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Agenda item 9

Consideration of communications under the Optional Protocol to the Covenant

Communication No. 1547/2007

Views adopted by the Committee on 27 October 2011, 103rd session

<i>Submitted by:</i>	Munarbek Torobekov (represented by counsel, Nurbek Toktakunov)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kyrgyzstan
<i>Date of communication:</i>	12 April 2006 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 6 March 2007 (not issued in document form)
<i>Date of adoption of Views:</i>	27 October 2011
<i>Subject matter:</i>	Failure to promptly bring a person detained on a criminal charge before a judge; court proceedings in violation of fair trial guarantees
<i>Substantive issues:</i>	Arbitrary arrest and detention; right to be brought promptly before a judge; right to a fair hearing by an independent and impartial tribunal; right to be presumed innocent; right to adequate time and facilities for the preparation of defence; right to be tried without undue delay; right to legal assistance; right to obtain the attendance and examination of witnesses; arbitrary interference with one's home

* Made public by decision of the Human Rights Committee.

<i>Procedural issue:</i>	Non-substantiation of claims
<i>Articles of the Covenant:</i>	9, paragraphs 1 and 3; 14, paragraphs 1, 2, 3(b), (c), (d), (e); and 17, paragraph 1
<i>Article of the Optional Protocol:</i>	2

On 27 October 2011, the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1547/2007.

[Annex]

Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights (103rd session)

concerning

Communication No. 1547/2007**

Submitted by: Munarbek Torobekov (represented by counsel, Nurbek Toktakunov)

Alleged victim: The author

State party: Kyrgyzstan

Date of communication: 12 April 2006 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 October 2011,

Having concluded its consideration of communication No. 1547/2007, submitted to the Human Rights Committee by Munarbek Torobekov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Munarbek Torobekov, a Kyrgyz national born in 1966. He claims to be a victim of violations by Kyrgyzstan of his rights under article 9, paragraphs 1 and 3; article 14, paragraphs 1, 2, 3(b), (c), (d), (e); and article 17, paragraph 1, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 7 January 1995. The author is represented by counsel, Nurbek Toktakunov.

Factual background

2.1 The author submits that, in the morning of 25 April 2003, several police officers from the Crime Detection Unit of the Pervomaysky District Department of Internal Affairs (District Department), led by Mr. Zh.O., entered his apartment in Bishkek. It appears that,

** The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Rafael Rivas Posada, Mr. Fabian Omar Salvioi, Mr. Krister Thelin and Ms. Margo Waterval.

as soon as the author opened the door and was asked by a police officer about a television set, the author immediately pointed to a box standing near the entrance that contained the television set. When the author tried to prevent police officers from coming inside, Mr. Zh.O. showed his police card and warned the author that in case of resistance the police would use force against him. When the author requested to see the search warrant, he was told by Mr. Zh.O. that there was no need for one. Mr. Zh.O. seized the television set and drew up a report of discovery and seizure to certify it. The television set's serial number was not included in the report, despite the author's request to do so. He was not provided with a copy of the report.¹

2.2 On the same day, the author, his girlfriend and an acquaintance, Mr. T.B., were brought to the District Department and interrogated. Subsequently, the investigator of the District Department, Ms. T.I., initiated criminal proceedings under article 167, part 3 (robbery), of the Criminal Code; the author and Mr. T.B. were arrested and interrogated as suspects in this criminal case in the absence of a lawyer. The author testified that the television set was given to him by Mr. A.R. as compensation for the beating of the author's girlfriend, as she needed money for medical treatment. The author submits that, prior to the interrogation, their rights as suspects were not explained to them. However, the arrest report of 25 April 2003 that bears the author's signature, states that he had familiarised himself with the report and that his rights and duties provided for under article 40 of the Criminal Procedure Code had been explained to him.

2.3 Later that day, Mr. A.R. and his mother, Ms. T.R., were interrogated by the investigator as victims and testified that, at around 3 a.m. on 25 April 2003, the author had taken away their television set by force. They refused, however, to undergo a forensic medical examination that was necessary in order to corroborate this assertion. The author submits that the interrogation report does not include the description of the television set in question and its serial number. The same day, the investigator ordered Mr. A.R. and Ms. T.R. to undergo a forensic medical examination, without, however, allowing the author and Mr. T.B. to familiarize themselves with the respective orders. Upon arrival of the author's privately hired lawyer, who was also representing Mr. T.B., at the District Department, the investigator referred to her workload and scheduled interrogation for the next day, i.e., 26 April 2003, although she had already interrogated the author and Mr. T.B. in the absence of their lawyer.

2.4 On 26 April 2003, the investigator postponed the interrogation to 28 April 2003, allegedly because the suspects were not transported from the temporary confinement ward (IVS).² On the same day, counsel tried to meet with his clients in the IVS but he was refused access on the basis of article 17 of the law "On the procedure and conditions of detention of persons suspected and accused of having committed crimes," pursuant to which administration, heads and staff of the confinement institutions should allow the suspects and accused persons to meet with their lawyers only when presented with a written authorization given by the prosecutor or investigator. The author claims that his lawyer was unable to receive such an authorization as the registry of the District Department was closed on Saturday, whereas the registry stamp was necessary for an authorization to be considered as an official document.

2.5 On 28 April 2003, the author's lawyer was taken to the hospital. He notified the investigator in charge of the case about the hospitalization and requested her to assign another lawyer to his clients, pursuant to the requirements of article 46 of the Criminal

¹ The report of discovery and seizure of 25 April 2003 bears the author's signature.

² Изолятор временного содержания (ИВС) is an institution for confinement of individuals who are suspected of, but not yet charged with, having committed a crime.

Procedure Code. On the same day, the investigator returned the television set to Ms. T.R. without registering its serial number in the material evidence examination report. Later that day, the author and Mr. T.B. were charged with premeditated robbery, the use of non-lethal force or threat thereof and entry into a dwelling. The author and Mr. T.B. were subsequently interrogated by the investigator in their capacity of accused in the absence of a lawyer. Their placement in custody was authorized by the Prosecutor of the Pervomaysky District on 28 April 2003. As transpires from the decision of the Prosecutor of the Pervomaysky District, the author's placement in custody was necessary, because of a previous conviction and a risk that he could abscond if released.

2.6 On 4 May 2003, that is 9 days after the incident and 8 days after the ordering of a forensic medical examination, Mr. A.R. and Ms. T.R. were examined by a medical expert. On 13 May 2003, the investigator carried out a confrontation between the author and Ms. T.R. in the absence of a lawyer. On 19 May 2003, the medical expert concluded that there were light injuries, such as bruises and scratches, on the bodies of Mr. A.R. and his mother. The author submits that neither he nor his co-accused was informed about the conclusions of the forensic medical examination.

2.7 On 28 May 2003, the author's lawyer (who had then left the hospital) complained to the investigator that his clients had not been assigned another lawyer. On 28 May 2003, the investigator in the case, Ms. T.I., resigned and, on 11 June 2003, the case was reassigned to another investigator. On 18 June 2003, the author's lawyer requested the new investigator, Mr. M.N., to interrogate his clients in his presence and to carry out a confrontation between Mr. A.R. and his clients. The request of the author's lawyer to carry out the confrontation was rejected by the investigator on 21 June 2003, allegedly due to his inability to establish the victims' whereabouts.

2.8 As transpires from the decision of the investigator of 21 June 2003, the author's lawyer had not presented himself on 28 April 2003 for the scheduled interrogation of his clients, without, however, informing the investigator, Ms. T.I., about the reasons for his absence. Due to the unavailability of an *ex officio* lawyer on call, it was not possible for the investigator to assign a new lawyer to the author and Mr. T.B. On an unspecified date, the new investigator, Mr. M.N., questioned the first investigator, Ms. T.I., who stated that, on 25 April 2003, the lawyer of the author and Mr. T.B. instructed his clients to testify in his absence and told them that he would be able to sign the interrogation reports at a later stage. At around 4 p.m. on 28 April 2003, the lawyer called the investigator and informed her that he was unable to represent his clients due to the hospitalization and that he would send another lawyer to replace him. The replacement lawyer, however, did not appear and an *ex officio* lawyer on call was unavailable. In the circumstances, the investigator had no other choice but to carry out the investigative actions in the absence of a lawyer.

2.9 On 21 June 2003, the author and his co-accused were interrogated by the new investigator in the presence of their lawyer and were informed of the conclusions of the forensic medical examination of Mr. A.R. and his mother.

2.10 On 24 June 2003, the investigation was completed. The author's lawyer examined the content of the criminal case file and requested the investigator to close the criminal case, because the television set was seized unlawfully as a result of an unauthorized search of the author's apartment by police officers and, thus, the material evidence had no evidential value. He also considered that the conclusions of the forensic medical examination did not have any evidential value either as the examination was conducted in violation of the procedural requirements. Furthermore, his clients were only shown the conclusions of the medical examination on 21 June 2003, whereas these conclusions had been ready on 19 May 2003.

2.11 On 25 June 2003, the investigator rejected the request of the author's lawyer of 24 June 2003. As transpires from the decision of the investigator of 25 June 2003, reference was made to article 8 of the law "On Investigation and Search Operations," which provides for the possibility of "examining" the dwellings of individuals suspected of having committed crimes by inquiry officers with the aim of finding the traces of the crimes. This law is based on the Constitution and does not interfere with the right of inviolability of one's home. Inquiry officers had, according to the decision, entered the author's apartment with the permission of its inhabitants and did not use any force or other violence in the course of the "examination".

2.12 On an unspecified date, the author's criminal case was transmitted to the Pervomaysky District Court of Bishkek. On 14 October 2003, before the start of the trial, the author's lawyer requested the court to recognise the material evidence as having no evidential value due to the fact that it was acquired unlawfully. On 14 October 2003, the Pervomaysky District Court dismissed this request without giving any grounds for its decision. On the same day, it interrogated the author and his co-accused, who testified that Mr. A.R. and Ms. T.R. had voluntarily given away their television set, as compensation for the beating of the author's girlfriend. In addition, the author testified that he did not give permission to the police officers to enter his apartment and that he was not presented with any documents authorizing their entry into his apartment. Also on the same day, Ms. T.R. stated in court that her son had left for Russia and had no intention to appear before the court and testify.

2.13 On 14 October 2003, the Pervomaysky District Court returned the case to the Prosecutor of the Pervomaysky District in order for him to provide "further proofs of the defendants' guilt" and "to ensure the appearance of Mr. A.R. before the court". The author's lawyer requested the release of his clients from custody. The court refused to change the measure of restraint applied in relation to the author and Mr. T.B. and considered that their placement in custody was necessary, because they had previous convictions and could abscond if released. Furthermore, they have been charged with having committed a particularly serious crime,³ whereas under article 110, part 2, of the Criminal Procedure Code "placement in custody may be applied to persons accused of having committed a particularly serious crime on a sole ground of gravity of the crime committed".

2.14 On 25 December 2003, the trial of the author and Mr. T.B. resumed in the Pervomaysky District Court, but Mr. A.R. did not appear in court. The author's lawyer again requested the release of his clients from custody but his request was again rejected on the same grounds. Due to the absence of Mr. A.R., the Pervomaysky District Court decided to postpone the hearing. On 5 January 2004, Mr. A.R. again did not appear in court. On the same day, the judge of the Pervomaysky District Court ordered the Prosecutor of the Pervomaysky District to ensure the appearance of Mr. A.R. in court by 9 January 2004, stating that "it was impossible to take any decision on the substance of the case without having heard the victim's testimony".

2.15 On 9 January 2004, the appearance of Mr. A.R. in court was still not ensured by the prosecution, and the court decided to examine the case in his absence. Mr. Zh.O., the police officer who seized the television set on 25 April 2003, was interrogated by the court and testified that although the search of the author's apartment had not been authorized, the

³ According to article 13 of the Criminal Code, particularly serious crimes are premeditated crimes punishable by more than 10 years' imprisonment or the death penalty. The author was charged under article 167, part 3, of the Criminal Code with having committed a premeditated crime punishable by 7 to 12 years' imprisonment and seizure of property.

author on a voluntary basis has given him a permission to enter his apartment. The prosecutor then asked the Pervomaysky District Court to proceed with the hearing and suggested to read in court the testimony given by the alleged victims during the preliminary investigation. The author's lawyer submits that he "had to agree" with the continuation of the trial in the absence of the victim, so as to not to continue his client's pre-trial custody indefinitely. The court then read out the victim's testimony given during the preliminary investigation. The author submits that in his statement, the prosecution claimed that the guilt of the author and Mr. T.B. has been proven by the victims' testimony and other case materials collected during the investigation.

2.16 On 14 January 2004, the author's lawyer requested the Pervomaysky District Court to acquit his clients and to send the case for further investigation, because (1) the television set was seized unlawfully as a result of an unauthorized search of the author's apartment by police officers and, thus, the material evidence had no evidential value; (2) the conclusions of the forensic medical examination did not have any evidential value, as the examination was conducted in violation of the procedural requirements; and (3) the court was unable to interrogate Mr. A.R., who, according to the author and Mr. T.B., could have given testimony exonerating them. The court dismissed the arguments of the author's lawyer in relation to the evidential value of the seized television set and the conclusions of the forensic medical examination, by establishing that the author himself showed and surrendered the television set to police officers and that the arguments concerning the conclusions of the medical examination were groundless. On the same day, the Pervomaysky District Court found the author and Mr. T.B. guilty under article 168 (robbery with violence) of the Criminal Code and sentenced them to 6⁴ and 8 years' imprisonment, respectively.

2.17 As transpires from the judgment of the Pervomaysky District Court of 14 January 2004, reference was made to article 61 of the Criminal Code, which provides for a deduction of the length of pre-trial detention from the overall length of imprisonment imposed by the court. Pursuant to this provision, one day of the author's pre-trial detention corresponds to two days of imprisonment in the high security prison.

2.18 On 14 January 2004, the author's lawyer submitted an appeal to the Bishkek City Court against the judgment of the Pervomaysky District Court. The appeal was dismissed on 11 March 2004 by the Judicial Chamber for Criminal Cases of the Bishkek City Court. On 25 May 2004, the Judicial Chamber for Criminal and Administrative Cases of the Supreme Court upheld the judgment of the Pervomaysky District Court of 14 January 2004 and the ruling of the Bishkek City Court of 11 March 2004 through the supervisory review procedure.

The complaint

3.1 The author claims to be a victim of violations by Kyrgyzstan of his rights under article 9, paragraphs 1 and 3; article 14, paragraphs 1, 2, 3(b), (c), (d), (e); and article 17, paragraph 1, of the Covenant.

3.2 In relation to article 9, paragraph 1, of the Covenant, the author claims that from the moment of his arrest, he was suspected of having committed a particularly serious crime and, therefore, pursuant to the requirements of article 46 of the Criminal Procedure Code, he should have been provided with a lawyer from the moment of his arrest. Contrary to this requirement, he was arrested, interrogated and charged with having committed a

⁴ On 30 November 1995, the author was sentenced to six years' imprisonment by the Pervomaysky District Court and, therefore, on 14 January 2004, the same court concluded that there was a repeat commission of an offence by the author.

particularly serious crime in the absence of a lawyer. The author adds that the Prosecutor of the Pervomaysky District did not ensure that his placement in custody was authorized in accordance with law, although the absence of the lawyer's signature was evident from the case materials.

3.3 In addition, any detention should be necessary and just. In the present case, there was no need to deprive the author of his liberty, as it was possible to ensure his presence in investigative and judicial proceedings through less severe restraint measures. Furthermore, the authorities have not provided any proof in support of their assertion that the author would abscond or commit other crimes if released. Additionally, as argued by the author's lawyer in court, he "had to agree" with the continuation of the trial in the absence of the victim, so as not to continue his client's pre-trial custody indefinitely. On two occasions, the author's lawyer had requested the Pervomaysky District Court to release the author, but his requests were denied. Under article 339, part 2, of the Criminal Procedure Code, the ruling of the first instance court on the application of the measure of restraint is final and could not be appealed.

3.4 The author claims that, contrary to article 9, paragraph 3, of the Covenant, the State party's law does not require that anyone arrested or detained on a criminal charge be brought promptly before the judge. His placement in custody was authorized by a prosecutor, who cannot be considered independent. Furthermore, under article 9, paragraph 3, the placement in custody is an exceptional measure. The Pervomaysky District Court, however, has twice rejected the requests of the author's lawyer to release his client, on the sole ground of gravity of the committed crime (see para. 2.13 above). The author submits that it would be ineffective to raise his claims under article 9, paragraph 3, before the domestic courts, because in the absence of relevant domestic law, the courts would be unable to enforce his rights guaranteed under article 9, paragraph 3, of the Covenant. Thus, there are no domestic remedies to exhaust for the claims under this provision of the Covenant.

3.5 The author claims that he is a victim of a violation of article 14, paragraph 2, of the Covenant. At the stage of preliminary investigation and in court, the author's lawyer challenged the evidential value of the conclusions of the forensic medical examination and of the seized television set. The State party's law requires the suspects and defendants to be informed of the day of the expert examination in order to allow them to be present, ask additional questions to the expert and challenge the conclusions. The investigator ordered the forensic medical examination of Mr. A.R. and Ms. T.R. on 25 April 2003 but did not inform the author and Mr. T.B. of the respective orders, thus, making it impossible for them to exercise their rights. The author and Mr. T.B. were informed by the investigator about the orders to conduct the forensic medical examination and the conclusions thereof only on 21 June 2003, when they were no longer able to challenge the conclusions. Moreover, the television set was seized unlawfully as a result of an unauthorized search of the author's apartment by police officers; its serial numbers and special features were not registered anywhere, which made it impossible for the author to prove that police officers had seized a television set that did not belong to the victims. The right to be presumed innocent until proven guilty requires that all doubts be interpreted in the defendant's favour. Despite the absence of Mr. A.R. in court, the Pervomaysky District Court based its decision on his testimony given during the preliminary investigation. By having interpreted all doubts about the author's guilt in favour of the prosecution, and placed the burden of proof on him to prove his innocence, the State party's courts have violated article 14, paragraph 2, of the Covenant.

3.6 On 26 April 2003, the author's lawyer was unable to meet with his client, because under the law "On the procedure and conditions of detention of persons suspected and accused of having committed crimes" the administration, heads and staff of the

confinement institutions should allow the suspects and accused persons to meet with their lawyers only when presented with a written authorization given by the prosecutor or investigator. The author claims that the above-mentioned law itself is in violation of article 14, paragraph 3(b), of the Covenant.

3.7 The author submits that the preliminary investigation and court proceedings in his case took a total of 10 months and 16 days. He claims, therefore, that his right under article 14, paragraph 3(c), of the Covenant to be tried without undue delay was violated.

3.8 The author claims that from 28 April to 23 May 2003, he was unable to prepare for his defence and to consult with his lawyer, as the investigator did not assign him another lawyer while the lawyer of his choosing was in the hospital. As a result, he was formally arrested, interrogated, charged and placed in custody in the absence of his lawyer, contrary to article 14, paragraphs 3(b) and (d), of the Covenant.

3.9 The author claims that the prosecution's inability to ensure the appearance of Mr. A.R. in court, despite his and his lawyer's numerous requests resulted in a violation of his right to examine the witnesses against him and to obtain the attendance and examination of witnesses on his behalf, guaranteed under article 14, paragraph 3(e), of the Covenant.

3.10 Article 14, paragraph 1, provides for the right to a fair and public hearing by the competent, independent and impartial tribunal. Impartiality, inter alia, implies that the court act as a referee between the prosecution and defence. However, in the author's case, the court clearly acted in favour of the prosecution, at times even fulfilling its tasks.

3.11 As to the claim under article 17, paragraph 1, the author points out that the television set was seized unlawfully as a result of an unauthorized search of his apartment by police officers. However, all his and his lawyer's complaints related to this unlawful interference were rejected on the grounds that no search had taken place, since the author himself had opened the door of his apartment and showed the television set to police officers. The author argues that that it is irrelevant for the purposes of article 17 of the Covenant whether his apartment was searched or "examined", since in any case the police needed to enter the apartment in order to seize the television set. He adds that the State party's courts could have ensured the right of inviolability of his home, by ruling that the seized television set could not be used as material evidence, since it was obtained unlawfully.

State party's failure to cooperate

4. By notes verbales of 6 March 2007, 28 April 2008, 1 October 2009 and 1 September 2010, the State party was requested to submit to the Committee information on the admissibility and merits of the communications. On 20 December 2010, a copy of the initial submission of 12 April 2006 in its entirety was retransmitted to the State party upon its request of 9 December 2010. The Committee notes, however, that the requested information has not been received from the State party. The Committee regrets the State party's failure to provide any information with regard to admissibility or the substance of the author's claims. It recalls that under the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that it may have taken. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.⁵

⁵ See communications No. 1208/2003, *Kurbonov v. Tajikistan*, Views adopted on 16 March 2006, para. 4; Nos. 1209/2003, 1231/2003 and 1241/2004, *Sharifova et al. v. Tajikistan*, Views adopted on 1 April 2008, para. 4; Nos. 1461, 1462, 1476 and 1477/2006, *Maksudov et al. v. Kyrgyzstan*, Views adopted on 16 July 2008, para. 9.

Issues and proceedings before the Committee

Consideration of admissibility

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

5.2 The Committee has ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. In the absence of any State party objection, the Committee considers that the requirements of article 5, paragraph 2(b), of the Optional Protocol have been met.

5.3 The Committee notes the author's claim that his rights under article 9, paragraph 1, and article 14, paragraphs 3(b) and (d), of the Covenant were violated, because he was formally arrested, interrogated, charged and placed in custody in the absence of his privately hired lawyer. The Committee also notes that, as transpires from the decision of the investigator of 21 June 2003 (see para. 2.8 above), the absence of the author's lawyer on 25 April 2003 and 28 April 2003 can at least in part be attributed to the lawyer himself. Furthermore, on 21 June 2003, the author and his co-accused were interrogated by the new investigator in the presence of their lawyer and were informed of the conclusions of the forensic medical examination of Mr. A.R. and his mother. In the circumstances, the Committee considers that these claims are inadmissible as insufficiently substantiated for purposes of admissibility under article 2 of the Optional Protocol.

5.4 With respect to the author's allegations under article 14, paragraphs 1, 2 and 3(e), the Committee observes that these complaints refer primarily to the appraisal of evidence adduced at the trial. It recalls⁶ that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice. In the present case, the Committee is of the view that the author has failed to demonstrate, for purposes of admissibility, that the conduct of the criminal proceedings in his case in fact suffered from such defects. It consequently considers that this part of the communication is insufficiently substantiated, for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

5.5 The Committee also notes the author's argument that he is a victim of a violation of article 14, paragraph 3(b), of the Covenant, because he could not meet with his lawyer on 26 April 2003, because of the lawyer's inability to comply with the requirements of the law "On the procedure and conditions of detention of persons suspected and accused of having committed crimes." The Committee notes, however, that the author does not explain how this affected the determination of the criminal charges against him. It concludes, therefore, that the author has failed to sufficiently substantiate, for purposes of admissibility, this part of the communication. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

⁶ See, inter alia, communications No. 541/1993, *Errol Simms v. Jamaica*, decision of inadmissibility adopted on 3 April 1995, para. 6.2; No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision of inadmissibility adopted on 2 November 2004, para. 7.3; No. 886/1999, *Bondarenko v. Belarus*, Views adopted on 3 April 2003, para. 9.3; No. 1138/2002, *Arenz et al. v. Germany*, decision of inadmissibility adopted on 24 March 2004, para. 8.6; the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 26, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI.

5.6 As to the author's claim under article 14, paragraph 3(c), concerning the alleged unreasonable delay of 10 months and 16 days between his arrest on 23 April 2003 and the ruling of the Judicial Chamber for Criminal Cases of the Bishkek City Court of 11 March 2004, after which his sentence became executory, the Committee notes that official charges were brought against the author on 28 April 2003 and that he was convicted on 14 January 2004. The Committee observes that the author has not presented sufficient information to indicate why he considers this delay excessive.⁷ In the light of the information before the Committee, it finds that this claim is insufficiently substantiated and therefore declares it inadmissible under article 2 of the Optional Protocol.

5.7 Finally, with regard to the author's allegations under article 17, paragraph 1, of the Covenant, the Committee notes the vagueness of these claims in relation to the lawfulness or otherwise of the entry or search or examination of the author's apartment by police officers and to the author's consent or lack thereof for such actions. For this reason, the Committee is unable to conclude that these allegations are sufficiently substantiated, for purposes of admissibility. Accordingly, the Committee considers this part of the communication inadmissible under article 2 of the Optional Protocol.

5.8 The Committee considers that the author's remaining claims under article 9, paragraph 3, of the Covenant, have been sufficiently substantiated, for purposes of admissibility, and proceeds to their examination on the merits.

Consideration of the merits

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

6.2 The Committee notes the author's claim that his rights under article 9, paragraph 3, of the Covenant, have been violated, as his placement in custody was authorized by a prosecutor who cannot be considered independent. In this respect, the Committee recalls its jurisprudence⁸ that paragraph 3 of article 9 entitles a detained person charged with a criminal offence to judicial control of his/her detention. It is generally admitted in the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. In the circumstances of the case, the Committee finds that the public prosecutor cannot be characterized as having the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3, and, therefore, concludes that there has been a violation of this provision.

6.3 The Committee further notes that, according to article 9, paragraph 3, anyone detained on a criminal charge is entitled to trial within a reasonable time or to release. The Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.⁹ In the present case, the Pervomaysky District Court has determined that the author's placement in custody was necessary, because he was charged

⁷ See communication No. 1338/2005, *Kaldarov v. Kyrgyzstan*, Views adopted on 18 March 2010, para. 7.8.

⁸ See, inter alia, communications No. 521/1992, *Kulomin v. Hungary*, Views adopted on 22 March 1996, para. 11.3; No. 1218/2003, *Platonov v. Russian Federation*, Views adopted on 1 November 2005, para. 7.2; No. 1348/2005, *Ashurov v. Tajikistan*, Views adopted on 20 March 2007, para. 6.5; *Kaldarov v. Kyrgyzstan* (note 7 above), para. 8.2.

⁹ See communications No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002, para. 8.2; No. 1014/2001, *Baban v. Australia*, Views adopted on 6 August 2003, para. 7.2.

with a particularly serious crime, had been previously convicted and that, therefore, there was a concern that he might abscond if released. While the author submits that he should have been released pending trial, he does not allege that the justification put forward by the Pervomaysky District Court for his placement in custody was inappropriate. The Committee also notes that the length of the author's pretrial detention was deducted from the overall length of his imprisonment imposed by the Pervomaysky District Court at a ratio of one to two days (see para. 2.17 above). For these reasons, the Committee finds that the length of the author's pretrial detention cannot be deemed unreasonable and that, consequently, there is no violation of article 9, paragraph 3, in this respect.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is therefore of the view that the facts before it disclose a violation of the author's right under article 9, paragraph 3, of the Covenant.

8. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, in the form of appropriate compensation. The State party is also under an obligation to take all necessary steps to prevent similar violations 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 or not 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 in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views and to have them translated into the official language and widely distributed.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
