



# 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. 2384/2014\*, \*\*

<i>Communication submitted by:</i>	Zhanysbek Khalmamatov, represented by Utkir Dzhabbarov
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kyrgyzstan
<i>Date of communication:</i>	13 September 2012 (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 30 April 2014 (not issued in document form)
<i>Date of adoption of Views:</i>	13 March 2020
<i>Subject matter:</i>	Torture; arbitrary detention; denial of fair trial
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Torture; lack of investigation; arbitrary detention; denial of fair trial
<i>Articles of the Covenant:</i>	2 (3) (a), 7, 9 (1), (3) and (4) and 14 (3) (b), (d) and (g)
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1. The author is Zhanysbek Khalmamatov, a national of Kyrgyzstan born in 1971. He claims to be a victim of a violation by Kyrgyzstan of his rights under article 7, read alone and in conjunction with article 2 (3) (a), and articles 9 (1), (3) and (4) and 14 (3) (b), (d) and (g) of the Covenant. The Optional Protocol entered into force for the State party on 7 January 1995. The author is represented by counsel.

\* Adopted by the Committee at its 128th session (2–27 March 2020).

\*\* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Christof Heyns, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.



**The facts as submitted by the author**

2.1 On 16 May 2009, a friend of the author died in a traffic accident.<sup>1</sup> The author was arrested as a suspect by the traffic police and brought to the Suzak district police station at 2.40 a.m. on 17 May 2009. He was held there until 4 p.m. the next day, while being subjected to repeated beatings by four police officers asking him to confess to having run over his friend with a car and fleeing the scene. He was hit and kicked in the head, chest, stomach and feet, including with a police baton, after which the officers took off his shoes, held him face down on a table and started beating his heels with a baton. Unable to bear the pain from the beatings, the author confessed to the crimes.

2.2 On 18 May 2009, the Suzak district prosecutor saw the author in the basement of the police station, and the author complained to him about the beatings he had suffered.<sup>2</sup> On the same day, the author was released, and the Suzak district prosecutor's office ordered a forensic medical examination of his injuries. On 19 May 2009, the author was sent by the forensic expert to the department of urology of the Zhalal-Abad regional hospital in order to undergo an examination, owing to the pain in his kidneys. Later that day, the author was taken by the police from the hospital to the Suzak district police station, where he was officially declared a suspect in the traffic accident that had resulted in the death of his friend. While at the police station, the author's condition deteriorated, and he was again taken to the department of urology of the Zhalal-Abad regional hospital. On 20 May 2009, the author was transferred to the Suzak district hospital and placed in the guarded ward, where he was interrogated by the police.

2.3 On 21 May 2009, the author was formally charged with accidentally running over his friend with a car. On the same date, the Suzak district court ordered the author's detention on remand. The author claims that the judge failed to examine the lawfulness of his arrest and ordered his detention, despite the investigator not being able to present any evidence that the author could abscond or obstruct the investigation. On 2 June 2009, the Zhalal-Abad regional court quashed the Suzak district court ruling to detain the author and ordered him to be placed under house arrest. On 9 July 2009, the Supreme Court of Kyrgyzstan reversed the ruling of the Zhalal-Abad regional court and ordered that the author be detained on remand. On 15 July 2009, the author was detained and placed in a temporary detention facility.

2.4 On 3 June 2009, the Suzak district prosecutor's office opened a criminal investigation into the author's ill-treatment by unknown police officers on charges of abuse of power. Two forensic medical examinations were performed, and both determined that the author had sustained various injuries which corresponded to the time of his detention at the Suzak district police station.<sup>3</sup> On 31 July 2009, the Suzak district prosecutor's office closed its investigation into the beatings, due to the lack of corpus delicti. The case was transferred to the Suzak district police department for further inquiry,<sup>4</sup> but the police department suspended the case on 3 August 2009, due to the absence of known perpetrators. After the author appealed the suspension of the case to the Office of the Prosecutor General on 19 August 2009, the Zhalal-Abad regional prosecutor's office quashed the two previous decisions by the district authorities and reopened the criminal investigation into the author's beatings. On 16 and 17

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<sup>1</sup> According to the author, on 16 May 2009, he and his friend, K, were drinking alcohol near a gas station when K left in search of a bathroom, was hit by an unknown vehicle and later died. The driver of the vehicle did not stop after hitting K and drove away. The author got into his own car and tried to chase the vehicle, but he hit an oncoming car.

<sup>2</sup> No details were provided.

<sup>3</sup> The submitted documents indicate that the first forensic medical examination, conducted on 18 May 2009, could not determine the time of occurrence or the severity of the injuries, and it was the recommendation of the examiner that a second examination be conducted to answer those questions. The conclusions were that the injuries had been caused by contact with blunt, hard objects with a limited contact surface, but it could not be excluded that they could have been caused by a car accident or by a fall. The second forensic examination was conducted on 24 June 2009 and was based on the results of the first examination and photographs of the author's injuries. The author himself was not examined. The second examination confirmed the injuries to the author's chest, back, ankle, heels, buttocks and kidney. It concluded that the injuries had most likely been caused by police batons or similar objects during the time when the author was being held in police custody.

<sup>4</sup> No further details were provided.

October 2009, the four police officers named by the author were officially charged with causing injuries, abuse of power and the unlawful arrest of the author. The author claims that, due to the delay, the authorities failed to question key witnesses and to seize important evidence, such as checking for traces of his blood in the room where he was tortured and on the clothing of the police officers, which could have been vital to his case in the trial against them.

2.5 On 4 May 2011, the Suzak district court found the four police officers not guilty of abuse of power, owing to lack of evidence. During the trial, the author's wife testified that she saw several police officers beating her husband at the police station on 18 May 2009. However, the court held that there were inconsistencies in her testimony and that she was attempting to cover up for her husband. There were two more witnesses, the author's brother and another relative, who testified that the author had told them, on 18 May 2009, that he had been beaten by the police and that the named police officers had subsequently offered to pay the author money if he would withdraw the complaint that he had lodged with the prosecutor's office about the beatings. With regard to the injuries disclosed, the trial court held that the conclusions of the second forensic medical examination were not correct, given that they had contradicted the circumstances of the case and the examination was conducted on the basis of the results of the first examination and photos of the author's injuries, rather than an examination of him in person. With regard to the author's detention at the Suzak district police station from 2.40 a.m. on 17 May 2009 to 4 p.m. on 18 May 2009, the court held that the author was lawfully held in connection with the car accident that he had caused earlier, because the police needed to gather all facts and evidence. On 12 August 2011, the Zhalal-Abad regional court upheld the decision of the Suzak district court. On 8 December 2011, the Supreme Court of Kyrgyzstan upheld the decisions of the Suzak district court and the Zhalal-Abad regional court.

2.6 On 23 March 2011, the Suzak district court found the author guilty of causing the death of his friend and sentenced him to nine years' imprisonment. Despite the author claiming that his confession was obtained through torture, the court retained it in evidence and it formed a basis for its verdict and ruled that the author's claim of torture was an attempt to avoid criminal liability. On 14 May 2011, the Zhalal-Abad regional court upheld the decision of the Suzak district court. On 12 October 2011, the Supreme Court of Kyrgyzstan upheld the decisions of the Suzak district court and the Zhalal-Abad regional court. On an unspecified date, the author was released owing to the passing of a general amnesty act.

2.7 The author submits that he has exhausted all available and effective domestic remedies.

### **The complaint**

3.1 The author claims that the police tortured him while he was in detention between 17 and 18 May 2009, in order to force him to confess to causing the death of his friend. The State party has failed to effectively investigate the circumstances of his detention and treatment, which is in violation of article 7, read alone and in conjunction with article 2 (3) (a), and article 14 (3) (g) of the Covenant. According to the author, both forensic medical examinations confirmed that he had received injuries during the time when he was in police custody, and the second examination concluded that the injuries were most likely caused by objects similar to police batons. Despite the facts that he was found by the district prosecutor in the basement of the police station on 18 May 2009 with visible injuries confirmed by hospital records and that he named all four police officers who had tortured him, the domestic authorities did not commence an official investigation into his beatings until 3 June 2009, and the perpetrators were not charged until 16 October 2009. The author refers to the facts that his own trial concluded before the trial of the police officers and that the same prosecutor prosecuted his case and the case against the four police officers. The author claims that the prosecutor concerned could not be impartial in pursuing the charges against the police officers, because their conviction for beatings and forced confession would have negatively affected the author's conviction.

3.2 The author claims that his arrest and detention on remand, as well as the fact that the judge who decided on his detention failed to examine the lawfulness of his arrest, were in violation of article 9 (1), (3) and (4) of the Covenant.

3.3 The author further claims that the State party has violated his rights under article 14 (3) (b) and (d) of the Covenant by failing to assign him a lawyer until he was brought before a judge on 21 May 2009, although he had been interrogated on several occasions between 17 and 21 May 2009. He submits that the police report of his arrest dated 20 May 2009 was submitted by the police both at his trial and at the trial of the four police officers. The copy of the report submitted at his trial contains a note by the investigator that the author's lawyer had refused to sign the report. However, the copy of the same report submitted by the police in the trial of the four police officers does not have the same note by the investigator. The author argues that such a discrepancy shows that his arrest report was falsified and that, on 20 May 2009, he did not have a lawyer.

#### **Lack of cooperation by the State party**

4. By notes verbales of 30 April 2014, 18 February 2015, 20 November 2015 and 5 January 2016, the Committee requested the State party to submit to it information and observations on the admissibility and the merits of the present communication. The Committee notes that such information has not been received. The Committee regrets the State party's failure to provide any information with regard to the admissibility or the merits of the author's claims. It recalls that article 4 (2) of the Optional Protocol obliges States parties to examine in good faith all allegations brought against them and to make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that they have been properly substantiated.<sup>5</sup>

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

5.1 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.

5.2 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.

5.3 The Committee takes note of the author's claims concerning the failure of the State party to provide him with legal assistance. The Committee observes, however, that those claims do not appear to have been raised at any point in the domestic proceedings. That part of the communication, raising issues under article 14 (3) (b) and (d) of the Covenant, is accordingly declared inadmissible for failure to exhaust all domestic remedies in accordance with article 5 (2) (b) of the Optional Protocol.

5.4 The Committee also takes note of the author's claims under article 9 of the Covenant. The Committee considers that the author has failed to sufficiently substantiate those allegations, for the purposes of admissibility, however, and finds them inadmissible under article 2 of the Optional Protocol.

5.5 In the Committee's view, the author has sufficiently substantiated his claims under article 7, read alone and in conjunction with article 2 (3) (a), and article 14 (3) (g) of the Covenant, for the purposes of admissibility. It therefore declares those claims admissible and proceeds with its consideration of the merits.

##### *Consideration of the merits*

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

6.2 The Committee takes note of the author's claims that, while he was in detention between 17 and 18 May 2009, four police officers tortured him and forced him to confess to

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<sup>5</sup> See, for example, *Sannikov v. Belarus* (CCPR/C/122/D/2212/2012), para. 4.

running over his friend with a car and that the State party has failed to effectively investigate his allegations of torture. In that regard, the Committee notes that the author provides a detailed account of the different types of torture to which he was subjected and the names of the police officers responsible for those acts. The Committee also notes that the copies of the forensic medical examinations confirm that the author sustained various injuries, whose occurrence coincides with the time of his detention at the Suzak district police station. The Committee observes that, although the domestic courts decided that the conclusions of the second forensic examination, which contained the most detailed answers to the questions concerning the time of occurrence, severity and cause of the author's injuries, were not correct, they provided no explanation as to the origin of the injuries in question.

6.3 The Committee recalls that a State party is responsible for the security of any person it holds in detention and that, when an individual in detention shows signs of injury, it is incumbent upon the State party to produce evidence showing that it is not responsible.<sup>6</sup> The Committee has held on several occasions that the burden of proof in such cases also cannot rest with the author of a communication alone, especially considering that frequently only the State party has access to the relevant information.<sup>7</sup> In the absence of any observations by the State party to counter the claims made by the author, the Committee decides that due weight must be given to the author's allegations.

6.4 Regarding the State party's obligation to properly investigate the author's claims of torture, the Committee recalls its jurisprudence according to which criminal investigation and consequential prosecution are necessary remedies for violations of human rights, such as those protected by article 7 of the Covenant.<sup>8</sup> The Committee also recalls that, once a complaint about ill-treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially so as to make the remedy effective.<sup>9</sup> In the present case, the Committee notes that, on 18 May 2009, the author lodged a complaint with the Suzak district prosecutor's office containing allegations of torture that and he immediately named all of the perpetrators and underwent a medical examination of his injuries on the following day. Despite that and the fact that the second medical examination concluded that the injuries had most likely been caused by police batons or similar objects around the time when the author was held in police custody, the Suzak district prosecutor's office and the Suzak district police department both opted to close the investigation, citing a lack of corpus delicti and the absence of known perpetrators. The Committee observes that, although the formal investigation into the allegations commenced on 3 June 2009, the perpetrators were not criminally charged until 16 October 2009. In that regard, the Committee takes note of the author's claim that, owing to the delay in launching the investigation and bringing charges, the authorities failed to seize important evidence, such as checking for traces of his blood in the room where he was tortured and on the clothing of the police officers, which could have been vital in the trial against them.

6.5 The Committee observes that, at the author's trial, despite the author's claims to the effect that his confession was obtained through torture, the court ruled that the confession was not coerced, and the author's claim of torture was found to constitute a defence strategy aimed at avoiding criminal liability. By the time the trial of the four police officers began, therefore, the Suzak district court had already made its determination as to how the author's confession had been obtained. The Committee takes note of the author's allegation that, given that the same prosecutor participated in both trials, he could not have been impartial in pursuing the charges against the police officers, because their convictions for beatings and extracting a forced confession would have negatively affected the author's conviction.

<sup>6</sup> See, for example, *Eshonov and 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.

<sup>7</sup> See, for example, *Mukong v. Cameroon* (CCPR/C/51/D/458/1991), para. 9.2; and *Belier v. Uruguay*, communication No. 30/1978, para. 13.3.

<sup>8</sup> See the Committee's general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, para. 14; and general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 18.

<sup>9</sup> See the Committee's general comment No. 20, para. 14; and, for example, *Neporozhnev v. Russian Federation* (CCPR/C/116/D/1941/2010), para. 8.4.

Taking into account all of the foregoing considerations, and considering the State party's failure to provide an explanation, the Committee concludes that the State party has not effectively investigated the author's allegations of torture and that the facts before it disclose a violation of the author's rights under article 7, read alone and in conjunction with article 2 (3), of the Covenant. Considering the State party's failure to provide an explanation with regard to the extraction of the forced confession, the Committee concludes that the facts before it disclose a violation of article 14 (3) (g) of the Covenant.

7. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the information before it discloses a violation by the State party of the author's rights under article 7, read alone and in conjunction with article 2 (3), and article 14 (3) (g) of the Covenant.

8. 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. That requires it to make full reparation to individuals whose Covenant rights have been violated. In the present case, the State party is under an obligation, *inter alia*: (a) to quash the author's conviction; (b) to conduct a thorough and effective investigation into the author's allegations of torture and, if confirmed, prosecute, try and punish those responsible; and (c) to provide the author 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.

9. 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 or 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 present Views and to have them widely disseminated in the official languages of the State party.

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