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on civil and
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HUMAN RIGHTS COMMITTEE
Seventy-ninth session
20 October - 7 November 2003

VIEWS

Communication No. 1096/2002

<u>Submitted by:</u>	Mrs. Safarmo Kurbanova (not represented by counsel)
<u>Alleged victim:</u>	The author's son, Mr. Abduali Ismatovich Kurbanov
<u>State party:</u>	Tajikistan
<u>Date of communication:</u>	16 July 2002 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 86/91 decision, transmitted to the State party on 16 July 2002 (not issued in document form)
<u>Date of adoption of Views:</u>	6 November 2003

On 6 November 2003, the Human Rights Committee adopted its Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1096/2002. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

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

Seventy-ninth session

concerning

Communication No. 1096/2002*

Submitted by: Mrs. Safarmo Kurbanova (not represented by
counsel)

Alleged victim: The author's son, Mr. Abduali Ismatovich
Kurbanov

State party: Tajikistan

Date of communication: 16 July 2002 (initial submission)

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

Meeting on 6 November 2003,

Having concluded its consideration of communication No. 1096/2002, submitted to the
Human Rights Committee by Safarmo Kurbanova on behalf of her son Abduali Ismatovich
Kurbanov under the Optional Protocol to the International Covenant on Civil and Political
Rights,

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

Adopts the following:

* The following members of the Committee participated in the examination of the present
communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo
Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo,
Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada,
Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski
and Mr. Maxwell Yalden.

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

1.1 The author of the communication is Mrs. Safarmo Kurbanova, a Tajik citizen born in 1929. She submits the communication on behalf of her son - Abduali Ismatovich Kurbanov, also Tajik citizen, born in 1960 and sentenced to death on 2 November 2001 by the Military Chamber of the Supreme Court of Tajikistan. He is at present awaiting execution in the Detention Centre No. 1 in Dushanbe. The author claims that her son is a victim of violations by Tajikistan¹ of articles 6, 7, 9 and 10, as well as paragraphs 1, 3 (a) and (g), and 5 of article 14 of the International Covenant on Civil and Political Rights. The communication also appears to raise issues under article 14, paragraph 3 (d), of the Covenant, although this provision is not directly invoked. The author is not represented by counsel.

1.2 On 16 July 2002, in accordance with rule 86 of its rules of procedure, the Human Rights Committee, acting through its Special Rapporteur for New Communications, requested the State party not to carry out the death sentence of Mr. Kurbanov while his case is pending before the Committee. No reply has been received from the State party in this regard.

The facts as presented by the author

2.1 According to the author, Mr. Kurbanov went to the police on 5 May 2001 to testify as a witness. He was detained for seven days in the building of the Criminal Investigation Department of the Ministry of the Interior, where according to the author he was tortured. Only on 12 May 2001, a formal criminal charge of fraud was made against him, an arrest warrant was issued for him, and he was transferred to an investigation detention centre. He was forced to sign a declaration that he renounced the assistance of a lawyer.

2.2 On 9 June 2001, a criminal investigation was opened in relation to the triple murder of Firuz and Fayz Ashurov and D. Ortikov, which had occurred in Dushanbe on 29 April 2001. In addition to the initial fraud charge, the author's son was, on 30 July 2001, charged with the murders and with illegal possession of firearms². The author claims that her son was tortured before he accepted to write down his confession under duress; during her visits, she noted scars on her son's neck and head, and as well as broken ribs. She adds that one of the torturers – investigation officer Rakhimov – was charged in August 2001 with having received bribes and with abuse of power in 13 other cases also related to the use of torture; he was later sentenced to 5 years and six months of imprisonment.

2.3 The investigation was concluded on 4 August 2001, and the case was sent to court. On 2 November 2001, the Military Chamber of the Supreme Court sentenced the author's son to death (with confiscation of his property). On 18 December 2001 the judgment was confirmed by the Supreme Court, following extraordinary appeal proceedings.

¹ The Optional Protocol entered into force for Tajikistan on 4 April 1999.

² It transpires from documents later submitted by the State party that the author's son was on 11 June 2001 initially informed that he was suspected of the murders.

2.4 The judgment of 2 November 2001 by the Military Chamber of the Supreme Court was submitted to the Committee by the author in Tajik; an unofficial English translation was provided subsequently. The judgment includes neither an account of the prosecution's case nor a transcript of the actual trial. It begins with a description of the facts as established by the court, then moves to the testimonies of the three accused persons and some witnesses, and finally addresses the issues of the conviction and sentencing. It does not transpire from this judgment how the Military Chamber of the Supreme Court was constituted, e.g. whether one or more of its judges were military officers. However, it transpires that Mr. Kurbanov was tried together with one Mr. Ismoil and Mr. Nazmudinov, who was a major in the service of the Ministry of National Security. According to the facts established by the court, Mr. Kurbanov killed, on 29 April 2001 three persons in the car of one of the victims, using an unregistered pistol. Later, he hid the bodies by burying them in the immediate vicinity of his garage and left the pistol with Mr. Ismoil, after telling him that he had killed three persons. On 8 May 2001, Mr. Ismoil delivered the pistol to Mr. Nazmedinov who in turn failed to deliver it to the authorities. Instead, the gun was found on 12 June 2001 in Mr. Nazmedinov's apartment.

2.5 According to the same judgment, Mr. Kurbanov confessed to the killings and admitted to burying his own clothes and the car's licence plate together with the bodies. Neither the two co-accused nor any of the witnesses heard by the court testified they had seen Kurbanov commit the killings. One witness, Mr. Hamid, testified that he learned on 5 May 2001 that Kurbanov had been detained for fraud and that he had later on directed the investigators to the site where Kurbanov was building a garage. The judgment refers to Hamid saying that "he was present when the three bodies of the dead were dug out from the pit of the garage and found out that the murderer was Kurbanov." Another witness, Mr. Mizrobov, testified that he was present on 5 May 2001 when Kurbanov was taken to the authorities. He was also present on 8 or 9 June 2001 when the bodies of the three victims, "Kurbanov's clothes" and the car license plate were found. The judgment mentions that there was ballistic evidence linking the pistol found on 12 June 2001 in Mr. Nazmedinov's apartment to the crime. However, no forensic evidence linking Mr. Kurbanov to the clothes found with the bodies is mentioned, and only the confessions of the three co-defendants linked Mr. Kurbanov to the gun.

2.6 At the end of the trial, Mr. Kurbanov was sentenced to death and confiscation of his property, whereas Mr. Ismoil and Mr. Nazmedinov were both sentenced to four years' imprisonment, on account of their involvement with the crime weapon, and then immediately pardoned and released by the same court.

The claim

3.1 The author claims that her son was detained for seven days without arrest warrant. During this time, he was unable to see his family or a lawyer. The fact that her son was illegally arrested and detained for one week without being promptly informed of the charges against him, constitutes, according to the author, a violation of article 9, paragraphs 1 and 2, of the Covenant.

3.2 Article 7 and article 14, paragraph 3 (g), of the Covenant are said to be violated as Mr. Kurbanov allegedly was subjected to torture and beatings by means of kicks and with batons, strangulation, torture with electricity during the investigation, to make him confess. During a

pre-trial cross-examination with the father of one of the murder victims – Mr. Ortikov – the author's son was beaten by the father in presence of the investigators.

3.3 The author contends that article 14, paragraph 1, of the Covenant was violated, as the court proceedings were partial. She alleges that the court proceedings were unfair from the beginning, as the families of the victims exercised pressure on the judges. All requests of the defence were rejected.

3.4 The author claims that when her son was charged with murder, she requested, due to her financial situation, a lawyer be assigned to him ex officio, but she was informed that the law provided no such possibility.

3.5 The author also claims that according to the case file, a lawyer assisted her son as of 20 June 2001, but in fact she hired a lawyer for her son only in July 2001. She adds that the lawyer visited her son only two or three times during the investigation, and this was always in the presence of an investigator. After the judgment, her son was unable to see the lawyer and benefit from his assistance. According to the author, the lawyer failed to appeal for cassation. Her son had no opportunity to consult the court's judgment, as no interpreter was provided to him. Mr. Kurbanov prepared a cassation appeal himself, but this was denied, because the deadline for filing the appeal had passed. The author's own cassation appeal was denied on the ground that she was not a party to the criminal case. The extraordinary appeal proceedings which her son availed himself of with the assistance of his lawyer were unsuccessful; they do not, according to author, provide an effective means of judicial protection. Article 14, paragraph 5, of the Covenant allegedly was violated because the author's son was deprived of his right to appeal.

3.6 During the investigation, the author's son was not assisted by an interpreter, nor was he offered a qualified interpreter during the trial, despite the fact that he is a Russian speaker and some of the court documents were in Tajik. This is said to be in violation of article 14, paragraph 3 (f), of the Covenant.

3.7 The author's son is said to be detained in inhuman conditions. The cells have no water; toilets are in a corner of the cells, but they cannot be used because of the lack of water. In winter, the cells are very cold, and in summer extremely hot. Air circulation is limited because of the tiny size of the cells and of the windows. They are infested with insects because of the lack of hygiene. Prisoners are allowed to leave their cell for a walk only for half an hour per day. These conditions are said to amount to a violation of article 10, of the Covenant.

3.8 Finally, the author claims that her son's right to life protected by article 6, paragraphs 1 and 2, was violated, because the violations of article 14 resulted in an illegal and unfair death sentence, which was pronounced by an incompetent tribunal.

State party's submissions on the admissibility and merits.

4.1 By Note verbale of 16 September 2002, the State party observes that pursuant to information from the Governmental Commission on implementation of the international obligations of Tajikistan in the field of human rights, Mr. Kurbanov was sentenced to death by

the Military Chamber of the Supreme Court on 2 November 2001. The criminal proceedings against the author's son were initiated on 12 May 2001. He was ordered arrested on the same day, and he signed a written statement that he did not need legal representation during the preliminary investigation.

4.2 The State party contends that on 29 April 2001, Mr. Kurbanov killed three persons, and that on 9 June 2001 a criminal investigation was opened in this regard. The State party points out that Mr. Kurbanov provided a written and full confession of his guilt, and explained the circumstances of the crime in presence of the lawyer, Mr. Nizomov. In the State party's view, the author's allegations about the use of illegal methods of interrogation including violence and torture against her son should be considered unsubstantiated, as neither during the investigation nor in court, were such allegations raised by Mr. Kurbanov.

4.3 The State party also dismisses as unsubstantiated the author's contention that her son was not provided with an interpreter during the investigation and during the court proceedings. Mr. Kurbanov is Tajik, and upon closure of the investigation, when he consulted the case file, he declared that he did not need an interpreter. Court proceedings were conducted in the presence and with the participation of an interpreter.

4.4 The State party finally observes that the Supreme Court noted that in his cassation appeal, the author's son did not challenge the judgment of the court nor the actions of the court and the investigators, but asked for commutation of the death sentence to a long prison term. The State party concludes that on the basis of its investigations into the case, no violations of the Covenant occurred.

Author's comments on State party's submission

5.1 By letters of 25 November 2002, 13 January, 27 March, and 21 July 2003, the author presented further information. She reaffirms that her son was arrested on 5 May 2001 at around 3 pm when he voluntarily went to the police to testify as a witness. On 7 May, the author complained in writing to the Office of the Prosecutor-General; that same day, officers from that Office went to the Ministry of the Interior, to inquire about the whereabouts of her son. They were unable to find him because, as he had been beaten and was covered with blood, he was hidden in a locked office, in the presence of the policeman who had beaten him.

5.2 The author notes that the State party's submission includes copies of interrogation record sheets, with a specific field reserved for the need for interpretation, where it is mentioned that Mr. Kurbanov does not need interpretation, and that he would make his deposition in Russian. For the author, this proves that her son's mother tongue is Russian. The investigation was conducted in Russian. Some of the proceedings, such as cross-examination, were however held in Tajik; in spite of her son's request for interpretation, the investigator refused to provide for it, explaining that Mr. Kurbanov was a Tajik national and was presumed to be proficient in Tajik. The trial was also held in Tajik. Some of the hearings benefited from interpretation, but according to the author, the interpreter was unqualified, and it was often difficult to understand him.

5.3 As to the authenticity of her son's written confession, the author states that her son does not deny the authenticity of his signature on the record sheets, but that he claims to have signed them under torture. The author reiterates that her son bears marks of torture on his body, and that this was brought to the attention of the State party on several occasions.

5.4 As Mr. Kurbanov was provided with services of a lawyer only on 23 July 2001, all proceedings during this period (including interrogations), were conducted without any legal representation. This facilitated the torture of her son, and he could not complain, inter alia, because he did not know to whom to complain.

5.5 The author reiterates that upon his arrest, her son was not promptly been informed of the reasons for his arrest, nor later, of the sentence he risked for the crime he had been charged with.

5.6 Between 5 and 12 May 2001, the author's son was detained in the building of the Criminal Investigation Department and was prevented from receiving food and items brought to him

5.7 Regarding the State party's argument that Mr. Kurbanov is Tajik and should be presumed to master Tajik the author notes that her son speaks only basic Tajik because his schooling was in Russian, moreover he had lived in Russia for a long time. He is not in a position to understand legal terminology and literary phrases in Tajik. For that reason he could not understand the charges or the sentence during the court procedures.

5.8 The author acknowledges that no specific complaint about the use of torture was made, but affirms that this allegation was raised in court and was also conveyed to numerous governmental and non-governmental organizations. Thus, in the author's opinion, the authorities were fully aware of the allegations relating to her son's torture. Yet, no inquiry was initiated.

5.9 The author reiterates that the entire investigation in her son's case was partial and not objective. The case file initially contained a complaint about fraud from the wife of one Khaidar Komilov. The investigators, however, removed all reference to that person at latter stage, calling him the "unknown Khaidar". According to the author, by doing so, the investigators eliminated from the proceedings a potentially important witness.

5.10 In her letter of 21 July 2003, the author submits that because of the anguish arising out of the prospect of his execution, her son's psychological condition has deteriorated significantly.

Issues and proceedings before the Committee

Decision on admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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

6.3 With regard to the requirement of exhaustion of domestic remedies, the Committee notes that although the author failed to file a normal appeal after conviction, his case was nevertheless reviewed through extraordinary appeal by the Supreme Court and that the State party has not challenged the admissibility of the communication on this ground. It therefore considers that the author has met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With regard to the author's allegation under article 14, paragraph 1, that the trial was partial due to the pressure exerted by the audience, the Committee considers that the author has not substantiated this claim, for the purposes of admissibility. Hence, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 As to the author's claims that her son was denied the assistance of a lawyer during the pre-trial investigation and that even at later stages the assistance of his lawyer remained limited, the Committee notes that these allegations could raise issues under article 14, paragraphs 3 (b) and (d), and recalls its jurisprudence that, particularly in cases involving capital punishment, it is axiomatic that the accused is effectively assisted by a lawyer³ at all stages of the proceedings. However, the Committee notes that the author's son was assisted by a privately hired lawyer from 23 July 2001 onwards, including the actual trial and the extraordinary appeal procedure, and that the author has not given any date for the so-called cross-examination arranged as a part of the pre-trial investigation. Furthermore, the Committee notes that although the author might have been suspected of the murders since the discovery of the bodies, he was informed of his status as a suspect on 11 June 2001 and formally charged with the murders on 30 July 2001, i.e. at a time when he already was assisted by a lawyer. Even though the Committee will have to address on the merits the conduct of the State party's authorities under article 9, paragraph 2, and article 14, paragraph 3 (a), it considers in the circumstances, that no issue under article 14, paragraph 3 (b) and (d) has been substantiated, for the purposes of admissibility.

6.6 Similarly, the Committee considers that the author has not substantiated, for purposes of admissibility, that article 14, paragraph 3 (f) was violated due to the limitations on, and the insufficient quality of, interpretation provided to her son. Noting, in particular, that the presence of an interpreter appears from the judgment of 2 November 2001, the Committee concludes that this claim is inadmissible under article 2 of the Optional Protocol.

6.7 As to the author's claim that her son was denied the right of appeal, the Committee notes that Mr. Kurbanov was represented by privately obtained counsel, who did not file a regular cassation appeal. It is not clear why this was not done, but as a result, Mr. Kurbanov's conviction could only be reviewed by way of an extraordinary appeal. In these particular circumstances, the Committee considers that although the review might have been more limited than in normal appeal proceedings, the author has failed to substantiate, for purposes of admissibility, her claim under article 14, paragraph 5. Accordingly, this part of the communication is inadmissible under article 2, of the Optional Protocol.

³ See for example Aliev v. Ukraine, Communication 781/1997, Robinson v. Jamaica, Communication No. 223/1987 and Brown v. Jamaica, Communication No. 775/1997.

6.8 The Committee considers that the remainder of the author's claims have been sufficiently substantiated for purposes of admissibility, and proceeds to their examination on the merits.

Examination of the merits

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

7.2 The Committee has taken note of the author's claim that her son was detained on a Saturday (5 May 2001), and detained for seven days without a charge. To support her claim, she provides a copy of the police register which displays a record entered on 7 May 2001 relating to her son's arrest, allegedly for fraud. She filed a complaint about the allegedly illegal detention of her son with the Office of the Procurator General on the same day. Furthermore, the Committee notes that according to the judgment of 2 November 2001 by the Military Chamber of the Supreme Court, the author was detained on 5 May 2001. This information is not refuted by the State party's contention that an arrest warrant was issued on 12 May 2001. In the absence of any further explanations from the State party, the Committee concludes that Mr. Kurbanov was detained for seven days without an arrest warrant and without being brought before a judge. The Committee concludes that his rights under article 9, paragraphs 2 and 3, of the Covenant have been violated.

7.3. Furthermore, the documents submitted by the State party show that Mr. Kurbanov was, after being detained since 5 May 2001 on other grounds, informed on 11 June 2001 that he was suspected of the killings of 29 April 2001 but charged with these crimes only on 30 July 2001. During his detention from 5 May 2001 onwards, he was, except for the last week starting on 23 July 2001, without the assistance of a lawyer. The Committee takes the view that the delay in presenting the charges to the detained author and in securing him legal assistance affected the possibilities of Mr. Kurbanov to defend himself, in a manner that constitutes a violation of article 14, paragraph 3 (a), of the Covenant.

7.4 The Committee has noted the author's fairly detailed description of beatings and other ill-treatment that her son was subjected to. She has furthermore identified by name some of the individuals alleged to have been responsible for her son's ill-treatment. In reply, the State party has confined itself to stating that these allegations were neither raised during the investigation nor in court. The Committee recalls⁴, with regard to the burden of proof, that this cannot rest alone with the author of a communication, especially considering that the author and the State party do not always have equal access to evidence and that frequently the State party alone has access to relevant information. Further, the mere fact that no allegation of torture was made in the domestic appeal proceedings cannot as such be held against the alleged victim if it is proposed, as in the present case, that such an allegation was in fact made during the actual trial but was neither recorded nor acted upon. In the light of the details given by the author on the alleged ill-treatment, the unavailability of a trial transcript and the absence of any further explanations from the State party, due weight must be given to the author's allegations. Noting in

⁴ See, for example, Communication No. 161/1983, Rubio v. Colombia.

particular that the State party has failed to investigate the author's allegations, which were brought to the State party's authorities' attention, the Committee considers that the facts as submitted disclose a violation of article 7 of the Covenant.

7.5 In the light of the above finding and the fact that the author's conviction was based on his confession obtained under duress, the Committee concludes that there was also a violation of article 14, paragraph 3 (g), of the Covenant.

7.6 As to the author's claim that her son's rights under article 14, paragraph 1 were violated through a death sentence pronounced by an incompetent tribunal, the Committee notes that the State party has neither addressed this claim nor provided any explanation as to why the trial was conducted, at first instance, by the Military Chamber of the Supreme Court. In the absence of any information by the State party to justify a trial before a military court, the Committee considers that the trial and death sentence against the author's son, who is a civilian, did not meet the requirements of article 14, paragraph 1.

7.7 The Committee recalls⁵ that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant. In the current case, the sentence of death was passed in violation of the right to a fair trial as set out in article 14 of the Covenant, and thus also in breach of article 6.

7.8 The State party has not provided any explanations in response to the author's fairly detailed allegations of the author's son's condition of detention after conviction being in breach of article 10 of the Covenant. In the absence of any explanation from the State party, due weight must be given to the author's allegations according to which her son's cell has no water, is very cold in the winter and hot in the summer, has inadequate ventilation and is infested with insects, and that the author's son is allowed to leave his cell only for half an hour a day. With reference to the United Nations Standard Minimum Rules for the Treatment of Prisoners, the Committee finds, that the conditions as described amount to a violation of article 10, paragraph 1, in respect of the author's son.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the rights of Mr. Kurbanov under article 7, article 9, paragraphs 2 and 3, article 10, article 14, paragraph 1 and paragraph 3 (a) and (g), and of article 6 of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the author's son is entitled to an effective remedy entailing compensation and a new trial before an ordinary court and with all the guarantees of article 14, or, should this not be possible, release. The State party is under an obligation to take measures to prevent similar violations in the future.

⁵ See Conroy Levy v. Jamaica, communication No. 719/1996, and Clarence Marshall v. Jamaica, communication No. 730/1996..

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to these Views. The State party is also requested to publish the Committee's Views.

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