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Communication No. 1755/2008

**Views adopted by the Committee at its 104th session,
12–30 March 2012**

<i>Submitted by:</i>	Ashraf Ahmad El Hagog Jumaa (represented by counsel, Liesbeth Zegveld)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Libya
<i>Date of communication:</i>	7 January 2008 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 25 January 2008 (not issued in document form)
<i>Date of adoption of Views:</i>	19 March 2012
<i>Subject matter:</i>	Alleged torture of author and death penalty imposed after an unfair trial
<i>Substantive issue:</i>	Torture, unfair trial, arbitrary arrest and detention; death penalty imposed following unfair trial
<i>Procedural issue:</i>	Non-substantiation of allegations
<i>Articles of the Covenant:</i>	6; 7; 9; 10; 14
<i>Article of the Optional Protocol:</i>	2

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. 1755/2008* **

Submitted by: Ashraf Ahmad El Hagog Jumaa (represented by counsel, Liesbeth Zegveld)

Alleged victim: The author

State party: Libya

Date of communication: 7 January 2008 (initial submission)

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

Meeting on 19 March 2012,

Having concluded its consideration of communication No. 1755/2008, submitted to the Human Rights Committee by Ashraf Ahmad El Hagog Jumaa, 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 is Ashraf Ahmad El Hagog Jumaa, a Bulgarian national of Palestinian origin, born on 25 October 1969 in Alexandria, Egypt. He claims to be a victim of violation by Libya of articles 6, 7, 9, 10 and 14 of the Covenant. He is represented by Liesbeth Zegveld. The Optional Protocol entered into force for the State Party on 16 May 1989.

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

** The text of one individual opinion (partially dissenting), signed by Committee member Fabian Omar Salvioli, is appended to the present Views.

1.2 On 17 April 2008, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, decided to examine the admissibility of the communication separately from the merits.

The facts as presented by the author

2.1 The author was, until his arrival in Bulgaria on 24 July 2007, a stateless person of Palestinian origin. He and his family had been living in Libya since 4 September 1972. At the beginning of the events at the basis of the case, the author was a graduate medical student at Benghazi University, Libya. Since 1998, he had worked as an intern in El-Fatah paediatric hospital in Benghazi.

2.2 On 29 January 1999, the author was arrested. He was accused of premeditated murder and causing an epidemic by injecting 393 children in Al-Fatah paediatric hospital with HIV.

2.3 During the interrogations, the author was allegedly compelled to confess guilt under torture. Methods of torture allegedly included extensive use of electric shocks on legs, feet, hands and chest while stretched naked on a steel bed; beatings on the soles of the feet; being hung by the hands; creation of a sensation of suffocation and strangulation; being suspended from a height by the arms; being threatened of attack by dogs while blindfolded; beatings on the body; injection of drugs; sleep deprivation; sensory isolation; very hot or ice-cold showers; being held in overcrowded cells; being blinded by bright lights. The author was allegedly subjected to anal rape. His confession triggered a wave of arrests of, in particular, Bulgarian medical personnel in Libya.

2.4 On 9 February 1999, 23 Bulgarian nationals, working in different hospitals in Benghazi, including the Al-Fatah paediatric hospital, were arrested by Libyan police without being informed of the grounds for their arrest. Seventeen of them were released on 16 February 1999. The author and five co-accused Bulgarian nurses¹ were allegedly tortured repeatedly for approximately two months. After they confessed, torture became less frequent, but still continued. One of the five nurses arrested on 9 February 1999, Kristyana Valcheva, had never worked at Al-Fatah paediatric hospital.

2.5 On 15 May 1999, the case was referred to the Public Prosecution Office, which brought the following charges against the author and the five co-accused: commission of acts against the Libyan sovereignty, leading to the indiscriminate killing of people for the purpose of subversion of State security (capital offence); involvement in a conspiracy and collusion for the commission of the above premeditated crimes; deliberately causing an epidemic by injecting 393 children at Al-Fatah hospital with the AIDS virus (capital offence); premeditated murder through the use of substances which cause death, by injecting children with the AIDS virus (capital offence); and commission of acts contrary to Libyan law and traditions (such as illegal production of alcohol, drinking alcohol in public places, illegal transaction in foreign currency, illicit sexual relationships). On 16 May 1999, the author and the five co-accuseds were, for the first time, brought before the Public Prosecution Office, approximately four months after their arrest. They were subsequently brought before the Prosecutor every 30 to 45 days.

¹ Kristyana Venelinova Valcheva, Nasya Stoycheva Nenova, Valentina Manolova Siropulo, Valya Georgieva Cherveniyashka and Snezhanka Ivanova Dimitrova.

First trial

2.6 The trial before the People's Court² began on 7 February 2000. The first time the author was granted access to a lawyer was on 17 February 2000, 10 days after the start of the trial. At that time, he raised the torture allegations in court. He was never given an opportunity to speak to his lawyer freely as State representatives were always present during their meetings. On 20 March 2001, the author was taken to the hospital due to his worsening state of health. He remained in hospital for 25 days. In June 2001, two of his co-defendants³ retracted their confessions, stating they had been extracted under torture. Subsequently, the author and his co-defendants pleaded "not guilty." The confession and the contention of the Head of State that the accused worked as CIA and Mossad agents were considered to be the basis of the case.

2.7 The criminal case against the author and the co-defendants was initially suspended, as the Court had not gathered enough evidence to maintain the accusation of conspiracy against the State. On 17 February 2002, the People's Court dismissed the case and remanded it to the Criminal Prosecution Office, which forms part of the ordinary criminal justice system. The Prosecutor withdrew the charges of conspiracy and presented new charges of illegal drug experiments, as well as contamination with HIV/AIDS of 426 children.⁴ Throughout this time, the author and the co-defendants remained in detention.

Second trial

2.8 In August 2002, the Indictment Chamber of the Benghazi Appeals Court maintained the charges as presented by the Criminal Prosecution Office and referred the case to an ordinary criminal court, the Benghazi Appeals Court. The prosecution relied on the confessions of the author and one of the co-defendants,⁵ and the result of the search of the residence of another co-defendant,⁶ where police had discovered five contaminated bottles of blood plasma. In July 2003, the second trial started. Professors Luc Montagnier and Vittorio Colizzi were appointed as experts. In September 2003, they testified that the infection of blood samples at Al-Fatah hospital had occurred in 1997, two years before the incriminating facts, and one year before the author became an intern in the hospital. Their expertise concluded that the cause of the infection was unknown and was not deliberate. Such nosocomial infections⁷ were caused by a very specific and highly infectious virus strain, owing to poor standards of hygiene and neglect.⁸ In December 2003, the Court appointed a second team of experts, which included five Libyan doctors. On 28 December 2003, the team rejected the findings made by the two renowned professors and stated that the AIDS epidemic was not attributable to nosocomial infections or to the re-use of infected medical equipment but to a deliberate act. The defendants called for another counter-expertise, but the court dismissed their request.

² Extraordinary Court for crimes against the State.

³ Kristiyana Valcheva and Nasya Nenova.

⁴ In the charges read to the author, the number of children cited as being contaminated rose from 393 to 426 between the first and the second trial.

⁵ Nasya Nenova

⁶ Kristiyana Valcheva

⁷ The author specifies that nosocomial infections are infections resulting from treatment in a hospital or hospital-like setting, but which are secondary to the patient's original condition.

⁸ See "Final report of Professors Luc Montagnier and Vittorio Colizzi to Libyan Arab Jamahiriya on the nosocomial HIV infection at the Al-Fateh Hospital, Benghazi, Libya," (Paris, 7 April 2003), which concludes that "no evidence has been found for a deliberated injection of HIV contaminated material (bioterrorism). Epidemiological stratification, according to admission time, of the data on seropositivity and results of molecular analysis are strongly against this possibility." (page 21).

2.9 On 6 May 2004, the Benghazi Appeals Court sentenced the author and the co-defendant to death for having caused the death of 46 children and contaminating 380 others. Nine Libyans working at Al-Fatah hospital, had also been charged with the same offence but appeared free at the trial, having been released on bail at the start of the proceedings. They were acquitted. As for the eight Libyan security officers who were accused of torture by the author and the co-defendants, the Court relinquished jurisdiction and referred their case back to the Prosecutor's office. On 5 July 2004, the author and the co-defendants appealed on points of law to the Libyan Supreme Court. The Prosecutor requested the Court to revoke the death sentences and refer the case to the Benghazi Appeals Court for retrial, as "irregularities" had occurred during the arrest and the interrogation of the author and his co-defendants. After postponing its sessions repeatedly, the Supreme Court quashed the judgement of the Benghazi Appeals Court and referred the case for retrial to the Tripoli Criminal Court on 25 December 2005. The Court refused to release the author and co-defendants on bail as there were insufficient guarantees that they would reappear for trial.

Retrial and release

2.10 The Tripoli Appeals Court reopened the trial on 11 May 2006. The Prosecutor reiterated his request for the death penalty for the author and his co-defendants. The author again pleaded not guilty and reiterated that he had been tortured to make him confess. On 19 December 2006, he was found guilty and sentenced to death. The Court stated it could not reconsider the torture allegations, as another Court had already dismissed the torture claims.

2.11 The author appealed to the Supreme Court on 19 December 2006. The session before the Court took place on 11 July 2007, although it was supposed to take place within three months after the submission of the appeal. According to the information provided by the author, the Supreme Court only had one session lasting one day. The result was the confirmation of the death sentence for the author and the co-defendants. On 17 July 2007, the High Judicial Council announced that the sentence would be commuted to life imprisonment, after a compensation agreement had been reached with the families of the victims. Subsequently, as a result of negotiations between Libya and Governments of other countries, the author was transferred to Bulgaria on 24 July 2007 to serve his sentence, where he was immediately pardoned and released.

2.12 The torture claims submitted by the author as early as 2000 were not investigated as expeditiously and thoroughly as they should have been. In June 2001, two of the co-defendants⁹ retracted their confessions as they had been obtained under duress, and identified the persons responsible for the torture. Only in May 2002, did the Criminal Prosecution Office decide to investigate the matter and order a medical report. Consequently, the Prosecution brought charges against eight security officers who were in charge of the investigation, a doctor and an interpreter. In June 2002, a Libyan doctor appointed by the Prosecutor examined the author and the co-defendants and found marks on their bodies which he argued resulted from "physical coercion" and "beatings." In its judgement dated 6 May 2004, the Benghazi Appeals Court determined that it did not have the competence to rule on the matter since the offence had not been committed under its jurisdiction, but within the jurisdiction of the Tripoli Appeals Court.

2.13 On 7 May 2004, the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment sent a joint urgent appeal to the State party regarding the author's and co-defendants' case, and requested information about the allegations of torture and of

⁹ Kristiyana Valcheva and Nasya Nenova.

unfair trial. They enquired about the lack of prosecution of officials responsible for the alleged torture.¹⁰ In response, the State party stated that the Department of Public Prosecutions had referred the case of the police officers to the Tripoli Appeals Court, since that court was the only one competent to hear the case. The trial against the police officers, one doctor and an interpreter started before the Tripoli Court. During the hearings, some of the police officers admitted that they had tortured the author and some of his co-defendants to obtain confessions.¹¹ The Court rejected the expert medical opinion produced by the defence, which was performed three years after the incriminating facts, on the grounds that a Libyan doctor officially appointed as expert considered that the examination had not been conducted in accordance with the protocols, that marks of torture were undetectable and that in all events, the alleged torture left no mark after two or three weeks. The Tripoli Court acquitted the suspects for lack of evidence on 7 June 2005. The author and the co-defendants appealed the Court's judgement, but the appeal was rejected by the Libyan Supreme Court on 29 June 2006. On 10 August 2007, international newspapers reported that the son of President Muammar Gaddafi, Saif al-Islam, had admitted in an interview with Al-Jazeera TV that the author and the co-defendants had indeed been tortured.¹²

¹⁰ See E/CN.4/2005/7/Add.1, paras. 396-398.

¹¹ Extract of statement from Major Salim Jum'a Salim, Chief of the police station for training dogs, 30 June 2002:

"At the orders of brigade General Harb Derbal, the suspects Ashraf, Kristiyana, Nasya, Snezhana and Valya were taken to the department of criminal investigation for interrogation. [...] When the interrogation started he [Harb Derbal, Director General of Criminal Investigation] brought a telephone machine along which works with cushions. He wanted to use it during the interrogation. It gives an electric shock. During the interrogation everyone was taken in separately. Brigade General Harb requested to attach the wire to the fingers. He requested to activate the machine in order to interrogate the suspect. He asked me a couple of times to switch on the machine. Since it was an order, I carried it out. The suspects were also put blindfolded on the square. The person named Ashraf was put in a cage where there were no dogs. As concerns the use of dogs at the interrogation, this did not occur. [...] An anaesthetist was called in. His name was Abduljalil Wafaa. All suspects were sedated. [...] When I switched on the machine, I did it because I am a military. When I get the order to switch it on, I switch it on."

Extract of statement from Izzudin Mukhtar Saleh Al Baraki, Sergeant-Major at the Directorate General for Criminal Investigation, guard of the author, 29 July 2002:

"Q: Did you notice any traces of force on the body of the aforementioned suspect?

A: Yes, I saw traces of force between the fingers. One time Lieutenant Nwar Abu Za'ainin came to him when he was praying. He pushed him, while he was praying. He did not stop with it. I prevented him from further hitting. Always when he [Ashraf] came out after examination, I saw fear on his face. Sometimes he cried and I saw tears in his eyes."

Extract of statement from Salim Jum'a Salim, Chief of the police station for training dogs, guard of the author and his co-defendants, also present during the interrogations, 29 July 2002:

"Q: Can you tell us what sort of pressure and physical force was exerted on the suspects?

A: As regards Ashraf Ahmad Jum'a, Kristiyana and Nasya, electrical equipment was used. The suspects were further placed in dog cages. They also were made to run on the square. I know that Jum'a Al Mashari has exerted physical force with electrical equipment. Also, Abdulmajid Al Shawal and Brigade General Harb Derbal. Usama Uwaidat was also often present at the interrogation sessions. "

¹² According to the interview record, Saif al-Islam stated: "Yes, they were tortured by electricity and they were threatened that their family members would be targeted. But a lot of what the Palestinian doctor has claimed are merely lies."

The complaint

3.1 The author claims that the State party violated articles 6, paragraph 2; 7; 9; 10 and 14 of the Covenant.

3.2 He claims that the death sentence was imposed after an unfair and arbitrary trial in violation of article 6, paragraph 2. He considers that both the verdict of 19 December 2006 and the upholding of the judgement by the Supreme Court on 11 July 2007 were the result of a flagrantly unfair and arbitrary trial. Referring to the jurisprudence of the Committee and its general comment No. 6, he contends that the imposition of an unfair trial with numerous violations of article 14 of the Covenant violates article 6, paragraph 2, of the Covenant.¹³ Although the death sentence was later commuted to life imprisonment, this should not relieve the State party from its obligation under this provision. The author emphasizes that the death sentence was commuted to life imprisonment only after a large sum of money had been offered to the families of the infected children, and heavy pressure had been brought to bear by the European Union, Bulgaria and other States.

3.3 The author claims that he was subjected to torture and drugged. The facts as described, according to him, are clear-cut evidence, confirmed by medical records and witnesses' statements that the Libyan authorities are responsible for the torture of the author at the hands of the investigators; and the fact that some of the perpetrators omit or refuse to mention the more severe ill-treatment is contradicted by the medical findings concerning the author and his co-defendants. While the doctor could not establish the exact time of the torture by rape and use of electrical equipment, there is no indication that the author went into detention in bad health. He emphasizes that the burden of proof cannot solely rest on him.¹⁴ The complaints were made at the earliest possible stage, when he was finally brought before a judge, eight months after being held incommunicado. At that time, he showed clear signs of torture, but no action was taken by the public prosecutor or by the court.¹⁵ The author contends that the severity of his ill-treatment was such as to be necessarily characterized as torture, since it was used to extract a confession. Cruel methods were applied for a lengthy period of time and a number of practices described above constitute torture per se.¹⁶ These practices as well as the lack of a timely and thorough investigation into his torture claims constitute a violation of article 7 of the Covenant. The author finally contends that his treatment throughout his detention also amounts to a violation of article 7.

3.4 The author considers that his arrest and detention were arbitrary. Under Libyan law, the author should have been brought before the Prosecutor within 48 hours after his arrest. This was however not done until four months later, on 16 May 1999. Even then, the authorities kept him incommunicado until 30 November 1999, when his family was finally allowed to see him. In this respect, the State party violated article 9, paragraph 1, of the Covenant. Moreover, the author was allegedly not informed promptly of charges against

¹³ See Communications No. 250/1987, *Carlton Reid v. Jamaica*, Views adopted on 20 July 1990; No. 730/1996, *Marshall v. Jamaica*, Views adopted on 3 November 1998; No 16/1977 *Daniel Mbenge v. Zaire*, Views adopted on 25 March 1983; No 349/1989, *Clifton Wright v. Jamaica*, Views adopted on 27 July 1992; Nos. 464/1991 and 482/1991, *Peart and Peart v. Jamaica*, Views adopted on 19 July 1995; and No. 719/1996, *Levy v. Jamaica*, Views adopted on 3 November 1998.

¹⁴ The author refers to the jurisprudence of the Committee, particularly communications No. 1096/2002, *Kurbanova v. Tajikistan*, Views adopted on 6 November 2003; and No 992/2001, *Louisa Bousroual v. Algeria*, Views adopted on 30 March 2006.

¹⁵ The author cites the jurisprudence of the Committee on this issue, inter alia, communications No. 612/1995, *Arhuacos. v. Colombia*, Views adopted on 29 July 1997; No 563/1993, *Bautista de Arellana v. Colombia*, Views adopted on 27 October 1995; and No. 04/1977, *William Torres Ramirez v. Uruguay*, Views adopted on 23 July 1980.

¹⁶ The author refers here to the use of electric shocks on genitals and anal rape.

him. It was not until he was brought before the Prosecutor that he was finally properly informed of the charges against him, still without legal counsel. This constitutes a violation of article 9, paragraph 2, of the Covenant. Finally, he was not brought promptly before a “judicial authority;” in fact, his first appearance in court was on 7 February 2000. Before this date, he only saw the Prosecutor, which constitutes a violation of article 9, paragraph 3 of the Covenant.

3.5 The author contends that the treatment to which he was subjected following his arrest also violated his rights under article 10 of the Covenant. He adds that he did not receive any medical care commensurate with his state of health during his detention, which is also in violation of article 10, paragraph 1. It was only after the abrupt deterioration of his state of health that he was hospitalized on 20 March 2001.

3.6 The author considers that the State party violated his right to a fair trial, as he was not informed of charges against him for the first four months of his detention; nor was he assigned a lawyer until 17 February 2000 – 10 days after the start of the trial and a full year after his arrest. He was forced to testify against himself through torture; he was not assisted by a lawyer when he made his confession before the Prosecutor; the court, without providing sufficient reasons, dismissed the expert report of Professors Montagnier and Collizi, despite every indication that their report exonerated the author and his co-defendants; the second search of Ms. Valcheva’s home, during which the police “providentially”¹⁷ discovered five bottles of contaminated blood plasma, was conducted without the presence of the accused or a defence lawyer; the inconsistencies in this “discovery,”¹⁸ the fact that the prosecution never produced the records of the searches, and finally that the court itself mistook the findings of one search for the findings of another prove that it was fabricated. The author concludes that the trial also suffered unreasonable delays.¹⁹ These elements constitute, according to the author, a violation of article 14 of the Covenant.

State Party’s observations on admissibility

4.1 On 24 March 2008, the State party challenged the admissibility of the communication on grounds of non-substantiation. It notes that the case was the subject of lengthy legal and judicial proceedings aimed at establishing the truth in a case concerning more than 450 children, and relating to violation of their fundamental right to life. According to the State party, the author was afforded full legal guarantees ensuring his right to a fair trial in conformity with international standards. Civil society organizations in Libya, international human rights organizations and foreign diplomatic missions in Libya followed the proceedings throughout.

4.2 The State party recalls that on 30 September 1998, a Libyan citizen, Mohammed Bashir Ben Ghazi, lodged a complaint with the Department of Public Prosecutions affirming that his son, then 14 months old, had been infected with the AIDS virus after a stay at Al-Fatah paediatric hospital in Benghazi. He discovered that his son was infected after he had been transferred to Egypt for treatment. On 12 October 1998, the Department of Public Prosecutions opened an investigation as it had received more complaints. It took 233 statements from parents of infected children and took measures, such as issuing an injunction to prevent foreign workers at the hospital from travelling abroad.

¹⁷ In quotation marks in the author’s initial submission.

¹⁸ The analysis of the bottles was carried out in March 1999, whereas the search of Ms. Valcheva’s home took place a month after.

¹⁹ More than eight years from the date of arrest on 29 January 1999 until the final judgement of the Supreme Court dated 11 July 2007.

4.3 The Secretary of the General People's Committee for Justice and Public Security issued Decision No 28/1209 to investigate the spread of the AIDS virus among children treated at Al-Fatah paediatric hospital. The investigating committee consisted of the director of the General Department of Criminal Investigations, senior investigating officers from the same department and doctors. It began work on 9 December 1998 and eventually identified the author, a Palestinian doctor, and five Bulgarian nurses as suspects. The State party explains that the committee concluded its work on 15 May 1999 and sent a report with the evidence and names of the suspects to the General Prosecution Office, which conducted an interview with the author and the co-defendants. The author confessed to committing the crime, in association with the five nurses.

4.4 The State party explains that as a consequence of the author's torture claim before the Benghazi Appeals Court on 3 June 2002, the judge of the indictment chamber issued a decision entrusting a representative of the Department of Public Prosecutions with the investigation of the author's allegations. From 13 June 2002, the Department of Public Prosecutions took statements from the defendants about their claims of torture. It also took statements from the committee tasked with investigating the spread of the AIDS virus among the children. Once the investigations were completed, the findings were transmitted to the indictment chamber which referred the case to the Benghazi Appeals Court on 4 July 2003. That court heard the case in more than 20 sittings. It sentenced the author to death on 6 May 2004, and ruled that it did not have territorial jurisdiction to hear the charges of torture against members of the investigation committee.

4.5 The State Party explains that the case on the charges of torture was referred to the Tripoli Appeals Court. This court delivered its verdict on 7 June 2005, acquitting the members of the committee. The author and the co-defendants appealed the death sentence pronounced by the Benghazi Appeals Court on 6 May 2004 to the Supreme Court, which delivered its verdict on 25 December 2005. The Court quashed the death sentence and sent the case back to the Benghazi Appeals Court for a hearing by a different panel of judges. From 11 May 2006, a new panel of judges heard the case over a total of 13 sittings. On 19 December 2006, the Court again sentenced the author and the co-defendants to death. On 12 February 2007, the defendants decided to appeal to the Supreme Court, which delivered its judgement on 11 July 2007.

4.6 The State party considers that the author confessed to participating in the commission of the crime at every stage of the investigation, beginning with his appearance before the investigation committee, then before the Office of the Prosecutor-General, which is the highest judicial investigation body in Libya,²⁰ and again before the Public Prosecution Office and during numerous sessions of the court which decided on the extension of his preventive detention.

4.7 The lengthy judicial proceedings in the case were aimed at uncovering the truth and identifying the perpetrators in a serious case. They were to afford full guarantees to the convicted persons, so that they could receive a fair trial in which all due process standards were met. According to the State party, the convicted persons could exercise their right to defence through a team of lawyers. The trial was held in open court and was attended by many representatives of civil society and human rights organizations and foreign diplomatic missions in Libya. The convicted persons, through their lawyers, appealed to the Supreme Court. The Court quashed the verdict the first time and sent the case back to the Benghazi Appeals Court to be heard by a new panel of judges. The new panel handed down a guilty verdict and the defendants again appealed to the Supreme Court. This time, the Supreme Court upheld the verdict.

²⁰ The State Party provided a copy of the author's detailed confessions.

4.8 With regard to the allegations of torture, the State Party notes that the author appeared before the committee formed to investigate this case on 11 April 1999. He confessed to participating in the commission of the crime. He was subsequently referred to the Office of the Prosecutor-General, where he was questioned on 15 May 1999 by a member of the Department of Public Prosecutions employed at the Office of the Prosecutor-General. He gave a detailed confession about his participation in the commission of the crime, in association with the Bulgarian nurses. He said nothing about being tortured by the above-mentioned investigation committee. He consistently confessed to his participation in the commission of this crime before all the different judicial authorities to which he was referred. It was only after the People's Court issued a decision about lack of jurisdiction to try the case, and the case was referred to the indictment chamber of the South Benghazi court of first instance on 3 June 2002, that the author told the judge of the indictment chamber that he had been tortured. The judge immediately entrusted the Department of Public Prosecutions with the investigation of the author's torture allegations. The latter launched an investigation and took statements from the author, the Bulgarian nurses and the members of the investigation committee. Even though the Department of Public Prosecutions was convinced that the allegations of torture were groundless, it framed charges against the members of the investigation committee. The court heard the case and delivered its verdict on 7 June 2005, acquitting the members of the investigation committee.

4.9 The State Party recalls that a total of 115 visits were paid to the convicted persons in prison by members of foreign organizations and diplomatic missions. The Secretary for Justice issued instructions to allow members of the author's family to visit him every Sunday, throughout his time in prison. A group of lawyers from Bulgaria was given permission to participate in the defence of the accused.

4.10 Commenting on the author's defence note submitted to the Supreme Court of Libya at the appeal against the verdict delivered by the Benghazi Appeals Court on 19 December 2006, the State party points out that the Supreme Court replied to all the objections raised by the author against the verdict of the Criminal Court.²¹

Author's comments on the State party's observations

5.1 On 2 July 2008, the author reaffirms that the communication is admissible. He adds that, as explained in his initial submission, all available domestic remedies were exhausted, both in relation to the torture claims and allegations of unfair trial. He points out that the State party did not argue that he had failed to exhaust these remedies. Moreover, upon his transfer to Bulgaria, the State party made the author sign a document that he would not initiate proceedings against the State Party.

5.2 As for the State Party's contention of non-substantiation of claims, the author considers he has substantiated and extensively pleaded the violation of his rights under the Covenant. On the other hand, the author considers that the State party's observations on the admissibility of the communication as mere refutation, and lacking legal precision about the conditions of his arrest and detention. The author recalls that he was held in an isolation cell normally reserved for detainees sentenced to death for 11 months. The size of the room was 10 square metres; it had no electricity or running water.

²¹ In its judgment dated 11 July 2007, the Supreme Court of Libya confirmed, point by point, the ruling of the Benghazi Appeals Court of 19 December 2006. The Court particularly focused on the contradiction in the author and the co-defendant's testimonies throughout the procedure, sometimes confirming the confessions made during the interrogation phase, sometimes refuting them.

5.3 The author refutes the State Party's argument that he only complained about torture four years after he had allegedly been tortured. Immediately after his incommunicado detention, which lasted 10 months in 1999, he continuously stated that he had been tortured. When his family was allowed to visit him on 31 December 1999, he revealed that he had been tortured. At that moment, his family hired a lawyer, who continuously reiterated the allegations. When the author repeatedly fainted during court sessions, the judge finally granted a request made by the author's lawyer to transfer him to a hospital, where he stayed for 25 days. Throughout the court sessions, the judge refused to research the torture allegations made by the author and the five nurses. In several reports, it has been determined that he and the five nurses were tortured. Some members of the criminal investigation team themselves admitted to having tortured the author and the nurses, or stated that they had seen them being tortured. The deputy head of the security police stated that the torture had a direct effect on the confessions of the author and the nurses; 10 of the 25 officers who committed the torture were prosecuted.

5.4 The author explains that during his detention from 1999 until 2007, he was mostly kept in isolation. From the time the death sentence was imposed on 6 May 2004 until his release, his defence lawyers were not allowed to visit him. He also explains that a high-level official told him to give a full confession on the alleged crimes, as this would lead to his release.

Committee's decision on admissibility

6.1 The Committee considered the admissibility of the communication at its ninety-seventh session on 5 October 2009.

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

6.3 The Committee noted that the State party challenged the admissibility of the author's claim on grounds of non-substantiation, stating that the author was accorded adequate guarantees ensuring his right to a fair trial, in conformity with international standards. It also noted that, according to the State party, the author confessed to participating in the commission of the crime at every stage of the investigation and that, despite doubts as to the reliability of the author's allegations of having been tortured, the Libyan authorities carried out an investigation. In the State party's opinion, these two elements should lead the Committee to consider the communication inadmissible for non-substantiation of claims. On the other hand, the author considered that his claims were extensively substantiated for purposes of admissibility, and that, on the contrary, the State party confined itself to merely refuting the facts as presented. Considering the amount of information provided by the author, both in terms of testimonies and medical and expertise reports, the Committee considered that the author had sufficiently substantiated, for purposes of admissibility, that the treatment he was subjected to in detention, and the trial that he had faced raised issues under articles 7, 9, 10 and 14 of the Covenant, which should be examined by the Committee on the merits.

6.4 As for the author's claim that the death sentence was imposed after an unfair and arbitrary trial, in violation of article 6, the Committee noted that the death sentence was not maintained. In view of the commutation of the author's death sentence, there was no longer any factual basis for the author's claim under article 6 of the Covenant. Accordingly, the

Committee found that this part of the claim had not been substantiated and was therefore inadmissible under article 2 of the Optional Protocol.²²

Absence of State party's observations on the merits

7. In notes verbales dated 5 November 2009, 6 August 2010, 7 October 2010 and 2 March 2011, the Committee requested the State party to convey information to it on the merits of the communication. The Committee notes that it did not receive the requested information. It recalls that, under the Optional Protocol, the State concerned is required to submit to the Committee written explanations or statements clarifying the matter and indicating what remedies, if any, may have been taken. In the absence of further observations from the State party, the Committee will examine the merits of the case on the basis of the information contained in the file. It will also give due weight to the author's allegations insofar as they have been sufficiently substantiated.

Issues and proceedings before the Committee

Consideration of the merits

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

8.2 The Committee notes the author's allegation that he was tortured and drugged during interrogation, and that the allegations were corroborated in court by medical records and witnesses' statements. The Committee takes note of the author's argument that the burden of proof cannot rest solely on him and that to this effect, there is no indication that the traces of rape and use of electrical equipment noted on his body could be attributed to a period prior to his detention, which therefore suggests that they were the result of torture at the hands of the interrogators. The Committee notes the author's contention that no immediate action was taken by the judge, who he saw for the first time in February 2000, although torture marks were still visible on his body. The Committee also notes that according to the author the investigation was not carried out thoroughly, but in an expeditious manner.

8.3 The Committee takes note of the State party's argument that the author consistently confessed to his participation in the commission of the crime of which he was accused before all the different judicial authorities to whom he was referred; that it is only on 3 June 2002 that the author told the judge of the indictment chamber that he had been tortured; that the judge immediately entrusted the investigation of those allegations to the Department of Public Prosecutions; and that even though it was convinced that the allegations of torture were groundless, the Public Prosecution Office framed charges against the members of the investigation committee. The Committee also takes note of the State party's observation that the Tripoli Criminal Court, which was competent to deal with the author's claims of torture, delivered its verdict acquitting the alleged perpetrators on 7 June 2005. The Committee notes that the author refutes the State party's argument in relation to the first time he reported having been tortured and reiterates that this occurred for the first time when he was presented before the judge in 2000 and at each appearance before a judicial authority.

²² See communications No. 971/2001, *Arutyuniantz v. Uzbekistan*, Views adopted on 30 March 2005; No. 609/1995, *Williams v. Jamaica*, Views adopted on 4 November 1997; No. 1161/2003, *Kharkhal v. Belarus*, decision of inadmissibility adopted on 31 October 2007; No 1141/2002, *Gougnina v. Uzbekistan*, decision of inadmissibility adopted on 1 April 2008.

8.4 The Committee notes the author's further allegation that he was detained incommunicado from the moment of his arrest on 29 January 1999 until he was brought for the first time before the Public Prosecution Office on 16 May 1999; and that during those four months, he was prevented from communicating with his family and the outside world. The Committee also notes the author's contention that after he was sentenced, he was held in an isolation cell normally reserved for detainees sentenced to death, with no access to his lawyer for 11 months; that the size of the room was 10 square metres; that it had no electricity or running water; and that prior to that date, he was held in isolation almost throughout his detention. The Committee notes that the State party did not refute these allegations.

8.5 The Committee reaffirms its jurisprudence²³ that the burden of proof cannot rest solely on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence, and frequently the State party alone has the relevant information. Article 4, paragraph 2, of the Optional Protocol implies that it is the State party's duty to investigate, in good faith, all allegations of violations of the Covenant made against it and its representatives, and to furnish to the Committee the information available to it. In cases where the author made all reasonable attempts to collect evidence in support of his claims, and where further clarification depends on information exclusively in the hands of the State party, the Committee may consider the author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. The Committee further recalls its jurisprudence that the State party has the duty not only to carry out thorough investigations of alleged violations of human rights, particularly violations of the prohibition of torture, but also to prosecute, try and punish anyone held to be responsible for such violations. As for incommunicado detention, 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 on article 7, which recommends that States parties make provision against incommunicado detention.²⁴

8.6 In the light of the above, the Committee concludes that the treatment inflicted on the author constitutes torture and that the explanations provided by the State party, including the reference to the verdict of the Tripoli Appeals Court of 7 June 2005, do not enable the conclusion that a prompt, thorough and impartial investigation was carried out, despite the presentation of clear evidence of torture, as contained in the medical reports and testimonies of the alleged perpetrators. On the basis of the information available to it, the Committee concludes that the torture inflicted on the author, his incommunicado detention, his prolonged isolation before and after his conviction, and the absence of a prompt, thorough and impartial investigation of the facts constitute a violation of article 7 of the Covenant, both alone and read in conjunction with article 2, paragraph 3, of the Covenant.

8.7 Having come to this conclusion, the Committee decides not to address the author's allegations under article 10 of the Covenant.²⁵

8.8 With regard to the alleged violation of article 9 of the Covenant, the Committee notes that the author was arrested on 29 January 1999 and that he was brought for the first time before the Public Prosecution Office on 16 May 1999, although under Libyan law, he should have been brought before the Prosecutor within 48 hours after arrest. The

²³ Communication No. 1412/2005, *Butovenko v. Ukraine*, Views adopted on 19 July 2011, para. 7.3.

²⁴ Committee's general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, para. 11, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A.

²⁵ Communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.8.

Committee further notes the author's allegation that even after that date, he was prevented from seeing his family, who was allowed to see him for the first time on 30 November 1999; that he was not informed of the charges against him until he was brought before the Prosecutor; that he was not provided with legal counsel; and that he was brought before a judge for the first time on 7 February 2000 when the trial started. The Committee notes that the State party has not provided any information to refute these claims. In the absence of any pertinent explanations from the State party, the Committee finds a violation of article 9 of the Covenant.²⁶

8.9 The author also invokes a violation by the State party of article 14 of the Covenant. In this regard, the Committee notes the author's allegation that he was granted access to a lawyer for the first time on 17 February 2000, ten days after the beginning of the trial and more than one year after his arrest; and that he was never given the opportunity to speak to the lawyer freely. The Committee also notes the author's contention that he was forced to testify against himself through torture and that he was not assisted by a lawyer during interrogation nor in preparation for the trial. The Committee also notes the author's allegations that the expert report of Professors Montagnier and Collizi was dismissed without sufficient reasons, despite every indication that it exonerated the author; that searches of the house of one of the co-defendants were carried out without the presence of the accused or a defence lawyer; and that the prosecution never produced the records of the searches. The Committee notes the State party's argument that the author was afforded full legal guarantees ensuring his right to fair trial; that his trial was held under international scrutiny; that the lengthy judicial proceedings were aimed at uncovering the truth and identifying the perpetrators in a serious case; and that the author was defended by a team of lawyers.

8.10 The Committee recalls its general comment No. 32 on article 14, in which it emphasizes that the right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of article 14, paragraph 1, those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination.²⁷ In the present case, taking into account the information provided by the State party, the Committee considers that an accumulation of violations of the right to fair trial took place, including the violation of the right not to testify against oneself; the violation of the principle of equality of arms – through unequal access to pieces of evidence and counter-expertise; and violation of the right to prepare one's own defense through the lack of access to a lawyer prior to the beginning of the trial and the inability to speak to said lawyer freely. The Committee therefore concludes that the trial and sentence of the author disclose a violation of article 14 of the Covenant.

9. 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 facts before it disclose a violation of article 7, both alone and read in conjunction with article 2, paragraph 3, and of articles 9 and 14 of the Covenant.

10. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the State party is under the obligation to provide the author with an effective remedy, including conducting a new full and thorough investigation into allegations of torture and ill-treatment and initiating proper criminal proceedings against those responsible for the

²⁶ Communication No. 1761/2008, *Giri v. Nepal*, Views adopted on 24 March 2011, para. 7.8.

²⁷ The Committee's general comment 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 8, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI.

treatment to which the author was subjected; and providing the author with appropriate reparation, including compensation. The State party is also under the obligation to take steps to prevent similar violations occurring in the future.

11. In becoming a State party to the Optional Protocol, the State party recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. 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 case 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 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

Individual opinion of Committee member, Mr. Fabían Omar Salvioli (partly dissenting)

1. In general I concur with the introductory part and conclusions of the Views reached by the Human Rights Committee on communication No. 1755/2008, *El Hagog Jumaa v. Libya*, but I regret that I am unable to agree with the statement in paragraph 6.4, as follows: “As for the author’s claim that the death sentence was imposed after an unfair and arbitrary trial, in violation of article 6, the Committee noted that the death sentence was not maintained. In view of the commutation of the author’s death sentence, there was no longer any factual basis for the author’s claim under article 6 of the Covenant. Accordingly, the Committee found that this part of the claim had not been substantiated, and was therefore inadmissible under article 2 of the Optional Protocol.”
2. I thought that it might be decided to reopen discussion on the admissibility of the possible violation of article 6 of the Covenant when the Committee considered the merits of the case, but unfortunately it maintained the position which gives rise to my partly dissenting opinion.
3. The Committee concludes its Views by stating that “an accumulation of violations of the right to fair trial took place, including the violation of the right not to testify against oneself, the violation of the principle of equality of arms through unequal access to pieces of evidence and counter-expertise; and of the right to prepare one’s own defense through the lack of access to a lawyer prior to the beginning of the trial and the inability to speak to him freely. The Committee, therefore, concludes that the trial and sentence of the author disclosed a violation of article 14.” (para. 8.10, emphasis added).
4. It is correctly indicated in the above paragraph that the death sentence handed down against Mr. El Hagog Jumaa resulted from an unfair and arbitrary trial. In the interests of consistency, the Committee should have concluded that the imposition of the death sentence following judicial proceedings in which the requirements of the Covenant were not fulfilled is a violation of article 6.
5. A violation of article 6, paragraph 2, of the International Covenant on Civil and Political Rights can occur without the death sentence necessarily having to be carried out; as the Committee pointed out on a previous occasion, “the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant” (communication No. 1096/2002, *Safarmo Kurbanova v. Tajikistan* (CCPR/C/79/D/1096/2002), 6 November 2003, para. 7.7). This jurisprudence was based on earlier decisions of the Committee stating that a preliminary hearing that did not respect the safeguards laid down in article 14 violates article 6, paragraph 2, of the Covenant (*Conroy Levy v. Jamaica*, communication No. 719/1996, para. 7.3; *Clarence Marshall v. Jamaica*, communication No. 730/1996, para. 6.6). This being so, I cannot understand how the Committee can fail to find a violation of article 6 in the present case, *El Hagog Jumaa v. Libya*, when it has established that violations of articles 7 and 14 of the Covenant occurred in the course of the proceedings against Mr. Ashraf Ahmad El Hagog Jumaa.
6. The commutation of the death sentence cannot erase the violation committed; the violation in question was committed precisely at the moment when the death sentence was upheld by decision of the Libyan Supreme Court, dated 11 July 2007.

7. The effect of the commutation of the death sentence in the present case is to avoid the commission of arbitrary deprivation of the right to life and resultant responsibility for the State for violation of article 6, paragraph 1, but it cannot extend to treating a violation that was indeed committed, in this case of article 6, paragraph 2, as not having occurred.

8. As I have previously argued, in both individual and joint opinions, the Committee must duly pronounce on all violations committed in a case, because this has practical consequences – for instance, in regard to due compensation.¹

9. The Committee should reaffirm its jurisprudence which offers the greatest guarantees in this respect; the principles of progressiveness and non-regressiveness require that a victim of a violation of the Covenant deserves, as a minimum, a measure of protection and resolution equal to that accorded in previous cases decided by the same body, in the most protective interpretation.²

10. Accordingly, while acknowledging the commutation of the death sentence in the present instance, I consider that the Committee ought to have indicated that there was also a violation of article 6, paragraph 2, of the International Covenant on Civil and Political Rights in the El Hagog Jumaa case.

[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.]

¹ See communication No. 1378/2005, *Kasimov v. Uzbekistan*, Views adopted on 30 July 2009, partly dissenting opinion of Committee member Mr. Fabián Salvioli, paras. 4, 7 and 8; and communication No. 1284/2004, *Kodirov v. Uzbekistan*, Views of 20 October 2009, partly dissenting opinion of Committee members Ms. Christine Chanet, Ms. Zonke Zanele Majodina and Mr. Fabián Salvioli, paras. 3, 6 and 7.

² Ibid.