



International Covenant on Civil and Political Rights

Advance unedited version

Distr.: General
23 August 2017

Original: English
English, French and Spanish only

Human Rights Committee

Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning Communication No.2162/2012^{*,**}

<i>Submitted by:</i>	Arsen Ambaryan (unrepresented)
<i>Alleged victims:</i>	Artur Ambaryan
<i>State party:</i>	Kyrgyzstan
<i>Date of communication:</i>	20 April 2012 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 18 June 2012 (not issued in document form)
<i>Date of adoption of Views:</i>	28 July 2017
<i>Subject matter:</i>	Detention and trial on criminal charges
<i>Substantive issues:</i>	Torture and ill-treatment; arbitrary arrest – detention; fair trial
<i>Procedural issues:</i>	non-exhaustion of domestic remedies
<i>Articles of the Covenant:</i>	2 (3), 7, 9 (2), (3) and (4) and 14 (3) (a), (f) and (5)
<i>Article of the Optional Protocol:</i>	2, 5 (2) (b)

* Adopted by the Committee at its 120th session (3 – 28 July 2017).

** The following members of the Committee participated in the examination of the present communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval.

1. The author of the communication is Mr. Arsen Ambaryan, a Kyrgyz national of Armenian origin born in 1960. He submits the communication on behalf of his brother, Mr. Artur Ambaryan, also a Kyrgyz national of Armenian origin born in 1968, who was serving a prison sentence in Kyrgyzstan at the time of the submission. The author claims that his brother is a victim of violation by Kyrgyzstan of his rights under article 7; article 9 (1), (2), (3) and (4); and article 14 (1), (3) (a) and (f), and (5), read in conjunction with article 2 (3) (a) and (b), of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Kyrgyzstan on 7 October 1994. The author is unrepresented.

The facts as submitted by the author

2.1 On 25 February 2011, approximately at 14:00 in Osh city, the author's brother was driving when he was stopped by a car with five persons in civilian clothing. Without identifying themselves they handcuffed him and searched his car.¹ During the search 2.7 grams of heroin was found in the car. Upon further questioning, the author's brother stated that he was not aware of the heroin's origin. At the time of the search, the author's brother was not informed of the reasons why he had been stopped; neither could he understand the conversation between the five persons, since it was in Kyrgyz language, which he did not understand.

2.2 The author's brother was taken to the Southern Regional Office for Combating Drug Trafficking of the Department of Internal Affairs of Kyrgyzstan (hereinafter, the OCDT), where he was subjected to psychological pressure, in order to make him confess to the possession of heroin with intent to sell, until 23:40 of the same day. He was placed in a cold room and deprived of warm food, water and access to the toilet for 10 hours. Handcuffed and in the absence of a lawyer or relatives, he was interrogated and threatened by persons in civilian clothing, who from time to time made video recordings. At no stage were his rights explained to the author's brother. In particular, he was not advised of his right to counsel and interpreter from the moment of detention, nor was he informed of the reasons of his detention.

2.3 At around 22:00, the author received a phone call from his brother, and at 23:00 the author arrived at the OCDT. Only then, for the first time after the arrest, his brother was allowed to use the toilet, in the presence of the officers while still being handcuffed. The author states that, unable to withstand the torture, humiliation and tiredness, his brother had given a false confession.

2.4 The author submits that a detention protocol was drawn up by the investigator at 23:40 on 25 February 2011, 10 hours after the arrest. The protocol did not indicate the legal basis for the detention, as contained in articles 94² and 95³ of the Criminal Procedure Code of Kyrgyzstan.

¹ From the material on file, it transpires that the Southern Regional Office for Combating Drug Trafficking of the Department of Internal Affairs of Kyrgyzstan was conducting a test purchasing operation (sting operation, entrapment/проверочная закупка).

² Article 94 of the Criminal Procedure Code of Kyrgyzstan.
Grounds for Detention of a Person Suspected in Committing a Crime
(1) Grounds for detention are:

1) the person is caught during the commission of a crime or directly after its commission; 2) eyewitnesses, including the victims, directly point out the person as the offender; 3) the suspect, his clothes, or his dwelling have evident traces of the crime.

(2) The person may be detained in the presence of other facts that give grounds to suspect the person in committing the crime, if attempted to escape, when he does not have a permanent place of residence or when his identification is not established.

³ Article 95 of the Criminal Procedure Code of Kyrgyzstan.

Procedure for Detaining a Person Suspected in Committing a Crime

(1) No later than three hours after the delivery of the detained, there shall be made the transcript of detention proceedings. The transcript shall contain the grounds and reasons, place and the time (with indication of hour and minute), the results of the personal search. The transcript of proceedings shall be read to the suspect, and he shall be explained his rights provided for herein by Article 40. The transcript of detention shall be signed by the person who has written it and by the detained. The

2.5 The author claims, that from 14:00 to 23:40 hours his brother was detained unlawfully. He was not informed of important procedural stages, such as the initiation of a criminal case against him and an expert examination that was conducted during his detention. Important procedural documents, such as the decision to initiate criminal proceedings, the detention protocol and the search protocol were written in Kyrgyz and in the absence of a lawyer and/or an interpreter, in violation of article 24 of the Constitution of Kyrgyzstan⁴.

2.6 On 26 February 2011, at around 2:00, the author's brother was transferred to a temporary detention facility, where he was un-cuffed for the first time. On 27 February 2011, 46 hours after arrest, the author's brother was interrogated as an accused, however his rights were not explained to him, in particular, the right to remain silent. The author submits that the interrogation protocol lacks a note record that his brother's rights were explained to him.

2.7 On 27 February 2011, the Osh City Court held hearings and decided that the author's brother should remain in custody until 25 April 2011, since he was accused of a grave crime and could attempt to escape justice. The hearings lasted 10-15 minutes, and the judge did not question the suggested legal basis for detention, nor considered alternative measures of restraint, in violation of domestic law.

2.8 During the court hearings the author's brother complained about being subjected to torture by the OCDT officers. Neither the court, nor the prosecutor reacted to his allegations, and did not refer the case for further investigation. The author submits that his brother did not raise allegations of torture before the Prosecutor's Office for fear of reprisal and further torture. The author refers to the Committee's jurisprudence in *Avadanov v. Azerbaijan*⁵ and the Instructions № 70 and 75 of the Prosecutor-General⁶, in support of his argument that the prosecutor, who was present at the hearings and was aware of the torture allegations, should have referred the case for further investigation, despite the absence of a request to that effect from the author's brother. The author also refers to a report by Human Rights Watch⁷ to support his argument that prosecutors often refuse to investigate allegations of torture.

2.9 On 3 and 9 March 2011, the counsel of the author's brother appealed the decision of the Osh City Court, issued on 27 February 2011, to the Osh Regional Court, which, sitting in a three-judge panel, rejected the appeal on 22 March 2011. The author alleges that the composition of the Osh Regional Court did not comply with the requirements of article 132-1 of the Criminal Procedure Code of Kyrgyzstan, according to which the appeal should have been decided by a single judge.

2.10 On 8 April 2011, the author's brother's counsel D.T. appealed under the supervisory review procedure to the Supreme Court of Kyrgyzstan, challenging the decision of the Osh City Court, issued on 27 February 2011, and the decision of the Osh Regional Court, issued on 22 March 2011, which ordered the author's brother pre-trial detention as a measure of restraint. On 19 May 2011, the Supreme Court of Kyrgyzstan, based on article 383 (4) of the Criminal Procedure Code of Kyrgyzstan rejected the appeal arguing that the criminal case of the author's brother had been examined on the merits by the court of the first instance. The author notes that neither his brother, nor the counsel D.T., were present at the

investigator is obliged to inform the prosecutor in writing about the detention within twelve hours starting from the moment of writing the transcript of detention.

(2) The detained shall be interrogated in accordance with the rules provided herein in Article 191.

⁴ Article 24 of the Constitution of Kyrgyzstan "since the moment of actual detention a person should be kept safe, such person shall be granted an opportunity to protect himself/herself personally, enjoy qualified legal aid from a lawyer as well as have an attorney".

⁵ Communication No. 1633/2007, *Avadanov v. Azerbaijan*, Views adopted on 25 October 2010, para. 6.3.

⁶ Instruction №70 of the Prosecutor-General of Kyrgyz Republic issued on 6 September 2011. Instruction №75 of the Prosecutor-General of Kyrgyz Republic issued on 19 October 2011.

⁷ Report of Human Rights Watch "Distorted Justice: Kyrgyzstan's Flawed Investigations and Trials on the 2010 Violence", 2011 "Prosecutorial authorities have refused to investigate allegations of torture, and courts have relied heavily on confessions allegedly extracted under torture".

hearings. The author maintains that the notification about the scheduled hearings at the Supreme Court on 19 May 2011 was received in Osh only on 20 May 2011, and that the protocol of the hearing contained false information regarding the participation of the counsel.⁸ The author further notes, that article 383 (4) of the Criminal Procedure Code of Kyrgyzstan does not provide the examination of the merits of a case as legal basis for termination of the supervisory review procedure.

2.11 On 25 April 2011, 50 days after the arrest, the author's brother received an indictment, dated 22 April 2011⁹, where he was formally accused of drug trafficking committed as part of an organized group. On 27 April 2011, the Osh City Court prolonged his detention without indicating the legal basis for it. Neither the author's brother, nor his counsel, were present at the hearing of 27 April 2011. The author submits that the domestic law does not provide an opportunity to appeal the decision of the Osh City Court concerning the remand in custody. The author submits that as of 25 April 2011, his brother's remand in custody was based on the indictment issued on 22 April 2011. The author claims that as of 25 April 2011 until the sentencing of his brother on 7 July 2011, the detention was arbitrary and unlawful.

2.12 The first trial hearing took place on 12 May 2011 at the Osh City Court and on 7 July 2011, the author's brother was convicted of drug trafficking committed as part of an organized group and sentenced to nine years of imprisonment. The author requested to obtain a copy of the verdict in Russian. In August 2011, he was informed that the translation would be provided after the payment of a translation fee. The author submits that the failure to provide the verdict in Russian constitutes a violation of his brother's rights to be informed of the charges against him in a language that he understands.¹⁰

2.13 On 15 July 2011 and on 2 September 2011, the author and his brother each filed an appeal to the Osh Regional Court, which the latter rejected on 6 October 2011. On 22 November and on 25 November 2011, the author and the author's brother respectively filed two requests for a supervisory review to the Supreme Court of Kyrgyzstan. The author's motion was not reviewed, while his brother's was rejected, both with a decision of the Supreme Court of Kyrgyzstan of 9 February 2012.

2.14 On 22 May 2012, the author's brother was transferred from pre-trial detention facility No.5 in Osh to correctional colony No.10 in Jalal Abad to continue to serve his sentence. On 19 July 2012, the author was informed by a State bailiff that, in accordance with the sentence, a confiscation of his brother's property, in particular his apartment would be carried out.

The complaint

3.1 The author claims that his brother is a victim of violation of his rights under article 7, read in conjunction with article 2 (3) (a) of the Covenant, as during the first three days following his detention, he was tortured by the OCDT officers to make him confess.

3.2 The author further claims that article 9 (1) of the Covenant, was violated, as his brother was detained at 14:00 on 25 February 2011, without being informed of the reasons and the detention protocol was drawn up only at 23:40 p.m. of the same day¹¹.

3.3 The author claims a violation of his brother's rights under article 9 (2) and article 14 (3) (a) and (f), of the Covenant, as being a native Russian speaker, he could not understand

⁸ From the protocol of the hearing and the court decision it transpires that the author's brother's counsel D.T. lodged the appeal, while another counsel Zh. T. was present during the hearing.

⁹ The author does not provide a copy and does not mention the body, which issued an indictment decision on 22 April 2011.

¹⁰ A copy of the verdict of 7 July 2011 translated into Russian language on 24 August 2011 is part of the file.

¹¹ The author refers to the Committee's jurisprudence in communication No. 1348/2005, *Ashurov v. Tajikistan*, Views adopted on 20 March 2007, para. 6.4.

the indictment available only in Kyrgyz, was not promptly informed of the charges against him and did not receive a copy of the verdict translated in Russian language.

3.4 The author claims that his brother's rights under article 9 (3) of the Covenant were violated, as the decision of 27 February 2011 by which the Osh City Court ordered his remain in custody had no legal basis and the Court did not consider alternative measures of restraint.¹²

3.5 Article 9 (4) and article 14 (5) of the Covenant were violated because the author's brother was deprived of his right to challenge at the Supreme Court of Kyrgyzstan the lawfulness of his detention. The author claims that as of 25 April 2011 until the sentencing of his brother on 7 July 2011, the detention was arbitrary and unlawful as it was based only on the indictment and the transmittal of the case to the first instance court. He claims that the refusal of the Supreme Court of 19 May 2011 to review his claim regarding the lawfulness of the detention of his brother is a violation of his brother's rights under article 9 (4) and article 14 (5).

3.6 The author claims a violation of his brother's rights under article 14 (1) of the Covenant, as the composition of the Osh Regional Court was not in accordance with domestic law.

State party's observations on admissibility and merits

4.1 On 4 October 2012, the State party submitted its observations on admissibility and merits. It submits that, on 7 July 2011, the author's brother was convicted of a crime under article 274 (2) (1) and (2) of the Criminal Code and sentenced to 9 years imprisonment. On 25 February 2011, police officers arrested him for possession of heroin during an action of the Southern Regional Office for Combating Drug Trafficking of the Department of Internal Affairs of Kyrgyzstan. On 23 April 2011, the pre-trial investigation was completed and the case was transmitted to the trial court. On 6 October 2011, the Osh Regional Court rejected the appeal filed against the trial court's decision of 7 July 2011. Based on article 4 (1) (3) of the Amnesty law adopted on the occasion of the 20 years of independence of Kyrgyzstan, the unserved term of punishment was reduced to one third. On 9 February 2012, the Supreme Court of Kyrgyzstan rejected the request for a supervisory review filed by the author's brother against the Osh Regional Court decision of 6 October 2011.

4.2 The State party further submits that the counsel of the author's brother appealed the decision of the Osh City Court of 27 February 2011, to the Osh Regional Court, which, sitting in a three-judge panel, rejected the appeal on 22 March 2011. The State party rejects the claim that the composition of the Osh Regional Court violated article 132-1 of the Criminal Procedure Code of Kyrgyzstan, which foresees a single judge hearing. It submits that the composition of the Osh Regional Court at the cassation stage was in compliance with article 31 (4) of the Criminal Procedure Code, according to which the cassation courts decide upon appeals in criminal cases sitting in a composition of three-judge panel.

4.3 On 19 May 2011, the Supreme Court of Kyrgyzstan discontinued the supervisory review initiated by the author's brother counsel, as the pre-trial investigation had been concluded and on 12 May 2011 the Osh City Court had begun examining the case on the merits. As to the claim that the pre-trial detention should be the exception, that the decision of the Osh City Court dated 27 February 2011 had no legal basis and the Court did not consider alternative measures of restraint, the State party maintains that based on article 267 (1) of the Criminal Procedure Code, the court can change or cancel the pre-trial restraining order. The court is not obliged to motivate its decision in this regard.

4.4 The State party further submits that the Supreme Court of Kyrgyzstan terminated the supervisory review proceedings because the first instance court took a new decision and therefore there was no further need to continue the supervisory review.

¹² The author refers to the Committee's jurisprudence in *Hill v. Spain* to support his argument that pre-trial detention should be the exception. See Communication No. 526/1993, *Hill v. Spain*, Views adopted on 2 April 1997, para. 12.3.

Author's comments on the State party's observations

5.1 On 10 December 2012, the author reiterated its initial submission. He maintains that his brother was subjected to torture and threats (cruel treatment) from the moment of his apprehension from 14:00 till 23:40h on 25 February 2011, which lead to his self-incrimination. He states that the State party did not rebut these allegations or provided explanations as to how, when and which organ may have investigated the alleged torture.

5.2 The author submits that the State party did not respond to his claim under article 9 (4) as to the lack of timely proceedings before a court to decide without delay on the lawfulness of his brother's detention and reiterates the arguments from the initial submission. He states that the mere fact that supervisory review proceedings were initiated in response to counsel's petition, indicates that the Supreme Court had sufficient elements to quash the detention on remand and apply a different restraint measure.

5.3 The author maintains that his brother was unfairly sentenced for a crime related to possession of drugs and the courts disregarded his arguments in violation of article 14 of the Covenant. He claims that the evidence was inadmissible as it was based on the 'provocation by the police' in the context of the test purchasing operation conducted by the police. The author reiterates his disagreement in relation to the examination of evidence and of witnesses during the trial, and in particular the status of the expert conclusions as to whether the substance found in the car of his brother was heroin. The author further claims that test purchasing operations are outside judicial control and that the judicial authorities disregarded the fact that the crime his brother was accused of was "provoked" by the police.

5.4 The author reiterates that his brother was not provided with the verdict in Russian, in violation of his rights to be informed of the charges against him in a language that he understands and to have the free assistance of an interpreter. The author's brother appealed his verdict without having the criminal case material in a language he understands and only having an unofficial translation of the verdict.

5.5 The author requests the Committee to find violations of his brother's rights under article 7, in conjunction with article 2(3) (a) and (b), article 9 (1) (2) (3) (4) and article 14 (1) (3) (a) and (f) and (5) of the Covenant. The Committee should recommend the State party to: conduct a thorough and effective investigation into the allegations of torture; prosecute those responsible; review the court's verdict; stop the confiscation of the author's brother's apartment; and change the judicial and administrative practice, in cases related the drugs trafficking, based on test purchase operations. He further requests a compensation to his brother for the violations suffered (5000 euros for moral damages; 25000 euros for the loss of his apartment and 7200 euros for material damages for the length of his imprisonment).

Additional submissions by the parties

Submission by the State party

6.1 On 19 June 2013, the State party reiterated that during their operation the police found 2.7 gram of heroin in the car of the author's brother. It underlines that the conclusions of the forensic-chemical expertise No.74 of 25 February 2011 confirmed that the substance found under the front sit in the author's brother's car was heroin.

6.2 Regarding the petition for supervisory review of the verdict the State party indicates that supervisory review was declined on the ground that the petition was filed by the author of the present communication, who did not present the necessary authorisation from his brother. As to the petition for supervisory review submitted by the alleged victim, it was reviewed and rejected.

6.3 The State party rejects the claims that numerous violations of the legislation occurred during the police operation, the investigation and the subsequent criminal judicial proceedings. It denies the author's assertions that his brother's allegations of torture were acknowledged and accepted as a fact by the trial court and that the State party did not respond to these allegations in its observations to the Committee. The State party refers to the verdict of 7 July 2011 which states that during the pre-trial investigation, the author's

brother pleaded partially guilty under the pressure of police officers. However, the State party rejects the interpretation of the author that the court accepted as a fact that his brother has been tortured. In the verdict, the court concluded that the author's brother alleged ill-treatment, his denial of involvement in drug related crime and his affirmation that the crime was staged by the police, had to be analysed as an attempt to avoid criminal liability and punishment. The State party adds that the investigator interrogated three times the author's brother and the latter admitted receiving the drug from a woman called D. Based on this testimony, the police conducted a search in her house and found additional 3.35 grams of heroin.

6.4 The State party further rejects the claims that violations of the legislation were committed during the apprehension and detention of the author's brother, notably violation of his right to legal assistance and interpretation, his right to be informed about the charges against him in a language he understands, his right to remain silent and his right to liberty. It submits that on 25 February 2011, the author's brother was provided with a document in Russian explaining his rights and obligations and that he signed having received it. At that initial stage, the author's brother was represented by a private counsel M.M. and his interrogation as a suspect was conducted in Russian and in the presence of his counsel. Further, on 27 February 2011, the author's brother was informed about the charges against him in Russian language. The interrogation as an accused was conducted also in the presence of his counsel and in Russian language. During the interrogation, he partially admitted guilt explaining that together with the co-accused B.A. they acquired and transported the drug with the aim of further sale. Therefore, the State party rejects the claims that the author's brother's 'right to not testify against himself' was violated.

6.5 The State party submits that in accordance with the requirements of article 231 of the Criminal Procedure Code, an interpreter was appointed on the case and the author's brother had access to the materials on the file together with his counsel and the interpreter. The State party admits that the verdict is in Kyrgyz language and that on 10 August 2011, the author's brother counsel made a request to the Osh City Court President to receive a copy in Russian. However, the translation fee was not paid. On 24 August 2011, in a letter to the counsel, the Osh City Court explained that according to article 146 (1) of the Criminal Procedure Code, the interested party had to pay for the translation.

6.6 The State party maintains that the author's brother did not complain about the alleged torture in police custody to the Osh City prosecutor's office. His counsel in his letter of 24 October 2012 to the General Prosecutor of Kyrgyzstan did not mention that his client had been tortured by the police. Lastly, as to the claim that the chemical expertise did not specify the methods used to identify the substance as heroin, the State party submits that the expertise was conducted according to the methodological guide for experts of the Ministry of Internal Affairs of Kyrgyzstan.

Submissions by the Author

6.7 In his additional comments, submitted on 30 September 2013, the author restates that his brother was subjected to torture of which the latter complained before the trial court. On 4 April 2013, the Osh City prosecutor's Office interrogated his brother with regard to the communication to the Committee. In this regard, on 5 April 2013, the author lodged a complaint with the Prosecutor General of Kyrgyzstan claiming that the acts of the Osh City Prosecutor's office amounted to pressure on the victim in the absence of counsel and requested the opening of a criminal case against the police officers involved. On 10 May 2013, the Prosecutor General upheld the Osh City prosecution decision/ruling not to open a criminal case. On 14 June 2013, the author responded to the Prosecutor General claiming, among others, that he had not received the Osh City Prosecution ruling not to open a criminal case. According to the author, it was impossible to challenge the decision (according to the law, in 7 days after the party has been informed) as the author had no information about the beginning of the preliminary investigation, about the organ conducting it and the one taking the decision, the motives and the reasoning.

6.8 The author again disagrees with the court's assessment of the evidence, with the chemical expertise conclusion and with the verdict. He submits that his brother's counsel was not allowed to cross examine an important witness and that his testimony was kept

secret. He claims that his brother did not have a fair trial as the method ‘test purchase’ used by the police is not under independent and impartial judicial control. He reiterates that the prosecutor did not react to his brother’s torture allegations during the court hearing. The Osh Prosecutor’s Office visited his brother in prison only on 4 April 2013, nearly two years after the arrest, and in connection to the communication before the Committee. He further maintains that the Prosecution is not an independent organ (as it functions in a conflict of interest: on one hand, supervising the investigation and in charge of the prosecution, and on the other hand – the protection against torture by the pre-trial investigation organs) and therefore the victims of torture in police custody have no effective remedy of protection.

6.9 The author reiterates that his brother was deprived from the possibility to appeal his verdict as he has not received it in a language that he understands¹³. The State party accepted this as a fact, maintaining only that the practice requiring paying for the translation is not in violation of the criminal procedure law. The author challenges the State party argument and refers to article 147 (1) (3) of the Criminal Procedure Code, according to which the court costs (процессуальные издержки) related to interpretation are paid by the State.

6.10 On 3 February 2015, the author informed the Committee that on 13 November 2014 the Osh City Court ordered the early release of his brother¹⁴. However, he maintains that his brother is still a victim under the Optional Protocol, as the State party did not acknowledge nor corrected the violations of his rights guaranteed by the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

8.3 The Committee takes note of the State party’s claim that the author's brother did not complain about the alleged torture in police custody to the Osh City prosecutor's office, and that his counsel in his letter of 24 October 2012 to the General Prosecutor of Kyrgyzstan did not mention torture against his client by the police either. The Committee however notes the author’s allegations that his brother complained during the court hearing about being subjected to torture by the police officers, and that he did not raise allegations of torture before the Prosecutor’s Office due to fear of reprisal and further torture. The Committee further notes that at a later stage (2 years later) the complaint lodged by the author on 5 April 2013 with the Prosecutor General of Kyrgyzstan against the acts of the Osh City Prosecutor’s office (questioning the author’s brother in connection to the communication before the Committee), and requesting the opening of a criminal case against the police officers, was rejected on 10 May 2013. The Committee therefore, considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met and it is not precluded from examining the above claim.

8.4 The Committee takes note of the author’s allegations of ill-treatment by police officers during the pre-trial detention with the aim to extract confession. The author’s brother alleged that he was beaten and tortured by police officers and forced to give written testimony against M.T. The author’s brother raised this allegation before national authorities, as it transpires notably from the Osh City Court verdict of 7 July 2011, and is not refuted by the State party. The Committee further notes that the court did not refer the

¹³ The author refers to general comment No. 32, of 23 August 2007, paras. 32 and 49.

¹⁴ The decision is not part of the file. (Quote from author’s letter: ‘I am glad to inform you that my brother, according to the decision of the Osh city court of 13 November 2014 parole exempt from punishment due to the expiration of the deadline provided by the law’.)

case for further investigation. In this regard, the Committee takes note of the State party's arguments that the author's brother wanted to escape from criminal liability and that he and his counsel had not complained of torture before the Prosecutor's office. The Committee further notes that the author's brother's allegations are not supported by any medical document. From the material before it, the Committee is not in a position to conclude that the author's brother was subjected to treatment contrary to article 7 of the Covenant. In the absence of more precise information from the author in this respect, the Committee concludes that the author's allegations under article 7 have been insufficiently substantiated for purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol.

8.5 The Committee notes the author's claims under article 9 (1) and (3) of the Covenant that his brother was arrested on 25 February 2011 and kept in detention from 14:00 to 23:40 p.m. without being informed of the reasons for it, and that on 27 February the Osh City Court ordered his remain in pre-trial detention without legal basis. However, the Committee observes that the author's brother detention in connection with the criminal proceedings was authorised by the Osh City Court on 27 February 2011 and the court, applying the domestic law, decided that the author's brother should remain in detention until 25 April 2011, since he was accused of a serious crime and could attempt to escape justice. The Committee considers that the author has failed to explain in which manner the initial arrest and subsequent order to remain in detention did not comply with the domestic law or was otherwise arbitrary under article 9 of the Covenant. Accordingly, the Committee considers that these claims are inadmissible for lack of substantiation under article 2 of the Optional Protocol.

8.6 With respect to the allegation under article 9 (2) that the author's brother was not promptly informed of the reasons for the arrest and the charges against him in a language that he understands, the Committee notes the State party's observations that the communication between the police and the author's brother at the time of detention took place in Russian language; that he was represented by a privately retained counsel; his interrogations as a suspect and as an accused were conducted in Russian and in the presence of his counsel; and he was informed about the charges against him in Russian language. In the absence of more precise rebuttal from the author in this respect, the Committee concludes that the author's allegations have been insufficiently substantiated for purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol.

8.7 The Committee notes the author's claims under article 9 (4) and article 14 (5) of the Covenant that : (1) From 25 April 2011 until the sentencing of his brother on 7 July 2011, his detention was arbitrary and unlawful as it was based only on the indictment and the transmittal of the case to the first instance court; and (2) that he and his brother were deprived of the right to challenge at the Supreme Court of Kyrgyzstan the lawfulness of the detention, as the Supreme Court respectively declined to examine the author's application for supervisory review and examined but rejected his brother's supervisory review motion. The Committee considers that these claims are insufficiently substantiated, for the purposes of admissibility, and declares them inadmissible under article 2 of the Optional Protocol.

8.8 The Committee notes the author's claims under article 14 of the Covenant in relation to the examination of evidence and of witnesses during the trial. It particularly observes the author's disagreement with the sentence against him, the assessment of material evidence, that the defence was not allowed to cross examine a key witness X, who had cooperated with the police in the test purchase, the methods and the conclusions of the expert witnesses, the use of the test purchase method, and the composition of three judges of the Osh Regional Court. In this regard the Committee recalls its case law according to which it is for the courts of State parties to the Covenant to evaluate the facts and the evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and

impartiality.¹⁵ In the present case, the Committee observes, that the material before it does not allow it to conclude that the examination of the evidence and questioning of witnesses by the court was carried out in an arbitrary manner. The materials contained on file do not allow the Committee either to conclude that the composition of the court was not in accordance with domestic law. The Committee therefore declares these claims insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

8.9 The Committee considers that the author has sufficiently substantiated his remaining claims, raising issues under article 14 (3) (a) and (f) of the Covenant, and therefore proceeds to their examination on the merits.

Consideration of the merits

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

9.2 The Committee notes the author's claims under article 14 (3) (a) and (f), that his brother, being a native Russian speaker, was not promptly informed of the reasons and the nature of the charges against him in writing, in a language that he understands, could not understand the indictment available only in Kyrgyz and did not receive the verdict in Russian language. The State party refuted these allegations by stating that an interpreter was appointed on the case and the author's brother had access to the materials on the file together with his counsel and the interpreter. The Committee recalls its jurisprudence that the reasons for arrest must be provided in a language that the arrested person understands¹⁶. It also recalls that the right of all persons charged with a criminal offence to be informed promptly and in detail in a language which they understand of the nature and cause of criminal charges brought against them, enshrined in paragraph 3 (a), is the first of the minimum guarantees in criminal proceedings of article 14. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally - if later confirmed in writing - or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based.¹⁷ Given that the indictment is a key document in the criminal proceedings, the Committee considers it essential that the accused person understands the contents fully and that the State makes all necessary efforts to provide that person with a translation free of charge in a language that he/she can understand. In the absence of further information on the file, due weight should be given to the author's allegations that his brother could not understand the indictment available only in Kyrgyz. Therefore, the Committee concludes that the facts as submitted reveal a violation of the author's brother's rights under article 14 (3) (a) of the Covenant.

9.3 With respect to the allegation that the author's brother was not able to understand the language used in court, the Committee recalls also that the right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court as provided for by article 14 (3) (f) enshrines another aspect of the principles of fairness and equality of arms in criminal proceedings;¹⁸ this right arises at all stages of the oral proceedings; and applies to aliens and also to nationals.¹⁹ The Committee however observes that interpretation was available to the author's brother throughout the proceedings before the courts as reflected in the protocols of the hearings. Therefore, the

¹⁵ See, inter alia, communications No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision of inadmissibility adopted on 2 November 2004, para. 7.3; No. 1138/2002, *Arenz et al. v. Germany*, decision of inadmissibility adopted on 24 March 2004, para. 8.6; and No. 2125/2011, *Tyan v. Kazakhstan*, Views adopted on ...2017, para. 8.10. See also the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 26.

¹⁶ See General comment No.35 : Article 9 : Liberty and security of person, para.26 and communication No.868/1999, *Wilson v.The Philippines*, paras. 3.3 and 7.5.

¹⁷ See General comment No.32 : Article 14 : Right to equality before courts and tribunals and to a fair trial, para. 31.

¹⁸ See communication No. 219/1986, *Guesdon v. France*, para. 10.2.

¹⁹ See General Comment 32.

Committee concludes that the facts as submitted do not disclose a violation of the author's brother's rights under article 14 (3) (f) of the Covenant.

10. The Human Rights Committee, acting under article 5(4) of the Optional Protocol, is of the view that the information before it discloses a violation by the State party of the author's rights under article 14 (3) (a) of the Covenant.

11. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to provide compensation to the author's brother for the violations suffered. The State party is also under an obligation to take all necessary steps to prevent the occurrence of similar violations in the future.

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

Annex

Individual opinion of Committee Members Mr. Yuval Shany, Mr. Santos Pais and Mr. Christofer Heynes (dissenting)

1. We regret not being able to join the other members of the Committee in finding that the State party violated the author's rights under article 14, paragraph 3(a) of the Covenant.
2. The author's brother was stopped on 25 February 2011, in a "sting operation", conducted by the Southern Regional Office for Combating Drug Trafficking of the Department of Internal Affairs of Kyrgyzstan. During the search of his car, 2.7 grams of heroin were found (para 2.1.). Although the author's brother stated, at the time, that he was not aware of the heroin's origin, he was certainly aware, from that moment on, of the possible charges relating to the drug possession.
3. It is further uncontested that, on 27 February 2011, the author's brother, who speaks Russian and was given a written indictment in Kyrgyz, was informed in Russian about the charges against him, that he was represented by private counsel during the interrogation (which took place in Russian), and that he had an interpreter assigned to his case by the State, with whom he was able to review the case file, including the written indictment (para. 6.4-6.5). The author has not provided any additional information, which would enable us to reach the conclusion that the State party had failed to inform him promptly and in detail in a language which he understands of the nature of the charge against him (especially taking into account the facts as stated in para. 2). As a result, we are of the view that this part of his claim is unsubstantiated and should have been found inadmissible.
4. It appears in this connection as if the finding of violation by the majority on the Committee was largely influenced by the fact that the State party failed to provide the author's brother with a written translation of the indictment detailing the charges against him (para. 9.2). We take issue with this aspect of the Views.
5. While we agree that, given their importance to the criminal process, the charges must be specified in a written document,²⁰ it does not appear to us to be necessary or reasonable to require States to translate such a document in written form into the specific language used by a criminal defendant, when other effective ways are available to enable him or her to be fully informed of the charges. We are of the view that it was not shown that in the present case the measures taken by the State party – in particular, the assignment of a state interpreter and full access to the case file (which included the indictment) – were inadequate or infringed his right to due process, especially given the fact that the author's brother was legally represented throughout the process.
6. As a result, we do not consider it sufficiently well established that the author's rights under article 14, paragraph 3(a) were violated in the circumstances of the present case.

²⁰ General comment No.32: Article 14 : Right to equality before courts and tribunals and to a fair trial, para. 31.