



## International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2850/2016\*\*\*

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

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

#### Background information

2.1 On 14 September 2011, around 9 a.m. the author, who at that time was held in pre-trial detention facility of Issyk-Atynsk district,<sup>1</sup> woke up in his cell from a strong blow in his

\* Adopted by the Committee at its 133<sup>rd</sup> session (11 October – 5 November 2021).

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

<sup>1</sup> The author does not indicate the exact period of his stay in the detention facility.

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

2.2 On 16 September 2011, a monitoring group consisting of representatives of the ombudsman's office and of two human rights NGOs, visited the facility and interviewed the detainees, having taken pictures confirming the bodily injuries they sustained.<sup>2</sup>

2.3 On 17 September 2011, the author and other detainees filed a formal complaint with the Issyk-Atynsk district prosecutor's office. On 27 September 2011, the prosecutor's office refused to open criminal proceedings. The prosecutor questioned the duty officer of the pre-trial detention facility Mr. O., according to whom, on 14 September 2011, around 9:40 a.m., Mr. T. from the cell No. 3,<sup>3</sup> was to be escorted to court. When the officer opened the cell, however, three detainees pushed him and ran to the courtyard. His request to return to the cell were ignored. One of the detainees, Mr. B., attacked him, threw into him used toilet paper, hit him with a plastic bottle and tore his uniform. When the officer raised alarm, Mr. B. hit him in the chest and pushed him. The officers who arrived to help, had to use force to re-establish the order in the facility. The same explanation was given by two other officers, Messrs. A. and Sh. The decision mentions that since medical-forensic reports are not yet ready, and an internal investigation is being carried out, the request for opening criminal proceedings against the officers who used force should be denied.

2.4 On 9 January 2012, the Prosecutor General's office revoked the district prosecutor's decision and ordered an additional investigation to be carried out by the Bishkek city prosecutor's office. However, it was again the Issyk-Atynsk district prosecutor's office that refused to open criminal proceedings in the case on 13 January 2012. The prosecutor's decision refers to the medical forensic reports of all the complainants, including the author. According to the medical-forensic report, the author sustain light injuries with no harm to his health. The Decision mentions that 13 of the complainants withdrew their appeals. As to the use of force by the detention facility officers, the decision notes that the officers acted lawfully in accordance with the Instruction No. 263 of the Ministry of Interior concerning detention, protection and escorting of suspected and accused persons. The decision also mentions that on 14 September 2011, officer O. filed a complaint to the Head of the Issyk-Atynsk pre-trial detention facility against the detainees B., B., Sh., T., and Ch., who had attacked him and tried to escape. On 24 September 2011, a criminal investigation was opened into these allegations. On 17 November 2011, officer O. revoked his complaint and requested to end the investigation. The criminal investigation was closed on 19 November 2011. In view of lawful use of force by the officers of the Issyk-Atynsk pre-trial detention facility in order to prevent an escape of detained persons and to re-establish the order, the prosecutor decided not to open a criminal investigation.

2.5 On 25 April 2012, the author appealed against this decision to Chuysky regional prosecutor's office. He noted that his allegations of beating were confirmed by the medical-forensic report. At the same time, the fact that he was trying to escape or in any way resisted the detention facility officers remained unconfirmed. At the same time, another detainee Mr. T. appealed against the same decision to the Issyk-Atynsk District Court. On 18 April 2012,

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<sup>2</sup> The author provided the Committee with pictures of his back with two long linear red lines on the left side and one red spot closer to the spine on the left side of the back.

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

the District Court repealed the decision of the prosecutor's office of 13 January 2012 and ordered the Issyk-Atynsk district prosecutor's office to conduct further investigation. On 16 June 2012, the Issyk-Atynsk district prosecutor's office refused to open a criminal investigation. The prosecutor questioned 7 detainees involved in the incident of 14 September 2011. All of them either stated that they did not have any claims or refused to provide explanations. One of them retracted his complaint. The author submitted an appeal to the Chuysky regional prosecutor's office claiming that the prosecutor failed to question the monitoring group who interviewed the detained persons.

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

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

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

2.9 On 21 October 2013, the author appealed the decision of 27 May 2013 to the Issyk-Atynsk District Court. He claimed that the decision is unlawful and groundless. He claimed that the prosecutor's argument that the police had used force in line to Instruction No. 263 to prevent escape of detainees is wrong, since no one can confirm the fact that the author and other detained persons attempted an escape. Even if they did try to escape, they were unarmed and there was no reason to use excessive force against them. The argument of the prosecutor that the injuries sustained by the author were light and of no harm to his health only confirms that he sustained beating. The level of injuries is of no importance. The human rights defender Ms. A. had not been questioned although she has seen the injuries of the detainees after their beatings.

2.10 The District Court rejected the author's appeal on 25 November 2013. The Court relied on the fact that several of the detainees retracted their complaints. It concluded that the investigation was carried out fully and according to the law. The author is not mentioned directly in the court decision.

2.11 On 18 December 2013, the author appealed to the Chuysky Regional Court. His appeal was rejected on 13 February 2014. The author submitted a supervisory review appeal to the Supreme Court but his appeal was rejected on 23 April 2014.

2.12 The author claims that conditions of detention in pre-trial detention facilities in Kyrgyzstan are inadequate. In support, he refers to the 2011 monitoring report carried out in 47 places of deprivation of liberty.<sup>4,5</sup>

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<sup>4</sup> Report on the results of implementation of the project "Eliminating torture in Kyrgyzstan with the help of national human rights mechanisms", 2011 (*Противодействие пыткам в Кыргызстане с помощью национальных механизмов защиты прав человека*).

<sup>5</sup> The author does not provide any details about conditions of detention he personally experienced.

**The complaint**

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

3.2 He claims that the lack of effective investigation into his allegations amounted to a violation of articles 7 and 10 (1) in conjunction with article 2 (3) of the Covenant. He notes that even if the investigation was reopened 5 times, the prosecutor's office never identified those responsible for the author's beatings, although he had named them. The prosecutors questioned only three officers, although many others have been involved in the incident on 14 September 2011. The investigation was superficial and seemed to aim at justifying the use of force by the police officers. Not all witnesses had been questioned either, in particular the members of the monitoring group.

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

**State party's observations on admissibility and the merits**

4.1 By note verbale of 25 May 2017, the State party submitted its observations on admissibility and merits. Concerning the incident of 14 September 2011, the State party recalls the facts, as noted in the Issyk-Atynsk district prosecutor's office decision of 27 September 2011, to the effect that the officer O. was attacked by detainees of cell No.6, when he tried to escort Mr. T. to court. The backup called by the officer had to use force to restore the order, in line with articles 12 and 13 of the Law on internal affairs agencies of Kyrgyzstan.

4.2 On 17 September 2011, several detainees complained about use of force against them by the detention facility officers to the Issyk-Atynsk district prosecutor's office. The author, who was detained in cell No. 5, appealed similarly. At the same time, 13 detained persons refused to testify, which was documented.<sup>6</sup>

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

4.4 The author's allegations had been investigated objectively, thoroughly and comprehensively, as shown by the decisions of the higher prosecutor's offices to repeal the decisions not to open criminal investigation by the Issyk-Atynsk district prosecutor's office. The latter carried out preliminary inquiry and decided not to open criminal investigation on several occasions due to the absence of corpus delicti in the actions of the detention facility officers. The said officers acted within the framework of articles 12 and 13 of the Law on internal affairs agencies. These provisions lay down the circumstances under which force can be used by law enforcement officers. Such circumstances include prevention and suppression of crime and other offences, apprehension of persons who committed crimes, in cases of resistance to lawful orders of law enforcement, if other nonviolent measures cannot guarantee the achievement of their duties.

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

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

**Author's comments to the State party's observations**

5.1 On 26 July 2017, the author submitted his comments to the State party's observations. He claims that in their investigation, the prosecutors concluded that the use of force in the incident of 14 September 2011 was necessary to re-establish the order in the detention facility. According to the State party, the initiator of the incident, Mr. B. attacked the duty

officer. However, the author, who was in another cell sleeping, was also subjected to the beating. He did not resist and was entirely under control of police officers. The author repeats his allegation that in fact he was beaten for his earlier fight with a police officer, therefore, the justification of use of force by the detention officers by the fact that the author resisted, is incorrect.

5.2 The State party states that the force was used legitimately by the police officers under articles 12 and 13 of the Law on internal affairs. The State party, however, refers to no unlawful actions by the author, and, therefore, the reliance to the above Law cannot justify the police actions towards the author.

5.3 Despite the results of the author's medical-forensic examination proving that he was beaten, the authorities opened no criminal case into the fact of bodily injuries he obtained, and limited themselves to conducting a preliminary investigation. Three officers questioned by the prosecutor justified the use of force by preventing an escape and re-establishing order, relying on the Instruction No. 263. The prosecutor's decisions state that the author and others tried to escape. However, nothing corroborates this statement, and no criminal case was ever open on charges of attempted escape. The author observes that even if the escape was attempted, the detainees were unarmed and there was no need to use excessive force against them. He also notes that it remains unclear for what purpose detainees from all cells had been brought to the courtyard and subjected to beatings.

5.4 The author reiterates his claims that the investigation failed to question all relevant witnesses. He mentions that the courts rejected his appeals relying on the fact that most detainees retrieved their complaints from the prosecutor's office and refused to testify. The author states that it was not relevant in his case.

#### **Further submissions by the parties**

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

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

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

##### *Consideration of admissibility*

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

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

7.3 The Committee notes the author's claims that his rights under articles 7 and 10 (1) of the Covenant were violated on account of poor conditions of detention in the Issyk-Atynsk pre-trial detention facility. The Committee, however, notes from the material on file, that the author has not raised these claims before the competent domestic authorities. It therefore finds this part of the communication inadmissible under article 5 (2) (b) of the Optional Protocol.

7.4 The Committee finds that the author has sufficiently substantiated his claims concerning the beatings by the detention facility officers and lack of effective investigation under articles 7 and 10 (1) read alone and in conjunction with article 2 (3) of the Covenant, and proceeds with their consideration on the merits.

*Consideration of the merits*

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

8.2 The Committee notes the author's claim under article 7 of the Covenant that on 14 September 2011, while he was detained and sleeping in his cell at pre-trial detention facility of Issyk-Atynsk district, he was suddenly awoken and beaten by detention facility officers in the head and all over his body. The author provides a detailed account of his beatings, which initially continued for some 30 minutes and claims that his beatings were in fact connected to a fight he had previously with a police officer, which constituted one of the grounds for the charges in the criminal case opened against him. The Committee notes that the author supplied several photographs, made by a monitoring group consisting of representatives of the ombudsman's office and of two human rights NGOs, on 16 September 2011, showing two long linear red lines on his back. The Committee further notes that, although the author does not supply a forensic medical report, the existence of such a report is mentioned in the decisions of the prosecutor's office (see para 2.4). The Committee notices inconsistency between the account of the prolonged and violent beating, provided by the author, the injuries revealed in the photographs and the apparent light superficial injuries certified by the forensic medical report, although they were made within a few days after the incident. The Committee notes that in any event the State party acknowledges that the author had been beaten and received light injuries while in detention.

8.3 According to the jurisprudence of the Committee, a State party is responsible for the security of any person it holds in detention and, when an individual who was in detention shows signs of injury, it is incumbent on the State party to produce evidence showing that it is not responsible.<sup>7</sup> The Committee has held on several occasions that the burden of proof in such cases cannot rest with the author of a communication alone, especially considering that frequently only the State party has access to the relevant information.<sup>8</sup>

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

8.5 The Committee also notes that while referring to the fact that the unrest in detention facility was caused by detainees from cell No. 6, and that the author was detained in cell No. 5 (see paras 4.1, 4.2), the State party does not provide any explanation as to why the author was taken outside by the police officers as well and beaten. In this context, the Committee refers to its General comment No.20, which extends the scope of article 7 of the Covenant to the prohibition of corporal punishment ordered, inter alia, as punishment for a crime or disciplinary measure.<sup>9</sup>

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

8.7 The Committee further notes the author's claim that article 7 of the Covenant has been violated in conjunction with article 2 (3) in view of lack of effective investigation into his allegations of beating by the police officers. In this regard the Committee takes note that the preliminary investigation was reopened 4 times and lasted one and a half years in order for

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<sup>7</sup> 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>8</sup> Mukong v. Cameroon (CCPR/C/51/D/458/1991), para. 9.2; and Bleier v. Uruguay (CCPR/C/15/D/30/1978), para. 13.3.

<sup>9</sup> General comment No. 20 on prohibition of torture, or other cruel, inhuman or degrading treatment or punishment, 1992, para. 5.

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

8.8 In view of this conclusion, the Committee decides not to examine the author's claims under article 10 (1) of the Covenant.

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

10. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to take appropriate steps to: (a) conduct a prompt and effective investigation into the beatings of the author, and if confirmed, prosecute, try and punish those responsible; ; (b) provide the author with adequate compensation for the violations of his rights. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

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