



# International Covenant on Civil and Political Rights

Distr.: General  
15 January 2018

Original: English

## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2403/2014\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	Andrei Androsoy (represented by counsel, Irina Vasilchenko, and, subsequently, Anastasia Miller)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kazakhstan
<i>Date of communication:</i>	20 January 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 28 May 2014 (not issued in document form)
<i>Date of adoption of Views:</i>	7 November 2017
<i>Subject matter:</i>	Torture in detention
<i>Procedural issue:</i>	Non-substantiation of claims
<i>Substantive issues:</i>	Torture; prompt and impartial investigation; arbitrary arrest and detention; fair trial
<i>Articles of the Covenant:</i>	2 (3), 7, 9 (1), (3) and (4) and 14 (1)
<i>Article of the Optional Protocol:</i>	2

1. The author of the communication is Andrei Androsoy, born in 1980, a citizen of Kazakhstan. He claims that the State party violated his rights under article 7, read alone and in conjunction with articles 2 (3), 9 (1), (3) and (4) and 14 (1) of the Covenant. The Optional Protocol entered into force for the State party on 30 September 2009. The author is represented by counsel.

#### The facts as submitted by the author

2.1 The author submits that he is a recovering drug addict, but was not under the influence of any drugs on 8 April 2010, when he was arrested and taken to the police department of the city of Rudny. There, a police officer, M.B., and his assistant pressured

\* Adopted by the Committee at its 121st session (16 October–10 November 2017).

\*\* The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Ilze Brands Kehris, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Ivana Jelić, Bamariam Koita, Marcia V.J. Kran, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Anja Seibert-Fohr, Yuval Shany and Margo Waterval.

\*\*\* An individual opinion by Committee member Olivier de Frouville is annexed to the present Views.



him to confess to having committed several burglaries. They showed the location of the apartment where the burglaries had been committed. One of the police officers punched the author in the head and in the abdomen, and threatened to incarcerate him since, as he was already a convict, it would not be hard to catch him again. The questioning was conducted without any formal documents or records; the author did not confess and was released that same day.

2.2 The author was arrested again on 12 April 2010. The police officers searched him and found several paper receipts that were marked “controlled purchase” (see para. 3.3) and an amount of heroin. The investigator in the case notified the prosecutor that he intended to seek pretrial detention of the author. On 13 April, police officer M.B. entered the author’s cell and promised him heroin in return for his confessing to several crimes he did not commit. The author agreed, and used heroin along with two cellmates. This fact was discovered during a medical examination later that day conducted by the medical personnel at the temporary detention facility. The report, issued on 16 April, found no injuries on the author’s body at the time of the examination.

2.3 As the fact of narcotic intoxication was not properly documented and no forensic testing was done, the author could not complain further about the actions of the officer. Other officers, however, received a disciplinary punishment for not having conducted a thorough personal check.

2.4 On 14 April 2010, the Rudny city court decided to detain the author pending trial on charges of drug trafficking, without specifying the length of the detention. On the same day, a police officer entered the author’s cell, handcuffed him, hit him twice in the abdomen, and told him that he was being transferred to detention facility No. 161/1 in the city of Kostanai. The author submits that he was kept in handcuffs during the trip, which lasted about an hour. During the next two months, he was constantly transferred between the detention facilities in Rudny and the one in Kostanai.

2.5 On 15 April 2010, when the author was detained in Kostanai, cellmates told him that they were “seniors” in that cell, as they were “assistants” to the administration of the detention facility. The author claims that his cellmates started beating him regularly two weeks after his arrival. On 29 May, he was beaten especially severely. He was pressured by the facility administration to write that he had accidentally bumped into a metal bed frame.

2.6 On 7 June 2010, the author submitted a complaint regarding “unlawful actions” by the personnel of the Kostanai detention facility, but it was “without results”.<sup>1</sup> On the same day, he was transferred to the Rudny detention facility to read and study the indictment against him. His mother, who served as his defender, noticed bruises and injuries on her son’s body and submitted a request for a medical examination. On 8 June, the author was brought to a trauma centre in Rudny, where he was diagnosed with bruises on his chest. The author’s complaint regarding the beatings was never thoroughly examined. On 9 June, the author’s lawyer submitted a formal complaint.

2.7 The complaint was sent to the prosecutor’s office, which forwarded it to the police department of the Kostanai region. The police department refused to initiate a criminal investigation, arguing that it had ascertained that the personnel at the Kostanai detention facility had committed no crimes.

2.8 During the trial, on 9 July 2010, the author’s lawyer requested the court to consider the medical certificate issued on 8 June. The certificate was made part of the trial records. On the same day, the court issued a decision ordering an examination of the author’s claims of beatings and drug use by inmates in both the Rudny and Kostanai detention centres. The court gave the authorities until 20 July to conduct the examination.

2.9 On 15 July 2010, the Kostanai police department refused to initiate a criminal investigation on the ground that no crime had been committed, as the author himself had attested that he had fallen from his upper bunk bed. On 25 July, the allegations regarding the Rudny facility were also dismissed, as the author had changed his testimony. While the author initially complained about the fact that he had been beaten over a period of two

---

<sup>1</sup> The author does not provide any details about this complaint, or its outcome.

months, he later retracted his statements and explained that he had received the injuries as a result of falling from his bed. These two decisions were combined in one letter from the prosecutor's office to the court, in which the prosecutor's office agreed with the decision not to open a formal criminal investigation as it had been ascertained that no crimes were committed by personnel of the detention facilities.

2.10 On 3 September 2010, after numerous requests and complaints from the author and his lawyer, the prosecutor of the city of Kostanai decided to resume a preliminary examination into claims of mistreatment submitted by the author. On 22 September 2011, the preliminary examination was again discontinued. The author and his lawyer never received copies of the decisions, or materials of the examination file.

### **The complaint**

3.1 The author claims that the State party violated his rights under article 7, separately and read in conjunction with article 2 (3), of the Covenant. During his detention in Rudny, he was subjected to psychological pressure and was offered heroin in return for self-incrimination. In detention facility 161/1 in Kostanai and in Rudny, he was systematically beaten by his cellmates because of his refusal to follow the orders of the detention facility administration. The author claims that the State party did not undertake an effective investigation of his complaints by a competent and impartial body because all the complaints were transmitted to the same police department in the Kostanai region that supervises detention facility 161/1 and were examined by the same officials. Moreover, the author and his counsel did not have access to all the necessary procedural documents during the criminal proceedings.

3.2 The author also claims that his rights under article 9 (1), (3) and (4) of the Covenant were violated. He claims, for example, that on 8 April 2010, he was detained for four hours, that the detention was not registered and that he was not informed of the charges against him. The author claims that article 134 (1) of the Criminal Procedure Code of Kazakhstan requires the police to register the detention if someone is detained for more than three hours. On 12 April, he was detained at 6.55 p.m., but the records indicate 20.40 p.m. as the time when detention commenced. On 14 April, the court ordered the author's detention pending trial based on the seriousness of the charges against him, without initially indicating the length of detention.

3.3 The author further claims that the State party violated his rights under article 14 (1). Article 11 of the law on criminal investigations stipulates the measures that can be taken by the police in investigating crimes. The police can organize a "controlled purchase" of a narcotic substance if there is an indication of criminal activity, but this information is not sufficient to initiate a criminal case. The European Court of Human Rights has ruled that while use of confidential informants per se does not violate the rights enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), the courts should not use their testimonies as a basis for a guilty verdict.<sup>2</sup>

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

4.1 On 25 November 2014 and 30 March 2015, the State party provided its observations on admissibility and the merits of the communication. The State party confirms that on 12 April 2010, at 3.30 p.m., police officers organized a controlled purchase of a narcotic substance. The same day, at 8.40 p.m., the author was taken into custody by the police in the city of Rudny. On 14 April, the Rudny city court decided to keep the author in detention pending trial. The criminal investigation against the author was initiated on 15 April and completed on 9 June. On 18 June, the materials of the criminal investigation were forwarded to the criminal court for the Kostanai region.

4.2 On 25 August 2010, the author was sentenced to 14 years of imprisonment on charges of drug trafficking, to be served in a special regime prison. The jury's guilty verdict was based on witness testimonies, search and seizure from the author himself and a video

<sup>2</sup> *Vanyan v. Russia* (application No. 53203/99), judgment of 15 December 2005.

recording of the “controlled purchase”. The expert forensic examination, which was carried out on 12 April 2010, concluded that the narcotic substance found was heroin.<sup>3</sup>

4.3 On 3 November 2010, the cassation appeal court of the Kostanai region agreed with the lower court’s verdict and sentence. On 10 January 2011, the Supreme Court of Kazakhstan refused to initiate supervisory review proceedings.

4.4 The courts considered the author’s claims regarding mistreatment, but found them to be baseless. Furthermore, the author complained to the prosecutor’s office, which also considered the claims and responded with detailed justifications and explanations.

4.5 On 13 April 2010, the author was questioned by the Rudny city prosecutor. At that time, the author did not make any complaints against police officers and did not claim to have been tortured or mistreated. During the questioning, the author claimed to be innocent of the crimes of which he was accused.

4.6 It was also established on 13 April 2010 that the author and two other persons in detention were found to be under the influence of narcotic substances. Based on this fact, the prosecutor’s office carried out an internal investigation as a result of which the chief of the temporary isolator unit and his deputies were subjected to a “disciplinary responsibility”.

4.7 As a part of the investigation into the author’s claims of mistreatment, the authorities questioned A.A., chief of the Rudny temporary isolator unit. He testified that the author had been admitted on 12 April 2010 and before his admission was examined by medical personnel, who found no injuries on his body. Subsequently, the court ordered author’s detention pending trial, and he was transferred to temporary detention facility No. 161/1 in Kostanai. After a certain period of time, the author was transferred back to the temporary isolator in Rudny. There, the examination upon admission to the facility established that the author bore injuries, which had been received in Kostanai. The complaint materials were forwarded to facility No. 161/1.

4.8 The authorities also questioned M.B, deputy chief of the police department in Rudny. He stated that the author had indeed been brought to the police department for questioning based on information that he was selling drugs. The author refused to cooperate. The deputy chief rejected the claims that the author had been tortured or mistreated while in his custody.

4.9 The author’s complaints did not lead to a criminal investigation. The author himself had testified, and explained that his bruises were the result of his fall from the upper bunk bed in his cell.

4.10 Based on the arguments mentioned above, the author’s claims should be considered by the Committee as inadmissible.

#### **Author’s comments on the State party’s observations on admissibility and the merits**

5.1 The State party submits that the “controlled purchase” was documented, but it does not specify who documented this process. The video of the event has no time stamp. The identity of the police officers who stopped and arrested the author is also not clear from the video.

5.2 Furthermore, the authorities never properly investigated the fact that the author and his cellmates were able to obtain and consume heroin in the detention centre. The State party never properly investigated the author’s claims regarding torture and mistreatment.

#### **Additional observations**

##### *From the State party*

6.1 On 6 August 2015, 26 February 2016, 16 August 2016 and 27 June 2017,<sup>4</sup> the State party provided additional observations on admissibility and the merits of the

---

<sup>3</sup> The total weight of the heroin is reported to be 2,746 grams.

communication. The State party reiterates its previous position. It claims that the investigation into alleged beatings of the author was discontinued for the following reasons. Several witnesses, including police officers and the author's cellmates, testified that they never saw anyone beating the author, and that he had fallen from his bunk bed and received injuries on his chest and shoulder. This was confirmed by the author's written statement dated 8 June 2010.<sup>5</sup> The fact that the author was injured was never a secret. This fact was registered in the medical journal of detention facility No. 161/1 of the city of Kostanai on 9 June 2010. Also, the author's claims that he was beaten by his cellmates, who were ordered to do so by the administration of detention facility No. 161/1, have "not been confirmed", and were rejected by testimonies as indicated above.

6.2 Regarding the use of heroin by the author and his cellmates on 13 April 2010, the authorities conducted a thorough investigation. As a result, several employees of the Rudny temporary isolator unit were disciplined. For example, one of the deputy chiefs of the isolator was fired and another deputy was issued a strict reprimand. Officer M.B, who the author claimed had given him heroin, denied ever doing so. There were no other witnesses to the alleged transfer of the drugs. Since no evidence of any crime was found, no criminal investigation was launched.

6.3 The State party further investigated the claims filed by the author in April 2015, after the present communication had been submitted to the Committee. A formal investigation into allegations of torture was initiated under articles 347-1 (2) (a) — torture and 307 (2) — abuse of official powers. As part of the investigation, the prosecutor's office considered 11 petitions from the author and/or his representatives, and the author was provided with written responses to each petition. The author took advantage of his right to appeal all procedural decisions if he disagreed with the results. Since there was no evidence of any crimes having been committed, the investigation was discontinued on 2 July 2015.

6.4 The domestic courts also considered the author's complaints. In its verdict, the court indicates, for example, that the author did not bring his torture claims forward until later in the process, when the complaints were filed by his lawyer, Ms. Vasilchenko. This caused the author to change his testimony and declare that he was forced to write a confession because of the beatings he suffered from his cellmates at the behest of the administration of the detention centre. The Supreme Court upheld the lower court's decision on 10 January 2011, agreeing with the jury's verdict and confirming the existence of equality of arms during the court hearings.

#### *From the author*

7.1 On 13 December 2015, 11 April 2016 and 17 February 2017, the author provided additional comments on the State party's submissions. The author submits that as a consequence of his communication to the Committee, the State party initiated another investigation that, nevertheless, was not effective and was discontinued. The author indicates that he started to complain about torture on 7 June 2010. It is only after the present complaint, dated 7 June 2010, that the author was examined and the bruises on his body documented. However, that did not lead to an effective investigation. Instead, on 9 June, the author was forced to submit a statement that he had not been tortured, but rather fell from his upper bunk bed.

7.2 Regarding the narcotic substances that were given to the author and his cellmates, the author insists that they were given to them by police officers in order to make him confess to crimes that he did not commit. While admitting that he consumed drugs, the author nevertheless submits that the State party's authorities failed to launch an effective investigation into his allegation that he was given drugs in exchange for his testimony, including such actions as forensic analysis of his hair and nails, a thorough examination of the detention facility, etc. The author also indicates that M.B., the same officer who

<sup>4</sup> In these responses, the State party provides a comprehensive record of the investigations, including copies of witness statements and court decisions.

<sup>5</sup> The State party provided a copy of the statement.

pressured him to confess and gave him drugs, was found guilty on several drug- and weapons-related charges on 15 August 2015.

7.3 The author further submits that the investigation into his torture allegations was not effective according to the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol). The Istanbul Protocol provides, first, that the investigation must be conducted promptly. His complaint was submitted to the prosecutor's office on 15 June 2010, but was not properly investigated for more than a year. Next, the investigation must be adequate, that is, the authorities should take all steps necessary to document injuries. However, the State party did not order a full medical forensic examination of the author. Third, the investigation results must also be transparent: the State party must share all information obtained during the investigation.

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

#### *Consideration of admissibility*

8.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether it is admissible under the Optional Protocol.

8.2 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.

8.3 The Committee takes note of the author's claim that he has exhausted all effective domestic remedies available to him in connection with his claims regarding mistreatment while in detention. In the absence of any objection by the State party in this respect, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

8.4 The Committee has noted the author's claims under articles 9 (1), (3) and (4) and 14 (1) of the Covenant. In the absence of any further pertinent information on file, however, the Committee considers that the author has failed to sufficiently substantiate these allegations, for purposes of admissibility. Accordingly, it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

8.5 The Committee considers that the author has sufficiently substantiated his claims under article 7, read alone and in conjunction with article 2 (3), of the Covenant for the purposes of admissibility, declares them admissible and proceeds with its consideration of the merits.

#### *Consideration of the merits*

9.1 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.

9.2 The Committee takes note of the author's claim that his treatment at the temporary isolator in the city of Rudny and the detention centre in the city of Kostanai, along with the State party's inability to effectively investigate the claims he submitted in that regard, amounted to torture, in violation of article 7, read alone and in conjunction with article 2 (3), of the Covenant. The Committee observes that the State party, in response to the author's allegations, provided a detailed description regarding its actions and steps taken in response to the author's claims. The Committee notes that these claims were considered by the prosecutor's office, the police, the trial court and the Supreme Court of Kazakhstan. In addition to these detailed descriptions, the State party provided copies of witness and expert statements, court decisions, decisions by the prosecutor's office and others. The Committee notes the State party's argument that while some injuries were found on the author's body, it could not be ascertained, after an investigation which is described in detail, that these injuries were caused by personnel of the temporary isolator in Rudny or the detention facility in Kostanai. The Committee further notes that the description of facts and other materials as submitted by the author do not provide sufficient evidence to support his

claims; neither has the author shown that his injuries were caused due to a lack of adequate supervision of the conditions of detention. In these circumstances, and on the basis of the information before it, the Committee cannot conclude that the author was subjected to treatment in violation of article 7 and that the State party failed in its obligations under article 2 (3) to investigate these claims.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it do not reveal a breach of any provision of the Covenant by the State party.

## Annex

[Original: French]

### **Individual opinion (dissenting) of Committee member Olivier de Frouville**

1. In this case, the Committee was of the view that it was not in a position to conclude that the State party had failed to discharge its obligation under article 2 (3) to conduct an investigation into the author's allegations (para. 9.2). The reasoning behind that conclusion is not in line with the Committee's jurisprudence on the assessment of investigations into allegations of violations of article 7 of the Covenant. The Committee has consistently considered that, when a complaint of ill-treatment prohibited under article 7 has been lodged, it must be investigated promptly and impartially by the authorities of the State party.<sup>1</sup> Yet, it is clear from the facts as submitted by the author of the communication and by the State party that the latter did not fulfil its obligation to promptly investigate the author's allegations.

2. Paragraphs 2.5 to 2.10 of the Views enumerate the many grievances and complaints filed by the author or his lawyer regarding ill-treatment that he allegedly experienced at the detention centre in Kostanai beginning in early May 2010. None of the grievances or complaints led to an investigation, a fact acknowledged by the State party (para. 4.9). According to the State party, the author had admitted that the bruises, which had been observed on his body and documented in a medical certificate dated 8 June, had in fact been caused by a fall from his upper bunk in his cell. However, the author explains that he was coerced into giving this rather ridiculous explanation (paras. 2.5 and 7.1). The facts as submitted demonstrate that, as soon as he was able to express himself freely, the author maintained his allegations of ill-treatment, repeating them in his communication to the Committee.

3. Lastly, it was not until April 2015, i.e. five years after the initial complaints and in reaction to the author submitting his communication to the Committee, that an official investigation into the allegations of torture was initiated and later closed owing to a lack of evidence of an offence (para. 6.3). Quite apart from the fact that it is doubtful that an investigation that was seemingly based solely on the statements of those accused of having tolerated or inflicted the ill-treatment could be impartial (para. 6.1), the investigation was not conducted promptly and cannot be considered to meet the requirements of article 2 (3) in connection with allegations of violations of article 7 of the Covenant.

4. Since the Committee did not take into account or, for that matter, even cite its own jurisprudence, its assessment of the facts in this case is distorted. Moreover, the Committee omitted to refer to its more general assessment of the situation in Kazakhstan contained in its concluding observations of June 2016 (CCPR/C/KAZ/CO/2), despite the fact that it had noted in paragraph 23:

(a) The reported high rates of torture and the high number of claims of torture dismissed at threshold due to the allegedly excessive evidentiary standard required to pursue an investigation under the new Criminal Procedure Code; [...] (c) The very low rate of effective prosecution, the mild punishments imposed and the involvement of interested law enforcement agencies in investigating allegations of torture or ill-treatment.

5. Furthermore, despite them being in line with its jurisprudence, the Committee did not consider it apposite to refer to other instruments or laws, such as the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or

---

<sup>1</sup> See the Committee's general comment No. (1992) on Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment, para. 14, and, for example, communication No. 1545/2017, *Gunan v. Kyrgyzstan*, Views adopted on 25 July 2011, para. 6.2.



Degrading Treatment or Punishment and the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), which the author cites extensively (para. 7.3). The Committee also ignored the findings of other competent bodies (see A/HRC/13/39/Add.3, para. 76) and the jurisprudence of the Committee against Torture in similar individual cases involving the same State party.<sup>2</sup> In those cases, the Committee against Torture concluded that the State party had violated article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in part because the investigation had not been conducted promptly. Under article 12, an investigation must be prompt, impartial and effective, promptness being essential both to ensure that the victim cannot continue to be subjected to prohibited acts and because, in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear.<sup>3</sup>

6. Legal certainty entails consistency in the interpretation of the law. Thus, it is important that the Human Rights Committee not only base its decisions on its own jurisprudence — which ought to go without saying — but also pay attention to trends in international law and to the jurisprudence of other competent bodies that rule on similar cases.

---

<sup>2</sup> Communications submitted to the Committee against Torture No. 433/2010, *Gerasimov v. Kazakhstan*, decision adopted on 24 May 2012; No. 441/2010, *Evloev v. Kazakhstan*, decision adopted on 5 November 2013; and No. 497/2012, *Bairamov v. Kazakhstan*, decision adopted on 14 May 2014.

<sup>3</sup> See *Gerasimov v. Kazakhstan*, para. 12.5.