



# 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. 2162/2012\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	Arsen Ambaryan (not represented by counsel)
<i>Alleged victim:</i>	Artur Ambaryan
<i>State party:</i>	Kyrgyzstan
<i>Date of communication:</i>	20 April 2012 (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 18 June 2012 (not issued in document form)
<i>Date of adoption of Views:</i>	28 July 2017
<i>Subject matter:</i>	Detention and trial on criminal charges
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Torture and ill-treatment; arbitrary arrest/detention; fair trial
<i>Articles of the Covenant:</i>	2 (3) (a) and (b), 7, 9 (1)–(4) and 14 (1), (3) (a) and (f) and (5)
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

\* Adopted by the Committee at its 120th session (3–28 July 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.

\*\*\* An individual opinion by Committee members Yuval Shany, José Manuel Santos Pais and Christof Heyns (dissenting) is annexed to the present Views.



1. The author of the communication is Arsen Ambaryan, a national of Kyrgyzstan of Armenian origin born in 1960. He submits the communication on behalf of his brother, Artur Ambaryan, also a national of Kyrgyzstan of Armenian origin, born in 1968, who was serving a prison sentence in Kyrgyzstan at the time of the submission. The author claims that his brother is a victim of violations by Kyrgyzstan of his rights under articles 7, 9 (1)–(4) and 14 (1), (3) (a) and (f) and (5), read in conjunction with article 2 (3) (a) and (b), of the Covenant. The Optional Protocol entered into force for Kyrgyzstan on 7 October 1994. The author is not represented by counsel.

### **The facts as submitted by the author**

2.1 On 25 February 2011, at approximately at 2 p.m., the author's brother was driving in Osh city when he was stopped by a car carrying five persons dressed in civilian clothing. Without identifying themselves, they handcuffed him and searched his car.<sup>1</sup> During the search, 2.7 grams of heroin were found. Upon further questioning, the author's brother stated that he was not aware of the heroin's origin. At the time of the search, the author's brother was not informed of the reasons why he had been stopped, nor could he understand the conversation between the five persons, since it was in the Kyrgyz language, which he did not understand.

2.2 The author's brother was taken to the Southern Regional Office for Combating Drug Trafficking of the Department of Internal Affairs of Kyrgyzstan, where he was subjected to psychological pressure to make him confess to the possession of heroin with intent to sell, until 11.40 p.m. of the same day. He was put in a cold room and deprived of warm food, water and access to the toilet for 10 hours. Handcuffed, and in the absence of a lawyer or relatives, he was interrogated and threatened by persons in civilian clothing, who from time to time made video recordings. At no stage were his rights explained. In particular, he was not advised of his right to counsel and an interpreter from the moment of detention, nor was he informed of the reasons for his detention.

2.3 At around 10 p.m., the author received a phone call from his brother and at 11 p.m. the author arrived at the Office. Only then, for the first time after the arrest, was his brother allowed to use the toilet, in the presence of the officers and still handcuffed. The author states that, unable to withstand the torture, humiliation and fatigue, his brother had made a false confession.

2.4 The author submits that a detention protocol was drawn up by the investigator at 11.40 p.m. on 25 February 2011, 10 hours after the arrest. The protocol did not indicate the legal basis for the detention, as stipulated in articles 94<sup>2</sup> and 95<sup>3</sup> of the Criminal Procedure Code of Kyrgyzstan.

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<sup>1</sup> From the material on file, it transpires that the Southern Regional Office for Combating Drug Trafficking of the Department of Internal Affairs of Kyrgyzstan was conducting a "sting" operation.

<sup>2</sup> Article 94 of the Criminal Procedure Code of Kyrgyzstan. Grounds for detention of a person suspected of committing a crime

“(1) Grounds for detention are:

(1) The person is caught during the commission of a crime or directly after its commission; 2) eyewitnesses, including the victims, directly point out the person as the offender; 3) the suspect, his clothes, or his dwelling have evident traces of the crime.

(2) The person may be detained in the presence of other facts that give grounds to suspect the person of committing the crime, if he attempted to escape, when he does not have a permanent place of residence or when his identification is not established.”

<sup>3</sup> Article 95 of the Criminal Procedure Code of Kyrgyzstan. Procedure for detaining a person suspected of committing a crime

“(1) No later than three hours after the delivery of the detained, there shall be made a transcript of the detention proceedings. The transcript shall contain the grounds and reasons, place and the time (with indication of hour and minute), and the results of the personal search. The transcript of proceedings shall be read to the suspect and his rights shall be explained to him, as provided herein by article 40. The transcript of detention shall be signed by the person who has written it and by the detained. The investigator is obliged to inform the prosecutor in writing about the detention within twelve hours starting from the moment of writing the transcript of detention.

2.5 The author claims that from 2 p.m. to 11.40 p.m. his brother was detained unlawfully. He was not informed of important procedural stages, such as the initiation of a criminal case against him and an expert examination that was conducted during his detention. Important procedural documents, such as the decision to initiate criminal proceedings, the detention protocol and the search protocol, were written in Kyrgyz and in the absence of a lawyer and/or an interpreter, in violation of article 24 of the Constitution of Kyrgyzstan.<sup>4</sup>

2.6 On 26 February 2011, at around 2 a.m., the author's brother was transferred to a temporary detention facility, where he was released from handcuffs for the first time. On 27 February, 46 hours after his arrest, the author's brother was interrogated as an accused; however, his rights were not explained to him, in particular, the right to remain silent. The author submits that the interrogation protocol lacks a note record that his brother's rights were explained to him.

2.7 On 27 February 2011, the Osh City Court held hearings and decided that the author's brother should remain in custody until 25 April, as he was accused of a grave crime and could attempt to escape justice. The hearings lasted between 10 and 15 minutes, and the judge did not question the suggested legal basis for detention, nor did he consider alternative measures of restraint, in violation of domestic law.

2.8 During the court hearings, the author's brother complained about being subjected to torture by the officers. Neither the court nor the prosecutor reacted to his allegations, and did not refer the case for further investigation. The author submits that his brother did not raise allegations of torture before the prosecutor's office for fear of reprisal and further torture. The author refers to the Committee's jurisprudence in *Avadanov v. Azerbaijan*<sup>5</sup> and instructions Nos. 70 and 75 of the Prosecutor-General in support of his argument that the prosecutor, who was present at the hearings and was aware of the torture allegations, should have referred the case for further investigation, despite the absence of a request to that effect from the author's brother. The author also refers to a report by Human Rights Watch to support his argument that prosecutors often refuse to investigate allegations of torture.<sup>6</sup>

2.9 On 3 and 9 March 2011, the author's brother's counsel appealed the decision of the Osh City Court issued on 27 February 2011 to the Osh Regional Court, which, sitting in a three-judge panel, rejected the appeal on 22 March. The author alleges that the composition of the Osh Regional Court did not comply with the requirements of article 132-1 of the Criminal Procedure Code, according to which the appeal should have been decided by a single judge.

2.10 On 8 April 2011, the author's brother's counsel, D.T., appealed under the supervisory review procedure to the Supreme Court of Kyrgyzstan, challenging the decision of the Osh City Court of 27 February 2011 and the decision of the Osh Regional Court of 22 March 2011, which had ordered the author's brother's pretrial detention as a measure of restraint. On 19 May, the Supreme Court of Kyrgyzstan, based on article 383 (4) of the Criminal Procedure Code, rejected the appeal, arguing that the criminal case of the author's brother had been examined on the merits by the court of first instance. The author notes that neither his brother nor the counsel D.T. were present at the hearings. The author maintains that the notification about the scheduled hearings at the Supreme Court on 19 May 2011 was received in Osh only on 20 May, and that the protocol of the hearing contained false information regarding the participation of the counsel.<sup>7</sup> The author further notes that article 383 (4) of the Criminal Procedure Code does not provide for the

(2) The detained shall be interrogated in accordance with the rules provided herein in article 191".

<sup>4</sup> Article 24 of the Constitution of Kyrgyzstan: "From the moment of actual detention a person should be kept safe. Such person shall be granted an opportunity to protect himself/herself personally, enjoy qualified legal aid from a lawyer as well as have an attorney".

<sup>5</sup> See communication No. 1633/2007, Views adopted on 25 October 2010, para. 6.3.

<sup>6</sup> "Prosecutorial authorities have refused to investigate allegations of torture, and courts have relied heavily on confessions allegedly extracted under torture." Ole Solvang, *Distorted Justice: Kyrgyzstan's Flawed Investigations and Trials on the 2010 Violence* (New York, Human Rights Watch, 2011).

<sup>7</sup> From the protocol of the hearing and the court decision, it transpires that the author's brother's counsel, D.T., lodged the appeal, while another counsel, Z.T., was present during the hearing.

examination of the merits of a case as legal basis for termination of the supervisory review procedure.

2.11 On 25 April 2011, 50 days after the arrest, the author's brother received an indictment dated 22 April 2011,<sup>8</sup> in which he was formally accused of drug trafficking committed as part of an organized group. On 27 April, the Osh City Court prolonged his detention without indicating the legal basis for it. Neither the author's brother nor his counsel was present at the hearing. The author submits that the domestic law does not provide an opportunity to appeal the decision of the Osh City Court concerning the remand in custody. The author submits that as of 25 April 2011, his brother's remand in custody was based on the indictment issued on 22 April. The author claims that as of 25 April until the sentencing of his brother on 7 July, the detention was arbitrary and unlawful.

2.12 The first trial hearing took place on 12 May 2011 at the Osh City Court and on 7 July, the author's brother was convicted of drug trafficking committed as part of an organized group and sentenced to nine years of imprisonment. The author requested a copy of the verdict in Russian. In August, he was informed that the translation would be provided after the payment of a translation fee. The author submits that the failure to provide the verdict in Russian constitutes a violation of his brother's right to be informed of the charges against him in a language that he understands.<sup>9</sup>

2.13 On 15 July and 2 September 2011, the author and his brother each filed an appeal with the Osh Regional Court, which rejected it on 6 October. On 22 and 25 November, the author and his brother respectively filed requests for a supervisory review with the Supreme Court of Kyrgyzstan. The author's motion was not reviewed while his brother's was rejected, both by decision of the Supreme Court of 9 February 2012.

2.14 On 22 May 2012, the author's brother was transferred from pretrial detention facility No. 5 in Osh to correctional colony No. 10 in Jalal Abad to continue serving his sentence. On 19 July, the author was informed by a State bailiff that, in accordance with the sentence, a confiscation of his brother's property, in particular his apartment, would be carried out.

### **The complaint**

3.1 The author claims that his brother is a victim of violations of his rights under article 7, read in conjunction with article 2 (3) (a), of the Covenant as during the first three days following his detention he was tortured by officers to make him confess.

3.2 The author further claims that article 9 (1) was violated, as his brother was detained at 2 p.m. on 25 February 2011 without being informed of the reasons, and the detention protocol was drawn up only at 11.40 p.m. of the same day.<sup>10</sup>

3.3 The author claims a violation of his brother's rights under articles 9 (2) and 14 (3) (a) and (f) as, being a native Russian speaker, he could not understand the indictment, which was available only in Kyrgyz, was not promptly informed of the charges against him and did not receive a copy of the verdict translated into Russian.

3.4 The author claims that his brother's rights under article 9 (3) were violated, as the decision of 27 February 2011 by which the Osh City Court ordered his remand in custody had no legal basis and the Court did not consider alternative measures of restraint.<sup>11</sup>

3.5 Articles 9 (4) and 14 (5) of the Covenant were violated because the author's brother was deprived of his right to challenge the lawfulness of his detention at the Supreme Court. The author claims that as of 25 April 2011 until the sentencing of his brother on 7 July, the

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<sup>8</sup> The author does not provide a copy and does not mention the body which issued the indictment decision.

<sup>9</sup> A copy of the verdict of 7 July 2011 translated into the Russian language on 24 August 2011 is part of the file.

<sup>10</sup> The author refers to the Committee's jurisprudence in communication No. 1348/2005, *Ashurov v. Tajikistan*, Views adopted on 20 March 2007, para. 6.4.

<sup>11</sup> The author refers to the Committee's jurisprudence in *Hill v. Spain* to support his argument that pretrial detention should be the exception. See communication No. 526/1993, Views adopted on 2 April 1997, para. 12.3.

detention was arbitrary and unlawful as it was based only on the indictment and the transmittal of the case to the first instance court. He claims that the decision of the Supreme Court of 19 May 2011 to refuse to review his claim regarding the lawfulness of the detention of his brother is a violation of his brother's rights under articles 9 (4) and 14 (5).

3.6 The author claims a violation of his brother's rights under article 14 (1) as the composition of the Osh Regional Court was not in accordance with domestic law.

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

4.1 On 4 October 2012, the State party submitted its observations on admissibility and the merits. It submits that on 7 July 2011, the author's brother was convicted of a crime under article 274 (2) 1) and 2) of the Criminal Code and sentenced to nine years' imprisonment. On 25 February 2011, police officers had arrested him for possession of heroin during an action undertaken by the Southern Regional Office for Combating Drug Trafficking of the Department of Internal Affairs of Kyrgyzstan. On 23 April, the pretrial investigation was completed and the case was transmitted to the trial court. On 6 October, the Osh Regional Court rejected the appeal filed against the trial court's decision of 7 July. Based on article 4 (1) 3) of the amnesty law adopted on the occasion of the 20th anniversary of the independence of Kyrgyzstan, the unserved term of punishment was reduced to one third. On 9 February 2012, the Supreme Court rejected the request for a supervisory review filed by the author's brother against the Osh Regional Court decision of 6 October 2011.

4.2 The State party further submits that the author's brother's counsel appealed the decision of the Osh City Court of 27 February 2011 to the Osh Regional Court, which, sitting in a three-judge panel, rejected the appeal on 22 March. The State party rejects the claim that the composition of the Osh Regional Court violated article 132-1 of the Criminal Procedure Code, which foresees a single-judge hearing. It submits that the composition of the Osh Regional Court at the cassation stage was in compliance with article 31 (4) of the Criminal Procedure Code, according to which the cassation courts decide upon appeals in criminal cases sitting in a panel of three judges.

4.3 On 19 May 2011, the Supreme Court discontinued the supervisory review initiated by the author's brother's counsel, as the pretrial investigation had been concluded and on 12 May, the Osh City Court had begun examining the case on the merits. As to the claims that pretrial detention should be the exception, that the decision of the Osh City Court dated 27 February 2011 had no legal basis and that the Court did not consider alternative measures of restraint, the State party maintains that based on article 267 (1) of the Criminal Procedure Code, the court can change or cancel a pretrial restraining order; the court is not obliged to motivate its decision in this regard.

4.4 The State party further submits that the Supreme Court terminated the supervisory review proceedings because the first instance court took a new decision and therefore there was no further need to continue the supervisory review.

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

5.1 On 10 December 2012, the author reiterated its initial submission. He maintains that his brother was subjected to torture and threats (cruel treatment) from the moment of his apprehension at 2 p.m. till 11.40 p.m. on 25 February 2011, which led to his self-incrimination. He states that the State party did not rebut these allegations or provide explanations as to how, when and which organ might have investigated the alleged torture.

5.2 The author submits that the State party did not respond to his claim under article 9 (4) as to the lack of timely proceedings before a court to decide without delay on the lawfulness of his brother's detention and reiterates the arguments from the initial submission. He states that the mere fact that supervisory review proceedings were initiated in response to counsel's petition indicates that the Supreme Court had sufficient elements to quash the detention on remand and apply a different restraint measure.

5.3 The author maintains that his brother was unfairly sentenced for a crime related to possession of drugs and the courts disregarded his arguments, in violation of article 14 of

the Covenant. He claims that the evidence was inadmissible as it was based on “provocation by the police” in the context of their “sting” operation. The author reiterates his disagreement in relation to the examination of evidence and of witnesses during the trial, and in particular the status of the expert conclusions as to whether the substance found in his brother’s car was heroin. The author further claims that “sting” operations are outside judicial control and that the judicial authorities disregarded the fact that the crime his brother was accused of was “provoked” by the police.

5.4 The author reiterates that his brother was not provided with the verdict in Russian, in violation of his right to be informed of the charges against him in a language that he understands and to have the free assistance of an interpreter. The author’s brother appealed his verdict without having the criminal case material in a language he understands and with only an unofficial translation of the verdict.

5.5 The author requests the Committee to find violations of his brother’s rights under article 7, in conjunction with articles 2 (3) (a) and (b), 9 (1)–(4) and 14 (1), (3) (a) and (f) and (5) of the Covenant. The Committee should recommend that the State party: conduct a thorough and effective investigation into the allegations of torture; prosecute those responsible; review the court’s verdict; stop the confiscation of the author’s brother’s apartment; and change the judicial and administrative practice in cases related to drugs trafficking based on “sting” operations. He further requests compensation to his brother for the violations suffered (€5,000 for moral damages; €25,000 for the loss of his apartment and €7,200 for material damages for the length of his imprisonment).

### **Additional observations**

#### *From the State party*

6.1 On 19 June 2013, the State party reiterated that during their operation the police found 2.7 grams of heroin in the author’s brother car. It underlines that the conclusions of forensic-chemical expertise No. 74 of 25 February 2011 confirmed that the substance found under the front seat in the car was heroin.

6.2 Regarding the petition for supervisory review of the verdict, the State party indicates that supervisory review was declined on the ground that the petition was filed by the author of the communication, who did not present the necessary authorization from his brother. As to the petition for supervisory review submitted by the alleged victim, it was reviewed and rejected.

6.3 The State party rejects the claims that numerous violations of the legislation occurred during the police operation, the investigation and the subsequent criminal judicial proceedings. It denies the author’s assertions that his brother’s allegations of torture were acknowledged and accepted as a fact by the trial court and that the State party did not respond to these allegations in its observations to the Committee. The State party refers to the verdict of 7 July 2011 which states that during the pretrial investigation, the author’s brother pleaded partially guilty under the pressure of police officers. However, the State party rejects the interpretation of the author that the court accepted as a fact that his brother had been tortured. In the verdict, the court concluded that the author’s brother’s alleged ill-treatment, his denial of involvement in drug-related crime and his affirmation that the crime had been staged by the police had to be analysed as an attempt to avoid criminal liability and punishment. The State party adds that the investigator interrogated the author’s brother three times and the latter admitted receiving the drug from a woman called D. Based on this testimony, the police conducted a search of her house and found an additional 3.35 grams of heroin.

6.4 The State party further rejects the claims that violations of the legislation were committed during the apprehension and detention of the author’s brother, notably the violation of his right to legal assistance and interpretation, his right to be informed about the charges against him in a language he understands, his right to remain silent and his right to liberty. It submits that on 25 February 2011, the author’s brother was provided with a document in Russian explaining his rights and obligations and that he acknowledged in writing having received it. At that initial stage, the author’s brother was represented by a

private counsel, M.M., and his interrogation as a suspect was conducted in Russian and in the presence of his counsel. Further, on 27 February, the author's brother was informed about the charges against him in Russian. The interrogation as an accused was also conducted in the presence of his counsel and in Russian. During the interrogation, he partially admitted guilt, explaining that, together with the co-accused B.A., he had acquired and transported the drug with the aim of further sale. Therefore, the State party rejects the claims that the author's brother's right not to testify against himself was violated.

6.5 The State party submits that in accordance with the requirements of article 231 of the Criminal Procedure Code, an interpreter was appointed to the case and the author's brother had access to the materials on the file together with his counsel and the interpreter. The State party admits that the verdict is in the Kyrgyz language and that on 10 August 2011, the author's brother's counsel made a request to the President of the Osh City Court for a copy in Russian. However, the translation fee was not paid. On 24 August, in a letter to the counsel, the Osh City Court explained that according to article 146 (1) of the Criminal Procedure Code, the interested party had to pay for the translation.

6.6 The State party maintains that the author's brother did not complain about the alleged torture in police custody to the Osh city prosecutor's office. His counsel, in his letter of 24 October 2012 to the Prosecutor General of Kyrgyzstan, did not mention that his client had been tortured by the police. Lastly, as to the claim that the chemical expertise did not specify the methods used to identify the substance as heroin, the State party submits that the expertise was conducted according to the methodological guide for experts of the Ministry of Internal Affairs of Kyrgyzstan.

*From the author*

7.1 In his additional comments, submitted on 30 September 2013, the author restated that his brother was subjected to torture, of which the latter complained before the trial court. On 4 April 2013, the Osh city prosecutor's office interrogated his brother with regard to the communication to the Committee. In this regard, on 5 April, the author lodged a complaint with the Prosecutor General of Kyrgyzstan claiming that the acts of the Osh city prosecutor's office amounted to pressure on the victim in the absence of counsel and requested the opening of a criminal case against the police officers involved. On 10 May, the Prosecutor General upheld the Osh city prosecution decision/ruling not to open a criminal case. On 14 June, the author responded to the Prosecutor General, claiming, among other things, that he had not received the Osh city prosecution ruling not to open a criminal case. According to the author, it was impossible to challenge the decision which, according to the law, had to be done within seven days after the party had been informed, as the author had had no information about the beginning of the preliminary investigation, about the organ conducting it or the one taking the decision, or the motives and the reasoning.

7.2 The author again disagrees with the court's assessment of the evidence, with the conclusions of the chemical expertise and with the verdict. He submits that his brother's counsel was not allowed to cross-examine an important witness and that his testimony was kept secret. He claims that his brother did not have a fair trial as the "sting" method used by the police is not under independent and impartial judicial control. He reiterates that the prosecutor did not react to his brother's torture allegations during the court hearing. The Osh prosecutor's office visited his brother in prison only on 4 April 2013, nearly two years after the arrest, and in connection with the communication before the Committee. He further maintains that the prosecution is not an independent organ as it functions under a conflict of interest: on one hand, supervising the investigation and in charge of the prosecution and, on the other hand, the protection against torture by the pretrial investigation organs; therefore, the victims of torture in police custody have no effective remedy of protection.

7.3 The author reiterates that his brother was deprived of the possibility to appeal his verdict as he has not received it in a language that he understands.<sup>12</sup> The State party

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<sup>12</sup> The author refers to the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, paras. 32 and 49.

accepted this as a fact, maintaining only that the practice of requiring payment for the translation is not in violation of the criminal procedure law. The author challenges the State party's argument and refers to article 147 (1) 3) of the Criminal Procedure Code, according to which the court costs related to interpretation are paid by the State.

7.4 On 3 February 2015, the author informed the Committee that on 13 November 2014 the Osh City Court had ordered the early release of his brother.<sup>13</sup> However, he maintains that his brother is still a victim under the Optional Protocol, as the State party did not acknowledge or correct the violations of his rights guaranteed by the Covenant.

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

#### *Consideration of admissibility*

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication 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 State party's claim that the author's brother did not complain about the alleged torture in police custody to the Osh city prosecutor's office and that his counsel, in his letter of 24 October 2012 to the Prosecutor General of Kyrgyzstan, also did not mention torture of his client by the police. The Committee notes, however, the author's allegations that his brother complained during the court hearing about having been subjected to torture by police officers and that he did not raise the allegations of torture before the prosecutor's office due to fear of reprisal and further torture. The Committee further notes that at a later stage (two years later), the complaint lodged by the author on 5 April 2013 with the Prosecutor General of Kyrgyzstan against the acts of the Osh city prosecutor's office (questioning the author's brother in connection with the communication before the Committee) and requesting the opening of a criminal case against the police officers was rejected on 10 May. The Committee therefore considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met and that it is not precluded from examining the claim.

8.4 The Committee takes note of the author's allegations of ill-treatment by police officers during his pretrial detention with the aim of extracting a confession. The author's brother alleged that he was beaten and tortured by police officers and forced to give written testimony against M.T. The author's brother raised this allegation before national authorities, as is indicated notably in the Osh City Court verdict of 7 July 2011, and is not refuted by the State party. The Committee further notes that the Court did not refer the case for further investigation. In this regard, the Committee takes note of the State party's arguments that the author's brother wanted to escape criminal liability and that he and his counsel had not complained of torture before the prosecutor's office. The Committee further notes that the author's brother's allegations are not supported by any medical document. From the material before it, the Committee is not in a position to conclude that the author's brother was subjected to treatment contrary to article 7 of the Covenant. In the absence of more precise information from the author in this respect, the Committee concludes that the author's allegations under article 7 have been insufficiently substantiated for purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol.

8.5 The Committee notes the author's claims under article 9 (1) and (3) of the Covenant that his brother was arrested on 25 February 2011 and kept in detention from 2 p.m. to 11.40 p.m. without being informed of the reasons, and that on 27 February the Osh City Court ordered his remand in pretrial detention without a legal basis. However, the Committee observes that the author's brother detention in connection with the criminal proceedings was authorized by the Osh City Court on 27 February and that the Court,

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<sup>13</sup> The decision is not part of the file.

applying the domestic law, decided that the author's brother should remain in detention until 25 April, since he was accused of a serious crime and could attempt to escape justice. The Committee considers that the author has failed to explain in what manner the initial arrest and subsequent order to remain in detention failed to comply with the domestic law or was otherwise arbitrary under article 9 of the Covenant. Accordingly, the Committee considers that these claims are inadmissible for lack of substantiation under article 2 of the Optional Protocol.

8.6 With respect to the allegation under article 9 (2) that the author's brother was not promptly informed of the reasons for the arrest and the charges against him in a language that he understands, the Committee notes the State party's observations that the communication between the police and the author's brother at the time of detention took place in the Russian language; that he was represented by a privately retained counsel; that his interrogations as a suspect and as an accused were conducted in Russian and in the presence of his counsel; and that he was informed about the charges against him in Russian. In the absence of a more precise rebuttal from the author in this respect, the Committee concludes that the author's allegations have been insufficiently substantiated for purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol.

8.7 The Committee notes the author's claims under articles 9 (4) and 14 (5) of the Covenant that: (a) from 25 April 2011 until the sentencing of his brother on 7 July, his detention was arbitrary and unlawful as it was based only on the indictment and the transmittal of the case to the first instance court; and (b) that he and his brother were deprived of the right to challenge at the Supreme Court of Kyrgyzstan the lawfulness of the detention, as the Supreme Court respectively declined to examine the author's application for supervisory review and examined but rejected his brother's supervisory review motion. The Committee considers that these claims are insufficiently substantiated for the purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol.

8.8 The Committee notes the author's claims under article 14 of the Covenant in relation to the examination of evidence and of witnesses during the trial. It particularly observes the author's disagreement with the sentence against him, the assessment of material evidence, the fact that the defence was not allowed to cross-examine a key witness, X, who had cooperated with the police in the "sting" operation, the methods and the conclusions of the expert witnesses, the use of the "sting" method and the composition of a three-judge panel of the Osh Regional Court. In this regard, the Committee recalls its case law according to which it is for the courts of States parties to evaluate the facts and the evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.<sup>14</sup> In the present case, the Committee observes that the material before it does not allow it to conclude that the examination of the evidence and questioning of witnesses by the court was carried out in an arbitrary manner. Nor do the materials contained on file allow the Committee to conclude that the composition of the court was not in accordance with domestic law. The Committee therefore declares these claims insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

8.9 The Committee considers that the author has sufficiently substantiated his remaining claims, raising issues under article 14 (3) (a) and (f) of the Covenant, and therefore 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 made available to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

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<sup>14</sup> See, inter alia, communications No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision of inadmissibility adopted on 2 November 2004, para. 7.3; No. 1138/2002, *Arenz et al. v. Germany*, decision of inadmissibility adopted on 24 March 2004, para. 8.6; and No. 2125/2011, *Tyan v. Kazakhstan*, Views adopted on 16 March 2017, para. 8.10. See also the Committee's general comment No. 32, para. 26.

9.2 The Committee notes the author's claims under article 14 (3) (a) and (f) that his brother, being a native Russian speaker, was not promptly informed of the reasons for and the nature of the charges against him in writing in a language that he understands, could not understand the indictment available only in Kyrgyz and did not receive the verdict in Russian. The State party refuted these allegations by stating that an interpreter was appointed to the case and the author's brother had access to the materials on the file together with his counsel and the interpreter. The Committee recalls its jurisprudence that the reasons for arrest must be provided in a language that the arrested person understands.<sup>15</sup> It also recalls that the right of all persons charged with a criminal offence to be informed promptly and in detail in a language which they understand of the nature and cause of criminal charges brought against them, enshrined in subparagraph 3 (a), is the first of the minimum guarantees in criminal proceedings of article 14. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally — if later confirmed in writing — or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based.<sup>16</sup> Given that the indictment is a key document in the criminal proceedings, the Committee considers it essential that the accused person understands the contents fully and that the State makes all necessary efforts to provide that person with a translation free of charge in a language that he/she can understand. In the absence of further information on the file, due weight should be given to the author's allegations that his brother could not understand the indictment available only in Kyrgyz. Therefore, the Committee concludes that the facts as submitted reveal a violation of the author's brother's rights under article 14 (3) (a) of the Covenant.

9.3 With respect to the allegation that the author's brother was not able to understand the language used in court, the Committee recalls also that the right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court, as provided for by article 14 (3) (f), enshrines another aspect of the principles of fairness and equality of arms in criminal proceedings;<sup>17</sup> this right arises at all stages of the oral proceedings, and applies to aliens and as well as to nationals.<sup>18</sup> The Committee observes, however, that interpretation was available to the author's brother throughout the proceedings before the courts, as reflected in the protocols of the hearings. Therefore, the Committee concludes that the facts as submitted do not disclose a violation of the author's brother's rights under article 14 (3) (f) of the Covenant.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the information before it discloses a violation by the State party of the author's rights under article 14 (3) (a) of the Covenant.

11. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to provide compensation to the author's brother for the violations suffered. The State party is also under an obligation to take all necessary steps to prevent the occurrence of similar violations in the future.

12. 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 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 present Views, and to have them widely disseminated in the State party.

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<sup>15</sup> See general comment No. 35 (2014) on liberty and security of person, para. 26; and communication No. 868/1999, *Wilson v. Philippines*, Views adopted on 30 October 2003, paras. 3.3 and 7.5.

<sup>16</sup> See general comment No. 32, para. 31.

<sup>17</sup> See communication No. 219/1986, *Guesdon v. France*, Views adopted on 25 July 1990, para. 10.2.

<sup>18</sup> General comment No. 32.

## Annex

### **Individual opinion of Committee members Yuval Shany, José Manuel Santos Pais and Christof Heyns (dissenting)**

1. We regret not being able to join the other members of the Committee in finding that the State party violated the author's rights under article 14 (3) (a) of the Covenant.
2. The author's brother was stopped on 25 February 2011 in a "sting" operation conducted by the Southern Regional Office for Combating Drug Trafficking of the Department of Internal Affairs of Kyrgyzstan. During the search of his car, 2.7 grams of heroin were found (para. 2.1). Although the author's brother stated at the time that he was not aware of the heroin's origin, he was certainly aware, from that moment on, of the possible charges relating to the drug possession.
3. It is further uncontested that on 27 February 2011, the author's brother, who speaks Russian and was given a written indictment in Kyrgyz, was informed in Russian about the charges against him, that he was represented by private counsel during the interrogation (which took place in Russian) and that he had an interpreter assigned to his case by the State with whom he was able to review the case file, including the written indictment (paras. 6.4–6.5). The author has not provided any additional information which would enable us to reach the conclusion that the State party had failed to inform him promptly and in detail in a language which he understands of the nature of the charge against him (especially taking into account the facts as stated in para. 2 above). As a result, we are of the view that this part of his claim is unsubstantiated and should have been found inadmissible.
4. It appears in this connection as if the finding of violation by the majority on the Committee was largely influenced by the fact that the State party failed to provide the author's brother with a written translation of the indictment detailing the charges against him (para. 9.2). We take issue with this aspect of the Views.
5. While we agree that given their importance to the criminal process the charges must be specified in a written document,<sup>1</sup> it does not appear to us to be necessary or reasonable to require States to translate such a document in written form into the specific language used by a criminal defendant when other effective ways are available to enable him or her to be fully informed of the charges. We are of the view that it was not shown that in the present case the measures taken by the State party in particular, the assignment of a State interpreter and full access to the case file (which included the indictment) were inadequate or infringed his right to due process, especially given the fact that the author's brother was legally represented throughout the process.
6. As a result, we do not consider it sufficiently well established that the author's rights under article 14 (3) (a) were violated in the circumstances of the present case.

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<sup>1</sup> See general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 31.