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**Human Rights Committee**

 Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2998/2017[[1]](#footnote-2)\*,[[2]](#footnote-3)\*\*

*Communication submitted by:* Mikhail Kudryashov (represented by Natalya Efimenko and “Golos Svobody”)

*Alleged victim:* The author

*State party:* Kyrgyzstan

*Date of communication:* 26 July 2013 (initial submission)

*Document references:* Special Rapporteur’s rule 97 decision, transmitted to the State party on 23 June 2017 (not issued in document form)

*Date of adoption of Views:* 13 July 2023

*Subject matter:* Commission of a criminal offense on police incitement; arbitrary detention and torture by financial police officers; discrimination on the grounds of sexual orientation

*Procedural issue:* Sufficient substantiation

*Substantive issues:* Torture – prompt and impartial investigation; effective remedy; arbitrary detention - arrest; right not to testify against oneself; discrimination on the grounds of sexual orientation

*Articles of the Covenant:* 2 (3), 7, 9 (1), 14 (3) (g) and 26

*Articles of the Optional Protocol:* 2 and 5

1. The author of the communication is Mr. Mikhail Kudryashov, a national of Kyrgyzstan born in 1988. He claims that Kyrgyzstan has violated his rights under article 7 alone and in conjunction with articles 2 paragraph 3 and article 26; article 9 paragraph 1; article 14 paragraph 3 (g); and article 26 of the International Covenant on Civil and Political Rights (“the Covenant”). The Optional Protocol entered into force for Kyrgyzstan on 7 January 1995. The author is represented by counsel.

 Facts as submitted by the author

2.1 On 30 October 2010, at 1 pm, the author met A.S., an undercover financial police officer, in a café and handed him CDs requested by A.S. The latter offered him a package of money. The author refused but, as A.S. protested, he accepted it because he had no money to pay the rent and felt uneasy to refuse. Other men approached with a video camera and asked the author to acknowledge that the CDs contained gay films. As the author did so, the men said that “sales of gay pornographic films are prohibited by the law of Kyrgyz Republic”. The author tried to explain that gay films and pornographic films were different things. The men switched off the camera, started insulting the author and threatened him with rape. They ordered the author to empty his bag and stated that it contained marked banknotes. They invited other people, allegedly attesting witnesses, to sign a protocol.

2.2 The author’s mobile phone, bag, wallet, passport, foreign passport and registration certificate were seized, he was handcuffed and driven to an unknown direction. 15-20 minutes later, he was brought to the main office of the financial police in Bishkek, where he was detained until 2:30 am of 31 October 2010 without his arrest being registered and with no legal assistance.

2.3 Almost immediately upon his arrival to the financial police department, the author was subjected to torture [by the financial police officers who had arrested him in the café]. He was ordered to undress and to take humiliating postures. Police officers were mocking him, making him repeat that he was gay, filming him with a mobile phone and forcing him to pose in front of the phone. He was repeatedly asked to put his hands up and beaten all over the body, including with a coffee jar, a rusty metal hanger, a beer bottle and a stick. On several occasions, he fell on the floor, was kicked, punched and scratched with military boots. He felt very cold because there was no heating, but he was not allowed to get dressed. He was given a paper and a pen and pressured to write a statement that his gay friends had raped him. He was also pressured to confess having distributed pornography. As the author continued to refuse to write, one of the police officers hit his head over the table. Another officer hit him on the right ear. The author’s sight became unclear, his ear started bleeding and he felt nauseated. He started feeling blunt pain in the back of his head. Later he felt shooting pains in his head. As he still refused to write a confession, one of the officers grabbed the metal pen and stuck it twice into his hand. The hand started bleeding. He was then thrown on the floor, kicked and punched on his back, liver area, chest and neck. Eight police officers were present during his interrogation. The author names three of them.

2.4 Several hours later, the author was taken to his apartment for a search. His friend K. was there. After the end of the search, the author and K. were pushed into a car, beaten, humiliated and threatened. They were brought back to the financial police department. K. was taken to another room, where he was beaten by six police officers, who were forcing him to write a complaint against the author. The author heard him scream. The officers held K. and said they were going to beat him until the author signed a confession. The author replied that he was not going to sign anything. After one of the police officers hit K. on the stomach, the author signed a confession to prevent his friend from being hurt. The author and K. were then kept in the financial police department and insulted until 2:30 am, when he was released.

2.5 On 2 November 2010, the author consulted a psychotherapist in the medical centre “Dar”, who prescribed him treatment against panic attacks. The author continuously experienced strong fear, suffered from headaches and insomnia, his hands were shaking, he had tears in his eyes, he lost appetite and felt cramping contractions in leg muscles. On 3 November 2010, the author consulted a local hospital, where he was diagnosed with “closed brain injury, brain concussion” and was directed for further consultations to a neuropathologist and oculist in the Republican Diagnostical Centre. These doctors observed the presence of bodily injuries, including a brain injury, and diagnosed the author with opticovascular syndrome.

2.6 On 4 November 2010, the author requested the Public Prosecutor’s Office of Bishkek to initiate criminal proceedings against seven financial police officers for his beatings, illegal arrest and seizure of his belongings of a total price of 22450 Kyrgyzstani Soms.[[3]](#footnote-4) In his complaint, he provided the full name of one of the police officers responsible for his torture and the first name of another. On the same day, the author’s friend K. also filed a complaint with the Public Prosecutor’s Office naming the same two police officers.

2.7 A forensic medical assessment was ordered by the prosecutor and carried out between 4 and 26 November 2010 by the Republican Bureau of Forensic Medicine. It concluded on the presence of bruises on the author’s parietal area, on his left forearm and on his lumber areas, which may have been caused by a hard blunt object at the time of the facts described in his complaint. The injuries suffered by the author were assessed as minor and not resulting in any short-term health impairment.

2.8 On 4 November 2010, the author consulted Bishkek Scientific and Research Centre of Traumatology and Orthopedy, where he underwent ambulatory treatment. Its discharge report dated 12 November 2010 stated that the author had presented a closed brain injury, a soft tissue contusion of the occipital area and soft tissue bruises. The author also holds a neuropathologist’s certificate diagnosing him with a closed brain injury and a brain concussion.

2.9 By an order of 30 November 2010, the Public Prosecutor’s Office of Bishkek refused to initiate criminal proceedings, citing the forensic medical assessment of 26 November 2010[[4]](#footnote-5), which had concluded that the author’s injuries were mild. It also referred to witness statements given by several financial police officers, including the one named in the author’s complaint, who claimed that no physical or psychological pressure had been exercised over the author and his friend K. The order concluded on the absence of any evidence of bodily injuries inflicted on the author and stated that the financial police officers had not exceeded their legal powers under the law “On Operative and Investigative Work”.

2.10 On 4 March 2011, the author was convicted by Oktyabrsky District Court under article 262 of the Criminal Code (production of pornographic literature, publications, images or other object of pornographic nature with the aim of their sales, distribution or advertising, as well as their sales and storage with the aim of sales) to a one-year suspended prison sentence. At his trial, he declared having signed a confession under torture, but the court did not take this into account. The verdict was confirmed on 26 July 2011 by Bishkeksky City Court.

2.11 On 13 May 2011, Pervomaysky District Court of Bishkek quashed the order of 30 November 2010 on refusal to initiate criminal proceedings. It referred to the forensic medical assessment of 4 November 2011 which had identified bodily injuries inflicted on the author at the time of the alleged abuse. The Court also cited the medical certificate issued by Bishkek Scientific and Research Centre of Traumatology and Orthopedy which diagnosed the author with a closed brain injury.

2.12 On 16 June 2011, the Public Prosecutor’s Office of Bishkek adopted another order refusing to initiate criminal proceedings. It stated that although the forensic medical assessment of 26 November 2020 had identified injuries on the author’s body, it had not examined the circumstances of their infliction. The order reiterated that the author’s claims of injuries were not confirmed by any evidence, thereby disregarding the forensic medical assessment and other medical certificates included into the case file. It cited testimonies of financial police officers who claimed that no violence had been exercised on the author. A reference was also made to the author’s conviction under article 262 of the Criminal Code.

2.13 The order of 16 June 2011 was not notified to the author within the legal deadlines. The author only obtained its copy in February 2012 after having complained to the Prosecutor General’s Office of Kyrgyz Republic. On 14 March 2012, he challenged this order with Pervomaysky District Court, referring to conclusions of the forensic medical assessment of 26 November 2010, which identified injuries on his body and on the body of his friend K., and to the report of Bishkek Scientific and Research Centre of Traumatology and Orthopedy. On 30 March 2012, Pervomaysky District Court rejected the author’s complaint arguing that the forensic medical assessment had assessed his injuries as mild. On 6 April 2012, the author appealed against this ruling. On 16 May 2012, Bishkeksky City Court rejected the author’s appeal.

2.14 In April 2012, the author underwent an examination, in compliance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), by independent experts in forensic medicine, psychology and psychiatry. Their report, adopted on 3 June 2012, concluded that the author had physical and psychological trauma resulting from his beatings in November 2010 and exhibited psychological symptoms typical of survivors of torture and cruel treatment. The report assessed that his claims of torture were highly probable.

2.15 On 24 July 2012, the author complained about inaction of the Public Prosecutor’s Office of Bishkek to the Prosecutor General’s Office of Kyrgyz Republic. On 26 July 2012, the Public Prosecutor’s Office of Kyrgyz Republic forwarded his complaint to the Prosecutor of Bishkek. By a letter of 8 August 2012, the Deputy Prosecutor of Bishkek informed the author that there were no grounds for quashing the order of 16 June 2011 refusing to initiate criminal proceedings.

2.16 On 21 August 2012, the author complained against the decision of 8 August 2012 of the Public Prosecutor’s Office in Bishkek to the Prosecutor General’s Office of Kyrgyz Republic. By a letter of 21 September 2012, the Prosecutor General’s Office of Kyrgyz Republic responded that the order of 16 June 2011 refusing to initiate criminal proceedings was well substantiated and there were no reasons for quashing it. It also referred to the judgement of 30 March 2012 of Pervomaysky District Court upholding this decision.

2.17 On 5 September 2012, the Supreme Court of Kyrgyz Republic rejected the author’s appeal for supervisory review against the rulings of Pervomaysky District Court of 30 March 2012 and of Bishkeksky City Court of 16 May 2012. The hearing in the Supreme Court took place in the absence of the parties despite the fact that on 29 August 2012, the author’s counsel had requested postponing the hearing. The Supreme Court observed that, based on the forensic medical assessment, the bodily injuries received by the author were minor, that the police officers interrogated by the Public Prosecutor’s Office of Bishkek had denied having applied to him physical force and that it was established that the police officers had not exceeded their legal powers. The Court did not accept a report of the Youth Human Rights Defense Group on the grounds that the assessment conducted by doctor E.Kh. was subjective.

2.18 The Public Prosecutor’s Office of Bishkek, the Prosecutor General’s Office of Kyrgyz Republic and the courts of all three instances simply copied each other’s reasoning and did not examine the author’s claims on the merits. His repeated complaints against torture were examined superficially and inefficiently. No necessary investigative measures, such as face-to-face confrontations, witness interrogations, etc., were conducted.

2.19 While the author was attempting to obtain initiation of criminal proceedings, financial police and prosecutorial authorities contacted journalists and had them publish “discriminatory” articles about the author.[[5]](#footnote-6) Two of them, titled “Got caught little gay, didn’t you?” and “Seller of gay porno undertook an attack against financial police”, appeared in “Vecherny Bishkek” newspaper on 5 November 2010 and 19 November 2010, following the author’s complaint to the Public Prosecutor’s Office. While the author was challenging the decision on refusal to initiate criminal proceedings in Bishkeksky City Court, financial police officers contacted the newspaper “Delo No”, which on 19 April 2012, published an article “Sexual minorities are becoming more aggressive…”, including a photo of the author’s face and his personal photos, and naming the author by his surname.

2.20 A report, dated 15 November 2014, by a Ukrainian forensic psychologiststates that the author exhibits symptoms of psycho-traumatic stress disorder, characteristic of people who have experienced a psychological trauma.

2.21 The author claims that he has exhausted all available domestic remedies. He recalls the Committee’s views on *Akhadov v. Kyrgyzstan*, which found that “supervisory review procedures against court decisions which have entered into force constitute an extraordinary appeal which is dependent on the discretionary power of a judge or prosecutor. When such review takes place, it is limited to issues of law only and does not permit any review of facts and evidence”.[[6]](#footnote-7)

 Complaint

3.1 The author claims that the State party violated his rights under article 7 of the Covenant by subjecting him to torture. He refers to medical certificates supporting his claims of torture delivered by the following medical experts and institutions: a psychotherapist of the medical centre “Dar”, a local hospital near the author’s place of residence, an oculist, a neurologist of the Medical Centre of Kyrgyz-Russian Slavic University, Bishkek Scientific and Research Centre of Traumatology and Orthopedy, the Republican Bureau of Forensic Medical Expertise, as well as a report of experts in forensic medicine, psychology and psychiatry of 3 June 2012.

3.2 The author submits that the State party has failed to ensure an immediate, impartial, thorough and effective investigation into torture, in violation of article 7 of the Covenant, taken in conjunction with its article 2 (3). He refers to the orders of 30 November 2010 and 16 June 2011 by which the Public Prosecutor’s Office of Bishkek refused to initiate criminal proceedings, stating that the author’s injuries were not supported by any evidence, relying on the testimonies of police officers who denied having applied physical violence and referring to the author’s criminal conviction. The author argues that these two orders demonstrate that the investigative authorities only created an appearance of an investigation, and his claims of torture were rejected on the grounds of his criminal conviction. The author complains against the lack of effective control over the Public Prosecutor’s Office by judicial authorities. He refers to the judgement of 16 May 2012 by which Bishkeksky City Court affirmed that the prosecutor had conducted a comprehensive and objective investigation, and to the judgement of 5 September 2012 of the Supreme Court of Kyrgyz Republic, which stated that the author’s injuries were mild and refused to take into consideration the medical assessment by doctor E.Kh.

3.3 The author submits that he was tortured not only to obtain a confession of an offense but also because of his belonging to the LGBT community, which amounts to violation of article 7 of the Covenant, in conjunction with its article 26.

3.4 The author claims that the State party has violated article 9 (1) of the Covenant because the authorities incited him to commit a criminal offense, illegally detained him and did not provide him with legal assistance. The author states that his detention in the financial police department for over 12 hours without any record and without access to counsel was illegal and arbitrary. He infers from the circumstances of his detention that the financial police had planned it in advance by luring him to commit an offence. The author claims violation of procedural guarantees for detained persons under articles 94 and 95 of the Criminal Procedure Code. He refers to the order on refusal to initiate criminal proceedings of 30 November 2010, which stated that the police officers’ acts had not exceeded their legal powers under the law “On Operative and Investigative Work”. This reference confirms, according to the author, that during his detention, he was deprived of protection of the Criminal Procedure Code.

3.5 The author argues that the State party has breached its obligations under article 14 (3) (g) by failing to conduct an effective investigation into the declaration he made during his trial about having been pressured to sign a confession under torture. The author submits that the judicial authorities did not give a proper assessment to his claims of torture and did not reflect his statements in their decisions. Consequently, his confession was used as a basis for his conviction, in violation of article 14 (3) (g).

3.6 The author claims that the State party has violated article 26 of the Covenant because he has been discriminated based on his belonging to the LGBT community. The author submits that he has openly revealed his sexual orientation during the investigation and in courts, which resulted in his discrimination by law enforcement and judicial authorities. He complaints about the fact that financial police officers and prosecutorial authorities incited mass media to publish discriminatory articles, thereby demonstrating their prejudice to his sexual orientation. As a result of this media coverage, the author was fired from his workplace, humiliated by his acquaintances, and lost many good friends.

3.7 The author asks the Committee to recommend to the State party to conduct an immediate, thorough and effective investigation into his torture and to bring the perpetrators to justice; to punish the public officials responsible for violation of his rights under article 9 of the Covenant in accordance with the national legislation; to review the author’s criminal conviction in another judicial process with guarantees of fair trial; to provide the author with full and adequate reparation, including compensation and rehabilitation; to establish an effective and independent mechanism for investigation of complaints against torture in accordance to the Istanbul Protocol.

**Additional submission of the author**

4.1 On 23 March 2016, the author provided the following additional explanations. He states that he has attempted challenging the orders refusing to initiate criminal proceedings in national jurisdictions because pre-investigative inspection conducted by law enforcement authorities had not been thorough. Even though the authorities had established beyond doubt the presence of injuries on his body, the inspection did not establish the circumstances of their infliction. Neither the Prosecutor’s Office nor the jurisdictions (Pervomaysky District Court, Bishkeksky City Court and the Supreme Court of Kyrgyz Republic) took into consideration the evidence provided by the author, such as the assessment conducted by the expert E.Kh. for Youth Human Rights Defense Group and the witness statements of K., who claimed having been submitted to pressure and torture by the finance police at the same time as the author. The author claims having attempted all existing judicial and hierarchical remedies at the national level to complain against the lack of effective investigation.

4.2 The author adds that the human rights situation of LGBT people in the State party is “catastrophic”. The society, which in its majority adheres to traditional views on relations between men and women, is hostile towards people who identify as LGBT. The government has repeatedly discussed adopting a draft law against “gay propaganda”. In 2015, the office of an LGBT organization in Bishkek was set on fire and there were physical attacks against participants of an anti-homophobia and anti-transphobia event. The author believes that not only he has exhausted all available domestic remedies but any further attempts for him to raise his claims at national level would be dangerous for his life.

 State party’s observations on the merits

5.1 In its observations on the merits dated 10 June 2019, the State party informed the Committee that the author had been arrested on 30 October 2010 by officers of the Directorate of the State Service of Financial Police (UGSFP) in Bishkek during a controlled purchase operation, while the author was selling 99 CDs for 10 000 Kyrgyzstani Soms to the officer A.S. On the same day, during a search in his apartment, a computer “Pentium-3” and 316 DVDs were discovered containing films of pornographic nature, as well as 144 announcements about sales of gay films.

5.2 The State party submits that the court found the author guilty on the basis of his own partial confession, witness statements of A.S., material evidence, a criminal psychological evaluation and a report of the “Republican Scientific and Industrial Laboratory of Forensic Expertise of Almaty city of the Republic of Kazakhstan”. By a verdict of Oktyabrsky District Court of 4 March 2011, the author was recognized guilty of an offense under article 262 of the Criminal Code (production and sales of pornographic objects) and given a one-year suspended prison sentence. The verdict was upheld by Bishkeksky City Court on 26 July 2011 and Supreme Court of Kyrgyz Republic on 12 April 2012.

5.3 On 4 November 2010, the Public Prosecutor’s Office of Bishkek received complaints from the author and K. who requested that measures be taken against officers of UGSFP in Bishkek who had inflicted them bodily injuries when transferring them to UGSFP administrative building. Following an inspection, on 16 June 2011, a prosecutor of the Public Prosecutor’s Office of Bishkek M.K. adopted an order refusing to initiate criminal proceedings due to absence of *corpus delicti*. The author challenged this order in Pervomaysky District Court in Bishkek. However, on 30 March 2012, the Court rejected his complaint. The Court’s ruling was upheld by Bishkeksky City Court on 16 May 2012 and by the Supreme Court of Kyrgyz Republic on 5 September 2012.

5.4 The State party submits that it is unable to provide any further information because in 2016, the case file related to the refusal to initiate criminal proceedings was destroyed due to expiration of its storage period.

**The author’s comments on the State party’s observations on the merits**

6.1 In its comments on the State party’s submissions, dated 20 August 2019 and received by post on 26 August 2019, the author notes that the State party has not provided any clear response to the substance of his communication.

6.2 The author recalls that in his communication, he claimed violation by the State party of its obligations under article 7 of the Covenant, taken in conjunction with its article 26, because of his torture based on discrimination. The State party does not negate these claims and informs the Committee that on 30 October 2010, the author was arrested by financial police officers. The State party then enumerates the acts incriminated to the author and the decisions of national jurisdictions on his criminal case. It appears that the State party justifies the illegal acts of the financial police officers by the “proven” guilt of the author.

6.3 The author reiterates that the State party has not ensured an immediate, impartial, thorough and effective investigation into his torture with elements of discrimination. The State party has not provided any argument against or in favour of his alleged discrimination. The author concludes that his allegations of torture based on discrimination because of his belonging to the LGBT community have not been effectively investigated.

6.4 The author claims that there are no effective remedies against torture in the State party. Prosecutorial authorities can hardly be viewed as an effective remedy for investigating allegations of torture because of the conflict of interests between their investigative and supervisory powers, coupled with their exclusive investigative competence over torture cases. Criminal proceedings for torture committed during pre-investigative inspections by officers of internal affairs bodies cast a shadow over the effectiveness of supervisory control over operative and investigative measures performed by prosecutorial authorities. There is also a conflict of interests between, on one hand, supporting the public accusation against the accused in the main trial and, on the other, examining his or her claim of torture made in court. If the claims of the accused about torture are confirmed, evidence obtained under torture cannot be admitted. In the absence of other evidence, the accused would be absolved. This would result in a negative performance indicator for prosecutorial authorities and may lead to a criminal prosecution of the supervising prosecutor for illegal initiation of criminal proceedings and illegal indictment. Furthermore, investigation of torture and other crimes committed by public officers is currently within the competence of the State Committee on National Security, mandated to defend the security of the country, which is a punitive political instrument unable to investigate affairs related to human rights.

6.5 The author reiterates his claims about absence of effective investigation into his allegations of torture and about the failure by prosecutorial and judicial authorities to take into account the assessment made by the expert E.Kh and the witness statements of K.

6.6 The author maintains his claims of violation of article 7 of the Covenant, taken alone and in conjunction with article 26, and of its articles 9 (1) and 14 (3) (g).

6.7 In relation to the State party’s statement about the destruction of his case file, the author submits that his communication was registered by the Committee in 2016. In his opinion, the destruction of his case file suggests that the State party cannot provide any substantial arguments to refute his allegations of torture and discrimination. The information provided by the State party demonstrates its unwillingness to critically assess the work of law enforcement and judicial authorities, recognize violation of the right not to be submitted to torture and to remedy the violations of the author’s rights, including sanctioning the responsible financial police officers and providing him compensation for moral prejudice and rehabilitation.

 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 The Committee takes note of author’s allegations, under article 14 (3) (g) of the Covenant, that judicial authorities disregarded his declaration of having signed a confession under torture and used this confession as a basis for his criminal conviction. The Committee observes however that, as the author admits himself, judicial decisions on his criminal case do not mention his declaration of torture made during his trial. Furthermore, the material before the Committee does not reveal that a confession allegedly signed by the author under torture was used as evidence against him in court. To the contrary, it appears from the judgement of 26 July 2011 of Bishkeksky City Court, enclosed into the communication, that the author’s conviction was based on other pieces of evidence, both material and testimonial. Therefore, the Committee considers that the author has failed to sufficiently substantiate his claims under article 14 (3) (g) for the purposes of admissibility. Accordingly, it concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.4 The Committee notes the author’s argument that he has been discriminated by judicial authorities based on his sexual orientation. The Committee observes however that the author does not provide any further substantiation for this claim. Therefore, it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7.5 The Committee considers that the author has sufficiently substantiated his other claims under articles, 2 (3), 7, 9 (1) and 26 of the Covenant. Therefore, and in absence of any arguments from the State party against the admissibility of the communication, the Committee declares these claims admissible and proceeds with their examination of the merits.

*Considerations of the merits*

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

8.2 The Committee notes the author’s claims under article 7 of the Covenant, taken alone and in conjunction with its articles 2 (3) and 26, related to his alleged torture in the financial police department in Bishkek on 30-31 October 2010, aimed at extracting a confession, forcing him to incriminate other individuals and discriminating him based on his sexual orientation, and to a lack of effective investigation into these acts. The Committee notes that the State party refutes the author’s claims by referring to an order of 16 June 2011 by which the Public Prosecutor’s Office of Bishkek refused to initiate criminal proceedings due to lack of *corpus delicti* and to decisions by judicial authorities upholding this order.

8.3 The Committee recalls its consistent jurisprudence that criminal investigation and consequential prosecution are necessary remedies for violations of human rights, such as those protected by article 7 of the Covenant.[[7]](#footnote-8) States parties have a duty to investigate, in good faith and in a prompt and thorough manner, all allegations of serious violations of the Covenant that are made against them and their authorities.[[8]](#footnote-9) The Committee further recalls that the burden of proof concerning factual questions cannot rest on the authors of the communication alone, especially considering that the authors and the State party do not always have equal access to evidence and that frequently the State party alone has access to relevant information, especially when the injuries allegedly occur in situations where the authors are detained by the State party authorities.[[9]](#footnote-10) In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider the author’s allegations as substantiated in the absence of satisfactory evidence or explanations to the contrary by the State party.[[10]](#footnote-11)

8.4 The Committee notes that the State party does not refute the author’s claim that he was detained by the financial police at the time of his alleged torture. The Committee further notes that the official forensic medical assessment conducted between 4 and 26 November 2010 identified the presence of injuries on the author’s body which could have been inflicted at the time of the author’s detention. The Committee further notes that the author has provided to the prosecutorial and judicial authorities a number of other medical certificates, obtained shortly after his alleged torture, which conclude that the author suffered serious injuries, such as a closed brain injury and a brain concussion. In these circumstances, the Committee considers that the order of 16 June 2011 of the Public Prosecutor’s Office of Bishkek refusing to initiate criminal proceedings on the grounds that the author’s claims of injuries are not supported by any evidence, as well as judicial decisions upholding this order, were not adopted following a thorough investigation. Another indication of the lack of a thorough and impartial investigation is that the order of 16 June 2011 is based exclusively on statements of the alleged perpetrators of torture and fails to take into account the testimony of K., who was detained by financial police officers at the same time as the author and also submitted a criminal complaint of ill-treatment. With regard to the State party’s reference to the author’s criminal conviction, which also appears in the reasoning of the order of 16 June 2011 on the refusal to initiate criminal proceedings, the Committee recalls that the prohibition of torture is absolute and not subject to any restrictions or derogation. In light of the above, the Committee concludes that the investigation into the allegations of torture was not carried out promptly or effectively, despite the detailed account by the author of the torture he suffered, concurring witness statements of K. and multiple medical certificates supporting the author’s claims. Accordingly, the Committee considers that that the facts before it disclose a violation of the authors’ rights under article 7, alone and in conjunction with article 2 (3).

8.5 The Committee takes note of the author’s claim that the State party has violated article 9 (1) of the Covenant because his arrest was planned in advance and resulted from the financial police inciting him to commit a criminal offense which he would have not otherwise committed. The Committee notes that the author also claims violation of article 9 (1) because he was detained for over 12 hours without any record, without access to counsel and in violation of procedural guarantees foreseen for persons deprived of liberty under the Criminal Procedure Code. The Committee recalls that an arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.[[11]](#footnote-12)

8.6 The Committee observes that police instigation to commission of criminal offenses is generally incompatible with fair trial guarantees.[[12]](#footnote-13) Though in the present case, the author does not claim violation of article 14 of the Covenant in relation to his conviction based on evidence obtained by police entrapment, he claims nevertheless that his arrest was arbitrary, in the sense of article 9 (1), because it resulted from his commission of a criminal offense under police instigation. The Committee notes that the State party acknowledges the author’s detention by financial police on 30 October 2010 during a controlled purchase operation and does not refute the author’s claim that he would have not otherwise committed the offense under article 262 of the Criminal Code if he had not been incited to it by financial police. In these circumstances and absent of any justification by the State party of the police operation in question, the author’s arrest presents signs of arbitrary detention. In light of the above and of the fact that the State party does not refute the author’s allegation that he was held in the financial police premises for 12 hours without his arrest being properly registered and recorded and without access to a counsel, the Committee considers that the author’s rights under article 9 (1) of the Covenant have been violated.

8.7 In relation to the author’s claims under article 26 of the Covenant, read alone and in conjunction with its article 7, the Committee recalls that article 26 not only entitles all persons to equality before the law as well as equal protection of the law, but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[[13]](#footnote-14) The prohibition against discrimination under article 26 also extends to discrimination based on sexual orientation and gender identity. [[14]](#footnote-15) The Committee further recalls that in cases of alleged discrimination, the burden of proof may be partially shifted to the State party.[[15]](#footnote-16) In this regard, the States parties to the Covenant are expected to conduct an effective investigation into possible discriminatory motives behind acts of violence when there is clear evidence of such motives.[[16]](#footnote-17)

8.8 Though it does not appear from the material before the Committee that the author has complained of discrimination on the basis of sexual orientation before national prosecutorial and judicial authorities, the judgement of 30 March 2012 of Pervomaysky District Court refers to an explanatory note written by the author on 4 November 2010 in which he stated that the financial police officers had beaten him for a long time “forcing him to confess having distributed pornography of homosexual content”. An explanatory note by K., dated 4 November 2010 and addressed the Public Prosecutor of Bishkek was also provided, in which K. declared having been pressured by the financial police officers to sign a declaration that both he and the author were gays and to write denunciations against other homosexual men. Furthermore, the Committee observes that the author provides copies of three media articles referring to his sexual orientation published while he was attempting to initiate criminal proceedings in relation to his maltreatment by financial police officers. The first two appeared on 5 and 19 November 2010, shortly after he filed a criminal complaint with the Public Prosecutor’s Office of Bishkek on 4 November 2010. The third publication appeared on 19 April 2012, shortly after the author introduced his appeal to Bishkeksky City Court, on 6 April 2012. The Committee observes that these media articles include details about preparation and execution of the police operation which resulted in the author’s arrest, photos taken during this operation and quotes of financial police officers involved in the operation. It therefore appears that financial police officers contributed to preparation of these publications. The Committee observes that the articles adopt a derogatory, sarcastic and disapproving language towards the author based on his sexual orientation. The Committee notes that the articles were published at three different times, each new publication containing information about further developments of the author’s attempts to initiate criminal proceedings against the financial police officers whom he accuses of torture. In view of the above, the Committee considers that domestic prosecutorial and judicial authorities failed to take into account clear signs of discriminatory motives behind the alleged violence imposed on the author by financial police officers, in violation of article 26 taken alone and in conjunction with article 7 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 7, read alone and in conjunction with articles 2 (3) and 26; articles 9 (1) and 26, of the International Covenant on Civil and Political Rights.

10. 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 to take appropriate steps to: (a) conduct a prompt investigation that is effective and thorough, impartial and independent, and transparent into the allegations of torture and arbitrary detention suffered by the author as well as into the alleged discrimination of the author based on his sexual orientation; (b) prosecute, try and punish those responsible for the violations committed; and (c) award the author comprehensive compensation and provide him with appropriate medical and psychological rehabilitation. The State party is also under an obligation to take steps to prevent similar violations 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 and enforceable 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. The State party is also requested to publish the Committee’s Views and to have them widely disseminated in the official language of the State party.

1. \* Adopted by the Committee at its 138th session (26 June – 26 July 2023). [↑](#footnote-ref-2)
2. \*\* The following members of the Committee participated in the examination of the communication: [Tania María Abdo Rocholl,](https://www.ohchr.org/Documents/HRBodies/CCPR/Membership/CV_ABDO_ROCHOLL.docx) Farid Ahmadov, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Laurence R. Helfer, Carlos Gómez Martínez, Bacre Waly Ndiaye, Marcia V.J. Kran, Hernán Quezada Cabrera, José Manuel Santos Pais, Chongrok Soh, Tijana Surlan, Kobauyah Tchamdja Kpatcha, Koji Teraya, Hélène Tigroudja and Imeru Tamerat Yigezu. [↑](#footnote-ref-3)
3. The complaint mentioned the seizure of a smartphone, a bag, a wallet, a processor Pentium 3, a printer, a passport, a foreign passport and a registration certificate. [↑](#footnote-ref-4)
4. The same forensic medical assessment, conducted between 4 and 26 November 2010, is alternatively referred to by one of these dates. [↑](#footnote-ref-5)
5. Copies of three articles are included into the communication. [↑](#footnote-ref-6)
6. *Otabek Akhadov v. Kyrgyzstan* (CCPR/C/101/D/1503/2006), para. 6.3. [↑](#footnote-ref-7)
7. [General comment No. 20](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCCPR%2FGEC%2F6621&Lang=en) (1992), para. 14; General comment No. 31 (2004) ([CCPR/C/21/Rev.1/Add. 13](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F21%2FRev.1%2FAdd.13&Lang=en)), para. 18; *Boyarkin and T.P. v. Kyrgyzstan* ([CCPR/C/130/D/2432/2014](https://juris.ohchr.org/casedetails/3434/en-US)), para. 7.3; *Abdurasulov et al. v. Kyrgzystan* ([CCPR/C/135/D/3200/2018-3207/2018](https://juris.ohchr.org/casedetails/3645/en-US)), para. 7.4. [↑](#footnote-ref-8)
8. *Boboev v. Tajikistan* ([CCPR/C/120/D/2173/2012](https://undocs.org/Home/Mobile?FinalSymbol=CCPR%2FC%2F120%2FD%2F2173%2F2012&Language=E&DeviceType=Desktop&LangRequested=False)), para. 9.3; *Abdurasulov et al. v. Kyrgzystan* ([CCPR/C/135/D/3200/2018-3207/2018](https://juris.ohchr.org/casedetails/3645/en-US)), para. 7.4. [↑](#footnote-ref-9)
9. *Abdurasulov et al. v. Kyrgzystan* ([CCPR/C/135/D/3200/2018-3207/2018](https://juris.ohchr.org/casedetails/3645/en-US)), para. 7.5. [↑](#footnote-ref-10)
10. *V.M. v. Sri Lanka* (CCPR/C/137/D/2406/2014), para. 8.3. [↑](#footnote-ref-11)
11. General Comment No. 35 (CCPR/C/GC/35), para. 12. [↑](#footnote-ref-12)
12. See, among others, ECHR, *Teixeira de Castro v. Portugal*, applications 44/1997/828/1034, 9 June 1998, paras 31-39; ECHR, *Akbay and others v. Germany*, applications nos. 40495/15 and 2 others, 15 October 2020, paras 111-149; ECHR, *Nikolov v. Austria*, application no. 48105/16, 24 January 2023, paras. 5-10. See also UNODC, *Human Rights and Criminal Justice Responses to Terrorism*, pp. 89-94 (<https://www.unodc.org/documents/terrorism/Publications/Module_on_Human_Rights/Module_HR_and_CJ_responses_to_terrorism_ebook.pdf>); OSCE, *Human Rights In Counter-Terrorism Investigations*, pp. 40-45 (<https://www.osce.org/files/f/documents/5/f/108930.pdf>). [↑](#footnote-ref-13)
13. [General comment No. 18](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCCPR%2FGEC%2F6622&Lang=en) (1989), para. 1. [↑](#footnote-ref-14)
14. *X v. Colombia* ([CCPR/C/89/D/1361/2005](https://documents-dds-ny.un.org/doc/UNDOC/DER/G07/418/84/PDF/G0741884.pdf?OpenElement)), para. 7.2; *Nikolai Alekseev v. Russian Federation* ([CCPR/C/130/D/2727/2016](https://juris.ohchr.org/casedetails/3297/en-US)), 7.12; *Ruslan Savolaynen v. Russian Federation* ([CCPR/C/135/D/2830/2016](https://juris.ohchr.org/casedetails/3605/en-US)), para. 7.15; *Sasha Maimi Krikkerik v. Russian Federation* (CCPR/C/137/D/2992/2017), para. 9.8. [↑](#footnote-ref-15)
15. *Muller and Engelhard v. Namibia*, CCPR/C/74/D/919/2000, para. 6.7. [↑](#footnote-ref-16)
16. See *Sasha Maimi Krikkerik v. Russian Federation* (CCPR/C/137/D/2992/2017), para. 9.8 [violent acts against participants of an LGBT pride parade, accompanied by anti-LGBT slogans, with police having reported animosity of the perpetrators to defenders of the LGBT cause]; ECHR, *Stoica v. Romania*, application no. 42722/02, 4 March 2008, paras. 121-124 [the prosecutor having disregarded stereotypical remarks from a police report describing the victim’s acts as “purely Gypsy”]; ECHR, *Makhashevy v. Russia*, application no. 20546/07, 31 July 2012, paras. 176-179 [verbal ethnic insults by the police towards the victims supported by witness statements, differentiated treatment of the victims by the police compared to other individuals of another ethnicity in the similar situation.] [↑](#footnote-ref-17)