

**International Covenant on  
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**Human Rights Committee****Communication No. 1782/2008****Views adopted by the Committee at its 104th session,  
12 to 30 March 2012**

<i>Submitted by:</i>	Tahar Mohamed Aboufaied (represented by Al-Karama for Human Rights and Track Impunity Always (TRIAL))
<i>Alleged victims:</i>	Idriss Aboufaied and Juma Aboufaied (the author's brothers), and the author
<i>State party:</i>	Libya
<i>Date of communication:</i>	5 April 2008 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 16 April 2008 (not issued in document form)
<i>Date of adoption of Views:</i>	21 March 2012
<i>Subject matter:</i>	Unlawful arrest, incommunicado detention, secret detention, torture and ill-treatment, arrest without a warrant, right to a fair trial, enforced disappearance
<i>Procedural issues:</i>	State party's failure to cooperate
<i>Substantive issues:</i>	Right to an effective remedy; 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 persons deprived of their liberty; right to liberty of movement and freedom to choose one's residence; right to a fair trial; recognition as a person before the law; right to freedom of expression; and right to peaceful assembly

*Articles of the Covenant:* 2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1 to 4; 10, paragraph 1; 12, paragraph 2; 14; 16; 19 and 21

*Articles of the Optional Protocol:* 5, paragraph 2 (b)

## 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 (104th session)**

concerning

#### **Communication No. 1782/2008\***

*Submitted by:* Tahar Mohamed Aboufaied (represented by Al-Karama for Human Rights and Track Impunity Always (TRIAL))

*Alleged victims:* Idriss Aboufaied and Juma Aboufaied (the author's brothers), and the author

*State party:* Libya

*Date of communication:* 5 April 2008 (initial submission)

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

*Meeting on 21 March 2012,*

*Having concluded* its consideration of communication No. 1782/2008, submitted to the Human Rights Committee by Tahar Mohamed Aboufaied 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**

1.1 The author of the communication, dated 5 April 2008, is Tahar Mohamed Aboufaied, a Libyan citizen born in 1974 and residing in Gheriane, Libya. He is acting on behalf of his two brothers, Idriss Aboufaied, born in 1957, and Juma Aboufaied, age unknown, as well as on his own behalf. He is represented by Al-Karama for Human Rights and Track Impunity Always (TRIAL). The Covenant and its Optional Protocol entered into force for Libya on 23 March 1976 and 16 August 1989, respectively.

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

The texts of four individual opinions by Committee members Ms. Christine Chanet jointly with Mr. Cornelis Flinterman, Sir Nigel Rodley, Mr. Walter Kaelin and Mr. Fabián Omar Salvioli are appended to the text of the present Views.

1.2 The author claims that the circumstances of his brother Idriss Aboufaied's two arrests, related to the peaceful expression of his political opinions, followed by prolonged detention, including incommunicado detention and an unfair trial, together with lack of effective remedies, constitute breaches by the State party of the latter's rights under articles 2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1 to 4; 10, paragraph 1; 12, paragraph 2; 14, paragraphs 1 and 3(a) and (d); 16; 19 and 21 of the Covenant.

1.3 The author further alleges that the unlawful arrest, and subsequent incommunicado detention for over a year of his brother Juma Aboufaied constitute breaches of articles 2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1 to 4; 10, paragraph 1; and 16 of the Covenant. Finally, he submits that he, himself, suffered violation of articles 2, paragraph 3; and 7 of the Covenant.

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

2.1 The communication describes the situation of the authors' brothers as of April 2008 in the following terms. The author subsequently informed the Committee that both of his brothers were later released, alive.<sup>1</sup>

#### *Idriss Aboufaied*

2.2 Idriss Aboufaied had practised as a civilian medical doctor in various Libyan towns before enrolling in a medical army unit and being sent to the front in 1987, during the Chad-Libya armed conflict. He was captured by the Chadian forces and detained for two years. Because of Colonel Gaddafi's refusal to recognize the existence of the armed conflict and thus the prisoners-of-war status of detained Libyan personnel, Idriss Aboufaied joined the National Front for the Salvation of Libya, an organized opposition group. In 1990, he obtained political asylum in Switzerland, where he continued to denounce human rights violations in his country. In 1998, together with other Libyan refugees, he founded the National Union for Reform (NUR), one of the most active Libyan opposition groups in exile. As Secretary General of NUR, he participated in significant meetings of Libyan dissidents, and openly advocated the promotion of the rule of law and respect for human rights.

2.3 In summer 2006, Colonel Gaddafi invited opponents in exile to return to Libya, assuring them that they would be permitted to express themselves freely, and that their civil and political rights would be guaranteed. As a result, in August 2006, Idriss Aboufaied announced his intention to return to Libya, where he would resume his political activities.<sup>2</sup> In September 2006, the Libyan Embassy in Bern issued him a passport, and renewed the Government's assurances that he would not be persecuted in Libya. Idriss Aboufaied arrived in Tripoli on 30 September 2006, where he was met by members of various Libyan security agencies and subjected to interrogation. His passport was confiscated without explanation and he was instructed to collect it at the Internal Security Office the following week. Idriss Aboufaied then proceeded to his family home in Gheriane, about 100 km from Tripoli, from where he wrote to two opposition websites, reaffirming his call for democracy and respect for human rights in Libya. A few days later, he was informed by his family that the Internal Security Agency (ISA) had sent agents to look for him while he was out of the house, and had ordered him to report to their office in the capital. However, around midnight that same day, ISA agents presented themselves at the family home, and ordered Idriss Aboufaied to report the next morning to the ISA Office in Gheriane, which he did.

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<sup>1</sup> See paras. 5.1 – 5.4 below.

<sup>2</sup> The author annexes a public statement in this regard, signed by Idriss Aboufaied (under the heading "National Union for Reform"), dated 16 September 2006.

Following an interrogation, he was instructed to report to the ISA Office in Tripoli on 5 November 2006. In the meantime, Idriss Aboufaied contacted several opposition websites, informing them of the visits by ISA, and that he would be travelling to Tripoli pursuant to orders received.<sup>3</sup>

2.4 On 5 November 2006, Idriss Aboufaied reported to the ISA Office in Tripoli and was arrested. Thereafter, the family was without news from him. On 21 November 2006, his case was transmitted to several mechanisms of the Human Rights Council.<sup>4</sup> By 22 November 2006, his health condition had severely deteriorated. A medical doctor was called to examine him in the detention centre,<sup>5</sup> and diagnosed symptoms of poisoning and intense fatigue. It was also confirmed that he had been tortured during his detention and deprived of sleep for several days. Idriss Aboufaied was then sent to the Gargarech psychiatric hospital in Tripoli.

2.5 On 29 December 2006, after 54 days in secret custody, Idriss Aboufaied was released. During his captivity, he was never brought before a judge, his family was not informed of his whereabouts, nor of the reasons for his arrest, as the authorities had refused to provide them with such information.

2.6 On 17 January 2007, despite his efforts to have his passport returned, so as to return to Switzerland, where he legally resided, Idriss Aboufaied was verbally notified that his request had been denied. He sought a lawyer to undertake legal proceedings, but as none agreed to represent him, out of fear of reprisals, he mandated the Geneva-based non-governmental organization Al-Karama<sup>6</sup> to represent him before the Human Rights Committee. On 22 January 2007, this organization wrote to the Libyan Permanent Mission in Geneva on his behalf, seeking the restitution of his passport.

2.7 On 1 February 2007, Idriss Aboufaied published a statement on foreign-based news websites, announcing his intention to organize a peaceful public protest in Tripoli on 17 February 2007.<sup>7</sup> He also notified the United States Embassy in Tripoli of this plan.

2.8 On 16 February 2007, that is the day before the planned protest, Idriss Aboufaied was arrested by a group of armed men, who had violently broken into his house. The officer in charge was identified as the local Head of ISA. Eleven other men were arrested in connection with the planned demonstration.

2.9 Idriss Aboufaied was held for two months in secret detention, reportedly at an ISA detention centre in Tripoli. After 20 April 2007, he was transferred to Ain Zara prison in Tripoli, together with four co-accused, where he was kept in a basement without light for several months, and not allowed to receive family visits. All the detainees reported acts of torture during the first five months of their captivity, including punches and beatings with wooden objects, beatings on the soles of the feet (*falaqa*), and being placed in a coffin during interrogation as a form of intimidation.

2.10 On 20 April 2007, while he was gravely ill, Idriss Aboufaied was brought before a special tribunal in the District of Tajoura, Tripoli, along with 11 co-accused, to face several

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<sup>3</sup> Two public statements in this regard are annexed.

<sup>4</sup> Namely, the Working Group on Arbitrary Detention; the Special Rapporteur on the question of torture; the Special Rapporteur on the right to freedom of opinion and expression; and the Special Rapporteur on the situation of human rights defenders.

<sup>5</sup> The author does not indicate the place of detention where the victim was then held captive.

<sup>6</sup> Co-counsel for the author in the present communication.

<sup>7</sup> To commemorate the anniversary of the death of 12 demonstrators in Benghazi, and to demand respect for human rights and the rule of law.

criminal charges.<sup>8</sup> The charges were vague and ambiguous, such as planning to overthrow the Government, possession of arms, and meeting with an official from a foreign Government. Idriss Aboufaied denied the first two charges, while admitting that he had contacted the United States Embassy ahead of the planned demonstration in February 2007. The case was transferred to the Revolutionary Security Court, where the charges brought against Idriss Aboufaied included violation of article 206 of the Libyan Penal Code.<sup>9</sup> A lawyer was assigned to him by the authorities, but he was not able to meet with him outside the courtroom.

2.11 The trial began on 24 June 2007, with three open court sessions in July 2007. Another hearing was to take place before the Revolutionary Security Court on 20 November 2007, which was postponed to 4 December 2007. The hearing was again postponed to 8 January 2008 for unclear reasons; it finally took place on 11 March 2008. The accused were not present at most of the hearings.<sup>10</sup>

#### *Juma Aboufaied*

2.12 Immediately after Idriss Aboufaied's second arrest on 16 February 2007,<sup>11</sup> his brother Juma, who resided at the family home in Gheriane, alerted a representative of Al-Karama. He also contacted a Libyan opposition news website by phone, indicating that he did not know his brother's whereabouts, and was afraid that he would be arrested as a reprisal for his communicating this information. On the same day, at 4:00 a.m., Juma Aboufaied was arrested at his home by State agents. He was last seen two days later, when he was brought back to the family home to collect his mobile phone and computer, which were confiscated. Since then, and up to the date of their communication to the Committee, the author had not received any information on Juma Aboufaied's whereabouts.<sup>12</sup> As he was not among the demonstration organizers, the author asserts that there is every reason to believe that the arrest and detention of Juma Aboufaied was related to his relationship with his brother Idriss, and the information he shared on the latter's arrest. This is confirmed by the fact that at the moment of his arrest, State agents made allusions to his phone conversations, and two days later confiscated his cell phone.

#### **The complaint**

3.1 The author claims that Idriss and Juma Aboufaied were both subjected to enforced disappearance by the Libyan authorities, albeit during different periods. Between 5 November and 29 December 2006, Idriss Aboufaied was illegally detained by State agents, kept in isolation and prevented, in particular, from any contact with family or legal counsel. He was subjected to the same conditions during the first two months and four days of his second detention,<sup>13</sup> until he was brought before the court of Tajoura on 20 April 2007. Consequently, Idriss Aboufaied was subjected to enforced disappearance for 54 days in

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<sup>8</sup> All the co-accused were identified by name by the author.

<sup>9</sup> The author explains that article 206 provides for the imposition of the death penalty on persons calling for "the establishment of a grouping, organization or association proscribed by law," as well as for those belonging to or supporting such organizations or associations.

<sup>10</sup> The author adds that in an interview given to the BBC on 2 August 2007, the son of Colonel Gaddafi, Saif al-Islam al-Gaddafi (then Executive Director of the influential Gaddafi International Charity and Development Foundation) declared that the accused had possessed arms and ammunition, and that "Idriss Aboufaied and his people [were] terrorists".

<sup>11</sup> See para. 2.8 above.

<sup>12</sup> New facts however emerged, as detailed in the author's subsequent submission to the Committee; see para. 5.1-5.4 below.

<sup>13</sup> That is, between 16 February and 20 April 2007.

2006, and for over two months in 2007. The author further contends that Juma Aboufaied, who was subjected to similar conditions of detention as his brother Idriss, has been forcibly disappeared since his arrest in February 2007.

3.2 The author alleges that Idriss and Juma Aboufaied are victims of a violation of article 6 of the Covenant, as the State party has not recognized their incommunicado detention, leaving the victims at the mercy of those holding them, with a major threat to their life. Consequently, and even if such circumstances did not lead to the actual death of the victims, the author contends that the State party failed to fulfil its obligation to protect their right to life, and breached its duty under article 6 of the Covenant.

3.3 The author further contends that by the very fact of their being subjected to enforced disappearance, Idriss and Juma Aboufaied, who were deprived of any contact with relatives and the outside world, were subjected to treatment contrary to article 7 of the Covenant.<sup>14</sup> Idriss Aboufaied was also exposed to actual acts of torture during his first detention, which led to serious deterioration of his health, and prompted his medical internment. He was seriously ill when he was first presented before a court on 20 April 2007. On the same day, he was transferred to Ain Zara prison, where he was kept in a basement without light for several months. Although no information was then available to the author regarding the treatment inflicted on Juma Aboufaied, nor regarding his state of health, the author refers to persisting reports of widespread use of torture and appalling living conditions in Libyan places of detention, and to the ill-treatment inflicted on Idriss Aboufaied. He also stresses that despite complaints of torture made by Idriss Aboufaied and his 11 co-defendants, the State party has not undertaken any investigation, let alone provided victims with effective remedies. The author therefore reiterates that the State party breached article 7 with respect to Idriss and Juma Aboufaied in several respects.

3.4 The author contends that he himself is a victim of a violation of article 7 of the Covenant,<sup>15</sup> in the light of the continuous and severe emotional distress he experienced as a result of the successive disappearances of his brothers, knowing that both of them were exposed to life-threatening conditions and torture.

3.5 The author alleges that the arrests of Idriss and Juma Aboufaied by ISA agents were undertaken in the absence of an enabling warrant, and their prolonged detention without judicial review exceeded maximum periods prescribed by law, in breach of Libyan law<sup>16</sup> and of article 9, paragraph 1, of the Covenant.<sup>17</sup> Neither Idriss nor Juma Aboufaied was

<sup>14</sup> The author refers to communications No. 449/1991, *Mojica v. the Dominican Republic*, Views adopted on 15 July 1994; No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996; No. 542/1993, *Tshishimbi v. Zaire*, Views adopted on 25 March 1996; No. 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, Views adopted on 24 March 1994, para. 5.4; No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.8; and No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 17 July 2003, para. 9.5.

<sup>15</sup> The author refers to communications No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983; No. 992/2001, *Bousroual v. Algeria* (note 14 above); No. 950/2000, *Sarma v. Sri Lanka* (note 14 above); No. 886/1999, *Schedko v. Belarus*, Views adopted on 28 April 2003, para. 10.2; No. 1044/2002, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 8.7; No. 959/2000, *Bazarov v. Uzbekistan*, Views adopted on 14 July 2006, para. 8.5; and No. 1159/2003, *Sankara v. Burkina Faso*, Views adopted on 28 March 2006, para. 12.2.

<sup>16</sup> The author refers to art. 14 of the Libyan Promotion of Freedom Act; art. 30 of the Code of Criminal Procedure, as well as arts. 122 and 123, which provide for a maximum period of 15 days in custody, which may be extended to 45 days only if a Magistrate deems it necessary.

<sup>17</sup> The author refers to communications No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.5; No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.5; and No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006,

promptly informed of the reasons for his detention. The former only learned of the charges against him more than two months after his second arrest. According to the author, both were therefore victims of violations of article 9, paragraph 2 of the Covenant. Furthermore, at no point during his first detention was Idriss Aboufaied brought before a judicial authority. Following his second arrest, he was brought before a special tribunal in the Tajoura District on 20 April 2007, but the two-month delay between his arrest and court appearance exceeds the standard of a “few days” as interpreted by the Committee under article 9, paragraph 3.<sup>18</sup> Juma Aboufaied was never brought before a judicial authority, and no criminal prosecution was initiated against him. The author therefore contends that both Idriss and Juma Aboufaied were victims of a violation of article 9, paragraph 3. Although Idriss Aboufaied was briefly brought three times before a Court, and a lawyer was formally assigned for his defence, the court’s lack of impartiality, and the inherently flawed nature of the proceedings resulted in the de facto impossibility for him to challenge the legality of his arrest and detention. Juma Aboufaied had no access to legal counsel or family members during his detention. The author concludes that the rights of Idriss and Juma Aboufaied under article 9, paragraph 4, of the Covenant were violated.

3.6 The author also asserts that, because Idriss and Juma Aboufaied were subjected to treatment amounting to a violation of article 7 of the Covenant during their detention, the abuses perpetrated against them also naturally result in a consequential violation of their rights under article 10, paragraph 1, of the Covenant.<sup>19</sup>

3.7 According to the author, by confiscating Idriss Aboufaied’s passport without justification upon his arrival in Libya, and explicitly refusing to return it to him, the State party’s authorities precluded his exercise of his right to freedom of movement, in breach of article 12, paragraphs 2 of the Covenant. No justification has been offered for the confiscation and retention of the passport, and it is maintained that no circumstances existed which rendered these actions permissible in terms of article 12, paragraph 3, of the Covenant.<sup>20</sup>

3.8 Under article 14, the author refers to the general lack of independence of the judiciary from the Executive in the State party, particularly with regard to special courts, such as the Revolutionary Security Court, and trials against political opponents. Idriss Aboufaied was prevented from attending most of the court hearings, which were held in closed sessions. Charges against him were not clearly enunciated and were only notified to him more than two months after his arrest.<sup>21</sup> He was never provided with adequate facilities to prepare and present his defence, as he was never provided with the case file, nor was he able to meet with his lawyer outside the courtroom. Also, he could not request a change of

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para. 9.5.

<sup>18</sup> The author refers to the Committee’s general comment No. 8 (1982) on the right to liberty and security of persons, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V; also communications No. 1128/2002, *Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.3; No. 992/2001, *Bousroual v. Algeria* (note 14 above), para. 9.6; No. 1196/2003, *Boucherf v. Algeria* (note 17 above), para. 7.6; and No. 277/1988, *Terán Jijón v. Ecuador*, Views adopted on 26 March 1992, para. 5.3.

<sup>19</sup> The author refers to the Committee’s general comment No. 21 (1992) on humane treatment of persons deprived of their liberty, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. B, para 3.

<sup>20</sup> The author refers to the Committee’s general comment No. 27 (1999) on freedom of movement, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40*, vol. I (A/55/40 (Vol. I)), annex VI, sect. A, para 9; also communications No. 1107/2002, *El Ghar v. Libyan Arab Jamahiriya*, Views adopted on 29 March 2004, para 7.3; and No. 1143/2002, *El Dernawi v. Libyan Arab Jamahiriya*, Views adopted on 20 July 2007, para 6.2.

<sup>21</sup> See para. 2.10 above.



counsel. For these reasons, the author contends that Idriss Aboufaied's rights under article 14, paragraphs 1, 3(a) and (d) were violated.<sup>22</sup>

3.9 The author further points out that, as victims of enforced disappearance, Idriss and Juma Aboufaied were denied the right to be recognized as persons before the law, in violation of article 16 of the Covenant.<sup>23</sup>

3.10 The author asserts that Idriss Aboufaied was imprisoned, and faced the possibility of being severely punished<sup>24</sup> for his attempt to peacefully meet with others and express their opposition to the regime in place. Such interference with the right to freedom of assembly and freedom of expression cannot, in the circumstances, be considered to be a justified restriction, as the State party never claimed to be protecting one of the legitimate purposes set out in article 19, paragraph 3, of the Covenant. Consequently, the author claims that Idriss Aboufaied is a victim of a violation by the State party of articles 19 and 21 of the Covenant.

3.11 Concerning article 2, paragraph 3, the author refers to the Committee's jurisprudence,<sup>25</sup> and stresses that by failing to take necessary measures to protect the victims' rights and offer them effective remedies for violation of articles 6, 7, 9, 10, 12, 14, 6, 9 and 21 read alone, the State party further breached the provisions of those articles read in conjunction with article 2, paragraph 3, of the Covenant.

3.12 As to the question of exhaustion of domestic remedies, the author claims that no remedies are available, in practice, for victims of human rights violations in Libya. Referring to human rights violations committed by the State party,<sup>26</sup> the author asserts that the fear of reprisals prevented him from initiating judicial action or seeking resort to other domestic remedies on behalf of his brothers. Idriss Aboufaied unsuccessfully tried to seek professional legal assistance prior to his second arrest, and the virtual impossibility of finding legal representation, as lawyers fear reprisals, constitutes a serious impediment to access to justice.<sup>27</sup> In addition, the author submits that even if he had had access to domestic remedies, had they been available, they would have been totally ineffective because of the deeply flawed judicial system within the State party.<sup>28</sup> The author therefore

<sup>22</sup> The author refers to the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI; communications No. 80/1980, *Vasilskis v. Uruguay*, Views adopted on 31 March 1983, para 11; No. 52/1979, *Lopez Burgos v. Uruguay*, Views adopted on 29 July 1981, para 13; and No. 662/1995, *Lumley v. Jamaica*, Views adopted on 30 April 1999, para 7.4.

<sup>23</sup> The author refers here to communications No. 1328/2004, *Kimouche v. Algeria*, Views adopted on 10 July 2007, para 7.9; and communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.9.

<sup>24</sup> At the time of the author's initial communication, judicial proceedings against Idriss Aboufaied were still pending.

<sup>25</sup> The author refers to communication No. 612/1995, *Vicente et al. v. Colombia*, Views adopted on 12 August 1995, para 10; and the Committee's general comment 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 8.

<sup>26</sup> Such as arbitrary arrests and detentions, extrajudicial killings, collective punishments and the relentless harassment against dissidents and their families.

<sup>27</sup> The author refers to communications No. 798/1998, *Howell v. Jamaica*, Views adopted on 7 November 2003, para 5.3; and No. 146/1983 and 148-154/1983, *Baboeram-Adhin et al. v. Suriname*, Views adopted on 4 April 1985, para 9.2.

<sup>28</sup> The author refers to the lack of independence of the judiciary, in practice, and to the long-standing and consistent pattern of political trials, characterized by unfair and summary proceedings before the

requests the Committee to consider, in the circumstances, that the requirement of exhaustion of domestic remedies has been satisfied.

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

4. On 28 January 2009, 22 April 2009 and 14 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 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>29</sup>

#### **Additional submission by the author**

5.1 On 4 July 2008, the author informed the Committee that at the beginning of April 2008, Idriss Aboufaied, who had been detained at Abu Salim prison, was transferred to Sabrata Hospital,<sup>30</sup> and was only allowed to leave the hospital to attend hearings in his trial. According to his family, his medical condition is serious and rapidly deteriorating.

5.2 On 15 April 2008, a hearing took place close to Abu Salim prison, in the presence of the accused and one of his family members. Another hearing took place on 13 May 2008, in the presence of the accused and two family members. Further to Idriss Aboufaied's request for release on medical grounds, the Court requested a medical report, and adjourned the hearing. On 10 June 2008, the last hearing took place, attended by the 12 accused. The author was also present. On that date, Idriss Aboufaied was sentenced to 25 years' imprisonment. The tribunal did not address his request for release on medical grounds. The author contends that inasmuch as the conviction of Idriss Aboufaied was the outcome of a grossly unfair trial,<sup>31</sup> his detention pursuant to this decision should be deemed by the Committee to be contrary to his right to liberty and security of the person, and therefore in breach of article 9, paragraph 1, of the Covenant.

5.3 In the same submission, the author further informed the Committee that Juma Aboufaied had been released on 27 May 2008, after having spent over 15 months in secret detention. At no point during his detention was he presented before a judicial authority, nor was he charged with an offence. Subsequent to his release, the State party authorities have taken no step with a view to granting Juma Aboufaied reparation for the arbitrary arrest and prolonged secret detention, nor have they undertaken any investigation to clarify the facts and prosecute perpetrators. The author requested the Committee to take these developments into account when considering his communication.

5.4 On 22 October 2008, the author informed the Committee that Idriss Aboufaied had been released on the night of 8-9 October 2008. Prior to his release, he was held at Sabrata hospital, since his transfer from Abu Salim prison in early April 2008. The author added

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"special revolutionary courts" (replaced in 2005 by the "State security court"), as well as secret trials, and trials *in absentia*, aimed at intimidating political opponents, and suppressing political dissent.

<sup>29</sup> See, inter alia, communications No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya* (note 17 above), 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, para. 4; and No. 760/1997, *Diergaardt et al. v. Namibia*, Views adopted on 25 July 2000, para. 10.2.

<sup>30</sup> He remained interned at that hospital at the time of the author's additional submission.

<sup>31</sup> The author recalls his observations as outlined in paras. 3.5 and 3.8 above.

that Idriss Aboufaied had requested authorization to leave the country in order to receive adequate medical treatment abroad, but that he remained, in the meantime, under close surveillance at his family home. Finally, the author requested the Committee to take these developments into account when considering his communication.

## 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 the communication is admissible under the Optional Protocol to the Covenant.

6.2 Further to article 5, paragraph 2 (a), of the Optional Protocol, 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 of Idriss Aboufaied was submitted in 2006 to the following: the United Nations Working Group on Arbitrary Detention, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on freedom of opinion and expression, and to the Special Rapporteur on the situation of human rights defenders. However, it observes that extra-conventional procedures or mechanisms established by the former Commission on Human Rights, the Economic and Social Council or the Human Rights Council, 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.<sup>32</sup> Furthermore, the communication concerning Idriss Aboufaied, who is no longer detained, has been filed without opinion by the Working Group on Arbitrary Detention.<sup>33</sup> Accordingly, the Committee is of the view that the matter concerning the rights of Idriss Aboufaied is not being examined under another procedure of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.

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 violations of articles 19 and 21, read alone and in conjunction with article 2, paragraph 3, 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 of violation have been sufficiently substantiated, and therefore finds no reason to consider the rest of the communication inadmissible. The Committee therefore proceeds to its consideration of the merits based on the claims made with respect to (a) Idriss Aboufaied, under articles 2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1 to 4; 10, paragraph 1; 12, paragraph 2; 14, paragraphs 1, 3 (a) and (d); and 16 of the Covenant; (b) Juma Aboufaied, under articles 2,

<sup>32</sup> See communications No. 540/1993, *Celis Laureano v. Peru* (note 14 above), para. 7.1; No. 1776/2008, *Bashasha v. Libyan Arab Jamahiriya*, Views adopted on 20 October 2010, para. 6.2; No. 1559/2007, *Hernandez v. Philippines*, Views adopted on 26 July 2010.

<sup>33</sup> See communications No. 688/1996, *Arredondo v. Peru*, Views adopted on 27 July 2000, para. 10.2; No. 1172/2003, *Madani v. Algeria*, Views adopted on 28 March 2007, paras. 2.7 and 7.2.

paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1 to 4; 10, paragraph 1; and 16 of the Covenant; and (c) the author himself, under articles 2, paragraph 3; and 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 Regarding the alleged secret and incommunicado detention of Idriss and Juma Aboufaied, 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 it recommends that States parties make provision against incommunicado detention. It notes that Idriss Aboufaied was kept in incommunicado detention in an undisclosed location during two distinct periods: between 5 November and 29 December 2006, and from his second arrest on 16 February 2007, until he was brought before the court of Tajoura on 20 April 2007. During these periods, he was kept in isolation, and prevented from any contact with his family or legal counsel. He remained in detention until 8 October 2008. In total, he was detained for a period of close to 22 months,<sup>34</sup> of which almost four months were in secret detention. Juma Aboufaied remained in secret detention for 15 months, from his arrest in February 2007, until he was released on 27 May 2008.

7.3 The Committee notes that the author alleges that his two brothers, Idriss and Juma Aboufaied, were subjected by the Libyan authorities to enforced disappearance. The Committee recalls that it considers that acts leading to such a disappearance 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>35</sup>

7.4 The Committee notes that the State party has provided no response to the author's allegations regarding the enforced disappearance of his two brothers, nor to his allegation that Idriss Aboufaied was subject to acts of torture in detention. The Committee also notes the author's claim that on 20 April 2007, the latter was transferred to Ain Zara prison, where he was kept in a basement without light for several months, despite his critical health condition, which was known to the State party. The Committee 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>36</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 provide

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<sup>34</sup> From 5 November to 29 December 2006 and from 16 February 2007 to 8 October 2008 (date of his final release).

<sup>35</sup> See communications No. 1328/2004, *Kimouche v. Algeria* (note 23 above), para. 7.2; No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya* (note 29 above), para. 6.2; No. 992/2001, *Bousroual v. Algeria* (note 14 above), para. 9.2; and No. 950/2000, *Sarma v. Sri Lanka* (note 14 above), para. 9.3; also Declaration on the Protection of All Persons from Enforced Disappearance (adopted by General Assembly resolution 47/133 of 18 December 1992), art. 1, para. 2.

<sup>36</sup> See communications No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya* (note 17 above), para. 6.7; and No. 1297/2004, *Medjnoune v. Algeria* (note 17 above), para. 8.3.

the Committee with 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 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. On the basis of the information at its disposal, the Committee concludes that to have kept Idriss and Juma Aboufaied in captivity for a prolonged period, to have prevented them from communicating with their family and the outside world, and to have subjected Idriss Aboufaied to acts of torture, constitute a violation of article 7 of the Covenant with regard to each of them.<sup>37</sup>

7.5 With regard to the author, the Committee notes the anguish and distress caused by the successive disappearance of his two brothers Idriss and Juma Aboufaied. 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>38</sup>

7.6 Regarding article 9, the information before the Committee shows that Idriss Aboufaied was twice arrested without a warrant by agents of the State party, and that he was held in secret detention for approximately two months on each occasion, without access to defence counsel, without being informed of the grounds for his arrest, and without being brought before a judicial authority. He was first informed of the charges against him in April 2007, when he was brought before a special tribunal in Tajoura District. Juma Aboufaied was kept in secret detention for fifteen months, without access to a lawyer, and without ever being informed of the grounds for his arrest. During these periods, Idriss and Juma Aboufaied were unable to challenge the legality of their detention or its arbitrary character. In the absence of any explanation from the State party, the Committee finds violations of article 9 of the Covenant with regard to both periods of detention of Idriss Aboufaied, and with regard to the entire period of detention of Juma Aboufaied.<sup>39</sup>

7.7 The Committee has taken note of the author's allegation under article 10, paragraph 1, that Idriss Aboufaied was subjected to acts of torture during his detention, and that he was kept in inappropriate detention facilities, given his medical condition. Juma Aboufaied was held incommunicado for the totality of 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 the author's brothers in detention, the Committee concludes that the rights of Idriss and Juma Aboufaied under article 10, paragraph 1, were violated.<sup>40</sup>

<sup>37</sup> See communications No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya* (note 29 above), para. 6.5; No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, (note 17 above), para. 6.2; No. 540/1993, *Celis Laureano v. Peru*, (note 14 above), para. 8.5; No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.4; and No. 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya* (note 14 above), para. 5.4.

<sup>38</sup> See communications No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.5; No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya* (note 17 above), para. 6.11; No. 107/1981, *Quinteros v. Uruguay* (note 15 above), para. 14; and No. 950/2000, *Sarma v. Sri Lanka* (note 14 above), para. 9.5.

<sup>39</sup> Communication No. 1297/2004, *Medjnoune v. Algeria* (note 17 above), para. 8.5.

<sup>40</sup> See the Committee's general comment No. 21 (1992) on humane treatment of persons deprived of their liberty, Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex VI, sect. B, para. 3; communications No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2; No. 1640/2007, *El Abani v. Libya*, (note 38 above), para.

7.8 As to the author's allegations under article 12, paragraph 2, of the Covenant, the Committee observes the uncontested information before it, according to which State party agents confiscated Idriss Aboufaied's passport without justification upon his arrival in Libya on 30 September 2006, and explicitly refused to return it to him, thereby precluding him from leaving the country and returning to his place of legal residence, in Switzerland. The Committee recalls that a passport provides a national with the means "to leave any country, including his own," as stipulated in article 12, paragraph 2, of the Covenant, and that such right may, by virtue of paragraph 3 of that article, be subject to restrictions "which are provided by law [and] are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant". In the present case, the State party has not put forward any argument to that effect. Consequently, the Committee finds that the confiscation of the author's passport, and failure to restore the document to him, must be deemed an unjustified interference with his right to freedom of movement, in violation of article 12, paragraph 2, of the Covenant.<sup>41</sup>

7.9 With respect to the author's complaint under article 14, the Committee notes from the information before it that on 20 April 2007 – two months after his second arrest – Idriss Aboufaied was brought before a special tribunal in Tajoura District, Tripoli, to face several criminal charges, of which he had not been previously informed. The case was then transferred to a Revolutionary Security Court which held some of its hearings in closed session, for reasons that have not been identified. Although a lawyer was assigned to him by the authorities, he was not able to meet with him outside the courtroom, nor was he able to examine the case file, and he was not permitted to attend some of the court hearings. On 10 June 2008, he was sentenced to 25 years' imprisonment and was maintained in detention until his release on 8 October 2008, despite his request for release on medical reasons, which was not considered by the Court. Based on the material before it, and in the absence of rebuttal information from the State party, the Committee concludes that the trial and sentencing of Idriss Aboufaied in the circumstances described disclose a violation of article 14, paragraphs 1, 3 (a) and (d), of the Covenant. Having so concluded, the Committee will not examine separately the claims of violation of article 2, paragraph 3, in conjunction with article 14.

7.10 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 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 (see art. 2, para. 3, of the Covenant) have been systematically impeded.<sup>42</sup> In the present case, the State party authorities subjected Idriss and Juma Aboufaied to incommunicado detention and refused to provide the family with any information concerning their whereabouts or condition, and further intimidated the family from seeking redress or assistance for them. The Committee, therefore, finds that the enforced disappearance of Idriss and Juma Aboufaied deprived them of the protection of the law during that period, in violation of article 16 of the Covenant.

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7.7; and No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya* (note 17 above), para. 6.4.

<sup>41</sup> See communications No. 1143/2002, *El Dernawi v. Libyan Arab Jamahiriya* (note 20 above), para 6.2; and No. 1107/2002, *El Ghar v. Libyan Arab Jamahiriya* (note 20 above), para 7.3.

<sup>42</sup> See communications No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya* (note 38 above), para 7.9; No. 1327/2004, *Grioua v. Algeria* (note 23 above), para. 7.8; and No. 1495/2006, *Madoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

7.11 The author invokes article 2, paragraph 3, of the Covenant, which requires States 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 States parties establishing 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. In the present case, the information before the Committee indicates that Idriss and Juma Aboufaied did not have access to an effective remedy, leading the Committee to find a violation of article 2, paragraph 3, read in conjunction with article 6, paragraph 1; 7; 9; 10, paragraph 1; and 16 with regard to Idriss and Juma Aboufaied, and read in conjunction with article 12, paragraph 2, with regard to Idriss Aboufaied.<sup>43</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>44</sup>

7.12 Having reached the foregoing conclusions, together with the fact that both brothers were released alive, the Committee will not examine separately the claims of violation of article 6 read alone.

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 7; 9; 10, paragraph 1; and 16 with regard to Idriss and Juma Aboufaied. It also finds that there was a violation of articles 12, paragraph 2; and 14, paragraphs 1, 3 (a) and (d) with regard to Idriss Aboufaied. The Committee further finds that the State party acted in violation of article 2, paragraph 3, read in conjunction with articles 6, paragraph 1; 7; 9; 10, paragraph 1; and 16 with regard to Idriss and Juma Aboufaied, and read in conjunction with article 12, paragraph 2, with regard to Idriss Aboufaied. 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 and his brothers with an effective remedy, including (i) a thorough and effective investigation into the disappearance of Idriss and Juma Aboufaied and any ill-treatment that they suffered in detention; (ii) providing the author and his brothers with detailed information on the results of its investigations; (iii) prosecuting, trying, and punishing those responsible for the disappearance or other ill-treatment; and (iv) appropriate compensation to the author and his brothers for the violations suffered. 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

<sup>43</sup> See communications No. 1422/2005, *El Hassy v. the Libyan Arab Jamahiriya* (note 17 above), para. 6.9; and No. 1196/2003, *Boucherf v. Algeria* (note 17 above), para. 9.9.

<sup>44</sup> See communication No. 1811/2008, *Chihoub v. Algeria*, Views adopted on 31 October 2011, para 8.11.

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.]



## Appendix

### I. Individual Opinion of Committee member Sir Nigel Rodley (concurring)

While concurring with some hesitation with the substantive findings of the Committee, I have misgivings about the Committee's unexplained treatment of these cases – or at least the case of Idriss Aboufaied – explicitly as “enforced disappearances”. There is no doubt that both brothers were victims of secret detention. The question is whether they were also placed outside the protection of the law, thus justifying both the categorization of the detentions as enforced disappearances and as violations of article 16.

Those who are experienced in working with the grotesque and unconscionable practice of enforced disappearance are familiar with the need to distinguish an unacknowledged detention, that perhaps exceeds national or international time limits and thus constitutes at least arbitrary detention, from the horrible reality of enforced disappearance. This distinction would appear to imply a temporal element in the notion of enforced disappearance. Indeed, there is a risk of trivializing the notion, if it is held to cover any secret detention (by which I understand neither the detention to be acknowledged nor the whereabouts disclosed) for however short a period.

On the other hand, only one of the international definitions of enforced disappearance, notably that in article 7, paragraph 2 (i) of the Rome Statute of the International Criminal Court addresses this temporal dimension.<sup>1</sup> It requires that there be an intent to deprive the person of the protection of the law “for a prolonged period of time”. Effectively, the implication may be that the temporal element is evidence of the placing of the person outside the protection of the law. Indeed, the Committee's standard language in paragraph 7.10 with regard to article 16 specifically refers to “a prolonged period of time”.

Normally, I think the Committee should require more than the mere assertion – albeit, as in this case, uncontested by the State party - that a person falls into that category without a significant temporal element. Not every secret detention, even for as much as two months, as was inflicted on Idriss Aboufaied, would necessarily fall to be treated as an enforced disappearance, as there would not on that basis alone be sufficient evidence of deprivation of protection of the law.

However, in the present case, there is less doubt regarding the treatment of Juma Aboufaied who was secretly detained for 15 months; and the case of his brother, who had twice been subject to two months' secret detention, is on the facts inseparable from his. Moreover, the existence of the practice of enforced disappearance in Libya is already familiar to the Committee.<sup>2</sup> Under these circumstances, it is probable that both brothers were indeed denied protection of the law, thus rendering permissible their categorization as enforced disappearances and the finding of a violation of article 16.

<sup>1</sup> Other definitions are found in the International Convention for the Protection of All Persons from Enforced Disappearance (2006), art. 2; and the Inter-American Convention on Forced Disappearance of Persons (1994), art. II.

<sup>2</sup> See communications No. 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya* (note that the term was not invoked in this case); No. 1295/2004, *El Alwani v. Libyan Arab Jamahiriya*; No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*; No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*; No. 1751/2008, *Aboussedra v. Libyan Arab Jamahiriya*; No. 1776/2008, *Bashasha v. Libyan Arab Jamahiriya*.

The misgivings remain, however; most enforced disappearances are really camouflages for clandestine murder. Very occasionally the victims reappear. We should be cautious about relatively brief secret detentions – arbitrary and torturous though they be – being treated as authentic enforced disappearances.

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

## II. Individual Opinion of Committee member Mr. Walter Kälin (partly dissenting)

While I agree with the finding of the majority that article 16 of the Covenant was violated in the case of Juma Aboufaied, I am not in a position to share this conclusion with regard to his brother, Idriss, who was secretly detained on two occasions for periods of approximately two months each. Both brothers were victims of secret detention, and thus of violations of Article 9 of the Covenant, but it is more than doubtful that, as the majority seems to suggest, secret detention always and regardless of its duration amounts to a violation of the right to recognition as a person before the law.

Article 16 of the Covenant protects the absolute and non-derogable right to be recognized as someone having the capacity to be a bearer of rights and duties, and thus is the most fundamental of all rights insofar as “recognition of legal personality is [...] a necessary prerequisite to all other rights of the individual.”<sup>1</sup>

It is probably for this reason that, for a long time, the Committee was hesitant to apply article 16 to cases of enforced disappearance. Only as late as 2007 did the Committee started to examine whether and under what circumstances a forced disappearance may amount to a violation of article 16. It held “that 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 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 (Covenant, art. 2, para. 3) have been systematically impeded”. It explained that in such cases, victims “are in practice deprived of their capacity to exercise entitlements under the law, including all their other rights under the Covenant, and of access to any possible remedy, as a direct consequence of the actions of the State.”<sup>2</sup>

This reasoning makes clear that not every case of a denial of justice or access to a remedy in case of a violation of a right violates article 16 of the Covenant. Rather, as the Committee since 2007 has consistently recognized,<sup>3</sup> this non-derogable guarantee is violated where victims are *systematically* and for a *prolonged* period of time deprived of any possibility to exercise their rights and denied access to a remedy against such violations. It is only under these circumstances that a de facto denial of the right to be treated as a bearer of rights is taking place. On the basis of the information available to the Committee,<sup>4</sup> I am unable to conclude that these conditions were fulfilled in the case of Idriss Aboufaied.

This conclusion should not be interpreted as disregarding the most serious anguish and suffering imposed on Idriss Aboufaied and his relatives. I am also fully aware that contemporary human rights definitions of enforced disappearance do not contain a temporal element.<sup>5</sup> However, while I am deeply convinced that forced disappearance is one of the

<sup>1</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd edition, (Kehl am Rhein, Engel, 2005), p. 369.

<sup>2</sup> Communications No. 1327/2004, *Grioua v. Algeria*, para. 7.8, and No. 1328/2004 *Kimouche v. Algeria*, para. 7.8.

<sup>3</sup> See, inter alia, communication No. 1751/2008, *Aboussedra v. Libyan Arab Jamahiriya*, Views adopted by the Committee on 25 October 2010, para. 7.9.

<sup>4</sup> See paras. 2.4, 2.5 and 2.9 of the Views in this case.

<sup>5</sup> See International Convention for the Protection of All Persons from Enforced Disappearance (2006), art. 2; Inter-American Convention on Forced Disappearance of Persons (1994), art. II. In contrast, art.

most heinous human rights violations, I maintain that the role of Committee is to apply article 16 rather than interpret a notion that is not enshrined in the Covenant. In this regard, I fear that by giving up the elements of the duration and systematic character of the deprivation of a person of the protection of the law when examining cases under article 16, the majority risks to trivialize this fundamental human rights guarantee.

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

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7, para. 2 (i) of the Rome Statute of the International Criminal Court requires that there be an intent to deprive the person of the protection of the law 'for a prolonged period of time'.

### **III. Individual Opinion of Committee member Ms. Christine Chanet jointly with Committee member Mr. Cornelis Flinterman (concurring)**

I express reservations over the use, in the statement of grounds for the Committee's decision not to address the issue of article 6 of the Covenant, of the expression "and in light of the fact that both brothers were released alive" (para. 7.12).

This wording might be interpreted as necessarily meaning that proof of death must be established with certainty for a finding of violation of article 6 to be made in respect of enforced disappearance.

In my view, this interpretation would wrongly give pride of place to the last sentence of article 6, paragraph 1, which states that "No one shall be arbitrarily deprived of his life", to the detriment of the second sentence of that paragraph, which states that the right to life "should be protected by law," when the two sentences are of equal importance.

In the matter of enforced disappearance, whether the victim is alive or dead, the mere fact of incommunicado detention which cuts the individual concerned off from the human community by severing contact between them, even temporarily, entails a risk to life for which the State is accountable.

This is the analysis made by the Human Rights Committee in the cases of *Djebrouni v. Algeria* (communication No. 1781/2008) and *Ouaghlossi v. Algeria* (communication No. 1905/2009), and it should not be jeopardized by a different interpretation as might result from the wording I criticize.

[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.]

#### IV. Individual Opinion of Committee member Mr. Fabían Omar Salvioli (partly dissenting)

1. In general, I agree with the Committee's decision in the *Aboufaied v. Libya* case (communication No. 1782/2008), but I regret to have to dissent from the contents of paragraph 7.12 of the Views and the conclusions drawn therefrom. In that paragraph, the Committee decided that, having previously found a violation of article 2, paragraph 3, read in conjunction with article 6, and in light of the fact that the Aboufaied brothers were released alive, "the Committee will not examine separately the claims of violation of article 6 read alone."

2. The Committee commonly places the "duty to guarantee" in the context of article 2, paragraph 3, of the Covenant; in my view, however, the provision concerned refers to only one aspect of that duty, namely the duty to ensure a remedy in respect of the violations committed. The duty to guarantee under international human rights law is far broader than the provision of an effective remedy; guaranteeing the exercise of a right is an obligation of the State not only after a violation occurs but also, essentially, before.

3. In previous individual opinions concerning other individual cases dealt with by the Committee,<sup>1</sup> I mentioned the right of guarantee in its three dimensions under the International Covenant on Civil and Political Rights. Although I refer back to those statements in order to avoid repeating identical arguments whenever an instance of enforced disappearance, such as the present one, occurs, I consider that in the Aboufaied case, bearing in mind the third dimension of the duty to guarantee, the Committee should have found a violation of article 6 of the Covenant in respect of both victims.

4. Apart from involving a restricted focus on the right to life, the position that article 6 is violated only in the event of the victims' death ignores the fact that the duty of guarantee covers each of the rights laid down in the Covenant (in this case, the right to life), for which the corresponding legal provision is made (in this instance, in article 6).

5. To limit the duty to guarantee rights to the existence of an effective judicial remedy, in accordance with the reasoning followed by the majority of the Committee in the present case, is to water down the responsibilities and obligations that all States parties to the International Covenant on Civil and Political Rights are required to discharge in good faith in order, in this particular case, to guarantee the right to life. In my opinion, therefore, the Committee should have concluded in its Views that a violation of article 6, paragraph 1, was committed in respect of the brothers Idriss and Juma Aboufaied.

#### **Is there a minimum length of time required for detention to be regarded as constituting enforced disappearance?**

6. I would not like to end this opinion without mentioning a matter which, although correctly resolved in the case of the present communication, may give rise to problems in the future. I refer to the risk of weakening the concept of enforced disappearance by introducing a time dimension as an additional element.

7. In the present case, the Committee correctly categorized the situations of both Idriss and Juma Aboufaied as constituting "enforced disappearance." Enforced disappearance is a complex violation of human rights attributable to the State in which public officials or individuals act with its support or acquiescence; it entails detention (lawful or unlawful),

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<sup>1</sup> Human Rights Committee, communication No. 1588/2007, *Benaziza v. Algeria*, Views of 26 July 2010, Partly dissenting opinion of Committee member Mr. Fabían Salvioli, paras. 19–21.

deprivation of liberty and a refusal to acknowledge detention or to provide information on the fate or whereabouts of the person detained with the aim of placing the person concerned outside the protection of the law. This is a continuing crime which ends only with the appearance of the victim, alive or not (hence, the extrajudicial execution of the individual is not a determinant of the crime of enforced disappearance).

8. The United Nations codification of enforced disappearances began with the Declaration on the Protection of All Persons from Enforced Disappearance.<sup>2</sup> In this instrument, the element of detention is dissociated from the status of the perpetrator (whether or not an agent of the State), and the nature of the detention (lawful or unlawful); although the Declaration does stipulate that there must be a refusal to acknowledge the disappearance or to disclose the fate *or whereabouts* of the person concerned.<sup>3</sup> The time factor (requirement of a minimum length of time to determine whether or not an enforced disappearance has been committed) is not even mentioned.

9. The emphasis on refusal to disclose the person's whereabouts indicates a realization of the risk that victims may be subjected to certain practices constituting grave violations of human rights, especially torture or cruel, inhuman or degrading treatment. Not surprisingly, therefore, the Declaration states that "any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention", and also requires that "accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or any other persons having a legitimate interest in the information, unless a wish to the contrary has been manifested by the persons [deprived of liberty]."<sup>4</sup>

10. The two specific treaties on the subject (the International Convention for the Protection of All Persons from Enforced Disappearance<sup>5</sup> and the pioneering Inter-American Convention on Forced Disappearance of Persons<sup>6</sup>) uphold the same criteria. The International Convention states the following: "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".<sup>7</sup> The Inter-American Convention qualifies forced disappearance in virtually identical terms: "For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees".<sup>8</sup>

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<sup>2</sup> Declaration on the Protection of All Persons from Enforced Disappearance, adopted on 18 December 1992 by General Assembly resolution 47/133.

<sup>3</sup> *Ibid.*, third preambular paragraph.

<sup>4</sup> *Ibid.*, art. 10, paras. 1 and 2.

<sup>5</sup> International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the United Nations General Assembly on 20 December 2006.

<sup>6</sup> Inter-American Convention on Forced Disappearance of Persons, adopted by the General Assembly of the Organization of American States on 9 June 1994.

<sup>7</sup> International Convention for the Protection of All Persons from Enforced Disappearance, art. 2.

<sup>8</sup> Inter-American Convention on Forced Disappearance of Persons, art. II.

11. The clarity of the rules laid down in these two instruments saves me from further argument, but in order to dispel any possible doubt, and in view of the possibility that the duration of detention may be analysed to determine whether or not it constitutes “enforced disappearance” or “secret detention”, in any case the International Convention for the Protection of All Persons from Enforced Disappearance states emphatically that “No one shall be held in secret detention”.<sup>9</sup>

12. The Rome Statute<sup>10</sup> (which is not a human rights treaty but an international criminal law treaty) has been heavily criticized for not following the definitions laid down in the international human rights instruments for various types of crimes; in the case of enforced disappearance, it incorporates the time dimension as an element of intent on the part of the perpetrator (the perpetrator must have intended to remove a person from the protection of the law for a prolonged period of time). *However, it should be noted that there is no reference to the duration of detention: it merely has to be proved that the perpetrator intended to remove the person from the protection of the law for a certain length of time.*<sup>11</sup> Thus, for example, if a person is detained or abducted by or with the acquiescence of agents of the State, no information is provided on the place of detention and a few days later the person concerned is found dead, or even if he succeeds in escaping from captivity and is reunited with his family, it is difficult to maintain that he was not the victim of enforced disappearance, as has happened in numerous cases in many countries of the world, particularly in South America during the military dictatorships.

13. Incorporating the time dimension into the topic under discussion could have still more serious consequences: how much time should be allowed before implementing the urgent action mechanisms provided for by the conventions protecting persons against enforced disappearance,<sup>12</sup> or United Nations non-treaty mechanisms?<sup>13</sup> International human rights law was very wise never to have introduced a minimum duration of detention to establish an artificial and fragmented standard for the crime of enforced disappearance.

14. The time dimension, in the sense of requiring a minimum duration of detention, has no place in the categorization of enforced disappearance. As regards the parameters to apply in dealing with acts of enforced disappearance, the Human Rights Committee would be ill-advised to use the Rome Statute as a reference, instead of continuing to be guided by its own rich jurisprudence (which has never referred to a period of time) or by the clear provisions of the United Nations Convention on the subject.

[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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<sup>9</sup> International Convention for the Protection of All Persons from Enforced Disappearance, art. 17.

<sup>10</sup> The Rome Statute establishing the International Criminal Court was adopted on 17 July 1998.

<sup>11</sup> See “International Criminal Court, Elements of Crimes” United Nations document PCNICC/2000/1/Add.2 (2000), art. 7 (1) (i), para. 6.

<sup>12</sup> See International Convention for the Protection of All Persons from Enforced Disappearance, art. 30; and Inter-American Convention on Forced Disappearance of Persons, art. XIV.

<sup>13</sup> For example, the Working Group on Enforced or Involuntary Disappearances.