

Before the United Nations Committee against Torture

In the case of

Alexander Pavlovich GERASIMOV

against

the Republic of Kazakhstan

(Communication No. 433/2010)

COMMENTS ON PURPORTED LETTER OF WITHDRAWAL

to

The United Nations Committee against Torture
c/o Petitions Team
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
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Introduction

1. On 9 March 2011 the OHCHR wrote to the legal representatives of Mr. Gerasimov enclosing a document sent by the Government of Kazakhstan which purported to be a letter of withdrawal. This followed acts of intimidation against Mr. Gerasimov which are outlined in the *Reply to the Government's Response* submitted on 28 February 2011 (the "Reply").
2. We have consulted with Mr. Gerasimov and we are not instructed to withdraw the claim against Kazakhstan that is currently before the Committee. Although significant pressure has been placed upon him to withdraw, the allegations of torture are maintained. The document sent to the Committee by the Government was obtained in a misleading fashion as part of ongoing attempts to interfere with the right of individual petition by intimidating the author into withdrawing his petition.
3. Mr. Gerasimov has presented clear, compelling, and consistent evidence maintaining his allegations when recently questioned by the authorities in Kazakhstan. In the absence of an unequivocal withdrawal, the Committee should move directly to consider the case and make a finding that the Convention was violated. In addition, the Committee should consider making a finding that there has been an interference with the right of individual petition.

Background

4. On 27 March 2007, Mr. Gerasimov was beaten and threatened with sexual violence by police officers in Kostanay, then tied up and repeatedly suffocated until he bled from his nose and ears and lost consciousness. As a result of his injuries he spent 13 days in hospital and suffers from PTSD. Despite formal complaints there has never been a proper investigation into his torture.
5. On 22 April 2010, Mr. Gerasimov submitted a Communication to the Committee.

Re-Opened Investigation

6. On 18 January 2011, Kazakhstan responded to the Communication, explaining that a new investigation had been commenced after a finding that the original investigation was insufficient and that Mr. Gerasimov had given consistent testimony. As outlined in the *Reply* filed on 28 February 2011, this new investigation consisted of a psychiatric examination of the author against his will in order "to establish the mental state of the victim, since there is a doubt in his ability to correctly perceive the circumstances relevant to the case,"¹ together with numerous interrogations. The investigation was conducted in a manner that appeared to be for the purpose of intimidating the victim rather than establishing the truth. As noted in the *Reply*, this was in the context of a pattern and practice in Kazakhstan of intimidation against those who make complaints of torture, which the UN Special Rapporteur on Torture noted in 2009.²

Further Interrogations

7. We are able to confirm that despite the intimidatory manner in which this renewed investigation was conducted, during further questioning Mr. Gerasimov repeated his consistent account of the torture which he had suffered at the hands of the police.

¹ 28 February 2011 Reply, paras. 10-12, 54; see Resolution Ordering a Psychiatric Examination, 8 January 2011.

² 28 February 2011 Reply, paras. 15-20.

8. On 19 January 2011, Mr. Gerasimov gave a detailed statement about his torture. As outlined in paragraph 14 of the *Reply*, he repeated the details of the torture that he suffered in an entirely consistent fashion.
9. In addition, we are now able to confirm that Mr. Gerasimov maintained his account in subsequent interrogations by the police, even when confronted with his torturers. Some of these sessions were videotaped by the police.
10. On 21 January 2011, during an investigatory confrontation with Almukhambetov, one of the police officers who tortured him, Mr. Gerasimov explained that Almukhambetov had tried to commit a sexual act on him, and that he and the other officers had thrown him to the floor and strangled him with the polypropylene bag. Mr. Gerasimov also explained that his family was putting pressure on him not to pursue the case.
11. On 25 January 2011, during a confrontation with Matashev, another of the police officers who tortured him, Mr. Gerasimov explained that his family was opposed to filing criminal charges, because they were afraid of the threats and after they started summoning him for questioning, a conflict started within the family, forcing him to recant his previous testimony concerning the use of force against him by Detective Matashev. Mr. Gerasimov explained that the testimony given by him at the confrontation was true, as Matashev and the other officers (there were five of them) threw him to the ground and held him while they suffocated him with the polypropylene bag.

Pressure to Withdraw the Complaint

12. As explained in the *Reply* at paragraphs 18-20, Mr. Gerasimov has come under some pressure from his family to withdraw the complaint. It appears that on 2 February 2011, Mr. Gerasimov was also required by the police to have a confrontation with his wife and her adult sons, during which they demanded that he stop the proceedings. This was in the context of previous threats made against Mr. Gerasimov and attempts to bribe him in order to abandon his complaint in 2007.

The Purported Withdrawal

13. On 9 March 2011, the OHCHR informed the Justice Initiative that it had received a typed, notarized letter in Russian and English, signed by Mr. Gerasimov, which stated that he wished to withdraw his communication to the Committee as he had acted “in a temper, in a painful nervous condition”. A copy of this letter was sent to the Kazakh Ministry of Foreign Affairs.
14. This alleged withdrawal was a departure from Mr. Gerasimov’s consistent position with regard to his case. Although he had informed lawyers from KIBHR that his family had pressured him to drop his complaint, Mr. Gerasimov had never expressed any desire to do so, and had consistently maintained the account of his torture. As a result, the Justice Initiative requested time to contact Mr. Gerasimov and investigate the origins of the purported letter of withdrawal.³
15. After some difficulty contacting Mr. Gerasimov, co-counsel from the KIBHR has been able to consult with him. As a result of the continued pressure from his family and the authorities, Mr. Gerasimov has had to leave his native Kostanay. Currently he is working in another city in Kazakhstan.

³ Letter from Justice Initiative to OHCHR, 6 April 2011. In an email on 12 April 2011, OHCHR granted the Justice Initiative until 6 May 2011 to respond to the letter.

16. As a result of those consultations, we can confirm that the circumstances under which the document sent by OHCHR on 9 March 2011 was written were as follows.
17. In February 2011, the police showed to Mr. Gerasimov statements of the three policemen who tortured him, which said that if he withdrew his complaint the officers would not bring any libel claims against him. An investigator from the financial police, Mr. Agafonov, and another officer then came to Mr. Gerasimov's workplace, and in their presence he wrote a letter in his own hand asking for the renewed domestic investigation to be concluded. This letter did not express any wish to discontinue proceedings before this Committee or to withdraw the Communication. Mr. Agafonov took the letter away and returned one or two days later to bring Mr. Gerasimov to the notary office. (To our knowledge, Mr. Gerasimov's handwritten letter remains in the custody of the Government.). At the notary office, Mr. Gerasimov was given a printed document, quickly looked at it, and signed it while Agafonov was present. Mr. Agafonov paid for the document to be notarised and for the translation of the text into English.
18. When Mr. Gerasimov was shown the document received by the Committee, he was surprised and upset. This was the first time that he had had a chance to read its contents in detail, and he realized that it was different from the letter that he had written. In particular he said that he had never written anything indicating that he had made his complaint while "in a temper." He does accept that he signed the document.

ARGUMENTS

19. Absent an unequivocal withdrawal, the Committee should move directly to consider the petition as it is in the interests of justice to do so. The Committee should find violations of the Convention on the basis of the clear and compelling evidence presented. In addition, the Committee should consider whether there has been a violation of the right of individual petition under Article 13 and of the right of petition under Article 22.

A. The Committee should Continue to Consider the Petition

20. The Committee should continue to consider the substance of Mr. Gerasimov's claim. It should only discontinue a complaint if the victim has unambiguously withdrawn that complaint by their own free will; and if any doubt exists, then the Committee should continue. In this case, the letter signed by Mr. Gerasimov is not an unambiguous withdrawal. It was signed only under substantial pressure and without having had an opportunity to review it, and Mr. Gerasimov has now made clear that he does not support its contents. In any event, the Committee also has the discretion to continue to consider a case where there is sufficient public interest in doing so.

Relevant Legal Standards

21. Where there is a suggestion that the claimant was pressured to withdraw the claim, or the claimant's will is unclear, this Committee should err on the side of continuing to consider the claim. This principle is reflected in Rule 103(2) of the Committee's Rules of Procedure, which states that "In case there is still doubt as to the wish of the complainant, the Committee shall be seized of the complaint."
22. The Human Rights Committee follows a similar practice. Manfred Nowak, previously the UN Special Rapporteur for Torture, has explained that:

“discussions in the [Human Rights] Committee have made clear that the withdrawal of a communication does not necessarily lead to a discontinuance of the proceedings...if it has the impression that a communication has been withdrawn under pressure, no provision of the OP prevents it from continuing to deal with the case, even against the declared will of the author.”⁴

23. The European Court of Human Rights (ECtHR) also examines whether a statement from a victim purporting to withdraw an application is “unambiguous” before it discontinues consideration of the case.⁵
24. Even if a claimant does seek to withdraw an application, human rights tribunals may continue to consider cases where the interests of justice require it. The Inter-American Court of Human Rights (IACtHR) has an explicit discretion whether to continue to consider a case where a complainant seeks to withdraw a claim, and evaluates each situation having heard submissions from the parties, rather than treating a withdrawal as automatically ending the case.⁶ The ECtHR has similar discretion to consider a case even if a claimant withdraws. Article 37 of the European Convention on Human Rights states that “the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.”⁷

Argument

25. In this case, none of the conditions that would allow the Committee to dismiss the case are met.
26. The letter from Mr. Gerasimov purporting to withdraw the claim, which Kazakhstan sent to the Committee, is not a clear and unambiguous expression of a desire to terminate the case. The printed letter was not prepared by Mr. Gerasimov, but by one of the investigators of the case. It was signed in the presence of that investigator, and without Mr. Gerasimov having read it in detail. After being shown a copy of the letter, Mr. Gerasimov was surprised by its contents and disputed some of the details. He stated that because of the effect that the domestic investigation was having on him and his family, and the resulting pressure that his family was putting on him to stop the case, he was unable to continue to participate in the renewed domestic investigation and had handwritten a letter saying that he would not pursue his domestic claim against the officers due to the statute of limitations. This was in no way an expression of a desire to withdraw his communication to this Committee.
27. Any withdrawal was not freely made, as it follows considerable intimidation, including a compulsory psychiatric examination, and confrontations with both his family members and the police accused of torturing him.
28. There have been no developments in the case that might explain any change in attitude. The renewed investigation into his torture was closed without bringing the case to court, and Mr. Gerasimov has not received any reparations or rehabilitation. The only change has been the pressure which the re-opened investigation has brought to bear on Mr. Gerasimov directly and indirectly through his family.

⁴ Manfred Nowak and Elizabeth McArthur, *CCPR Commentary (2nd ed)* (N.P. Engel, Kehl Germany, 2005), at 30P, 8

⁵ *Sitaropoulos & Others v. Greece*, ECtHR, 8 July 2010, para. 21.

⁶ Rules of Procedure, Art. 53: When the party that has brought the case notifies the Court of its intention not to proceed with it, the Court shall, after hearing the opinions of the other parties thereto, decide whether to discontinue the hearing and, consequently, to strike the case from its list.

⁷ See e.g. *Cumana and Mazare v. Romania*, ECtHR, Judgment of 17 December 2004;

29. This is in the context of the pattern of intimidation reported by the Special Rapporteur on Torture in 2009. The fact that such intimidation has been brought against the first person to lodge a complaint before this Committee in respect of Kazakhstan is a matter of particular concern, and the public interest in the protection of human rights requires that the Committee continue to consider the claim.

B. The Committee should find a Violation

30. The Committee has before it clear, compelling and consistent evidence upon which it can make a finding of a violation of the Convention, and should promptly move to decide the case so as to end the intimidation.
31. Mr. Gerasimov has frequently described the way that he was tortured by the police in March 2007, through consistent accounts given to local counsel and to pro bono counsel who travelled from New York to Kazakhstan to interview him.
32. Mr. Gerasimov also described and demonstrated his ill-treatment on video,⁸ in which he is very calm, and does not appear agitated in any way. The Committee is invited to view the video at <http://blog.soros.org/2010/04/the-dry-submarino-police-torture-in-kazakhstan/> or on the DVD attached as Exhibit 34 to the Communication filed in April 2010. More recently, he gave an interview to Kazakh TV Channel Seven, in which he described once again his torture as well as confirmed that he had filed a complaint.
33. Nothing in the recent investigation casts any doubts on this evidence. Indeed, during the investigation Mr. Gerasimov repeatedly confirmed the details of his torture. The letters which Mr. Gerasimov wrote or signed do not say that the torture did not occur, or that he was mistaken in any way.

C. Interference with Right of Petition

34. As noted in the *Reply* at paragraphs 47 to 55, the actions of the Government appear to have been intended to intimidate the author into withdrawing his petition, and the Committee should consider whether there is a violation of the right of petition under Articles 13 and 22 of the Convention and other relevant standards.

Relevant Legal Standards

35. Article 13 of the Convention requires that States protect complainants “against all ill-treatment or intimidation as a consequence of his complaint”. The obligation not to interfere with the right of individual petition is also recognized in other human rights systems. The Human Rights Committee has said that States are implicitly “obliged not to hinder access to the Committee and to prevent any retaliatory measures against any person who has addressed a communication to the Committee”.⁹ The ECtHR has similarly explained that

“It is of the utmost importance for the effective operation of the system of individual application instituted under Article 34 that applicants or potential applicants should be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints. As the Court has

⁸ Exhibit 34 to the Communication to Committee against Torture, 22 April 2010.

⁹ UNHRC, *General Comment No. 33 on The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*.

noted in previous decisions, “pressure” includes not only direct coercion and flagrant acts of intimidation against actual or potential applicants, members of their family or their legal representatives, but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy.”¹⁰

The ECtHR Grand Chamber found a violation where the authorities had approached individuals they thought were applicants, questioned them about their applications without their lawyer being present, and gave them a statement to sign saying that no application had been made. This was considered to be “a form of illicit and unacceptable pressure on the applications to withdraw their application”.¹¹

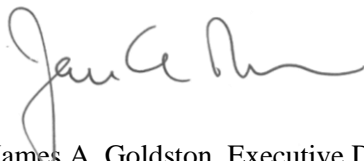
Argument

36. As described above and in previous submissions, the conduct of the new investigation placed substantial pressure on Mr. Gerasimov, as he was forced to undertake a psychiatric evaluation against his will and was interrogated and made to confront his torturers. As a result of this pressure, he has left home. He was eventually made to sign a letter that he had not written.
37. The first communication against Kazakhstan to the Committee has resulted in the Government sending a letter of withdrawal, which was prepared and processed by the authorities, and which was signed by the victim after sustained pressure was exerted on him. This took place against the background of a pattern of intimidating torture victims to withdraw complaints. We therefore invite the Committee to examine whether Kazakhstan has violated its obligation under Article 13 to protect complainants against intimidation, and under Article 22 to give effect to the right of individual petition.

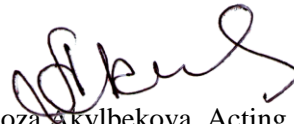
CONCLUSION

38. In light of the submissions above, we ask the Committee to immediately proceed to examine the case on its merits. We re-iterate the arguments made in the original Communication and our Reply of 28 February 2011, and also ask the Committee to examine whether Kazakhstan has violated Mr. Gerasimov’s right to petition.

New York, 6 May 2011



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¹⁰ *Mamatkulov & Askarov v. Turkey*, ECtHR, Judgment of 14 February 2005.

¹¹ *Akdivar and others v Turkey*, ECtHR [GC], Grand Chamber Judgment of 30 August 1996, paras. 100-106.