Yevgeniy Zhovtis
v. Kazakhstan

Communication to the
United Nations Human Rights Committee

November 2010

OPEN SOCIETY
JUSTICE INITIATIVE

Communication to the Human Rights Committee

In the case of

Yevgeniy ZHOVTIS

against

the Republic of Kazakhstan

submitted for consideration under the
First Optional Protocol to the
International Covenant on Civil and Political Rights

to
The United Nations Human Rights Committee
c/o Petitions Team
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
1211 Geneva 10
Switzerland

9 November 2010

TABLE OF CONTENTS

I. THE AUTHOR OF THE COMMUNICATION

1. The Author of this communication is Yevgeniy Zhovtis, a Kazakh national born in Almaty, Kazakhstan on 17 August 1955. The Author is Director of the Kazakhstan International Bureau for Human Rights and the Rule of Law.

2. This communication is being submitted to the United Nations Human Rights Committee on behalf of the Author by the Open Society Justice Initiative and the Kazakhstan International Bureau on Human Rights and the Rule of Law. Vera Tkachenko, former counsel of Mr. Zhovtis, provided significant assistance in preparation of the communication. A signed authorization form is attached.

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II. STATE CONCERNED

4. This communication is directed at Kazakhstan ("Kazakhstan" or "the State Party"), a State Party to the International Covenant on Civil and Political Rights ("the Covenant" or "ICCPR") and the First Optional Protocol.

5. Kazakhstan ratified the ICCPR on 24 January 2006. Kazakhstan signed the Optional Protocol to the ICCPR on 25 September 2007 and acceded to the instrument on 30 June 2009. The Optional Protocol entered into force for Kazakhstan on 30 September 2009.

III. SUMMARY OF THE CLAIM

6. Yevgeniy Zhovtis is a renowned human rights defender and Director of the Kazakhstan International Bureau for Human Rights and the Rule of Law. Mr. Zhovtis's organization has been subjected to government harassment and intimidation over the years. On occasion, the government has acted against the NGO through the Kazakhstan criminal justice process, which is widely reported by the United Nations and other international bodies to lack the independence and impartiality that is necessary to protect individual rights from arbitrary government power.

7. On 26 July 2009, Mr. Zhovtis was involved in a tragic accident when he accidentally struck a pedestrian who was walking on a dark road at night and subsequently died as a result of his injuries. Mr. Zhovtis immediately acknowledged his role in the accident, provided compensation for the family of the deceased, and assisted the police in their enquiries by providing them with information about the accident.

8. On the day after the accident the police had already concluded that Mr. Zhovtis was a suspect in a criminal investigation for the violation of traffic regulations which negligently caused the death of a pedestrian – but they did not inform him of this fact until 18 days later, on 14 August 2009. The delay made a big difference. On at least four occasions, the police questioned Mr. Zhovtis while conveying to him falsely that he was merely a witness – who under Kazakh law was obliged to answer all their questions – rather than a suspect entitled to multiple rights including the right not to answer police questions and the right to pose questions to prosecution experts. Only on 14 August 2009, after two weeks of questioning Mr. Zhovtis as a witness, did the police inform him that he had in fact been a suspect since the day after the accident. The defence raised this issue at trial, arguing repeatedly that the prosecution expert evidence was based on factually incorrect data obtained in violation of Mr. Zhovtis' rights, and having mislead him, and that the evidence obtained as a result should not be relied upon. The court failed to rule upon the question.

9. On 14 August 2009, on the same day that they informed Mr. Zhovtis that he was a suspect, the police promptly closed the investigation. After giving Mr. Zhovtis and his counsel only one day to study the 150-page case file, on 18 August 2009 the police sent the file to the prosecutor's office, which on 20 August transferred the case to court.[1] The rushed closure of the investigation prevented the defence from raising outstanding investigative issues, and meant that the defence applications which had been made to the prosecutor's office were left unresolved when the trial started.

10. Also on 14 August, Mr. Zhovtis learned that the police had already obtained an expert auto-technical analysis which concluded that he could have prevented the accident. This analysis was based on various assumptions, namely the estimates of time, speed and distance made by Mr. Zhovtis when he was lead to believe he was a witness. The defence questioned this conclusion and commissioned highly experienced independent experts from Kazakhstan and abroad, who found that the analysis was utterly flawed and that there was no way that Mr. Zhovtis could have prevented the accident.

11. On 28 August 2009, the trial started. The trial judge refused to consider the defence-tendered evidence of the independent experts, declining to hear their testimony or even to consider their statements. Instead, the judge relied only on the prosecution evidence to conclude that Mr. Zhovtis was negligent in not preventing the accident, and therefore guilty of the offence of violating traffic regulations which negligently caused the death of an individual. In fact, in direct contravention

[1] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 52.

of Kazakh law, the trial judge refused to consider any of the expert evidence presented by the defence, treated all defence legal arguments with contempt, and failed to give any reasons – let alone adequate ones - for rejecting them.

12. In another breach of Kazakh law, the judge did not offer Mr. Zhovtis the opportunity to benefit from the official reconciliation procedure with the mother of the deceased, even though in her statement she had stated unequivocally that she had reconciled with Mr. Zhovtis and did not want him to be prosecuted. Under Kazakh law, such a statement by a relative of the deceased should – and ordinarily does – result in termination of the criminal case or verdict without sentencing. In the instant case, the trial judge made no mention of the mother's statement, ignoring the question completely.

13. On 3 September 2009, after ratifying the police deceit, refusing to consider critical defence evidence, and depriving the defence of the opportunity to benefit from reconciliation, the trial judge retired for only 25 minutes. The judge then delivered a six-page decision finding Mr. Zhovtis guilty of the offence of violating traffic regulations which negligently caused the death of an individual, and promptly sentenced him to a term of four years imprisonment, only one year short of the maximum, with no consideration of mitigating factors.

14. On 10 October 2009 Mr. Zhovtis lodged an appeal against the conviction and sentence to the Almaty Regional Court. The hearing was on 20 October 2009, and at the conclusion of the proceedings the court issued a decision which merely affirmed the trial court's findings, repeating the same fair trial violations which so tainted the first instance proceedings. The Regional Court had full jurisdiction to consider the facts and the legal decisions that lead to the conviction, and so had every opportunity to review the expert evidence and the evidence of the victim. However, the court refused to consider the independent experts, attempted not to hear the evidence of the victim and then ignored what she said, and confirmed the same sentence. Again in breach of Kazakh law, the appeal was conducted *in absentia* despite Mr. Zhovtis's request to be present. In addition, Mr. Zhovtis was not informed that he would not be allowed to be present at the appeal, and therefore did not have a chance to discuss with his counsel the strategy they should follow in his absence. [2]The behaviour of the judge was so biased that an independent trial observation report from the International Commission of Jurists in Geneva concluded that the process against Mr. Zhovtis constituted a "denial of justice," and that there was no equality of arms between the prosecution and the defence.

15. On 25 October 2009, Mr. Zhovtis was sent to a new prison for those convicted of non-intentional offences – not in Astana, the capital, where such a prison already existed, but rather in the frontier town of Ust-Kamenogorsk, near the border with China and close to Mongolia, more than 1,000 kilometers away both from Mr. Zhovtis's family and colleagues in Almaty, and from journalists and diplomats in Astana.

[2] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 58.

16. As a result of the unfair prosecution, trial and appeal, Mr. Zhovtis has suffered the following violations of the Covenant:

- *A. Violation of the Right to Call Independent Expert Witnesses.* Both the trial court and appeal court refused to consider expert witnesses who would have testified that the prosecution "expert" evidence was worthless and that there was no way that Mr. Zhovtis could have prevented the accident, in violation of the right of the accused to obtain the attendance of witnesses on his behalf protected in Article 14(3)(e).
- *B. Violation of the Right to a Fair Trial.* The trial and appeal processes were manifestly arbitrary and amounted to a denial of justice, insofar as they failed to respect the principles of impartiality or of equality of arms, and the right to silence, in violation of the right to a fair trial in Article 14.
- *C. Violation of the Right to an Appeal.* The appeal hearing considered only technical aspects of the case and refused to address any substantive issues of fact or law, in violation of the right to a full reconsideration of the conviction protected in Article 14(5). Despite his request to be present, Mr. Zhovtis was prevented from attending the appeal hearing, in violation of Article 14(5) and 14 (3)(d).
- *D. Arbitrary Sentence and Degrading Prison Conditions.* The sentence of imprisonment imposed on Mr. Zhovtis is arbitrary as it did not pursue a legitimate aim but was used for the purpose of silencing a human rights defender. The sentence imposed was excessive in relation to the seriousness of the offence, was not substantiated by an adequate assessment of its need, and was imposed after a trial that amounted to a denial of justice, in violation of Article 9. In addition, the prison conditions imposed are degrading in violation of Article 10, and the prison rules are applied in an arbitrary and discriminatory manner, in violation of his right to privacy protected in Article 17.
- *E. Violation of Duty to Protect a Human Rights Defender*. The trial process was suborned in order to silence a prominent human rights defender, and the arbitrary and discriminatory treatment of Mr. Zhovtis in prison aims to limit his legitimate activities, in violation of the right to promote human rights, which is rooted in the rights to Free Movement (Article 12), Privacy and Reputation (Article 17), Association (Article 22), and Expression (Article 19).

17. As a result of the unfair investigation, trial and appeal, a tragic accident has been manipulated to punish and silence one of Kazakhstan's leading human rights defenders.

IV. THE FACTS

18. Any assessment of the investigation of the accident and the subsequent trial and appeal of Mr. Zhovtis must take account of the repeated concerns that have been raised by international and domestic monitoring bodies regarding the independence

of the judiciary and the safety and freedom of human rights defenders in Kazakhstan.

Human Rights and Criminal Justice in Kazakhstan

19. Human rights defenders and journalists in Kazakhstan have experienced a long history of harassment at the hands of the Kazakhstan government. In recent years, the government has increasingly resorted to criminal prosecution to silence government critics. During the UN Universal Periodic Review of 12 February 2010, the UN Human Rights Council recommended that Kazakhstan effectively investigate and prosecute violations committed against human rights defenders and journalists.[3] Numerous international observers have concluded that the criminal justice system is not sufficiently independent .[4]

Attacks on Independent Voices and the Media

20. Recent years have seen a pattern of attacks against government critics in Kazakhstan, which appear to be aimed at silencing them. The 2004 Human Rights Watch report "Political Freedom in Kazakhstan" documented the prosecution or harassment of fifteen members of unregistered parties and movements.[5]

21. More recently there has been a restriction of freedom of expression in Kazakhstan,[6] including the use of threats and harassment against independent journalists for criticizing the president or government policies and practices.[7] For example, on 8 August 2009 Ramazan Yesergepov, editor of the newspaper *Alma-Ata Info*, received a three-year prison sentence following a closed trial in which the accused was not represented, after the newspaper published an article making corruption allegations against several national security officers based on classified documents.[8] In June 2009 the independent Almaty weekly *Taszhargan* was forced to cease publishing after an appellate court upheld a prior decision awarding Romin

[3] Ex. 1: UN Human Rights Council, *Draft Report of the Universal Periodic Review, Kazakhstan*, A/HRC/WG.6/7/L.9, 16 February 2010, at recommendation 76. Available at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session7/KZ/A_HRC_WG.6_7_L.9_Kazakhstan.pdf

[4] Ex. 2: Amnesty International, *Amnesty International Report 2010 – Kazakhstan* (28 May 2010) ("Criminal proceedings continued to fall short of international fair trial standards, undermining the rule of law"). Available at: http://www.unhcr.org/refworld/docid/4c03a81e64.html. See also Ex. 3: International Commission of Jurists, *Submission on the 1st Periodic Report of Kazakhstan to the Human Rights Committee* (May 2010) (stating that "the exercise of judicial independence continues to be hampered by executive influence, corruption, and the dominant role of the Prosecutor's office in the judicial process"). Available at: http://www.icj.org/dwn/database/KazakhstanLOI310510.pdf. See also Ex. 4: Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despoy, Mission to Kazakhstan, 11 January 2005, E/CH.4/2005/60/Add.2 ("Report of the Special Rapporteur") at para. 72 (finding that "if Kazakhstan is to be considered a truly democratic State, it is crucial to introduce legal adjustments that may even include constitutional reforms, so as to reach a fairer balance of power between the branches of Government and, more especially, increase the independence of the judiciary"). Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/102/63/PDF/G0510263.pdf?OpenElement

[5] Ex. 5: Human Rights Watch, "Political Freedoms in Kazakhstan" (5 April 2004). Available at: http://www.hrw.org/en/reports/2004/04/05/political-freedoms-kazakhstan-0

[6] Ex. 6: Human Rights Watch, "World Report: Kazakhstan" (2010). Available at: http://www.hrw.org/en/world-report-2010/kazakhstan

[7] *Ibid.*

[8] *Ibid.*

Madinov, a member of parliament, three million tenge (about US$20,000) in "moral damages" for an article alleging that his business interests benefited from his legislative work.[9]

22. On 10 July 2009, legislation was introduced which allows the authorities to reclassify all forms of internet content such that they would be subject to existing restrictive laws on expression.[10] The law also expands the grounds for banning media content relating to elections, strikes, and public assemblies, using broad wording that could give rise to arbitrary interpretation.[11] Taken together, these developments "maintain a chilling environment in which media outlets and journalists are faced with the constant threat of lawsuits and crippling defamation penalties."[12]

Kazakhstan International Bureau for Human Rights and the Rule of Law (KIBHR)

23. KIBHR is a non-governmental organization (NGO) that was founded in 1993. It works to promote civil and political rights in Kazakhstan, including freedom of expression and information, protection from torture, freedom of thought, freedom of association and assembly, freedom of movement, fair trial rights, and participation in governance. KIBHR headquarters are in Almaty, and it has branches and representatives in eleven regions of Kazakhstan. It is one of the largest and most respected human rights NGOs in Central Asia.[13] Mr. Zhovtis, a founding director of the KIBHR, remained actively involved in all of KIBHR's activities at the time of his trial. An acclaimed lawyer and legal analyst, Mr. Zhovtis has for a decade been respected domestically and internationally as the leading human rights defender in Kazakhstan and the most authoritative critic of the human rights violations committed by the government of Kazakhstan.

24. Mr. Zhovtis has been honored for his work with the Friedrich-Ebert Foundation Award (2007), the International League for Human Rights Award (1999), and the Democracy and Civil Society Award (1998), given jointly by the European Union and the United States.[14] In 2002, he received "The Best Lawyer of Kazakhstan" award. In September 2010, while in prison, he was awarded the Sakharov prize by the Norwegian Helsinki Committee.[15]

25. In recent years, KIBHR, and Mr. Zhovtis personally, have experienced several incidents of harassment.

- In 1999, part of the office of the KIBHR was burnt down in an arson attack, including the offices of both Mr. Zhovtis and KIBHR Deputy Director at the

[9] *Ibid.*
[10] Ex. 7: Human Rights Watch, "Kazakhstan: Rescind New Media Restrictions" (14 July 2009). Available at: http://www.unhcr.org/refworld/docid/4a5d994a1e.html
[11] *Ibid.*
[12] Ex. 6: Human Rights Watch, "World Report: Kazakhstan" (2010). Available at: http://www.hrw.org/en/world-report-2010/kazakhstan
[13] For more information on KIBHR's activities, please see its website: www.bureau.kz
[14] Ex. 8: Human Rights Watch, "Kazakhstan: Give Rights Defender Fair Trial" (1 September 2009). Available at: http://www.hrw.org/en/news/2009/09/01/kazakhstan-give-rights-defender-fair-trial
[15] Norwegian Helsinki Committee, Andrey Sakharov Freedom Award 2010 to Evgeny Zhovtis, 27 August 2010. Available at: http://www.nhc.no/php/index.php?module=article&view=992.

time, Zh. Turmagambetova. The investigation conducted by law enforcement authorities did not yield any results. Those responsible were not found.[16]

- In 2003, a small quantity of marijuana was planted in Mr. Zhovtis's car just before he was to go to Tashkent to speak at the European Bank for Reconstruction and Development (EBRD) annual meeting.[17] Mr. Zhovtis discovered the drugs and reported the incident to the police, but no charges were brought.
- In August 2005 intruders broke into the Almaty office of KIBHR and stole computers and hard drives. They took no other valuables. The intruders also rifled through documents maintained by the organization. As a result, KIBHR lost all data it had collected over several prior years, and was for a time paralyzed in its human rights work.[18] The police investigation of the burglary yielded no results.[19]
- In 2005, authorities from the prosecutor's office and the tax inspectorate undertook an audit into the activities of the KIBHR over a 5 year period, which lasted many months. The authorities concluded that there had been minor violations of the rules associated with the payment of taxes and social deductions. The KIBHR did not dispute those findings in court and paid the fines, because it believed that challenging the findings would be futile and because several other NGOs had also opted to pay the fines.[20]
- In 2007, the Department of Corruption and Economic Crimes conducted a financial inspection of the activities of one of KIBHR's branch offices. The inspection was instigated by an "anonymous" complaint, signed only by "patriots", which alleged that KIBHR received funding from the United States to finance "Orange Revolutions." No charges were filed.[21]
- In 2008, the Kazakhstan authorities conducted a lengthy tax inspection of KIBHR, in which the Auezov district tax inspection office of the City of Almaty rendered an assessment requiring payment by KIBHR of a large amount of what were alleged to be unpaid back taxes on grants. The KIBHR challenged the assessment, asserting that the grants were not subject to taxes because they came from various governments and other institutions that had agreements with the Kazakhstan government. In April 2009 the Tax Committee of the City of Almaty informed the KIBHR that the initial audit was not consistent with the

[16] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 7.
[17] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 8.
[18] Ex. 11: Kazkahstan International Bureau for Human Rights and the Rule of Law ("KIBHR"), "Work of the Human Rights Bureau is Paralyzed" (15 August 2005). Available at: http://www.bureau.kz/data.php?n_id=1588&l=ru. See also Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para.10.
[19] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 10.
[20] *Ibid.*, at para. 9.
[21] Ex. 12: KIBHR, "The audit of the South Kazakhstan Branch of the KIBHR was conducted by the police on an paranoid-obscurant statement" (9 February 2007). Available at http://www.bureau.kz/data.php?n_id=1589&l=ru. See also Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 11.

law, and acknowledged that KIBHR's assessment was correct and that it did not owe any back taxes.[22]

Criminal Justice in Kazakhstan

26. Numerous international monitoring bodies have voiced concern with the flawed criminal justice system and the lack of an independent judiciary in Kazakhstan. According to the International Commission of Jurists (ICJ), the contemporary justice system of Kazakhstan has preserved many Soviet-era features, despite its recent ratification of the ICCPR, numerous legislative changes, and its political success in obtaining the chairmanship of the OSCE.[23]

27. In its most recent Country Report on Human Rights, the U.S. Department of State expressed particularly harsh condemnation of Kazakhstan's judiciary:

> "The law does not provide adequately for an independent judiciary … Corruption was evident at every stage of the judicial process. Although judges were among the most highly paid government employees, lawyers and human rights monitors alleged that judges, procurators, and other officials solicited bribes in exchange for favorable rulings in the majority of criminal cases."[24]

28. As one of leading Kazakhstan's lawyers indicates:

> "[…] judges are dependent on the executive branch not only in terms of receiving their status. The existing system of managing justice administration restricts judges in their independence. In Kazakhstan judges are evaluated based on the number of overruled judicial decisions. These statistics significantly impact a judge's career growth and is a hidden form of managing their actions. Judges are afraid to announce verdicts which may not please higher ranking officials. […]. In our country if a judge overrules a few judicial acts, this may result in their punishment or even dismissal. […] [As a result of all these factors,] the judiciary becomes an appendix of the executive branch of power, making all actions of the latter legal. […] the justice system leans strongly toward supporting the interests of public prosecutors. Therefore, sometimes judges feel free to subtly — and at times strongly — support public prosecutors in filling the gaps in case-related evidence. […] Most dauntingly, courts may be used by authorities to deal with dissidents and political opponents."[25]

29. Amnesty International has declared that the violations that took place in the criminal case against Mr. Zhovtis "are exemplary of similar concerns in other cases that Amnesty International has been documenting in Kazakhstan over the years

[22] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 12.
[23] Ex 13 (a): International Commission of Jurists, "Report of the Appeal Hearing of the Case of Yevgeniy Zhovtis, 20 October 2009" (March 2010), English translation ("ICJ Appeal Hearing Report") at p. 4.
[24] Ex. 14: U.S. Department of State, 2009 Human Rights Reports: Kazakhstan (11 March 2010). Available at: http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136088.htm
[25] Ex. 15: Daniyar Kanafin, "Criminal Justice Reform in Kazakhstan and OSCE Commitments", Security and Human Rights Journal (November 2008).

about the failures of the criminal justice system."[26] The flaws revealed in the investigation, prosecution and trial of Mr. Zhovtis are "symptomatic of a profound and systemic failure of responsible officials in Kazakhstan to guarantee that the right of all persons charged with a criminal offence to a fair trial is respected and protected" and "continue[] to undermine the respect for the rule of law, human rights and the right of victims to true justice."[27] Amnesty has urged the government of Kazakhstan to undertake further measures to ensure that all aspects of its criminal justice system comply with the standards of Kazakhstan's international human rights treaty obligations.[28]

30. In 2005, the UN Special Rapporteur on the Independence of Judges and Lawyers noted in particular that the executive continues "to play almost as dominant a role within the judiciary as it did under the previous regime, and this tendency has even increased."[29] The Special Rapporteur faulted a system of appointment of judges that lacks objectivity and transparency, and in which reappointment is subject to abuse.[30] These flaws rendered judges more susceptible to political bias, bribery, and other corruption,[31] and therefore more likely to engage in Soviet-style "telephone justice" that undermines the rule of law in Kazakhstan.[32] Indeed, the Special Rapporteur continued to monitor a number of court cases against journalists, members of the political opposition, or other activists "that reveal a potential abuse of the judiciary to control political opposition or dissent and undermine the rule of law."[33]

31. The Special Rapporteur further noted that Kazakhstan's acquittal rate of around one percent raised serious concerns about the enforcement of the principle of presumption of innocence.[34] This problem arose in part from the relative weakness of defence lawyers compared to the power of the prosecutor's office and the predominant role of prosecutors throughout the judicial process.[35] According to Amnesty International, such an imbalance of power undermines the principle of equality of arms in practice and the independence of the courts in general.[36]

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[26] Ex. 16: Amnesty International, "Prosecution of human rights defender exposes systemic failure to ensure fair trials in Kazakhstan" (16 September 2009). Available at: http://www.amnesty.org/en/library/info/EUR57/002/2009/en

[27] *Ibid.*

[28] *Ibid.*

[29] Ex. 4: Report of the Special Rapporteur, at para. 69.

[30] *Ibid.*, at para. 33 and 69.

[31] Ex. 17: Kazakhstan Judicial Assistance Project, "Strengthening the Rule of Law in Kazakhstan", Chemonics International (27 August 2007) ("Strengthening the Rule of Law"), at p. 3.

[32] Ex. 4: Report of the Special Rapporteur, at para. 66. "Telephone justice" refers to the Soviet practice in which officials make phone calls to a judge during or just prior to a trial to request a particular outcome, or otherwise to make their wishes clear to the judge. It has more recently come to refer to the more general practice of inappropriately influencing or applying pressure to the judiciary.

[33] *Ibid.,* at para. 67.

[34] *Ibid.,* at para. 34 and 37.

[35] *Ibid.*, at para 48; and see Ex, 17: Strengthening the Rule of Law, at p.16.

[36] Ex. 18: Amnesty International, "Kazakhstan, Summary of Concerns on Torture and Ill-treatment" (November 2008),at para. 1.2.1. Available at: http://www.amnesty.org/en/library/info/EUR57/001/2008/en

The Accident and Investigation

The Traffic Accident

32. On 26 July 2009 at around 22:10, Mr. Zhovtis was returning to his home in Almaty from a fishing trip near the village of Karoy with three friends. He was driving his car, a Toyota 4 Runner, within the speed limit, along the Karoy-Almaty road in Almaty province. Oncoming cars dazzled him with their headlights, limiting his visibility[37] and causing him to slow down. When the oncoming cars passed, Mr. Zhovtis saw a man in the road. Later, a specialist analysis conducted on the basis of the data from the accident, showed that most likely Zhovtis saw the pedestrian at about 20 metres away, but the car travelled this distance at about one second. He did not have time to use the emergency brake before hitting the pedestrian.[38] It is undisputed that neither before nor during the accident did Mr. Zhovtis lose control of the vehicle.[39] As the evidence at trial confirmed, Mr. Zhovtis was not intoxicated at the time of the accident.[40]

33. The pedestrian died at the scene of accident. The cause of death of the pedestrian was later determined to be traumatic shock as a result of a closed cerebrospinal injury.[41]

34. Immediately after the accident, a passenger in Mr. Zhovtis' vehicle, Sergei Nagornyi, quickly called an acquaintance in nearby Bakanas Village and told him to call the police and an ambulance. Once the police arrived, Mr. Zhovtis and the three passengers in his car voluntarily gave statements.[42] Throughout the course of the ensuing investigation, Mr. Zhovtis was fully cooperative with the police. He responded willingly and swiftly to all law enforcement requests.

35. On the day of the accident, Mr. Zhovtis offered his apologies to the relatives of the deceased pedestrian, specifically to the uncle of the deceased, Mr. Marat Moldabayev, and to the husband of the sister of the deceased. On 29 July 2009, Mr. Zhovtis together with a colleague visited the mother of the deceased, Mrs. Raikhan Moldabayeva, at her home in Bakanas, and apologized to the family members present. Mrs. Moldabayeva stated words of forgiveness.[43]

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[37] Mr. Zhovtis was wearing glasses while driving at the time of the accident. See Ex. 19 (a): Interrogation of Zhovtis as a Witness, 31 July 2009, English translation; see also Ex. 20 (a): Transcript of the Main Judicial Proceedings, Balkhash District Court of the Almaty Region, Case No. 1-24, English translation ("Trial court transcript"), Part 1, at p. 22. As a police-ordered medical exam subsequently confirmed, see para. 38 infra, Mr. Zhovtis has perfect vision with those glasses.

[38] Ex. 21 (a): Petition to Department of Internal Affairs to Dismiss the Criminal Case, Sh.B. Batkalova, 24 August 2009 ("Petition to Dismiss the Case"), English translation, at p. 1-2.

[39] *Ibid*., at p. 2.

[40] Ex. 20 (a): Trial court transcript, Part 2, at p. 24.

[41] Ex. 22 (a): Prosecution Statement in the Criminal Case #09193603100017, Deputy Chief of the Criminal Department of the Almaty Regional Department of Internal Affairs, 14 August 2009, English translation ("Prosecution Statement, 14 August 2009"), at p. 1.

[42] *Ibid*., at p. 5.

[43] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 20.

36. On 6 August 2009, Mr. Zhovtis voluntarily paid compensation of $15,000 US dollars to the family.[44] He later described this payment as his moral obligation.[45] On that date, Mr. Zhovtis received a receipt for the sum that had been paid, as well as a statement of reconciliation signed by the deceased's mother, Mrs. Raikhan Moldabayeva, on behalf of herself and two other family members, in which she confirmed that she had been indemnified by Mr. Zhovtis for her pain and suffering.[46] Both the investigator and the court subsequently declared only the mother of the deceased, Raikhan Moldabayeva, to be the victim in accordance with the Kazakh legislation.[47]

37. During the subsequent trial, Public Defender Koshim read this statement to the Court, together with the written acknowledgement of the payment of $15,000 by Mr. Zhovtis. The statement of Mrs. Moldabayeva was added to the case file.[48] In addition, Mr. Zhovtis asked for this statement to be entered into the record.

Police Investigation

38. On 27 July 2009, the day of the accident, an investigation was initiated by the Balkhash District Police Department in the village of Bakanas, which was the department with responsibility for the place where the accident occurred. The police prepared a traffic accident diagram and Mr. Zhovtis was medically examined for alcohol, and Mr. Zhovtis and the passengers in his car were questioned.[49]

39. However, on 27 July 2009, the Chief of the Criminal Department of the Almaty Regional Department of Internal Affairs decided to take over the criminal proceedings in relation to the traffic accident.[50] On 28 July 2010, the case was transferred to the Investigation Department of the Almaty Regional Road Police, which is located in the village of Krasnoye Pole not far from the city of Almaty, approximately 200 kilometers away from the site of the accident. Mr. Zhovtis was told that the case was transferred because the sister of the deceased wrote a letter to the Almaty Regional Road Police, in which she expressed a lack of confidence in the staff of the Investigation Department of the Balkhash District Police Department.[51] Mr. Zhovtis was secretly designated a suspect on the same day by the new inquiry officer, Major M. Sadirbayev, although he was not informed of this fact until 14 August 2009.[52] In response to police questioning on 28 July 2009, Mr. Zhovtis gave what he believed to be a witness statement in which he told the police that his visibility had worsened when the oncoming cars approached and, giving his

[44] *Ibid*.
[45] Ex. 23 (a): Appeal Complaint of Yevgeniy Zhovtis to the Criminal Cases Collegium of the Almaty Regional Court, 16 September 2009, English translation ("Appeal Complaint of Yevgeniy Zhovtis"), at p. 12.
[46] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 21.
[47] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 23.
[48] Ex. 20 (a): Trial court transcript, Part 1, at p. 14.
[49] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 33.
[50] Ex. 24 (a): Resolution #09193603100017 to initiate criminal proceedings and take over the case, Chief of the Criminal Department of the Almaty Regional Department of Internal Affairs, 27 July 2009, English translation (Resolution to initiate criminal proceedings").
[51] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 34.
[52] Ex. 20 (a): Trial court transcript, Part 1, at p. 17-18.

perception at the time, he said that he only saw the pedestrian when the pedestrian was two to three meters in front of Mr. Zhovtis's car.[53]

40. On 29 July 2009, Mr. Zhovtis voluntarily participated in the on-site verification and clarification procedure with the police and a prosecutor.[54] He led the officials to the location of the accident on the Almaty-Karaoy road. The location was then photographed.[55] Mr. Zhovtis voluntarily gave further witness statements on 30 July and 31 July 2009. [56]

41. The police also interviewed Mr. Nagornyi, one of the passengers in Mr. Zhovtis's car, on 28 July and 31 July 2009. It is undisputed that Mr. Nagornyi corroborated Mr. Zhovtis's explanation of the circumstances of the accident.[57] The police also interrogated the other passengers in the car, Mr. Nikitenko, who worked as a driver for the KIBHR, and Mr. Startsev, a friend of Mr. Nikitenko. Mr. Startsev stated: "I was sleeping. I woke up when Evgeniy said that he had hit a person. We came outside and saw a person."[58] Mr. Nikitenko stated: "I wasn't sleeping, but I didn't see anything. All I felt was a strong impact."[59]

42. On 6 August 2009 the police ordered a medical examination of Mr. Zhovtis's vision, which found that he had perfect vision when wearing glasses and that it was impossible to identify the duration of any blinding of sight that Mr. Zhovtis may have suffered from the headlights of oncoming vehicles due to the lack of baseline data, such as the type of the vehicle that caused the alleged blinding, the intensity of the headlights, the amount of mud accumulated on the headlights, and the elevation of the headlights relative to the roadbed.[60]

43. On 12 August 2009 the police ordered an "auto-technical" expert analysis of the accident ("State auto-technical analysis"). The analysis, which was conducted by the regional forensic laboratory of the Almaty Center of Forensic Analysis, was tasked with determining the following: (1) the breaking criteria for Mr. Zhovtis's car; (2) the amount of time Mr. Zhovtis had before passing the oncoming car, taking into consideration the adaptation time after being blinded and assuming that he was blinded when the distance from the oncoming car was 100 m, the speed of the oncoming car was 100-120 km/hour and Mr. Zhovtis's car was 80-90 km/hour; and (3) whether Mr. Zhovtis had "the technical possibility to stop the car before the place where he ran over the pedestrian and after being blinded assuming that the

[53] Ex. 25 (a): Transcript of the Interrogation of the Witness E.A. Zhovtis, 28 July 2009, English translation.
[54] Article 238 of the Criminal Procedure Code of the Republic of Kazakhstan ("CPC") regulates the verification of the testimony at the site of the accident and is a standard procedure.
[55] Ex. 27 (a): Minutes of the On-site Statement Verification and Clarification Procedure, 29 July 2009, English translation.
[56] Ex. 28 (a): Transcript of the Interrogation of the Witness E.A. Zhovtis, 30 July 2009, English translation; Ex. 19 (a): Transcript of the Interrogation of the Witness, E.A. Zhovtis, 31 July 2009, English translation.
[57] Ex. 29 (a): Transcript of the Interrogation of the Witness, S.L. Nagorniy, 28 July 2009, English translation; Ex. 30 (a): Transcript of the Interrogation of the Witness, S.L. Nagorniy, 31 July 2009, English translation.
[58] *Ibid*., at p. 13.
[59] Ex. 20 (a): Trial court transcript, Part 2, at p. 10.
[60] *Ibid.*, at p. 22.

pedestrian was moving in the same direction".[61] The State auto-technical analysis was completed on 14 August 2009, and concluded that Mr. Zhovtis could have avoided hitting the pedestrian.[62]

44. The State auto-technical analysis cites as baseline data that blinding occurred when the distance from the oncoming car was 100 meters. However, it notes that the experts compiling the report did not establish this fact but accepted it as a given based on the case files and "pursuant to the resolution prescribing the expert assessment."[63] The report further relies on the case files to establish "that the driver was moving for 2-3 seconds while being blinded."

45. On 14 August 2009, the police completed their investigation.[64] On this date Mr. Zhovtis was informed for the first time that he was in fact a suspect, and he had been considered a suspect since 28 July. He was charged on the same day, 14 August, with the offence of violating traffic regulations which negligently caused the death of an individual.[65] He was immediately released on the condition that he provided an undertaking not to leave his place of residence.[66] The deputy chief of the Department of Interior of Almaty region, Kozhamberdiev, told Mr. Zhovtis and his counsel, Ms. Batkalova, that they had only one day to study the 150-page case file — 15 August 2009, a Saturday. When Mr. Zhovtis and his counsel asked to study the case file on Monday, Kozhamberdiev threatened put Mr. Zhovtis in pre-trial detention. Mr. Zhovtis and his counsel managed to photograph each page of the case file with a digital camera on 15 August.[67]

46. On Monday, 17 August 2009, Mr. Zhovtis sent the reconciliation letter from the mother of the deceased to the police. The police did not start the reconciliation procedure, despite the fact that they were obliged by law to do so. On 18 August the police sent the file to the prosecutor's office.[68]

Defence Application for Additional Expert Investigations

47. On 18 August 2009, the defence filed a request to have the policeman in charge of the investigation, senior inquiry officer Mr. Sadirbayev, conduct an additional expert auto-technical analysis, in view of the deficiencies which characterized the State auto-technical analysis of 12 August.[69] The investigator refused this request,

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[61] Ex. 31 (a): Expert Report #8001, Almaty Center of Forensic Analysis of the Republic of Kazakhstan, 14 August 2009, English translation ("State auto-technical analysis").
[62] *Ibid.*
[63] *Ibid*.
[64] Ex. 20 (a): Trial court transcript, Part 2, at p. 6.
[65] Ex. 22 (a): Prosecution Statement, 14 August 2009. Article 296, part 2 of the Criminal Code of the Republic of Kazakhstan states: "Violation of the traffic rules or of the rules of exploitation of a transport vehicle by a person driving a car, trolleybus, tramway, or other mechanical transport vehicle, where such violation is caused by negligence and results a death of an individual is punishable by up to 5 years imprisonment with an up to 3-year ban on driving."
[66] Ex. 32 (a): Undertaking not to leave and to maintain good conduct, signed by E.A. Zhovtis, 14 August 2009, English translation.
[67] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 52.
[68] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 52.
[69] Ex. 33 (a): Application to carry out a repeat judicial road traffic expert assessment, Sh.B. Batkalova, 18 August 2009, English translation.

but did not inform the defence before the case went to trial, meaning that there was no opportunity to appeal this refusal prior to trial.[70] On 25 August 2009 the defence submitted a complaint against this refusal to the relevant prosecutors,[71] but did not receive a reply before the trial began.

Closure of the investigation

48. Kazakh law requires that that all defense applications submitted to the prosecutor's office be resolved before the transfer of the case to the court. Despite this, on 20 August, the prosecutor's office sent the case to court. The rushed closure of the investigation prevented the resolution of defence applications challenging the investigation.

Independent Expert Witnesses

49. On 25 August 2009, defence counsel for Mr. Zhovtis requested a series of independent experts to provide an analysis of the accident in order to establish whether it could have been avoided.

50. The first expert was Mr. I. I. Nusupbayev, Editor-in-Chief of *Automotive Information Agency Formula S,* and a leading journalist on automotive technology in Kazakhstan with more than 15 years experience. [72] Since 1998, Mr. Nusupbayev has cooperated closely with the European Association of Automobile Experts and Journalists, and participates regularly in technical tests of new cars from the leading manufacturers.[73] Mr. Nusupbayev concluded that the police-ordered "auto-technical" expert analysis of the accident was "unprofessional" insofar as it relied upon estimates of the speed of both of the vehicles provided by Mr. Zhovtis. According to Mr. Nusupbayev, only measurable data from the actual accident scene together with known data from standard reference books should be used when assembling a mathematical reconstruction of an accident. Mr. Nusupbayev cites the "braking path", or the distance between the impact point and the stopping point of the vehicle, as measurable data from the accident scene. This can in turn be used to determine the speed of the vehicle. Mr. Nusupbayev cited as standard reference data the amount of time it takes for the braking system to engage after stepping on the brake pedal (0.5 seconds), and the driver's reaction time before applying the brakes (1.5 to 2 seconds). The measurable data of the braking path and the vehicle speed, together with the reference data of the time of engagement of the braking system and the driver's reaction time, should in turn have been used to determine the distance which the vehicle covered from the moment the driver saw the hazard until full stop of the vehicle. Based on Mr. Nusupbayev's analysis, Mr. Zhovtis "did not have the technical or any other ability to avoid the accident."[74]

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[70] Ex. 20 (a): Trial court transcript, Part 2, at p. 43.
[71] Ex. 34 (a): Application to dismiss the criminal case, Sh.B. Batkalova, 24 August 2009, English translation ("Petition to Dismiss the Case").
[72] In accordance with the legislation of Kazakhstan, this expert has the status of specialist, as he is not licensed.
[73] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 43.
[74] Ex. 35 (a): Statement of Expert Witness I.I. Nusupbayev, Editor-in-Chief of the *Automotive Agency Formula S*, 28 August 2009, English translation.

51. A second report was produced by A.I. Zakharov and K.P. Grebenshchikov, two experts from the Center for Independent Examinations "PROFI" based in Krasnoiarsk in the Russian Federation. The center has specialized in expert auto-technical analysis since 1988. The experts used the same standard reference literature and methodology used by the prosecution. They concluded that Mr. Zhovtis did not have time to engage the braking system of his vehicle before hitting the pedestrian and "did not have the technical ability to prevent this collision from the moment the hazard emerged."[75]

52. A third report was an expert analysis conducted by O.G. Kuznetsov of the Expert-Evaluation Center based in Almaty, Kazakhstan. Kuznetsov is a renowned expert in the field of auto-expertise, and one of the co-authors of the methodological guidelines used in the prosecution expert analysis.[76] Kuznetsov reviewed the procedure and methodology used to prepare the prosecution expert analysis and concluded that it contained "significant deviations from the procedural and methodological requirements". In particular, the prosecution experts failed to collect independent evidence from the accident, and displayed ignorance of methods recommended for use in expert practice for studying similar traffic accidents. Kuznetsov thus concluded that the findings of the prosecution expert analysis of 14 August 2009 were "unfounded…as contradicting the factual circumstance of the case."[77]

The Trial Process

53. The trial commenced on 27 August 2009, before Judge Ch. N. Tolkunov, exactly one month after the accident. The entire trial consisted of three hearings – on 27 August, and 2 and 3 September.

54. On the first day of trial Mr. Zhovtis invited the court to reject the criminal case as unfounded. When that argument was summarily rejected, Mr. Zhovtis asked for the hearing to be postponed until 2 September 2009 as his lawyers were not present.[78] The Court granted that request.

55. During the course of the trial, the defence attempted on multiple occasions to challenge the State auto-technical analysis of 14 August 2009, and to have the

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[75] Ex. 36 (a): Expert Report No. 364, Center for Independent Examinations, A.I. Zakharov and K.P. Grebenshchikov, 29 August 2009, English translation.

[76] O.G. Kuznetsov has a higher technical education and a higher legal education; is a specialist of technical sciences; has the scholarly title of docent of "law"; is a qualified forensic expert for the specialty Forensic Study of the Circumstances of Highway Traffic Accidents and Transport Vehicles; and has had a state license to engage in forensic activities since 3 July 2001. Mr. Kuznetsov has worked in his field and in this specialty since 1981. He is presently working at the independent organization Expert Assessment Center, and previously worked at the Center of Forensic Examinations of the Kazakhstan Ministry of Justice, where he was the expert who conducted the forensic auto-technical examinations. See Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 42.

[77] Ex. 37 (a): Report No. 21/SI on Analysis of the Copy of Expert Conclusion No. 8001 of 8/14/2009, O.G. Kuznetsov, 31 August 2009, English translation.

[78] V. Voronov was on a business trip in Moscow and Sh. Batkalova was busy with another trial. Due to the short notice about the trial, they could not change their schedules. Mr. Zhovtis submitted to the court documents confirming the absence of attorneys, and the proceedings were postponed. See Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 55.

evidence of its independent experts considered by the court, either in the form of written statements or through oral testimony. The trial judge consistently refused these requests, with little or no explanation.

56. The defence submitted to the court the written statement of 6 August 2009, signed by Mrs. Moldabayeva, on behalf of herself and two other family members, stating that she forgives Zhovtis and has no material claims. The defense also submitted a receipt for the US $15,000 received by Mrs. Moldabayeva as compensation for material and moral damages.[79] However, the Court failed to apply the reconciliation procedure that pursuant to the Kazakhstan Criminal Code should have ended the criminal case.

57. Throughout the trial the judge repeatedly displayed bias when he dismissed the arguments of the defence with little or no justification.

1. Refusal to Consider Independent Expert Witnesses

58. The defence for Mr. Zhovtis repeatedly sought to challenge the prosecution auto-technical expert analysis of 14 August 2009, to call additional independent expert testimony, and to have the evidence of its independent experts considered by the court, in the form of written submission and/or oral testimony at trial. In rejecting these requests, the Court offered little or no explanation.

Preliminary Hearing on Independent Experts

59. On the first day of trial the defence applied for a preliminary hearing to determine whether the case should be terminated or subjected to additional investigation.[80] The defence argued that the State auto-technical analysis of 14 August 2009 was flawed and unreliable for two reasons. First, as the reports of the independent experts made clear, the State auto-technical analysis was based on factually incorrect data. Second, although on 28 July the police secretly designated Mr. Zhovtis a suspect, they failed to inform him of that status or to afford him the rights to which suspects are entitled, including to confront, reject, and question any experts in the course of the investigation.[81] As a result, Mr. Zhovtis had had no opportunity to pose questions to, or reject, the experts M.K. Salkanov and V.P. Kravchenko, who carried out the State auto-technical analysis. The Judge rejected the defence request, simply observing that the issues could be "examined by the court in the main proceeding and after that an impartial decision could be made."[82] Contrary to the requirements of the laws of Kazakhstan, the judge did not deliberate in chambers prior to issuing this ruling, nor did he provide any further explanation

[79] Ex. 20 (a): Trial court transcript, Part 1, at p. 14.

[80] Ex. 20 (a): Trial court transcript, Part 1, at p. 5. In requesting a preliminary court hearing, Mr. Zhovtis cited Article 128 of the CPC, which states that every piece of evidence must be evaluated from the point of view of its relevance, admissibility, and reliability, and all selected evidence in its entirety must be sufficient for the disposition of a criminal case.

[81] Article 68(7) of the CPC states: "A suspect shall have the right . . . (12) to participate, with permission of the investigator, in investigative action being conducted on his petition or the petition of defense counsel or legal representative . . . (13) to become familiar with the records of investigative actions performed with his participation and to make comments on the records".

[82] Ex. 20 (a): Trial court transcript, Part 1, at p. 10.

for his rejection of the application.[83] The trial was then postponed until 2 September 2009.

Defence Application to Find Prosecution Expert Report Inadmissible.

60. On 2 September 2009 the defence made a further application for the State auto-technical analysis of 14 August 2009 to be declared inadmissible, on the grounds that the analysis had been obtained in violation of procedural regulations which govern requests for any forensic examination and the use of data.[84] Specifically, the defence again argued that, although Mr. Zhovtis had been secretly designated a suspect on 28 July, he had not been notified of this fact and had rather been denied the rights which Kazakh law grants to suspects, including:

> "the right to challenge the expert and the right to file an application to suspend the forensic examination agency from conducting the examination; the right to file an application to appoint as experts individuals named by [him] or experts from the particular forensic examination bodies, as well as to file an application to conduct the forensic examination by a panel of experts; the right to file an application to put additional questions before the experts and to clarify the questions already posed."[85]

61. The defence also reaffirmed its argument that the State auto-technical analysis of 14 August was inadmissible because it was compiled in violation of the regulations for ordering forensic examinations, based on the questioning of Mr. Zhovtis as a witness after the authorities had identified him as a suspect, and because the analysis relied on inaccurate data obtained from Mr. Zhovtis.[86] To support these claims the defence referred to the expert opinions of I. I. Nusupbayev and O.G. Kuznetsov, which criticized the methodology of the prosecution experts, and the independent accident reconstruction report produced by A.I. Zakharov and K.P. Grebenshchikov, which concluded that Mr. Zhovtis did not have the technical ability to prevent the collision from the moment the hazard emerged.[87]

62. The court declined to make a decision on this application and instead decided to leave it open until the end of trial. The judge explained that the issues presented in the application "will have to be decided by the court based on an examination of all the evidence presented at trial."[88]

Defence Application to Hear the Testimony of Independent Expert Witnesses

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[83] *Ibid.* According to Article 102(4) of the CPC, an application made by a party in a criminal proceeding must be considered and a decision issued on it immediately after it is filed. When it is impossible to make an immediate decision, it must be done no later than three days from the date of filing. Thus, the CPC does not provide for an option to leave the application open.
[84] Ex. 20 (a): Trial court transcript, Part 1, at p. 15-17.
[85] *Ibid.*
[86] *Ibid*.
[87] *Ibid.*, at p. 26-30.
[88] *Ibid.*, at p. 37. The judge cited Article 371 of the CPC. However, Article 102(4) provides that an application made by a party in a criminal proceeding must be considered and a decision issued on it immediately after it is filed. When it is impossible to make an immediate decision, it must be done no later than three days from the date of filing.

63. On 2 September 2009, the defence made a specific application to call as witnesses the principal investigator of the Almaty Regional Department of the Interior, the prosecution experts, and the independent experts proposed by the defence .[89] In breach of Kazakhstan law, the presiding judge granted the motion to call the prosecution experts and the investigator, but denied the "motion to call expert Kuznetsov and international experts" without any period of deliberation and without providing any other explanation for his decision.[90] Only later, in the trial court verdict, did the Judge purport to explain that, in his view, no grounds existed to declare as evidence the conclusion of the independent experts, since their examination was conducted "outside of the framework of the criminal procedure code and only on the basis of source data submitted by defendant Ye.A. Zhovtis, without taking into consideration objective data in the case".[91] In reality, the independent experts were given the same data as the prosecution experts – the only point that was contested in the requests to the experts is the fact of the blinding.[92]

Testimony of Expert Witness for the Prosecution

64. The prosecution experts began giving their evidence on 2 September 2009. Despite the objections made by the defence, the judge read into the record the State auto-technical analysis of 14 August 2009. The Court then heard the testimony of V.P. Kravchenko of the Forensic Examinations Centre of the Ministry of Justice of the Republic of Kazakhstan, a co-author of the State auto-technical analysis.[93] In his testimony, Mr. Kravchenko acknowledged that in calculating the relevant distances involved in the accident, he had not relied on any specialized literature but had taken an unspecified "human factor" into consideration.[94] He admitted that if the distances upon which he had based his conclusions were different, his conclusions would have changed.[95]

65. On 3 September 2009, the court heard the testimony of experts B.K. Dzhanbyrshiev and M.K. Salkanov of the Forensic Examinations Centre who had been brought to court pursuant to a court order.[96] They were questioned by the defence, and

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[89] *Ibid.*, at p. 36.
[90] *Ibid.*, at p. 38. Article 102(4) of the CPC provides that an application made by a party in a criminal proceeding must be considered and a decision issued on it immediately after it is filed. When it is impossible to make an immediate decision, it must be done no later than three days from the date of filing. The Supervisory Board, which considered Mr. Zhovtis's second appeal, also failed to explicitly deal with the defence expert point in its decision of 10 December 2009. The decision only says that the defence arguments set forth in the Supervisory appeal complaint "are not well-founded and are refuted by the evidence studied in the judicial investigation, the legality and relevance of which are not in doubt. In addition, they are similar to the arguments in the petition of appeal, which were the subject of thorough study when considering the case in the appeal procedure and were properly evaluated." See Ex. 38 (a): Decision No. 1n-515/2009 on refusal to initiate supervisory proceedings, Supervisory College of Almaty Regional Court, 10 December 2009, English translation ("Supervisory decision").
[91] Ex. 39 (a): Trial Court Verdict of 3 September 2009, Balkhash District Court of Almaty Region, Transcribed Version of 7 September 2009, English translation ("Trial Court Verdict"), at p. 7.
[92] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 44.
[93] Ex. 20 (a): Trial court transcript, Part 2, at p. 16-20
[94] *Ibid.*
[95] *Ibid.*
[96] *Ibid.,* at p. 22-25.

accepted that they could not state whether Mr. Zhovtis had been blinded temporarily or otherwise by the headlights of the oncoming vehicle.[97]

2. Failure to apply the reconciliation procedure

66. Under Kazakhstan law, a person who commits a minor offense shall not be subjected to criminal liability if they have achieved reconciliation with the victim or their close relatives and have made amends for the harm caused. [98] The Supreme Court has found that "the decision to discontinue a criminal case may be made at the preliminary hearing stage or at any other stage of the main court proceedings."[99] The process is commenced by the request of the victim to discontinue the criminal case in a written application, at which stage the authority conducting the criminal process, either the investigators or the court depending on the stage of the process, "must determine" the application.[100]

67. Article 75 of the CPC establishes that it is the right of "close relatives" of the deceased to be recognized as a victim, and they shall have the right to reach reconciliation.[101] The definition of a "close relative" who may be recognized by the court as a victim has been interpreted restrictively by the courts and includes the victim's mother, but not an uncle. The Supreme Court of Kazakhstan has established that for cases dealing with crimes which lead to a death, "close relatives of the victim may be declared victims, on whom moral damage has been inflicted by the crime, and they have the right to conciliation with the person committing these crimes... Close relatives of the victim are his parents, children, adopted children, adopted, full and half-brothers and sisters, grandfather, grandmother, and grandchildren. This list of persons contained in Article 7(24) of the Criminal Procedure Code is exhaustive and is not subject to broadened interpretation."[102]

68. On 6 August 2009, Raikhan Moldabayeva, the mother of the victim of the 26 July accident, provided a statement in this case confirming that she had reconciled with Mr. Zhovtis and asking for a dismissal of the criminal case.[103] However, the court

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[97] *Ibid.*, at p. 24.

[98] Ex. 40 (a): Regulatory decision No. 4 of the Supreme Court of the Republic of Kazakhstan, 21 June 2001 (as amended and supplemented by regulatory decisions of the Supreme Court of the Republic of Kazakhstan No. 6 dated 11 July 2003). Paragraph 3-1 of the decision states: "Pursuant to part two of Article 67 of the Criminal Code, a person who has committed minor serious offense is to be relieved from criminal liability regardless of the actual consequences and even if his actions include multiple, cumulative or repeat offences, if the following conditions are met: a) the offense committed by that person is classified as a minor; b) the person who has committed the offense has achieved reconciliation with the victim; c) the person who has committed the offense has made amends for the harm caused to the victim."

[99] *Ibid,* at paragraph 15.

[100] *Ibid,* at paragraph 7: "Following an application by a victim to reduce the punishment applied to the accused (defendant) due to there being no financial claims against him, the authority conducting the criminal process *must determine* whether there has been a reconciliation between the victim and the person who has committed the offence" (emphasis added).

[101] *Ibid,* at paragraph 12: "In accordance with part 11 of Article 75 of the CPC which relates to offences connected with causing death, close relatives of the deceased who were caused moral harm by the offence may be recognized as victims and shall have the right to reach reconciliation with the person who has committed such offences."

[102] *Ibid.*

[103] Ex. 20 (a): Trial court transcript, Part 1, at p. 14.

failed to consider the application or to make a decision upon it. On 6 August 2009 the defence sent the statement of Mrs. Moldabayeva to the police inquiry officer in charge of the investigation. The police subsequently denied that the statement existed,[104] but the existence of the statement was later confirmed by the Supervisory College of Almaty Regional Court.[105]

69. On 2 September 2009, the defence applied for the statement of Mrs. Moldabayeva to be entered into the trial record. The Court allowed the application and also permitted the entry of the written acknowledgment of Mrs. Moldabayeva's receipt of fifteen thousand US dollars from Mr. Zhovtis as payment for damages and for pain and suffering caused by the death of her son.[106]

3. Bias and Lack of Equality of Arms

70. Throughout the trial, the trial court exhibited an attitude of bias against the defence of such magnitude as to have interfered with the equality of arms. The defence made numerous applications during the trial, almost all of which were either rejected with little or no reasoning or were left unanswered. The defence raised questions as to the bias of the judge and the fairness of the trial both during the trial and on appeal.

Summary Rejection of Defence Application Concerning Conditions of Release

71. On 27 August 2009, the first day of trial, the defence applied to annul the conditions of release, arguing that they were imposed without first fulfilling the duty to make a finding that Mr. Zhovtis would flee the investigation, the prosecution, or the trial, or that he would pose an obstruction to an impartial investigation.[107] The court rejected the application as "unfounded" without providing any reasons.[108]

Summary Rejection of Defence Application to Conduct a Preliminary Court Hearing

72. On 27 August 2009, as noted above, the defence applied for a preliminary hearing to determine whether the criminal case should be terminated or subjected to additional investigation.[109] The defence argued that the investigation had been

[104] Ex. 20 (a): Trial court transcript, Part 2, at p. 33.
[105] Ex. 38 (a): Supervisory decision, at p. 4 ("As follows from the case file, R.S. Moldabayeva, the mother of the deceased victim, K.Ye. Moldabayev, on 0806.09 did indeed send a written declaration to the UD DVD of Almaty Region on reconciliation with Ye.A. Zhovtis and dismissal of the criminal case.").
[106] Ex. 20 (a): Trial court transcript, Part 1, at p. 14.
[107] Article 139 of the CPC states: "When sufficient grounds exist to believe that the accused is likely to flee from pre-trial investigation, prosecution or trial, or would pose an obstruction to the objective investigation and resolution of the case by the court, or will continue his criminal activities, as well as a measure for enforcement of the verdict, the prosecutorial entity, within the limits of its authority, has the right to use one of the restraining measures stipulated by Article 140 of the CPC."
[108] Ex. 20 (a): Trial court transcript, Part 1, at p. 10. Article 102(4) of the CPC states that "an application is subject to consideration and a ruling which must be issued immediately after the application has been made. In cases when an immediate ruling with respect to the application is not possible, the ruling must be issued no later than three days from the day the application was made."
[109] In requesting preliminary court hearing, Mr. Zhovtis cited Article 128 of the CPC, which states that every piece of evidence must be evaluated from the point of view of its relevance, admissibility, and reliability, and all selected evidence in its entirety must be sufficient for the disposition of a criminal case.

marred by numerous violations of the CPC, such as the failure to inform Mr. Zhovtis for more than two weeks that he had been designated as a suspect in the case;[110] the interrogation of Mr. Zhovtis without being informed of his status as a suspect;[111] the use of the initial statements made by Mr. Zhovtis as a ground for a charge, even though he still believed that he was a witness at the time he made such statements;[112] and the failure to inform him about his rights as a suspect.[113]

73. The court rejected the application, finding that the issues raised could be examined during the main trial hearing, and that "an impartial decision can be adopted afterwards." The judge did not deliberate in chambers prior to issuing the ruling, nor did he provide any further explanation for his rejection of the application.[114]

Failure to Rule on Defence Application to Declare the Investigation Invalid

74. On 2 September 2009, the defence made an application to declare as invalid the investigative proceedings leading to the criminal case and to reverse all decisions made in the course of such proceedings, based on the occurrence of substantial procedural violations during the investigation.[115] The court ruled that the defence application would be left pending and unanswered until the end of trial, even though this option is not available under the laws of Kazakhstan.[116]

Delayed and Summary Rejection of Defence Application to Challenge the Presiding Trial Court Judge on Grounds of Bias

75. On 2 September 2009, the defence also filed an application to challenge the Presiding Trial Court Judge over doubts about his impartiality, arguing that he had failed in his responsibilities to adjudicate upon important elements of the investigation process, that he should have given proper reasons for his decisions, and that it was not permissible to leave unanswered the defence application to have

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[110] Article 68(1) of the CPC states: "a suspect is a person who is an object of a criminal investigation and of which he has been informed by the detective or the investigator; or who has been arraigned; or on whom a restraining measure has been imposed prior to filing charges."

[111] Article 286(7) of the CPC states: "any individual who is the subject of a criminal investigation may only be interrogated in the capacity of a suspect."

[112] Article 116(3) of the CPC states: "any testimony given by a suspect in the course of the preliminary interrogation in the capacity of a witness may not be used as evidence nor become a basis for charges." See

[113] Article 114 of the CPC states: "1. Every person involved in a criminal proceeding has the right to know his rights and responsibilities, the legal implications of the position he takes, as well as to understand the meaning of the procedural actions he is engaged in and the case documents presented to him. 2. The prosecutorial body must explain to each person involved in the criminal proceeding his rights and responsibilities, and to give them the opportunity to exercise them in the manner prescribed by this Code. At the request of the individual the prosecutorial body must explain his rights and responsibilities repeatedly. The prosecutorial body must inform the participants of the names of the persons that can be challenged, as well as other necessary information about them. It is obligatory that the rights and responsibilities be explained to the individual who has acquired the status of a participant in the proceedings before performing any procedural action with his participation and before he takes any sort of a position as a participant in the proceeding."

[114] Ex. 20 (a): Trial court transcript, Part 1, at p. 10.

[115] *Ibid.*, at p. 31-35 and 37.

[116] *Ibid.*, at p. 37. The judge cited Article 371 of the CPC, which lists the mandatory questions a judge should decide on *for the purposes of sentencing* while rendering a verdict in the deliberation room; this provision is not directly related to the request of the Defence.

the investigation declared invalid..The Court's decision on the application was only given once the defence had renewed the application at the end of the trial, when the Judge decided that it was a point that could be considered on appeal.[117]

Refusal to Rule on Defence Application to Postpone Trial Proceedings

76. On 2 September 2009, after the Presiding Trial Court Judge reconvened the hearing at 15:00, the defence requested that the court postpone questioning of witnesses until after the court had reviewed and issued substantiated rulings on the defence applications that were made earlier that day (2 September).[118] In support of this request, the defence relied on Article 102 of the CPC which requires that "an application is subject to consideration and a ruling with its respect has to be issued immediately after it has been made. In cases when an immediate ruling with respect to the application is not possible, it has to be issued no later than three days from the day the application has been made."[119]

77. The court ignored Mr. Zhovtis's and Counsel Voronov's request, and proceeded with questioning.[120]

Refusal to Afford Adequate Opportunity to Prepare for Closing Arguments

78. On 3 September 2009, in the afternoon, the court announced the completion of the judicial investigation and the commencement of closing arguments. When defence counsel requested an additional workday to prepare, the court responded by allowing defence counsel an additional 40 minutes. In light of the limited amount of time available for preparation and apparent bias of the court, the defence – both counsel and the accused – refused to participate in closing arguments.[121]

Failure to Comply with Procedural Requirements Mandating Adequate Time to Deliberate and Prepare Written Verdict

79. On 3 September 2009, the trial court produced its six-page verdict within 25 minutes of the end of the trial,[122] despite the fact that Kazakh law requires a judge to reflect on a series of 18 questions before delivering the verdict.[123] Mr. Zhovtis was found guilty of committing a crime under Article 296(2) of the Criminal Code of the Republic of Kazakhstan, and sentenced to four years imprisonment with loss of the right to drive a vehicle for three years. The sentence would be served in a settlement colony "for persons who have committed crimes due to negligence."[124]

80. Under Kazakh law, a sentence does not come into force until 15 days after it is delivered, or until the conclusion of any appeal. After delivering its sentence in this

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[117] *Ibid.*, at p. 45.
[118] *Ibid.,* at p. 2. See also Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 55, explaining that the court must ordinarily issue a decision immediately, and may only utilize the three day delay for exceptional reasons, and must give reasons for doing so.
[119] *Ibid.*
[120] *Ibid.*
[121] *Ibid.*, at p. 49-51.
[122] Ex. 41 (a): Appeal Complaint of V. Voronov and V. Tkachenko, 11 September 2009, English translation.
[123] CPC, Article 371(1).
[124] Ex. 20 (a): Trial court transcript, English translation.

case, however, the court ordered that Mr. Zhovtis be held in pre-trial detention pursuant to a request of the prosecutor (as opposed to the previous measure of pre-trial restraint, which allowed Mr. Zhovtis to reside at home on an undertaking that he not to leave his place of residence). Mr. Zhovtis was then immediately taken into custody and subsequently held at the detention centre of Taldykorgan, in the Almaty Region, pending the appeal hearing. The judge did not provide any justification for this decision.[125]

81. In its verdict, the court also rejected the remaining applications made by the defence.[126] The court found that there were no grounds to declare as evidence the conclusions of the independent experts, since they conducted their examinations outside of the framework of the criminal procedure code, and since the questioning of the prosecution experts Salkanov and Kravchenko left "no doubts as to the objectivity of the conclusion."[127]

82. There are substantial discrepancies between the verdict as read out and recorded in the court room and the written verdict provided to Mr. Zhovtis and the defence on 9 September 2009.[128] For example, the verdict read out in the court room stated that the court had heard the closing arguments of the defence lawyers and Mr. Zhovtis's final word, even though both the lawyers and Mr. Zhovtis had refused to speak at the conclusion of the trial.[129]

First Appeal to the Collegium of the Almaty Regional Court

83. The appeal process took place between October 2009 and January 2010. The first appeal was to the collegium on criminal cases of the Almaty Regional Court in October 2009. This was followed by an appeal to the Supervisory College of the same court in November 2009, and finally an appeal to the Supreme Court in January 2010 (see section beginning at paragraph 109 below).

84. The first appeal before the Collegium of the Almaty Regional Court took place on 20 October 2009 in the town of Taldykorgan which is located approximately 250 kilometers from Almaty, the location of the trial court hearing. According to the Code of Criminal Procedure of Kazakhstan, an appellate court has the competence to verify the legality, justification, and justness of the verdict as requested by their appeal complaint.[130] The appeal court can uphold the trial court verdict, overturn it, or change it.[131] Finally, the appeal court has the right, whether by application of the parties or at its own initiative, to call and question additional witnesses, experts, and specialists and to request additional studies or any other physical evidence—including witnesses and evidence that were deemed inadmissible by the court of

[125] *Ibid.*
[126] *Ibid.*
[127] *Ibid.*
[128] Ex. 41 (a): Appeal Complaint of V. Voronov and V. Tkachenko, 11 September 2009, English translation.
[129] For a comparison of the two versions of the verdict, see *Ibid.* According to the defence, 679 words were added which constitute 52 text entries of 115 lines, and 6 of these text entries were more than 10 lines each.
[130] CPC, at Article 404(1).
[131] *Ibid.*, at Article 403(3).

first instance.[132] During the appeal the defence raised the question of the fairness of the trial, given that the independent experts had not been allowed to give evidence. Despite the fact that the appeal court had full jurisdiction to reconsider all aspects of the trial, the appeal failed to correct any of the violations that had marred the trial.

1. Appeal in Absentia

85. Mr. Zhovtis's requested to be present at his appeal,[133] however the appeal took place in his absence, and Mr. Zhovtis remained confined in the pre-trial detention centre during the hearing.

86. On 14 September 2009, over a month prior to the appeal hearing, Mr. Zhovtis filed a written petition to the Almaty Regional Court asking to be present at the appeal hearing. Mr. Zhovtis did not receive a reply to his request. On the day before the appeal hearing, Mr. Zhovtis was told by the detention center administration to prepare for the appeal. His wife was allowed to provide him with a suit to wear at the hearing. Mr. Zhovtis waited the whole morning to be transferred to the court, and when he was not transferred he thought that the hearing had been postponed. The next day he learned from his lawyers that the appeal was heard *in absentia.* Given that Mr. Zhovtis believed that he would be present at the appeal, he did not have a chance to instruct his lawyers on a strategy to pursue in his absence.[134]

87. On 20 October 2009, at the start of the hearing, the defence made an additional application requesting that Mr. Zhovtis be present at the appeal as provided for by the relevant legislation. The Judge replied that the Court had discretionary power to decide on the personal participation of the accused in the appeal hearing, and that it was not required since the prosecutor had not requested the Court to increase the sentence of punishment.[135] When defence counsel pressed the point, asking the Court to "(i)ssue a separate decision stating reasons why Mr. Zhovtis (had) not been brought before the court or grant the request of Mr. Zhovtis to bring him before the court", the presiding judge interrupted, saying, "There will be such a decision, later we will issue a decision."[136] However, no such decision was issued during the appeal hearing, nor were detailed grounds for the decision ever publicly disclosed. When defence counsel again asked the Court to issue a separate decision stating reasons for keeping Mr. Zhovtis in custody and not bringing him before the Court, the presiding judge did not respond.[137]

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[132] *Ibid.*, at Article 410(1).
[133] Ex. 42 (a): Application to Participate in the Appeal, Ye.A. Zhovtis, 14 September 2009, English translation. Mr. Zhovtis petitioned to be present at the appeal hearing pursuant to Article 408, part 4, of the CPC, which states: "persons who, in compliance with part 2, Article 396, were granted the right to appeal their sentence […] are allowed to be present during the appeal court proceedings in all cases. They are, at their behest, allowed to speak out in order to explain the basis for their complaints…"
[134] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 58.
[135] Ex. 13 (a): ICJ Appeal Hearing Report, at p. 14. Article 408(6) CPC states that persons who are granted the right to appeal should "in all cases be allowed into the appeal court hearing" and be "given the floor to speak in support of complaints filed or an objection or protests against them." See also Article 396(1) CPC, which states: "Right of appeal to the sentence, ruling belongs to a convicted or acquitted person, their defenders, representatives and legal representatives <…>."
[136] *Ibid.*, at p. 15.
[137] *Ibid.*

88. No court minutes were kept during the appeal, despite the absence of Mr. Zhovtis. Though Kazakhstan law does not require that minutes be kept in appeal proceedings, observers from the International Commission of Jurists subsequently noted: "it is crucial that in proceedings where the court considers questions of facts and questions of law and where parties give their arguments including testimony of the victims that court minutes be kept in a regular manner."[138]

2. Failure to Consider the Evidence of the Independent Experts

89. Despite having the power to do so, the appeal court failed to consider the independent expert witnesses, and thus confirmed and repeated the failure of the trial court.

90. Counsel for Mr. Zhovtis submitted an appeal disputing the trial court verdict and requesting the appeals court to reverse it and to terminate the case due to a number of factors, including the failure to consider the independent experts.[139] The following arguments were made in support of the appeal:

a) The trial court dismissed without justification the defence request to conduct a preliminary hearing.

b) The trial court initially failed to consider and subsequently rejected without justification of the defence request to conduct further expert analysis by the independent experts.

c) The trial court dismissed without justification the defence request to admit into the record the final report of independent experts.

d) The trial court initially failed to consider and subsequently rejected the defence request to deem inadmissible the prosecution expert evidence.

91. The Court rejected these arguments, stating that it had no doubts as to the objective nature of the State auto-technical analysis.[140] The Court considered that the independent expert reports went "beyond the inquiry and judicial proceedings that were conducted" and could not be allowed, since the experts "were not forewarned of criminal liability for giving willfully false evidence in compliance with Article 246 [of the Code of Criminal Procedure]".[141] The Court then cited a resolution of the Supreme Court of Kazakhstan that would seem to mandate consideration of independent expert evidence: "an expert report does not have any preferences compared to other evidence and previously established force, and shall be subject to analysis, comparison and evaluation along with other evidence pertaining to a case."[142] The Court interpreted this to mean that evaluation of the prosecution expert forensic examinations sufficed, and precluded consideration of outside reports: "the automotive forensic examination report, Ref. No. 8001, as of 14

[138] *Ibid.,* at p. 13.
[139] Ex. 23 (a): Appeal Complaint of Yevgeniy Zhovtis.
[140] Ex. 43 (a): Judgment of the Balkhash District Court of Almaty Region, 20 October 2009, English translation ("First Appeal Decision"), at p. 8.
[141] *Ibid*., at p. 6.
[142] Ex. 44 (a): Regulatory Resolution, Ref. No. 16, Supreme Court of the Republic of Kazakhstan (26 November 2004), Section 11, English translation.

August 2009 conducted by experts of the Forensic Centre under the Ministry of Justice of the Republic of Kazakhstan was compared and evaluated together with other evidence pertaining to a case . . . this forensic examination, combined with other pieces of evidence, creates a sufficient evidentiary base on this criminal case in order to find E. Zhovtis guilty."[143]

3. The Court Ignored the Evidence of the Victim's Mother

92. The mother of the victim, Mrs. Raykhan Moldabayeva, experienced a number of bizarre incidents on her way to the appeal that raised suspicions that the authorities had sought to prevent her from participation in the appeal hearing.[144] When she eventually managed to speak to the court, her statement was dismissed with no explanation.

93. At approximately 9:15-9.30 AM on the morning of the appeal, road police stopped the car transporting Mrs. Moldabayeva and KIBHR staff members to the appeal hearing, ostensibly to search the car. When the car was stopped for the police check, a second car ran into it. Following the accident, one of the police officers confiscated the licenses of the drivers of both cars and drove away. [145] Mrs. Moldabayeva then left the accident scene with two KIBHR staff members in an attempt to find mobile phone reception, leaving the driver with the car they had been riding in. A passing car offered the walkers a ride, which they accepted. That car was also stopped by the police. Mrs. Moldabayeva and the two KIBHR staff members then began walking again and making phone calls to colleagues when they were stopped by a prosecutor, who accused them of leaving the accident scene. After a short argument with Mrs. Moldabayeva and the KIBHR staff members, the prosecutor left and sent another police car to detain them. Finally, the police twisted Mrs. Moldabayeva's arms and tried to take her away in their car, until journalists and opposition activists intervened and prevented the police from removing her.[146]

94. The hearing was opened in the absence of Mrs. Moldabayeva, although the Court was aware that she was expected to arrive soon. The Court did not ask whether the parties deemed it possible to open the hearing in the absence of the victim. The victim's counsel did not insist on the victim's personal participation in the hearing.[147] When Mrs. Moldabayeva eventually arrived at the court building after the start of the hearing, court authorities initially denied her entry to the courtroom. The court subsequently granted her entry.[148]

95. The defence made an application to add to the case file a notary-certified statement by Mrs. Moldabayeva made since the end of the trial court hearing, in which she stated that she had reconciled with Mr. Zhovtis and that he had paid damages to the family of the deceased. In her statement, Mrs. Moldabayeva further requested that

[143] Ex. 43 (a): First Appeal Decision, at p. 6.
[144] Ex. 13 (a): ICJ Appeal Hearing Report, at p. 13.
[145] Ex. 45 (a): Complaint of Roza Akylbekova to the Chief of the Main Directorate of Internal Affairs [GUVD] of Iliysk District, English translation.
[146] *Ibid.*
[147] Ex. 13 (a): ICJ Appeal Hearing Report, at p. 13.
[148] *Ibid.* See also Ex. 46 (a): Justice Initiative interview with Roza Akylbekova, Taldykorgan, 20 October 2009, English translation.

the court drop the criminal charges against Mr. Zhovtis. The defence included with the new statement original copies of similar previous statements, which had been given to the police investigator earlier but not added to the case file.[149]

96. Mrs. Moldabayeva gave testimony confirming her reconciliation statement. The observers and the public in the courtroom could understand very little of her statement, and only grasped the words "I have forgiven", which she spoke in Russian. At this point, the Judge abruptly interrupted Mrs. Moldabayeva, and prevented her from explaining her position, saying: "Oh yes, we've got your application". He then hastily suspended the hearing and announced that the court would retire to deliberate. As a result, the Court failed to hear the part of the written application by Mrs. Moldabayeva stating her request that Mr. Zhovtis not be held criminally liable. In addition, the court did not invite the defence or the prosecution to question her.[150]

97. The victim was represented by lawyer M. Sh. Kabulov, as she had been at the trial court hearing. The basis of his authority to represent the victim remained unclear. When asked by the presiding Judge to produce his written credentials, he failed to do so, saying he would pass them on to the Court later. When observers from the International Commission of Jurists requested, during a break in the proceedings, that he confirm his credentials as the victim's legal representative and explain his formal role in relation to the victim, Kabulov did not give a direct answer.[151]

98. Mr. Kabulov adopted essentially the same position as that of the Prosecution, contrary to the position set forth in Mrs. Moldabayeva's written application.[152] In particular, he requested that the guilty judgment should be upheld, that there were no grounds for termination of the proceedings, and that no additional material should be included in the file. During the pleading, Mr. Kabulov repeatedly departed from Mrs. Moldabayeva's position with a reference to an opinion expressed by some other unnamed relatives of the deceased. However, Mrs. Moldabayeva never questioned Mr. Kabulov's credentials or his role during the trial proceedings.[153] He started his closing speech with the following words: "(T)he mother of the deceased said: 'I forgive him, leaving the rest with the court discretion' – so I cannot tell her not to forgive him."[154]

99. The International Commission of Jurists, in a report issued following the appeal, emphasized that this position "appeared contrary to the position of the victim herself as set forth in her application to the Court", and noted "the difference in the positions and attitudes of the mother of the deceased and her representative".[155]

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[149] *Ibid*.
[150] *Ibid*., at pg. 17-18.
[151] Ex. 13 (a): ICJ Appeal Hearing Report, at p. 9.
[152] *Ibid.*, at p. 20
[153] *Ibid.*, at p. 9.
[154] *Ibid.*, at p. 20
[155] *Ibid.*, at p. 13.

100. The court granted the application of the defence to include Mrs. Moldabayeva's written statement, but did not provide any evaluation of the statement, either during the hearing or in the verdict.

101. In late October 2009, Mrs. Moldabayeva and KIBHR filed a request to initiate criminal proceedings for abuse of power against the police personnel involved in the attempt to obstruct them from attending the hearing.[156] On 5 January 2010, after significant delay, senior police investigator U. M. Nurzhanov informed KIBHR of his refusal to institute criminal proceedings against the officers due to the absence of the elements of a crime.[157] On 29 September 2010, the Taldykorgan city court upheld the investigator's decision, noting that the police had lawfully conducted an "operational and search activity."[158] On 2 October 2010, KIBHR appealed this decision to the Court of the Almaty Region.[159]

4. The Conduct of the Appeal Demonstrated Bias

102. As in the trial hearing, the appeal court repeatedly dismissed defence applications without explanation or left them unanswered, demonstrating bias and a violation of equality of arms between the prosecution and the defence.

103. On the day of the trial, police blocked off the road to Taldykorgan for extended periods of time, and a reinforced police squad significantly restricted access to the court building by sealing off the adjacent neighborhood and blocking traffic on the adjacent streets. The court permitted only 45 mostly pre-selected guests to view the hearing, citing insufficient capacity in the courtroom. Court officials ignored requests to bring more chairs into the courtroom during the break, despite the fact that "the number of chairs was considerably smaller than the room could accommodate."[160] In addition, the court failed to provide video transmission of the hearing to the neighbouring room, even though the necessary equipment was available.[161]

104. Ultimately, the court refused to permit the entry of more than 100 people, including journalists, several representatives of Kazakh and Kyrgyz nongovernmental organizations and political parties, representatives of international NGOs, and representatives of other international organizations.[162]

105. As in the trial court hearing, the appeals court denied or left without consideration the numerous applications made by the defence, including the following:

    a) To declare as invalid the investigation leading to the criminal case and to reject all conclusions drawn and decisions made in the course of such proceedings. The court left the application without consideration.[163]

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[156] *Ibid.*
[157] Ex. 46 (a): Decision of the Taldykorgan Municipal Court, 29 September 2010.
[158] *Ibid*.
[159] Ex. 46 (b): Grievance Concerning the Ruling of the Taldykorgan Municipal Court, 2 October 2010.
[160] *Ibid.*, at p. 11.
[161] *Ibid*.
[162] *Ibid*.
[163] *Ibid*., at p. 18.

b) To declare as unlawful the sentence issued by the trial court, and to add to the case file audio- and videotapes showing substantial differences between the trial court verdict as it had been announced at the end of the hearing and the text of the trial court verdict released subsequent to the hearing. The court rejected the application following an objection by the prosecution that the source of the tapes could not be established.[164]

c) To add to the case file the evidence of two independent experts, who asserted that Mr. Zhovtis could not have avoided the accident, and to hear the testimony of one of the experts.[165] The court rejected the application without reasons.[166]

106. During the hearing, the appeals court did not to consider the factual record of the case, in violation of Kazakh law. The appeal hearing lasted fewer than four hours, including deliberations.[167]

107. The appeals court fully upheld the trial court verdict and sentence.[168] The court failed to provide any justification for affirming the severe sentence. The court did not announce the full text of the judgment in the courtroom, and only announced the operative provisions pursuant to which the conviction was upheld.[169]

108. The written judgment upheld all the rejections of the motions submitted by the defence and granted one supported by the Prosecution. In particular, it found no violations of Kazakhstan law in the following: the interrogation of Mr. Zhovtis as a witness, while he was in fact a suspect; the alteration of the pronounced trial court verdict contrary to Kazakhstan's legislation; the rejection of the request for a repeat forensic auto-technical analysis of the accident; or the insufficiency of time to prepare the pleadings and final statement or other violations alleged. The written decision also stated that Mr. Zhovtis had been forbidden from taking part in the proceedings because there was no issue of aggravating his position or increasing his sentence.[170]

Further appeals

109. On 17 November 2009, the defence filed a further appeal with the Supervisory College of the Almaty regional court, which is a discretionary review procedure under Kazakhstan law.[171] In the notice of appeal the defence raised a number of

[164] *Ibid*., at p. 18.
[165] *Ibid.*, at p. 16
[166] *Ibid*., at p. 18.
[167] *Ibid.*, at p. 17-21.
[168] Ex. 43 (a): First Appeal Decision, at p. 9.
[169] Ex. 13 (a): ICJ Appeal Hearing Report, at p. 21.
[170] *Ibid*., at p. 22.
[171] According to Article 459(1) of the CPC, "The decisions of the courts that entered into force can be reviewed under supervisory appeal if there were violations of the constitutional rights during the investigation or court examination of the case or in case if the law was applied incorrectly and it led to 1) sentencing non-guilty person; 2) lack of grounds for the not-guilty verdict or for stopping the case without grounds; 3) denying the accused his right to judicial defence; 4) the sentence imposed does not correspond to the gravity of the offence and personality of the convicted; 5) an unlawful or unjustified decision in the framework of the implementation of the verdict; 6) recidivism indentified not correctly; mistake in

issues including the refusal of the appeal court to hear the independent experts and examine the defence evidence, the one-sided approach of the appeal, the refusal of the appeal court to hear the evidence of Mr. Zhovtis, and the failure of the appeal court to consider the reconciliation procedure. On 10 December the Supervisory College conducted a preliminary hearing and concluded that there were no grounds to review the fair trial violations, and that the findings were "well-founded and based on evidence which was gathered with observance of the law and studied during the course of the court investigation and are sufficiently justified and correspond to the factual circumstances of the case."[172] The decision did not explicitly deal with any of the points raised by the defence but concluded that the arguments "are not well-founded and are refuted by the evidence studied in the judicial investigation, the legality and relevance of which are not in doubt. In addition, they are similar to the arguments in the petition of appeal, which were the subject of thorough study when considering the case in the appeal procedure and were properly evaluated."[173]

110. On 27 January 2010 the defence submitted an appeal to the Supreme Court which has a discretionary power to review cases. On 26 April 2010 the Supreme Court declined to consider the appeal. It denied the application made by the defence to review the failure of the trial court to recognize the reconciliation process and to dismiss the case, or alternatively, in the event that Mr. Zhovtis would not agree to the reconciliation, to not impose any punishment after a finding of guilt. In its decision, the Supreme Court went beyond the issues raised in the application and, citing the expert auto-technical analysis, declared that the guilt of Mr. Zhovtis was fully proven.[174] The Supreme Court argued that the failure of Mr. Zhovtis to plead guilty prevented the reconciliation:

> "Taking into account that during the trial of the first instance Zhovtis Ye. did not plead guilty to the offence he was accused of and did not ask to apply Article 67 of the Criminal Code, the [trial] court did not take the statement of Moldabayeva into account."[175]

Imprisonment

111. Following the first appeal to the Provincial Court, the authorities transferred Mr. Zhovtis to a minimum security prison that had been created and populated with inmates immediately prior to his arrival there. During his time in prison, Mr. Zhovtis has been subjected to restrictions on his movement and contact with the outside world in excess of those at similar prisons in Kazakhstan, and in comparison to his fellow inmates.

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choosing the regime of the penitentiary facility; 7) incorrect decision on civil claim; 8) unlawful or unjustified decision on the newly discovered circumstances or forced medical treatment."

[172] Ex. 38 (a): Supervisory decision, at p. 2.

[173] *Ibid*., at p. 3.

[174] *Ibid.*, at p. 2.

[175] Ex. 47 (a): Supreme Court of the Republic of Kazakhstan, Decision # 4u-715-2010 on refusal to initiate supervisory proceedings, 28 April 2010, English translation, at page 2.

New Prison Hastily Created after Mr. Zhovtis's Conviction

112. On 25 October 2009 Mr. Zhovtis was transferred to a minimum security prison, referred to as a "colony-settlement", located at Ust-Kamenogorsk. The prison is approximately 1,000km from both Astana, the capital, and Almaty, the largest city where Mr. Zhovtis lives. The distance has hindered the ability of Mr. Zhovtis to receive visits from his lawyer or his family members.

113. Prior to 2009 there was only one prison for those convicted of non-intentional offences, located in Astana. Immediately after the conviction of Mr. Zhovtis, a second facility for non-intentional offenders was set up by creating a special additional "colony-settlement" in Ust-Kamenogorsk.[176] In early October 2009, authorities transferred over 100 prisoners from the Astana prison to that in Ust-Kamenogorsk. Many of the transferred prisoners had families in Astana, where they had had the right to unrestricted long-term visits as prescribed by the law. Some of them had lived outside the colony with their families. Most of them had had jobs. Upon arrival in the Ust-Kamenogorsk prison, none of the transferred prisoners had any long visits for about one and a half months, none are allowed to live with their families.

114. The prison covers an area of approximately 100 by 300 meters, and houses some 150 prisoners in three dormitories. Mr. Zhovtis stays in a dormitory where 28 people sleep in one room and share one toilet. Contrary to the requirements of prison regulations, there are no cooking facilities for prisoners. Inmates are not permitted access to their beds from 06:00 to 22:00. Three times a day, inmates must line up for a roll-call and report to the canteen for meals, or face disciplinary sanctions. If prisoners are allowed out during the day, they must be present at the roll-call in the morning and evening. According to prisoners who were transferred from a similar prison in Astana, such rules are not used in the Astana prison and appear to be particular restrictions imposed in Ust-Kamenogorsk.[177]

Limited Contact with the Outside World

115. According to the Kazakhstan's Penal Code, prisoners in "colony settlements" live without security guards, under the surveillance of the prison administration. They have the right to move freely on its territory, the right to unlimited short-term (two to four hours) and long-term (up to five days) visits in specific rooms within the facility. If prisoners have a regular job and positive references, they may: travel without supervisions within the boundaries of the territory adjacent to the correctional institution, with the authorization of the colony-settlement; wear civilian clothes; have money and valuables on their person; use money without restriction; receive parcels, communications and printed matter; may have an unlimited number of visits. Convicts who have not violated the established procedure for serving the sentence and who have families may, by order of the chief of the colony-settlement, be authorized to reside with their families in a leased

[176] Ex. 13 (a): ICJ Appeal Hearing Report, at p. 8; and Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 60-61.
[177] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 83-84.

residence or in their own housing on the territory adjacent to the correctional institution, or within the populated area where the colony-settlement is located.[178]

Prohibition of Extended Family Visits

116. Prior to April 2010, in all "colony settlements" in Kazakhstan, prisoners also enjoyed the right of extended visits with family outside the territory of the facility at their own or rented housing for a period of up to five days. This was associated with the fact that there was insufficient space for extended-visits within the "colony-settlement." Mr. Zhovtis was allowed an extended family visit outside the facility only once, from 6 to 9 April 2010, when he spent three days with his wife in a rented flat in Ust-Kamenogorsk. He asked for five days as provided for by the legislation but was granted only three, without explanation.[179] After this visit, in late April, the East Kazakhstan Special Prosecutor for supervision of the legality of sentence execution, O. Dayembayev, decided that extended family visits outside the prison were no longer allowed. He gave no clear reasons for the change in the rules. No such visits have occurred since then. When Mr. Zhovtis filed a further application for a long-term visit on 17 April, the prison administration refused the application, arguing that the law doesn't permit it.[180] Given that there are 150 prisoners and only two rooms assigned for extended family visits, it is impossible to schedule such visits.[181]

Extended Quarantine Period

117. Upon arrival, all newcomers are placed in so-called "quarantine" for a maximum of 15 days, and according to the legislation, the regime in quarantine should not differ from the general regime in the facility. At Ust-Kamenogorsk, the administration uses the maximum term as a rule. From his arrival on 25 October until 9 November 2009, Mr. Zhovtis was placed in quarantine. Contrary to the legislation, Mr. Zhovtis was not allowed to receive visits while in quarantine.[182] On 10 November, the colony administration announced a new quarantine allegedly caused by the flu, and Mr. Zhovtis was once more forbidden from receiving visitors for another two weeks.[183] At the same time, about 50 prisoners continued to work outside the facility during this quarantine period.[184]

Ban on Legal Visits

118. On 16 November 2009 the prison administration barred Mr. Zhovtis from seeing his lawyer. The lawyer wished to discuss with Mr. Zhovtis the supervisory appeal complaint that was due for filing within the following three days. At about 5:30PM on that day, after Mr. Zhovtis's lawyer had waited for more than two hours, prison

[178] Ex. 48 (a) - Relevant Provisions of the Penal Code of the Republic of Kazakhstan, English translation.
[179] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 62.
[180] Ex. 49 (a): Complaint by E.A. Zhovtis to the Special Prosecutor of the Eastern Kazakhstan Region, 20 April 2010, English Translation ("Complaint of 20 April 2010").
[181] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 63. Mr. Zhovtis further notes that in prisons with a stricter regime, there are at least 25 extended-visit rooms per 1,000 people, based on the standard of the law that each prisoner has the right to 4 visits a year. *Ibid*.
[182] *Ibid.*
[183] *Ibid*.
[184] *Ibid.*

officials informed him that he needed permission to meet with Mr. Zhovtis from the head of the prison. At the time, the head of the prison was in a village located more than 40 km from Ust-Kamenogorsk.[185] The rules of the colony-settlement provide for unrestricted meetings between prisoners and their lawyers.[186] In addition, every time that Mr. Zhovtis meets with any visitor other than his wife, an employee of the prison is present and takes notes of the conversation. This includes a meeting with a representative of the Open Society Justice Initiative on 28 September 2010. The Justice Initiative had informed the Ministry of Foreign Affairs, the Penitentiary Committee and the head of the prison administration that the purpose of the meeting was to discuss this communication to be submitted to the Human Rights Committee.[187]

Other Restrictions on Communications Outside the Prison

119. Other prisoners have been allowed to leave the facility and almost all prisoners currently work outside the facility each day of the work week. Over the course of a year Mr. Zhovtis has only had the opportunity to leave the prison grounds without an escort on eight occasions, for about four hours each time.[188] Unlike the other prisoners, he has been forbidden from residing in the city, or from going into the city, including to medical institutions, without being escorted by a colony employee.[189] He spent more than a year in the colony-settlement, and has never been granted leave to spend a week-end outside of the institution – a regular privilege in the colony-settlements awarded to several dozen other prisoners in the facility with Mr. Zhovtis.[190] The prison authorities did not provide any justification for this differential treatment. The prison rules provide for the restriction of visits to the outside as one of the more severe disciplinary sanctions, with a maximum time limit on the sanction of 30 days.[191] No disciplinary sanction of this type was ever imposed on Mr. Zhovtis. Mr. Zhovtis's lawyer filed a request with the prison administration on 20 September 2010 asking to explain these restrictions.

120. Mr. Zhovtis is also required to submit the telephone and address of each person he wishes to call. In contrast, almost all other prisoners freely use the mobile phone during their time outside the facility and they are free to meet anyone when the leave the facility to work. Mr. Zhovtis is not allowed to pass his articles outside the facility through the visitors.[192]

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[185] *Ibid*.
[186] Internal Rules and Procedures of the Correctional Institutions, approved by the Minister's of Justice order No. 148 of 11 December 2001, at para. 82; Penal Code of the Republic of Kazakhstan, at Part 1 Article 84, Part 2 Article 84, and Part 1 Article 125
[187] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 81.
[188] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 57.
[189] *Ibid*.
[190] *Ibid.*, at para. 64.
[191] Article 111(2) of the Penal Code of the Republic of Kazakhstan states: "Those who serve their sentences in the colonies-settlements can be subjected to the sanctions such as annulment of the right to live outside of the facility or to leave the facility during the time free of work, for up to 30 days."
[192] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 102.

Refusal of Medical Treatment

121. Mr. Zhovtis became sick with the flu around 10 November 2009. He had a high fever (39 degrees celsius) and was sick for two weeks. The prison authorities did not provide him with any medical aid,[193] though they allowed him to receive necessary medicine from colleagues and friends, and permitted him to stay in bed during the day.[194]

122. For about three weeks beginning on 12 November 2009, the prison authorities refused to allow Mr. Zhovtis to visit a dentist, even though he suffered from gum inflammation and a visibly serious infection.[195] Doctors from other prison facilities who came to see Mr. Zhovtis during this period advised only that he gargle with salt water. He was not provided with any medicine, including painkillers.

> "During almost 3 weeks I was visited three or four times by the head of the medical unit of the regional directorate of the Kazakh Department of Corrections. He was accompanied by some sort of a major/doctor, who would just tap on my tooth with an ordinary tea spoon and tell me that I should rinse my mouth with salt water and baking soda. Then, twice they invited a dentist from some other correctional institution, who said the same thing. The height of lunacy was some time at the end of November when they brought to the penal settlement a 60's era dental chair, all rusted and with no appliances whatsoever. It is in it that they, most probably, were planning to treat me. I obviously said that I would never sit in it. From that time on and until today it has been lying in the basement of our barrack."[196]

123. Finally, in early December, Mr. Zhovtis was escorted to an outside dental clinic, where he was treated until the end of December and for more than half of January 2010. He had an operation in which his gum was cut open. Due to the fact that he had been denied much-needed treatment for over a month, Mr. Zhovtis ultimately had to endure several long and painful and expensive surgical procedures.[197]

124. On 12 November 2010 Mr. Zhovtis wrote a complaint to the Ministry of Justice with regard to the violations of his rights taking place in the Ust-Kamenogorsk colony-settlement.[198]

Coerced Labor Contract

125. On 11 November 2009 prison authorities attempted to force Mr. Zhovtis to sign a labor contract with the State Enterprise RGP Yenbek-Oskemen. The contract stated that Mr. Zhovtis would be employed as an occupational safety engineer with a

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[193] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 72.
[194] *Ibid.*
[195] Ex. 50 (a): "Public Statement on Prison Conditions," E.A. Zhovtis, 132 November 2009, English Translation.
[196] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 77.
[197] *Ibid*.
[198] Ex. 51 (a): Letter of Complaint on Prison Conditions to Colonel of Justice Mr. M.Sh. Zhumadilov, Acting Head of the Administration Corrections System Committee for the Eastern Kazakhstan District Ministry of Justice of the Republic of Kazakhstan, 12 November 2009, English translation ("Letter of Complaint of 12 November 2009").

monthly salary of 20,000 tenge (133 USD). Mr. Zhovtis declined to sign the contract, citing as reasons his dissatisfaction with the labor conditions, the salary, and that he did not have the necessary qualifications for the position.[199] Yenbek-Oksemen's aim is to conduct business or productive activities using the work of the prisoners.[200]

126. On 12 November 2009, KIBHR sent a request to the head of prison administration confirming its offer to Mr. Zhovtis of a consultancy position in the creation of a monitoring network on freedom of religion, with a salary of 187,500 tenge. The head of the prison refused the request, citing as grounds an order of the Minister of Justice prohibiting convicted persons from working with copying, radiotelegraph, telephone, and fax equipment.[201]

127. In a decree dated 18 November 2009, the head of corrections facilities for the East-Kazakhstan Oblast, N.T. Muhamedzhanov, imposed a disciplinary sanction on Mr. Zhovtis in the form of a reprimand for declining to enter into the personal labor agreement with Yenbek-Oskemen. The administration viewed Mr. Zhovtis's refusal to sign the contract as a "disinclination to work" and a serious violation of prison rules.[202]

128. On 13 January 2010 under threat of further sanctions, Mr. Zhovtis signed a contract with Yenbek-Oksemen to work as a warehouseman. He submitted complaints to the prosecutors' offices and penitentiary department claiming the contract was unlawful.[203]

Complaints with regard to treatment in prison

129. On 12 November 2009, Mr. Zhovtis appealed against the fact that extended visits and annual leaves were not being granted to any inmate in the settlement, and that inmates were not allowed to reside with their families outside the settlement. This appeal was sent to the Chairman of the Criminal Correction System Committee of the Ministry of Justice, M. Ayubayev; the Public Prosecutor of the East Kazakhstan region, K. Tulegenov; and the Ombudsman of the Republic of Kazakhstan, A. Shakirov. He received no official response.[204]

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[199] Ex. 52 (a): Letter of Complaint on Forced Labor to Mr. I.D. Merkel First Deputy of the Prosecutor General of Kazakhstan, December 2009, English translation ("Letter of Complaint on Forced Labor"), English translation.

[200] Ex. 53 (a): Reply of South Kazakhstan Penitentiary Department to Zhovtis and Kuchukov complaint, 20 December 2009, English translation.

[201] Ex. 54 (a): Response to Complaint on Forced Labor by Public Prosecutor's Office, 11 December 2009, English translation ("Response to Complaint on Forced Labor"). Mr. Zhovtis further notes that virtually all enterprises and organizations have computers or faxes, and so the ban preventing prisoners from operating copy machines, telephone and telegraph devices contained in the attachment to the Internal Regulations of correctional institutions does not make sense, and can only apply to a job performed within the correction facilities. Finally, there is a special additional punishment in Kazakhstan – a ban on specific activity or on specific positions, but no any professional ban (except of driving) was imposed on Mr. Zhovtis by the court decision. See Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 79-82.

[202] Ex. 52 (a): Letter of Complaint on Forced Labor.

[203] Ex. 51 (a): Letter of Complaint of 12 November 2009.

[204] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 85.

130. On 13 December 2009, Mr. Zhovtis lodged an appeal concerning the fact that he had been denied a short-term visit with two representatives of the National Democratic Institute. This appeal was lodged with East Kazakhstan special public prosecutor for the supervision of the legality of sentence execution, O. Dayembayev. On 29 December 2010, the prosecutor accepted the complaint and instructed the head of the detention facility not to permit such violations of Mr. Zhovtis's rights in the future.[205]

131. Mr. Zhovtis filed a complaint to the First Deputy of the Prosecutor General of Kazakhstan I.D. Merkel disputing the sanction imposed on him for his refusal to accept the offer of working inside the prison. He cited the prohibition of involuntary labor by the Constitution of the Republic of Kazakhstan, except where it is prescribed in a judgment which has entered into legal force.[206]

132. On 21 December 2009 prison authorities informed Mr. Zhovtis about the 11 December 2009 response to his complaint by the Public Prosecutor's Office, which states that the sanction was imposed on Mr. Zhovtis on lawful grounds.[207] The prosecutor cited article 125(3) of the penal code, which that states that the labor of the convicted persons is regulated by the labor legislation of Kazakhstan, except with regard to the conclusion and termination of labor contracts and transfers to a different job. [208]

133. With regard to Mr. Zhovtis's complaint about the denial of his right to live outside of the colony settlement in a rented flat, the prosecutors' offices and the penitentiary department cited a decree of the Minister of Justice stating that only prisoners without previous disciplinary sanctions can enjoy this right.[209] The sanction should not have affected the other rights of Mr. Zhovtis such as the right to leave the facility for work, or the right to visit the doctor, but he continued to be deprived of these possibilities without explanation.[210]

134. Following this, on 23 December 2009 Mr. Zhovtis filed an appeal against the Prosecutor's response, addressed to the first deputy Prosecutor General, I. Merkel; the first deputy public prosecutor of the East Kazakhstan region, M. Kul-Mukhamed; the Ombudsman of the Republic of Kazakhstan, A. Shakirov; and the chairman of the Constitutional Council of the Republic of Kazakhstan, I. Rogov. This appeal argued that article 99 of the Criminal Correction Code, under which Mr. Zhovtis has been penalized for refusing to perform forced labour, was

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[205] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 86.
[206] Constitution of the Republic of Kazakhstan, Article 24.1 ("Everyone has the right to freedom of employment, free choice of occupation and profession. Forced labor is allowed only under a court sentence under conditions of a state of emergency or martial law").
[207] Ex. 54 (a): Response to Complaint on Forced Labor.
[208] Penal Code of the Republic of Kazakhstan, Article 125(3) ("The labor of the convicts is regulated by labor laws of the Republic of Kazakhstan, except the conclusion and termination of a labor contract and transfer to another job. The conclusion and termination of a labor contract and transfer of a convict to a different job may be accomplished by the employer with authorization of the colony-settlement administration."). See Ex. 48 (a): Relevant Provisions of the Penal Code of the Republic of Kazakhstan, English translation.
[209] Ex. 54 (a): Response to Complaint on Forced Labor.
[210] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 71.

unconstitutional.[211] The Constitutional Council rejected the appeal on the basis that it could not address Mr. Zhovtis's grievance since he did not have the right to contact the Constitutional Council. The office of the public prosecutor of the East Kazakhstan region responded that the penalty imposed on Mr. Zhovtis was lawful in accordance with article 99 of the Criminal Correction Code without addressing the arguments on whether that article complied with the Constitution and the International Labor Organization (ILO) Convention on Forced Labor.[212]

135. On 25 January 2010, Mr. Zhovtis again contacted the East Kazakhstan special public prosecutor for the supervision of the legality of sentence execution, O Dayembayev, complaining of the absence of the kitchen envisioned by law at the settlement, the lack of sufficient space for eating a meal by oneself, the requirements for inmates who did not eat in the dining hall to go to the dining hall anyway, and the absence of a toilet facility in one of the dormitories which required that inmates had to use an unheated toilet on the street at a temperature of 30-40 degrees below zero. Mr. Zhovtis did not receive any official response to this complaint.[213]

136. In late January 2010, Mr. Zhovtis and more than 60 other inmates contacted the Public Prosecutor General, K. Mami, and the Minister of Justice, R. Tusupbekov, to again raise their grievance concerning the failure to grant extended visits with families outside the penal settlement. The inmates have also not received any official response.[214]

137. On 3 February 2010, Mr. Zhovtis filed an application with Ust-Kamenogorsk court asking the court to annul the sanction imposed on him by the prison administration for the refusal to work, and to impose a sanction on the head of the prison for unlawful actions. Mr. Zhovtis argued that Article 125(3) of penal code requires that a convicted person get the permission of the prison administration to take on specific job, but does authorize prison officials to coerce a convicted person to work for a specific company. Mr. Zhovtis also argued that the disciplinary sanction was unlawful because Article 99(2) of the Penal Code[215] only prohibits prisoners from stopping work "in order to resolve a labor conflict", which was not the case in his situation.[216]

138. On 8 February 2010 Mr. Zhovtis petitioned the Ust-Kamenogorsk Court to submit the case to the Constitutional Council of the Republic of Kazakhstan in order to

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[211] Ex. 52 (a): Letter of Complaint on Forced Labor.; Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 87.
[212] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 87.
[213] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 88.
[214] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 89.
[215] Article 99 of the Penal Code of the Republic of Kazakhstan states: "Convicts are prohibited from stopping work to resolve labor conflicts. Refusal to work or stopping work is a malicious violation of the procedure for serving a sentence and may result in application of measures of punishment and material liability." See Ex. 48 (a): Relevant Provisions of the Penal Code of the Republic of Kazakhstan, English translation.
[216] Ex. 55 (a): Complaint (in a special proceeding procedure on recognition of illegal acts of an official, repeal of a decree on the imposition of punishment) to the Court of the City of Ust-Kamenogorsk**,** 3 February 2010, English translation.

review the constitutionality of the provisions of Article 99 of the Penal Code declaring the obligation of all prisoners to work.[217] Mr. Zhovtis argued that this article is a vestige of the Soviet penal system that contravenes the Constitution and Labor Code of Kazakhstan.[218] Mr. Zhovtis cited commentary to the Constitution approved by the Scientific-Methodological Council of the Ministry of Justice, which strictly limits the lawful use of forced labor.[219] Mr. Zhovtis also noted that, "Stalin's Gulag system . . . was transformed into [the] so-called 'chemistry,' i.e. [the] direction of convicts to a settlement for construction of core enterprises for a small wage."[220]

139. In accordance with the legislation, Mr. Zhovtis could either apply to the court that covers his own place of residence or where his respondent is located. Mr. Zhovtis chose Ust-Kamenogorsk court, where his section of the colony-settlement is located and where he lives, since the head of the facility is based at the colony-settlement's main section in the village of Saratovka, 40 kilometers away. On 4 March 2010, the Ust-Kamenogorsk court ruled that the case should be heard either in the Ulan court, which covers the area where the head of the prison facility is based, or in Almaty on the basis of Mr. Zhovtis's place of residence.[221]

140. On 10 March 2010 Mr. Zhovtis appealed the decision of the Ust-Kamenogorsk City Court to the Ust-Kamenogorsk Regional Court.[222] On 6 April 2010 the Ust-Kamenogorsk Regional Court upheld the decision of the City Court, and remanded the case to Court No. 2 of Ulan District, East-Kazakhstan Region.[223] Mr. Zhovtis petitioned Court No. 2 of Ulan District not to examine the claim and to return the documents to him, so that he could file the claim at the Almalinskiy Court of the City of Almaty, the court of his place of domicile. On 21 April 2010 Court No. 2 of Ulan District complied with this request, and returned the case documents to Mr. Zhovtis on 7 May 2010.[224]

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[217] Individuals do not have the right of direct appeal to the Constitutional Council in Kazakhstan.

[218] Ex. 56 (a): Petition (on the suspension of proceedings and appeal to the Constitutional Council) to the Court of the City of Ust-Kamenogorsk, 8 February 2010, English translation.

[219] *Ibid.* Mr. Zhovtis cited the following language: "the principle of the freedom of employment was first proclaimed in the Constitution of the Republic of Kazakhstan instead of the right to work. Previously, the stipulated right to work was simultaneously the obligation to work, for deviation from which a sanction was established. Therefore, it cannot be and was not legal in the legal sense of this work because it simultaneously decreed possible conduct and conduct as due. […] The exception to the principle of freedom of employment is the permissibility of forced labor only according to the court sentence or under state of emergency or martial law. […] In full accordance with the international acts in the Constitution of the RK, the possibility is provided for forced labor in strictly defined cases. In such cases, work is indicated in emergency situations […] and also work performed on the basis of a court sentence in accordance with Articles 39, 42 of the [Criminal Code of Kazakhstan], where according to the court sentence correctional works or community service are designated as punishment."

[220] *Ibid*.

[221] Ex. 57 (a): Decision of the Ust-Kamenogorsk Court, 4 March 2010, English translation. Mr. Zhovtis further indicates that after he had been sentenced, his registration as resident at his home address in Almaty was removed. See Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 95.

[222] See Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 96.

[223] Ex. 59 (a): Complaint on Forced Labor to the City Court of Ust-Kamenogorsk, 19 August 2010, English translation.

[224] *Ibid.*

141. On 18 May 2010, Mr. Zhovtis filed the claim at Almalinskiy District Court No. 2 of the City of Almaty. On 21 May 2010, the Almalinskiy District Court No. 2 returned the claim to Mr. Zhovtis, indicating erroneously the village of Saratovka as the place where he was serving his sentence and instructing him to contact the Ulan District Court of East-Kazakhstan Region. On 4 June 2010, Mr. Zhovtis appealed the decision, pointing out that he is serving his sentence in the city of Ust-Kamenogorsk.[225] On 22 July 2010, the Appeals Board of the Almaty City Court upheld the ruling of Almalinskiy District Court No. 2 of the City. However, the Board corrected the mistake of the Almalinskiy District Court No. 2 regarding the place where Mr. Zhovtis is serving his sentence, and found that he is serving his sentence at the settlement colony in Ust-Kamenogorsk**.** The Board explained to Mr. Zhovtis his right to contact the Ust-Kamenogorsk City Court of East-Kazakhstan Region.[226]

142. On 19 August 2010, Mr. Zhovtis filed a new complaint with the Ust-Kamenogorsk City Court, East-Kazakhstan Region, challenging the disciplinary sanctions imposed on him and the constitutionality of a provision of the Penal Code that requires all prisoners to work.[227] This is the same court with which he had initially filed the claim in February 2010.

143. On 23 August 2010, the court of the city of Ust-Kamenogorsk again refused to consider Mr. Zhovtis's complaint, ruling that he had to contact the Ulan district court of the East Kazakhstan region with his complaint. On 8 September 2010, Mr. Zhovtis filed an appeal against this ruling with the East Kazakhstan Regional Court.[228]

V. ADMISSIBILITY

144. The communication brought on behalf of Mr. Zhovtis satisfies the requirements for admissibility within the Covenant and the Optional Protocol.

No Other International Complaint

145. This communication is not being examined and has never been submitted to any other body of international complaint and investigation, and therefore satisfies the requirement of Article 5(2)(a) of the Optional Protocol.

Jurisdiction

146. Kazakhstan ratified the ICCPR on 24 January 2006. Kazakhstan signed the Optional Protocol to the ICCPR on 25 September 2007 and acceded to the instrument on 30 June 2009. The Optional Protocol entered into force for Kazakhstan on 30 September 2009.

147. While the investigation and first trial of Mr. Zhovtis preceded the entry into force of the Optional Protocol, the complaint is admissible as (1) Kazakhstan has affirmed

[225] *Ibid*.
[226] *Ibid*.
[227] *Ibid*.
[228] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 101.

the earlier violation by act and implication, (2) the violation continues after the relevant date, and (3) the violation generates effects which themselves violate the Covenant.

148. This Committee has previously found that where a state affirms a previous violation then the complaint is admissible:

> "A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations of the State Party."[229]

149. The Committee has also considered such complaints to be admissible where the violation continues to effect the victim, concluding that there will be an ongoing violation where the alleged violations "continue, or have effects which themselves constitute violations, after that date [of entry into force of the Treaty]."[230]

150. Mr. Zhovtis's submissions under Article 14 meet the requirement of jurisdiction *ratione temporis* because the Optional Protocol entered into force in Kazakhstan prior to his appeal. In a similar case where the appeal occurred after the Covenant entered into force, this Committee has established that "the alleged violations [that] continue or have continuing effects which in themselves constitute a violation" yet noted that it was not precluded from considering the author's complaint *ratione temporis* because:

> "although the author was convicted and sentenced at first instance in June 1989, that is before the entry into force of the Covenant for Ireland, his appeal was dismissed on 21 May 1990, that is after the entry into force of the Covenant for Ireland, and his imprisonment lasted until August 1994."[231]

151. Mr. Zhovtis's Article 14 claims are admissible *ratione temporis* because the court of appeal essentially affirmed and continued the violations of his right to a fair trial that were committed by the trial court. These violations of fair trial guarantees include:

a) violation of the right to call independent expert witnesses at both trial and appeal;

b) breach of the principle of equality of arms and of the requirement of impartiality, as the trial and appeal were skewed in favour of the prosecution;

c) violation of the protection against self-incrimination as both trial and appeal court did not question the use of factual statements obtained from Mr. Zhovtis when he was mislead into believing he was a witness, and not a suspect with the right to silence, in breach of the criminal procedure legislation.

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[229] *Könye v. Hungary,* UNHRC, Decision of 22 Sept. 1992, UN Doc. CCPR/C/5-/D/520/1992, at para. 6.4. Available at: http://www1.umn.edu/humanrts/undocs/html/dec520.htm.

[230] *Lovelace v. Canada,* UNHRC, Decision of 30 July 1981, UN Doc. Supp. No. 40 (A/36/40), at para. 11. Available at: http://www1.umn.edu/humanrts/undocs/session36/6-24.htm.

[231] *Holland v. Ireland*, UNHRC, Decision of 25 October 1996, UN Doc. CPCR/C/58/D/593/1994, at para. 9.2. The applicant complained that his trial before Special Criminal Court was not independent and impartial in violation of Article 14.

152. The violation of Article 14(5) – right to appeal; violations of article 10 (right to be treated with dignity in detention) and Article 17 (right to privacy and family life) – as well as other rights associated with the failure of the government of Kazakhstan to protect Mr. Zhovtis's fundamental rights as a human rights defender – are all admissible *ratione temporis* as they took place after the Optional Protocol entered into force.

Exhaustion of Domestic Remedies

153. Mr. Zhovtis has exhausted all available domestic remedies.

Fair Trial Rights

154. With regard to the exhaustion of domestic remedies related to the fair trial rights, Mr. Zhovtis took all available judicial steps. As extensively outlined in the facts section below, the defence team filed numerous applications alleging fair trial violations to the prosecutor, to the trial court, the appeal court and in an application for supervisory appeal. None of these steps brought results or even a fully reasoned answer outlining why there was not a violation of fundamental human rights.

a) As outlined below, on 20 October 2009, the appeal court affirmed the decisions of the trial court which violated fair trial standards, including the failure to consider the evidence of independent experts, failure to safeguard the protection against self-incrimination, and failure to address the bias of the trial judge, all amounting to a lack of equality of arms between the two sides. In addition, the appeal court refused to accept and evaluate claims of the defense about the discrepancies between the trial court verdict as read out in the court and the application of Mr. Zhovtis to be present during the hearing.

b) On 17 November 2009, the defence filed an application for supervisory appeal reiterating all fair trial violations that took place during the appeal and trial. It has to be noted that this supervisory appeal is discretional only. On 20 October 2009, the Board of Criminal Cases of the Almaty Regional Court refused to initiate supervisory proceedings.

c) On 27 January 2010, the defence filed an application to initiate supervisory proceedings with the Supreme Court – another discretionary appeal. On 26 April 2010 at the preliminary hearing the Supreme Court refused to initiate the supervisory proceedings.

Prison Conditions

155. With regard to the violations of Articles 10 and 17 related to his treatment in prison, Mr. Zhovtis filed a number of complaints to the prison authorities, prosecutors entrusted to supervise the legality of the actions of the prison administration and to the courts. These complaints related to the conditions of detention, being singled out by the prison administration and subjected to harsher rules than it is provided for by the prison regulations, excessive limits of the contacts with outside world. The main complaints and decisions are listed below. None of the complaints was successful.

a) On 13 November 2009, Mr. Zhovtis filed a complaint to the prison authorities and prosecutors' offices with regard to violations of the regulations providing for long-term visits and residence outside of the colony-settlement. The response contained general citations of the law referring to the discretion of the director of the facility and citing the disciplinary sanction imposed on Mr. Zhovtis as the justification for the actions of the prison authorities. This was despite the fact that the sanction was imposed after the complaint was filed.

b) In November 2009, Mr. Zhovtis filed a complaint to the Prosecutor General's office disputing the legality of the disciplinary sanction imposed. On 11 December 2009, the complaint was dismissed by the prosecutor of the East-Kazakhstan region where the Prosecutor General's office transferred Zhovtis's complaint.

c) On 25 January 2010, Mr. Zhovtis filed a complaint to the regional prosecutor with regard to the lack of kitchens for prisoners, as required by the law, as well as other violations of sanitary norms. No reply was received.

d) On 3 February 2010, Mr. Zhovtis filed an application with the Ust-Kamenogorsk City Court asking the court to annul the disciplinary sanction imposed as unlawful. On 8 February 2010, Mr. Zhovtis also filed a petition to the same court asking for the case to be referred to the Constitutional Council to review the constitutionality of a provision of the Penal Code requiring all prisoners to work. This resulted in the following series of procedural steps:

- On 4 March 2010, the Ust-Kamenogorsk Court found that, since the court considered Mr. Zhovtis's place of domicile is Almaty and the Civil Procedure Code of Kazakhstan does not provide for the possibility of filing a petition against a state body or official at the court of the place where the claimant is serving his sentence, the case should be transferred to the court overseeing Saratovka, the village where the head of the "colony-settlement" is based, namely the Ulan District Court of East-Kazakhstan Region.[232] The court ignored the fact that Mr. Zhovtis has a document stating that he lives in Ust-Kamenogorsk, and that the rules of the Civil Procedure Code that states that a lawsuit can be filed to the court at the place of domicile of the plaintiff.

- On 10 March 2010, Mr. Zhovtis appealed the decision of the Ust-Kamenogorsk District Court to the Ust-Kamenogorsk Regional Court.[233] On 6 April 2010 the Ust-Kamenogorsk Regional Court upheld the decision of the District Court.[234]

- Mr. Zhovtis petitioned Court No. 2 of Ulan District, East-Kazakhstan Region not to examine the claim and to return the documents to him, so that he could file the claim at the Almalinskiy Court of the City of Almaty, the

[232] Ex. 57 (a): Decision of the Ust-Kamenogorsk Court, 4 March 2010, English translation.
[233] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010 at para. 96.
[234] Ex. 59 (a): Complaint on Forced Labor to the City Court of Ust-Kamenogorsk, 19 August 2010, English translation.

court of his place of domicile. On 21 April 2010, Court No. 2 of Ulan District complied with this request and returned the documents for the case to Mr. Zhovtis on 7 May 2010.[235]

- On 18 May 2010, Mr. Zhovtis filed the claim at Almalinskiy District Court No. 2 of the City of Almaty. On 21 May 2010, the Almalinskiy District Court No. 2 of the City of Almaty returned the claim to Mr. Zhovtis, indicating erroneously the village of Saratovka as the place where he was serving his sentence and instructing him to contact the Ulan District Court of East-Kazakhstan Region. Mr. Zhovtis appealed the decision, pointing out that he is serving his sentence in the city of Ust-Kamenogorsk.[236]
- On 22 July 2010, the Appeals Board of the Almaty City Court upheld the ruling of Almalinskiy District Court No. 2 of the City. However, the Board corrected the mistake of the Almalinskiy District Court No. 2 regarding the place where Mr. Zhovtis is serving his sentence, and found that he is serving his sentence at the settlement colony in Ust-Kamenogorsk**.** The Board explained to Mr. Zhovtis his right to contact the Ust-Kamenogorsk City Court of East-Kazakhstan Region.[237]
- On 19 August 2010, Mr. Zhovtis filed a new complaint with the Ust-Kamenogorsk City Court, East-Kazakhstan Region, challenging the disciplinary sanction imposed on him and the constitutionality of a provision of the Penal Code on the obligation of all prisoners to work.[238] This is the same court he had initially filed the claim with in February 2010. The complaint was dismissed on 23 August 2010 on the same grounds that the court does not have the jurisdiction.
- On 8 September 2010, Mr Zhovtis filed yet another appeal against this ruling with the East Kazakhstan Regional Court.[239]
- On 20 April 2010, Mr. Zhovtis filed a complaint to the regional prosecutor with regard to the denial of long-term visits.[240]
- On 20 September 2010, Mr. Zhovtis's lawyer sent a request to the head of the prison with several questions about the treatment in prison, including the denial of visits outside the colony, imposing of sanctions, and lack of rewards.[241]

156. While some of the complaints filed by Mr. Zhovtis with regard to prison conditions are still being considered by authorities of the State Party, there is no expectation that they will result in any change to Mr. Zhovtis's situation. The fact that his claim

[235] *Ibid.*
[236] *Ibid*.
[237] *Ibid*.
[238] *Ibid*.
[239] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 101.
[240] Ex. 49 (a): Complaint of 20 April 2010. *See also* Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 97.
[241] Ex. 9: Statement of Yevgeniy Zhovtis, November 2010, at para. 102.

on forced labor is sent from one court to another for more than 7 months without the court ever getting to its substance illustrates the ineffectiveness of the remedies for these violations.

Fundamental Rights as a Human Rights Defender

157. The violations of Mr. Zhovtis's fundamental rights as a human rights defender are the direct result of his subjection to an unfair trial process and subsequent discriminatory treatment in prison. Indeed, whenever human rights defenders experience targeted persecution that results in the rights violations and the inhibition of their work in protecting and promoting human rights, their rights as defenders are implicitly undermined. Thus, Mr. Zhovtis's other attempts to exhaust—the appeals of the trial court decision based on fair trial violations, and the unsuccessful complaints based on his treatment in prison—also constitute exhaustion of remedies for violations of his rights as a human rights defender.

158. The Human Rights Committee has deemed applicants to have fulfilled the requirements of exhaustion on a particular claim if pursuing that claim in the domestic context "would be manifestly futile."[242] Mr. Zhovtis mentioned several times in different complaints that the actions against him appeared to be motivated by political decisions and as retribution for his activities as a human rights defender. Given the unyielding response of the Kazakh courts to Mr. Zhovtis's claims that his basic fair trial and human dignity rights had been violated, it would have been futile for him to submit the novel but no less significant claim that these violations had undermined his rights as a human rights defender. Indeed, the laws of Kazakhstan provide no avenue in which to contest violations of these fundamental rights.

159. Consequently, all domestic remedies have been exhausted.

VI. VIOLATIONS OF THE COVENANT

160. As a result of the unfair prosecution, trial and appeal, Mr. Zhovtis has suffered the following violations of the Covenant:

- *A. Violation of the Right to Call Independent Expert Witnesses.* Both the trial court and appeal court refused to consider expert witnesses who would have testified that the prosecution "expert" evidence was worthless and that there was no way that Mr. Zhovtis could have prevented the accident, in violation of the right of the accused to obtain the attendance of witnesses on his behalf protected in Article 14(3)(e).

- *B. Violation of the Right to a Fair Trial.* The trial and appeal processes were manifestly arbitrary and amounted to a denial of justice, insofar as they failed to respect the principles of impartiality or of equality of arms, and the right to silence, in violation of the right to a fair trial in Article 14.

[242] *Brough v. Australia,* UNHRC, Decision of 17 March 2006, Communication No. 1184/2003, at para. 8.6 and 8.12; see also *Faure v. Australia*, UNHRC, Decision of 31 October 2005, Communication No. 1036/2001, at para. 6.1; *Escolar v. Spain*, UNHRC, Decision of 28 March 2006, Communication No. 1156/2003, at para. 5.2 and 6.

- *C. Violation of the Right to an Appeal.* The appeal hearing considered only technical aspects of the case and refused to address any substantive issues of fact or law, in violation of the right to a full reconsideration of the conviction protected in Article 14(5). Despite his request to be present, Mr. Zhovtis was prevented from attending the appeal hearing, in violation of Article 14(5) and 14 (3)(d).
- *D. Arbitrary Sentence and Degrading Prison Conditions.* The sentence of imprisonment imposed on Mr. Zhovtis is arbitrary as it did not pursue a legitimate aim but was used for the purpose of silencing a human rights defender. The sentence imposed was excessive in relation to the seriousness of the offence, was not substantiated by an adequate assessment of its need, and was imposed after a trial that amounted to a denial of justice, in violation of Article 9. In addition, the prison conditions imposed are degrading in violation of Article 10, and the prison rules are applied in an arbitrary and discriminatory manner, in violation of his right to privacy protected in Article 17.
- *E. Violation of Duty to Protect a Human Rights Defender*. The trial process was suborned in order to silence a prominent human rights defender, and the arbitrary and discriminatory treatment of Mr. Zhovtis in prison aims to limit his legitimate activities, in violation of the right to promote human rights, which is rooted in the rights to Free Movement (Article 12), Privacy and Reputation (Article 17), Association (Article 22), and Expression (Article 19).

A. Violation of the Right to Call Independent Expert Witnesses

161. The conviction of Mr. Zhovtis was based solely or to a decisive extent on expert evidence presented by the prosecution. However, the trial court refused to consider independent expert evidence called on behalf of the defence that entirely refuted the prosecution claims and which was therefore of crucial importance to a fair trial. The appeal court had the opportunity to remedy this violation but instead chose to confirm and repeat it.

162. Article 14(3)(e) of the ICCPR guarantees the right of the accused to obtain the attendance of witnesses on his behalf:

> "In the determination of any criminal charge against him, everyone shall be entitled ... To obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".[243]

163. The Human Rights Committee emphasized the importance of this right in General Comment No. 32:

> "this guarantee is important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of

[243] Article 14(3)(e) ICCPR.

compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution."[244]

164. The Human Rights Committee has reviewed the right to call independent expert witnesses on behalf of the defence in the context of the presentation of expert evidence. In *Fuenzalida v. Ecuador*, the author requested an independent examination of blood and semen, and the domestic court denied his request. The Committee held that "the court's refusal to order expert testimony of crucial importance to the case" constituted a violation of Article 14(3)(e).[245]

165. The European Court of Human Rights has also affirmed the right to call witnesses on behalf of the defence under Article 6(3)(d) of the European Convention. Although the court may use its discretion and is not required to hear every witness, the essential aim of the provision is that the two parties are heard "under the same conditions" in order to achieve the full realization of the principle of "equality of arms".[246] With regard to the hearing of expert witnesses and the ability to obtain a "counter-expert", the Court has found it "easily understandable that doubts should arise, especially in the mind of an accused, as to the neutrality of an expert".[247] Consequently, the principle of equality of arms requires equal treatment as between the hearing of experts for the prosecution and "the hearing of persons who were or could be called, in whatever capacity, by the defence."[248]

166. In this case, neither the trial nor the appeal courts allowed the independent experts to be called as witnesses, nor did they permit their statements to be considered as evidence. The independent experts directly contradicted the central plank of the prosecution case, calling into question both the factual basis of the prosecution analysis and its methodology, and were of crucial importance to Mr. Zhovtis's ability to mount a proper defence.

B. Violation of the Right to a Fair Trial

167. Both the trial and appeal hearings were characterized by numerous violations of the right to a fair trial, such that the process as a whole was manifestly arbitrary and amounted to a denial of justice. The violations include the following: (1) the process was neither impartial nor respectful of the principle of equality of arms, as undue deference was given to the prosecution, while defence applications were peremptorily dismissed without adequate explanation; and (2) factual statements in which he estimated his speed during the accident which were obtained under

[244] UNHRC, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, at para. 39 ("General Comment No. 32").
[245] *Fuenzalida v. Ecuador*, UNHRC, Decision of 12 July 1996, UN Doc. CCPR/C/57/D/480/1991, at para. 9.5. The Human Rights Committee has also recently found a violation where no justification was given for the refusal to call prosecution witnesses to be cross-examined. *Kulov v. Kyrgyzstan*, UNHRC, Decision of 26 July 2010, UN Doc. CCPR/C/99/1369/2005, at para. 8.7.
[246] *Engel v. Netherlands*, ECtHR, Judgment of 8 June 1976, at para. 91.
[247] *Bonisch v. Austria*, ECtHR, Judgment of 6 May 1985, at para. 32. In this case court appointed expert had significant procedural advantage to the defence witnesses, and the defence were not able to obtain the appointment of a counter-expert.
[248] *Ibid*.

compulsion from Mr. Zhovtis were subsequently used against him, in breach of the procedural guarantees including the right to silence.

168. The International Commission of Jurists noted in its report on the observation of the appeal hearing of Mr. Zhovtis:

> "Mindful of the fact that it is generally for the national courts to assess and evaluate the facts of the case,[249] the observers recall that when the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation is manifestly arbitrary or amounted to a denial of justice, concerns as to the satisfaction of guarantees under Article 14 may arise."[250]

169. Article 14 of the ICCPR states: "In the determination of any criminal charge against him ... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The Human Rights Committee has established that the requirements of Article 14 constitute "an absolute right that may suffer no exception."[251]

170. While the Committee generally leaves the review or evaluation of facts and evidence to the courts of State parties, it foregoes this policy where "it can be ascertained that the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation was manifestly arbitrary or amounted to a denial of justice."[252]

171. When courts do not respect the Article 14 rights to equality of arms, impartial tribunal, to an appeal, and the right against self-incrimination, such deficiencies clearly amount to an arbitrary denial of justice and warrant review by the Committee. Mr. Zhovtis has not only suffered these procedural violations, but has spent more than a year in prison under degrading and discriminatory conditions as a result.

1. The trial and appeal were biased against Mr. Zhovtis.

172. The investigation, trial, and appeal failed to meet the requirements for equality of arms that are inherent to a fair trial. The process was characterized by bias and a lack of equality of arms, with inadequate reasons given throughout the process in a rush to convict Mr. Zhovtis as quickly as possible.

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[249] *Romanov v Ukraine*, UNHRC, Decision of 30 December 2003, UN Doc. CCPR/C/79/D/842/1998, at para. 6.4.

[250] Ex. 13 (a): ICJ Appeal Hearing Report, at p. 29, citing *Arutyniantz v. Uzbekistan*, UNHRC, Decision of 13 April 2005, UN Doc. CCPR/C/83/D/971/2001, at para 6.5

[251] *Gonzalez del Rio v. Peru*, UNHRC, Decision of 28 October 1992, UN Doc. CPCR/C/46/D/263/1987, at para. 5.1 (finding that the state party had not refuted the specific allegation that "some of the judges involved in the case had referred to its political implications . . . and justified the courts' inaction or the delays in the judicial proceedings on this ground").

[252] Arutyniantz v. Uzbekistan, Communication # 971/2001, CCPR/C/83/D/971/2001, 13 April 2005, para 6.5. *Mahmoud Walid Nakrash and Liu Qifen v. Sweden*, CCPR/C/94/D/1540/2007, 19 November 2008, paragraph 7.3. See also, Arusjak Chadzjian v. Netherlands, CCPR/C/93/D/1494/2006, 5 August 2008, para. 8.4, Surinder Kaur v. Canada, CCPR/C/94/D/1455/2006, 18 November2008, para. 7.3, Daljit Singh v. Canada, CCPR/C/86/D/1315/2004, 28 April 2006, para 6.3, Jonny Rubin Byahuranga v. Denmark, CCPR/C/82/D/1222/2003, 9 December 2004, paras. 11.3-11.4.

The process was characterized by bias and a lack of equality of arms

173. In General Comment No. 32, the Committee described in greater detail the implications of the impartiality requirement, noting that it contains both subjective and objective aspects.[253] First, judges "must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other."[254] Second, to fulfill the requirement of objective impartiality, the tribunal must appear impartial to a reasonable observer.[255]

174. In addition, equality of arms "means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds**,** not entailing actual disadvantage or other unfairness to the defendant."[256]

175. These conditions were not respected in Mr. Zhovtis's case. The trial and appeal hearings were marked by a judicial deference to the prosecution that skewed the fairness of the process.

176. The trial court rejected virtually all substantive applications by the defence without justification and refused to hear defence witnesses, while both trial and appeal courts allowed all but one of the applications of the prosecution.[257] The trial court allowed only those defence applications where the prosecutor did not object.[258] The appeals court granted only a single application of the defence—one supported by the prosecution—and dismissed all other defense applications.[259] The unequal treatment was particularly pronounced where the courts allowed the prosecution to present expert evidence but refused to permit the defence to do so. The observers of the International Commission of Jurists stressed "the striking disparity in treatment of the prosecution and defence evidence and witnesses in the case."[260] The observers noted that Mr. Zhovtis was not informed of his actual legal status during the investigation; that he was not allowed to participate in the appeal hearing; that most of the defence motions were dismissed without sufficient reasons; and that attempts were made to prevent a witness testifying on behalf of Mr. Zhovtis. Furthermore, the majority of the public was not allowed to be present at the hearing,

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[253] General Comment No. 32, at para. 21.
[254] *Ibid.,* citing *Karttunen v. Finland,* UNHRC, Decision of 23 October 1992, UN Doc. CPCR/C/46/D/387/1989, at para. 7.2.
[255] *Ibid.*, at para. 21.
[256] *Dudko v. Australia* , UNHRC, Decision of 23 July 2007, UN Doc. CCPR/C/90/D/1347/2005,at para. 7.4.
[257] See Ex. 60: Justice Initiative, List of the Defense Motions at the Zhovtis Trial; and Ex. 61: Justice Initiative, List of Defense Motions at the Zhovtis Appeal.
[258] *Ibid*.
[259] Ex. 13 (a): ICJ Appeal Hearing Report, at p. 29-30.
[260] *Ibid.*, at p. 32.

and the text of the judgement was amended contrary to the requirements of Kazakhstan law."[261]

177. The appeal court confirmed the violations of the trial chamber, and upheld the refusal of the trial court to hear the expert witnesses, giving the barest of explanations that the appeal court "does not have any doubts as to the objective nature of the [State] auto-technical analysis."[262] All defence applications at the appeal were rejected, except for one that the prosecution did not oppose. With regard to the appeal hearings, the International Commission of Jurists concluded that "[t]he Defence thus was denied an opportunity to present evidence on an equal basis with the Prosecution. The observers are of the opinion that repeated unreasoned denial of consideration of relevant documents at the first instance trial, and their blanket support for non-consideration with no or *pro-forma* reasons at the appeal level, raise concerns over impartiality of the Court and its possible interest in the outcome of the case."[263]

Failure to give adequate reasons

178. Human rights law requires that a tribunal must give proper reasons for its decisions. The Human Rights Committee has upheld this principle in numerous cases where Jamaican courts failed to give reasoned judgments, thereby effectively preventing the convicted persons from exercising their right to appeal.[264] The Committee found that, in order to enjoy the effective exercise of the right to have one's conviction and sentence reviewed by a higher tribunal, "a convicted person is entitled to have, within a reasonable time, access to written judgements, duly reasoned, for all instances of appeal."[265]

179. The European Court of Human Rights has also emphasized the duty to give reasoned judgments. The Court found in *Higgins and Others v. France* that, while this obligation "cannot be understood as requiring a detailed answer to every argument . . . the extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case."[266] In that case, the European Court found a violation of the right to a fair trial because the appeal court in question had failed to give express and specific explanations for refusing to consider proceedings from a lower court.[267]

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[261] Ex. 62: International Commission of Jurists, Press Release, "Kazakhstan: Zhovtis appeal hearing failed to meet international fair trial standards" (11 March 2010). Available at: http://icj.org/IMG/ZhovtisPRfinal_ENG.pdf

[262] Ex. 43 (a): First Appeal Decision, at p. 8.

[263] Ex. 13 (a): ICJ Appeal Hearing Report, at p. 30.

[264] *A. Little. v. Jamaica*, UNHRC, Decision of 1 November 1991, Communication No. 283/1988, at para. 9, read in conjunction with para. 8.5 (violation of article 14(5) of the Covenant; no reasoned judgment issued by the Court of Appeal for more than five years after dismissal); see also *A. Currie v. Jamaica*, UNHRC, Decision of 29 March 1994, Communication No. 377/1988, at para. 13.5 (violation of both article 14(3)(c) and (5) for failure of the Court of Appeal to issue written judgment thirteen years after dismissal of appeal).

[265] *Ibid.*

[266] *Higgins and Others v. France*, ECtHR, Judgment of 19 February 1998, at para. 42.

[267] *Ibid.*, at 43.

The Trial was Rushed

180. Article 14 has numerous guarantees that are designed to ensure that the accused person has sufficient time to respond to the prosecution case and to present an effective defence.[268] Unusually, the investigation of Mr. Zhovtis was completed within two weeks – a process that even included obtaining expert reports. He and his counsel were given only one day – a Saturday – to familiarize themselves with the case file. When they requested more time, the police threatened to impose pre-trial detention. Contrary to the law, the case was sent to court before the prosecutor's office dealt with the defense's applications. The trial started two weeks after Mr. Zhovtis learned he was a suspect.[269] While the judge allowed the defence an extra two days as the lawyers could not attend on that day, the trial itself was marked by rushed decisions that were given without reasons. When defence counsel requested time to prepare their closing arguments, they were given only 40 minutes.

181. Furthermore, the trial court produced its six-page verdict within 25 minutes of the end of the trial, despite the fact that Kazakh law requires a judge to reflect on a series of 18 questions before delivering the verdict. In addition, several discrepancies exist between the verdict that was read out in court and the verdict that was subsequently published. The entire process was characterized by haste unknown in the criminal justice system, apparently in an attempt to convict Mr. Zhovtis as quickly as possible. The Committee ruled on a similar situation in the recent case of *Kulov v. Kyrgyzstan,* finding a violation of the author's rights under Article 14(1) of the Covenant in part because the "63-page judgment was prepared within three hours, putting into question the partiality of the judges".[270]

182. In conclusion, rather than being a careful examination of the two sides of an adversarial process, the trial and appeal were skewed in favour of the prosecution. The judiciary acted to promote the interests of the prosecution above those of the defence with sufficient bias to cause a reasonable observer to conclude that the process was not impartial.

2. The trial and appeal did not respect the right against self-incrimination.

183. The trial court failed to respect the right against self-incrimination by accepting factual estimates given by Mr. Zhovtis as the basis of the prosecution expert evidence. At the time he made those statements, Mr. Zhovtis had not been informed that he was a suspect rather than a witness, an oversight with serious legal consequences: he was deliberately mislead into thinking that he was (as a witness) under compulsion to answer the questions, as opposed to (as a suspect) entitled to

[268] The Committee has held: "that the right of an accused to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and an emanation of the principle of equality of arms." *Sawyers, McLean and McLean v. Jamaica,* UNHRC, Decision of 7 April 1988, UN Doc. CCPR/C/41/D/256/1987 (1991), at para. 13.6. See also *Paul Kelly v. Jamaica*, UNHRC, Decision of 8 April 1991, UN Doc. CCPR/C/41/D/253/1987, at para. 5.9; *C. Wright v. Jamaica*, UNHRC, Decision of 27 July 1992, UN Doc. CCPR/C/55/D/459/1991, at para. 8.4.

[269] The determination of what constitutes "adequate time" for preparation of a defense is dependent upon the specific circumstances of an individual case. See *Smith v. Jamaica,* UNHRC, Decision of 31 March 1993, UN Doc. CCPR/C/47/D/282/1988, at para. 10.4.

[270] *Kulov v. Kyrgyzstan*, UNHRC, Decision of 26 July 2010, UN Doc. CCPR/C/99/1369/2005, at para. 8.4

refuse to answer the questions. Despite the fact that these initial estimations by Mr. Zhovtis were basically just his assumptions, they were used by the official investigators to develop the State auto-technical analysis. This analysis was subsequently admitted by the trial court and served as the primary basis for the conviction. This violation of the right to a fair trial was confirmed and repeated by the appeal courts, which not only failed to overturn the decision of the trial court, but relied on the same evidence to convict Mr. Zhovtis.

184. Fair trial guarantees, including the right against self-incrimination, apply not only to the trial itself but also to pre-trial proceedings, as an initial failure to guarantee due process in pre-trial proceedings may jeopardize the fairness of the subsequent trial.[271] The Human Rights Committee has held that the guarantee against self-incrimination in Article 14(3)(g) of the ICCPR empowers judges to consider "any allegations made of violations of the rights of the accused during *any stage of the prosecution*."[272]

185. The European Court of Human Rights has found a violation of the right against self-incrimination where statements that were taken in breach of procedural guarantees were used in subsequent criminal proceedings with an aim of incriminating the applicant.[273] The Court also found that the right is not limited to directly incriminating statements, but also includes factual admissions:

> "The right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature—such as exculpatory remarks or mere information on questions of fact—may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. . . ."[274]

186. Where the statements are made when the suspect is accidentally or deliberately described as a witness rather than a suspect, there is still a violation. The European Court found a fair trial violation in a situation where, even though the accused had been formally designated as a witness under the criminal procedure laws, he should have been regarded *de facto* as a person charged with a criminal offence when he was asked to testify as a witness.[275] That Court has found that the right to a fair trial "can be applicable to cases of compulsion to give evidence even in the absence of

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[271] See *Imbrioscia v Switzerland*, ECtHR, Judgment of 24 November 1993, at para 36; *John Murray v United Kingdom*, ECtHR, Judgment of 8 February 1996, at para 62; *Berlinski v Poland*, ECtHR, Judgment of 20 June 2002, at para 75.
[272] UNHRC, General Comment No. 13, Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, UN Doc. HRI/GEN/1/Rev.1, 13 April 1984, at p. 14, para. 14-15 (emphasis added).
[273] *Saunders v. United Kingdom*, ECtHR (GC), Judgment of 17 December 1996, at para. 70-71 [Grand Chamber judgment] (emphasis added).
[274] *Ibid*.
[275] *Serves v. France*, ECtHR, Judgment of 20 October 1997, at para. 42.

any other proceedings, or where an applicant is acquitted in the underlying proceedings".[276]

187. As a witness, Mr. Zhovtis had little choice but to answer the questions posed by law enforcement authorities.[277] However, Articles 68 and 114 of the Criminal Procedure Code of Kazakhstan ("CPC") require that individuals be told when they are a suspect and be informed of their rights as a suspect.[278] In addition, where a person's status of a witness changes to that of a suspect, Article 116(3) of the CPC provides: "any testimony given by a suspect in the course of the preliminary interrogation in the capacity of a witness may not be used as evidence nor become a basis for charges."

188. The failure to inform Mr. Zhovtis of his status also deprived Mr. Zhovtis of a number of additional rights guaranteed to a suspect under the CPC that are necessary to ensure the equality of arms with the prosecution. These include: the right to be informed that his statements might be used against him; the right to access the case file; the right to challenge the expert and the right to file an application to suspend the forensic examination agency from conducting the examination; the right to file an application to appoint as experts individuals named by him or experts from the particular forensic examination bodies, as well as to file an application to conduct the forensic examination by a panel of experts; and the right to file an application to put additional questions before the experts and to clarify the questions already posed.[279]

189. Mr. Zhovtis participated in the investigation in the belief that he was a witness who was compelled by law to answer the questions put to him. The statements he made during this time became the foundation of the prosecution case against him. These statements included pure conjectures by Mr. Zhovtis about the speed of his vehicle, the speed of oncoming traffic, and the distances between vehicles. The prosecution introduced these conjectures into evidence as hard facts, and used them to complete expert analysis of the accident and to reach conclusions about causation and liability. Despite repeated requests to do so, the trial court refused to exclude this evidence, and instead relied on it as the sole piece of evidence to convict Mr. Zhovtis. The appeal court confirmed and repeated this violation.

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[276] *O'Halloran and Francis v. United Kingdom*, ECtHR, Judgment of 29 June 2007, at para. 35; see also *Funke v. France*, ECtHR, Judgment of 25 February 1993, at para. 39 and 40; and *Heaney and McGuinness v. Ireland*, ECtHR, Judgment of 21 December 2000, at para. 43-45.

[277] Article 82.4 of the CPC states that "a witness is required to … give all true information that he knows about the case and to answer all the questions". Article 82.6 of the CPC states that "a witness bears criminal responsibility for false testimony as provided for by the Criminal Code of Kazakhstan." And that "avoiding giving testimony or failure to appear following subpoena by the investigative body will lead to administrative responsibility." In addition, Article 82.3 of the CPC establishes the right of a witness to refuse to provide testimony that can result in the initiation of a criminal or administrative investigation against himself, his spouse or close relatives.

[278] CPC, at Articles 68(1) ("A suspect is considered a person against whom a criminal case has been initiated on the basis of and in the procedures established by this Code in connection with the suspicion of his commission of a crime, which is announced to him by the investigator, or is detained or has a measure of restriction applied prior to arraignment") and Article 68(7) ("A suspect has the right . . . to receive from the person detaining him an immediate explanation of the rights belonging to him").

[279] *Ibid.*, at Article 68(7).

C. Violation of the Right to an Appeal

190. In addition to the failings outlined above, whereby the appeal hearings confirmed and repeated violations of Article 14 in the trial, the appeal hearing further violated the right to a fair trial because (1) the appeal court failed to address the substance of the appeal and limited itself to consideration of the formal aspects of the conviction, contrary to Article 14(5) of the ICCPR, and (2) Mr. Zhovtis was not present at the appeal, despite his request to be there, contrary to Article 14 (5) and 14 (3)(d) of the ICCPR.

191. Article 14(5) of the ICCPR states: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." Article 14(3)(d) of the ICCPR states that, in the determination of any criminal charge against him, everyone shall be guaranteed "[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing".

1. Failure to Address the Substance of the Appeal

192. The appeals court violated Mr. Zhovtis's right to review under Article 14 by failing to engage in a substantive review through a full evaluation of the evidence and the conduct of the trial. Specifically, the appeal court: (a) failed to consider the evidence of the independent experts; (b) failed to consider the evidence from the victim's family; (c) failed to answer numerous applications made by the defence; and (d) failed to review the reasons given in the court below.

193. The Human Rights Committee has held that the right to review under Article 14 requires a substantive review, "both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case."[280] A review "limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant."[281] In other words, in addition to pure questions of law, the review must provide "for a full evaluation of the evidence and the conduct of the trial".[282] To this end, the Committee has said that "effective access" must include access to "a duly reasoned, written judgement of the trial court" as well as "to other documents, such as trial transcripts, necessary to enjoy the effective exercise of the right to appeal."[283]

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[280] General Comment No. 32, at para. 48, citing: *Bandajevsky v. Belarus*, UNHRC, Decision of 28 March 2006, UN Doc. CCPR/C/86/D/1100/2002, at para. 10.13; *Aliboeva v. Tajikistan*, UNHRC, Decision of 18 October 2005, UN Doc. CCPR/C/85/D/985/2001, at para. 6.5; *Khalilova v. Tajikistan*, UNHRC, Decision of 18 October 2005, UN Doc. CCPR/C/85/D/985/2001, at para. 7.5.

[281] *Ibid.*, citing *Gómez Vázquez v. Spain*, UNHRC, Decision of 20 July 2000, UN Doc. CCPR/C/69/D/701/1996, at para. 11.1.

[282] *V. P. Domukovsky, Zaza Tsiklauri, Petre Gelbakhiani and Irakli Dokvadze v. Georgia*, UNHRC, Decision of 6 April 1998, UN Doc. CCPR/C/62/D/623/1995, CCPR/C/62/D/624/1995, CCPR/C/62/D/626/1995, CCPR/C/62/D/627/1995, at para. 18.11.

[283] General Comment No. 32, at para. 49, citing: *Van Hulst v. Netherlands*, UNHRC, Decision of 1 November 2004, UN Doc. CCPR/C/82/D/903/1999, at para. 6.4; *Bailey v. Jamaica*, UNHRC, Decision of 31 March 1993, UN Doc. CCPR/C/47/D/334/1988, at para. 7.2; *Morrison v. Jamaica*, UNHRC, Decision

a) The appeal court refused to consider the independent expert evidence

194. As in the trial court hearing, the appeal court rejected without justification three independent expert analyses asserting that Mr. Zhovtis could not have avoided the accident. The appeals court also rejected without justification the application made by the defence to hear the testimony of the author of one of the independent forensic analyses, a certified independent forensic expert.

b) The appeal court failed to consider the evidence from the deceased's family

195. As outlined above, extraordinary obstacles appear to have been placed in the way of Mrs. Moldabayeva in order to stop her from attending the appeal hearing. Mrs. Moldabayeva's lawyer made every effort to contradict her position and her testimony. She eventually managed to give limited evidence. Rather than undertake a full investigation into the apparent attempts to prevent her from giving evidence, the appeal court abruptly cut off her testimony, and then failed to address the fact that she had asked for reconciliation, a request that should have ended the proceedings under Kazakh law. The attempts of the KIBHR staff to initiate a proper investigation into the accident, including several applications to the prosecutor's office and courts, yielded no result.

196. The International Commission of Jurists noted:

> "The Kazakhstan authorities as well as the Court were aware of the intent of the mother of the deceased to present testimony containing a statement forgiving Mr. Zhovtis, which she had submitted in written form. The statement of the mother of the deceased should have been considered a statement of a witness, as it is irrelevant as to what procedural status she had under the Kazakhstan law, as long as the statement she made was taken into account by the Court.[284] Furthermore, since reconciliation is one of the necessary elements for dismissing criminal charges, the statement of the mother of the deceased could have been of the primary importance to the case. As the evidence was potentially of such decisive importance, attempts to prevent her from attending the trial could amount to 'serious obstruction of the Defence <…> therefore precluding a fair trial of the defendant.'[285] The victim's mother managed to appear before the Court. However, it should be noted that when Mr. Zhovtis's Defence brought the Court's attention to the attempts preventing her from coming, the Court refused to consider the matter."[286]

c) The appeal court left unanswered multiple requests made by the defence.

197. The appeal court violated the right of review by failing to address numerous substantive requests that were made on behalf of the defence. These included: an application to declare as invalid the investigation leading to the criminal case and to

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of 31 July 1998, UN Doc. CCPR/C/63/D/611/1995, at para. 8.5; and *Lumley v. Jamaica*, UNHRC, Decision of 30 April 1999, UN Doc. CCPR/C/65/D/662/1995, at para. 7.5.

[284] Citing *Artner v.Austria*, ECtHR, Judgment of 28 August 1992, at para. 19; and *Isgro v Italy*, ECtHR, Judgment of 19 February 1991, at para 33.

[285] *Peart and Peart v. Jamaica*, UNHRC, Decision of 19 July 1995, UN Doc. CCPR/C/54/D/464/1991, at para. 11.5.

[286] Ex. 13 (a): ICJ Appeal Hearing Report, at p. 30.

reject all conclusions drawn and decisions made in the course of such proceedings; and an application to consider the reconciliation statement by the mother of the deceased as a mitigating factor under Article 67 of the CPC, which provides for relief of criminal liability for certain offences if the accused has reconciled with the victim and made amends for the harm.

d) The appeal court failed to give any reasons for its decision

198. The appeal court violated Mr. Zhovtis's right to review by obstructing his access to "a duly reasoned, written judgement of the trial court".

199. According to Mr. Zhovtis's defence counsel, numerous discrepancies exist between the verdict as read out and recorded in the court room and the written verdict provided to Mr. Zhovtis and the defence on 9 September 2009 (see paragraph 60 of the facts, above).[287] The defence made an application to the appeals court to add to the case file audio and video tapes showing the substantial differences between the trial court verdict as announced at the end of the hearing and the text of the trial court verdict released subsequent to the hearing, and to declare as unlawful the sentence issued by the trial court. The application noted that the amendment of a trial court verdict subsequent to its announcement at the end of trial violates Kazakh law. The appeals court rejected the application, following an objection by the prosecution that the source of the tapes could not be established.

2. Presence at the Appeal

200. The State Party violated Mr. Zhovtis's rights to effective representation under Article 14(3)(d) of the ICCPR by preventing him from attending his appeal hearing and denying him the opportunity to give effective instructions for his defence at the appeal. This failure is another aspect of the lack of equality of arms.

201. The UN Human Rights Committee has said that the phrase "according to law" within Article 14(5) of the ICCPR relates "to the determination of the modalities by which the review by a higher tribunal is to be carried out."[288] Specifically, the Committee has found that "if domestic law provides for further instances of appeal, the convicted person must have effective access to each of them".[289] Effective access implies the Article 14(3)(d) rights "to be tried in his presence" and "to defend himself in person or through legal assistance of his own choosing", the restriction of which "must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice."

202. The Committee has commented that trials in the absence of the accused are only permitted "in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present."[290] This means not only that all due notification

[287] CPC, at Article 377, which states that amendments to the verdict shall not be allowed after it is announced.
[288] General Comment No. 32, at para. 45, citing *Salgar de Montejo v. Colombia*, UNHRC, Decision of 24 March 1982, Communication No. R.15/64, at para.10.4.
[289] *Ibid.*
[290] *Ibid*. at para. 36.

has been made to inform the accused of the date and place of the hearing, but also that the accused was "summoned in a timely manner."[291]

203. With regard to appeal hearings, the Committee found a violation of Article 14(3)(d) where the accused had indicated that he wished to be present in person during the appeal proceedings, but that a delay in notifying him of the hearing had "jeopardized his opportunities to prepare his appeal and to consult with his court-appointed lawyer, whose identity he did not know until the day of the hearing itself."[292]

204. In the recent case of *Kulov v. Kyrgyzstan*, the author claimed that the examination of his case on the supervisory review procedure of the Supreme Court took place in his and his lawyers' absence, although with the participation of the prosecutor, even though the author requested to be present according to his rights under the Constitution of Kyrgyzstan and the Criminal Procedure Code.[293] The Committee found a violation of Article 14(5) of the Covenant, noting that, despite the fact that under the Criminal Procedure Code of Kyrgyzstan that participation of the accused at the hearing of the supervisory review procedure is decided by the court itself, the State party had "failed to explain the reasons why it did not allow the participation of the author or his lawyers at the proceedings at the Supreme Court".[294]

205. The European Court of Human Rights has affirmed the principle, holding that:

> "… where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence. The principle that hearings should be held in public entails the right for the accused to give evidence in person to an appellate court. From that perspective, the principle of publicity pursues the aim of guaranteeing the accused's defence rights."[295]

206. An influential commentator has suggested that there is also a violation of equality of arms in such circumstances:

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[291] *Ali Maleki (represented by his son, Kambiz Maleki) v. Italy*, UNHRC, Decision of 27 July 1999, U.N. Doc. CPCR/C/66/D/699/1996, at para. 9.3-9.4; see also *Daniel Monguya Mbenge v. Zaire*, UNHRC, Decision of 25 March 1983, Communication No. 16/1977, at para. 14.98.

[292] *L. Simmonds v. Jamaica*, UNHRC, Decision of 23 October 1992, Communication No. 338/1988, at para. 8.4. See also a case where the lawyer failed to follow the accused's instructions: *G. Campbell v. Jamaica*, UNHRC, Decision of 30 March 1992, Communication No. 248/1987, at para. 6.6.

[293] *Kulov v. Kyrgyzstan*, UNHRC, Decision of 26 July 2010, UN Doc. CCPR/C/99/1369/2005, at para. 3.12.

[294] *Ibid*., at para. 8.8.

[295] *Tierce and Others v. San Marino,* ECtHR Judgment of 25 July 2000, at para. 95. In *Botten v. Norway,* the European Court found a violation of the right to fair trial where the Supreme Court of Norway convicted and sentenced the applicant, in spite of not having summoned him or heard him in person. Even though the proceedings before the lower appeals court had included a public hearing at which the applicant was represented by counsel, the European Court nevertheless found that the "Supreme Court was under a duty to take positive measures" to "summon the applicant and hear evidence from him directly before passing judgment". *Botten v. Norway,* ECtHR Judgment of 19 February 1996*,* at para. 53.

> "The most important criterion of a fair trial is the *principle of "equality of arms"* between the plaintiff and respondent or the prosecutor and defendant *("audiatur et altera par")*. For instance, this principle is violated if the accused is excluded from an appellate hearing when the prosecutor is present or if a court expert takes such a dominating position that he is in effect a witness for the prosecution."[296]

207. As set out above, Mr. Zhovtis filed a written petition asking to be present at his appeal. He did not receive an official response, but a day before the hearing he was told by the administration of the pre-trial detention center to prepare to go to court. Mr. Zhovtis was not informed that the hearing was taking place in his absence, and at the start of the hearing the defence filed another application specifically requesting that Mr. Zhovtis be present. Both requests cited Article 408(6) of the CPC, which provides for a right of those who can file an appeal under CPC Article 396 to participate in person in the appeal hearing in all cases. A defendant is mentioned among persons who can file an appeal under Article 396 of the CPC, meaning that Mr. Zhovtis had a right to participate in a hearing in every instance.

208. The Court refused the application, arguing that pursuant to Article 408(2) of the CPC, the personal participation of the defendant is only required when the Prosecutor has requested an increased punishment. Despite the repeated requests of the defence, the appeal court refused to issue a separate decision giving reasons why Mr. Zhovtis was not brought to the court, or to grant the request of Mr. Zhovtis to be brought before the court.[297]

209. The appeal court did not have an "objective and sufficiently serious purpose" to refuse to allow Mr. Zhovtis to be present at the appeal hearing, failing to meet the Committee's standard that proceedings conducted *in absentia* may only be permitted "in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present." Here, the appeal court did not heed Mr. Zhovtis's request to exercise his right, and prevented him from being present at the hearing. Indeed, the holding of the appeal hearing without Mr. Zhovtis presents an even greater risk of unfair trial than in the recent *Kulov* case, since in that case the hearing was carried out by a supervisory body empowered only to examine violations of the law, whereas the appeal court here passed judgment on issues of fact.[298]

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[296] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, Germany: N.P. Engel Verlag, 2005), 321. Nowak cites the following Committee jurisprudence stressing the principle of "equality of arms": *Casanovas v. France*, UNHRC, Decision of 19 July 1994, U.N. Doc. CCPR/C/51/D/441/1990, at para. 9.3; *Dominique Guesdon v. France*, UNHRC, Decision of 25 July 1990, UN Doc. CCPR/C/39/D/219/1986, at para. 10.2; *Dieter Wolf v. Panama*, UNHRC, Decision of 26 March 1992, UN Doc. CCPR/C/44/D/289/1988, at para. 6.6; and *Fei v. Colombia*, UNHRC, Decision of 4 April 1995, UN Doc. CCPR/C/50/D/514/1992, at para. 8.4.

[297] Ex. 13 (a): ICJ Appeal Hearing Report, at p. 15.

[298] See generally *Kulov v. Kyrgyzstan*, UNHRC, Decision of 26 July 2010, UN Doc. CCPR/C/99/1369/2005.

210. The impact of depriving Mr. Zhovtis of the possibility to be present at his appeal was particular serious in this case. Mr. Zhovtis had refused to exercise his right to have the last word during his trial because of the violations of his rights during that trial, and in particular the fact that he had been given insufficient time to prepare. By conducting his appeal *in absentia*, the state deprived him of a possibility to personally present his version of the events before a court. Furthermore, because he was led to believe that he would be present at the hearing by the detention administration, and was not informed on the day that the hearing was taking place in his absence, he was denied an opportunity to discuss with his lawyers what strategy they should follow in his absence.

D. Arbitrary Sentence and Degrading Prison Conditions

211. The sentence of imprisonment imposed upon Mr. Zhovtis did not pursue a legitimate aim but was used to silence a prominent human rights defender. The sentence imposed on Mr. Zhovtis and confirmed by the appeal court is arbitrary because it is unnecessarily lengthy and severe, and out of all proportion to the gravity of the offence, in violation of Article 9 ICCPR. In addition, the conditions Mr. Zhovtis has been subjected to during his imprisonment are specific to him and excessive, and thus arbitrary and degrading, in violation of Articles 10 and 17 of the ICCPR.

1. The sentence of imprisonment imposed upon Mr. Zhovtis is arbitrary.

212. The sentence of imprisonment imposed upon Mr. Zhovtis by the trial court and affirmed by the appeals court is arbitrary because (a) it was imposed for the improper purpose of silencing a human rights defender, rather than for any legitimate purpose, and (b) it is excessive in relation to the seriousness of the offence committed and the mitigation presented, was unsubstantiated by an adequate assessment of why it was necessary, and followed an unfair trial that amounted to a denial of justice.

a) *Imprisonment for an improper purpose*

213. The European Court of Human Rights has found that the determination of whether or not a prison sentence is arbitrary must include an assessment of whether the punishment is necessary to achieve a legitimate aim.[299] In *Gusinskiy v. Russia*, the Court specifically condemned detention which was used partly for the purpose of silencing political opposition.[300] In that case, the state arrested and detained Mr. Gusinskiy, the owner of media holding company regarded as being one of the few opposition media groups, only to release him one month later after he agreed top sell his company to a state-owned energy company. Mr. Gusinskiy contended that Russian authorities were "motivated by a wish to effectively silence his media and, in particular, its criticisms of the Russian leadership" and that his detention constituted "an abuse of power".[301] The Court found a violation of Article 18[302] in

[299] *Saadi v. United Kingdom,* ECtHR (GC) Judgment of 29 January 2008, at para. 70.
[300] *Gusinkiy v. Russia*, ECtHR, Judgment of 19 May 2004.
[301] *Ibid.,* at para. 70 and 72.

conjunction with Article 5(1)(c)[303] of the European Convention, holding that the state had deprived the applicant of his liberty without a legitimate aim:

> "…[I]t is not the purpose of such public-law matters as criminal proceedings and detention on remand to be used as part of commercial bargaining strategies. The facts that Gazprom asked the applicant to sign the July agreement when he was in prison, that a State minister endorsed such an agreement with his signature and that a State investigating officer later implemented that agreement by dropping the charges strongly suggest that the *applicant's prosecution was used to intimidate him*. . . . In such circumstances the Court cannot but find that the restriction of the applicant's liberty permitted under Article 5 § 1 (c) was applied not only for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, but also for other reasons."[304]

b) Disproportionate Sentence after an Unfair Trial

214. The Human Rights Committee has clearly indicated that detention is arbitrary if it is disproportionate to the prevailing circumstances. In *A. v. Australia*, the Committee stated that "detention should not continue beyond the period for which the state can provide appropriate justification".[305] In other words, a sentence must not be totally disproportionate to the severity of the crime committed: the punishment must fit the crime.[306] The Committee reiterated this principle in considering mandatory prison terms, finding that such legislation "leads in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed," and was inconsistent with legitimate State aims.[307] In *Fernando v. Sri Lanka*, in which the court in question imposed a one-year term of "rigorous imprisonment" on the author, the Committee found that the court had grossly abused its powers to impose penalties for "contempt of court" and that it did so without offering a reasoned explanation as to why such a severe and summary penalty was warranted.[308] The Committee announced that "the imposition of a draconian penalty without adequate explanation and without independent procedural safeguards" falls within the prohibition of arbitrary deprivation of liberty.[309] The Committee has

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[302] Article 18 of the ECHR states: "The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."
[303] Article 5(1)(c) of the ECHR states: "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: . . . (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed and offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".
[304] *Gusinkiy v. Russia*, ECtHR, Judgment of 19 May 2004, at para. 76-78 (emphasis added).
[305] *A v. Australia*, UNHRC, Decision of 30 April 1997, UN Doc. CCPR/C/59/D/560/1993, at para. 9.4.
[306] *Ibid.*; see also *C. v. Australia*, UNHRC, Decision of 28 October 2002, UN Doc. CCPR/C/76/D/900/1999.
[307] UNHRC, Concluding Observations of Australia, UN Doc. CCPR/CO/69/AUS, 28 July 2000, at para. 522. The legislation at issue had a legitimate objective, the reduction of the over-representation of indigenous persons in the criminal justice system; however, the punishment was inconsistent with this objective.
[308] *Fernando v. Sri Lanka*, UNHRC, Decision of 31 March 2005, UN Doc. CCPR/C/83/D/1189/2003, at para. 9.2.
[309] *Ibid.*

found that prison sentences following an unfair process may violate the prohibition of arbitrary deprivation of liberty in Article 9. In *Little v. Jamaica*, the Committee found that "the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant."[310]

215. The sentence of imprisonment imposed on Mr. Zhovtis was disproportionate to the severity of the crime he was convicted of. It is not clear how such a sentence furthers the legitimate aim of preventing car accidents committed by negligence, as was the prosecution case. The sentence of four years given to Mr. Zhovtis was only one year short of the statutory maximum, despite the fact that the defence presented multiple points of mitigation on behalf of Mr. Zhovtis. Mr. Zhovtis reconciled with the victim, who had expressed her view that she did not wish for him to be prosecuted, which is a specific point of mitigation under Article 67 of the CPC. In addition, the trial court followed the prosecutor's advice to take the death of the victim into account as an aggravating circumstance, despite the fact that, under Article 296(2) of the CPC, the death of the victim in a traffic accident is not an aggravating circumstance but an element of the crime. Both the trial and appeal courts completely failed to explain why they had not taken these important factors into account in passing sentence.

2. The prison conditions under which Mr. Zhovtis is detained are degrading.

216. The State Party violated Mr. Zhovtis's right to respect for his dignity without discrimination by the denial of medical treatment, by an arbitrary and coerced labor contract, and by the discriminatory and arbitrary application of the prison rules so as to deny him privileges that are provided for by law and afforded to other prisoners. These violations, together with his placement in a hastily created prison with stricter rules than similar institutions, indicate that the treatment of Mr. Zhovtis is meant as retribution for his work as a human rights defender and his activities as a critic of the government.

217. Article 10 of the ICCPR guarantees that:

> "1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. . . . 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."

218. In its General Comment on Article 10, the Human Rights Committee reiterated that prisoners must be treated with dignity which means that they cannot be singled out for individual treatment: "Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion,

[310] *Little v. Jamaica,* UNHRC, Decision of 1 November 1991,UN Doc. CCPR/C/43/D/283/l988, at para. 8.6.

political or other opinion, national or social origin, property, birth or other status."[311]

219. The UN Standard Minimum Rules for the Treatment of Prisoners establish further guarantees for the respect of the human dignity of persons deprived of their liberty. In particular, the rules highlight that "The regime of the [penal] institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings."[312]

Denial of Medical Treatment

220. For three weeks at the end of 2009 Mr. Zhovtis was denied medical treatment, despite the fact that he was in excruciating pain from a toothache that began in early November. The prison had no dental office, and his repeated requests to travel outside the prison for dental treatment were denied. He was eventually escorted to an outside dental clinic where, due to the severity of his medical need, he was treated for more than six weeks at significant expense (see paragraphs 96-98 of the facts, above).

221. The UN Standard Minimum Rules for the Treatment of Prisoners ("UN Standard Minimum Rules") establish that

> "The medical services should be organized in close relationship to the general health administration of the community or nation. . . . Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers. . . . The services of a qualified dental officer shall be available to every prisoner."[313]

222. The Human Rights Committee has ruled that providing medical, including dental, treatment is an element of the humane treatment of detainees.[314] The Committee found a violation in *Simpson v Jamaica* where a convict suffering from an undiagnosed and untreated condition was visited by a prison doctor but denied specialist treatment.[315] The European Court of Human Rights has also found degrading treatment where a prisoner was refused access to a specialist, noting that "[h]e must have known that he risked at any moment a medical emergency with very serious results and that no immediate medical assistance was available. This

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[311] UNHRC, General Comment 21, Article 10: Replaces general comment 9 concerning humane treatment of persons deprived of liberty, UN Doc. HRI/GEN/1/Rev.1, 1994, at p. 33, para. 4.
[312] UN Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, ("UN Standard Minimum Rules"), Rule 60.
[313] *Ibid.,* Rule 22(1)-(3).
[314] *Floyd Howell v. Jamaica*, UNHRC, Decision of 21 October 2003, UN Doc. CCPR/C/79/D/798/1998, at para 6.2.
[315] *Simpson v Jamaica*, UNHRC, Decision of 31 October 2001, UN Doc. CCPR/C/73/D/695/1996, at para 7.2.

must have given rise to considerable anxiety on his part."[316] In the European Court's view, the failure to provide basic medical assistance to the applicant when he clearly needed and had requested it and the refusal to allow independent specialised medical assistance, together with other forms of humiliation, "amounted to degrading treatment within the meaning of Article 3 of the Convention."[317]

Coerced Labor Contract

223. While the ICCPR and other international law do not explicitly prohibit involuntary prison labor, the Constitution of Kazakhstan and the Labor Code of Kazakhstan do not provide for an exception to the prohibition of forced labor.

224. The UN Standard Minimum Rules establish that "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."[318]

225. Mr. Zhovtis is imprisoned in a colony-settlement for individuals convicted of negligent offences, which allows and should encourage prisoners to work outside of the facility. The administration decisions to prevent him from taking a job offer, to impose a disciplinary sanction upon him, and to coerce him to sign a labor contract fit the larger pattern of discriminatory treatment towards him at the prison facility. Almost all prisoners in the facility where Mr. Zhovtis is held work outside the facility, and there are effectively no jobs inside. Furthermore, the arbitrary application of the disciplinary sanction hindered the enjoyment of other rights by Mr. Zhovtis, such the right to contacts with the outside world described below.

<u>Right to Privacy and Family Life</u>

226. In addition to arbitrarily banning Mr. Zhovtis from leaving the facility, Kazakhstan appears to have created a new prison in order to detain him far away from his family and from other persons with whom he needs to have contact. As a practical matter, Mr. Zhovtis has been limited in the exercise of the right to have meaningful contact with his family and colleagues. Despite the fact that he is held in an semi-open prison where prisoners are released to visit their families at weekends and on holidays, Mr. Zhovtis has never been allowed to leave the colony unaccompanied. Only on eight occasions was he allowed to leave the facility without being accompanied by prison employees, for about four hours each time. He has spent more than a year in this facility and has never been awarded leave to spend a week-end outside the prison, a regular privilege in the "colony-settlements" awarded to several dozen other prisoners in the same facility as Mr. Zhovtis.

227. Article 17 of the ICCPR forbids unlawful and arbitrary interferences with privacy and family life. This requires that the relevant legislation must "specify in detail the precise circumstances in which such interferences may be permitted" so as not to

[316] *Sarban v Moldova*, ECtHR, Judgment of 4 October 2005, at para. 87.
[317] *Ibid.*, at para. 90.
[318] *Ibid.*, Rule 71(6).

give too much discretion to decision-makers in authorizing interferences.[319] For an interference to be lawful, it must "provide satisfactory legal safeguards against arbitrary application."[320] The Committee has commented specifically on the importance of respecting the privacy and family rights of prisoners, expressing concern over "harsh rules of conduct in prisons that restrict the fundamental rights of prisoners, including freedom of speech, freedom of association and privacy."[321] The European Court of Human Rights has found a violation of the right to private and family life where domestic law did not clearly indicate the discretion conferred on public authorities to interfere with family visits, such that the complainant did not enjoy "the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society."[322]

228. The restrictive rules in Kazakhstan have been criticized by the United Nations Special Rapporteur on Torture, who expressed concern with regard to the restrictions on contact with the outside world and recommended that Kazakhstan "design the system of execution of punishment in a way that truly aims at rehabilitating and reintegrating offenders, in particular by abolishing restrictive prison rules and regimes, including for persons sentenced to long prison terms, and maximizing contact with the outside world."[323]

229. The law in Kazakhstan and the rules in the facility where Mr. Zhovtis is imprisoned provide in theory for extensive contacts with the outside world, including short and long term visits outside the colony, and the possibility for prisoners to live in their own or rented houses.[324] However, such visits can be prohibited at the discretion of the head of the colony-settlement. In the case of Mr. Zhovtis, the authorities significantly restrict his enjoyment of those rights, denying many of them altogether. Thereafter, the authorities allowed one visit (which happened to coincide

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[319] UNHRC, General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17), UN Doc. HRI/GEN/1/Rev.6 (2003), at para. 3 ("General Comment No. 16").

[320] *Pinkney v. Canada,* UNHRC, Decision of 29 October 1981, UN Doc. CPCR/C/OP/1, at para. 31-34.

[321] UNHRC, Concluding Observations on Japan, UN Doc. CPCR/C/79/Add. 102. (1998).

[322] *Vlasov v. Russia*, ECtHR, Judgment of 12 June 2008, at para. 123-27 (holding that "the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, in order to give the individual adequate protection against arbitrary interference"). See also *Moiseyev v. Russia*, ECtHR, Judgment of 9 October 2008, at para. 249-51; and *Al-Nashif v. Bulgaria,* ECtHR, Judgment of 20 June 2002, at para. 119.

[323] Ex. 63: Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to Kazakhstan, UN Doc. A/HRC/13/39/Add.3, 16 December 2009, at p. 22. Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13specialsession/A.HRC.13.39.Add.3_en.pdf

[324] According to the Kazakhstan's Penal Code, prisoners in "colony settlements" live without security guards, under the surveillance of the prison administration. They have the right to move freely on its territory, the right to unlimited short-term (two to four hours) and long-term (up to five days) visits outside the facility, and the right to live with their family outside the facility in their own or rented houses. If prisoners have a regular job and positive references, they may enjoy twenty-four business days vacation each year with the right to go home, use money with no restrictions, purchase food and clothes, and travel outside the colony without escort for work, medical treatment, or studies. Ex. 48 (a) - Relevant Provisions of the Penal Code of the Republic of Kazakhstan, English translation.

with the meeting of President Nazarbayev with U.S. President Obama in April 2010, during which the case of Mr. Zhovtis was raised) and then prohibited further long-term visits with the family, simply stating that the law does not allow it.

230. Specifically, on 16 November 2009, the prison authorities prevented Mr. Zhovtis from seeing his lawyer, who wished to discuss with Mr. Zhovtis the supervisory appeal complaint that was due for filing within the following three days. This requirement violated the rules of the "colony-settlement," which provide for unrestricted meetings with a lawyer.

E. Violation of Mr. Zhovtis's Rights as a Human Rights Defender

231. International law requires heightened protection for human rights defenders in order to protect their rights and allow them to carry out their work. The legal process against Mr. Zhovtis, his disproportionate sentence, and his subsequent discriminatory and arbitrarily restrictive conditions of imprisonment have failed to take this into account, and have instead become tools to silence him. Especially flagrant in this regard are the measures adopted in the prison where he is held – the semi-open prison should encourage maximum contact with the outside world and the reintegration. By refusing him the right to work outside the facility and prohibiting the long-term visits outside the facility or the right to live with his family in the city where the facility is located, the State Party aims to limit his ability to continue working as a human rights defender, The tactics used against Zhovtis come at a delicate point in Kazakhstan's political development as the country assumes chairmanship of the Organisation for Security and Co-operation in Europe (OSCE), and have a chilling effect on civil society in Kazakhstan.

232. The process against Mr. Zhovtis interferes with his right to work to protect human rights, a justiciable claim which is constructed from diverse elements including his right to communicate with others under Article 17, his right of association with civil society protected by Article 22, his freedom of movement protected by Article 12, and his particular rights as a human rights defender to freedom of expression guaranteed by Article 19.

233. Many of the violations of Mr. Zhovtis's human rights appear to be related to his activities as a human rights defender. As director of the Kazakhstan International Bureau on Human Rights and the Rule of Law, an independent human rights organization, Mr. Zhovtis has been raising concerns over human rights abuses in Kazakhstan for several years in both the domestic and international context—concerns that include the inconsistencies of criminal proceedings in Kazakhstan with national law and international fair trial standards.[325] As described in paragraph 25 above, the Kazakhstan International Bureau for Human Rights and the Rule of Law ("the Bureau") has been the subject of harassment and intimidation tactics prior to the criminal investigation and trial proceedings in this case. These tactics

[325] Ex. 16: Amnesty International, "Prosecution of human rights defender exposes systemic failure to ensure fair trials in Kazakhstan," 16 September 2009. Available at: http://www.amnesty.org/en/library/info/EUR57/002/2009/en

have included attacks on personal honour and reputation, the invasion of private spaces such as the Bureau's workplace, and abuse of the criminal justice apparatus for harassment and intimidation purposes.

1. The Duty to Protect Human Rights Defenders

234. The 1999 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms ("Declaration on the Right to Promote Human Rights") states:

> "Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels."[326]

235. Governments have a positive obligation to respect and ensure human rights,[327] which is "both negative and positive in nature."[328] This includes an obligation to respect and ensure human rights defenders, who have the right "to be protected effectively under national law in reacting against or opposing … activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms." [329]

236. The duty to protect human rights defenders attaches to persons not because of their status or other personal characteristics, but rather because of the functions that they perform to protect human rights. This duty arises from specific human rights guarantees, and the general duty to provide procedures and mechanisms to prevent the occurrence of ICCPR violations.[330] The Declaration on the Right to Promote Human Rights applies this principle in the context of known, heightened risks faced by human rights defenders: the competent authorities must protect all defenders, individually and in association with others, "against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration."[331] The Declaration on the Right to Promote Human Rights applies the duty of investigation to human rights defenders: when such defenders have endured violations of their rights as a result of facing situations of heightened, known risk, the State "shall conduct a prompt and impartial investigation or ensure that an inquiry takes place."[332] The preamble to the

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[326] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN Doc. A/RES/53/144, 1999, Article 1 ("Declaration on the Right to Promote Human Rights").

[327] Article 2(1) of the ICCPR states: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[328] UNHRC, General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, at para. 6.

[329] Declaration on the Right to Promote Human Rights, Article 2.

[330] See, e.g., General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), UN Doc. HRI/GEN/1/Rev.6 at 151, 10 March 1992,at para. 11.

[331] Declaration on the Right to Promote Human Rights, Article 12.

[332] *Ibid.,* Article 9(5).

Declaration reaffirms the importance of the Universal Declaration of Human Rights and the International Covenant on Human Rights as the "basic elements of international efforts to promote universal respect for and observance of human rights and fundamental freedoms."

237. As someone who has engaged consistently in human rights documentation, advocacy and activism over the course of many years, Mr. Zhovtis performs the role of a "social communicator": he actively engages in the publication or dissemination of views, information, and knowledge on human rights; seeks, obtains, receives, and holds information about human rights; discusses new human rights ideas and principles and advocates their acceptance; and communicates with non-governmental and inter-governmental organizations. The human rights violations associated with the criminal investigation and judicial proceedings in the instant case, as well as the history of persecution of Mr. Zhovtis's organization, amount to harassment and intimidation designed to frustrate Mr. Zhovtis's performance of these crucial functions and to create an atmosphere of fear in which Mr. Zhovtis and other members of civil society are discouraged from criticizing the government and reporting on human rights issues in the future—the "chilling effect."

238. The State Party has not only failed in its positive obligation to protect Mr. Zhovtis from a known, heightened risk, but has also failed to refrain from tactics that have the direct effect of silencing Mr. Zhovtis as a human rights defender.

239. On 16 September 2009, the UN Special Rapporteur on human rights defenders, together with the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, sent an urgent appeal regarding the trial of Mr. Zhovtis. The special rapporteurs expressed concern that "the verdict given to Mr. Zhovtis appears not proportional and excessively harsh," that "Mr. Zhovtis might have not been afforded a fair trial," and "that this might be related to his activities carried out in the defence of human rights."[333]

240. On 10 March 2010, the US Helsinki Commission expressed concerns about the treatment of Mr. Zhovtis in prison and the fact that he is not afforded the same freedoms as other prisoners.[334] Numerous other international organizations[335] and

[333] UN Human Rights Council, Addendum to the report of the Special Rapporteur on human rights defenders, UN Doc. A/HRC/13/22/Add.1, 24 February 2010, at para. 1266-1267, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-20-Add1_EFS.pdf

[334] Ex. 64: US Helsinki Commission, "Cardin, Hastings: Kazakhstan Supreme Court Should Consider the Case of Imprisoned Rights Activist", 10 March 2010.

[335] Ex. 65: Freedom House, "Freedom House Calls on Kazakhstan to Give Zhovtis Case Fair Review" 23 March 2010, available at: http://www.freedomhouse.org/template.cfm?page=70&release=1157; Ex. 66: Norwegian Helsinki Committee, "Human Rights Challenges in Kazakhstan (examination of Kazakhstan's commitments during OSCE chairmanship)" 1 February 2010, available at: http://humanrightshouse.org/Articles/13258.html; Ex. 67: Human Rights Watch, Letter to President Nazarbaev regarding the Trial of Yevgeniy Zhovtis, 2 October 2009, available at: http://www.hrw.org/en/news/2009/10/02/letter-president-nazarbaev-regariding-trial-evgenii-zhovtis; Ex. 68: Human Rights First, Letter to President Nazarbayev, 25 September 2009, available at: http://www.humanrightsfirst.org/pdf/090928-HRD-zhovits-petition-eng-no-sig.pdf; Ex. 69: OSCE Office

governments[336] have also expressed concerns about Mr. Zhovtis's imprisonment, as well as his trial and appeal, with many calling upon the Supreme Court of Kazakhstan to review Mr. Zhovtis's case.

2. Detention for Political Motives

241. The State violated Mr. Zhovtis's rights as a human rights defender because Kazakhstan has arbitrarily detained him for political reasons, rather than as a proportionate response to the criminal offence.

242. As noted in Section D above, the sentence of imprisonment imposed on Mr. Zhovtis and confirmed by the appeal court is arbitrary because it is unnecessarily lengthy and severe, and out of all proportion to the gravity of the offence. It is not clear how the sentence imposed upon Mr. Zhovtis furthers the legitimate aim of preventing car accidents committed by negligence, as was the prosecution case.

243. Considering the Mr. Zhovtis's position as a human rights defender and critic of the government in Kazakhstan, the past incidents of persecution of his organization, and the general record of persecution of human rights NGOs in Kazakhstan at the hands of the State, the disproportional nature of the sentence "strongly suggest[s] that the applicant's prosecution was used to intimidate him".[337] The political motives for the detention of Mr. Zhovtis are further illustrated by the excessive and arbitrary restrictions which are placed on his movements and activities while in detention, when compared with other prisoners in the same facility.

3. Freedom of Movement

244. The disproportionate and excessive sentence imposed upon Mr. Zhovtis violates his right of freedom of movement, which is one essential component of his rights as a human rights defender.

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for Democratic Institutions and Human Rights, "Senior OSCE official visits Kazakh rights defender in detention, stresses importance of fair appeals process", 19 September 2009, available at: http://www.osce.org/item/39624.html; Ex. 16: Amnesty International, "Prosecution of human rights defender exposes systemic failure to ensure fair trials in Kazakhstan", 16 September 2009, available at: http://www.amnesty.org/en/library/asset/EUR57/002/2009/en/c62bc613-54fc-4f58-8ee1-7753f18ee2c9/eur570022009en.html

[336] Ex. 70: US Department of State, U.S. Statement on Kazakhstan's Refusal to Review Case of Zhovtis, 29 April 2010, available at: http://www.america.gov/st/texttrans-english/2010/April/20100429160422eaifas1.157343e-02.html?CP.rss=true; Ex. 71: European Union, EU Statement in the OSCE on the case against human rights defender Yevgeniy Zhovtis, 17 December 2009, available at: http://www.se2009.eu/en/meetings_news/2009/12/18/eu_statement_in_the_osce_on_the_case_against_human_rights_defender_evgeniy_zhovtis; Ex. 72: US Commission on International Religious Freedom, "USCIRF Questions Legitimacy of Kazakhstan's OSCE Chairmanship", 16 November 2009, available at: http://www.uscirf.gov/index.php?option=com_content&task=view&id=2820&Itemid=126; Ex. 73: Ambassade de France, "Déclaration de Bernard Kouchner sur la condamnation d'Evgueni Jovtis 21 October 2009, available at: http://www.ambafrance-uk.org/Declaration-de-Bernard-Kouchner,16212.html; Ex. 74 : European Parliament, Resolution of 17 September 2009 on the case of Yevgeny Zhovtis in Kazakhstan, available at: http://www.europarl.europa.eu/document/activities/cont/200909/20090923ATT61106/20090923ATT61106EN.pdf

[337] *Gusinkiy v. Russia*, ECtHR, Judgment of 19 May 2004, at para. 76-78.

245. Article 12 of the ICCPR provides: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." The Committee has recognized that while detention generally affects the right to liberty under Article 9, it may also raise issues under Article 12 as, "in some circumstances, articles 12 and 9 may come into play together."[338] As with other restrictions on freedom of movement, detention must be necessary and must only serve permissible purposes: "Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument which might achieve the desired result; and they must be proportionate to the interest to be protected,"[339] both by the State and also "by the administrative and judicial authorities in applying the law."[340]

246. The Declaration on the Right to Promote Human Rights has recognized that freedom of movement is crucial to the work of human rights defenders. Human rights defenders must have the ability "to attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments."[341] They must also enjoy "unhindered access to and communication with international bodies with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms."[342] Finally, human rights defenders must have the ability to travel to the communities of the people they represent—communities that are often marginalized and require long journeys to reach. Human rights defenders depend on freedom of movement to serve these communities.[343]

247. Human rights defenders must also be protected from bureaucratic harassment. The Committee has expressed concern over the "manifold legal and bureaucratic barriers unnecessarily affecting the full enjoyment of the rights of the individuals to move freely,"[344] including such tactics as "harassment … for example by physical intimidation, arrest, loss of employment or expulsion of their children from school or university" as unacceptable when used by States to hinder freedom of movement.[345] The Inter-American Commission on Human Rights has affirmed these principles, finding that States may violate the right to freedom of movement directly through restrictions on the travel of human rights defenders, and indirectly when state agents either threaten or harass defenders in order to restrict their movement.[346]

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[338] UNHRC, General Comment 27, Freedom of Movement (Art. 12), U.N. Doc CCPR/C/21/Rev.1/Add.9, 1999, at para. 7.
[339] *Ibid*., at para. 14.
[340] *Ibid*., at para. 15.
[341] Declaration on the Right to Promote Human Rights, Article 9, at para. 3(b).
[342] *Ibid*. at para. 4.
[343] *Case of Ricardo Canese v. Paraguay*, IACtHR, Judgment of 31 August 2004, at para. 101.
[344] *Ibid*., at para. 17.
[345] *Ibid*.
[346] Inter-American Commission on Human Rights, *Report on the Situation of Human Rights Defenders in the Americas,* OEA/Ser.L/V/II.12, doc. 5 rev. 1, 7 March 2006, at para. 102.

248. The arbitrary restriction on Mr. Zhovtis's movements outside of the colony-settlement, when contrasted with other prisoners at the same facility and the regime that applied prior to his arrival, demonstrate the excessive restriction of his freedom of movement. In addition, by creating a new prison especially for Mr. Zhovtis in a far corner of Kazakhstan, the government has made it difficult for members of civil society, diplomats and journalists to visit him, effectively further limiting his role as a human rights defender.

4. The Right to a Reputation

249. The conviction of Mr. Zhovtis together with the excessive and arbitrary sentence of imprisonment is an attempt to ruin his reputation, in violation of Article 17 of the ICCPR.

250. A criminal process which leads to incarceration based on unsubstantiated allegations is an interference with the right to reputation contained within Article 17, which protects the individual "against unlawful attacks on his honour or reputation,"[347] and requires that "provision must be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible."[348] In *Tshisekedi v. Zaire*, the State arrested the applicant opposition leader and attempted to incarcerate him in a psychiatric institution based on unsubstantiated allegations that he was insane. The Committee found these actions in violation of the applicant's right to honour and reputation under Article 17.[349]

251. Here, by subjecting Mr. Zhovtis to a criminal process that was characterized by a rush to convict him in a trial that was entirely unfair, and by subsequently sentencing him to a lengthy prison term that was wholly arbitrary, Kazakhstan has sought to tarnish the reputation of a leading human rights defender in the country.

5. Freedom of Association and Communication

252. The arbitrary trial and sentence have also violated the right to freedom of association of Mr. Zhovtis under Article 22 ICCPR, and a further element of the duty to protect human rights defenders. This also interfered with Mr. Zhovtis's right under Article 17 of the ICCPR to communicate and interact freely with others, another important element of the duty to protect human rights defenders who can only function to the extent that they can communicate with the outside world

253. Article 22 of the ICCPR provides: "Everyone shall have the right to freedom of association with others." The Declaration on the Right to Promote Human Rights highlights the importance of this principle in the context of human rights defenders, stating that everyone pursing the promotion of human rights should enjoy the freedom, both individually and in association with others, "To meet or assemble peacefully" and "To form, join and participate in non-governmental organizations,

[347] Article 17 ICCPR.
[348] General Comment No. 16, at para. 11.
[349] See *Tshisekedi v. Zaire*, UNHRC, Decision of 2 November 1989, Communications Nos. 241 and 242/1987.

associations or groups."[350] Freedom of association permits persons formally to join together in groups to pursue common interests, including groups such as non-governmental organizations formed for public purposes. However, if the scope of the right stopped there, governments could restrict the ability of groups to operate freely, for example through interference with the internal decisions and organization of the association. Therefore, in order for individuals to fully realize their right to freedom of association, "organizations themselves must be able to function freely without unreasonable governmental interference."[351] The Committee has expressed concern over technical procedures that impose burdensome procedures on civil society so as to prohibit the exercise of freedom of association for non-governmental organizations and trade unions.[352]

254. In addition, Article 17 of the ICCPR obliges States to ensure the right of every person to be protected against arbitrary interference with his privacy, family, and home.[353] The Committee has found "that the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone."[354] This includes communication with others, which for prisoners means that they must be allowed "to communicate with their family and reputable friends at regular intervals, by correspondence as well as by receiving visits."[355]

255. The European Court of Human Rights also recognizes this right to privacy as part of the need to develop "the network of personal, social and economic relations that make up the private life of every human being."[356] In the context of prisoners, *McFeeley v. UK* underlined the importance of relationships with others, concluding that private life continued to apply to prisoners and required a degree of association for persons imprisoned.[357]

256. As a human rights defender, Mr. Zhovtis has as large network of individuals with whom he must stay in contact in order to function effectively. He has been effectively prohibited from associating with civil society and others with an interest in defending human rights in Kazakhstan. By prohibiting him to work for his organization, the Kazakhstan International Bureau for Human Rights and the Rule of Law, in Ust-Kamenogorsk the State prevented Mr. Zhovtis from exercising his legitimate activities. This prohibition was based on the nature of the organization that he asked to work for. As noted above, almost all prisoners work in the colony

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[350] Declaration on the Right to Promote Human Rights, Article 5.
[351] Human Rights First, *The Neglected Right: Freedom of Association in International Human Rights Law*, December 1997. Available at: http://www.humanrightsfirst.org/pubs/descriptions/neglrt.aspx
[352] See Concluding Observations on Belarus, UN Doc. CCPR/C/79/Add. 86 (1997), at para. 19; and Concluding Observations on Lithuania, UN Doc. CCPR/C/79/Add. 87 (1997), at para. 20.
[353] See General Comment No. 16.
[354] *Coeriel and Aurik v. The Netherlands,* UNHRC, Decision of 31 October 1994, UN Doc. CCPR/C/52/D/453/1991, at para. 10.2.
[355] *Miguel Angel Estrella v. Uruguay*, UNHRC, Decision of 29 March 1983, UN Doc. Supp. No. 40 (A/38/40) at 150 (1983), at para. 9.2
[356] *Slivenko et al v. Latvia*, ECtHR (GC), Judgment of 9 October 2003, at para. 96 [Grand Chamber judgment].
[357] *McFeeley v. UK* (1981), 20 DR 44, at p. 91.

settlement work outside the facility. According to Mr. Zhovtis's estimates, only people placed in quarantine, a few individuals with disabilities, and himself and a journalist named Kuchukov, do not work outside. The only explanation given for the refusal was the citation of outdated internal prison rules that prisoners should not work with faxes and other equipment – rules which if they still apply at all, could apply only to the work inside the institution.

257. Mr. Zhovtis is also not allowed to give articles and publications to his visitors and instead has to dictate them over phones. His calls are closely monitored while other prisoners are free to use the mobile phones during the work day outside the facility. All his meetings with visitors take place in the presence of an employee of the prison who takes close notes.

6. Freedom of Expression

258. Finally, the arbitrary conviction and sentence have violated Mr. Zhovtis's right to freedom of expression, which is a particularly important role for human rights defenders given their role as a "public watchdog."

259. Article 19 of the ICCPR provides: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds". The Declaration on the Right to Promote Human Rights highlights the importance of this principle in the context of human rights defenders, stating that everyone has the right, both individually and in association with others: to communicate with non-governmental or intergovernmental organizations; to know, seek, obtain, receive and hold information about human rights; to publish, impart or disseminate views, information and knowledge on all human rights; and to develop and discuss new human rights ideas and principles and to advocate their acceptance.[358]

260. The Committee has found that "the right for an individual to express his political opinions, including his opinions on the question of human rights, forms part of the freedom of expression guaranteed by Article 19 of the Covenant."[359] Numerous Committee cases have confirmed that protected expression includes political expression.[360]

261. The Inter-American Commission has recognized that harassment and intimidation tactics against "social communicators," including human rights activists, violate the right to freedom of expression.[361] Harassment and intimidation tactics obstruct the investigation not only of specific abuses; they also create an atmosphere of fear, which in turn produces a chilling effecting on government criticism and the

[358] Declaration on the Right to Promote Human Rights, Articles 5, 6, and 7.
[359] *Kivenmaa v. Finland*, UNHRC, Decision of 31 March 1994, UN Doc. CCPR/C/50/D/412/1990, at para. 9.3.
[360] See *Nqalula Mpandanjila et al. v. Zaire*, UNHRC, Decision of 26 March 1986, Communication No. 138/1983; *Kalenga v. Zambia*, UNHRC, Decision of 26 March 1986, Communication No 326/1988; *Jaona v. Madagascar*, UNHRC, Decision of 1 April 1985, Communication No. 132/1982; and *Aduayom et al. v. Togo*, UNHRC, Decision of 12 July 1996, Communications Nos. 422/1990, 423/1990 and 424/1990.
[361] Inter-American Commission on Human Rights, Office of the Special Rapporteur for Freedom of Expression, Declaration of Principles on Freedom of Expression, Principle 9 (Oct. 2000), Principle 9. Available at http://www.cidh.oas.org/relatoria/showarticle.asp?artID=26&1ID=1

reporting of human rights abuses.[362] States have a responsibility to refrain from tactics of harassment and intimidation aimed at silencing human rights defenders, and must investigate and punish acts of harassment or intimidation committed against human rights defenders by state actors or third parties.[363]

262. The European Court of Human Rights has found that freedom of expression enjoys its widest permissible limits with regard to criticism of government and the free flow of information.[364] The Court has noted that a healthy democracy requires that the actions or omissions of the government be subject to the close scrutiny not only of the legislative and judicial authorities, but also of public opinion.[365] A democratic government must also avoid any chilling effect that any restrictive measures it adopts may have upon political expression.[366] In the recent case of *HCLU v. Hungary*, the European Court found the State had violated the expression rights of a non-governmental organization by refusing to give public interest information to them, and noted that placing obstacles in the way of the press and NGOs "may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as 'public watchdogs' and their ability to provide accurate and reliable information may be adversely affected."[367]

VII. RELIEF SOUGHT

263. The Author requests that the Committee:

a) declare that Kazakhstan violated the Author's rights under Article 14 of the ICCPR by denying his rights to call defense witnesses, to a fair trial, and to an appeal;

b) declare that Kazakhstan violated the Author's rights under Articles 9 and 10 of the ICCPR by violating the prohibition of arbitrary sentencing and degrading prison conditions;

c) declare that Kazakhstan violated the Author's rights under Article 17 of the ICCPR by an arbitrary and discriminatory interference into his right to privacy; and

d) declare that Kazakhstan violated the Author's rights as a human rights defender under Articles 12, 17, 19, and 22 of the ICCPR because the flawed judicial process, arbitrary sentence, unjust imprisonment and excessive restrictions in prison imposed in an arbitrary and discriminatory manner have directly undermined the Author's rights to freedom of

[362] *Hector Felix Miranda v. Mexico*, IACtHR, Judgment of 1998, at para. 52.
[363] Inter-American Commission on Human Rights, Office of the Special Rapporteur for Freedom of Expression, Declaration of Principles on Freedom of Expression, Principle 9 (Oct. 2000), Principle 9. Available at http://www.cidh.oas.org/relatoria/showarticle.asp?artID=26&1ID=1
[364] *Lombardo and Others v. Malta,* ECtHR, Judgment of 24 April 2007, at para. 53-4.
[365] *Sener v. Turkey*, ECtHR, Judgment of 18 July 2000, at para. 40.
[366] *Castells v. Spain*, ECtHR, Judgment of 23 April 1992, at para. 46.
[367] *Ibid*.

movement, to privacy and reputation, to freedom of expression, and to freedom of association, which are essential to his activities in defending human rights.

264. The Author further requests that the Committee:

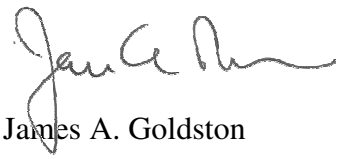
a) request that Kazakhstan quash the conviction of the Author, rendered as it was pursuant to a trial and appeal process that lacked basic safeguards and fell short of international fair trial standards;

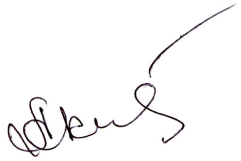
b) request that Kazakhstan immediately release the Author;

c) request that the State Party provide effective remedies, including just compensation, to the Author for the violation of his rights under the Covenant;

d) fulfill its duties to protect human rights defenders and prevent similar violations from happening in the future.

9 November 2010





James A. Goldston
Executive Director
Open Society Justice Initiative

Roza Akylbekova
Acting Director
Kazakhstan International Bureau for Human Rights and Rule of Law

VIII. LIST OF SUPPORTING DOCUMENTS

Exhibit 1	UN Human Rights Council, Draft Report of the Universal Periodic Review, Kazakhstan, A/HRC/WG.6/7/L.9, 16 February 2010
Exhibit 2	Amnesty International, *Amnesty International Report 2010 – Kazakhstan* (28 May 2010)
Exhibit 3	International Commission of Jurists, *Submission on the 1st Periodic Report of Kazakhstan to the Human Rights Committee* (May 2010)
Exhibit 4	Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despoy, Mission to Kazakhstan, 11 January 2005
Exhibit 5	Human Rights Watch, "Political Freedoms in Kazakhstan" (5 April 2004)
Exhibit 6	Human Rights Watch, "World Report: Kazakhstan" (2010)
Exhibit 7	Human Rights Watch, "Kazakhstan: Rescind New Media Restrictions" (14 July 2009)
Exhibit 8	Human Rights Watch, "Kazakhstan: Give Rights Defender Fair Trial" (1 September 2009)
Exhibit 9	Statement of Evgeniy Zhovtis, November 2010
Exhibit 10	[INTENTIONALLY BLANK]
Exhibit 11	Kazkahstan International Bureau for Human Rights and the Rule of Law ("KIBHR"), "Work of the Human Rights Bureau is Paralyzed" (15 August 2005)
Exhibit 12	KIBHR, "The audit of the South Kazakhstan Branch of the KIBHR was conducted by the police on an paranoid-obscurant statement" (9 February 2007)
Exhibit 13 (a)	International Commission of Jurists, "Report of the Appeal Hearing of the Case of Evgeniy Zhovtis, 20 October 2009" (March 2010) (ENG)
Exhibit 13 (b)	International Commission of Jurists, "Report of the Appeal Hearing of the Case of Evgeniy Zhovtis, 20 October 2009" (March 2010) (RUS)
Exhibit 14	U.S. Department of State, 2009 Human Rights Reports: Kazakhstan (11 March 2010)
Exhibit 15	Daniyar Kanafin, "Criminal Justice Reform in Kazakhstan and OSCE Commitments", Security and Human Rights Journal (November 2008)
Exhibit 16	Amnesty International, "Prosecution of human rights defender exposes systemic failure to ensure fair trials in Kazakhstan" (16 September 2009)
Exhibit 17	Kazakhstan Judicial Assistance Project, "Strengthening the Rule of Law in Kazakhstan", Chemonics International (27 August 2007) ("Strengthening the Rule of Law")

Exhibit 18 Amnesty International, "Kazakhstan, Summary of Concerns on Torture and Ill-treatment" (November 2008)

Exhibit 19 (a) Interrogation of Zhovtis as a Witness, 31 July 2009 (ENG)

Exhibit 19 (b) Interrogation of Zhovtis as a Witness, 31 July 2009 (RUS)

Exhibit 20 (a) Transcript of the Main Judicial Proceedings, Balkhash District Court of the Almaty Region, Case No. 1-24 ("Trial court transcript") (ENG)

Exhibit 20 (b) Transcript of the Main Judicial Proceedings, Balkhash District Court of the Almaty Region, Case No. 1-24 ("Trial court transcript") (RUS)

Exhibit 21 (a) Petition to Department of Internal Affairs to Dismiss the Case, Sh.B. Batkalova, 24 August 2009 ("Petition to Dismiss the Case") (ENG)

Exhibit 21 (b) Petition to Department of Internal Affairs to Dismiss the Case, Sh.B. Batkalova, 24 August 2009 ("Petition to Dismiss the Case") (RUS)

Exhibit 22 (a) Prosecution Statement in the Criminal Case #09193603100017, Deputy Chief of the Criminal Department of the Almaty Regional Department of Internal Affairs, 14 August 2009 ("Prosecution Statement, 14 August 2009") (ENG)

Exhibit 22 (b) Prosecution Statement in the Criminal Case #09193603100017, Deputy Chief of the Criminal Department of the Almaty Regional Department of Internal Affairs, 14 August 2009 ("Prosecution Statement, 14 August 2009") (RUS)

Exhibit 23 (a) Appeal Complaint of Evgeniy Zhovtis to the Criminal Cases Collegium of the Almaty Oblast Court, 16 September 2009 ("Appeal Complaint of Evgeniy Zhovtis") (ENG)

Exhibit 23 (b) Appeal Complaint of Evgeniy Zhovtis to the Criminal Cases Collegium of the Almaty Oblast Court, 16 September 2009, at p. 12 ("Appeal Complaint of Evgeniy Zhovtis") (RUS)

Exhibit 24 (a) Resolution #09193603100017 to initiate criminal proceedings and take over the case, Chief of the Criminal Department of the Almaty Regional Department of Internal Affairs, 27 July 2009 ("Resolution to initiate criminal proceedings") (ENG)

Exhibit 24 (b) Resolution #09193603100017 to initiate criminal proceedings and take over the case, Chief of the Criminal Department of the Almaty Regional Department of Internal Affairs, 27 July 2009 ("Resolution to initiate criminal proceedings") (RUS)

Exhibit 25 (a) Transcript of the Interrogation of the Witness E.A. Zhovtis, 28 July 2009 (ENG)

Exhibit 25 (b) Transcript of the Interrogation of the Witness E.A. Zhovtis, 28 July 2009 (ENG)

Exhibit 26 [INTENTIONALLY BLANK]

Exhibit 27 (a) Minutes of the On-site Statement Verification and Clarification Procedure, 29 July 2009 (ENG)

Exhibit 27 (b) Minutes of the On-site Statement Verification and Clarification Procedure, 29 July 2009 (RUS)

Exhibit 28 (a) Transcript of the Interrogation of the Witness E.A. Zhovtis, 30 July 2009 (ENG)

Exhibit 28 (b) Transcript of the Interrogation of the Witness E.A. Zhovtis, 30 July 2009 (RUS)

Exhibit 29 (a) Transcript of the Interrogation of the Witness, S.L. Nagorniy, 28 July 2009 (ENG)

Exhibit 29 (b) Transcript of the Interrogation of the Witness, S.L. Nagorniy, 28 July 2009 (RUS)

Exhibit 30 (a) Transcript of the Interrogation of the Witness, S.L. Nagorniy, 31 July 2009 (ENG)

Exhibit 30 (b) Transcript of the Interrogation of the Witness, S.L. Nagorniy, 31 July 2009 (RUS)

Exhibit 31 (a) Expert Report #8001, Almaty Center of Forensic Analysis of the Republic of Kazakhstan, 14 August 2009 (“Expert Report #8001”) (ENG)

Exhibit 31 (b) Expert Report #8001, Almaty Center of Forensic Analysis of the Republic of Kazakhstan, 14 August 2009 (“Expert Report #8001”) (RUS)

Exhibit 32 (a) Undertaking not to leave and to maintain good conduct, signed by E.A. Zhovtis, 14 August 2009 (ENG)

Exhibit 32 (b) Undertaking not to leave and to maintain good conduct, signed by E.A. Zhovtis, 14 August 2009 (RUS)

Exhibit 33 (a) Application to carry out a repeat judicial road traffic expert assessment, Sh.B. Batkalova, 18 August 2009 (ENG)

Exhibit 33 (b) Application to carry out a repeat judicial road traffic expert assessment, Sh.B. Batkalova, 18 August 2009 (RUS)

Exhibit 34 (a) Application to dismiss the criminal case, Sh.B. Batkalova, 24 August 2009 (ENG)

Exhibit 34 (b) Application to dismiss the criminal case, Sh.B. Batkalova, 24 August 2009 (RUS)

Exhibit 35 (a) Statement of Expert Witness I.I. Nusupbayev, Editor-in-Chief of the *Automotive Agency Formula S*, 28 August 2009 (ENG)

Exhibit 35 (b) Statement of Expert Witness I.I. Nusupbayev, Editor-in-Chief of the *Automotive Agency Formula S*, 28 August 2009 (RUS)

Exhibit 36 (a) Expert Report No.364, Center for Independent Examinations, A.I. Zakharov and K.P. Grebenshchikov, 29 August 2009 (ENG)

Exhibit 36 (b) Expert Report No.364, Center for Independent Examinations, A.I. Zakharov and K.P. Grebenshchikov, 29 August 2009 (RUS)

Exhibit 37 (a) Report No. 21/SI on Analysis of the Copy of Expert Conclusion No. 8001 of 8/14/2009, O.G. Kuznetsov, 31 August 2009 (ENG)

Exhibit 37 (b) Report No. 21/SI on Analysis of the Copy of Expert Conclusion No. 8001 of 8/14/2009, O.G. Kuznetsov, 31 August 2009 (RUS)

Exhibit 38 (a) Decision No. 1n-515/2009 on refusal to initiate supervisory proceedings, Supervisory College of Almaty Regional Court, 10 December 2009 ("Supervisory decision") (ENG)

Exhibit 38 (b) Decision No. 1n-515/2009 on refusal to initiate supervisory proceedings, Supervisory College of Almaty Regional Court, 10 December 2009 ("Supervisory decision") (RUS)

Exhibit 39 (a) Trial Court Verdict of 3 September 2009, Balkhash District Court of Almaty Region, Transcribed Version, 7 September 2009 ("Trial Court Verdict") (ENG)

Exhibit 39 (b) Trial Court Verdict of 3 September 2009, Balkhash District Court of Almaty Region, Transcribed Version, 7 September 2009 ("Trial Court Verdict") (RUS)

Exhibit 40 (a) Regulatory decision No. 4 of the Supreme Court of the Republic of Kazakhstan, 21 June 2001 (as amended and supplemented by regulatory

decisions of the Supreme Court of the Republic of Kazakhstan No. 6 dated 11 July 2003) (ENG)

Exhibit 40 (b) Regulatory decision No. 4 of the Supreme Court of the Republic of Kazakhstan, 21 June 2001 (as amended and supplemented by regulatory decisions of the Supreme Court of the Republic of Kazakhstan No. 6 dated 11 July 2003) (RUS)

Exhibit 41 (a) Appeal Complaint of V. Voronov and V. Tkachenko, 11 September 2009 (ENG)

Exhibit 41 (b) Appeal Complaint of V. Voronov and V. Tkachenko, 11 September 2009 (RUS)

Exhibit 42 (a) Application to Participate in the Appeal, E.A. Zhovtis, 14 September 2009 (ENG)

Exhibit 42 (b) Application to Participate in the Appeal, E.A. Zhovtis, 14 September 2009 (RUS)

Exhibit 43 (a) Judgment of the Balkhash District Court of Almaty Oblast, 20 October 2009 ("First Appeal Decision") (ENG)

Exhibit 43 (b) Judgment of the Balkhash District Court of Almaty Oblast, 20 October 2009 ("First Appeal Decision") (RUS)

Exhibit 44 (a) Regulatory Resolution, Ref. No. 16, Supreme Court of the Republic of Kazakhstan (26 November 2004), Section 11 (ENG)

Exhibit 44 (b) Regulatory Resolution, Ref. No. 16, Supreme Court of the Republic of Kazakhstan (26 November 2004), Section 11 (RUS)

Exhibit 45 (a) Complaint of Roza Akylbekova to the Chief of the Main Directorate of Internal Affairs [GUVD] of Iliysk District (ENG)

Exhibit 45 (b) Complaint of Roza Akylbekova to the Chief of the Main Directorate of Internal Affairs [GUVD] of Iliysk District (RUS)

Exhibit 46 (a) Decision of the Taldykorgan Municipal Court, 29 September 2010

Exhibit 46 (b) Grievance Concerning the Ruling of the Taldykorgan Municipal Court of the Almaty Region, 2 October 2010

Exhibit 47 (a) Decision # 4u-715-2010 on refusal to initiate supervisory proceedings, Supreme Court of the Republic of Kazakhstan, 28 April 2010 (ENG)

Exhibit 47 (b) Decision # 4u-715-2010 on refusal to initiate supervisory proceedings, Supreme Court of the Republic of Kazakhstan, 28 April 2010 (RUS)

Exhibit 48 (a) Relevant Provisions of the Penal Code of the Republic of Kazakhstan (ENG)

Exhibit 48 (b) Relevant Provisions of the Penal Code of the Republic of Kazakhstan (RUS)

Exhibit 49 (a) Complaint by E.A. Zhovtis to the Special Prosecutor of the Eastern Kazakhstan Region, 20 April 2010 ("Complaint of 20 April 2010") (ENG)

Exhibit 49 (b) Complaint by E.A. Zhovtis to the Special Prosecutor of the Eastern Kazakhstan Region, 20 April 2010 ("Complaint of 20 April 2010") (RUS)

Exhibit 50 (a) Public Statement on Prison Conditions, E.A. Zhovtis, 13 November 2009 (ENG)

Exhibit 50 (b) Public Statement on Prison Conditions, E.A. Zhovtis, 13 November 2009 (RUS)

Exhibit 51 (a) Letter of Complaint on Prison Conditions to Colonel of Justice Mr. M.Sh. Zhumadilov, Acting Head of the Administration Corrections System Committee for the Eastern Kazakhstan District Ministry of Justice of the Republic of Kazakhstan, 12 November 2009 (ENG)

Exhibit 51 (b) Letter of Complaint on Prison Conditions to Colonel of Justice Mr. M.Sh. Zhumadilov, Acting Head of the Administration Corrections System Committee for the Eastern Kazakhstan District Ministry of Justice of the Republic of Kazakhstan, 12 November 2009 (RUS)

Exhibit 52 (a) Letter of Complaint on Forced Labor to Mr. I.D. Merkel First Deputy of the Prosecutor General of Kazakhstan, December 2009 ("Letter of Complaint on Forced Labor") (ENG)

Exhibit 52 (b) Letter of Complaint on Forced Labor to Mr. I.D. Merkel First Deputy of the Prosecutor General of Kazakhstan, December 2009 ("Letter of Complaint on Forced Labor") (RUS)

Exhibit 53 (a) Reply of South Kazakhstan Penitentiary Department to Complaint by Zhovtis and Kuchukov, 20 December 2009 (ENG)

Exhibit 53 (b) Reply of South Kazakhstan Penitentiary Department to Complaint by Zhovtis and Kuchukov, 20 December 2009 (RUS)

Exhibit 54 (a) Response to Complaint on Forced Labor by Public Prosecutor's Office, 11 December 2009 ("Response to Complaint on Forced Labor") (ENG)

Exhibit 54 (b) Response to Complaint on Forced Labor by Public Prosecutor's Office, 11 December 2009 ("Response to Complaint on Forced Labor") (RUS)

Exhibit 55 (a) Complaint (in a special proceeding procedure on recognition of illegal acts of an official, repeal of a decree on the imposition of punishment) to the Court of the City of Ust-Kamenogorsk**,** 3 February 2010 (ENG)

Exhibit 55 (b) Complaint (in a special proceeding procedure on recognition of illegal acts of an official, repeal of a decree on the imposition of punishment) to the Court of the City of Ust-Kamenogorsk**,** 3 February 2010 (RUS)

Exhibit 56 (a) Petition (on the suspension of proceedings and appeal to the Constitutional Council) to the Court of the City of Ust-Kamenogorsk, 8 February 2010 (ENG)

Exhibit 56 (b) Petition (on the suspension of proceedings and appeal to the Constitutional Council) to the Court of the City of Ust-Kamenogorsk, 8 February 2010 (RUS)

Exhibit 57 (a) Decision of the Ust-Kamenogorsk Court, 4 March 2010 (ENG)

Exhibit 57 (b) Decision of the Ust-Kamenogorsk Court, 4 March 2010 (RUS)

Exhibit 58 INTENTIONALLY BLANK

Exhibit 59 (a) Complaint on Forced Labor to the City Court of Ust-Kamenogorsk, 19 August 2010 (ENG)

Exhibit 59 (b) Complaint on Forced Labor to the City Court of Ust-Kamenogorsk, 19 August 2010 (RUS)

Exhibit 60 Justice Initiative, List of the Defense Motions at the Zhovtis Trial

Exhibit 61 Justice Initiative, List of Defense Motions at the Zhovtis Appeal

Exhibit 62 International Commission of Jurists, Press Release, "Kazakhstan: Zhovtis appeal hearing failed to meet international fair trial standards" (11 March 2010)

Exhibit 63 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to Kazakhstan, UN Doc. A/HRC/13/39/Add.3, 16 December 2009

Exhibit 64	US Helsinki Commission, "Cardin, Hastings: Kazakhstan Supreme Court Should Consider the Case of Imprisoned Rights Activist" (10 March 2010)
Exhibit 65	Freedom House, "Freedom House Calls on Kazakhstan to Give Zhovtis Case Fair Review" (23 March 2010)
Exhibit 66	Norwegian Helsinki Committee, "Human Rights Challenges in Kazakhstan (examination of Kazakhstan's commitments during OSCE chairmanship)" (1 February 2010)
Exhibit 67	Human Rights Watch, Letter to President Nazarbaev regarding the Trial of Evgenii Zhovtis, 2 October 2009
Exhibit 68	Human Rights First, Letter to President Nazarbayev, 25 September 2009
Exhibit 69	OSCE Office for Democratic Institutions and Human Rights, "Senior OSCE official visits Kazakh rights defender in detention, stresses importance of fair appeals process" (19 September 2009)
Exhibit 70	US Department of State, U.S. Statement on Kazakhstan's Refusal to Review Case of Zhovtis, 29 April 2010
Exhibit 71	European Union, EU Statement in the OSCE on the case against human rights defender Evgeniy Zhovtis, 17 December 2009
Exhibit 72	US Commission on International Religious Freedom, "USCIRF Questions Legitimacy of Kazakhstan's OSCE Chairmanship", 16 November 2009
Exhibit 73	Ambassade de France, Déclaration de Bernard Kouchner sur la condamnation d'Evgueni Jovtis, 21 October 2009
Exhibit 74	European Parliament, Resolution of 17 September 2009 on the case of Yevgeny Zhovtis in Kazakhstan