



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 2021/2010

#### Decision adopted by the Committee at its 113th session (16 March–2 April 2015)

<i>Submitted by:</i>	E.Z., represented by counsel from the Open Society Justice Initiative and the Kazakhstan International Bureau on Human Rights and the Rule of Law
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kazakhstan
<i>Date of communication:</i>	9 November 2010 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 23 December 2010 (not issued in document form)
<i>Date of adoption of decision:</i>	1 April 2015
<i>Subject matter:</i>	Treatment of persons deprived of liberty, unfair trial and appeal, discrimination
<i>Procedural issues:</i>	Inadmissibility <i>ratione temporis</i> and non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Arbitrary detention; right to a fair trial; prohibition of torture and cruel and inhuman treatment; protection against interference with one's privacy; liberty of movement; freedom of expression.
<i>Articles of the Covenant:</i>	9; 10; 12; 14 (1), (3) (d) and (e) and (5); 17; 19; 22
<i>Articles of the Optional Protocol:</i>	3; 5 (2) (b)

GE.15-11006 (E)



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## Annex

### **Decision of the Human Rights Committee under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political rights (113th session)**

concerning

#### **Communication No. 2021/2010\***

*Submitted by:* E.Z., represented by counsel from the Open Society Justice Initiative and the Kazakhstan International Bureau on Human Rights and the Rule of Law

*Alleged victim:* The author

*State party:* Kazakhstan

*Date of communication:* 9 November 2010 (initial submission)

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

*Meeting* on 1 April 2015,

*Having concluded* its consideration of communication No. 2021/2010, submitted to the Human Rights Committee by E.Z. under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

*Adopts* the following:

#### **Decision pursuant to article 5 (4) of the Optional Protocol**

1. The author of the communication is E.Z., a Kazakh national born in 1955. He claims to be a victim of a violation, by Kazakhstan, of his rights under articles 9, 10, 12, 14 (1), (3) (d) and (e) and (5), 17, 19 and 22 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Kazakhstan on 30 September 2009. The author is represented by counsel from the Open Society Justice Initiative and the Kazakhstan International Bureau on Human Rights and the Rule of Law.

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\* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Fabián Omar Salvioli, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.  
The text of an individual opinion by Committee member Yuval Shany is appended to the present Views.

### The facts as submitted by the author

2.1 The author submits that on 26 July 2009, at around 10.10 p.m., he was returning home from a fishing trip that he had made near the village of Karoy. He had three friends with him in the car, and he was the driver. He submits that he was driving within the speed limit. He also submits that he suddenly saw someone on the road, and because the person was too close, he was not able to use his brakes and hit the pedestrian. The pedestrian died at the scene of the accident.

2.2 The author submits that one of the passengers in his car was able to call an acquaintance for him to call an ambulance and the police. When the police arrived, the author and all three passengers gave statements. One of the passengers, Mr. N., corroborated the author's explanation of the circumstances of the accident. Another passenger, Mr. S., only stated that he was asleep when the accident occurred. The author claims that, at all times during the investigation, he was fully cooperative with the police. Trying to reconcile with the relatives of the deceased, he paid compensation of \$US 15,000 to the family and offered his apologies to the relatives.

2.3 The author submits that, on 27 July 2009, the Balkhash District Police initiated an investigation into the accident. The author was examined for alcohol in his blood, and the passengers were questioned. On 28 July 2009, the investigation was transferred to the Almaty Regional Road Police. The author claims that he had been "secretly" designated as a suspect. However, at the time of the police questioning on 28 July 2009, he believed that he was only a witness. At that time, the author told the police that his visibility "worsened", and, based on his perception, he stated that he saw the pedestrian only two or three metres in front of his vehicle. On 30 and 31 July, the author gave the police further statements. In those statements, he was asked about the difference in his statements of 27 July 2009 and of 28 July 2009 with regard to the distance between the car and the pedestrian. The author explained that, right after the accident, he was in a state of shock and "as such, did not know where this man appeared from in front of" the author's car.

2.4 On 12 August 2009, the police ordered an expert analysis<sup>1</sup> of the accident, which was completed on 14 August 2009. The expert analysis concluded that the author "could have avoided hitting the pedestrian". On the same day, the police announced the completion of its investigation. The author claims that this was the first time that he had been informed that he was considered a suspect in the investigation. He was charged with the criminal offence of a violation of traffic regulations which negligently caused the death of a person, under article 296 (2) of the Criminal Code. He was released immediately on condition that he did not leave his place of residence.

2.5 The author claims that he and his lawyer had only one day — 15 August 2009 — to study the criminal case. They were able to take pictures of each page with a digital camera.<sup>2</sup> On 17 August 2009, the author sent a "reconciliation letter" to the mother of the deceased. He claims that the police should have started a "reconciliation process", which is prescribed by law, but failed to do so. On 18 August 2009, the police investigation file was sent to the prosecutor's office.

2.6 On 18 August 2009, the author filed a request for the police to conduct an additional expert analysis, "in view of the deficiencies" of the first analysis. The police refused to do so, but did not inform the author of this until immediately before the trial.<sup>3</sup> The author

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<sup>1</sup> The author submits that the analysis was carried out by the government-owned Almaty Centre for Forensic Analysis.

<sup>2</sup> The author submits that the file consisted of 150 pages.

<sup>3</sup> The author submits that he therefore could not appeal this decision.

claims that Kazakh law prescribes that all defence requests are to be resolved before cases are sent from the prosecutor's office to the court. Despite this, the prosecutor's office had sent the case to court on 20 August 2009. The author submits that he requested several independent experts to provide analysis of the accident.

2.7 The author submits that the trial started on 27 August 2009 and consisted of three hearings — on 27 August, 2 September and 3 September 2009. The defence counsel tried to challenge the findings of the expert analysis. The trial judge rejected those requests. The author referred to several examinations by independent experts in which the methodology of the prosecution experts was criticized.<sup>4</sup> On 2 September 2009, the author filed a motion to call, as expert witnesses, the principal investigator of the Almaty Regional Police Department and independent experts. The court granted the motion to call the investigator, but denied the motion to call the independent experts, without providing specific reasons. The author submits that, overall, three experts were questioned during the investigation and testified in court.

2.8 The author also submits that there were a number of procedural violations during the trial. The court failed to apply the reconciliation procedure, "exhibited an attitude of bias against the defence", failed to rule on number of defence motions, refused to "afford adequate opportunity to prepare for the closing argument", and failed to comply with procedural requirements mandating adequate time to deliberate and prepare the court's written verdict. At the end of the trial, the author was declared guilty as charged and was sentenced to four years of imprisonment to be served in a colony/settlement for persons convicted of crimes of negligence.<sup>5</sup> After the verdict was announced on 3 September 2009, the author was taken into custody.

2.9 The author submits that, on 20 October 2009, Almaty Regional Court's collegium on criminal cases considered his appeal against the trial court's verdict. Despite his written request to be present during the appellate hearings, he was not brought in from the pretrial detention centre in which he was being held at the time. The court ruled that the participation of the convicted person is mandatory only in cases in which the prosecutor asks for a more serious penalty than the verdict of the trial court. Accordingly, the author was represented by counsel.<sup>6</sup>

2.10 The author contends that one of his complaints on appeal was the fact that the trial court had failed to consider evidence from the independent experts. The appellate court stated that it had "no doubts as to the objective nature" of the expert analysis carried out as part of the investigation. During the appellate proceedings, the mother of the deceased made a statement before the court that she had reconciled with the author and he had paid damages to the family. She asked the court to drop criminal charges. Counsel for the victim<sup>7</sup> asked the court for the verdict to be upheld.

2.11 The author submits that the conduct of the appellate hearings demonstrated the court's bias. The author also submits that, contrary to the position of the Committee, he and his lawyers did not have effective access to a duly reasoned, written judgement of the trial court in preparing for the appeal hearings. The court repeatedly dismissed defence motions, without explanations. Only 45 persons were allowed to be present, with the limited capacity

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<sup>4</sup> The author claims that the independent experts produced an "accident reconstruction report", which showed that the author "did not have the technical ability to prevent collision from the moment that the hazard emerged".

<sup>5</sup> The court also ruled that the author lost his right to operate a vehicle for three years.

<sup>6</sup> Three lawyers participated in the first appellate proceedings, on 20 October 2009.

<sup>7</sup> It remains unclear from the submission whether this counsel was acting on behalf of the mother of deceased, or was representing the deceased person or someone else.

of the courtroom being cited.<sup>8</sup> The appellate court rejected the defence counsel's arguments and upheld the trial court's verdict.

2.12 The author further submits that, on 17 November 2009, he filed another appeal with the Supervisory College of Almaty Regional Court, which, he claims, is a "discretionary procedure" under the law.<sup>9</sup> The author again cited the same complaints as during the previous appeal: the bias of the trial court and subsequently of the appeal court, the failure of those courts to consider and to rule on numerous motions by the defence, and the refusal to consider evidence from the independent experts. The appeal was rejected, and the panel of judges considered that the arguments on the appeal had been the subject of a thorough study during the previous appeal procedure and that all evidence had been properly evaluated. On 26 April 2010, the Supreme Court declined to consider the appeal made to it on 27 January 2010.

2.13 The author submits that, on 25 October 2009, he was transferred to a minimum security prison, referred to as a colony/settlement, which was located in the city of Ust-Kamenogorsk. That prison was located approximately 1,000 km from the capital city, Astana, which hindered visits by his lawyers or his family members. The author submits that the prison was created in early October 2009, when approximately 100 prisoners were transferred from an Astana prison. In the Astana prison, many of the prisoners had lived outside of the colony with their families, and many had jobs. Having arrived at the Ust-Kamenogorsk colony, none of the transferred prisoners were allowed to have any long visits for about one and a half months, and none were allowed to live with their families.

2.14 The author submits that the conditions of the colony/settlement were restrictive. He resided in a dormitory with 28 other convicts, and they shared one toilet. He claims that, contrary to the prison regulations, there were no cooking facilities for prisoners. If prisoners were allowed outside the colony, they had to be present during roll call in the morning and the evening.

2.15 The author also submits that, starting from April 2010, extended-length family visits outside the colony were no longer allowed. On 17 April 2010, the author's application to make such a visit was denied by the administration of the colony. Within the colony, there were only two family rooms for 150 prisoners, which made it impossible to schedule visits with the family there. Furthermore, on 16 November 2009, the author was prevented from meeting with his lawyer. The lawyer was told by the administration of the colony that he needed permission from the head of the administration, who was not there at the time. On 28 September 2010, during the author's meeting with a representative of a non-governmental organization (NGO), a member of the administration of the colony had been present.

2.16 The author submits that, during his imprisonment at the colony, he did not enjoy certain privileges that were routinely granted to other prisoners; for example, he was not granted leave to spend weekends outside the colony. He was also required to submit the names and telephone numbers of each person he wanted to call, while there was no such restriction on other prisoners. The administration of the colony did not provide medical treatment when the author was sick with influenza, though he was allowed to stay in bed and to use medicine brought by his friends and colleagues. On another occasion, he had to wait for three weeks for a dental operation on an infected gum.

2.17 In addition, on 11 November 2009, the administration of the colony attempted to force the author to sign a labour contract with a State-owned enterprise. The author refused,

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<sup>8</sup> The author submits that over 100 persons were denied access to the courtroom.

<sup>9</sup> The author cites article 459 (1) of the Criminal Procedure Code of Kazakhstan.

citing his dissatisfaction with the labour conditions and the salary. Because of this, he was reprimanded with a disciplinary action for refusing to work, which was considered a “serious violation of prison rules”. On 13 January 2010, under the threat of further disciplinary actions, the author signed a labour contract, but submitted complaints to the prosecutor’s office, claiming that the contract was “unlawful”.

2.18 Regarding the refusal to allow him to live outside the colony, the author filed many complaints to the prosecutor’s office, the Ministry of Justice and the Office of the Ombudsman, but received no “official responses”. On 13 December 2009, he filed a complaint after the administration refused two visits from an NGO. The prosecutor’s office accepted the complaint and instructed the head of the administration of the colony to refrain from such violations in the future. The author also complained to the prosecutor’s office and to the Ust-Kamenogorsk court about the disciplinary action for his refusal to enter into an employment contract. The prosecutor’s office responded by stating that the disciplinary action was lawful. The court refused to consider his complaint, citing jurisdictional issues.

### **The complaint**

3.1 Regarding the admissibility of his claims under article 14 (1) and (3) (d) and (e), the author acknowledges that some of these events took place before the entry into force of the Optional Protocol for the State party. The author argues that the State party affirmed these violations by act and implication, that the violations continued after the entry into force of the Optional Protocol, and that the violations generate effects which themselves violate the Covenant.<sup>10</sup> The author submits that the complaints and arguments made during the trial were repeated by him and his counsel during the appellate proceedings, which took place after the entry into force of the Optional Protocol. Therefore, he argues that all his claims are admissible *ratione temporis*.

3.2 The author claims that, by refusing to call independent expert witnesses during the trial and the appeal proceedings, the State party violated his rights under article 14 (3) (e).

3.3 The author further claims that the trial and appeal proceedings were “manifestly arbitrary” and amounted to a denial of justice, insofar as they failed to respect the principles of impartiality, of equality of arms, and of the right to silence, in violation of article 14 (1).

3.4 Despite his request to be present, the author was not present at his appeal proceedings, in violation of his rights under article 14 (3) (d) and (5).

3.5 The author considers that the sentence imposed on him was arbitrary and did not pursue a legitimate aim; rather, it was used to silence him. The sentence that was imposed was excessive in relation to the seriousness of the offence, and was imposed after a trial that amounted to a denial of justice, in violation of article 9. In addition, the prison conditions were degrading, in violation of article 10, and the prison rules were applied in an arbitrary and discriminatory manner, in violation of his right to privacy under article 17.

3.6 Finally, the author claims that his rights under articles 12, 17, 19 and 22 were also violated, because his imprisonment was aimed at limiting his legitimate activities as a human rights defender.

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

4.1 On 22 February 2011, the State party, challenging the admissibility of the communication, submitted that the author had not exhausted all available domestic

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<sup>10</sup> The author refers to communication No. 520/1992, *Könye v. Hungary*, decision of 22 September 1992, para. 6.2.

remedies, as required by article 5 (2) (b) of the Optional Protocol. Specifically, regarding violations at the pretrial and trial proceedings, a request for a supervisory review by the Supreme Court was submitted by the author's lawyer, which was rejected. The State party contends that the author "should have personally requested" such a supervisory review, in accordance with article 460 of the Criminal Procedure Code.

4.2 The State party maintains that the complaints regarding the conditions of imprisonment in the colony/settlement are inadmissible too, because the author failed to pursue appellate and supervisory review procedures in courts. The State party points out that the author filed the present communication with the Committee before his judicial appeals against disciplinary actions had been finalized.

4.3 On 22 June 2011, the State party provided its comments on the merits of the communication. Regarding the court's failure to call and question independent experts, the State party submits that not only did the police conduct an expert analysis, they also questioned and took the testimonies of two additional experts. The verdict of the trial court and the decision of the appellate instances are thus supported by the evidence adduced during those proceedings. The findings of expert analyses by other experts could not have been admitted as evidence, because those analyses had been conducted in violation of the requirements of the Criminal Procedure Code.

4.4 Regarding the impartiality of the courts, as well as equality of arms and the right to remain silent, the State party submits that, in accordance with national legislation, the courts are independent and are guided by the law only. Regarding the status of the author, a person can become a suspect only after a criminal case has been initiated. Before the criminal case against the author was initiated, he was questioned as a witness, and had full rights to remain silent; nobody forced him to provide information or incriminate himself.

4.5 The State party also submits that the process of reconciliation can be initiated by courts only if the victim does not oppose such a procedure. The court considered the opinions of the deceased person's relatives. The deceased person's sister, for example, along with other relatives, did not agree to reconciliation, and insisted that the author should be charged and tried. Considering the fact that the author did not admit his guilt, and that some relatives had insisted on criminal punishment, the court concluded that no reconciliation had been reached.

4.6 Regarding the author's rights to an effective appeal, the State party submits that the court duly considered the author's request to be present at the appellate proceedings. Article 408 of the Criminal Procedure Code prescribes the participation of the convicted person in such proceedings only if there is a request by the prosecutor's office to increase, or otherwise worsen, the verdict and sentence of the trial court. Since there was no such request, the court decided that the author's participation was not necessary. In addition, as is evident from the decision of the appellate court, the author was represented by three defence lawyers.

4.7 The State party further submits that the author's allegations regarding arbitrariness of his imprisonment, and conditions at the colony/settlement, are without merit. His imprisonment was only related to the crime committed, and not to his profession. Regarding the length of the imprisonment, the State party provides statistics regarding crimes committed under article 296 (2) of the Criminal Code. From 2008 to 2010, 632 persons were convicted under that article. Of these, 102 persons received similar or stricter sentences. Therefore, the author's punishment cannot be considered excessive or discriminatory.

4.8 Regarding the author's allegation of discriminatory treatment during his imprisonment, which, he asserts, amounted to a violation of articles 10 and 17, the State party contends that the first disciplinary action against the author was based on the fact that

he had violated the internal rules of the colony/settlement by refusing to sign his labour agreement.<sup>11</sup> The State party submits that such disciplinary actions were commonplace, with 137 such violations recorded in 2010. The author was also subjected to disciplinary action on 17 July 2010, on the grounds that he had been watching television during sleeping hours (95 such violations were recorded in 2010). On 9 February 2011, the author was sanctioned for having taken food items from the canteen to the dormitory room (23 such violations were recorded in 2010).

4.9 Furthermore, the State party submits that, because of those violations and disciplinary actions, the author was not eligible for early conditional release, as provided for by article 453 of the Criminal Procedure Code. That decision was made by a commission of the administration of the colony/settlement, and the author did not appeal it.

4.10 Regarding medical assistance in the colony, the State party submits that the colony in question has a doctor and a nurse among its staff. When necessary, prisoners are sent to other medical facilities outside the colony. On 13 November 2009, the author consulted a dentist, and did not express any complaints. In December 2009, he was sent to a private clinic for dental treatment. Regarding other conditions of imprisonment, the State party submits that the dormitory where the author is imprisoned measures 53 square metres, has 26 inhabitants, and has a separate television room, closet, toilet, and shower, and a canteen.

4.11 The State party also submits that, during the imprisonment, the author had 249 meetings with family members and friends, and with representatives of various organizations and embassies. Fifty-four of those meetings were with his wife and son. The author was not allowed to spend time outside of the colony because of the disciplinary actions taken against him.

4.12 The State party, in conclusion, denies that the author was treated in a discriminatory manner. The author was treated in accordance with the national legislation, the Covenant, and minimum standards for the treatment of prisoners.

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

5.1 On 29 August 2011, the author, responding to the State party's observations on admissibility and the merits, reiterated his previous position regarding alleged violations.<sup>12</sup> With regard to the admissibility, the author contends that he did not personally file a supervisory appeal to the Supreme Court because of the Committee's jurisprudence in *Gelazauskas v. Lithuania*,<sup>13</sup> and based on the fact that the supervisory appeal filed by his lawyer had been rejected.

5.2 The author submits that the Committee will review the allegation of violations of the Covenant starting from the date on which it begins consideration of such matters, irrespective of the submission date. The author has continued to complain about the prison

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<sup>11</sup> The State party cites the provisions of the Standard Minimum Rules for the Treatment of Prisoners, according to which, in relevant part: "All prisoners under sentence shall be required to work, subject to their physical and mental fitness as determined by the medical officer." "Within the limits compatible with proper vocational selection and with the requirements of institutional administration and discipline, the prisoners shall be able to choose the type of work they wish to perform."

<sup>12</sup> In his letter dated 22 December 2011, the author again repeats his position regarding alleged violations of all the listed articles (see para. 1). In addition, the author argues that the provisions of the Penal Enforcement Code regarding compulsory labour are unconstitutional. On 13 March 2012, the author, through his counsel, informed the Committee that he was to be released on 17 March 2012 as part of the general amnesty.

<sup>13</sup> The author refers to communication No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted on 17 March 2003.

conditions, discrimination, and excessive limits on contact with the outside world, but none of his complaints has been successful.

5.3 The author maintains his position regarding the court's failure to call an additional independent expert, and regarding the fact that he did not have an opportunity to prepare his defence, to challenge the evidence or to request the new evidence to be added before the trial. He submits that statements taken from him as a witness should not have been used against him in court, as this violated the Criminal Procedure Code and the protection against self-incrimination contained in the Covenant. He reiterates that the court should have used the reconciliation process, as it did not have to take into account the opinions of all relatives but only those of "close" relatives.

5.4 The author submits that although his presence was not formally required by law, his absence violated the fairness of the hearing. The State party had failed to explain why the author's participation had not been possible. The sentence itself was arbitrary and did not pursue a legitimate aim; rather, it was imposed to silence him. The author also submits that he challenged the constitutionality of article 99 of the Penal Enforcement Code regarding his mandatory employment contract during the imprisonment, but the domestic courts refused to consider his complaint. The combined effect of the restrictions imposed on the author during the imprisonment amounted to a violation by the State party of articles 10 and 17, of the Covenant.<sup>14</sup>

5.5 With regard to remedies, the author asks that the Committee (a) find the State party in violation of all the listed articles; (b) request the State party to quash his conviction; and (c) request the State party to provide him with just compensation.

#### **Further submissions by the State party**

6.1 By its note verbale dated 15 November 2011, the State party submits that the Prosecutor General's Office considered the author's complaint regarding the disciplinary action that had been imposed on him. That decision was then further appealed to Ulan District Court, which rejected the author's appeal. At the same time, the author filed a complaint with the Constitutional Council asking for article 99 of the Penal Enforcement Code to be considered unconstitutional. That complaint was rejected too, because the Constitutional Council does not receive complaints from citizens.<sup>15</sup>

6.2 The State party considers that labour that is performed in prisons does not violate national legislation or the State party's international obligations, and is aimed at "correction of the convicted persons". A refusal to work during imprisonment is therefore a violation of the rules of imprisonment and can lead to disciplinary action.

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

##### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

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<sup>14</sup> The author further maintains that the "excessive sentence" and harsh conditions and restrictions imposed on him during the imprisonment were all part of a campaign to silence him as a human rights defender.

<sup>15</sup> The State party refers to article 72 of the Constitution, according to which the Constitutional Court can only receive requests from certain government officials.

7.2 As required under article 5 (2) (a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee takes note of the State party's submission that the author failed to exhaust domestic remedies by not "personally" requesting the Supreme Court to undertake a supervisory review of his case, and that he did not pursue appellate and supervisory proceedings in court challenging the disciplinary actions taken against him during his imprisonment. The Committee recalls its jurisprudence that filing requests for a supervisory review<sup>16</sup> to the president of a court that are directed against court decisions which have entered into force and which depend on the discretionary power of a judge constitutes an extraordinary remedy and that the State party must show that there is a reasonable prospect that such requests would provide an effective remedy in the circumstances of the case.<sup>17</sup> Furthermore, with regard to the judicial proceedings to challenge the disciplinary action against the author, the Committee notes that he did file complaints to the prosecutor's office and to Ulan District Court, even if this was done after the date of submission of the present communication for the Committee's consideration. In these circumstances, the Committee finds that it is not precluded from considering the communication under article 5 (2) (b) of the Optional Protocol.

7.4 The Committee notes that the alleged violations of article 14 (1) and (3) (d) and (e) relating to the investigation and the trial at the court of first instance occurred prior to the entry into force of the Optional Protocol for the State party (i.e. before 30 September 2009). The Committee recalls its jurisprudence<sup>18</sup> to the effect that it cannot consider alleged violations of the Covenant that occurred prior to the entry into force of the Optional Protocol for the State party, unless the violations complained of continued after the entry into force of the Optional Protocol. The Committee considers that the alleged acts or omissions by the State party in the present case do not give rise to a continuous violation, and therefore declares those claims inadmissible *ratione temporis* under article 1 of the Optional Protocol.

7.5 Regarding the author's claims under article 14 (1) and (3) (d) and (e) in relation to the examination of evidence and of expert witnesses during the Court of Appeal trial, the Committee recalls that it is generally for States parties' courts to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice, or that the court failed in its duty of independence and impartiality. In light of the information available on file, the Committee considers that, in the present case, the author has failed to demonstrate that the alleged "bias" or "lack of equality of arms" reached the threshold for arbitrariness in the evaluation of the evidence, or amounted to a denial of justice. The Committee therefore concludes that the author's claims under article 14 (1) and (3) (d) and (e) have not been sufficiently substantiated. Accordingly, the Committee declares that part of the communication inadmissible under article 2 of the Optional Protocol.

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<sup>16</sup> The Committee also notes that such requests, as with any other motions or requests to courts, can be filed by a duly authorized counsel on behalf of the author.

<sup>17</sup> See *Gelazauskas v. Lithuania*, para. 7.4; and communication No. 1851/2008, *Sekerko v. Belarus*, Views adopted on 28 October 2013, para. 8.3; communication Nos. 1919-1920/2009, *Protsko and Tolchin v. Belarus*, Views adopted on 1 November 2013, para. 6.5; communication No. 1784/2008, *Schumilin v. Belarus*, Views adopted on 23 July 2012, para. 8.3; communication No. 1814/2008, *P.L. v. Belarus*, decision of inadmissibility adopted on 26 July 2011, para. 6.2.

<sup>18</sup> See, for example, communications Nos. 422-424/1990, *Aduayom and others v. Togo*, Views adopted on 30 June 1994, para. 6.2; and *Könye v. Hungary*, para. 6.4.

7.6 The Committee also takes note of the author's allegations that the Almaty Regional Court of Appeal failed to secure his presence during the appellate proceedings, in violation of the requirements of article 14 (5) of the Covenant. The Committee considers, however, that the author has failed to substantiate that his inability to attend the proceedings at the Court of Appeal resulted in a violation of his rights under article 14 (5) of the Covenant. Accordingly, the Committee declares those claims inadmissible under article 2 of the Optional Protocol.

7.7 As to the alleged violation under articles 9, 12, 17, 19 and 22 of the Covenant, the Committee takes note of the State party's argument that those restrictions were placed on the author as a consequence of his imprisonment, subsequent to the lawful verdict from a court of law. Furthermore, regarding the alleged violation under article 14 (5), the Committee considers that the author has failed to substantiate his claims regarding his rights during the appeal procedure. Accordingly, and in the absence of any further pertinent information on file, the Committee considers that the author has failed to sufficiently substantiate those particular claims for the purposes of admissibility. Accordingly, it declares that part of the communication inadmissible under article 2 of the Optional Protocol.

7.8 Finally, regarding the author's claim that his rights under article 10 were violated because he was requested to sign a contract with a State-owned enterprise, the Committee notes the State party's submission that labour is a general requirement during imprisonment, while refusal to work is considered to be a violation of the penitentiary rules. According to article 8 (3) (b) of the Covenant, prohibition of forced labour shall not be held to preclude the performance of hard labour in pursuance of a sentence to such punishment by a competent court. Article 8 (3) (c) (i) of the Covenant further defines that a person under detention may be required to perform works or services that are normally required of a person who is under detention in consequence of a lawful order of a court. When imposing a labour obligation on a prisoner, the State should ensure that the prisoner is fit to perform the required labour; however, the existence of such a requirement does not in and of itself amount to a violation of the Covenant. The Committee notes that, although the author indicated that he was not satisfied with the work conditions, there is nothing in the file, apart from the general statement, to indicate the reasons for such dissatisfaction. For instance, it is not clear whether the required work resulted in mental or physical hardship. The Committee therefore considers that claim to be unsubstantiated and declares it inadmissible under article 2 of the Optional Protocol.

8. Therefore, the Human Rights Committee decides that:

- (a) The communication is inadmissible under articles 1 and 2 of the Optional Protocol;
- (b) The present decision shall be communicated to the author and to the State party.

## Appendix

### **Individual opinion of Committee member Yuval Shany (concurring)**

1. While I concur with the decision of the Committee, I wish to express some doubts as to whether the State party indeed complied with the rights of the author under the Covenant when it barred him from being present in his appellate hearings.

2. According to the facts presented to the Committee, Almaty Regional Court held that “participation of the convicted person is mandatory only in cases in which the prosecutor asks for a more serious penalty than the verdict of the trial court” (para. 2.9) and that the author’s presence was “not necessary” (para. 4.6). Although the Covenant does not require States parties to provide for the physical presence of convicted persons in all appellate hearings (as opposed to their physical presence at the trial phase, which is mandated by article 14 (3) (d)), the conduct of appellate proceedings must provide the individual in question with the some of the key safeguards provided in article 14 (1) — most significantly, with the right to equality before the courts<sup>a</sup> and the right to a fair hearing by a competent, independent and impartial tribunal established by law.<sup>b</sup> Thus, in circumstances in which it had been shown that the convicted person’s request for physical presence in the appellate hearings had been disposed of in a discriminatory manner, or that such a presence was essential for ensuring the fairness of the appellate hearings, barring him or her from attending them would amount to a violation of the Covenant.

3. In the present case, the author has not established that article 408 of the Criminal Procedure Code of Kazakhstan, which provides for mandatory court presence in cases involving an appeal brought by the prosecution, but not in appeals brought by the defence, was designed to discriminate against convicted persons or actually violated his right to equality of arms, given the fact that he was represented in the appellate proceedings by three counsels. Furthermore, the author has not explained how his exclusion from the appellate hearings actually affected the fairness of the proceedings. As a result, although I still have doubts as to whether article 408 conforms with the Covenant and whether Almaty Regional Court properly weighed the rights of the author under article 14 (1) when it decided to bar him from attending the appellate hearings, I agree with the Committee that the author failed to substantiate his claims in this regard under article 14 (1) of the Covenant.

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<sup>a</sup> The right to equality before courts under article 14 (1) reflects, inter alia, the principle of “equality of arms”. See the Committee’s general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 8.

<sup>b</sup> See, for example, communication No. 1086/2002, *Sholam Weiss v. Austria*, Views adopted on 3 April 2003, para. 9.6.