



International Covenant on Civil and Political Rights

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Human Rights Committee

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

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

1. The authors of the communication are Alimzhon Saidarov, Avaz Davudov, Erkin Vasilov and Khikmatillo Erbabaev, Kyrgyz citizens, born in 1969, 1969, 1974 and 1991, respectively. The authors claim that the State party has violated their rights under article 7, read in conjunction with articles 2 (3), 9 (1) and (2), 10 (2) (a), 14 (3) (d) and 26 for Mr. Saidarov; articles 9 (1), 14 (3) (d) and 26 for Mr. Davudov; articles 9 (1), 14 (3) (d) and 26 for Mr. Vasilov and articles 9 (1) and (2), 14 (3) (d) and 26 of the Covenant for Mr. Erbabaev. Although the authors, with the exception of Mr. Saidarov, have not formally

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

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



claimed violations of article 7 of the Covenant, facts as submitted by Mr. Davudov, Mr. Vasilov and Mr. Erbabaev give rise to such allegations. The Optional Protocol entered into force for the State party on 7 January 1995. The authors are represented by counsel, Valeryan Vakhitov.

The facts as submitted by the authors

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

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

2.3 On 20 June 2010, Mr. Erbabaev returned to the city of Osh from the village of Sura-Tash, to which he and his family had fled to escape the riots. At around 5.30 p.m., he went to meet Mr. Vasilov. Both men were arrested at that time and brought to the Osh branch of the National Security Service. They both had to stand facing the wall for half a day and were beaten on the back, kidneys and head to coerce them into confessing to a crime. Mr. Erbabaev was later tortured to force him to confess to a crime he had not committed.

2.4 Mr. Erbabaev was detained on 20 June 2010 at 5.30 p.m. and initially questioned as a witness. It was only on the morning of 22 June 2010 that his detention as a suspect was registered by an investigator from the National Security Service, in the absence of a lawyer representing Mr. Erbabaev. On 23 June 2010, the Osh city court decided to detain Mr. Erbabaev, pending trial. On 13 August 2010, the investigator in charge of Mr. Erbabaev's case dismissed all charges against him, except for failure to report a crime, an offence under article 339 (1) of the Criminal Code.

2.5 Mr. Erbabaev submits that, under national legislation, there was no requirement to place persons accused of the above-mentioned crime in pretrial detention. Mr. Erbabaev was not released pending trial despite having a permanent address and remained in detention until 26 August 2010. On 21 January 2011, Osh city court sentenced Mr. Erbabaev to one year of imprisonment, to be served in a settlement colony. On 26 May 2011, following a supervisory protest brought by the prosecutor's office, the Osh regional court overturned the initial verdict, and requested the Osh city court to conduct a rehearing of the case. On 16 September 2011, the Supreme Court of Kyrgyzstan reviewed that decision under its supervisory review procedure, and upheld the initial verdict and the sentence handed down by Osh city court in their entirety.

2.6 Mr. Davudov submits that he was first detained and questioned as a witness on 22 June 2010. His detention as a suspect was formalized and registered approximately five hours after his initial detention. On 24 June 2010, the court ordered the author to be placed in pretrial detention. The author was detained at the National Security Service detention facility in Osh until 26 August 2010, when he was transferred to pretrial detention facility (SIZO) No. 25, where he was held until 1 February 2011, pending trial.¹ On 21 January 2011, the author was sentenced to five years of imprisonment for kidnapping and possessing an illegal weapon. As with Mr. Erbabaev, in Mr. Davudov's case the verdict and sentence were first overturned by the Osh regional court, but were later upheld by the Supreme Court.

2.7 Mr. Saidarov was also detained on 22 June 2010 by the National Security Service. He did not resist arrest, but was nevertheless subjected to violent force. He was also forced

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

to stand with his face to the wall while unidentified officers took turns to beat him on the back, head and other parts of the body. As a result, he suffered several broken ribs, as confirmed in a medical certificate dated 6 October 2012. He could not eat for two weeks, and only drank water. He was afraid to complain about the torture and mistreatment he experienced for fear of reprisals. Although Mr. Saidarov was initially detained and questioned as a witness, he was subsequently arrested as a suspect, approximately two hours after he was initially taken into custody.

2.8 On 23 June 2010, the court decided to place Mr. Saidarov in pretrial detention. He was charged with kidnapping, illegal detention and participation in mass riots. Mr. Saidarov was held at a National Security Service detention facility in Osh until 26 August 2010, when he was transferred to pretrial detention facility (SIZO) No. 25, where he was detained until 1 February 2011. On 21 January 2011, Osh city court sentenced Mr. Saidarov to five years of imprisonment.

2.9 Mr. Vasilov was detained on 20 June 2010. He was taken to the first floor of the National Security Service building in Osh, where he was forced to stand with his face to the wall while several unidentified officers beat him. He was then taken to an office in the building, where six unidentified officers interrogated him about alleged killings and possession of weapons. He was then undressed and beaten again. Unidentified officers placed a plastic bag over Mr. Vasilov's head, causing him to suffocate and lose consciousness.

2.10 Mr. Vasilov further submits that, on 21 June 2010, he was formally interrogated as a witness. On 23 June 2010, his status was changed to a suspect and his detention was authorized by a court. The author claims that he had no access to a lawyer during the entire interrogation process. Mr. Vasilov, together with his co-defendants, namely the co-authors of the present communication, requested the court's permission to call their own witnesses, who would provide important evidence for the defence. The court rejected their request. At the end of the trial, Mr. Vasilov was sentenced to three years of imprisonment.

The complaint

3.1 Mr. Saidarov submits that the beatings and torture he suffered at the police station amounted to a violation of article 7 of the Covenant, read in conjunction with articles 2 (3) and 10 (2). In their complaints to the Committee, Mr. Davudov, Mr. Vasilov and Mr. Erbabayev also refer to beatings and ill-treatment, without formally claiming violations of specific articles of the Covenant. Mr. Saidarov further submits that he has never raised a complaint with the State party relating to torture or ill-treatment for fear of reprisals.²

3.2 The authors submit that, in its decision of 23 June 2010 on pretrial detention measures, Osh city court had failed to evaluate the necessity and legality of their custody, in violation of article 9 of the Covenant. The authors further submit that the Committee's Views in *Kulov v. Kyrgyzstan*, whereby the Committee found a violation of article 9 (1), as "the investigators had absolutely no evidence" that the author "wanted to escape or to obstruct the inquiries" and affirmed that "remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances", apply to their case. Referring to the Committee's Views in *Mukong v. Cameroon*, which confirmed that "arbitrariness" must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, the authors claim that their detention was arbitrary, in violation of article 9 of the Covenant.

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

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

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

3.5 The authors claim that, given their Uzbek ethnicity, the fact that the criminal proceedings related to the conflict between Kyrgyz and Uzbek communities and the aggrieved party was of Kyrgyz ethnicity, as were all representatives of the authorities participating in the criminal proceedings against the authors, amounts to discrimination, which is prohibited under article 26 of the Covenant.

State party's observations on admissibility and the merits

4.1 In its observations dated 29 October 2014, the State party submits that, during the events of June 2010, when inter-ethnic violence erupted in and around the city of Osh, much government-owned and private property was burned and destroyed. The authors of the communication took an active part in these events, specifically by illegally detaining two Kyrgyz citizens at Mr. Saidarov's residence in Osh and using violence against them.³

4.2 On 21 January 2011, Mr. Saidarov and Mr. Vasilov were sentenced to three years of imprisonment; Mr. Erbabaev was sentenced to one year of imprisonment and Mr. Davudov was sentenced to five years of imprisonment. On 3 March 2011, the Osh city prosecutor's office brought a supervisory review protest before the Osh regional court. The regional court, in its decision of 26 May 2011, sent the case back to the Osh city court for a new trial.

4.3 The counsel for the defence disagreed with the decision of the Osh regional court and brought a supervisory review request procedure before the Supreme Court, on the grounds that the alleged victims and the defendants had reconciled and the victims had no claim to compensation. The counsel for the defence asked the Supreme Court to uphold the ruling of the court of first instance.

4.4 The Supreme Court ruled that the court of first instance had taken all relevant evidence into consideration, and upheld the initial conviction. By asking the Supreme Court to uphold the lower court's verdict and sentence, the defendants admitted their guilt. The arguments presented by the authors in their communication to the Committee contradict the content and substance of the supervisory review request submitted to the Supreme Court.

4.5 The State party also submits that all the authors had opportunities to submit their complaints regarding torture and mistreatment to the State authorities, but failed to do so.

4.6 The State party further submits that, under article 59 of the Criminal Procedure Code, the courts can consider compensation for cases of illegal indictment, arbitrary detention or persecution. This is applicable when the criminal charges are dismissed or the defendant is acquitted. Since the authors have raised no complaints and have been found guilty by the courts, the issue of compensation cannot be considered.

Additional observations by the authors

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

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

5.3 During the hearings, the authors asked the court to issue a summons for one of the officers, Z.K., who had come to Mr. Saidarov's house. The court denied their request, claiming that the officer in question was in Bishkek at the time.

³ The State party provides no further information.

5.4 The State party contends that the authors have raised no complaints alleging torture or ill-treatment. However, the authors submit that their relatives complained⁴ to the authorities about the torture suffered by the authors at the hands of law enforcement officers. In response to these complaints, the authorities only responded that they had identified no violations.⁵ On 16 December 2010, Mr. Erbabaev complained during the court hearings that National Security Service officers had tortured him in detention.⁶ Mr. Davudov complained that he had been beaten by officers. The court and the prosecutor's office chose to ignore these complaints.

5.5 In addition, a group of human rights defenders met with the Prosecutor General of Kyrgyzstan on 11 August 2011.⁷ During the meeting, they complained about the authors' illegal detention and the use of force during their arrest. The State party did not conduct an investigation into those claims.⁸

5.6 The authors further submit that the court hearing to determine pretrial detention measures was held in the offices of the National Security Service. During these so-called hearings, the prosecutor who asked the judge to detain the authors pending trial hit Mr. Saidarov in the stomach and the back. Given this atmosphere of fear, the authors realized that it was futile and dangerous to complain about torture to the very people who tortured them.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee considers that the State party does not directly challenge the admissibility of the present communication, but notes its argument that the authors raised no complaints with the national courts and authorities relating to torture and ill-treatment. The Committee observes that the authors provided copies of complaints regarding torture and ill-treatment submitted by their relatives to the domestic authorities, and notes that the State party did not investigate these claims promptly and impartially. Additionally, one of the authors, Mr. Erbabaev, complained during the court hearings about the torture he had suffered at the hands of National Security Service officers. Accordingly, in the absence of any clear and coherent arguments from the State party regarding the admissibility of the present communication, the Committee concludes that it is not precluded by article 5 (2) (b) of the Optional Protocol from considering the communication.

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

6.5 The Committee considers that the authors have sufficiently substantiated, for the purposes of admissibility, their remaining claims under article 7, read in conjunction with

⁴ The authors have submitted copies of these letters.

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

⁶ Copies of court records show that Mr. Erbabaev claimed during the hearing that he had been beaten.

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

⁸ The authors have submitted a copy of the authorities' responses to these complaints, addressed to relatives of the authors: (1) to Ms. Erbabaeva dated 26 July 2010, and (2) one addressed jointly to Ms. Vasilova, Ms. Saidarova, and Ms. Erbabaeva, dated 12 August 2010. The authorities deny any ill-treatment, pressure or violations of procedural rules.

articles 2 (3), 10 (2) (a) and 9 (1) and (2) of the Covenant. It therefore declares those claims admissible and proceeds with its consideration of the merits.

Consideration of the merits

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

7.2 The Committee notes the claims, made under article 7 of the Covenant, that the authors were subjected to physical and psychological pressure to coerce them into confessing to a crime. The Committee observes that these allegations have not been refuted by the State party. The Committee recalls its consistent jurisprudence that once a complaint of ill-treatment, constituting a violation of article 7, has been filed, the State party must investigate the complaint promptly and impartially.⁹ The Committee notes that, according to the authors' submissions, the relatives of the authors have filed complaints with the national authorities, claiming torture and other forms of ill-treatment. In addition, Mr. Erbabayev complained during a court hearing about torture that he had suffered at the hands of National Security Service officers; this statement is clearly recorded in the minutes of the court hearing. Despite these complaints, neither the courts nor the relevant local authorities, including the prosecutor's office, launched a prompt and impartial investigation. Additionally, the State party, in its observations also failed to address the claims and allegations submitted by the authors in their communication. Under these circumstances, due weight must be given to the authors' allegations. Accordingly, the Committee concludes that the facts before it disclose a violation of the authors' rights under article 7, read in conjunction with article 2 (3) of the Covenant. Having concluded that, in the present case, there has been a violation of article 7, read in conjunction with article 2 (3) of the Covenant, the Committee decides not to examine separately Mr. Saidarov's claims under article 10 (2).

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

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

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated to, inter alia, take appropriate steps to conduct a prompt and impartial investigation into the authors' allegations of torture; and to provide the authors with adequate compensation. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the

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

rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the present Views and to disseminate them widely in the official languages of the State party.
