed*) Fabián Omar **Salvioli**

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