



## International Covenant on Civil and Political Rights

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### Human Rights Committee

### Communication No. 1913/2009

#### Views adopted by the Committee at its 107th session (11 to 28 March 2013)

<i>Submitted by:</i>	Hisham Abushaala (represented by Rachid Mesli of Al Karama for Human Rights)
<i>Alleged victim:</i>	Abdelmotalieb Abdulghader Mohsen Abushaala (author's brother), the author and his parents
<i>State party:</i>	Libya
<i>Date of communication:</i>	11 August 2009 (initial submission)
<i>Document reference:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 17 November 2009 (not issued in document form)
<i>Date of adoption of Views:</i>	18 March 2013
<i>Subject matter:</i>	Enforced disappearance
<i>Substantive issues:</i>	Right to life, prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, right of all persons deprived of their liberty to be treated with humanity and dignity, recognition as a person before the law and right to an effective remedy
<i>Procedural issue:</i>	Lack of cooperation from the State party
<i>Articles of the Covenant:</i>	Articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1) and 16
<i>Article 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 (107th session)**

concerning

#### **Communication No. 1913/2009\***

*Submitted by:* Hisham Abushaala (represented by Rachid Mesli of Al Karama for Human Rights)

*Alleged victim:* Abdelmotaleb Abdulghader Mohsen Abushaala (author's brother), the author and his parents

*State party:* Libya

*Date of communication:* 11 August 2009 (initial submission)

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

*Meeting* on 18 March 2013,

*Having concluded* its consideration of communication No. 1913/2009, submitted to the Human Rights Committee by Hisham Abushaala 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 11 August 2009, is Hisham Abushaala, a Libyan citizen. He claims that his brother, Abdelmotaleb Abdulghader Mohsen Abushaala, a Libyan citizen born on 14 March 1975 in Tripoli, is a victim of violations by Libya of articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1) and 16 of the Covenant. The author claims that he himself and his parents are victims of a violation of articles 2 (para. 3) and 7 of the Covenant. The author is represented by Rachid Mesli of Al Karama for Human Rights.

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\* The following members of the Working Group participated in the consideration of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iluia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

**The facts as submitted by the author**

2.1 On 17 September 1995, Abdelmotaleb Abdulghader Mohsen Abushaala (Abdelmotaleb Abushaala) went to the Higher Institute of Civil Aviation, where he was a student, to resit an examination. While Abdelmotaleb Abushaala was in the Institute car park, preparing to return home, several armed officers in plain clothes approached him and arrested him using considerable brutality. They punched and kicked him and took him away in his car. The arrest took place in the presence of many witnesses, including the director of the Institute.

2.2 The day following the arrest, Mr. Abushaala's father, Abdelkader Mohammed Abushaala, went to the Institute, where the director confirmed that the son had been arrested by the internal security forces. Fearing reprisals against his family, Abdelmotaleb Abushaala's father contacted family friends and asked them to try to find out why his son has been arrested and where he was being held. These persons went to all Government offices and detention centres but did not manage to obtain any new information.

2.3 When the family heard that many young people were detained at Abu Salim Prison, Abdelmotaleb Abushaala's mother, Mahbouba Wafa, went there but was unable to obtain confirmation that her son was being held at the prison. For several years, she continued to go to the prison and made several attempts to obtain information about her son. She also handed the prison staff food and clothing for her son, which the guards accepted without ever confirming, however, whether or not her son was in the prison. In 2001, Abdelmotaleb Abushaala's parents submitted a written request to the prison management, at the latter's invitation, for information as to whether their son was there. They never received a reply.

2.4 Having heard rumours that many young students were held at Ain-Zara Prison, Abdelmotaleb Abushaala's mother went there several times. She was asked to submit a written request, which she duly did at the beginning of 2002. However, she never received a reply.

2.5 Abdelmotaleb Abushaala's relatives also called on the people's committees of Tripoli to intervene, but to no avail. Between 2002 and 2006, the family tried to find a lawyer to bring legal proceedings, but all the lawyers advised them to resolve the matter amicably and told them that there was no judicial procedure for dealing with such matters.

2.6 In 2008, the victim's family asked the human rights foundation, presided over by Saif Al-Islam Gaddafi, the son of the then Head of State, to intervene, but to no avail. The family still have no news of their son.

**The complaint**

3.1 Abdelmotaleb Abushaala's parents claim that they did everything possible to find out what had happened to their son. They were unable to bring legal proceedings, as it proved impossible to find a lawyer who was willing to represent them. Recalling the Committee's jurisprudence, the author contends that domestic remedies are neither available nor effective. Therefore, there is no longer any need to apply the criterion of the exhaustion of domestic remedies.

3.2 Abdelmotaleb Abushaala was subjected to an enforced disappearance after his arrest on 17 September 1995, and this was followed by a refusal to acknowledge his deprivation of liberty. The author recalls the definition of "enforced disappearance" set forth in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance and in article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court.

3.3 As a victim of enforced disappearance, Abdelmotaleb Abushaala was de facto prevented, in violation of article 2, paragraph 3, of the Covenant, from exercising his right

of recourse to challenge the lawfulness of his detention. His relatives did everything in their power to find out what had happened to him, but the State party took no follow-up action, notwithstanding that it has an obligation to provide an effective remedy by, for example, conducting a thorough and effective investigation.

3.4 The enforced disappearance of Abdelmotaleb Abushaala constituted in and of itself a serious threat to his right to life, amounting to a violation of article 6, insofar as the State party failed in its obligation to protect that fundamental right.

3.5 With regard to Abdelmotaleb Abushaala, the mere fact of being subjected to an enforced disappearance constitutes inhuman or degrading treatment, which is a violation of article 7 of the Covenant. The victim may also have been subjected to physical torture from the time of his arrest, as this is known to be a particularly widespread practice in the State party.

3.6 From the perspective of the author and his family, the victim's disappearance was, and still is, a paralysing, painful and distressing ordeal, since they have had no news of what has happened to him since 1995. Accordingly, the author alleges that the treatment of Abdelmotaleb Abushaala is a violation under article 7 of his own rights and of those of his parents.

3.7 Abdelmotaleb Abushaala was arrested by the internal security forces without a warrant and without being informed of the reasons for his arrest. This is a breach of article 9, paragraph 1, of the Covenant. He was then arbitrarily detained and has been held incommunicado ever since his arrest on 17 September 1995. He has never been brought before a judicial authority and his detention has never been acknowledged. The authorities continue to conceal the truth about his fate. Abdelmotaleb Abushaala remains arbitrarily deprived of his liberty and security, in violation of article 9. The author recalls the Committee's jurisprudence, according to which the unacknowledged detention of any individual is deemed to be a very serious denial of article 9.

3.8 It is furthermore claimed that Abdelmotaleb Abushaala has been kept isolated from the outside world since 17 September 1995 and has not been treated with humanity or with respect for the inherent dignity of the human person, and that he is therefore the victim of a violation of article 10, paragraph 1, of the Covenant.

3.9 As a victim of unacknowledged detention and, as such, a person deprived of the protection of the law, Abdelmotaleb Abushaala has been reduced to the status of "non-person", in violation of article 16 of the Covenant. He has consequently been deprived of his rights under the Covenant.

#### **Lack of cooperation from the State party**

4. On 17 November 2009, 9 August 2010, 20 January 2011, 31 May 2011, 15 August 2011 and 26 December 2012 the State party was requested to submit its observations on the admissibility and merits of the communication. The Committee notes that this information has not been received. It regrets the State party's refusal to provide any information on the admissibility and/or merits of the author's claims. It recalls that in accordance with article 4, paragraph 2, of the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and indicating the measures, if any, that have been taken by the State to remedy the situation.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

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

5.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

5.3 With regard to the exhaustion of domestic remedies, the Committee reiterates its concern that, in spite of five reminders having been addressed to the State party, no observations on the admissibility or merits of the communication have been received from the State party. In the 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 on behalf of Abdelmotaleb Abushaala under articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1) and 16 of the Covenant. It also notes that issues may arise under article 7 and article 2 (para. 3) of the Covenant with respect to the author and his parents.

### *Consideration of the merits*

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as required under article 5, paragraph 1, of the Optional Protocol. It notes that the State party has not replied to the author's allegations. In the circumstances, due weight must be given to his allegations to the extent that they have been sufficiently substantiated.<sup>1</sup>

6.2 The Committee notes the claim of the author that his brother, Abdelmotaleb Abushaala, was arrested on 17 September 1995 in the car park of the Higher Institute of Civil Aviation by armed officers in plain clothes from the internal security forces. The arrest allegedly took place in the presence of many witnesses, including the director of the Institute. The Committee notes that the family has never received any confirmation of the place of detention of Abdelmotaleb Abushaala. It recalls that, in cases of enforced disappearance, the act of deprivation of liberty, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate of the disappeared person, denies the person the protection of the law and places his or her life at a serious and constant risk, for which the State is accountable. In the present case, the Committee notes that the State party has produced no evidence to show that it has met its obligation to protect Abdelmotaleb Abushaala's life. The Committee therefore concludes that the State party has failed in its duty to protect Abdelmotaleb Abushaala's life, in violation of article 6, paragraph 1, of the Covenant.<sup>2</sup>

<sup>1</sup> See, inter alia, communication No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 4; communication No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 4; communication No. 1208/2003, *Kourbonov v. Tajikistan*, Views adopted on 16 March 2006, para. 4; and communication No. 760/1997, *Diergaardt et al. v. Namibia*, Views adopted on 25 July 2000, para. 10.2.

<sup>2</sup> See, inter alia, communication No. 1779/2008, *Mezine v. Algeria*, Views adopted on 25 October 2012, para. 8.4; communication No. 1753/2008, *Guezout v. Algeria*, Views adopted on 19 July 2012, para. 8.4; and communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 8.4.

6.3 The Committee recognizes the suffering that being held indefinitely without contact with the outside world causes. It recalls its general comment No. 20 (1992)<sup>3</sup>, in which it recommends that States parties should make provision against incommunicado detention. It notes in the instant case that Abdelmotaleb Abushaala was arrested on 17 September 1995 and that his fate remains unknown to this day. In the absence of a satisfactory explanation from the State party, the Committee considers that this disappearance constitutes a violation of article 7 of the Covenant with respect to Abdelmotaleb Abushaala.<sup>4</sup>

6.4 The Committee also takes note of the anguish and distress caused to the author and his parents by Abdelmotaleb Abushaala's disappearance. It considers that the facts before it disclose a violation of article 7 of the Covenant, read alone and in conjunction with article 2, paragraph 3, with regard to the author and his parents.<sup>5</sup>

6.5 With regard to the alleged violation of article 9, the Committee notes the author's statement to the effect that Abdelmotaleb Abushaala was arrested on 17 September 1995 by armed officers in plain clothes from the internal security forces; that he was arrested without a warrant and without his being informed of the reasons for his arrest; that Abdelmotaleb Abushaala was neither informed of the charges against him nor brought before a judicial authority through which he would have been able to challenge the lawfulness of his detention; and that no official information was given to the author and his parents regarding the victim's place of detention or his fate. In the absence of a satisfactory explanation from the State party, the Committee finds that there has been a violation of article 9 with regard to Abdelmotaleb Abushaala.<sup>6</sup>

6.6 As to the claim under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty must not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In view of Abdelmotaleb Abushaala's incommunicado detention, and in the absence of any information from the State party in that regard, the Committee finds that there has been a violation of article 10, paragraph 1, of the Covenant.<sup>7</sup>

6.7 With regard to the alleged violation of article 16, the Committee reiterates its established jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law, if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3), have been systematically impeded.<sup>8</sup> In the present case, the Committee notes that the State party has

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<sup>3</sup> See general comment No. 20 (1992), concerning the prohibition of torture and cruel treatment or punishment. *General Assembly Official Record, Forty-seventh Session, Supplement No. 40*, (A/47/40), annex VI.

<sup>4</sup> See, inter alia, communication No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012, para. 7.5, and communication No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 6.5.

<sup>5</sup> See communication No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012, para. 7.6; communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 8.6; and communication No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.5.

<sup>6</sup> See, inter alia, communication No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012, para. 7.7; and communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 8.7.

<sup>7</sup> See, inter alia, communication No. 1780/2008, *Zarzi v. Algeria*, Views adopted on 22 March 2011, para. 7.8.

<sup>8</sup> Communication No. 1905/2009, *Khirani v. Algeria*, para. 7.8; communication No. 1781/2008, *Berzig*

not furnished any information about the fate or whereabouts of the disappeared person, notwithstanding the many requests submitted to the State party by the author. The Committee concludes that the enforced disappearance of Abdelmotaleb Abushaala since 17 September 1995 has denied him the protection of the law and deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

6.8 The author invokes article 2, paragraph 3, of the Covenant, under which States parties have an obligation to ensure an effective remedy for all persons whose Covenant rights have reportedly been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004),<sup>9</sup> concerning the nature of the general legal obligation imposed on States parties, in which it states that the 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 instant case, Abdelmotaleb Abushaala's parents submitted requests for visits to two prisons, sought the intervention of the people's committees of Tripoli, were informed by several lawyers that there was no relevant judicial procedure and eventually decided to request the intervention of the human rights foundation. However, all their efforts were to no avail and the State party failed to conduct a thorough and effective investigation into the disappearance of the author's brother.

6.9 The Committee concludes that the facts before it reveal a violation of article 2 (para. 3), read in conjunction with articles 6 (para. 1), 7, 9, 10 (para. 1) and 16 of the Covenant with regard to Abdelmotaleb Abushaala and of article 2 (para. 3), read in conjunction with article 7 of the Covenant, with respect to the author and his parents.

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

8. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author and his parents with an effective remedy by, inter alia: (a) conducting a thorough and effective investigation into the disappearance of Abdelmotaleb Abushaala; (b) providing the author and his family with detailed information on the results of its investigation; (c) releasing him immediately, if he is still being detained incommunicado; (d) in the event that Abdelmotaleb Abushaala is deceased, handing over his remains to his parents; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the author and his parents for the violations suffered, as well as to Abdelmotaleb Abushaala, if he is still alive. The State party is also under an obligation to take steps to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its

<sup>9</sup> v. *Algeria*, para. 8.8; and communication No. 1780/2008, *Zarzi v. Algeria*, para. 7.9.

<sup>9</sup> See general comment No. 31 (2004), concerning the general legal obligation imposed on States parties. *General Assembly Official Records, Forty-ninth Session, Supplement No. 40, vol. I (A/59/40 (Vol. I)), annex III.*

jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information 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 languages of the State party.

[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.]

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