



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 2024/2011

#### Views adopted by the Committee at its 103rd session, 17 October–4 November 2011

<i>Submitted by:</i>	Arshidin Israil (represented by counsel, Yury Stukanov)
<i>Alleged victims:</i>	The author
<i>State party:</i>	Kazakhstan
<i>Date of communication:</i>	28 January 2011 (initial submission)
<i>Document references:</i>	Special Rapporteur's rules 92 and 97 decision, transmitted to the State party on 1 February 2011 (not issued in document form)
<i>Date of adoption of Views:</i>	31 October 2011
<i>Subject-matter:</i>	Extradition to China of Uighur asylum-seeker
<i>Substantive issues:</i>	Arbitrary detention, refoulement
<i>Procedural issues:</i>	Non-compliance with request for interim measures
<i>Articles of the Covenant:</i>	6, 7, 9
<i>Articles of the Optional Protocol:</i>	

## 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 (103rd session)**

concerning

#### **Communication No. 2024/2011\***

*Submitted by:* Arshidin Israil (represented by counsel, Yury Stukanov)

*Alleged victims:* The author

*State party:* Kazakhstan

*Date of communication:* 28 January 2011 (initial submission)

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

*Meeting on* 31 October 2011,

*Having concluded* its consideration of communication No. 2024/2011, submitted to the Human Rights Committee on behalf of Mr. Arshidin Israil 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,

*Adopts the following:*

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

1.1 The author of the communication is Arshidin Israil, a Chinese national of Uighur origin, born in 1972, who, at the time of the initial submission was detained in an Isolation Detention Centre in Kazakhstan, awaiting extradition to China, following the refusal to grant him asylum in Kazakhstan. He submits that if the State party proceeds with his extradition, he would be at risk to be subjected to torture and could be sentenced to death in China. Although he does not invoke it specifically, these claims appear to raise issues under articles 6 and 7, of the Covenant. The author also claims to be a victim of violations by Kazakhstan of his rights under article 9, paragraph 1, and article 2, paragraph 3 (a), of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 30 September 2009. The author is represented by counsel.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

1.2 On 1 February 2011, when registering the communication and pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party not to proceed with Mr. Israil's extradition to China, pending examination of his case. This request was reiterated on 7 April 2011. On 27 June 2011, author's counsel informed the Committee that Mr. Israil had been extradited to China on 30 May 2011.

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

2.1 The author is a Chinese national of Uighur origins. In July 2009, while in China, he provided information over the phone to the Radio Free Asia<sup>1</sup> regarding the events in Urumchi town, where a number of Uighurs had been reportedly killed by the police during a demonstration. The author left China on 23 September 2009, fearing persecution because of his cooperation with foreign media. He crossed illegally the border with Kazakhstan, and, on 29 September 2009, he applied for asylum with the representation of the Office of the United Nations High Commissioner for Refugees (UNHCR) in Almaty. On 10 March 2010, the UNHCR Office granted him refugee status.

2.2 On 1 April 2010, the author was supposed to travel to a European country which had agreed to grant him residence. Instead of allowing him to travel, however, the Kazakh authorities placed him under house arrest, where he was under constant supervision and could not move freely. He remained there until 23 June 2010 and was repeatedly questioned by different Kazakh officials. On 23 June 2010, he was arrested by the police following an extradition request from the Chinese authorities on charges of having participated, in China, in terrorist activities and for having endangered public safety (arts. 120 and 125 of the Chinese Criminal Code). The author reports that at least one of the charges that the author faces in China is for a crime punishable by death penalty. He submits copies of: written order from the General Prosecutor of Kazakhstan; letter from the Chinese Embassy in Kazakhstan; request for judicial cooperation; extradition request by the Chinese General Prosecutor's Office, in which it is stated that the Supreme Court of China has decided that, if found guilty, the author would not be sentenced to death; search warrant; arrest warrant; copy of identity document.

2.3 On 25 June 2010, the Almalin Regional Court issued a detention order against the author for one month, pending extradition. On 28 June 2010, the author appealed against the detention order, which the Almaty City Court rejected on 2 July 2010. On 23 July 2010, 19 August 2010 and 27 August 2010, the Almalin Regional Court extended the author's detention by an additional month each time. All appeals against these orders were unsuccessful. On 9 September 2010, the Commission of the Almaty Department of the Migration Committee of Kazakhstan rejected the author's asylum application under article 12 of the Law on Refugees. On 20 September 2010, the author filed an appeal to the Chairman of the above Committee against the rejection, which to date remained unanswered. On 22 November 2010, the author appealed the rejection before the Almalin City Court. His appeal was rejected on 30 December 2010.

2.4 On 13 January 2011, the author filed a request to the General Prosecutor to be released from detention, since he was detained in excess of the terms provided for in the article 534 of the Criminal Procedure Code, which authorizes detention pending an extradition request for no more than three months. The General Prosecutor never responded to that request.

2.5 The author affirms that he has thus exhausted all available domestic remedies.

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<sup>1</sup> Based in the United States of America.

**The complaint**

3.1 At the time of registration of the communication, the author claimed that if the State party proceeded with his extradition, he would be tortured and sentenced to death in China. These claims appear to raise issues under articles 6 and 7 of the Covenant, although not specifically invoked by the author.

3.2 The author claims violations of the Kazakh criminal procedure, which led to violations of his rights under article 9, paragraph 1 and article 2, paragraph 3 (a), in particular because of his placement in house arrest between 1 April 2010 and 23 June 2010, and, later on, he was kept detained prior to expulsion from 23 June 2010 to 30 May 2011, even if the law allows only for a three months' pre-expulsion detention.

**State party's observations**

4.1 By Note Verbale of 1 April 2011, the State party challenged the admissibility of the communication. The State party informs that, on 9 November 2009, it received a request from the General Prosecutor's Office of China concerning the extradition of the author to China where he was accused of terrorist activities and threat to public security and was under an arrest warrant. The State party notes that the Chinese authorities have submitted material showing that the author was sentenced in China in 1997, for having participated in terrorist acts. He has been released after having served his prison term. According to the documents submitted (arrest warrant, search warrant, etc.), the author was accused of separatist and terrorist activities in connection with his participation in the mass disorders in Urumchi. The State party was also informed that the author had left China while he has been under investigation.

4.2 The State party points out that the author had crossed illegally the border with Kazakhstan in September 2009, and sought asylum with the UNHCR Office in Almaty on 29 September 2009. In February 2010, the UNHCR Office issued a refugee certificate to the author.

4.3 Given the entry into force of the State party's Law on Refugees, the author asked the Almaty Migration Committee to grant him refugee status, and his request was rejected. On 23 December 2010, this decision was confirmed by the Almalinsk District Court of Almaty, and on 9 February 2011, on appeal, by the Almaty City Court.

4.4 According to the State party, on 3 March 2011, the author filed a cassation appeal against the above-mentioned court decisions with the Almaty City Court. At this point in time, this appeal was still pending. On this ground, the State party believed that the communication should be declared inadmissible, for non-exhaustion of domestic remedies. The State party added that in any event, the author's extradition could only be addressed once the Almaty City Court renders its final decision.

4.5 By Note Verbale of 21 May 2011, the State party presented additional information and clarifications on the merits of the communication. It informs that the author had been arrested on 24 June 2010, following a request for extradition to China on charges of terrorism.

4.6 The State party adds that on 9 September 2010, the Commission of the Almaty Department on Migration examined the author's asylum request of 8 June 2010, in the presence of a special representative of UNHCR in Kazakhstan. According to the State party, all recommendations made by UNHCR in the present case have been taken into account. On 14 September 2010, the author's asylum request was rejected. The whole process was monitored also by a representative of the independent non-governmental organization (name provided). The author was represented by a lawyer provided by UNHCR. The lawyer in question participated directly in the interviews and sessions of the

Almaty Department on Migration. No complaints were formulated concerning the examination of the author's case by the Department on Migration.

4.7 The State party points out that the author had appealed against the refusal of the Department on Migration to grant him asylum before the courts of first instance, appeal, and cassation. His case was examined in public hearings, in a transparent manner. On 15 April 2011, the cassation instance rejected the author's claim and its decision entered into force. The author submitted a request to the Supreme Court of Kazakhstan to have his case examined under the supervisory review proceedings (no dates provided). On 18 May 2011, the Supreme Court decided to order the re-examination of the case under the supervisory proceedings.

4.8 The State party adds that the recommendations of UNHCR were taken into account in the present case. In 2010 and 2011, the State party's authorities met with senior officials of UNHCR, conducted consultations and transmitted information concerning the author. As a result, on 3 May 2011, UNHCR officially annulled the refugee certificate it had initially issued to the author.

4.9 The State party adds that the decision of the Department on Migration was based on established and verified information, showing that granting the author asylum in the State party or in a third country could pose serious damages to the security in the State party or in other neighbouring regions. The Kazakh authorities have actively monitored the author's actions for two years. The decision to extradite him was taken irrespective to his past activities, but was rather based on the future threats he could pose for the State party.

#### **Author's comments on the State party's observations**

5.1 On 23 May 2011, the author provided clarifications about the proceedings in the author's case, and explained that on 5 May 2011, the author has submitted a request for a supervisory review of his case with the Supreme Court of Kazakhstan. Counsel also reports that, on 28 April 2011, he had requested the General Prosecutor's Office to provide him with a copy of the extradition order against the author, given that the law has changed in the meantime, and an appeal against such orders was now possible.

5.2 On 27 June 2011, counsel informed the Committee that the author was extradited to China on 30 May 2011. He notes that the decision to extradite his client was taken in September 2010, and at this point of time it was impossible to appeal against it. In January 2011, the Criminal Procedure Code was amended, and an appeal against such decisions was introduced under article 531-1 of the Criminal Procedure Code, dealing with appeals concerning forcible removals: this provision has a retroactive effect. Counsel recalls that he had requested a copy of the extradition order from the General Prosecutor's Office on 28 April 2011. He received a reply on 7 June 2011, informing him that if an appeal is filed against the extradition order, the Prosecutor's Office would transmit all materials to the competent court. Counsel appealed on 27 May 2011 with the Almalinsk District Court of Almaty, but no decision was taken.

#### **Additional information by the State party**

6. The State party presented additional information on 12 August 2011. It notes that the author's counsel claims that the complainant's extradition took place in violation of national law, as the Prosecutor's decision to extradite his client, taken in September 2010, was not subjected to appeal at that time. The State party explains that the Prosecutor's Office took its decision on 23 September 2010. However, given that the author had applied for asylum, his removal was stopped until the completion of the asylum proceedings. The legislation in force at this point of time provided for a court review of the extradition order. Article 109 of the Criminal Procedure Code of Kazakhstan regulates appeals against

actions/omissions to act and decisions by prosecutors. Individuals whose rights and freedoms are directly concerned by an action/omission to act and decisions by prosecutors may complain to court if postponing the verification of the legality of such actions/omissions or decisions until the trial stage would make the restoration of the person's rights or freedoms difficult or impossible. Thus, the decision of the General Prosecutor's Office to extradite the author could have been appealed in 2010.

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

#### *Non-respect of the Committee's request for interim measures<sup>2</sup>*

7.1 The Committee notes that the State party extradited the author although his communication had been registered under the Optional Protocol and a request for interim measures of protection had been addressed to the State party in this respect. The Committee recalls that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (preamble and art. 1).<sup>3</sup> Adherence to the Optional Protocol obliges a State party to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination, to forward its views to the State party and to the individual (art. 5, paras. 1 and 4). It is incompatible with these obligations, for a State party, to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

7.2 Apart from any violation of the Covenant found against a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration, by the Committee, of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In the present communication, the author alleged that his rights under articles 6 and 7 of the Covenant would be violated should he be extradited to China. Having been notified of the communication, the State party breached its obligations under the Optional Protocol by extraditing the author before the Committee could conclude its consideration and examination and the formulation and communication of its Views. It is particularly regrettable for the State to have done so after the Committee has acted under rule 92 of its rules of procedure, requesting the State party to refrain from doing so.

7.3 The Committee recalls<sup>4</sup> that interim measures pursuant to rule 92 of the Committee's rules of procedure adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the rule, especially by irreversible measures such as, as in the present case, the author's extradition undermines the protection of Covenant rights through the Optional Protocol.

#### *Consideration of admissibility*

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

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<sup>2</sup> See, for example, communication Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, *Maksudov et al. v. Kyrgyzstan*, Views adopted on 16 July 2008, paras. 10.1–10.3.

<sup>3</sup> See, for example, communication No. 869/1999, *Piandiong et al. v. the Philippines*, Views adopted on 19 October 2000.

<sup>4</sup> See communication No. 964/2001, *Saidova v. Tajikistan*, Views adopted on 8 July 2004.

8.2 The Committee notes that the same matter is not being examined under any other international procedure of investigation or settlement, in line with the requirements of article 5, paragraph 2 (a), of the Optional Protocol.

8.3 On the issue of exhaustion of domestic remedies for purposes of the requirements of article 5, paragraph 2 (b), of the Optional Protocol, the Committee notes that the author's counsel made reasonable attempts to complain against the appropriate authorities' refusal to grant Mr. Israil refugee status and their subsequent decision to have the latter extradited to China, but that these proceedings were rendered futile by the State party, which proceeded with the extradition in the meantime.

8.4 The Committee considers that the author's allegations, raising issues under articles 6 and 7, read together with articles 2, paragraph 3, and 9, read together with article 2, of the Covenant, have been sufficiently substantiated, for purposes of admissibility, and declares them admissible.

*Consideration on the merits*

9.1 The Human Rights Committee has considered the communications in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

9.2 The author has claimed having been initially kept under house arrest, from 1 April to 23 June 2010. On 23 June 2010, he was placed in detention pending extradition. According to the State party's law, such detention cannot exceed three months. In the present case, however, the author was kept detained from 23 June 2010 to 30 May 2011, when he was extradited. All appeals concerning the author's continuing house arrest and subsequent detention remained unsuccessful. The Committee recalls that deprivation of liberty is permissible only when it takes place on such grounds and in accordance with such procedure as are established by domestic law and when this is not arbitrary.<sup>5</sup> It notes that the State party has not addressed these claims specifically. In the circumstances, the Committee considers that due weight must be given to the author's allegations. Accordingly, the Committee concludes that, in the circumstances of the present case, the author's rights under article 9, paragraph 1, read together with article 2, paragraph 3 (a), of the Covenant, have been violated.

9.3 As to whether the author's extradition from Kazakhstan to China exposed him to a real risk of torture or other ill-treatment in the receiving State, in breach of the prohibition of refoulement contained in article 7 of the Covenant, the Committee observes that the existence of such a real risk must be decided in the light of the information that was known, or ought to have been known, to the State party's authorities at the time of the extradition. In determining the risk of such treatment in the present case, the Committee must consider all relevant elements.<sup>6</sup>

9.4 The Committee reiterates that States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.<sup>7</sup> This principle is not subject to any balancing with considerations of national security or the type of criminal conduct of which an individual is accused or suspected.

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<sup>5</sup> See, for example, *Maksudov et al. v. Kyrgyzstan* (footnote 2 above).

<sup>6</sup> *Ibid.*

<sup>7</sup> Human Rights Committee, general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para.9.

9.5 The Committee has noted the State party's arguments submitted in general terms as to the threat which could result from maintaining the author in Kazakhstan. It considers that, although not invoked by the State party specifically, these arguments tend in fact to establish that the State party has respected its obligations under article 13 of the Covenant, rather than addressing the issues related to the eventual risks for the author, under articles 6 and 7, as set forth in the present communication. The Committee considers at the outset that it was known, or should have been known, to the State party's authorities at the time of the author's extradition that there were widely noted and credible public reports that China resorted to use of torture against detainees and that the risk of such treatment was usually high in the case of detainees belonging to national minorities, including Uighurs, held for political and security reasons.<sup>8</sup> In the Committee's view, these elements in their combination show that the author faced a real risk of torture in China if extradited. Moreover, it is clear that the author was sought in China for serious crimes, and could face a death sentence there. While a statement was made by the Chinese authorities in their request of extradition that the author would not be sentenced to death (see para. 2.2 above) and the State party did not address this issue, the Committee considers that a risk of conviction and death sentence being procured through treatment incompatible with article 7 of the Covenant is not removed. In the circumstances, the Committee is of the view that there is also a risk of a violation of article 6 of the Covenant.

9.6 The Committee recalls<sup>9</sup> that if a State party removes a person within its jurisdiction to another jurisdiction where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, the State party itself may be in violation of the Covenant. In the circumstances of the present case, the Committee concludes that the author's extradition thus amounted to a violation of articles 6 and 7 of the Covenant.

10. 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 by Kazakhstan of the author's rights under article 9, paragraph 1 read together with article 2, paragraph 3 (a); article 6 and article 7, read alone and together with article 2, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation. The State party is requested to put in place effective measures for the monitoring of the situation of the author of the communication, in cooperation with the receiving State. The State party should provide the Committee with updated information, on a regular basis, of the author's situation. The State party is also under an obligation to prevent 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 or not and that, pursuant to article 2 of the Covenant, the State

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<sup>8</sup> See, for example Committee against Torture, concluding observations in connection with the examination of the fourth periodic report of China (CAT/C/CHN/CO/4), paras. 11 and 18, and report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (E/CN.4/2006/6/Add.6). The author has also referred to reports of Amnesty International, in particular on the inquiries concerning the 2009 disorders in the Xinjiang Uighur Autonomous Region in China.

<sup>9</sup> See, for example, communication No. 469/1991, *Ng v. Canada*, Views adopted on 5 November 1993, para. 6.2; Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 12.

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 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views, to have them translated in official languages of the State party and widely distributed.

[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.]

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