



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2359/2014^{*, **}

<i>Communication submitted by:</i>	Mr Saidarov, Mr Davudov, Mr Vasilov, and Mr Erbabaev (represented by counsel, Mr Valeryan Vakhitov)
<i>Alleged victim:</i>	The authors
<i>State party:</i>	Kyrgyzstan
<i>Date of communication:</i>	5 December 2013(initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 20 March 2014 (not issued in document form)
<i>Date of adoption of Views:</i>	17 March 2017
<i>Subject matter:</i>	Arbitrary detention and torture of four authors
<i>Procedural issue:</i>	Non-substantiation
<i>Substantive issues:</i>	Torture – prompt and impartial investigation; arbitrary arrest – detention; discrimination on the ground of national, ethnic or social origin; fair trial – legal assistance.
<i>Articles of the Covenant:</i>	2 (3); 7; 9 (1), (2); 14, (3) (d); 26.
<i>Article of the Optional Protocol:</i>	2

* Adopted by the Committee at its 119th session (6 March-29 March 2017).

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

1. The authors of the communication dated 5 December 2013, are Mr Alimzhon Saidarov, Mr Avaz Davudov, Mr Erkin Vasilov, and Mr Khikmatillo Erbabaev, Kyrgyz citizens, born in 1969, 1969, 1974 and 1991 respectively. The authors claim to be victims of violations by Kyrgyzstan of their rights under article 7 read in conjunction with article 2(3), article 9 (1) and (2), article 10 (2) (a), article 14 (3) (d), and article 26 for Mr Saidarov; article 9 (1), article 14 (3) (d), and article 26 for Mr Davudov; article 9 (1), article 14 (3) (d), and article 26 for Mr Vasilov; and 9 (1) and (2), article 14 (3) (d), and article 26 of the Covenant for Mr Erbabaev. Although the authors, except Mr Saidarov, have not formally claimed violations of article 7, facts as submitted by Mr Davudov, Vasilov and Erbabaev give rise to allegations of article 7 of the Covenant. The Optional Protocol entered into force for the State party on 7 January 1995. The authors are represented by counsel, Mr Valeryan Vakhitov.

The facts as presented by the authors

2.1 The authors submit that on 9 and 10 June 2010, ethnic violence broke out between Kyrgyz and the minority Uzbek population in the city of Osh in the south of Kyrgyzstan.

2.2 The authors further submit that on 12 June 2010, Mr Saidarov, Mr Davudov and Mr Vasilov and other unspecified persons were hiding from the street violence in Mr Saidarov's house in the city of Osh. At some point, the authors came out of the house to help to extinguish a fire on a neighbour's house. In the process that ensued, the neighbours detained two minors of Kyrgyz ethnicity, later identified as Mr I.D and Mr A.D., who were suspected of being the arsonists and brought them to Mr Saidarov's house. Mr Saidarov immediately informed the police by phone about the detention of the alleged arsonists. On 13 June 2010 in the morning, the officers from the National Security Service (hereinafter NSS) came and took the alleged perpetrators of the arson from Mr Saidarov's house; the officers issued no official report of the incident.

2.3 On 20 June 2010, Mr Erbabaev returned to the city of Osh from the village Sura-Tash, where he and his family were escaping the riots. At around 5:30pm, he went to meet Mr Vasilov. Both were arrested at that time and brought to the NSS department in Osh. They both had to stand facing the wall for a half day and were beaten on their back, kidneys and head in order to confess committing a crime. Later on, Mr Erbabaev was tortured to force him to confess in committing crimes he did not commit.

2.4 Mr Erbabaev was detained on 20 June 2010 at 5:30pm and first questioned as a witness. Only on 22 June 2010 in the morning, his detention as a suspect was registered by an NSS investigator. This decision was taken in absence of a lawyer to represent Mr Erbabaev. On 23 June 2010, the Osh city court decided to detain Mr Erbabaev pending his trial. On 13 August 2010, the investigator in charge of Mr Erbabaev's case, dismissed all charges against him except one under article 339 (1) of the Criminal Code of Kyrgyzstan, accusing him of non-reporting the commission of crime.

2.5 Mr Erbabaev submits that such a crime does not require detention pending trial under the national legislation. Despite having a permanent address, the author was not released pending trial. The author was kept in the NSS detention until 26 August 2010. On 21 January 2011, the Osh city court sentenced the author to one year of imprisonment, to be served in a settlement colony. On 26 May 2011, upon a supervisory protest brought by the Prosecutor's office, the Osh regional court overturned this decision, and requested the Osh city court to conduct a rehearing of the case. On 16 September 2011, the Supreme Court of the Republic of Kyrgyzstan reviewed this decision under supervisory review procedure, and the initial verdict and sentence of the Osh city court dated 21 January 2011 were upheld in its entirety.

2.6 Mr Davudov submits that he was first detained and questioned on 22 June 2010 as a witness. His detention as a suspect was formalized and registered on 22 June 2010, approximately five hours after his initial detention. On 24 June 2010, the court decided to detain the author pending his trial. The author was detained in the NSS detention facility in the city of Osh until 26 August 2010, when he was transferred to SIZO No. 25 in Osh, where

he was held until 1 February 2011 pending his trial.¹ On 21 January 2011, the author was sentenced to five years of imprisonment for kidnapping and possessing an illegal weapon. As with Mr Erbabaev, Mr Davudov's verdict and sentence was first overturned by the Osh regional court, but reinstated by the Supreme Court of Kyrgyzstan.

2.7 Mr Saidarov was also detained on 22 June 2010 by the NSS officers. He did not resist his arrest, but despite this, he was subjected to violent force. He was also forced to stand face to a wall, and unknown NSS officers took turns in beating him on his back, head and other body parts. As a result, he suffered several broken ribs, which has been confirmed by a medical certificate dated 6 October 2012. He could not eat for two weeks, and only drank water. He was afraid to complain about torture and mistreatment for the fear of reprisals. While Mr Saidarov was initially detained and questioned as a witness, he was then arrested as a suspect, about two hours after his initial apprehension.

2.8 The court decided to detain Mr Saidarov pending trial on 23 June 2010. He was charged with kidnapping, illegal detention of a person, and participation in mass riots. The author was kept in NSS detention facility in Osh until 26 August 2011, after which he was transferred to SIZO No. 25, where he was detained until 1 February 2011. On 21 January 2011, the Osh city court sentenced Mr Saidarov to five years of imprisonment.

2.9 Mr Vasilov was detained on 20 June 2010. This author was taken to the first floor of the NSS building in Osh, was forced to stand facing a wall, and several unknown NSS officers hit him while passing by. He was then taken to one of the offices in that same building, where six unknown officers interrogated him on alleged killings and possessions of weapons. He was then undressed and beaten again. Unknown officers placed a plastic bag over Mr Vasilov's head, causing him to suffocate and lose consciousness.

2.10 Mr Vasilov further submits that only on 21 June 2010, he was formally interrogated as a witness. On 23 June 2010, his status was changed to a suspect, and his detention was sanctioned by court. The author claims that during all these interrogations, he had no access to a lawyer. Mr Vasilov, along with co-defendants and co-authors of the present communication, requested the court to call their own witnesses, who would provide important evidence in their defence, but the court rejected these requests. At the end of the trial, Mr Vasilov was sentenced to three years of imprisonment.

The complaint

3.1 Mr Saidarov submits that the beating and torture in the police station amounted to a violation of article 7 of the Covenant read in conjunction with article 2 (3), and article 10 (2). In their complaints to the Committee, Mr Davudov, Mr Vasilov and Mr Erbabaev² also complain about beatings and mistreatment, without formally claiming specific articles of the Covenant. Mr. Saidarov further submits that he has never complained to the State party about torture or mistreatment for fear of reprisals.

3.2 The authors submit that the Osh City Court did not evaluate the necessity and legality of their custody while deciding on their pre-trial detention on 23 June 2010, contrary to article 9 of the Covenant. The authors further submit that the Committee's views on *Kulov v. Kyrgyzstan*, finding a violation of article 9 (1) as "the investigator had no evidence that the author wanted to escape or to obstruct the inquiries" and affirming that "remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all circumstances", applies in their case. Referring to the Committee's views on *Mukong v. Cameroun*, that confirmed that "arbitrariness" must be interpreted more broadly to include elements of

¹ It is not clear whether this author was released on this date or not.

² These three authors also provide copies of the complaints relating to torture submitted by their relatives.

inappropriateness, injustice, lack of predictability and due process of law, the authors claim that their detention was arbitrary, in violation of article 9 of the Covenant.

3.3 The authors assert that the fact that they were brought before a judge more than 48 hours from the moment of their arrest, that they did not have access to a lawyer from the moment of their arrest, that they were interrogated in the absence of a lawyer, and that the charges were not included into the report of arrest, violates their rights under article 9 (1) of the Covenant. Mr Saidarov and Mr Erbabayev additionally claim violations of article 9 (2) of the Covenant.

3.4 All four authors claim that the fact that they did not have an access to a lawyer of their choice amounts to a violation of article 14 (3) (d) of the Covenant.

3.5 The authors claim that since they were of Uzbek ethnicity, the criminal proceedings related to the conflict between Kyrgyz and Uzbeks, and the aggrieved party in the criminal proceedings was of Kyrgyz ethnicity, the fact that all representatives of authorities participating in the criminal proceedings against the authors were of Kyrgyz ethnicity, amounts to discrimination prohibited by article 26 of the Covenant.

State party's observations on admissibility and the merits

4.1 On 29 October 2014, the State party provided its observation on the merits of the communication. The State party submits that throughout the June 2010 events, during which inter-ethnic violence that erupted in and around the city of Osh, many government and private property was burned and destroyed. The authors of the communication took active part in these events, specifically, by illegally detaining two Kyrgyz citizens by using violence against them.³ These two persons were detained at Mr. Saidarov's residence in Osh.

4.2 On 21 January 2011, Mr Saidarov and Mr Vasilov were sentenced to three years of imprisonment; Mr Erbabayev was sentenced to one year of imprisonment, and Mr Davudov – to five years of imprisonment. On 3 March 2011, the Osh city prosecutor's office brought a supervisory review protest to the Osh regional court. Based on this protest, the Osh regional court by its decision dated 26 May 2011 returned the case back to the Osh city court for a rehearing de novo.

4.3 Counsel for the defendants disagreed with the Osh regional court's decision and brought a supervisory review request procedure to the Supreme Court of the Republic of Kyrgyzstan, in which the lawyers argued that the alleged victims and the defendants have reconciled and the victims did not have any compensation claims to the defendant. Counsel asked the Supreme Court to leave the first instance's court decision unchanged.

4.4 The Supreme Court of Kyrgyzstan decided that the first instance court of the city of Osh took into consideration all the relevant evidence. The Supreme Court therefore upheld the first instance court's decision. By asking the Supreme Court to uphold the lower court's verdict and sentence, the defendants admitted their guilt. The arguments presented by the authors in the communication to the Committee contradict with the content and substance of their supervisory review request to the Supreme Court.

4.5 The State party also submits that all authors have had opportunities to submit their complaints regarding torture and mistreatment to the State party authorities, but they never did so.

4.6 The State party further submits that according to article 59 of the Criminal Procedure Code of Kyrgyzstan, the courts can consider compensation for cases of illegal indictment, arbitrary detention, or persecution. This is applicable when the criminal charges are

³ The State party provides no further information.

dismissed, or the defendant is acquitted by court. Since there have been no complaints from the authors, and they have been found guilty, the question of compensation cannot be considered.

Additional observations by the authors

5.1 On 23 January 2015, the authors, responding to the State party's observations, submit that the State party failed to answer the questions posed by the authors in their communication to the Committee.

5.2 The persecution of the authors should be seen in context of events of June 2010. Many houses and other property belonging to ethnic Uzbeks were burned down. Two young men, who were detained in Mr Saidarov's house, were suspected of being one of the arsonists. The authors contacted the authorities immediately, but the law enforcement officers came to pick up the detained arsonists only the next day, on 13 June 2010.

5.3 During the court hearings, the authors asked the court to summon one of the officers, Mr Z.K., who came to Mr Saidarov house. The court denied their request, claiming that the said officer is currently in Bishkek.

5.4 The State party contends that the authors never complained about torture or mistreatment. The authors submit, however, that the relatives of all the authors complained⁴ to the authorities about the torture suffered by them by the hands of the law enforcement officers. In response to these complaints, the authorities only responded that they have identified no violations.⁵ On 16 December 2010, Mr Erbabaev complained during the court hearings⁶ that the NSS officers tortured him while he was in detention. Mr Davudov complained that he was beaten by the NSS officers. The court and the prosecutor's office chose to ignore these complaints.

5.5 In addition, a group of human rights defenders⁷ met with the Prosecutor General of Kyrgyzstan, Ms Salyanova, on 11 August 2011, and during this meeting, they complained about illegal detention and use of force during the apprehension against the authors. The State party did not conduct any investigation regarding these claims.⁸

5.6 The authors further submit that the court hearing to determine a pre-trial detention measure was held in of the NSS offices. During these so-called hearings, the prosecutor who asked the judge to arrest the authors pending trial hit Mr Saidarov in the stomach and in the back. In this atmosphere of fear, the authors realized that is futile and dangerous to complain about torture to the very people who tortured them.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

⁴ The authors have submitted copies of these letters.

⁵ The authors have provided copies of these letters from the State party authorities.

⁶ The copy of court records show that Mr Erbabaev claimed during the hearing that he was beaten.

⁷ The names of these human rights defenders have not been provided.

⁸ The authors submit a copy of responses by the authorities to these complaints, addressed to relatives of the authors, dated 26 July and 12 August 2010. The authorities respond that there have been no mistreatment, pressure or any violations of the procedural rules.

6.2 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 investigation or settlement.

6.3 The Committee considers that the State party does not directly challenge the admissibility of the present communication, but notes its argument that the authors did not complain to national courts and authorities about torture and mistreatment. The Committee observes that the authors provided copies of complaints to the domestic authorities regarding torture and mistreatment submitted by relatives of all the authors, and notes that the State party did not investigate these claims promptly and impartially. Additionally, one of the author's, Mr Erbabaev complained during the court hearings about torture he suffered in the hands of the NSS officers. Accordingly, absent the State party's clear and coherent arguments regarding the admissibility of the present communication, the Committee concludes that it is not precluded by article 5 (2) (b) of the Optional Protocol from considering the communication.

6.4 The Committee has noted the authors' claims under articles 14 (3) (d) and 26 of the Covenant. In the absence of any further pertinent information on file, however, the Committee considers that the authors have failed to sufficiently substantiate, for purposes of admissibility, these allegations. Accordingly, it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.5 In the Committee's view, the authors has sufficiently substantiated, for the purposes of admissibility, their remaining claims under article 7, read in conjunction with article 2 (3), article 10 (2) (a), and article 9 (1) and (2) of the Covenant, declares them admissible and proceeds with their consideration of the merits.

Consideration of the merits

7.1 The Committee has considered the present communication in the light of all the information submitted by the parties, in accordance with article 5 (1) of the Optional Protocol.

7.2 The Committee notes the claims under article 7 of the Covenant that the authors were subjected to physical and psychological pressure to force them to confess guilt in the commission of a crime. The Committee observes that these allegations have not been refuted by the State party. The Committee recalls its consistent jurisprudence that once a complaint of ill-treatment contrary to article 7 has been filed, a State party must investigate the complaint promptly and impartially.⁹ The Committee notes that in the circumstances of the present communication, relatives of all the authors have filed complaints with the State party's authorities, claiming torture and other forms of mistreatment. In addition, Mr. Erbabaev complained during a court hearing about torture that he suffered in the hands of the NSS officers, which is clearly recorded in the minutes of the court hearing. Despite these complaints, the courts, and the relevant local authorities, including the prosecutor's office, failed to launch a prompt and impartial investigation. Additionally, in its response to the Committee, the State party equally failed to address claims and allegations as submitted by the authors in their communication. In the circumstances, due weight must be given to the authors' allegations. Accordingly, the Committee concludes that the facts before it disclose a violation of the authors' rights under article 7, read in conjunction with article 2 (3), of the Covenant. Having thus come to a conclusion regarding a violation of the authors' rights under article 7, read in conjunction with article 2 (3), the Committee decides not to examine Mr Saidarov's claims under article 10 (2) separately.

⁹ See general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, para. 14.

7.3 The Committee further notes the authors' claims under article 9 (1) that they all were arbitrarily detained by the NSS officers, without initial registration of their detention, and that all authors were first questioned as witnesses. The authors further claim that their initial detention was arbitrary, and that they should have been released pending trial. The State party in its observations on the merits of the present communication did not address the issue of arbitrary detention. The Committee recalls its general comment No. 35 (2014) on liberty and security of person according to which arrest within the meaning of article 9 need not involve a formal arrest as defined under domestic law. In the absence of any pertinent explanation from the State party regarding the authors' allegations of arbitrary detention, the Committee considers that the authors' rights under article 9 (1) of the Covenant were violated. Having come to a conclusion regarding violations of article 9 (1) regarding all authors, the Committee decides not to examine Mr Saidarov and Mr Erbabayev's separate claims under article 9 (2).

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation of the authors' rights under article 7 read in conjunction with article 2 (3), and article 9 (1) of the Covenant.

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors 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 take appropriate steps to conduct a prompt and impartial investigation into the authors' allegations of torture; and provide the authors with adequate compensation. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant 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 remedy when it has been determined that a violation has occurred, 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. In addition, it requests the State party to publish the Views. The State party is also requested to publish the present Views and disseminate them widely in the official languages of the State party.
