



# Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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## Committee against Torture

### Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 651/2015

<i>Communication submitted by:</i>	Aleksei Ushenin (represented by counsel, Viktoria Samartseva)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Kazakhstan
<i>Date of complaint:</i>	18 June 2014 (initial submission)
<i>Date of present decision:</i>	12 May 2017
<i>Subject matter:</i>	Torture following arrest and detention
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Substantive issue:</i>	Torture — prompt and impartial investigation
<i>Articles of the Convention:</i>	1, 2, 12, 13 and 14

#### Background

1. The complainant is Aleksei Ushenin, a citizen of Kazakhstan born in 1977. He claims that Kazakhstan violated his rights under articles 1, 2, 12, 13 and 14 of the Convention. The complainant is represented by counsel, Viktoria Samartseva of the Kazakhstan International Bureau for Human Rights and Rule of Law.

#### Facts as presented by the complainant

2.1 The complainant submits that on 28 August 2011, several police officers arrested him and took him to a police station. During his detention, police officers<sup>1</sup> tortured him in an attempt to force him to confess involvement in a robbery. The police officers threatened the complainant that if he did not confess, the authorities would put his wife in jail. In addition, the police officers inflicted beatings on his feet and hands and repeatedly hit his head against the wall.

2.2 The complainant claims that the police officers repeatedly put a plastic bag on his head until he lost consciousness; he was revived with ammonium chloride. The complainant also claims that the police officers put out cigarettes on his body, causing severe burns. They pulled down his pants and burned his buttocks with cigarettes, and repeatedly inserted a rubber baton in his anus. One of the police officers filmed this treatment. The complainant submits that the police officers threatened to shoot him and

<sup>1</sup> The complainant provides the names of several of the officers, including K.U., K.R. and S.H.



took him to the woods<sup>2</sup> and made him dig what they said was his grave. They then took him back to the police station and continued beating him.

2.3 The complainant submits that during the night of 29 August 2011, he was examined by a paramedic, who gave him a pain relief injection. Afterwards, police officers took him back to a room and continued beating him until the afternoon of the next day.

2.4 To protest the police violence and torture, the complainant went on a hunger strike between 29 October and 18 November 2011, and during that time swallowed eight nails. As a result, his health deteriorated rapidly. When his health reached a life-threatening point, an operation was carried out to remove the nails from his stomach. The complainant claims that he was taken to a hospital, where he was neglected and did not receive the necessary medical assistance.

2.5 The complainant claims that his wife, who was pregnant at the time, was arrested by police on 28 August 2011 and taken to a police station, where police officers degraded and threatened her in order to force her to testify against the complainant. To compound the arbitrary nature of her detention, the police officers did not inform her of her rights and put her in a detention cell with murder suspects in order to pressure her psychologically.

2.6 Furthermore, the police officers told her that they would take away her identity documents and that she would not be able to prove that anything illegal had happened to her. Police officers also warned her that if she disappeared, no one would ever know what had happened to her. She was kept in unlawful detention for 15 hours. The authorities returned her identification card after three days. During this time, they showed the complainant his wife's identification card to prove that they were holding her, and threatened him that if he did not confess, the authorities would lock up his wife and would bring numerous men to infect her with HIV.

2.7 The complainant's sister also submitted a complaint to the authorities, claiming that the complainant had been tortured. She stated that she herself was also pressured psychologically by the police to testify against her brother.

2.8 The complainant submits that, on 6 September 2011, while still in detention, he met a prosecutor and a representative of the penitentiary system from the ministry of internal affairs and communicated with them, in writing and verbally, that he had been tortured. The two officials examined his body for signs of bodily harm. Eight days after the torture had been inflicted upon the complainant, there were numerous round burn marks on his back and bruises on his feet and hands, which were confirmed by medical certificate No. 01-14/1413 dated 6 September 2011.<sup>3</sup>

2.9 The complainant claims that on 30 August 2011, he again met with a prosecutor, M.U., who said that he could not do anything about the torture allegations, since he was "being pressured by people from the city". Only on 21 December was a criminal investigation opened into the claims of torture. Two persons who were detained with the complainant were questioned and testified that they had witnessed burns, injuries and bruises on the complainant's body.

2.10 The complainant claims that during the criminal proceedings against him, he informed the judge, the prosecutor, the court secretary and an investigator of the fact that he had been tortured by police officers, and showed the court signs of bodily harm and a medical certificate. The judge ordered the complainant's medical certificate to be excluded from the official record of the case. The complainant claims that the court ignored his oral statement as well, and decided to prolong his detention for two more months. The court ignored the claims of torture, although under national law, in the case of a torture complaint the courts are under an obligation to look into the allegations without delay.

2.11 The complainant claims that, on 30 December 2011, he filed a motion to dismiss the criminal case against him on the grounds that he had been tortured. He was sentenced on 17

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<sup>2</sup> The exact location has not been provided.

<sup>3</sup> The authorities also ordered an examination, No. 01-19/29, which confirmed the existence of burn marks and injuries but concluded that the injuries could have been self-inflicted.

January 2012 to five years and six months of imprisonment. The complainant appealed the decision to dismiss his claim of 30 December with the Ural city court, on the grounds that he had been tortured. His appeal was dismissed on 5 June 2014. The complainant appealed the dismissal of his 30 December motion with the Western Kazakhstan regional court, on the grounds that he had been tortured. His appeal was again rejected, on 11 June 2014. Domestic remedies were therefore exhausted by the complainant on that date.

### **The complaint**

3.1 The complainant claims that he was subjected to torture by the State party's authorities and, therefore, his rights under article 1 of the Convention were violated.

3.2 The complainant submits that the State party did not undertake the necessary measures to prevent his being tortured during the initial period of detention, effectively condoning torture, in violation of article 2 (1) of the Convention.

3.3 The complainant further claims, under articles 12 and 13 of the Convention, that the State party did not proceed to a prompt and impartial investigation, based on reasonable grounds to believe that an act of torture had been committed; that the State party did not ensure that the case was promptly and impartially examined by the competent authorities; and that the State party did not take steps to ensure that the complainant and witnesses were protected against all ill-treatment or intimidation.

3.4 The investigation into the claims of torture was ineffective. It disregarded the medical certificates, which clearly prove that torture had taken place. The complainant and his representatives did not have access to the torture investigation materials. All the information obtained by investigators was based on evidence provided by police officers, who were not interested in revealing the truth.

3.5 The complainant contends that the State party did not guarantee his right to obtain redress and the right to fair and adequate compensation, in violation of article 14 of the Convention.

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

4.1 By note verbale dated 17 March 2015, the State party challenged the admissibility of the complaint. The State party submits that the complainant was charged with and convicted of two crimes: hooliganism (under article 257 (3) of the Criminal Code) and robbery (under article 179 of the Code). On 17 January 2012, the complainant was sentenced to five years and six months of imprisonment.

4.2 The complainant's appeals were rejected by the appellate court on 28 March 2012 and the cassation appeals court on 30 October 2014. Both courts ruled that the decisions of the lower courts on the complainant's appeals should stand. Article 458 of the Criminal Procedure Code foresees the right of a convicted person to appeal a conviction even after the sentence has taken effect. This can be done by filing a request for a supervisory review with the Supreme Court of Kazakhstan.

4.3 This right is not limited in time. The complainant can still apply for a supervisory review and since he has failed to exhaust this remedy, the Committee must consider his complaint inadmissible.

4.4 The State party further claims that on 14 December 2011, the department responsible for economic crimes and corruption refused to initiate a criminal investigation on the basis of the complainant's claims of torture, finding, again, that no crime of torture had been committed.

4.5 On 30 July 2015, the State party provided its observations on the merits of the communication. It submits that on 1 September 2011, the authorities indeed received a complaint of torture from the complainant. On 14 September, the prosecutor's office started an investigation into the circumstances of the complainant's claims. This preliminary investigation was closed without initiating a criminal case, as the authorities found that no crime had been committed against the complainant.

4.6 The evidence that was gathered during the preliminary investigation was reviewed again by the Office of the Prosecutor General<sup>4</sup> which, on 20 March 2015 decided to re-examine the case. On 22 April, this examination was discontinued as well, as it was decided that no crime had been committed.

4.7 On 22 July 2015, upon receiving the complainant's submission to the Committee, the Office of the Prosecutor General decided to reopen the case. The State party takes note of the claims made by the complainant that he was taken to a forest outside the city, where he was ordered to dig his own grave, and that his wife and other relatives were pressured to testify against him. The results of this re-examination will be shared with the Committee in due course.<sup>5</sup>

4.8 The State party further notes that, in general, Kazakhstan is implementing several broad measures to combat torture. In 1998, the State party ratified the Convention and in 2009 it became party to the Optional Protocol thereto. Places of detention and imprisonment are regularly monitored to prevent torture. Furthermore, a national preventive mechanism has been created to monitor places of detention.

4.9 The State party has established a system for identifying torture and considering torture complaints. All places of detention must have special torture complaint boxes. The evidence gathered as a result of torture cannot be used in court, and persons subjected to torture must be paid compensation and provided with rehabilitation.

#### **Additional information from the complainant**

5.1 On 12 June 2016, in reply to the State party's observations, the complainant submitted that the response conveys mostly general information on combating torture. The State party provides no specific evidence which would refute the allegations made by the complainant.

5.2 The investigation into the claims of torture that was reopened by the State party was closed on 23 December 2015, finding that no crime of torture had been committed. The complainant disagreed with this decision and asked the Office of the Prosecutor General to reopen the case, pointing to serious deficiencies in the investigation. This request was rejected on 6 May and again on 18 May 2016. The State party's repeated refusal to start a criminal prosecution demonstrates the unwillingness of the authorities to punish police officers who perpetrate torture.

5.3 In its report dated 23 December 2015, the prosecutor refused to initiate a criminal case on the basis of the allegations of torture, despite clear evidence that the author had been tortured. The medical certificate dated 7 September 2011 indicates that the complainant had burn marks on his torso, buttocks and neck, bruises on his neck and feet and scars on his stomach. The second medical examination, dated 30 September 2011, came to similar findings.<sup>6</sup>

5.4 As indicated in the same report, the complainant was questioned on 7 September 2015 and largely confirmed his previous claim that he had been tortured. In addition to giving the State party's authorities specific details of the torture, he also gave them the names of several of the alleged perpetrators, including officer K.U., who assaulted him in Terektinsky district police station.

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

##### *Consideration of admissibility*

6.1 Before considering a claim contained in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same

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<sup>4</sup> It is not clear what prompted this review.

<sup>5</sup> The State party failed to provide a copy of the findings of this investigation at the time of consideration of the present complaint. A copy of the decision has been provided by the complainant.

<sup>6</sup> The report also mentions that these injuries could have been self-inflicted.

matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. It notes that in the present case, the State party argues that the complainant has not filed a request for a supervisory review before the Supreme Court of Kazakhstan. However, the State party has not shown whether and in how many cases supervisory review procedures were successfully applied in cases concerning torture. In these circumstances, the Committee considers that the State party has not provided sufficient information to demonstrate the effectiveness of filing a complaint before the Supreme Court under the supervisory review procedure about ill-treatment or torture, following the entry into force of the final decision of a court.<sup>7</sup> Accordingly, the Committee considers that it is not precluded by article 22 (b) of the Convention from examining the present communication. Having found no obstacles to the admissibility, the Committee declares the communication admissible and proceeds with its examination on the merits.

#### *Consideration of the merits*

7.1 The Committee has considered the communication in the light of all the information made available to it by the parties concerned, in accordance with article 22 (4) of the Convention.

7.2 The Committee notes that the complainant has alleged a violation of articles 1 and 2 (1) of the Convention on the grounds that the State party failed in its duty to prevent and punish acts of torture. These provisions are applicable insofar as the acts to which the complainant was subjected are considered acts of torture within the meaning of article 1 of the Convention.<sup>8</sup> In this respect, the Committee notes the complainant's detailed description of the treatment he was subjected to while in police custody and of the content of at least two medical certificates which corroborate the information provided by the complainant and provide detailed descriptions of the injuries. The Committee considers that the treatment as described by the complainant can be characterized as severe pain and suffering inflicted deliberately by officials with a view to obtaining a forced confession.

7.3 The Committee considers that under these circumstances, the State party should be presumed liable for the harm caused to the complainant unless it provides a compelling alternative explanation. In the present case, despite several investigations conducted by the authorities, the State party provided no such explanation, merely denying involvement and even suggesting that some of the injuries could have been self-inflicted. In the absence of a plausible explanation from the State party, and in the circumstances of the present communication, the Committee considers that due weight must be given to the author's detailed allegations. Accordingly, based on the detailed account which the complainant has given of ill-treatment and torture, including names of perpetrators and at least two witnesses, and the corroboration of his allegations in the medical forensic documentation, the Committee concludes that the facts as reported constitute torture by the police within the meaning of article 1 of the Convention and that the State party failed in its duty to prevent and punish acts of torture, in violation of article 2 (1) of the Convention.

7.4 The complainant also claims that no prompt, impartial and effective investigation was carried out into his allegations of torture and that those responsible have not been prosecuted, in violation of articles 12 and 13 of the Convention. The Committee notes the unrefuted evidence that the author raised his torture claims on numerous occasions, including during his pretrial detention hearing and with the prosecutors. Furthermore, the complainant addressed his torture claims in his letter dated 12 September 2011, which was rejected by the Western Kazakhstan regional court on 23 September.

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<sup>7</sup> See, for example, communication No. 441/2010, *Evloev v. Kazakhstan*, decision adopted on 5 November 2013, para. 8.5.

<sup>8</sup> See communication No. 269/2005, *Ben Salem v. Tunisia*, decision adopted on 7 November 2007, para. 16.4.

7.5 The Committee notes that the State party did conduct several investigations into the torture claims. On 30 December 2011, for example, the investigation was discontinued since the authorities ascertained that no crime of torture had been committed. The Committee recalls that an investigation in itself is not sufficient to demonstrate the State party's conformity with its obligations under article 12 of the Convention if it can be shown not to have been conducted impartially.<sup>9</sup> In the present case, the complainant's claims regarding torture were initially ignored by the authorities. The prosecutor's office finally issued a report dated 23 December 2015, on the basis of which an investigation into the author's claims was discontinued, without assessing the detailed evidence presented by the complainant. The Committee recalls that article 12 of the Convention also requires that the investigation be prompt and impartial, promptness being essential both to ensure that the victim cannot continue to be subjected to prohibited acts and also because, in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear.<sup>10</sup> Despite contemporary evidence, including two medical certificates confirming physical signs of torture, and the complainant's detailed description of the methods of torture used along with the names of perpetrators and witnesses, the State party failed to examine the evidence and to identify any perpetrators.

7.6 In the light of the above findings and based on the materials before it, the Committee concludes that the State party has failed to comply with its obligation to carry out a prompt and impartial investigation into the complainant's allegations of torture, in violation of article 12 of the Convention. The Committee considers that the State party has also failed to comply with its obligation under article 13 and to ensure the complainant's right to complain and to have his case promptly and impartially examined by the competent authorities.

7.7 With regard to the alleged violation of article 14 of the Convention, the Committee notes that it is uncontested that no perpetrators of torture were identified and, therefore, the complainant was not able to bring a claim of damages as a result of the torture suffered. The Committee recalls in this respect that article 14 of the Convention recognizes not only the right to fair and adequate compensation, but also requires States parties to ensure that the victim of an act of torture obtains redress. The redress should cover all the harm suffered by the victim, including restitution, compensation, rehabilitation of the victim and measures to guarantee that there is no recurrence of the violations, while always bearing in mind the circumstances of each case. A civil proceeding should be available independently of the criminal proceeding and necessary legislation and institutions for such civil procedures should be in place. On the basis of the information before it, the Committee concludes that the State party is also in breach of its obligations under article 14 of the Convention.<sup>11</sup>

8. The Committee, acting under article 22 (7) of the Convention, is of the view that the facts before it disclose violations of article 1 in conjunction with article 2 (1) and of articles 12, 13 and 14 of the Convention.

9. The Committee urges the State party to conduct a proper, impartial and independent investigation in order to bring to justice those responsible for the complainant's treatment, to provide the complainant with redress and fair and adequate reparation for the suffering inflicted, including compensation and full rehabilitation, and to prevent similar violations in the future. Pursuant to rule 118, paragraph 5, of its rules of procedure, the State party should inform the Committee, within 90 days from the date of its transmittal, of the steps it has taken to respond to the present decision.

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<sup>9</sup> See communication No. 257/2004, *Keremedchiev v. Bulgaria*, decision adopted on 11 November 2008, para. 9.4.

<sup>10</sup> See communication No. 59/1996, *Blanco Abad v. Spain*, decision of 14 May 1998, para. 8.2.

<sup>11</sup> *Ibid.*, para. 5.5.