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Communication No. 1755/2008

**Views adopted by the Committee at its 104th session,
12 to 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]

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 Mr. 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 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 an individual opinion by Committee member Mr. Fabian Omar Salvioli is appended to the text of 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 lived 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 with HIV in Al-Fatah paediatric hospital.

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 breast while stretched naked on a steel bed; beatings on the soles of the feet; being hung by the hands; create a sensation of suffocation and strangulation; being suspended from a height by the arms; being threatened to be attacked by dogs while blindfolded; beatings; 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. 17 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, Mrs. Kristyana Valcheva, had never worked at Al-Fatah paediatric hospital.

2.5 On 15 May 1999, the case was referred to the People's Prosecution Office, which brought the following charges against the author and the 5 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 (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 5 co-accused were, for the first time, brought before the Popular Prosecution Office, approximately four months after their arrest. They were subsequently brought before the Prosecutor every 30 to 45 days.

First trial

2.6 The trial before the People's Court (the Extraordinary Court for crimes against the State) began on 7 February 2000. The first time the author was granted access to a lawyer

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

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 these meetings. On 20 March 2001, the author was taken to the hospital due to his worsening state of health. He remained there for 25 days. In June 2001, two of his co-defendants² 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 children³. Throughout this time, the author and the co-defendants remained in detention.

Second trial

2.8 In August 2002, the Benghazi Criminal Court Arraignment Chamber 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-defendants⁴, and the result of the house search of the residence of another of the co-defendants⁵, where police had discovered five contaminated bottles of blood plasma. In July 2003, the second trial started. Professor Luc Montagnier and Professor 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 incriminated 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 infections⁶ were caused by a very specific and highly infectious virus strain, owing to poor standards of hygiene and neglect⁷. 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.

2.9 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 contaminated 380 others. Nine Libyans working at Al-Fatah hospital, had also been charged with the same offence but appeared free on trial, having been released on bail at the start of the proceedings. They

² Kristiyana Valcheva and Nasya Nenova.

³ In the charges read to the author, the number of children contaminated rose from 393 to 426 between the first and the second trial.

⁴ Nasya Nenova

⁵ Kristiyana Valcheva

⁶ The author specifies that nosocomial infections are those which are a result of treatment in a hospital or hospital-like setting, but secondary to the patient’s original condition.

⁷ “Final Report of Prof. Luc Montagnier and Prof. Vittorio Colizzi to Libyan Arab Jamahiriya on the Nosocomial HIV infection at the Al-Fateh Hospital, Benghazi, Libya, Paris, 7 April 2003”, which concludes: “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”, see page 21.

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 a re-trial, 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 release on bail of the author and co-defendants as there were insufficient guarantees 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 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 a 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 the 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-defendants⁸ retracted their confessions as they had been obtained under duress, and identified those held 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 it did not have competence to rule on the matter since the offense had not been committed under its jurisdiction but within the jurisdiction of Tripoli Appeals Court.

2.13 On 7 May 2004, the UN Special Rapporteur on Torture sent an urgent appeal to the State Party regarding the author's and co-defendants' case and requested information about the allegations of torture, and the allegations of unfair trial. He inquired about the lack of prosecution of officials held responsible for the alleged torture⁹. In response, the State Party stated that the Department of Public Prosecution 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

⁸ Kristiyana Valcheva and Nasya Nenova.

⁹ E/CN.4/2005/7/Add.1

Court. During the hearings, some of the police officers admitted they had tortured the author and some of his co-defendants to obtain confessions¹⁰. The Court rejected the expert medical opinion produced by the defence, which was performed three years after the incriminated facts, on the ground that a Libyan doctor officially appointed as an 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, Seif Al-Islam, admitted in an interview with Al-Jazeera TV that the author and the co-defendants had indeed been tortured.¹¹

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(2). He considers that both the verdict of 19 December 2006 and the upholding of the judgement at 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

¹⁰ Extract of Statement of 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 of 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 of 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 dogs 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. [...]

¹¹ According to the interview record, Seif 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".

General Comment No. 6 [16], he contends that the imposition of an unfair trial with numerous violations of article 14 of the Covenant violates article 6(2) of the Covenant¹². 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 as a result of a large sum of money offered to the families of the infected children and heavy pressure from 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 witness statements. Libyan authorities are responsible for the torture of the author at the hands of the investigators; 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 him¹³. 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 court¹⁴. 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 se¹⁵. These practices as well as the lack of a timely and thorough investigation into torture claims constitute a violation of article 7. 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. Moreover, the author was allegedly not informed promptly of charges against 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. Finally, he was not brought promptly before a "judicial authority" as he made his first appearance in court on 7 February 2000. Before this date, he indeed only saw the prosecutor, which constitutes a violation of article 9, paragraph 3.

¹² *Carlton Reid v. Jamaica*, communication No 250/1987, views adopted on 20 July 1990; *Marshall v. Jamaica*, communication No 730/1996, views adopted on 3 November 1998; *Daniel Mbenge v. Zaire*, communication No 16/1977, views adopted on 25 March 1983; *Clifton Wright v. Jamaica*, communication No 349/1989, views adopted on 27 July 1992; *Peart and Peart v. Jamaica*, communication Nos. 464/1991 & 482/1991, views adopted on 19 July 1995; and *Levy v. Jamaica*, communication No. 719/1996, views adopted on 3 November 1998.

¹³ The author refers to the jurisprudence of the Committee, particularly *Kurbanova v. Tajikistan*, communication No. 1096/2002, views adopted on 6 November 2003, *Louisa Bousroual v. Algeria*, communication No 992/2001, views adopted on 30 March 2006.

¹⁴ The author cites the jurisprudence of the Committee on this issue, *inter alia*, *José Vicente et al. v. Colombia*, communication No 612/1995, views adopted on 19 August 1997; *Bautista de Arellana v. Colombia*, communication No 563/1993, views adopted on 27 October 1995; and communication No. 04/1977, *William Torres Ramirez v. Uruguay*, views adopted on 23 July 1980.

¹⁵ The author refers here to the use of electric shocks on genitals and anal rape.

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

3.6 The author considers that the State party violated his right to fair trial, as he was not informed of charges against him for the first four months of his detention; he was not assigned a lawyer until 17 February 2000, ten 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 Prof. Montagnier's and Dr. Collizi's expert report, 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"¹⁶ discovered five bottles of contaminated blood plasma, was conducted without the presence of the accused or a defence lawyer; the inconsistencies in this "discovery"¹⁷, 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 the other prove that it was fabricated. The author concludes that the trial also suffered unreasonable delays¹⁸. 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, violating 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 AIDS after a stay at Al-Fatah paediatric hospital in Benghazi. He discovered that his son was so infected, after being transferred to Egypt for treatment. On 12 October 1998, the Department of Public Prosecutions opened an investigation, having received more complaints. It took 233 statements from the parents of the infected children and took measures such as issuing an injunction to prevent foreign workers at the hospital from travelling abroad.

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 AIDS 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

¹⁶ Put in quotation marks by the author in the initial submission.

¹⁷ The analyses of the bottles were carried out in March 1999 whereas the search of Ms Valcheva's home took place a month after.

¹⁸ More than 8 years from the date of the arrest on 29 January 1999 until the final judgement of the Supreme Court dated 11 July 2007.

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 Criminal Court on 3 June 2002, the judge of the indictment chamber issued a decision which entrusted a representative of the Department of Public Prosecution with the investigation of the author's allegations. From 13 June 2002, the Department of Public Prosecution took statements from the defendants about their claims of torture. It also took statements from the committee tasked with investigating the spread of AIDS among children. Once the investigations were completed, the findings were transmitted to the indictment chamber which sent the case before the Benghazi Criminal 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 Criminal Court. This court delivered its verdict on 7 June 2005, acquitting the members of the committee. The author and the co-defendants appealed the sentence to death pronounced by the Benghazi Criminal Court on 6 May 2004 to the Supreme Court, which delivered its verdict on 25 December 2006. The Court quashed the death sentence and sent the case back to the Benghazi Criminal 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 Libya¹⁹ and again before the Office of the People's Prosecutor 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 representatives of 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 be heard by a new panel of judges. When the new panel handed down a guilty verdict, the defendants appealed to the Supreme Court again. This time, the Supreme Court upheld the verdict.

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 this 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 Prosecution employed at the Office of the Prosecutor-General. He made a detailed confession about his participation in the commission of this

¹⁹ The State Party provided a copy of the author's detailed confessions.

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. Only after the People's Court issued a decision about lack of jurisdiction to try the case, and the case was sent to the indictment chamber of the South Benghazi court of first instance on 3 June 2002, the author told the judge of the indictment chamber that he had been tortured. The judge immediately entrusted the Department of Public Prosecution 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 Prosecution 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 foreign diplomatic mission. The Secretary for Justice issued instructions allowing members of the author's family to visit him every Thursday, 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 Criminal 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 Court²⁰.

Authors' 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 has not argued that the author had failed to exhaust these remedies. Moreover, upon his transfer to Bulgaria, the State party has made the author sign a document relinquishing to start a procedure 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 admissibility are a mere refutation, which lacks legal precision, on 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 meters; it had no electricity or running water.

5.3 The author refutes the State Party's argument that he would have complained about the torture only four years after having been allegedly tortured. Immediately after his incommunicado detention, which lasted 10 months in 1999, he continuously stated that he was tortured. When his family was allowed to meet with him on 31 December 1999, he revealed that he had been tortured. At that moment, his family hired a lawyer, who continuously restated 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

²⁰ In its judgment dated 11 July 2007, the Supreme Court of Libya confirmed, point by point the ruling of the Benghazi Criminal Court of 19 December 2006. The Court particularly focused on the contradiction of the author and the co-defendant's testimonies along the procedure, sometimes confirming the confessions made during the interrogation phase and sometimes refuting them.

research the torture allegations made by the author and the 5 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 have tortured the author and the nurses, or stated having seen them, being tortured. The vice president of the security police stated that the torture had a direct effect on the confessions of the author and the nurses' 10 officers out 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.

Decision of the Committee concerning admissibility

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

6.2 The Committee noted, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under any other international procedure of 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, since 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, medical reports 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 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 Protocol²¹.

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 State party was requested to convey information to the Committee on the

²¹ *Arutyuniantz v. Uzbekistan*, communication No 971/2001, views adopted on 30 March 2005; *Williams v. Jamaica*, communication No 609/1995, views adopted on 4 November 1997; *Kharkhal v. Belarus*, communication No 1161/2003 inadmissibility decision adopted on 31 October 2007; *Gougnina v. Uzbekistan*, communication No 1141/2002, inadmissibility decision adopted on 1 April 2008.

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 witness statements. The Committee takes note of the author's argument that the burden of proof cannot solely rest on him and that to this effect, there was no indication that the traces of rape and use of electrical equipment noticed on his body could be attributed to a period prior to his detention, therefore suggesting that they were the result of torture in the hands of interrogators. The Committee notes the author's contention that no immediate action was taken by the judge whom 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 and 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 he was accused of before all the different judicial authorities he was referred to; that it is only on 3 June 2002 that he told the judge of the indictment chamber that he had been tortured; that the judge immediately entrusted the Department of Public Prosecution with the investigation of those allegations; 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 torture claims, delivered its verdict on 7 June 2005, acquitting the alleged perpetrators. 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 to the judge in 2000 and at each appearance before the judicial authority.

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 Popular Prosecution Office on 16 May 1999; and that during those 4 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 meters; and it had no electricity or running water; and that prior to that date, he was almost throughout his detention kept in isolation. The Committee notes that the State party did not refute these allegations.

8.5 The Committee reaffirms its jurisprudence²² that the burden of proof cannot rest on the author of the communication alone, 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. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In cases where the 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 a 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 to 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 should make provision against incommunicado detention²³.

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, are not such as to conclude that a prompt, thorough and impartial investigation was carried out despite the presentation of clear evidence of torture, such as that contained in the medical reports and the testimony of the alleged culprits. 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, 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 Covenant²⁴.

8.8 With regard to the alleged violation of article 9, the Committee notes that on 29 January 1999, the author was arrested, that he was brought for the first time before the Popular Prosecution Office on 16 May 1999 although under Libyan law, he should have been brought before the prosecutor within 48 hours after arrest. The 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 to the prosecutor; that he was not provided with legal counsel; and that he was brought to a judge for the first time on 7 February 2000 when the trial started. The Committee notes that the State party has provided no 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 Covenant²⁵.

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 only on 17 February 2000, ten days after the beginning of the trial

²² Communication No. 1412/2005, *Butovenko v. Ukraine*, Views adopted on 19 July 2011, para. 7.3

²³ General comment No. 20: Article 7 on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, para. 11.

²⁴ Communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.8.

²⁵ Communication No. 1761/2008, *Giri v. Nepal*, Views adopted on 24 March 2011, para. 7.8.

and more than one year after his arrest; and that he was never given an opportunity to speak to his 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 and in preparation of the trial. The Committee also notes the author's allegations that Professor Montagnier's and Doctor Collizi's expert report was dismissed without sufficient reasons despite every indication that it exonerated the author; that searches in one of the co-defendants' house were carried out without the presence of the accused or a defence lawyer, and that the prosecution never produced the record 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 where it has emphasized 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 discrimination²⁶. 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 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.

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 alone and read in conjunction with article 2, paragraph 3; article 9 and article 14 of the Covenant.

10. Pursuant to article 2, paragraph 3(a), of the Covenant, the Committee considers that the State party is under an 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 treatment to which the author was subjected; and providing the author with appropriate reparation, including compensation. The State party is also under an 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.

²⁶ General Comment 32 on article 14 on the right to equality before courts and tribunals and to a fair trial, para. 8

[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 by 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, 12 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.²⁷

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.²⁸

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.]

²⁷ See Human Rights Committee, communication No. 1378/2005, *Kasimov v. Uzbekistan*, Views of 30 July 2009, partly dissenting opinion of Committee member Mr. Fabián Salvioli, paras. 4, 7 and 8; and Human Rights Committee, Views of 20 October 2009, partly dissenting opinion of Committee members Ms. Christine Chanet, Ms. Zonke Majodina and Mr. Fabián Salvioli, paras. 3, 6 and 7.

²⁸ Ibid.

