



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. 2850/2016*, **

<i>Communication submitted by:</i>	E.S. (represented by counsel, Rysbek Adamaliev)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kyrgyzstan
<i>Date of communication:</i>	23 June 2016 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 16 November 2016 (not issued in document form)
<i>Date of adoption of Views:</i>	19 October 2021
<i>Subject matter:</i>	Beating by police in detention; treatment of prisoners; conditions of detention
<i>Procedural issue:</i>	Substantiation of claims
<i>Substantive issues:</i>	Torture or cruel, inhuman or degrading treatment or punishment; conditions of detention
<i>Articles of the Covenant:</i>	7 and 10 (1), read alone and in conjunction with 2 (3)
<i>Article of the Optional Protocol:</i>	3

1. The author of the communication is E.S., a national of Kyrgyzstan. He claims that the State party has violated his rights under articles 7 and 10 (1), read alone and in conjunction with article 2 (3), of the Covenant. The Optional Protocol entered into force for Kyrgyzstan on 7 January 1995. The author is represented by counsel.

Factual background

2.1 On 14 September 2011 at approximately 9 a.m., the author, who at that time was being held in a pretrial detention facility in Issyk-Ata district, Chu region, Kyrgyzstan,¹ was woken

* Adopted by the Committee at its 133rd session (11 October–5 November 2021).

** The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haïba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobayyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

¹ The author does not indicate the exact period that he was held in the detention facility.



up in his cell with a strong blow to his back. Four officers started shouting and beating the author and two other detainees. The author and his cellmates were taken out to the corridor, where they saw some 15 other detainees. They were all then taken to the courtyard of the detention facility, where the beatings continued. The author was beaten on the head, including with a set of heavy keys, and one of the officers jumped on his head. He sustained multiple blows from boots, police batons and wooden sticks all over his body. Overall, the beating lasted for approximately 30 minutes. The author asked why he was being beaten, but in response the officers only intensified the blows. Later, the author found out that a detainee from another cell had asked to use the toilet and had reacted strongly when his request was rudely denied by the duty officer. In response, the duty officer called for backup and the mass beating started. The author also believes that he was beaten because of charges against him, which concerned a fight with a police officer.

2.2 On 16 September 2011, a monitoring group consisting of representatives of the Ombudsman's Office and of two human rights non-governmental organizations (NGOs) visited the facility, interviewed the detainees and took pictures confirming the bodily injuries that they had sustained.²

2.3 On 17 September 2011, the author and other detainees filed a formal complaint with Issyk-Ata district prosecutor's office. On 27 September 2011, the prosecutor's office issued a decision refusing to open criminal proceedings. The prosecutor had questioned the pretrial detention facility's duty officer. According to the duty officer, on 14 September 2011, at approximately 9.40 a.m., a detainee from cell No. 3 was to be escorted to court.³ When the officer opened the cell, however, three detainees pushed him and ran to the courtyard. His requests for them to return to the cell were ignored. One of the detainees attacked him, threw used toilet paper at him, hit him with a plastic bottle and tore his uniform. When the officer raised alarm, another detainee hit him in the chest and pushed him. The officers who arrived to help had to use force to re-establish order in the facility. The same explanation was given by two other officers. According to the decision, since the forensic medical reports were not yet ready and an internal investigation was being carried out, the request to open criminal proceedings against the officers who used force should be denied.

2.4 On 9 January 2012, the Prosecutor General's Office revoked Issyk-Ata district prosecutor's decision and ordered an additional investigation to be carried out by Bishkek city prosecutor's office. However, on 13 January 2012, Issyk-Ata district prosecutor's office again refused to open criminal proceedings in the case. The district prosecutor's decision refers to the forensic medical reports on all the complainants, including the author. According to his forensic medical report, the author sustained light injuries with no harm to his health. According to the decision, 13 of the complainants had withdrawn their appeals. As to the use of force by the detention facility officers, the decision notes that the officers acted lawfully, in accordance with instruction No. 263 of the Ministry of the Interior concerning the detention, protection and escorting of suspected and accused persons. The decision also notes that on 14 September 2011, the duty officer filed a complaint with the head of the Issyk-Ata pretrial detention facility against the five detainees who had attacked him and tried to escape. On 24 September 2011, a criminal investigation was opened into these allegations. On 17 November 2011, the duty officer retracted his complaint and requested that the investigation be closed. The criminal investigation was closed on 19 November 2011. On the grounds that the use of force by the officers of the pretrial detention facility had been lawful in order to prevent detainees from escaping and to re-establish order, the district prosecutor decided not to open the criminal investigation.

2.5 On 25 April 2012, the author appealed against that decision before Chu regional prosecutor's office. He noted that his allegations of beating had been confirmed by the forensic medical report. It remained unconfirmed as to whether he was trying to escape or had in any way resisted the detention facility officers. Another detainee appealed against the

² The author provided the Committee with photographs of his back, which showed two long red lines on the left side and one red spot closer to the spine on the left side.

³ Investigative documents and court decisions on file indicate cell No. 3 as the source of incident. The State party refers to cell No. 6 instead. The author was held in cell No. 5, according to the State party's observations.

same decision before Issyk-Ata district court. On 18 April 2012, the district court repealed the decision of Issyk-Ata district prosecutor's office of 13 January 2012 and ordered it to conduct further investigations. On 16 June 2012, the district prosecutor's office once again refused to open a criminal investigation. The district prosecutor questioned seven detainees involved in the incident on 14 September 2011. They all either stated that they were not making a claim or refused to provide an explanation. One of them retracted his complaint. In the author's appeal before Chu regional prosecutor's office, he claimed that the prosecutor had failed to question the monitoring group that had interviewed the detainees.

2.6 On 13 September 2012, Chu regional prosecutor's office repealed Issyk-Ata district prosecutor's office decision of 16 June 2012 not to open a criminal investigation. The regional prosecutor's office noted, in particular, that persons detained in other cells, specifically female detainees, had not been questioned.

2.7 On 25 September 2012, having questioned two female detainees, Issyk-Ata district prosecutor's office refused to open a criminal investigation. One of the female detainees confirmed having seen the officers open all the cells except the one in which women were being held, take the detainees to the courtyard and beat them with police batons and wooden sticks. Another female detainee declared having seen no beatings but having heard the arguments and shouting and seen detainees being escorted next to her cell. On 16 October 2012, the author filed a motion with Issyk-Ata district prosecutor's office to question all the witnesses, both men and women, who were being held on 14 September 2011 in the same facility as the author, and a human rights defender, who was a member of the monitoring group who had personally interviewed the author. The author's motion was rejected on the grounds that all the witnesses had been questioned.

2.8 On 22 April 2013, the author appealed against the refusal of 25 September 2012 by Issyk-Ata district prosecutor's office before Chu regional prosecutor's office. On 13 May 2013, the regional prosecutor's office repealed the decision in question. On 27 May 2013, Issyk-Ata district prosecutor's office issued yet another decision not to open a criminal investigation. The decision mentions that the author, who by then was serving a sentence in correctional facility No. 3, had refused to give testimony on the matter, which was duly documented.

2.9 On 21 October 2013, the author appealed against the decision of 27 May 2013 before Issyk-Ata district court. He claimed that the decision was unlawful and groundless. He claimed that the district prosecutor's argument that the police had used force in accordance with instruction No. 263 to prevent the escape of detainees was wrong, since no one could confirm whether the author and other detained persons were attempting to escape. Even if they were trying to escape, they were unarmed and there was no reason to use excessive force against them. The district prosecutor's argument that the injuries sustained by the author were light and of no harm to his health only confirmed that he had been beaten. The level of injuries was of no importance. The human rights defender had not been questioned, although she had seen the detainees' injuries after the beatings.

2.10 The district court rejected the author's appeal on 25 November 2013, on the grounds that several of the detainees had retracted their complaints. It concluded that the investigation had been carried out fully and in accordance with the law. The author is not mentioned directly in the court decision.

2.11 On 18 December 2013, the author appealed before Chu regional court. His appeal was rejected on 14 February 2014. The author submitted a supervisory review appeal to the Supreme Court, which rejected his appeal on 23 April 2014.

2.12 The author claims that the conditions of detention in pretrial detention facilities in Kyrgyzstan are inadequate. In support of this claim, he refers to a report on monitoring carried out in 2011 in 47 places of deprivation of liberty.⁴

⁴ Report on the results of implementation of the project entitled "Eliminating torture in Kyrgyzstan with the help of national human rights mechanisms" ("*Противодействие пыткам в Кыргызстане с помощью национальных механизмов защиты прав человека*"), 2011. The author does not provide details of the conditions of detention that he personally experienced.

Complaint

3.1 The author claims that the beating to which he was subjected in the Issyk-Ata pre-trial detention facility violated his rights under articles 7 and 10 (1) of the Covenant.

3.2 He claims that the lack of effective investigation into his allegations amounted to a violation of articles 7 and 10 (1) read in conjunction with article 2 (3) of the Covenant. He notes that even though the investigation was reopened five times, the prosecutor's office never identified those responsible for the beating of the author, although he had named them. The prosecutors questioned only three officers, although many others have been involved in the incident on 14 September 2011. The investigation was superficial and seemed aimed at justifying the use of force by the police officers. Not all witnesses had been questioned, in particular the members of the monitoring group.

3.3 The author further claims that the poor conditions of detention, as described in the 2011 monitoring report, further exacerbated his suffering while detained, in violation of his rights under articles 7 and 10 (1) of the Covenant.

State party's observations on admissibility and the merits

4.1 In a note verbale dated 25 May 2017, the State party submitted its observations on admissibility and merits. Concerning the incident of 14 September 2011, the State party recalls the facts, as noted in the decision of 27 September 2011 by Issyk-Ata district prosecutor's office, to the effect that the duty officer was attacked by detainees from cell No. 6 when he was trying to escort one of them to court. The officer called for backup, and the use of force was necessary to restore order, in accordance with articles 12 and 13 of the Internal Affairs Agencies Act.

4.2 On 17 September 2011, several detainees filed complaints with Issyk-Ata district prosecutor's office about the use of force against them by the detention facility officers. The author, who was detained in cell No. 5, appealed similarly. At the same time, 13 detained persons refused to testify, which was documented.

4.3 According to the results of a forensic medical examination conducted on 19 September 2011, the author had scratches on his chest, which could have been caused by a scratching object and which were consistent with the indicated date of the incident.

4.4 The author's allegations had been investigated objectively, thoroughly and comprehensively, as shown by the decisions of the higher prosecutor's offices to repeal the decisions by Issyk-Ata district prosecutor's office not to open a criminal investigation. The latter carried out preliminary inquiries and decided not to open a criminal investigation on several occasions owing to the absence of corpus delicti in the actions of the detention facility officers. The officers had acted within the framework of articles 12 and 13 of the Internal Affairs Agencies Act. These provisions lay down the circumstances under which force may be used by law enforcement officers, including to prevent and suppress crime and other offences, to apprehend persons who have committed crimes and to address resistance to lawful orders of law enforcement, if other non-violent measures cannot guarantee the achievement of their duties.

4.5 The author appealed in court against the last decision of the prosecutor not to open criminal investigation. The courts of all instances, in their decisions dated 25 November 2013 and 14 February and 23 April 2014, found the decision of the prosecutor's office to be lawful and well grounded, and rejected the author's appeal.

4.6 In the light of the above, the State party concludes that the author's claims to the Committee are unsubstantiated.

Author's comments on the State party's observations on admissibility and the merits

5.1 On 26 July 2017, the author submitted his comments on the State party's observations. He notes that in their investigation, the prosecutors concluded that the use of force during the incident of 14 September 2011 was necessary to re-establish order in the detention facility. According to the State party, the initiator of the incident, B., attacked the duty officer. However, the author, who was asleep in another cell, was also subjected to the beating. He

did not resist and was entirely under control of police officers. The author repeats his allegation that in fact he was beaten for his earlier fight with a police officer. The claim that the use of force by the detention officers was justified by the author's resistance is therefore incorrect.

5.2 The State party claims that the use of force by the police officers was legitimate under articles 12 and 13 of the Internal Affairs Agencies Act. However, since the State party refers to no unlawful actions by the author, the above Act cannot justify the actions of the police towards him.

5.3 Despite the results of the author's forensic medical examination proving that he was beaten, the authorities failed to open a criminal case into the bodily injuries that he obtained, limiting themselves to conducting a preliminary investigation. Three officers questioned by the prosecutor justified the use of force by stating that it was necessary to prevent an escape and re-establish order, on the basis of instruction No. 263. The prosecutor's decisions state that the author and others tried to escape. However, this statement has not been anything corroborated, and no criminal case was ever opened on charges of attempted escape. The author observes that even if it was an attempted escape, the detainees were unarmed and there was no need to use excessive force against them. He also notes that it remains unclear for what purpose detainees from all cells had been brought to the courtyard and subjected to beatings.

5.4 The author reiterates his claims that the investigation failed to question all relevant witnesses. He mentions that the courts rejected his appeals on the basis that most detainees retracted their complaints to the prosecutor's office and refused to testify, which was not relevant to his case.

Additional submissions

From the State party

6.1 On 10 November 2017, the State party reiterated its previous observations.

From the author

6.2 On 7 December 2017, the author submitted additional comments on the State party's observations, stating that if the State party had been duly implementing its obligations, there would have been an effective investigation into his allegations of torture, and a criminal case would have been opened in view of the fact that his injuries had been inflicted in detention, when he was under the full control of police officers.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

7.2 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.

7.3 With regard to the author's claims of a violation of articles 7 and 10 (1) of the Covenant on account of poor conditions of detention in the Issyk-Ata pretrial detention facility, the Committee notes from the material on file that the author has not raised these claims before the competent domestic authorities. Accordingly, it declares this part of the communication inadmissible under article 5 (2) (b) of the Optional Protocol.

7.4 The Committee considers that the author has sufficiently substantiated for the purposes of admissibility the claims under articles 7 and 10 (1), read alone and in conjunction with article 2 (3), of the Covenant concerning the beating by the detention facility officers and the lack of effective investigation. It therefore declares the communication admissible and proceeds with its consideration of the merits.

Consideration of the merits

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

8.2 The Committee notes the author's claim under article 7 of the Covenant that on 14 September 2011, while he was detained and sleeping in his cell in a pretrial detention facility in Issyk-Ata district, he was suddenly awoken and beaten on his head and all over his body by detention facility officers. The author provides a detailed account of his beating, which initially continued for some 30 minutes. He claims that his beating was in fact connected to a fight that he had previously with a police officer, which constituted one of the grounds for the charges in the criminal case against him. The Committee notes that the author supplied several photographs, taken on 16 September 2011 by a monitoring group consisting of representatives of the Ombudsman's Office and of two human rights NGOs, which show two long red lines on his back. The Committee further notes that, although the author does not supply a forensic medical report, the existence of such a report is mentioned in the decisions of the district prosecutor's office (see para 2.4). The Committee notes inconsistency between, on the one hand, the author's account of the prolonged and violent beating and, on the other, the minor injuries shown in the photographs – despite their having been taken within only a few days of the incident – and the apparently light, superficial injuries certified by the forensic medical report. The Committee notes that in any event the State party acknowledges that the author was beaten and received light injuries while in detention.

8.3 According to the jurisprudence of the Committee, a State party is responsible for the security of any person that it holds in detention and, when an individual in detention shows signs of injury, it is incumbent on the State party to produce evidence showing that it is not responsible.⁵ The Committee has held on several occasions that the burden of proof in such cases cannot rest alone on the author of the communication, especially considering that frequently the State party alone has access to the relevant information.⁶

8.4 The Committee takes into consideration the argument of the State party that the police officers have recourse to the use of force for the legitimate purpose of preventing the escape of detainees and re-establishing order in the detention facility after unrest caused by detainees of one of the cells. However, the Committee notes that the State party has not provided sufficient arguments to support the allegation that detainees were indeed attempting to escape, or the claim that the force used was strictly within the limits necessary to achieve the aims of preventing the escape and re-establishing order.

8.5 The Committee notes that while referring to the fact that the unrest in the detention facility was caused by detainees from cell No. 6, and that the author was detained in cell No. 5 (see paras 4.1 and 4.2), the State party does not provide any explanation as to why the author was also taken outside by the police officers and beaten. In this context, the Committee refers to its general comment No. 20 (1992), in which it notes that the scope of article 7 of the Covenant extends to the prohibition of corporal punishment, including excessive chastisement ordered as punishment for a crime or as a disciplinary measure.⁷

8.6 In light of the above considerations, the Committee considers that the facts before it reveal that the beating of the author by the police officers on 14 September 2011 amounted to cruel and degrading treatment in violation of article 7 of the Covenant.

8.7 The Committee further notes the author's claims of a violation of article 7 read in conjunction with article 2 (3) of the Covenant in view of lack of effective investigation into his allegations of beating by the police officers. In this regard, the Committee notes that the preliminary investigation was reopened four times and lasted one and a half years, during which time Issyk-Ata district prosecutor's office questioned a limited number of witnesses

⁵ *Eshonov v. Uzbekistan* (CCPR/C/99/D/1225/2003), para. 9.8; *Siragev v. Uzbekistan* (CCPR/C/85/D/907/2000), para. 6.2; and *Zheikov v. Russian Federation* (CCPR/C/86/D/889/1999), para. 7.2.

⁶ *Mukong v. Cameroon* (CCPR/C/51/D/458/1991), para. 9.2; and *Bleier Lewenhoff and Valiño de Bleier v. Uruguay* communication No. 30/1978, para. 13.3.

⁷ General comment No. 20 on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, para. 5.

from the detention facility. The Committee further notes that, having arrived at the conclusion that the police officers used force under instruction No. 263 in order to prevent an attempted escape and to re-establish order, the prosecutors have never tried to establish why so many detained persons who did not participate in the assault of the duty officer, the author among them, were beaten. There seems to have been no attempt to substantiate the claim that an escape was attempted, or to establish whether, if so, the use of force was proportionate to the aim of re-establishing order in the detention facility or preventing the attempted escape. In addition, the prosecutors did not question all the relevant witnesses, in particular the members of the monitoring group who visited the detention facility and interviewed the detainees just two days after the incident. The State party did not provide any information about the actions of the author that justified the use of force under articles 12 and 13 of the Internal Affairs Agencies Act. The Committee further notes that when the author appealed against the decision by Issyk-Ata district prosecutor's office dated 27 May 2013, the courts rejected his appeal only because the other detainees, who had initially complained about the beatings to the prosecutor's office, had withdrawn their complaints. The courts disregarded the fact that the author had maintained his complaint. In view of these facts, the Committee concludes that no effective investigation has been conducted into the author's allegations of ill-treatment, in violation of article 7 read in conjunction with article 2 (3) of the Covenant.

8.8 Having concluded that, in the present case, there has been a violation of article 7, read alone and in conjunction with article 2 (3), of the Covenant, the Committee decides not to examine separately the author's claims under article 10 (1) of the Covenant.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of article 7, read alone and in conjunction with article 2 (3), of the Covenant.

10. Pursuant to 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 take appropriate steps to conduct a prompt and effective investigation into the beating of the author and, if confirmed, to prosecute, try and punish those responsible; and to provide the author with adequate compensation for the violations of his rights. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

11. 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 present Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.
