



# 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. 2125/2011\*, \*\*

<i>Communication submitted by:</i>	Dmitry Tyan (represented by his wife Irina Khan, and by Anara Ibrayeva, the Kazakhstan International Bureau for Human Rights and Rule of Law)
<i>Alleged victim:</i>	Dmitry Tyan
<i>State party:</i>	Kazakhstan
<i>Date of communication:</i>	1 April 2011 (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 22 December 2011 (not issued in document form)
<i>Date of adoption of Views:</i>	16 March 2017
<i>Subject matter:</i>	Right not to be subjected to torture or to cruel, inhuman or degrading treatment; arbitrary arrest and detention; conditions of detention; fair trial
<i>Procedural issues:</i>	Substantiation of claims; admissibility <i>ratione temporis</i>
<i>Substantive issues:</i>	Torture; prompt and impartial investigation; arbitrary arrest and detention; fair trial; legal assistance; right to be tried in one's presence
<i>Articles of the Covenant:</i>	2 (3), 7, 9, 10 and 14
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1. The author is Dmitry Tyan, a national of Kazakhstan born in 1972, currently serving a sentence in the correction facility UK-161/2 in Kostanai region in Kazakhstan. He claims that Kazakhstan has violated his rights under articles 2 (3), 7, 9, 10 and 14 of the Covenant.

\* Adopted by the Committee at its 119th session (6-29 March 2017).

\*\* The following members of the Committee participated in the examination of the present communication: Tanía Maria Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamariam Koita, Marcia V.J. Kran, Duncan Muhumuza Laki, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval.



The Optional Protocol entered into force for Kazakhstan on 30 September 2009.<sup>1</sup> The author is represented by counsel.

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

2.1 On 22 October 2008, around 5 p.m., the author — the owner of a construction business in Astana — and his wife were summoned by the police to the Department of Internal Affairs in Astana. They were questioned as witnesses in the case of the murder of the wife and three minor children of their acquaintance Y., also a businessman in Astana. The questioning lasted until 10.30 p.m. After that the author was taken to the Almaty District Department of Internal Affairs and was questioned there until 1.30 a.m. During the questioning, five police officers were beating and threatening him in order to force him to confess guilt and to give testimony against his acquaintance E., who was the main suspect in the case. At 2.30 a.m. on 23 October 2008, the author was allowed to leave.

2.2 Around 10 a.m. on 23 October 2008, the author and his wife reported the ill-treatment by police to the Department of the National Security Committee in Astana, indicating the names of two of the five officers who had tortured him.<sup>2</sup> Directly from there, the author was taken for fingerprinting and DNA-testing by the police officers who had questioned him the previous day. A police officer stayed at the author's apartment that night for the purposes of security.

2.3 Around 7 p.m. on 24 October 2008, the author was questioned as a suspect, since his fingerprint had been found in the bathroom of the victims' house and he supposedly owed money to Y. Around 9 p.m., he was escorted to a temporary detention facility at the Department of Internal Affairs in Astana. From 24 to 27 October 2008, the author was questioned repeatedly without his lawyer, N., who had been hired by his wife. Officer O. visited the author several times each day, threatening him and beating him about his ears and his head. On 25 October 2008, the police officers informed the author that his lawyer and his wife had abandoned him. On the same day, the police officers hit him in the chest and made him stand next to the wall for four hours. On several occasions, he was locked in without food, water or access to a toilet in a so-called "glass" — a 50 cm<sup>2</sup> space where he could not sit down. The police officers ignored the author's requests for a medical examination. The first medical examination was carried out on 30 October 2008, when there were no marks left on the author's body. The author was examined every day between 30 October and 21 November 2008, when he had not been subjected to ill-treatment.

2.4 On 25 October 2008, the author was forced into writing a confession, in which he testified against E. On 26 October 2008, the court authorized the detention of the author for 10 days. On 27 October 2008, the author was made to write a second confession, in the presence of a lawyer on duty, A. The author retracted the two confessions and refused the services of A. on 2 November 2008, when a new lawyer, G., hired by his wife, visited him.

2.5 On 3 November 2008, the author was charged with murder of Ms. Y. and her children. In view of the gravity of the charges, the investigator, not the court, extended the author's detention, in total until 28 December 2008. Subsequent decisions to extend the detention were made by the courts on 22 December 2008 and 16 January 2009. The author appealed each of the decisions concerning his detention, requesting release on bail. The courts rejected the appeals stating that the author could influence the witnesses in the case or abscond from investigation or trial.

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<sup>1</sup> At the time of ratification of the Optional Protocol, the State party made the following declaration: "The Republic of Kazakhstan, in accordance with article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights, recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Republic of Kazakhstan concerning actions and omissions by the State authorities or acts or decisions adopted by them following the entry into force of this Optional Protocol in the Republic of Kazakhstan."

<sup>2</sup> On the same day, the author submitted similar complaints to the Prosecutor's Office of the Almaty District in Astana and the Personal Security Department of the Ministry of Internal Affairs in Astana.

2.6 On 25 November 2008, after being transferred to the pretrial detention facility of the Ministry of Justice, the author wrote two more confessions in the absence of his lawyers. On 27 November 2008, he wrote a statement refusing the services of three out of his four lawyers, K., S. and N., and requesting to be transferred back to the police temporary detention facility. On 6 December 2008, the author met with his lawyers and wrote a statement confirming his wish to be defended by them. On 12 December 2008, the author, in the presence of his lawyer K., retracted the two confessions written on 25 November 2008.

2.7 On 29 December 2008, the Department of Internal Affairs took a decision not to open a criminal case against the police officers who had allegedly ill-treated the author. On 9 February 2009, the Prosecutor's Office of Astana ordered further investigation to be carried out, in particular because some witnesses had not been identified and questioned by the investigators and some other (unspecified) actions to verify the claims made had not been undertaken. On 16 March 2009, after an additional investigation, the Department of Internal Affairs refused to open a criminal case. The decision of 16 March 2009 was an exact copy of the decision of 29 December 2008. The author's appeal, submitted on an unspecified date to the Prosecutor General's Office was rejected on 27 May 2009. On 21 January 2010, in response to a letter from the author's wife dated 30 December 2009, the Prosecutor General's Office stated that the allegations concerning the use of unlawful investigative methods towards the author were considered by the trial court and the appeal court and could not be confirmed.

2.8 The author was held in the police temporary detention facility from 24 October to 30 December 2008, although, by law, he should have been placed in a pretrial detention facility of the Ministry of Justice. He was transferred to a pretrial detention facility, remaining there from 25 to 27 November 2008 and then from 30 December 2008 to the end of his pretrial detention. Between 30 December 2008 and 10 March 2009, he was held in solitary confinement. At this time, he was not allowed to receive packages from his wife.

2.9 On numerous occasions between 24 October 2008 and 6 January 2009, the author's lawyers were denied access to him. When they managed to have a meeting with the author, it was only for a couple of minutes and in the presence of police officers.

2.10 Since his first encounter with the police on 22 October 2008, the author has insisted that he had an alibi for the evening of 21 October 2008, when the murder was said to have been committed. This alibi could be confirmed by nine witnesses and by the transcripts of his home and mobile telephone calls. The police, however, started to check his alibi only in January 2009.

2.11 On 2 March 2009, the author's criminal case was transmitted to court. The author alleges numerous violations of his rights during the trial. Among others, the author claims that the four retracted confessions were accepted by the court as evidence; the presiding judge did not allow the author to mention torture by the police and, when he did mention it, the judge asked the jury not to take this information into account; one of his lawyers, U., was not allowed to represent him in court;<sup>3</sup> and the court did not take into account the author's alibi and based its verdict on inadmissible evidence, which was collected in violation of procedural norms and was not sufficient to prove his guilt. The author further claims that the principle of equality of arms was violated in the court, since he and his lawyers were not allowed to introduce any evidence. During the court hearings, the judge denied 190 questions by the defence and rejected 52 defence petitions. The experts invited by the author were heard by the court as witnesses and not as experts and their expert opinion was not taken into account. The author also claims that he received copies and not the originals of the trial transcripts, that some transcripts were missing and were given to him late, only after numerous complaints, and that his lawyers were denied the request for three extra days to prepare the pleadings. The second presiding judge, N., was not impartial, because his son was a financial police officer investigating a case against the author. The same judge also examined the author's appeals of pretrial detention orders on 30 December

<sup>3</sup> The author already was represented by two lawyers who had represented him since the beginning of his detention. U. was contracted by the author's wife when the trial was ongoing.

2008 and 26 January 2009. The author's request for the removal of the judge was denied. The author also claims that there was pressure from the presiding judge on the defence and the jury, that the presiding judge did not do anything to prevent the threats from the family of the victims and that the jury was composed of eight women and two men of Kazakh ethnicity, when the author is a man of Korean ethnicity.

2.12 The author raises numerous claims concerning assessment by the court of the evidence in the case. Among others, he claims that the crime scene protocol was rewritten the next day, that technical errors were made in collecting evidence and that the experts arrived at incorrect conclusions, in particular about the date when his fingerprint was left in the bathroom of the victims' house, the DNA found on a piece of cloth and the handwriting in the four confessions. He also alleges that no evidence has been presented in the court concerning the money he owed to Y., which was said to be the motive for the crime.

2.13 On 16 June 2009, the Astana City Court sentenced the author to 25 years in prison and confiscation of property. The author appealed on 30 June 2009 to the Supreme Court, which rejected the appeal on 10 November 2009. The author, although represented by his lawyers, was denied the possibility of being present at the hearing of the appeal court, despite a written request. In the appeal, the author raised claims about procedural violations at the stage of investigation and collection of evidence, the lack of independence of judge N. and the failure of the trial court to investigate the circumstances under which the author wrote the four confessions and the pressure exerted on him by the police, specifically the restriction of his right to receive packages and to be visited by his lawyers. The appeal court considered his case for two hours and rejected his appeal without reviewing the facts and evidence in his case. The author appealed under the supervisory review proceedings to the Supreme Court on 16 November 2009. Without notifying the author or his lawyers about the date of the hearing, on 5 January 2010, the Supreme Court decided not to open a supervisory review of the appeal. On 5 September 2011, the author submitted another appeal under the supervisory review proceedings to the Supreme Court. On 6 December 2011, the Supreme Court reduced his sentence by 1 year to 24 years in prison. On an unspecified date, the author submitted one more appeal under the supervisory review proceedings to the Supreme Court. The appeal was rejected on 9 December 2015. On an unspecified date, the author submitted a request to the City Court No. 2 in Kostanai to review his sentence following entry into force on 1 January 2015 of the new Criminal Code of 3 July 2014. On 18 November 2015, Kostanai City Court No. 2 reduced the sentence to 19 years in prison.

2.14 The author complains about conditions of detention in the colony AK-159/7 in Karaganda, where he was held from 26 August 2010 to 18 September 2010. Among other complaints, he mentions overcrowded sleeping areas (eighty to ninety persons in a room), humidity, cold temperatures in the rooms, a lack of natural light, insufficient artificial light and a lack of ventilation. He alleges that the inmates had to clean up the sewage and that his correspondence was subjected to censorship.<sup>4</sup> He also claims that there is no possibility of work and no activities for the inmates in the correction facility UK-161/2 in Kostanai region, where he is currently serving the sentence.

### **The complaint**

3.1 The author claims that his rights under article 7 of the Covenant read alone and in conjunction with article 2 (3) of the Covenant have been violated on account of torture by the police, the lack of effective investigation into his allegations and the lack of effective remedies.

3.2 He alleges that his rights under article 9 of the Covenant, read alone and in conjunction with article 2 (3), of the Covenant have been violated due to the failure of the courts to justify the need for his detention when authorizing it and by the authorization of his detention dated 3 November 2008 by the investigator and not by the court.

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<sup>4</sup> The author provided a brief dated 3 June 2009, issued by the Public Monitoring Commission of correction facilities and temporary detention facilities in the Karaganda region on the basis of its visit to the colony AK-159/7 on 4 May 2009.

3.3 The author further claims that the restrictions of the visits by his wife and lawyers and restriction of the possibility of receiving packages from his wife while in pretrial detention, the solitary confinement in the pretrial detention facility and the conditions of detention in the colony AK-159/7 and in the correction facility UK-161/2 were in violation of his rights under article 10 of the Covenant.

3.4 The author claims that, during the judicial proceedings, his rights under article 14 (1), read alone and in conjunction with article 2 (3), and article 14 (2) and (3) (b), (d), (e) and (g) of the Covenant have been violated.

3.5 The author finally alleges that his right under article 14 (5) of the Covenant to have his conviction and sentence reviewed by a higher tribunal was violated because he was not present during the appeal hearing and because the appeal court has failed to review the facts of his case before rejecting his appeal in a formal decision.

3.6 The author seeks an effective investigation into his allegations of torture and punishment of those responsible for it; the revision of the court's verdict with the exemption from evidence of the four confessions extracted from him under torture; and full and adequate reparation of the violations suffered, including compensation and rehabilitation.

#### **State party's observations**

4.1 In a note verbale dated 25 February 2012, the State party submitted its observations. The State party states that the Department of Internal Affairs carried out an investigation into the alleged ill-treatment of the author by police officers but could not confirm the author's allegations. The decision of the Department not to open a criminal case was upheld by the Prosecutor's Office. The investigation ended with the decision of the Department of Internal Affairs, dated 16 March 2009, not to open a criminal case against the police officers. The materials and results of the investigation were considered in the trial court.

4.2 The State party further maintains that, since his arrest on 24 October 2008, the author's lawyers had permission to visit him and all investigative actions have been conducted in their presence and were followed by medical examinations.<sup>5</sup> The author's detention was authorized and extended by the court in accordance with the national legislation.

4.3 The State party observes that the author has written four confessions, in which he provided evidence against E. and stated that he witnessed how E. attacked Y. According to expert conclusion No. 2388/1 dated 18 December 2008, the analysis of the author's handwriting in the four texts did not reveal the mental or physical state of the author to be out of the ordinary at the time of writing. The State party maintains that the head of the police temporary detention facility stated that no pressure was exerted on the author in detention and that there was no restriction of the visits by his lawyers. The court found that the evidence had been obtained in a lawful way and accepted it as admissible. The court based its verdict not only on the confessions by the author, but also on evidence collected during the investigation, among them the fingerprint of the author found in the bathroom of the victims' house and on their car, his DNA on the cigarette found in the yard of the victims' house, the statements of E. and the debt he owed to Y. The author's alibi is confirmed only by his relatives and a friend of his wife. The transcript of the author's mobile telephone calls shows that there were no telephone calls after 7 p.m. on 21 October 2008.

4.4 The State party denies any violation of the author's rights during the investigation or the judicial proceedings in his case.

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

5.1 On 20 April 2012, the author submitted his comments to the observations of the State party. To the State party's observation concerning the investigation into the author's

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<sup>5</sup> Reference is made to the following dates: 30 and 31 October 2008 and 4, 5, 6, 11, 13 and 21 November 2008.

allegations of ill-treatment, the author replies that, while according to the national legislation the decision on whether to open a criminal case on the basis of torture allegations should be made by the institution responsible within three days, the decision in his case was made more than two months after he submitted his complaint. The investigation was carried out by the police, which was not an independent institution given that the alleged perpetrators were police officers. Contrary to the State party's statement, the materials and the results of the investigation have not been studied in the trial court, where the presiding judge called on the jury not to take into account the claims of the author about having been tortured.

5.2 The courts did not analyse the reasons for detention of the author. The decisions of the investigator authorizing his detention for two months were not reviewed by the court.

5.3 The expert who carried out the study of the four confessions written by the author only analysed the text of the confessions and did not use free samples of the author's handwriting. According to the expert K., hired by the author, free samples are essential in order to establish whether the text in question was written by a person in a disturbed mental or physical state.

5.4 None of the evidence mentioned by the State party as a basis for the court's verdict could prove that the author was involved in the crime. The fingerprint in the bathroom was left by the author when he helped to install the mirror in August 2008, the DNA test was inconclusive and no supporting documents were presented to confirm the author's debt to Y. The verdict was based on mere assumptions. The State party has not referred to the transcript of home telephone calls, which confirm the author's alibi.

5.5 The author further rebuffs the observations of the State party, repeating his original arguments and maintains that his complaint reveals violations of the Covenant, as mentioned in the submission.

#### **Additional submission by the parties**

6. In its note verbale dated 30 June 2016, the State party confirms its previous observations and maintains that the author's claims should be found inadmissible as unsubstantiated under articles 2, 3, and 5 of the Optional Protocol to the Covenant.

7. In his additional comments submitted on 30 July 2016, the author reiterated the main arguments of his initial submission.

#### **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 author's claim that he has exhausted all effective domestic remedies available to him. In the absence of any objection by the State party in this connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

8.4 The Committee notes that the events in the author's case happened before 30 September 2009, when the Optional Protocol entered into force for the State party. The Committee observes that it is precluded *ratione temporis* from examining alleged violations of the Covenant that occurred before the entry into force of the Optional Protocol for the State party, unless the violations complained of continue after that date or continue to have effects that in themselves constitute a violation of the Covenant,<sup>6</sup> or an affirmation of a

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<sup>6</sup> See, inter alia, communications No. 2027/2011, *Kusherbayev v. Kazakhstan*, Views adopted on 25

prior violation.<sup>7</sup> In this light, the Committee notes the author's claims under article 9 of the Covenant concerning the illegality of his pretrial detention and under article 10 of the Covenant concerning his solitary confinement between January and March 2009, the restrictions on receiving visits from his wife and the lawyers and of the parcels from his wife. The Committee notes that the domestic proceedings on these issues were finalized before the entry into force of the Optional Protocol for the State party and finds them inadmissible *ratione temporis*. With regard to the remainder of the author's claims, the Committee notes that they have been raised before the domestic courts and institutions after 30 September 2009, within the appeals and supervisory proceedings, and have been dismissed in a manner affirming the alleged violation. The Committee thus considers them admissible *ratione temporis*.

8.5 The Committee notes the author's claim under article 10 of the Covenant concerning the conditions of his detention in prisons AK-159/7 in between August and September 2010 and UK-161/2, as of September 2010. The Committee observes that the author has not provided sufficient information on the domestic proceedings he undertook and materials in support of his allegations relevant to the conditions of detention in the prisons. Accordingly, the Committee finds this part of the author's claim under article 10 of the Covenant insufficiently substantiated for purposes of admissibility under article 2 of the Optional Protocol.

8.6 The Committee notes that the author alleges a lack of independence and impartiality by judge N. because his son was involved in investigation of the financial case against the author and because the same judge examined the author's appeals of pretrial detention orders on 30 December 2008 and 26 January 2009. The Committee observes, however, that the author has not provided sufficient information or explanation regarding the bias of the judge and his failure to fulfil his duty of impartiality and independence. Nor has the author furnished sufficient documents to support his claim. The Committee also notes that the author's other claims under article 14 (1) of the Covenant, such as that the presiding judge pressured the defence and the jury, that the judge failed to ensure protection against the threats voiced by the family of the victims, that the jury was of unlawful composition etc., are of a general nature and have not been sufficiently substantiated for the purposes of admissibility. The Committee thus finds this part of the communication inadmissible under article 2 of the Optional Protocol.

8.7 Regarding the author's claims under article 14 (3) (b) of the Covenant, the Committee notes that the author and his lawyer did receive the trial transcripts and were able to comment on them, albeit with some delay. The author has not sufficiently specified to which documents and witness statements in particular he and his lawyers were denied access or how, in his opinion, this had affected the outcome of the proceedings. Neither has the author explained why he and his lawyers needed three additional days to prepare for pleadings. In the absence of any other pertinent information or explanation on file, the Committee therefore finds that this claim is not sufficiently substantiated for the purposes of admissibility under article 2 of the Optional Protocol.

8.8 The Committee notes the author's claim that the trial court violated his rights under article 14 (3) (d) because his third lawyer U. was not allowed to represent him in the court. In this regard, the Committee notes that from the material on file that it transpires that, according to the trial court, bringing a third lawyer onto the team would have prolonged the proceedings, since the lawyer mentioned was already engaged in another trial for the whole following week and would thus have been unable to study the materials of the author's case. Because the trial had already been going on for a month, the court decided to reject the author's request. In this light and taking into account that the author has not indicated the importance of the third lawyer for his defence, the Committee finds that this claim is not

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March 2013, para. 8.2; No. 1633/2007, *Avadanov v. Azerbaijan*, Views adopted on 25 October 2010, para. 6.2; and No. 1367/2005, *Anderson v. Australia*, inadmissibility decision adopted on 31 October 2006, para. 7.3.

<sup>7</sup> See communication No. 2027/2011, *Kusherbaev v. Kazakhstan*, Views adopted on 25 March 2013, para. 8.3.

sufficiently substantiated and declares it inadmissible under article 2 of the Optional Protocol.

8.9 The Committee also notes the author's complaint that article 14 (3) (d) has been violated because neither he nor his lawyers were present at the supervisory review hearing by the Supreme Court on 5 January 2010. In this regard, the Committee notes that the author has not provided the text of the supervisory appeal and the decision of the court, nor has he specified the nature and character of the hearing or indicated whether a prosecutor was present at the hearing in question. In the absence of any other information or explanation on file, the Committee concludes that the author has failed to sufficiently substantiate his claim under article 14 (3) (d) and finds it inadmissible under article 2 of the Optional Protocol.

8.10 The Committee notes the author's allegations under article 14 (3) (e) 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 status of experts invited by the defence and the status of their conclusions in the court. In this regard the Committee notes, from the information on file, that the judge was applying domestic law in determining the status of witnesses and of the evidence in question. The Committee recalls that it is generally for the courts of State party to the Covenant to review 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>8</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 reached the threshold for arbitrariness in the evaluation of the evidence, or amounted to a denial of justice. The Committee therefore declares this part of the communication insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

8.11 The Committee considers that the author has sufficiently substantiated his remaining claims, raising issues under article 7, read alone and in conjunction with article 2 (3), of the Covenant and the remainder of claims under article 14 (1), (3) (d) and (g) and (5) of the Covenant, the Committee proceeds to their examination on the merits.

#### *Consideration of the merits*

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

9.2 The Committee takes note that the allegations of torture presented by the author relate to the events that took place on 22 October 2008, and between 25 and 27 October 2008, when he was questioned by the police officers as a witness and a suspect, respectively. The Committee notes the author's claim that, because he had been under police surveillance since the morning of 23 October 2008, he could not see a medical expert to be examined after the beating he sustained. The Committee also notes, from the material available to it that, on 24 and 30 October 2008, the author was examined by medical experts who neither found any marks on his body nor received any complaints from the author. The author has not contested the independence of the medical experts. The Committee also notes the author's allegations that the investigation of his complaints concerning torture by the police officers on 22 October 2008 was not effective. In this regard, the Committee observes that, on 9 February 2009, the Prosecutor's Office of Astana repealed the decision of the Department of Internal Affairs dated 29 December 2008 not to open a criminal investigation against the police officers who allegedly tortured the author. The Committee notes that the reasons indicated by the Prosecutor's Office included the failure of the investigators to identify and question a number of possible witnesses mentioned by the author. On 16 March 2009, after an additional investigation, the

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<sup>8</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; and No. 1138/2002, *Arenz et al. v. Germany*, decision of inadmissibility adopted on 24 March 2004, para. 8.6. See also the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 26.



Department of Internal Affairs again refused to open a criminal investigation. The Committee notes, however, that the decision of the Department of Internal Affairs of 16 March 2009 was identical to its decision of 29 December 2008 and that it did not contain information on any additional investigative measures undertaken. The Committee notes the arguments of the domestic authorities that the author's allegations of torture and the results of the investigation were considered by the trial court. The State party, however, has not presented any documents in support of its arguments. From the information before it, the Committee observes that not only did the trial court not consider the author's allegations of torture, but that it also prevented the author from speaking about them in front of the jury. In the light of the above, the Committee finds that there has been a violation of the author's rights under article 2 (3), read in conjunction with article 7, of the Covenant due to the lack of effective investigation of his torture allegations.

9.3 The Committee notes the author's claim about being denied the right to participate in the appeal court hearing on 10 November 2009. In this regard, the Committee notes that the author had requested to be present in the court in person and that the court followed domestic law in rejecting his written request.<sup>9</sup> The Committee also notes that the author was represented by four lawyers at the appeal hearing and that at least two of these lawyers had represented him throughout the criminal proceedings against him. The Committee finds, however, that article 14 (3) (d) of the Covenant applies to the present case, since under the appeal proceedings the court examines the case as to the facts and the law and makes a new assessment of the issue of guilt or innocence. The Committee recalls that article 14 (3) (d) of the Covenant requires that accused persons are entitled to be present during their trial and that proceedings in the absence of the accused are only permissible if this is in the interest of the proper administration of justice or when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present.<sup>10</sup> Accordingly, in the absence of adequate explanation by the State party, the Committee finds that the facts before it disclose a violation of article 14 (3) (d) of the Covenant. In view of this conclusion, the Committee decides not to examine the author's claims under article 14 (5) of the Covenant.

9.4 The Committee further notes the author's claim that the trial court has accepted his forced confessions as evidence. It also notes the statement of the State party that the evidence considered by the court was obtained in a lawful way and accepted by the court as admissible. In this regard, the Committee notes that information on file indicates that the trial court has not considered the way the four confessions were obtained by the police officers. There is nothing on file to suggest that the court has considered that, when the author wrote the confessions, he was under police control in a detention facility and that he retracted the confessions once he talked to his lawyers. In this light, the Committee concludes, that the author's rights under article 14 (1) and (3) (g) of the Covenant have been violated.

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 2 (3), read in conjunction with article 7, of the Covenant and of article 14 (1) and (3) (d) and (g) 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: (a) conduct a thorough and effective investigation into the author's allegations of torture and, if confirmed, prosecute, try and punish those responsible for the torture of the author; (b) review the court's verdict in the author's case with the exclusion of the confessions the nature of which was not duly verified by the court; and (c) provide compensation to the author for the violations suffered. The State party is also under

<sup>9</sup> According to article 408 (2) of the Code of Criminal Procedure, the presence of the sentenced person in the second-instance court hearing is possible only if the Prosecutor requests a heavier penalty for this person.

<sup>10</sup> See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 36.

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 or not 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 when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the 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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