



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

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**Committee against Torture**

**Communication No. 441/2010**

**Decision adopted by the Committee at its fifty-first session,  
28 October to 22 November 2013**

<i>Submitted by:</i>	Mr. Oleg Evloev (represented by the Kazakhstan International Bureau for Human Rights and Rule of Law)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Kazakhstan
<i>Date of complaint:</i>	20 December 2010 (initial submission)
<i>Date of present decision:</i>	5 November 2013
<i>Subject matter:</i>	Failure to carry out a prompt and impartial investigation into allegations of torture, to bring perpetrators to justice, provide full and adequate reparation, forced confessions.
<i>Substantive issues:</i>	Torture; severe pain or suffering; effective measures to prevent torture; right to complain to, and to have one's case promptly and impartially examined by the authorities; right to fair and adequate compensation, confessions obtained under duress.
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Articles of the Convention:</i>	1, 2, 12, 13, 14 and 15

GE.13-49776



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## Annex

### **Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (fifty-first session)**

concerning

#### **Communication No. 441/2010**

*Submitted by:* Mr. Oleg Evloev (represented by the Kazakhstan International Bureau for Human Rights and Rule of Law)

*Alleged victim:* The complainant

*State party:* Kazakhstan

*Date of complaint:* 20 December 2010 (initial submission)

*The Committee against Torture*, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

*Meeting on 5 November 2013,*

*Having concluded* its consideration of complaint No. 441/2010, submitted to the Committee against Torture on behalf of Mr. Oleg Evloev under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

*Having taken into account* all information made available to it by the complainant and the State party,

*Adopts* the following:

#### **Decision under article 22, paragraph 7, of the Convention against Torture**

1. The complainant is Oleg Evloev, a Kazakh national born in 1980. He claims to be a victim of violations by Kazakhstan<sup>1</sup> of his rights under articles 1, 2, 12, 13, 14 and 15 of the Convention against Torture. He is represented by the Kazakhstan International Bureau for Human Rights and the Rule of Law.<sup>2</sup>

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

2.1 On 21 October 2008, around 8 p.m., a mother and her three minor children were murdered in their home in Astana. On 22 October 2008, around 5p.m., one D.T. was questioned by the Internal Affairs Department of Astana as a witness in this context.

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<sup>1</sup> The State party made the declaration under article 22 of the Convention against Torture on 21 February 2008.

<sup>2</sup> A power of attorney, dated 24 November 2009 and signed by the complainant, is attached to the complaint.

Around 10 p.m., D.T. was brought to the Internal Affairs Department of the Almaty District, where he was subjected to beatings in order to force him to confess his guilt in the murders. On 24 October 2008, he was again interrogated and subsequently arrested as a murder suspect. On 27 October 2008, D.T. wrote two statements in which he confessed to having committed the murders together with the complainant. D.T. retracted his statements on 2 November 2008 and 5 January 2009, claiming that he was forced to write them under psychological pressure and under torture by police officers.

2.2 Based on D.T.'s confession, an international arrest warrant was issued against the complainant and he was arrested on 29 October 2008 in the Chechen Republic of the Russian Federation. On 8 December 2008, he was extradited to Kazakhstan to be prosecuted for murder. He travelled by plane to Astana, accompanied by Kazakh police officers. On the way the airplane stopped twice for refuelling, in Atyrau and in Aktobe. On both occasions the complainant was taken to the airport premises and was subjected to humiliation by the officers. For instance, his hands were handcuffed behind his back and he was forced to kneel and eat food off a plate. When he refused, the officers pushed his face into the plate, pushed him to the floor and took pictures of him with their mobile phones.

2.3 In Astana, the complainant was placed in the temporary detention centre of the Department of Internal Affairs and subjected to torture to force him to confess his guilt in the murders. In particular, at least six police officers hit him in the area of his kidneys; threatened him with sexual violence; tied his hands and forced him to lie on the floor; put a gas mask on his head, repeatedly interrupting the air flow, causing him to choke; and inserted hot needles under his nails. They also showed him photos of his father and claimed that he had also been detained and tortured. The above treatment continued until the morning of 10 December 2008, when the complainant produced two written confessions. On 10 December 2008, the complainant was examined by a forensic medical expert, as he alleged that on 9 December 2008, four police officers had beaten him, hit him in the area of his head and suffocated him with a gas mask. The expert confirmed that he had numerous injuries, consistent in time with his allegations of ill-treatment.<sup>3</sup>

2.4 On 10 December 2008, the complainant was brought before the prosecutor supervising the criminal case. The complainant complained of having been tortured and showed the prosecutor the marks of violence on his body. However, the prosecutor did not take any measures to investigate the allegations, but simply extended the detention of the complainant by a further 70 days. After the meeting with the prosecutor, the methods of torture used became more sophisticated, as the police officers were aiming to leave fewer marks on the complainant's body. Thus, he was handcuffed naked by an open window in extremely cold temperatures and forced to stand with his legs wide apart and his head against the wall, until he collapsed from exhaustion. He was beaten over the head and the soles of his feet with a full two-litre plastic water bottle, deprived of sleep and placed repeatedly in a "glass", a 50 by 50 centimetre concrete cell without windows or other openings. As a result he had injuries to his head, broken ribs and a fractured left foot. He was denied medical assistance. The complainant maintains that his ill-treatment lasted until 17 February 2009, when he was transferred to another detention facility.

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<sup>3</sup> Forensic medical examination report No.3393 of 10 December 2008. The Chief Investigator of the Division of Internal affairs of the Investigation Department was ordered to perform a forensic medical examination of the complainant. The complainant was examined on the premises of the Akmolinsky Branch of the Forensic Medical Centre. The expert concluded that the complainant had injuries to his wrist and an injury to the left side and to the middle part of his head. Those injuries had been caused with a hard object less than 24 hours earlier. The expert also established injuries to his chest and to the lower part of his left leg, caused by a rounded object one to three days earlier.

2.5 The complainant, his attorney and his parents submitted numerous complaints regarding the ill-treatment to the Prosecutor's Office and the courts, as well as to other authorities, none of which were examined on their merits. In particular, the complainant complained to a prosecutor during an interrogation on 10 December 2008 and again to the same prosecutor during an interrogation, in the presence of his lawyer, on 16 December 2008. On 21 January 2009, the complainant's father submitted a written complaint to the Astana City Prosecutor's Office regarding the ill-treatment of his son. On 18 May 2009, the complainant's mother submitted another complaint in this respect to the Internal Security Department of the Ministry of Internal Affairs. On 22 May 2009, the complainant's attorney requested the Prosecutor's Office of Astana city to provide him with a copy of the formal refusal to open an investigation into the allegations of torture. A copy of the decision by an investigator of the Internal Security Division of the Department of Internal Affairs of Astana, dated 8 June 2009 and approved by the Head of the Prosecutor's Office of Astana, was not provided until 26 June 2009, one week after the complainant was found guilty of murder. On an unspecified date in 2009, the decision of 8 June 2009 was appealed on behalf of the complainant by his parents to the prosecutor K.V. of the Prosecutor's Office of Astana city who also refused to open an investigation. In all cases, the authorities refused to open an investigation into the allegations of torture.

2.6 During the complainant's trial before the Astana City Court and the second instance Supreme Court, the complainant's allegations of torture were not taken into consideration. No one was ever held accountable for the torture inflicted on the complainant and he never received compensation or rehabilitation after being tortured. Throughout the trial he was denied unimpeded communication with his defence attorney and visits from his parents. On 16 June 2009, the complainant was declared guilty of the four murders and sentenced to life imprisonment. His appeal to the Supreme Court was rejected on 10 November 2009, as it found the judgment of the court of first instance to be lawful and the complainant's arguments groundless. In addition, the complainant submits that lodging a complaint before the Supreme Court within the supervisory review proceedings concerning the fact of his torture would have been futile, as D.T., who was convicted together with the complainant, had submitted such a complaint, but it was left without examination. Consequently, the complainant maintains that he has exhausted all the available domestic remedies.

### **The complaint**

3.1 The complainant claims that his rights under article 1 of the Convention were violated by the State party, since he was tortured by State officials to force him confess his guilt in a multiple murder.

3.2 He further claims that his rights under article 2 of the Convention were violated, as the State party did not take effective administrative, judicial or other measures to prevent the acts of torture against him either during the extradition process, or while he was in pretrial detention.

3.3 He claims to be a victim of a violation of his rights under articles 12 and 13 of the Convention, since the State party authorities failed to conduct a prompt and impartial investigation into his allegations of torture.

3.4 The complainant also claims that his rights under article 14 of the Convention were violated, as the authorities did not offer him redress and adequate compensation, including rehabilitation.

3.5 Finally, he claims to be victim of a violation of his rights under article 15 of the Convention, because the courts retained his forced confessions when establishing his guilt in a crime.

**The State party's observations on admissibility**

4.1 By a note verbale of 10 March 2011, the State party challenged the admissibility of the complainant's communication for non-exhaustion of domestic remedies.

4.2 The State party explains that on 23 October 2008, the complainant was accused, in absentia, for murder of four persons in Astana on 22 October 2008. On the same day, court No. 2 of the Almatinsk District of Astana authorized the complainant's arrest. As it transpired that the complainant had left Kazakhstan in the meantime, an international arrest warrant was issued against him. As a result, he was arrested in the Republic of Ingushetia (Russian Federation) and extradited to Kazakhstan on 9 December 2008.

4.3 On 16 January 2009, the complainant was charged under articles 96 (2), 179 (3) and 185 (2) of the criminal code of Kazakhstan for premeditated murder of two or more individuals in a helpless state, committed with selfish aims, in a group, with particular violence, with the aim of concealing another crime; robbery with the aim of acquiring others' property in an important amount; and unlawful appropriation of a means of transportation. On 27 February 2009, his case was brought to court. On 16 June 2009, a jury of the Astana City Court found the complainant guilty under articles 96 (2), 179 (3) and 185 (2) of the criminal code. The complainant was sentenced to life imprisonment. At the same trial, the complainant's co-accused, D.T., was sentenced to 25 years imprisonment with confiscation of property. The State party explains that the complainant's guilt was established on the basis of a multitude of corroborating pieces of evidence collected during the preliminary investigation, assessed in court and recognized as lawfully obtained.

4.4 In June 2009, the complainant appealed against his conviction to the Supreme Court, claiming that he was convicted unlawfully. In November 2009, the Supreme Court upheld the decision of the court of first instance and rejected the complainant's appeal. The State party maintains that the complainant failed to file an application for supervisory review to the Supreme Court and therefore has not exhausted all domestic remedies.

4.5 As to the complainant's allegations of torture, the State party submits that in 2009 the complainant's parents, through the complainant's current counsel, complained of the unlawful conviction of their son and the use of unlawful methods of investigation to the Astana District Prosecutor's Office and to the Astana City Prosecutor's Office. The complainant complained to the Ministry of Internal Affairs of Kazakhstan, claiming that during the preliminary investigation, he was subjected to physical and psychological pressure by officers of the Department of Internal Affairs of Astana. The Internal Security Division of the Department of Internal Affairs of Astana carried out an investigation into these allegations, but decided not to initiate criminal proceedings due to lack of corpus delicti in the officers' acts. This decision was verified by the supervising prosecutor of the Prosecutor's Office of Astana and was confirmed. Neither the complainant nor his family or legal counsel appealed against the prosecutor's refusal to annul the decision not to initiate criminal proceedings, although an appeal against such decision was possible with a higher prosecutor and in court. Therefore, the complainant has failed to exhaust all available domestic remedies.

4.6 The State party notes that under article 22, paragraph 5 (b), of the Convention, the Committee may not consider a complaint unless it ascertains that all domestic remedies have been exhausted. Article 460 of the criminal procedure code (right of appeal against a court sentence, ruling and resolution which have entered into force) provides that an application for review of a court decision which has entered into force may be filed by the parties in the proceedings who have the right to lodge an appeal and a cassation appeal and thus the complainant could and still can do so.

4.7 The State party rejects the complainant's contention that, for him, initiation of supervisory review proceedings is futile, since such an application submitted by his co-

accused, D.T., also containing allegations of torture, was rejected by the Supreme Court. The State party finds this argument unfounded, as the refusal by the court to request a supervisory review as a result to D.T.'s application in no way means that the complainant's appeal would also be rejected, if lodged. The complainant can request examination of his case under the supervisory review of his case by the Supreme Court, as provided for under article 576 of the criminal procedure code. In case of a negative response, he could appeal to the General Prosecutor's Office with an application for a supervisory review of court decisions already in force, in accordance with article 460 of the criminal procedure code.

4.8 In conclusion, the State party emphasises the complainant's failure to: (a) submit an application for supervisory review with the Supreme Court; (b) appeal to the General Prosecutor's Office or in court against the refusal of the city prosecutor of Astana to initiate criminal proceedings into his torture claims; (c) complain to the General Prosecutor's Office with a request for a protest motion regarding the re-examination of the court rulings that have already entered into force under the supervisory review proceedings and therefore he has not exhausted all available domestic remedies.

### **The complainant's comments on the State party's observations**

5.1 On 22 April 2011, the complainant provided his comments on the State party's submission. He reiterates the facts of the case and recalls that on 8 December 2008, he was extradited from the Chechen Republic, and he arrived in Astana early on 9 December 2008. He was humiliated prior to and during his extradition by Kazakh officials. In the temporary detention centre of the Ministry of Internal Affairs in Astana, he was tortured during his interrogation by police officers and forced to produce written confessions to a multiple murder. As a result of the torture he suffered, the complainant received injuries to his head, had broken ribs and a fractured left foot.

5.2 The complainant refutes the State party's assertion that a complaint regarding his ill-treatment was submitted by his parents only in 2009 and recalls that he first complained about torture to a prosecutor on 10 December 2008, the day following his ill-treatment, and that he showed the marks of torture on his body to the prosecutor during an interrogation which was videotaped.<sup>4</sup> However, instead of verifying the complainant's claims, the prosecutor extended his detention in the temporary detention centre for 70 days, thus giving police officers 24-hour access to the complainant.

5.3 On 16 December 2008, in the presence of his lawyer, the complainant complained about the torture he had suffered during an interrogation by the prosecutor supervising his criminal case. In January 2009, in light of the passivity of the authorities, the complainant's parents laid a complaint before the Astana city prosecutor, however it was forwarded to the Internal Security Department of the Ministry of Internal Affairs. According to the complainant, this demonstrates the failure of the authorities to conduct a proper investigation into his complaint of torture.

5.4 According to the complainant, an investigation into his allegations of torture was carried out, at the request of his parents, only six months after his own complaint of 10 December 2008. His numerous complaints regarding the torture endured have not been assessed by the court of first instance during his trial which started in March 2009, as the judge prohibited the complainant from speaking about torture in the presence of the jury. At the same time, however, the court based its decision on evidence obtained under duress, in particular on the complainant's written forced confessions. On 18 May 2009, losing any

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<sup>4</sup> The complainant contends that he told the prosecutor that he was forced and tortured, that he has injuries to the thorax and the head, that he was prevented from sleeping and was subjected to psychological pressure.

hope that the courts would consider investigating her son's allegations of torture, the complainant's mother filed a petition directly with the Department of Internal Security of the Ministry of Internal Affairs, requesting the conduct of a prompt and thorough investigation. Her complaint was forwarded to the Internal Security Division of the Department of Internal Affairs of Astana on 21 May 2009. On 22 May 2009, the complainant's lawyer requested the Astana city prosecutor to issue a ruling on the refusal to investigate the complainant's complaint of torture.

5.5 After having conducted an investigation, the Internal Security Division refused to initiate criminal proceedings against the police. The complainant claims that the investigation carried out by the authorities, six months after the submission of his first complaint, was not prompt, independent, impartial, thorough or effective, as is required under the Convention. He stresses that no verification of his initial complaint of 10 December 2008 was carried out, the only verification being conducted six months later, following his parents' complaints.

5.6 The complainant further claims that he was only provided with a copy of the decision of 8 June 2009, by which the Internal Security Division of the Department of Internal Affairs of Astana refused to initiate criminal proceedings against the officers who had tortured him, after the pronouncement of his sentence by the Astana City Court on 16 June 2009. He claims that this was done on purpose, to avoid him appealing against this decision directly during the trial.

5.7 He reiterates that all domestic remedies have been exhausted, contending that the remedies invoked by the State party are ineffective. In substantiation, he notes that the supervisory review proceedings with the Supreme Court or the General Prosecutor's Office are discretionary and exceptional in nature, as they cannot be initiated by the complainants themselves but that a judge or a prosecutor must request or not the review of a case under the supervisory review proceedings, even without consulting the case file.

5.8 The complainant emphasizes that his allegations of torture were not examined by the Astana City Court or on appeal by the Supreme Court, despite his repeated requests, which also shows the failure of the authorities to adequately address his claims of torture. His sentence of life imprisonment pronounced on 16 June 2009 entered into force on 10 November 2009, after the decision of the Supreme Court. None of the courts dealt with his allegations of torture, which demonstrates that domestic remedies were both unavailable and not effective.

5.9 The complainant adds that it was possible to submit an appeal against the refusal of the investigator of the Internal Security Division of the Department of Internal Affairs of Astana to initiate criminal proceedings on the allegations of torture only in the context of the appeal against the judgment of the Astana City Court.

5.10 In this connection, he points out that, according to article 103 of the criminal procedure code, all complaints relating to a criminal case, irrespective of their addressee are forwarded for action by the court which is examining the criminal case. In the present case, however, the courts examining the complainant's criminal case failed to assess the complainant's allegations of torture. He also notes that in its judgement of 4 October 2011 on application No.10641/09, *Ushakov v. Russian Federation*, the European Court of Human Rights stated that the final decision is considered to be that of the final court and not the decision on the refusal to initiate criminal proceedings, since further appeals on torture are meaningless. For this reason, no obligation to lodge additional appeals against the refusal to open a criminal case on torture with courts or a prosecutor (in addition to the appeal complaint against the judgments of the court of first instance) exists, for purposes of exhaustion of domestic remedies.

5.11 As to the supervisory review proceedings, the complainant maintains that the rejection by the Supreme Court of the appeal under the supervisory review proceedings of D.T., who was convicted together with the complainant in the same criminal case and who also claimed to have been tortured in his complaint, demonstrates the ineffectiveness of such proceedings.<sup>5</sup>

5.12 The complainant adds that the passivity of the national authorities in not considering and investigating his allegations of torture represents a strong argument against the effectiveness of domestic remedies. He reiterates that only effective remedies must be exhausted.

5.13 The complainant further submits that the possibility of lodging complaints with the Prosecutor's Office does not represent an effective domestic remedy. The State party argues that he failed to appeal to the General Prosecutor's Office against the refusal of the prosecutor to initiate criminal proceedings. In the complainant's opinion, a representative of the General Prosecutor's Office was present during the consideration of his appeal by the Supreme Court in any event. However, the Prosecutor's Office did not consider his allegations of torture and did not initiate any investigation of them. This confirms the ineffectiveness of submitting complaints to the General Prosecutor's Office. The complainant also complained about torture to the District Prosecutor on 10 December 2008 and subsequently to the Astana City Prosecutor's Office (which on 26 June 2009 upheld the refusal of 8 June 2009 of the Department of Internal Security of the Department of Internal Affairs of Astana to initiate criminal proceedings against police officers involved in his ill-treatment), as well as to the representative of the General Prosecutor's Office who was present when his appeal was examined by the Supreme Court. The failure of the authorities to address his allegations of torture undermined the complainant's hope of getting redress at national level by way of a complaint submitted to the General Prosecutor's Office.

5.14 Moreover, and with reference to the case law of the Human Rights Committee, the complainant notes that the State party has not demonstrated that supervisory review proceedings before the Supreme Court and the General Prosecutor's Office, as domestic remedies, are not only provided by law but are also available and effective, both in theory and in practice.

5.15 The complainant adds that his family has received threats from police officers and from family members of the murdered mother and her three children.

5.16 Finally, he submits that the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment visited him and the complainant informed him of the ill-treatment he had suffered and this was reflected in the official report of the Special Rapporteur on his mission to Kazakhstan.<sup>6</sup>

#### **State party's observations on merits**

6.1 On 9 September 2011, the State party provided its observations on the merits. It recalls the facts of the case (see paras. 4.2–4.3 above) and stresses that it has provided the Committee with enough arguments on the inadmissibility of the communication.

6.2 The State party adds that complainant's alleged ill-treatment during his extradition in 2008 was duly investigated and found to be without grounds. On 9 December 2008, upon

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<sup>5</sup> In this connection, the complainant points out that before the judgment entered into force, the national authorities and, in particular, the Chairman of the supervisory review body of the Supreme Court, referred to the complainant as a "convict", thus violating the principle of presumption of innocence and demonstrating the ineffectiveness of the supervisory proceedings.

<sup>6</sup> A/HRC/13/39/Add.3, para. 59 and appendix, paras. 116 and 117.

his arrival at the temporary detention centre of the Internal Affairs Department in Astana, the complainant was examined by a medical doctor of the centre and, according to the records in the journal of medical assistance and in the record of his interrogation, no injuries were found on him and he formulated no complaints whatsoever. The complainant was represented by professional attorneys throughout the pretrial investigation and during the trial.

6.3 During his interrogation on 9, 10 and 21 December 2008, as well as on 8 January 2009 (with his counsel absent on 10 December), the complainant confessed, freely, to having murdered the family of A.E. (four persons in total) and a robbery. On 10 December 2008, the complainant was interrogated from 2.30 to 4.20 p.m. and he confessed his guilt. Later in the evening, however, when he was again interrogated (from 5.13 to 6.05 p.m.), he declared that he had confessed his guilt under torture. On the same day, at 8 p.m. a forensic medical examination was performed on the complainant and an injury to his head was found. An investigation was carried out concerning this fact and on 21 December 2008, the Department of Interior Affairs of Astana City concluded that the injury was caused by the fact that the complainant accidentally hit his head against roof of the police car while getting inside during his transportation. Thereafter, a number of additional forensic medical examinations were performed on the complainant, but no injuries were revealed. In addition, during the interrogations on 16, 18 and 21 December 2008 and on 8 January 2009, the complainant confessed his guilt.

6.4 The State party maintains that the allegations of torture by the complainant and his family were based only on the complainant's own statements and the examination of those complaints did not produce objective evidence demonstrating that he had indeed been subjected to torture. In fact, the complainant had never indicated concretely the circumstances of his alleged ill-treatment and never specified by whom, when and where exactly he had been subjected to torture. Consequently, on 8 June 2009, the investigator of the Internal Security Division of the Department of Internal Affairs of Astana refused to initiate a criminal case into the complainant's allegations. As to the fact that notification of this decision was received by the complainant's mother only on 26 June 2009 (that is after he was convicted by the court of first instance on 16 June 2009), the State party submits that the complainant, as well as his attorney could have requested the court during the hearing to order the prosecution to produce the said decision. In addition, all the complaints of the complainant and his parents concerning the alleged ill-treatment were duly examined by the competent authorities. Moreover, the complainant's allegations were also addressed by the national court during his trial before the court of first instance in the absence of a jury, pursuant to article 562, paragraph 5, of the code of criminal procedure, as well as by the Supreme Court and a prosecutor, when his appeal was examined. However, his allegations were found to be unfounded. The complainant's allegations were examined within the time limits set in national legislation (article 184 of the criminal procedure code).

6.5 As to the complainant's statement that the investigation into his allegations of torture was initiated only after his parents' complaint of January 2009 and not following his oral complaint to the prosecutor on 10 December 2008, the State party reiterates that following the complainant's claim of 10 December 2008, a forensic medical examination was performed on him. Taking into account the results of the examination, an internal investigation was carried out, but the complainant's allegations were found to be groundless (see para. 6.3 above).

6.6 The State party reiterates that the complainant has failed to exhaust all available domestic remedies concerning his allegations of torture, as he has not availed himself of the remedy under articles 460 and 576 of the criminal procedure code, i.e., he has not submitted a complaint to the Supreme Court within the supervisory review proceedings. Under article 460 of the code, only parties to the proceedings may challenge a judgment which has

entered into force within appeal/cassation proceedings. Consequently, the complainant or his lawyers could and still can challenge the judgment of the court before the Supreme Court. Under article 464 of the code, following a preliminary examination, the court adopts a decision either on the initiation of supervisory review proceedings or on their refusal, or to return the complaint. In this regard, it points out that such a decision is adopted collegially by three judges and not by the Chair of the Supreme Court. As to the complainant's argument that submitting a complaint to the Supreme Court within the supervisory proceedings would have been in vain, as D.T.'s request was unsuccessful, the State party observes that each complaint regarding supervisory proceedings is examined separately without consideration of the outcome of other examinations. Moreover, even if the complainant was referred to as a "convict" by a Supreme Court judge, nothing indicated that he was prevented from submitting a complaint within the supervisory proceedings. In addition, the State party disagrees that submitting a complaint to the Supreme Court would have been an ineffective remedy. It points out that in 2010, 48 persons were acquitted in the framework of the supervisory review proceedings, while during the first half of 2011, 13 persons were acquitted.

6.7 The State party adds that the domestic investigation met the requirements of promptness, independence, impartiality, thoroughness and effectiveness, as required by the Convention. The investigation was carried out in accordance with national legislation. The preliminary examination of the complainant's claims of torture was later examined by a prosecutor. The prosecutor found the complainant's allegations groundless. In this connection, the State party notes that neither the complainant nor his lawyers appealed against this decision. In any case, the very fact that the Prosecutor's Office refused to initiate criminal proceedings concerning the complainant's claims of torture does not demonstrate that his complaint was not examined objectively. Furthermore, all investigative actions within the pretrial investigation were carried out in the presence of the complainant's lawyer and all evidence was obtained in accordance with national law. Forensic medical examinations were performed on the complainant, the results of which did not demonstrate that the complainant had been subjected to torture. The State party points out that according to forensic examination report No. 2416 of 19 December 2008, in which his handwriting was examined, it could not be established that the complainant's written confessions were made under any extraordinary circumstances and nothing indicated that he had written that statement while being in an extraordinary psychological state. The State party believes that the complainant's allegations that he had been subjected to torture constituted a defence strategy aimed at obstructing the investigation of the crimes he had been accused of.

6.8 The State party also points out that the results of the internal investigation concerning the complainant's allegations of torture were examined, *inter alia*, by the court of first instance. During the trial, the forensic medical experts confirmed that they had not received any complaints from the complainant regarding his alleged ill-treatment by the police and confirmed that he had no injuries. The State party also notes that during the trial, law enforcement officers and experts who had examined the complainant were questioned regarding his allegations. It adds that the appeal court also examined the complainant's allegations, but found them unjustified. In this connection, it recalls that the courts are independent and guided only by the constitution and the laws and that the complainant's case was adjudicated in accordance with these principles. The State party also notes that the complainant was not present when his appeal was examined, pursuant to article 408, para. 2, of the criminal procedure code. However, he was duly represented by a lawyer.

6.9 It further explains the procedure for submitting complaints concerning decisions and actions of the investigator, prosecutor, court or judge as set out under articles 103 and 109 of the criminal procedure code. It points out that pursuant to article 105 of the code, complaints about decisions or actions of investigators are to be submitted to the prosecutor

supervising the case, while complaints about decisions or actions of the prosecutor are to be submitted to a higher prosecutor. Moreover, if a person's rights have been violated due to prosecutors' or investigators' refusal to initiate criminal proceedings, the person concerned can complain to a court under article 109 of the criminal procedure code. However, if a criminal case has already been brought to court, pursuant to article 284 of the code, all complaints regarding that case are to be submitted to the court examining that case.

6.10 The State party describes in detail how and by what evidence the complainant's guilt was established, and explains that the principle of presumption of innocence has been observed in his case.

6.12 As to the effectiveness of domestic remedies, in particular complaining to courts and to the General Prosecutor's Office, the State party notes that under the provisions of the constitution and the national laws, a citizen has a right to legal protection against any infringement of his or her rights. According to article 83 of the constitution, the Prosecutor's Office supervises the actions of, inter alia, investigators and investigative authorities to ensure that they are lawful. Any complaint alleging unlawful means of investigation is duly verified by the Prosecutor's Office.

6.13 In light of the above considerations, the State Party maintains that the complainant's rights under articles 1, 2, 12, 13, 14 and 15, of the Convention have not been violated in the present case.

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

7.1 On 15 November 2011, the complainant submitted his comments on the State party's observations. He reiterates his previous submissions (see paras. 2.2–2.4 above) and comments. Regarding the State party's contention that his complaints of torture were duly examined on 24 December 2008 and 16 March and 8 June 2009, the complainant notes that in fact he was informed of only one decision – that of 8 June 2009, when an investigator of the Internal Security Division of the Department of Internal Affairs of Astana refused to initiate criminal proceedings into his allegations. The complainant, his parents and his lawyer were unaware of any other examinations of his claims of torture. He was never questioned regarding his claims of torture, even though he identified the police officers who had ill-treated him to the prosecutor who interrogated him on 10 December 2008, invoked the findings of the forensic medical examination report of 10 December 2008 and stated that his injuries could be seen on the video recording of his interrogations of 10 and 16 December 2008 (which, as it later transpired, got lost as per the police explanations). On the State party contention that one of the refusals to initiate criminal proceedings into his allegations was issued on 16 March 2009 by the Internal Inspectorate of the Department of Interior Affairs, the complainant explains that he did not know on what grounds such a decision was adopted or who approached the Inspectorate and notes that he learned about this decision only on 26 May 2009 in the context of a court hearing.

7.2 As to his statement admitting to having murdered the family of A.E. (see para. 6.3 above), he submits that he was coerced into giving this statement. He adds that the State party has not addressed his statement that, inter alia, the interrogation of 10 December 2008 was recorded on video, but that the video recording had later disappeared and notes that the State party has not commented on the results of forensic medical examination report No. 3393 of 10 December 2008 (see para. 2.3 above). Furthermore, he had refused the services of a lawyer appointed to him on the first day and the subsequent lawyer provided ex officio had only six months of professional experience and was not impartial. The complainant's requests to have another lawyer appointed to him were disregarded. In addition, he maintains that not all investigative actions were performed in the presence of his lawyer (e.g. when he was coerced into confessing his guilt). He reiterates that the judiciary in Kazakhstan is not independent and that the Prosecutor's Office has a dominating role. The

courts did not examine his allegations of torture, as they perceived his complaints as a way of influencing the court in an attempt to avoid the investigation of his criminal liability.

7.3 The complainant adds that the State party has not commented on his argument that it was possible to submit an appeal against the refusal of 8 June 2009 by the Internal Security Division of the Department of Internal Affairs of Astana city to initiate criminal proceedings on his allegations of torture only in the context of the appeal against the judgment of the court of first instance. He notes that the State party constantly refers to numerous forensic medical examinations allegedly performed on him, but, with the exception of the forensic report concerning his statement in which he confessed his guilt, does not provide any information as to who, when and why such examinations were performed. The complainant emphasises that during one of the hearings, a forensic expert explained that he did not have enough samples of the complainant's handwriting to reach any concrete conclusion as to the circumstances under which he had produced his written confessions. The complainant also notes that he was examined by a medical doctor only shortly after his placement in the temporary detention centre. As to the State party's comments on the effectiveness of the procedure for submitting complaints concerning the decisions and actions of investigators, the prosecutor, the courts, etc. under articles 103, 105, 109 and 284 of the criminal procedure code, the complainant maintains that in his case, the procedures and requirements (inter alia, the time limits) prescribed in the those articles of the code were not observed by the national authorities.

7.4 The complainant further stresses that he never voluntarily confessed his guilt during the preliminary investigation or in court. He reiterates that during his trial before the courts of first and second instance, his allegations of torture were not taken into consideration. In this connection, he quotes in detail from the trial transcript his statements concerning the fact that he had been subjected to torture. He adds that the national courts were biased as they were influenced by numerous negative publications about him in the mass media (e.g. by the interviews given by different officials).

7.5 The complainant explains that the investigation of his complaints of torture is neither impartial nor objective, as the unlawful actions of the police officers of the Department of Internal Affairs of Astana were investigated by the same Department of Internal Affairs of Astana, while the Prosecutor's Office and the courts failed to ensure respect of the international principles of effective investigation. He further notes that from the State party's observations it appears that three decisions were adopted on the refusal to initiate criminal proceedings regarding his torture – on 21 December 2008 and on 16 March and 8 June 2009. However, he received a copy only of the last one. He adds that in any event, none of the three investigations met the requirements of promptness, independence, impartiality, thoroughness and effectiveness, as required under the Convention. He adds that the investigator of the Internal Security Division of the Department of Internal Affairs of Astana (who adopted the decision of 8 June 2009), in the course of examining his allegations, did not question the complainant personally, did not take into account forensic medical report No. 3393, did not order a scientific examination of the clothes worn by the complainant or the officers indicated by the complainant and did not examine the video recordings of the interrogations of 10 and 16 December 2008. He reiterates that, given that he received a copy of the decision of 8 June 2009 only following his conviction, he could only challenge it within the appeal proceedings.

7.6 With regard to the exhaustion of domestic remedies, the complainant, inter alia, reiterates that he had unsuccessfully complained about his ill-treatment to the prosecutor on 10 December 2008, thereafter to the Prosecutor's Office of Astana and then to the representative of the General Prosecutor's Office during his appeal to the Supreme Court. Consequently, the failure of authorities to address his allegations of torture undermined the complainant's confidence of obtaining redress at the national level. As to the supervisory

review proceedings, the complainant recalls that the rejection by the Supreme Court of the supervisory application of his co-accused, D.T., who was also ill-treated, demonstrates the ineffectiveness of such proceedings. In addition, the clear unwillingness of the authorities to investigate serious allegations of ill-treatment in the present case demonstrates that the possibility of submitting a complaint within the supervisory review proceedings would have been an ineffective domestic remedy.

7.7 In light of this, the complainant requests the Committee to conclude that his rights under article 1, read in conjunction with article 2, paragraph 1, as well as under articles 12, 13 and 14 of the Convention have been violated. He requests the Committee to ask the State party to carry out an effective investigation into his allegations of torture and to have those responsible prosecuted. He further requests that his forced confessions are expunged from the list of evidence retained in his criminal case. Finally, he requests the State party to compensate and rehabilitate him.

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

#### *Consideration of admissibility*

8.1 Before considering any claims contained in a complaint, the Committee must decide whether or not it is admissible under article 22 of the Convention.

8.2 The Committee has ascertained, as it is required to do under article 22, paragraph 5(a), of the Convention that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

8.3 With respect to the exhaustion of domestic remedies, the Committee notes that the State party challenges the admissibility on the grounds that the complainant has not appealed to a higher prosecutor the decision of 8 June of 2009, by which an investigator of the Internal Security Division of the Department of Internal Affairs of Astana refused to open a criminal case on the complainant's allegations of torture. Further, the State party claims that he failed to complain to the Supreme Court within the supervisory review proceedings, and that, in case of disagreement with the court's ruling that has entered into force, he could have complained to the General Prosecutor, also under the supervisory review proceedings.

8.4 With regard to the State party's argument that the complainant has not appealed the decision of 8 June 2009 of the Internal Security Division of the Department of Internal Affairs of Astana, the Committee notes that the complainant's allegations of ill-treatment have been drawn to the attention of the competent national authorities on numerous occasions. In particular, it remains uncontested that the complainant complained to a prosecutor of the Prosecutor's Office of Astana during his interrogation on 10 December 2008, i.e., one day after the alleged acts of torture occurred, and also to a prosecutor during the interrogation on 16 December 2008. On 21 January 2009, the complainant's father submitted a written complaint to the Prosecutor's Office of the Almatinsky District of Astana against the treatment of his son. On 18 May 2009, the complainant's mother submitted another complaint to the Department of Internal Security of the Ministry of Internal Affairs. On 22 May 2009, the complainant's lawyer requested the Prosecutor's Office of Astana to receive a copy of the formal refusal to open an investigation into allegations of torture. The complainant also complained in court, during the trial, that he had been subjected to torture (i.e. during the hearing before the Astana City Court on 26 May 2009 and in his appeal of 29 June 2009 to the Supreme Court, at which a representative of the General Prosecutor's Office was present). Therefore, the competent authorities have been notified of the complainant's allegations of torture.

8.5 As to the State party's argument concerning the complainant's failure to exhaust the available domestic remedies within the supervisory review proceedings with the Supreme Court and the General Prosecutor's Office, the Committee notes that the complainant appealed the judgement of 16 June 2009 of the Astana City Court to the Supreme Court. His appeal was rejected and the judgment of the lower court entered into force on 10 November 2009. In this regard, the Committee observes that, even considering that the supervisory review proceedings may be effective in some instances, the State party has not provided any evidence as to the effectiveness of these proceedings in cases of torture. The Committee further takes note of the statistical figures provided by the State party, intended to demonstrate that a supervisory review was an effective remedy (i.e. in 2010, 48 persons were acquitted in the framework of the supervisory review proceedings, while during the first half of 2011, 13 persons were acquitted.). However, the State party has not shown whether and in how many cases supervisory review procedures were successfully applied in cases concerning torture and where conviction was based on forced confessions obtained under 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 General Prosecutor's Office and 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.

8.6 The Committee recalls that the rule of exhaustion of all domestic remedies does not apply if the application of domestic remedies has been or would be unreasonably prolonged or would be unlikely to bring effective relief.<sup>7</sup> In this connection and in the circumstances described above, the Committee notes that the complainant, his relatives and his lawyer have made reasonable efforts and attempts to have domestic remedies exhausted, but without success. Accordingly, the Committee is not precluded by the requirements of article 22, paragraph 5 (b), of the Convention from considering the communication on the merits.

8.7 With reference to article 22, paragraph 4, of the Convention and rule 111 of the Committee's rules of procedure, the Committee finds no other obstacle to the admissibility of the communication and proceeds to its examination on the merits.

#### *Consideration of the merits*

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

9.2 The Committee notes that the complainant has alleged a violation of article 1, read in conjunction with article 2, paragraph 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 forensic medical report No. 3393 of 10 December 2008 documenting the physical injuries inflicted on him to force him to confess his guilt in a multiple murder, robbery and other crimes. 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. The State party, while not contesting the conclusions of the medical report, denies any involvement by officials. It

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<sup>7</sup> See, e.g., communication No. 024/1995, *A.E. v. Switzerland*, decision of 2 May 1995, para. 4.

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

is uncontested that the complainant was placed in pretrial investigation at the premises of the Ministry of Internal Affairs in Astana at the time his injuries were incurred. 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, the State party provided no such explanation and thus the Committee must conclude that the investigating officers are responsible for the complainant's injuries. Based on the detailed account which the complainant has given of ill-treatment and torture, and the corroboration of his allegations in the medical forensic documentation, the Committee concludes that the facts as reported constitute torture 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, paragraph 1, of the Convention.

9.3 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 that, although the complainant reported the acts of torture the day after their occurrence, during his interrogation on 16 December 2008, and that his family reported the complainant's ill-treatment, *inter alia*, on 21 January 2009, a preliminary inquiry was initiated only after six months and resulted in a refusal to open a criminal investigation due to a lack of *corpus delicti* in the actions of the police officers. Thereafter, following the complainant's appeals before the national courts, his complaints concerning acts of torture were disregarded; no investigation was initiated and no criminal responsibility was attributed to the officers responsible.

9.4 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 this respect, it notes that the investigation was entrusted to an investigator of the Internal Security Division of the Department of Internal Affairs of Astana, essentially the same institution where the alleged torture had been committed. In this connection, the Committee recalls its concern that preliminary examinations of complaints of torture and ill-treatment by police officers are undertaken by the Department of Internal Security, which is under the same chain of command as the regular police force and consequently do not lead to impartial examinations.<sup>10</sup>

9.5 The Committee recalls that article 12 of the Convention also requires that the investigation should be prompt and impartial, promptness being essential both to ensure that the victim cannot continue to be subjected to such 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>11</sup> The Committee notes that a preliminary investigation was started six months after the reported acts of torture on 10 December 2008. The Committee also notes that, according to the information contained in the decision of 8 June 2009 of the Internal Security Division, the investigation into the complainant's allegations relied heavily on the testimony of the police officers who denied any involvement in the torture and attached little weight to the complainant's allegations and the uncontested medical evidence documenting the injuries inflicted on him (medical forensic examination report No. 3393). A decision to refuse to initiate criminal proceedings was adopted only on 8 June 2009 and no criminal charges

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

<sup>10</sup> See CAT/C/KAZ/CO/2, para. 24.

<sup>11</sup> Communication No. 59/1996, *Encarnación Blanco Abad v. Spain*, decision of 14 May 1998, para. 8.2.

were brought against the perpetrators or any remedy provided to the complainant. In addition, the Committee notes that it remains uncontested that the complainant was never promptly informed by the authorities who investigated his complaints, as to whether the investigation was being carried out and at what stage the investigation was.<sup>12</sup>

9.6 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, to ensure the complainant's right to complain and to have his case promptly and impartially examined by the competent authorities.

9.7 With regard to the alleged violation of article 14 of the Convention, the Committee notes that it is uncontested that the absence of criminal proceedings deprived the complainant of the possibility of filing a civil suit for compensation since, according to domestic law, the right to compensation for torture arises only after conviction of the responsible officials by a criminal court. 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. The Committee considers that, notwithstanding the evidentiary benefits to victims afforded by a criminal investigation, a civil proceeding and the victim's claim for reparation should not be dependent on the conclusion of a criminal proceeding. It considers that compensation should not be delayed until criminal liability has been established. A civil proceeding should be available independently of the criminal proceeding and necessary legislation and institutions for such civil procedures should be in place. If criminal proceedings are required by domestic legislation to take place before civil compensation can be sought, then the absence or delay of those criminal proceedings constitute a failure on behalf of the State party to fulfil its obligations under the Convention. The Committee emphasizes that disciplinary or administrative remedies without access to effective judicial review cannot be deemed to constitute adequate redress in the context of article 14. 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>13</sup>

9.8 With regard to the alleged violation of article 15 of the Convention, the Committee observes that the broad scope of the prohibition in article 15 of the Convention, proscribing the invocation of any statement which is established to have been made as a result of torture as evidence in any proceedings is a function of the absolute nature of the prohibition of torture and implies, consequently, an obligation for each State party to ascertain whether or not statements admitted as evidence in any proceedings for which it has jurisdiction have been made as a result of torture<sup>14</sup>. In this connection, the Committee observes that the national courts failed to address adequately the complainant's repeated allegations that he had been forced to produce written confessions as a result of torture. Accordingly, the Committee concludes that the State party has failed to ascertain whether or not statements admitted as evidence in the proceedings have been made as a result of torture. In these

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<sup>12</sup> See communication No. 207/2002, *Dragan Dimitrijevic v. Serbia and Montenegro*, decision of 24 November 2004, para. 5.4.

<sup>13</sup> *Ibid.*, para. 5.5.

<sup>14</sup> See e.g. communication No. 219/2002, *G.K. v. Switzerland*, decision adopted on 7 May 2003, para. 6.10.

circumstances, the Committee concludes that there has been a violation of article 15 of the Convention.

10. The Committee, acting under article 22, paragraph 7, of the Convention, is of the view that the facts before it disclose violations of article 1 in conjunction with article 2, paragraph 1, and of articles 12, 13, 14 and 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

11. 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 the transmittal of this decision of the steps it has taken in response to the present decision.

[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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