

**Communication to the Committee against Torture**

**In the case of**

**Alexander Pavlovich GERASIMOV**

**against**

**the Republic of Kazakhstan**

*submitted for consideration under the  
Convention against Torture  
and Other Cruel, Inhuman or Degrading Treatment or Punishment*

to

The Committee against Torture  
c/o Centre for Human Rights  
United Nations Office  
8-14 avenue de la Paix  
1211 Geneva 10  
Switzerland

22 April 2010

## TABLE OF CONTENTS

<b>I. THE AUTHOR OF THE COMMUNICATION .....</b>	<b>4</b>
<b>II. THE ALLEGED VICTIM .....</b>	<b>4</b>
<b>III. SUMMARY OF CLAIM .....</b>	<b>4</b>
STATE PARTY .....	4
DOMESTIC REMEDIES .....	4
SUMMARY OF THE CLAIM .....	5
<b>IV. FACTS OF THE CLAIM .....</b>	<b>6</b>
ARBITRARY DETENTION AT SOUTHERN UIA POLICE STATION – 27 MARCH 2007 .....	6
UNREGISTERED DETENTION WITHOUT ACCESS TO A LAWYER .....	7
TORTURE DURING INTERROGATION .....	7
FURTHER INTERROGATION AND RELEASE – 28 MARCH 2007 .....	9
PHYSICAL INJURIES AND HOSPITAL TREATMENT .....	9
DIAGNOSIS OF PTSD AND TREATMENT .....	10
FIRST COMPLAINTS .....	11
PRELIMINARY INVESTIGATION BY THE POLICE .....	11
CRIMINAL INVESTIGATION BY REGIONAL DIA .....	12
INTIMIDATION OF MR. GERASIMOV .....	13
CRIMINAL INVESTIGATION STOPPED .....	13
FIRST APPEAL AGAINST REFUSAL TO INVESTIGATE .....	13
SECOND CRIMINAL INVESTIGATION STOPPED .....	14
SECOND APPEAL AGAINST REFUSAL TO INVESTIGATE .....	14
THIRD APPEAL AGAINST REFUSAL TO INVESTIGATE .....	15
FOURTH APPEAL AGAINST REFUSAL TO INVESTIGATE .....	15
<b>V. ADMISSIBILITY .....</b>	<b>16</b>
NO OTHER INTERNATIONAL COMPLAINT .....	16
JURISDICTION .....	16
EXHAUSTION OF DOMESTIC REMEDIES .....	18
1. <i>Mr. Gerasimov has Exhausted All Available Remedies</i> .....	18
2. <i>Other Remedies are Neither Effective nor Available</i> .....	19
3. <i>Danger to Mr. Gerasimov and his Family</i> .....	20
4. <i>Unreasonable Delay</i> .....	20
<b>VI. ALLEGED VIOLATIONS OF THE UNCAT .....</b>	<b>21</b>
A. MR. GERASIMOV WAS TORTURED .....	21
<i>Medical Evidence Corroborating the Allegations of Torture</i> .....	23
<i>The Allegations are Consistent with Widely Reported Patterns of Torture in Kazakhstan</i> .....	24
<i>Reverse Burden of Proof</i> .....	25
B. FAILURE TO ADOPT SAFEGUARDS TO PREVENT TORTURE .....	27

<i>Legal Standards</i> .....	27
<i>Failure to Register Detention</i> .....	30
<i>Failure to Provide Access to a Lawyer</i> .....	32
<i>Failure to Provide Access to a Doctor</i> .....	33
<b>C. FAILURE TO CONDUCT AN EFFECTIVE INVESTIGATION</b> .....	34
1. <i>Lack of Independence and Impartiality</i> .....	35
Investigation by the Southern UIA and the Regional DIA .....	37
Investigation by the DCECC .....	37
2. <i>Undue Delay in the Investigation</i> .....	38
3. <i>Inadequacy of the Investigation</i> .....	39
a) Interviewing Key Witnesses .....	40
b) Preserving Evidence .....	41
c) Independent Medical Evidence.....	41
4. <i>No Opportunity for Participation by the Victim in the Investigation</i> .....	42
5. <i>Lack of Transparency of the Investigation</i> .....	43
6. <i>No Finding of Responsibility</i> .....	44
<b>D. FAILURE TO PROVIDE REDRESS</b> .....	46
<b>VII. CONCLUSION</b> .....	<b>48</b>
<b>VIII. LIST OF SUPPORTING DOCUMENTS</b> .....	<b>50</b>

## I. THE AUTHOR OF THE COMMUNICATION

1. This claim is submitted by the Open Society Justice Initiative and the Kazakhstan International Bureau for Human Rights and the Rule of Law who are appointed as legal representatives of the victim. A letter of authority is attached to this communication.<sup>1</sup>
2. Address for exchange of confidential correspondence:  
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## II. THE VICTIM

**Name:** Gerasimov  
**First name(s):** Alexander Pavlovich  
**Nationality:** Republic of Kazakhstan  
**Profession:** Construction worker  
**Date and place of birth:** [REDACTED]; Kostanay Region, Republic of Kazakhstan  
**Present address:** [REDACTED], Kostanay, Republic of Kazakhstan

## III. SUMMARY OF CLAIM

### State Party

3. The communication is submitted against the Republic of Kazakhstan, which acceded to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“UNCAT”) on 26 August 1998. Kazakhstan made the declaration under Article 21 and 22 recognising the right of individual communication on 21 February 2008.

### Domestic Remedies

4. A full description of the criminal complaints and appeals undertaken by Mr. Gerasimov in an attempt to bring about an effective criminal investigation into his

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<sup>1</sup> This communication was prepared with substantial *pro bono* assistance from the New York office of Lovells, and also with research assistance from the Lowenstein Human Rights Project of Yale Law School.

allegations of torture is outlined in paragraphs 37 to 54 below. In summary, they include the following:

- a) Complaint on behalf of Mr. Gerasimov by his stepson, Sergey Pshechenko, to the Prosecutor's Office for the City of Kostanay, 29 March 2007.
- b) Complaint by Mr. Gerasimov to the Kostanay Southern Unit of Internal Affairs ("Southern UIA"), 5 April 2007.
- c) Appeal to Regional Prosecutor's Office against refusal to initiate a criminal investigation by Southern UIA, 12 September 2007.
- d) Appeal to Regional Prosecutor's Office against refusal to initiate a criminal investigation by Regional Department for Combating Economic Crimes and Corruption (DCECC), 3 March 2008.
- e) Appeal to Regional Prosecutor's Office against second refusal to initiate a criminal investigation, March 2008.
- f) Appeal to Second Court of the City of Kostanay, March 2008.
- g) Request to Prosecutor General's Office to open a criminal investigation, 20 May 2008.

#### **Summary of the claim**

5. On 27 March 2007, police officers detained Mr. Gerasimov at a police station in the City of Kostanay in Kazakhstan. They held him for more than 24 hours, without registration, and interrogated him about the alleged murder of an elderly woman in his neighborhood. In the course of the interrogation, they tortured him in an attempt to elicit a confession. A group of at least five police officers beat him severely with blows to his kidneys, threatened him with sexual violence, and tied his hands and held him down on the floor while suffocating him with a polypropylene bag in a process known as "dry *submarino*" until he bled from his nose, ears and from the abrasions on his face, before finally losing consciousness. They then repeated this process several times. He was eventually released without charge.
6. As a result of his physical injuries, Mr. Gerasimov spent 13 days in the hospital. He later spent more than a month in a psychiatric hospital undergoing treatment for Post-Traumatic Stress Disorder (PTSD), from which he continues to suffer today. His numerous complaints and appeals to the prosecution authorities and to the courts received only superficial examination. A prompt, impartial and effective criminal investigation was never carried out. As a result, no one has been held criminally responsible for the torture of Mr. Gerasimov, and he has not obtained compensation or medical rehabilitation for his torture.
7. The Republic of Kazakhstan violated the UNCAT in at least four ways:
  - *A. Mr. Gerasimov was Tortured.* The treatment inflicted upon Mr. Gerasimov by state agents for the purposes of eliciting a confession amounted to torture, contrary to Article 1.

- *B. Failure to Adopt Safeguards to Prevent Torture.* The State Party has failed to establish adequate safeguards against ill-treatment during the initial period of detention, allowing a situation of unregistered detention that facilitates torture, contrary to Article 2.
- *C. Failure to Conduct an Effective Investigation.* The State Party has failed to conduct a prompt and effective investigation into the allegations of torture, contrary to Article 12 and Article 13.
- *D. Failure to Provide Redress.* The State Party has failed to provide access to effective remedies including compensation and adequate reparation for the torture, contrary to Article 14.

#### **IV. FACTS OF THE CLAIM**

8. The victim, Mr. Alexander Gerasimov, was born on 13 October 1969 in the Kostanay Region of Kazakhstan.<sup>2</sup>
9. He is represented in this communication by the Open Society Justice Initiative and the Kazakhstan International Bureau for Human Rights and the Rule of Law. A letter of authorization is attached to this communication at Exhibit 33.

#### **Arbitrary Detention at Southern UIA Police Station – 27 March 2007**

10. In March 2007 Alexander Gerasimov was 37 years old, employed as a construction worker, married to Anna Nikolaevna Pshechenko, with four children: his stepsons, Anatoly Pshechenko (then age 21), Sergey Pshechenko (then age 19), and Vladislav Pshechenko (then age 10); and his biological son, Ruslan Gerasimov (then age 2). Mr. Gerasimov and his family then lived (and still live) in the City of Kostanay, in the Kostanay Region of Kazakhstan.<sup>3</sup>
11. On his way home from work at about 9.30 in the evening of Tuesday, 27 March 2007, Mr. Gerasimov received a phone call on his mobile phone from his wife. She told him that his stepson Anatoly had been detained by the police and taken to the local police station, the Kostanay City Southern Unit of Internal Affairs (“Southern UIA”).<sup>4</sup>
12. Seeking an explanation for Anatoly’s detention, Mr. Gerasimov and his wife went to the police station. In the lobby, they saw Anatoly’s friends, Alexander Siguev and Irina Vasilyeva, who had been with Anatoly when the police detained him. Mr. Gerasimov’s wife asked the police about Anatoly’s whereabouts. The police told

<sup>2</sup> See Exhibit 50: Gerasimov’s Passport.

<sup>3</sup> See Exhibit 39: Statement of Mr. Alexander Gerasimov (“Gerasimov Statement”); Exhibit 34: Videotaped Interview with Mr. Gerasimov undertaken by counsel on 14 April 2009 (describing and reenacting the acts of torture inflicted upon him on 27 March 2007); Exhibit 43: Diagram #3 – Kazakhstan; Exhibit 44: Diagram #4 – Regions within Kazakhstan.

<sup>4</sup> *Ibid.*, Gerasimov Statement at para. 3. The “Southern UIA” is also referred to as the “Yuzhnyy OVD” in some of the translations of the exhibits.

her they had no record of Anatoly's detention. However, he was in fact in the building.<sup>5</sup>

13. Mr. Gerasimov and his wife then went to the waiting room in the police station. After waiting approximately 40 minutes, five police officers entered the room. Alexander Siguev told Mr. Gerasimov that these were the same officers who took Anatoly into custody. Mr. Gerasimov and his wife approached the officers and asked them about their son, Anatoly.<sup>6</sup>
14. Upon learning that Mr. Gerasimov was Anatoly's stepfather, but without explanation, one of the five officers grabbed Mr. Gerasimov by the arm and took him to an office on the third floor of the police station. The officer left him locked alone in this office for approximately 30 minutes.<sup>7</sup>
15. During this time, Mr. Gerasimov received a phone call on his mobile phone from his stepson, Sergey, who said that he had also been picked up by the police and was being held in an office on the third floor of the police station. The police officers later confiscated Mr. Gerasimov's mobile phone.<sup>8</sup>

#### **Unregistered detention without access to a lawyer**

16. At approximately 20:00 on 27 March 2007, the same five officers entered the office where Mr. Gerasimov was being held and demanded to know why Mr. Gerasimov had killed Valentina Tarnaurskaya, an elderly woman who had lived in Mr. Gerasimov's neighborhood. Mr. Gerasimov was shocked by this accusation. He acknowledged that he knew the woman, but he denied any involvement in her death.<sup>9</sup>
17. Over the course of the next hour, the officers questioned Mr. Gerasimov and continued to demand that he confess to the murder. They said his sons had told them that he had committed the murder. They also told him that a witness had seen him at the woman's house and that his fingerprints had been found there. Mr. Gerasimov continued to deny the accusations.<sup>10</sup>

#### **Torture during interrogation**

18. After about an hour of interrogation, the officers ordered Mr. Gerasimov to stand in the corner of the office.<sup>11</sup> One of the officers then approached Mr. Gerasimov and inflicted several heavy blows to Mr. Gerasimov's left and right kidneys.<sup>12</sup>
19. The officers then threatened Mr. Gerasimov with sexual violence. They placed Mr. Gerasimov on his knees, and one of the officers unzipped his trousers. Upon seeing

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<sup>5</sup> *Ibid.* para. 4.

<sup>6</sup> *Ibid.* para. 5.

<sup>7</sup> *Ibid.* para. 6.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.* para. 7.

<sup>10</sup> *Ibid.* para. 10.

<sup>11</sup> Exhibit 41: Diagram #1 – Third Floor of the Southern UIA / Police Station, Location 2.

<sup>12</sup> See note 3 above, at para. 11.

this, Mr. Gerasimov jumped to his feet.<sup>13</sup> The officers shouted that they wanted to “play piano” on Mr. Gerasimov.<sup>14</sup>

20. The five officers then forced Mr. Gerasimov to the floor, chest down.<sup>15</sup> They tied his hands behind his back using his belt. Four officers held his legs and torso so that he could not move. Then, the fifth officer took a thick clear polypropylene bag, turned it inside out, and placed it over Mr. Gerasimov’s head, covering his eyes, nose and mouth. This officer then forced his right knee into Mr. Gerasimov’s back, along his spine, and began to pull the plastic bag backwards. Mr. Gerasimov’s head and neck were pulled back. He felt as if his spine would crack. He began to suffocate.<sup>16</sup>
21. Mr. Gerasimov began to choke and lose consciousness. When this happened, the fifth officer stopped pulling on the bag, and he was able to breathe a little. As soon as he revived, however, the fifth officer again pressed his knee into his back and pulled the bag backwards, again suffocating him.<sup>17</sup>
22. This process was repeated multiple times. Every time the fifth officer released the bag, he shouted: “Confess and that’s it! We know that you killed the grandma!”<sup>18</sup>
23. Mr. Gerasimov became disoriented. He did not know where he was. He thought he was going to die, and he felt ready to die. After a point, he stopped resisting.<sup>19</sup> He does not know how long this torture continued. He believes that it lasted at least 15 minutes but could have continued for one hour.<sup>20</sup>
24. At some point, Mr. Gerasimov’s blood became visible on the polypropylene bag and on the floor. The pressure of the plastic against his face and head caused several abrasions that started to bleed. His eyebrow area, nose and ears were all bleeding. Upon seeing the blood, the officers stopped the torture.<sup>21</sup>
25. The officers made Mr. Gerasimov clean up the blood on the bag and on the floor of the office with a rag. One officer then led him to the bathroom and made him throw out the bag and the bloodied rag.<sup>22</sup> After throwing out the bag and the rag, Mr. Gerasimov was taken to another office, with a registration desk, where he was placed behind the door.<sup>23</sup>
26. Some time later, Mr. Gerasimov was taken to another office on the third floor of the police station where he saw Anatoly and Sergey.<sup>24</sup> He was then taken to another

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<sup>13</sup> See note 3 above, at para. 12.

<sup>14</sup> *Ibid.* para. 11.

<sup>15</sup> *Ibid.* para. 13; See note 11 above: Diagram #1 – Third Floor of the Southern UIA / Police Station.

<sup>16</sup> *Ibid.* para. 14; See Exhibit 34: Video Interview and Transcript of Interview with Mr. Gerasimov.

<sup>17</sup> *Ibid.* para. 15.

<sup>18</sup> *Ibid.* para. 16.

<sup>19</sup> *Ibid.* para. 17.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.* para. 18.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.* para. 20.

<sup>24</sup> *Ibid.* para. 21.



office where he spent the night in a chair, under the supervision of a police officer.<sup>25</sup>

27. Exhibit 34 is a DVD in which Mr. Gerasimov demonstrates the torture that was inflicted upon him.

#### **Further interrogation and release – 28 March 2007**

28. It appears that in the morning of 28 March 2008, Anatoly and Sergey were released from the police station. Mr. Gerasimov was not. His detention on 27 March 2007 was not registered. Although the documentary evidence has not been made available, it appears that the police officers at the Southern UIA documented his presence at the police station only the next day, 28 March 2007.<sup>26</sup>
29. At approximately 9:00 hours on 28 March 2007, Mr. Gerasimov was taken to speak with a police investigator. The investigator asked him more questions about the woman's murder. During his interrogation, the investigator struck him in the head with a large book. The investigator then led him from room to room, on different floors, within the police station.<sup>27</sup>
30. Mr. Gerasimov was not charged with any offence, and he was released from the Southern UIA police station at approximately 18:00 hours on 28 March 2007. His wife had contacted the Regional Department of Internal Affairs ("Regional DIA") and complained about her husband's detention. The Regional DIA then called the Southern UIA and requested his release.<sup>28</sup>
31. Immediately following his release, Mr. Gerasimov suffered from severe headaches and nausea. His body was swollen and he was unable to sit in a taxi. He had to walk home from the police station, accompanied by his wife and stepson, Sergey. Once home, Mr. Gerasimov continued to have severe headaches. His wife called an ambulance and an emergency doctor, who told Mr. Gerasimov that he required immediate emergency care.<sup>29</sup>

#### **Physical Injuries and Hospital Treatment**

32. On the evening of 28 March 2007, Mr. Gerasimov was taken to the Kostanay City Hospital.<sup>30</sup> He was admitted at 20:38 hours to the Neurosurgical Unit.<sup>31</sup> He was examined and given injections and a lumbar puncture.<sup>32</sup> He was diagnosed as suffering from a "major closed craniocerebral trauma," "cerebral contusion," "contusions to the right kidney, the lumbar region, and the soft tissue of the head,"

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<sup>25</sup> *Ibid.* See note 11 above: Diagram #1 – Third Floor of the Southern UIA / Police Station, Location 5.

<sup>26</sup> See Exhibit 31: Gerasimov Appeal (Fenko Letter ) to Reverse Ruling to Refuse to Initiate Criminal Proceedings (20 May 2008).

<sup>27</sup> See note 3 above, at para. 22.

<sup>28</sup> *Ibid.* para. 23.

<sup>29</sup> *Ibid.* para. 25.

<sup>30</sup> *Ibid.*

<sup>31</sup> Exhibit 22: Regional DCECC Decision (5 Sept. 2007).

<sup>32</sup> See note 3 above, at para. 25.

and a “contused wound to the right superciliary arch.”<sup>33</sup> His visible injuries are depicted in the photographs taken on or about 29 March 2007 while he was hospitalized.<sup>34</sup>

33. Mr. Gerasimov remained in the hospital for 13 days and was released on 10 April 2007.<sup>35</sup> In spite of his release, he continued to experience strong headaches,<sup>36</sup> pain in his kidney areas,<sup>37</sup> and hand and eye tremors.<sup>38</sup> Following his release from the hospital, he was diagnosed with a shifted kidney and persistent bacterial infections of both kidneys, an ultrasound taken on 1 August 2007 demonstrating that “the right kidney was 1-2 cm prolapsed, with rotation.”<sup>39</sup>
34. On 23 April 2007, a medical examination was conducted to evaluate Mr. Gerasimov’s health. This document has never been provided to Mr. Gerasimov or his legal team.<sup>40</sup>

### **Diagnosis of PTSD and Treatment**

35. Between April and August 2007, Mr. Gerasimov was treated by a neurologist for headaches, hand tremors and anxiety resulting from his ill-treatment by the police during his unregistered detention in March 2007.<sup>41</sup> He began to suffer from hallucinations and a sense of insurmountable and indeterminate fear.<sup>42</sup> His ill health prevented him from functioning normally at his job and in regular social circles.<sup>43</sup>
36. On 7 August 2007, Mr. Gerasimov underwent a psychological examination and was diagnosed with Post-Traumatic Stress Disorder (“PTSD”). He was referred to a psychiatric hospital for further examination and treatment. There, the diagnosis of

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<sup>33</sup> See Exhibit 1: Discharge Epicrisis.

<sup>34</sup> See Exhibit 3: Photograph #1 – Facial Injuries; Exhibit 4: Photograph #2 – Lower Back; Exhibit 5: Photograph #3 – Lower back (Close Up) (29 Mar. 2007).

<sup>35</sup> See note 33 above.

<sup>36</sup> See Exhibit 7: Neurologist Notes (11 April 2007).

<sup>37</sup> See Exhibit 6: Urologist Notes (11 Apr. 2007).

<sup>38</sup> See Exhibit 17: Neurologist Notes (1 Aug. 2007); Exhibit 18: Neurologist Notes (2 Aug. 2007); Exhibit 19: Neurologist Notes (6 August 2007); Exhibit 20: Psychological Examination (7 Aug. 2007).

<sup>39</sup> See Exhibit 8: Urologist Notes (19 April 2007); Exhibit 16: Ultrasound (1 Aug. 2007).

<sup>40</sup> See note 31 above (Exhibit 22): Regional DCECC Decision (5 September 2007) (stating that “according to the conclusions of the forensic medical examination No. 180 of 23,04,2007, A.P. Gerasimov suffered light injuries and was admitted to the neurosurgical department of the Kostanay City Hospital at 8:38 p.m. on 23.04.07.”); See also: Exhibit 23, Gerasimov Appeal to the Regional Prosecutor to Reverse the Ruling to Refuse to Initiate Criminal Proceedings (12 Sept. 2007) (acknowledging the forensic medical report cited in Exhibit 22, but stating that “the conclusions about light bodily harm to health are made only based on the discharge epicrisis from the city hospital, but the fact of further out-patient treatment is not taken into consideration”).

<sup>41</sup> See note 38 above (Exhibits 17, 18, 19 & 20), Neurologist Notes (11 Apr. 2007 & 2 August 2007 & 6 August 2007); See note 39 above, Psychological Examination (7 Aug. 2007).

<sup>42</sup> See note 36 & 38 above (Exhibits 17, 18, 19 & 20), Neurologist Notes (11 Apr. 2007 & 2 and 6 Aug. 2007); See note 38 above, Psychologist Examination (7 Aug. 2007).

<sup>43</sup> See note 3 above, at para. 29.

PTSD was confirmed, and he was treated as an in-patient from 8 August to 3 September 2007.<sup>44</sup> His employer placed him on official sick leave.<sup>45</sup>

### **First Complaints**

37. On 29 March 2007, Mr. Gerasimov's stepson, Sergey Pshechenko, submitted a complaint both on his behalf and on behalf of Mr. Gerasimov to the Prosecutor's Office for the City of Kostanay ("City Prosecutor's Office").<sup>46</sup>
38. On 5 April 2007, Mr. Gerasimov submitted a complaint to the Kostanay Southern Unit of Internal Affairs ("Southern UIA"), which is the police station where the alleged torture occurred.<sup>47</sup>

### **Preliminary Investigation by the police**

39. In April 2007, The Southern UIA undertook a preliminary investigation, and an officer from the Southern UIA took statements from Mr. Gerasimov, his stepsons Anatoly and Sergey, and three police officers. The officer did not interview or take statements from Mr. Gerasimov's wife, his co-workers, medical personnel on duty at the City Hospital on 28 March 2007, or from Alexander Sigurev and Irina Vasilyeva, who were with Anatoly when the police arrested him and who were at the Southern UIA when Mr. Gerasimov was detained.<sup>48</sup> The police officers who were interviewed stated that Mr. Gerasimov and his stepsons were questioned at the police station but that they did not observe any injuries to them.<sup>49</sup> Other officers suggested that they were never even brought to the police station, put in a holding cell, or detained overnight.<sup>50</sup>
40. On 8 May 2007, Investigator A.A. Abilbekov of the Southern UIA, the investigator who issued the original decision to question Mr. Gerasimov, issued a decision not

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<sup>44</sup>See note 42 above, Psychological Notes (7 Aug. 2007); See: Exhibit 21: Sick Leave Papers (Aug. - Sept. 2007).

<sup>45</sup> *Ibid.*, Sick Leave Papers (Aug. - Sept. 2007).

<sup>46</sup> See Exhibit 2: S. Pshechenko Complaint (29 Mar. 2007).

<sup>47</sup> No copy of this complaint is available, but it is referred to in the Prosecutor General's Office Letter of 6 June 2007 [Exhibit 12] indicating that the appeal (complaint) of A.P. Gerasimov was being sent to the Prosecutor's Office of the Kostanay Region for Action.

<sup>48</sup> See Exhibit 31: Gerasimov Appeal (Fenko Letter) to Reverse the Ruling to Refuse to Initiate Criminal Proceedings (20 May 2008).

<sup>49</sup> See note 40 above (Exhibit 22), Regional DCECC Decision (5 Sept. 2007) (indicating that Senior Investigator K.Kh Miramov of the Investigation Department of the Southern UIA and Investigator Tulepbergenov gave similar explanations to the effect that Mr. Gerasimov and his stepsons were questioned on arrival at the Southern UIA but that they sustained no bodily injuries); See also note 40 above (Exhibit 23), Gerasimov Appeal to the Regional Prosecutor to Reverse the Ruling to Refuse to Initiate Criminal Proceedings (12 Sept. 2007) (citing the testimony of Miramov and Tulepbergenov that Gerasimov and the Pshechenko brothers were brought to the Southern UIA for questioning, noting that testimony of two other police officers was taken to the effect that no beatings or detentions occurred, and objecting that none of this testimony of police officers was questioned in any way while completing the investigation).

<sup>50</sup> See Exhibit 28: Regional DCECC Decision – Ruling of Refusal to Initiate Criminal Proceedings (1 Feb. 2008), citing the testimony of Major B.G. Tasenov and Duty Unit Assistant A.T. Bisengaliyev, both of the Southern UIA.

to initiate a criminal investigation.<sup>51</sup> That decision was upheld by the Senior Assistant Prosecutor for Kostanay City on 30 May 2007.<sup>52</sup>

### **Criminal Investigation by Regional DIA**

41. On 10 June 2007, following an intervention by the Kazakhstan International Bureau for Human Rights and the Rule of Law (“KIBHR”), the City Prosecutor’s Office quashed the decision of the Senior Assistant Prosecutor and ordered the Department of Internal Security within the Kostanay Region Department of Interior Affairs (“Regional DIA”) to investigate Mr. Gerasimov’s complaint.<sup>53</sup> On 13 June 2007, the Department of the National Security Committee of the Republic of Kazakhstan for the Kostanay Region informed Mr. Gerasimov that his torture complaint submitted on 5 April 2007 to the Southern UIA and that was forwarded by letter of 9 June 2006 by the Prosecutor General’s Office would indeed be forwarded to the appropriate government organization for action.<sup>54</sup> On 19 June 2007, the Regional Prosecutor’s Office for the Kostanay Region (“Regional Prosecutor’s office”) informed Mr. Gerasimov that his complaint had been sent to the Directorate of Internal Security of the Regional DIA for further review.<sup>55</sup>
42. By 28 June 2007, the renewed investigation had finished, and the Regional DIA informed Mr. Gerasimov that it had resulted in (a) a finding of a violation of a regulation that requires the registration of detainees held in custody for more than three hours, and (b) disciplinary sanctions against “a number of staff ... up to the removal from their positions.”<sup>56</sup> The Regional DIA also stated that criminal charges had been laid against “staff” of the Southern UIA. According to the Regional DIA, the charges were instituted under Article 308, Part 4(a) of the Republic of Kazakhstan’s Criminal Code, which criminalizes actions taken in excess of official authority or involving the use or threat of violence.<sup>57</sup> These charges appear to have been dropped when the case was transferred to the DCECC (see below).
43. On 16 July 2007, 3½ months after the events, a scientific examination was conducted on the clothes worn by Mr. Gerasimov and three police officers present in the Southern UIA on the night of 27 March 2007. Neither Mr. Gerasimov nor his lawyer knew about this examination or were permitted to attend. The examination

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<sup>51</sup> See Exhibit 14: Regional Prosecutor’s Office Letter (19 June 2007).

<sup>52</sup> *Ibid.* para. 3.

<sup>53</sup> See Exhibit 13: City Prosecutor’s Office Letter (18 June 2007).

<sup>54</sup> See Exhibit 12: National Security Committee Letter (13 June 2007) (stating “[i]n accordance with Article 185 of the Republic of Kazakhstan Code of Criminal and based on Article 7(6) of the Republic of Kazakhstan Law of 12 January 2007 ‘On procedure for Reviewing Appeals of Individuals and Legal Entities’, we are sending the claim of A.P. Gerasimov (KUZ No. 148 of 02.06.2007) to be passed on according to jurisdiction.”; See also: Exhibit 9, Prosecutor General’s Office Letter (6 June 2007) (indicating that the appeal [complaint of A.P. Gerasimov] was being sent to the Prosecutor’s Office of the Kostany Region for Action).

<sup>55</sup> See Exhibit 14: Regional Prosecutor’s Office Letter (19 June 2007).

<sup>56</sup> See Exhibit 15: Regional DIA Letter (28 June 2007).

<sup>57</sup> *Ibid.*; See Exhibit 46: Criminal Code Article 308.

concluded that fibers found on Mr. Gerasimov's clothes were not similar to those found on the officers' clothing.<sup>58</sup>

### **Intimidation of Mr. Gerasimov**

44. In June 2007, Mr. Gerasimov received several anonymous phone calls from unidentified people who attempted to bribe him to withdraw his complaint. These people also threatened him and told him that if he did not retract his complaint then a criminal case would be brought against him. As a result, Mr. Gerasimov feared for his safety and for the safety of his family.<sup>59</sup>
45. On 12 June 2007, Mr. Gerasimov submitted a complaint to the Regional Prosecutor's Office concerning pressure being exerted against him to withdraw his complaint. Police officers had offered the stepsons 500,000 Tenge (or approximately \$4,000 USD) in exchange for the withdrawal of their complaints and their stepfather's complaint.<sup>60</sup>
46. Mr. Gerasimov submitted a second complaint to the Regional Prosecutor's Office on 13 June 2007 regarding further threats that he received stating that a criminal case would be filed against him unless he withdrew his complaint.<sup>61</sup>

### **Criminal Investigation Stopped**

47. In July, the Regional Prosecutor's Office reversed the Regional DIA's decision to open its own criminal investigation into the allegations of ill-treatment and instead sent the case to the Department for Combating Economic Crimes and Corruption for the Kostanay Region ("DCECC") for further examination.<sup>62</sup> On 5 September 2007, the DCECC refused to initiate a criminal investigation.<sup>63</sup> It cited a lack of evidence connecting the police officers' actions to Mr. Gerasimov's injuries.<sup>64</sup>

### **First Appeal against refusal to investigate**

48. On 12 September 2007, Mr. Gerasimov appealed the DCECC's refusal to the Regional Prosecutor's Office,<sup>65</sup> and on 20 September the Director of the Kostanay Regional Branch of the KIBHR also wrote to the Regional Prosecutor's Office asking that Office to take appropriate action in investigating Mr. Gerasimov's complaint.<sup>66</sup> On 24 September 2007, the Regional Prosecutor's Office reversed the

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<sup>58</sup> See Exhibit 28: Regional DCECC Decision, Ruling on Refusal to Initiate Criminal Proceedings (1 February 2008).

<sup>59</sup> See Exhibit 10 & Exhibit 11: Gerasimov Complaints (12 and 13 June 2007).

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.* Gerasimov Complaint 13 June 2007.

<sup>62</sup> See note 40 above (Exhibit 22), DCECC Decision (5 September 2007) (referring to a Regional Prosecutor's Office Decision to reverse the regional DIA's decision to open their own criminal investigation and stating that the Regional Prosecutor's Office Decision was received by the Regional DCECC on 30 July 2007).

<sup>63</sup> See note 31 above (Exhibit 22), DCECC Decision (5 Sept. 2007).

<sup>64</sup> *Ibid.*

<sup>65</sup> See note 40 above (Exhibit 23), Gerasimov Appeal to the Regional Prosecutor to Reverse the Ruling to Refuse to Initiate Criminal Proceedings (12 Sept. 2007).

<sup>66</sup> See Exhibit 24: Kazakhstan Bureau for Human Rights Letter (20 Sept. 2007).

DCEEC decision and sent the case back to the regional DCECC for further examination.<sup>67</sup> The Regional Prosecutor Office's letter stated that "the issue of initiating the criminal proceedings cannot be resolved currently, without additional examination."<sup>68</sup> On 24 September 2007, the DCECC received the case-file from the Regional Prosecutor's Office with the request to conduct a follow-up investigation.<sup>69</sup>

### **Second Criminal Investigation Stopped**

49. On 3 December 2007, the Regional DIA wrote to the KIBHR with further details of the results and findings of its investigation of June 2007, which included:
- a) findings of numerous flagrant violations of laws and regulations of the Ministry of Internal Affairs by Southern UIA police officers;
  - b) the discipline and removal of ten [unnamed] persons from their positions at the Southern UIA;
  - c) the conduct of a follow-up investigation into the allegations of maltreatment of Mr. Gerasimov to be conducted by the Department of Internal Security of the Regional DIA;
  - d) the initiation of a criminal investigation against several police officers, and subsequent reversal of this decision by the Regional Prosecutor's Office; and
  - e) the transfer of Mr. Gerasimov's file back to the DCECC for a follow-up investigation, and the decision of the DCECC not to initiate a criminal investigation.<sup>70</sup>
50. On 22 January 2008, Mr. Gerasimov enquired with the Regional Prosecutor's Office as to the status of the DCECC's second review of his complaint.<sup>71</sup> The DCECC then issued a second decision on 1 February 2008 again refusing to initiate a criminal investigation, on the grounds that it was not possible to prove involvement of the officers of Southern UIA.<sup>72</sup>

### **Second Appeal against refusal to investigate**

51. A further appeal was filed in March 2008. However, on 19 March 2008 the Regional Prosecutor's Office upheld the decision to refuse to open an investigation,

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<sup>67</sup> See Exhibit 25: Regional Prosecutor's Office Letter (25 Sept. 2007).

<sup>68</sup> *Ibid.*

<sup>69</sup> See note 58 above (Exhibit 28), DCECC Decision of 1 Feb. 2008 (note that the date of receipt of the DCECC of the case-file from the Regional Prosecutor's Office with the request to conduct a follow-up investigation is incorrectly noted in the English translation of the DCECC Decision of 1 Feb. 2008 as "24 December 2007" (Exhibit 28) and the correct date of receipt of "24 September 2007" is provided in the Regional Prosecutor's Office Letter of 25 September 2007 (Exhibit 25).

<sup>70</sup> See Exhibit 26: Ministry of Internal Affairs Letter (3 Dec. 2007).

<sup>71</sup> Referred to in Exhibit 29(a) Regional Prosecutor's Office Letter of 19 Mar. 2008 stating that "[t]he Regional Prosecutor's Office has reviewed your appeal about not agreeing with the ruling to refuse to initiate criminal based on the statement of A.P. Gerasimov and hold police staff of the Yuzniy OVD [Southern UIA] of the city of Kostanay criminally liable."

<sup>72</sup> See note 58 above (Exhibit 28), DCECC Decision of 1 Feb. 2008.

and said that recourse for Mr. Gerasimov's "light bodily injuries" could be pursued through the courts.<sup>73</sup>

### **Third Appeal against refusal to investigate**

52. Mr. Gerasimov then appealed the Regional Prosecutor's Office's decision to both the Prosecutor General's Office of the Republic of Kazakhstan ("Prosecutor General's Office") and to the Second Court of the City of Kostanay ("City Court"). On 25 March 2008, the City Court declined to hear Mr. Gerasimov's appeal, and upheld the decision of the Regional Prosecutor's Office to refuse to open a criminal investigation.<sup>74</sup>

### **Fourth Appeal against refusal to investigate**

53. On 20 May 2008, Mr. Gerasimov further requested the Prosecutor General's Office to initiate a criminal investigation on the basis that the DCECC investigation was deficient in numerous respects.<sup>75</sup> In particular, Mr. Gerasimov's lawyer argued that:
- a) The examination of Mr. Gerasimov's complaint was superficial and biased;
  - b) The forensic medical examination did not appear to consider Mr. Gerasimov's subsequent outpatient care;
  - c) Even if Mr. Gerasimov's injuries were "light," that did not rule out the possibility that Mr. Gerasimov had been tortured;
  - d) The investigation ignored important contradictions in police officers' testimony;
  - e) Two police officers confirmed that Mr. Gerasimov had been detained and questioned, as his interrogation was recorded at the Regional DIA on 28 March 2007 and his wife visited the interrogation and her visit is recorded in the admission log; and
  - f) The investigation failed to exhaust all avenues to identify the persons who inflicted Mr. Gerasimov's injuries. In particular, the police did not interview: (a) Mr. Gerasimov's coworkers; (b) Vitaliy Povornitskiy, who notified Mr. Gerasimov's wife that Anatoly had been detained; (c) the medical personnel at the City Hospital where Mr. Gerasimov was treated; and (d) other patients in Mr. Gerasimov's ward who observed police officers visiting Mr. Gerasimov.<sup>76</sup>
54. On 11 June 2008, the Prosecutor General's Office informed Mr. Gerasimov that it would uphold the DCECC's refusal to open a criminal investigation as it had insufficient evidence to act on Mr. Gerasimov's complaint.<sup>77</sup> As the City Court had already rejected the appeal, no further challenge to this decision was made.

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<sup>73</sup> See Exhibit 29: Regional Prosecutor's Office Letter (19 Mar. 2008).

<sup>74</sup> See Exhibit 30: City Court Decision (25 Mar. 2008).

<sup>75</sup> Fenko Letter (20 May 2008), see note 26 above (Exhibit 31).

<sup>76</sup> *Ibid.*

<sup>77</sup> See Exhibit 32, Prosecutor General's Office Letter (11 June 2008).

## V. ADMISSIBILITY

55. The communication brought on behalf of Mr. Gerasimov satisfies the requirements for admissibility within the Convention.

### **No Other International Complaint**

56. 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 22(5)(a) UNCAT.

### **Jurisdiction**

57. Kazakhstan made the required declaration under Article 21 and 22 of the UNCAT on 21 February 2008, recognizing the competence of the Committee to receive and consider State and individual communications. Therefore, the United Nations Committee against Torture (“Committee against Torture”) has jurisdiction to review the ongoing violations alleged in the present Petition that occurred in the territory under the jurisdiction of the State Party.
58. While the act of torture complained of preceded the entry into force of the Treaty, the complaint is admissible as (1) Kazakhstan has affirmed 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 Convention. As this Committee has established:

“The Committee recalls that a State party’s obligations under the Convention apply from the date of its entry into force for that State party. It considers, however, that it can examine alleged violations of the Convention which occurred before a State party’s recognition of the Committee’s competence to receive and consider individual communications alleging violations of the Convention (i.e. before the declaration under Article 22 became effective...), if the effects of these violations continued after the declaration under Article 22 became effective, and if the effects constitute in themselves a violation of the Convention. A continuing violation must be interpreted as an affirmation, after the formulation of the declaration, by act or by clear implication, of the previous violations of the State party.”<sup>78</sup>

59. In interpreting the similar rules with regard to admissibility of complaints under the International Covenant on Civil and Political Rights (“ICCPR”), the United Nations Human Rights Committee (“UN HRC”) has 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.”<sup>79</sup>

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<sup>78</sup> *A. A. v. Azerbaijan*, Communication No. 247/2004, U.N. Doc. CAT/C/35/D/247/2004 (2005).

<sup>79</sup> *Könye v. Hungary*, UN HRC Views of 22 Sept. 1992, U.N. Doc. CCPR/C/5-D/520/1992, at para. 6.4. Available at: <http://www1.umn.edu/humanrts/undocs/html/dec520.htm>.



60. The UN HRC also considers such complaints to be admissible where the violation continues to affect 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].”<sup>80</sup>
61. Specific examples of ongoing violations confirmed by the UN HRC include both a failure to investigate an allegation of a human rights violation, and a failure to provide remedies for it:
- “The Committee finds it necessary to remind the State Party that it is under obligation, in respect of violations occurring or continuing after the entry into force of the Covenant, thoroughly to investigate alleged violations and to provide remedies where applicable, for victims or their dependants.”<sup>81</sup>
62. With respect to the torture of Mr. Gerasimov in violation of Article 1 that occurred in 2007 (see **section IV-A below**), the Committee should conclude that the torture amounts to a “previous violation” of the Treaty that has since been affirmed by the State Party by act or clear implication, due to its willful failure to acknowledge responsibility for the torture, its willful failure to make any changes to the legal system that permitted the torture, and its continuing failure to mount an adequate investigation into the torture. In addition, Mr. Gerasimov continues to suffer from Post-Traumatic Stress Disorder as a result of the torture, which means that the previous violation continues to have an effect upon him which itself amounts to a violation of the treaty. This aspect of the complaint is therefore admissible.
63. With regard to the failure to prevent torture under Article 2(1) (see **section IV-B below**), despite having ratified the Convention in 1998 the State Party has still not enacted the new laws necessary to bring its legislation into line with the recommendations of the Committee, and has not enforced the procedures necessary to prevent the torture that occurred to Mr. Gerasimov. In addition, it has failed to take the specific steps that the Committee has recommended are necessary to prevent torture from occurring in Kazakhstan. Consequently, it has both affirmed the violation and continued it, and this complaint is therefore admissible under both grounds.
64. With regard to the failure to adequately investigate the torture under Article 12 and Article 13 (see **section IV-C below**), the attempts by Mr. Gerasimov to bring about an effective investigation continued after the entry into force of the Treaty, and yet the government has still not undertaken an investigation into the torture that satisfies the requirements of the Convention. Consequently, the failure to investigate constitutes an ongoing violation of the duty thoroughly to investigate alleged violations and this aspect of the complaint is admissible.

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<sup>80</sup> *Lovelace v. Canada*, UN HRC Views 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>.

<sup>81</sup> *S.E. v. Argentina*, UN HRC Views of 26 March 1990, Comm. No. 275/88, at para. 5.4. Available at: [http://www.bayefsky.com/html/100\\_argentina275.php](http://www.bayefsky.com/html/100_argentina275.php).

65. Lastly, with regard to the failure to provide adequate remedies for the torture (see **section IV-D below**) the State Party has failed to provide any effective remedy for the violations of domestic law and of the Treaty. Consequently, this constitutes another ongoing violation for the failure to provide remedies where applicable, and this aspect of the complaint is also admissible.

#### **Exhaustion of Domestic Remedies**

66. As outlined above, Mr. Gerasimov and his family have attempted to make complaints on numerous occasions to government bodies about his torture and ill-treatment at the Kostanay Southern UIA on 27-28 March 2007. This communication satisfies the requirements of Article 22(5)(b) for the exhaustion of domestic remedies because (1) he has exhausted all the remedies that are available with numerous complaints to the prosecution authorities and to the Court, and there is no reasonable prospect of redress from any other procedure, (2) the failure of the authorities to open a criminal investigation means that he is unable to invoke any other remedy, (3) the police have tried to force Mr. Gerasimov to withdraw his complaint, and it is potentially dangerous for him to pursue any further remedies, and (4) the procedure has now become unreasonably delayed such that there is no duty to pursue it further.

##### 1. Mr. Gerasimov has Exhausted All Available Remedies

67. Mr. Gerasimov has exhausted all possible domestic remedies. He made a prompt complaint to the prosecution authorities. Paragraphs 48 to 54 above outline the subsequent attempts by Mr. Gerasimov, his family, and his legal representatives to persuade the prosecution authorities to conduct a proper investigation. This included four appeals against the refusal to commence a criminal investigation and judicial challenge against the decision of the prosecution authorities not to do so.
68. The decision of the Kostanay City Court suggests that there was a further appeal through that court to the Kostanay Regional Court. However, that appeal was not effective in practice. Article 109 (9) of the Criminal Procedure Code of Kazakhstan only allows for 3 days in which to appeal a decision of the City Court to the Regional Court, which is counted from the date of the decision, and not from the date on which it is received by the parties. The lawyer for Mr. Gerasimov did not receive the decision until after the 3 day period for appeal had expired.
69. Furthermore, any appeal under Article 109 is not an effective appeal, as it may not be utilized for appeals against prosecutorial discretion. The Judicial Reform Index for Kazakhstan published by the Central Europe and Eurasia Program (CEELI) of the American Bar Association in 2004 explains that:

“[...] The judicial appellate process is another area where the procuracy wields considerable power. “*Rayon*” [district] courts are the courts of first instance for less serious criminal cases and most civil cases. All parties have a right to appeal *rayon* court decisions to the *oblast* [regional] courts, which hear appeals in panels of three on a *de novo* basis. However, certain decisions of *rayon* courts, most notably those concerning the complaints against prosecutorial

decisions or acts pursuant to Article 109 of the Criminal Procedure Code, may not be appealed to the *oblast* level.[...]<sup>82</sup> (emphasis added).

## 2. Other Remedies are Neither Effective nor Available

70. Given the gravity of the violations against Mr. Gerasimov, nothing less than a criminal investigation and prosecution would constitute an effective remedy. There is no need to pursue civil, administrative and disciplinary measures as these cannot be considered an effective remedy for such a serious violation.<sup>83</sup> In this case, the failure of the State Party to open a criminal investigation has hindered the ability of Mr. Gerasimov to invoke any other available remedy.<sup>84</sup>
71. A civil remedy is not possible under Kazakh law without a criminal prosecution, as a civil claim may only be brought as a part of the criminal trial.<sup>85</sup> In any event, a civil claim is not capable of bringing about the criminal prosecution that is necessary in order to provide an effective remedy for torture and the failure to investigate. In such circumstances, the requirement for exhaustion in Article 22(5)(b) is met because the recourse procedure is unlikely to bring the complainants effective relief.<sup>86</sup>
72. While the Human Rights Commissioner, a position established by presidential decree in 2002, may receive complaints which he can refer to the competent authorities, asking them to initiate administrative measures or criminal proceedings against the alleged perpetrators, this process is not effective. Following his recent visit to Kazakhstan, the United Nations Special Rapporteur on Torture

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<sup>82</sup> American Bar Association – Central European and Eurasian Bar Initiative, *Judicial Reform Index for Kazakhstan*, Feb. 2004, p. 17. Available at: <http://www.abanet.org/rol/publications/kazakhstan-jri-2004.pdf>.

<sup>83</sup> *Vicente et al v. Colombia*, UN HRC Views of 29 June 1995, CCPR/C/60/D/612/1995. Available at: <http://www1.umn.edu/humanrts/undocs/612-1995.html>; *Coronel et al v. Colombia*, UN HRC Views of 29 Sept. 1996, CCPR/C/76/D/778/1997, at para. 6.2. Available at: <http://www1.umn.edu/humanrts/undocs/778-1997.html>.

<sup>84</sup> *Assenov & Others v. Bulgaria*, ECtHR Judgment of 28 Oct. 1998, at para. 103 (holding that the failure of the public prosecutor to open an investigation was tantamount to undermining the effectiveness of any other domestic remedies that may have been available).

<sup>85</sup> Article 162(2) of the Criminal Procedure Code of Kazakhstan states: “A civil claim is brought in relation to the accused or to those financially responsible for the actions of the accused and is considered in conjunction with the criminal case.” According to Article 169.1, the civil claim can be fully or partially sustained if a guilty verdict is rendered by the court. Article 923 of the Civil Code entitled “Responsibility for the harm, sustained as a result of unlawful actions of the state bodies of interrogation, preliminary investigation, the Prosecutor’s Office and the courts” contains a narrow list of persons and conditions which give rise to the right for compensation and damages from the State, which does not include torture. The list in part 1 of Article 923 defines such unlawful actions as follows: “Harm caused to a person as a result of unlawful conviction, criminal prosecution, unlawful use of restrictive measures during preliminary investigation in the form of detention, home arrest, confinement of the right to movement, unlawful use of administrative penalties in the form of arrest or correctional labor, unlawful confinement to the psychiatric institution or any other medical facility is compensated by the state according to the procedure, established by the respective legislation, regardless of the guilt of state officials.”

<sup>86</sup> *Cyril Le Gayic et al. v France*, Decision of the Committee against Torture, U.N. Doc. CAT/C/18/D/46/1996, at para. 7.2. Available at: <http://www.unhcr.ch/tbs/doc.nsf/0/6bb4749751311718802566f9003e91f3?Opendocument>.

(“UN Special Rapporteur on Torture”) concluded that this mechanism was ineffective:

“Although the Special Rapporteur recognizes that impunity is not total, he found that existing complaint mechanisms are ineffective. The burden of proof rests on the alleged victim of ill-treatment; therefore, only a small minority of perpetrators are actually brought to justice.”<sup>87</sup>

### 3. Danger to Mr. Gerasimov and his Family

73. Even if there were an additional, effective avenue of recourse for Mr. Gerasimov to pursue – and he maintains that there is not – there is a real risk of violence to Mr. Gerasimov were he to continue his complaint domestically. As outlined above, the police attempted to force Mr. Gerasimov to withdraw his complaint, and when he refused, tried to bribe him to do the same. He made a formal complaint with regard to these threats, but nothing has come of those complaints. The UN HRC has held that there is no requirement to exhaust domestic remedies where it is dangerous to do so.<sup>88</sup> Given the failure of the police to investigate credible allegations of threats to Mr. Gerasimov, it is clear that they have not taken the threats seriously, despite the fact that there is a history of police intimidation in Kazakhstan when individuals seek to assert their rights.
74. The UN Special Rapporteur on Torture in his report published on 8 February 2010 expresses particular concern as to reports of reprisals against those who make complaints of torture:

“Many of the detainees interviewed by the Special Rapporteur indicated that they had been threatened with further charges, longer imprisonment and, in some cases, sexual violence by fellow inmates in order to make them withdraw complaints or sign declarations that they did not have any complaints, or statements that they had sustained injuries while resisting arrest. He also learned that, in certain cases, threats are made against family members of the detainee, for example, they will be arrested or that the friends of the child will be informed. Such behaviour, besides going counter to international standards, renders any complaints system meaningless and should be addressed in a determined manner.”<sup>89</sup>

### 4. Unreasonable Delay

75. This Committee has held that the requirement for exhaustion of domestic remedies is satisfied where the recourse procedure is being unreasonably delayed.<sup>90</sup> The UN HRC has found that a three year delay in adjudicating a case at first instance,

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<sup>87</sup> See Exhibit 51: Manfred Nowak, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – Mission to Kazakhstan, A/HRC/13/39/Add.3, at para. 51.

<sup>88</sup> *Phillip v. Jamaica*, UN HRC Views of 20 October 1998, Comm No. 594/92, at para. 6.4.

<sup>89</sup> Special Rapporteur on Torture Report on Mission to Kazakhstan (Exhibit 51), see note 87 above, at para. 59.

<sup>90</sup> *Cyril Le Gayic et al. v. France*, see note 86 above.

discounting the availability of subsequent appeals, was “unreasonably prolonged.”<sup>91</sup> Here, after nearly three years of efforts the process against the police officers has not even been begun. It would be unreasonable to require Mr. Gerasimov to make any further efforts to force the State Party to accept its responsibilities, given the lengths to which he has already gone.

76. Consequently, the requirements for admissibility have all been met.

## **VI. VIOLATIONS OF THE UNCAT**

77. The Republic of Kazakhstan violated the UNCAT in at least four ways:

- *A. Mr. Gerasimov was Tortured.* The treatment inflicted upon Mr. Gerasimov by state agents for the purposes of eliciting a confession amounted to torture, contrary to Article 1.
- *B. Failure to Adopt Safeguard to Prevent Torture.* The State Party has failed to establish adequate safeguards against ill-treatment during the initial period of detention, allowing a situation of unregistered detention that facilitates torture, contrary to Article 2.
- *C. Failure to Conduct an Effective Investigation.* The State Party has failed to conduct a prompt and effective investigation into the allegations of torture, contrary to Article 12 and Article 13.
- *D. Failure to Provide Redress.* The State Party has failed to provide access to effective remedies including compensation and adequate reparation for the torture, contrary to Article 14.

### **A. Mr. Gerasimov was Tortured**

78. The treatment inflicted on Mr. Gerasimov by the police officers on 27-28 March 2007 amounts to torture within the definition of Article 1 of the UNCAT.
79. The police officers of the Southern UIA inflicted severe physical and mental pain and suffering by delivering heavy blows to his kidneys, threatening him with sexual violence, tying his hands with a belt, holding him down on the floor, and suffocating him with a bag until he lost consciousness. The resulting pain was intentionally inflicted for the purpose of eliciting a confession. This is consistent with patterns of torture that have been repeatedly found by this Committee and other inter-governmental and non-governmental monitoring bodies to be common in Kazakhstan.

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<sup>91</sup> *Fillastre and Bizoarn v. Bolivia*, UN HRC Views of 5 November 1991, U.N. Doc. CCPR/C/43/D/336/1988, at para. 5.2. Available at: <http://www1.umn.edu/humanrts/undocs/html/dec336.htm>.

80. Article 1 UNCAT states:

“For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

81. Putting a hood over the head of detainees is prohibited conduct.<sup>92</sup> Covering the eyes of a detainee and leaving them in isolation is an exacerbating feature “that was likely to arouse in him feelings of fear, anxiety and vulnerability likely to humiliate and debase him and break his resistance and will.”<sup>93</sup>
82. Suffocating someone until they lose consciousness is torture. Asphyxiation is defined by the Istanbul Protocol as a common form of torture, which notes that it can be perpetrated in two forms.<sup>94</sup> **Dry submarino** is carried out through covering the head with a plastic bag, closing off the nose and the mouth, and applying pressure around the neck. Several complications may develop from the process which would include petechiae of the skin, nosebleeds, bleeding from the ears, congestion of the face, infections in the mouth and acute or chronic respiratory problems.<sup>95</sup> Suffocation by other methods has also been recognized by applicants, state parties, and the CAT as a form of torture.<sup>96</sup>
83. The threat of violence can also amount to torture.<sup>97</sup> The uncertainty that is caused to an individual held and abused in unofficial custody is sufficient to amount to torture, as it is the “the infliction of mental suffering by creating a state of anguish

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<sup>92</sup> *Ireland v. United Kingdom*, ECtHR Judgment of 18 January 1978, at para. 96 & 167 (finding a breach of the Convention for the practice of putting a black or navy coloured bag over the detainees’ heads and, at least initially, keeping it there all the time except during interrogation).

<sup>93</sup> *Dikme v. Turkey*, ECtHR Judgment of 11 July 2000, at para. 91.

<sup>94</sup> United Nations Office of the High Commissioner for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Professional Training Series No. 8/Rev.1, at para. 214 (2004) (“Istanbul Protocol”). Available at: <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ruben David v. Sweden*, UN HRC Views of 8 November 2002, at para. 2.6 & 8.3. Available at: <http://www.unhcr.org/refworld/country,,CAT,,BGD,,42ce734c6,0.html>. (holding that it was uncontested that the applicant had been subjected to torture but that there was no real personal risk that he would be tortured again if he was returned to Bangladesh).

<sup>97</sup> *Migel Angel Estrella v. Uruguay*, UN HRC Views of 29 March 1983, at para. 1.6, 8.3 & 10. *The Greek Case*, Eur. Comm. H.R. Decision of 5 November 1969, at 461; *Campbell and Cosens v. United Kingdom*, ECtHR Judgment of 25 February 1982, at para. 26.

and stress by means other than bodily assault.”<sup>98</sup> In the context of interrogation, leaving the victim in a state of “uncertainty about his fate” has been considered a violation of international law.<sup>99</sup> Where the legal process is abused, inhuman treatment may occur from the risk that the individual will be subjected to an “unjustified or disproportionate sentence.”<sup>100</sup>

84. Similar to the cases outline above, Mr. Gerasimov was subjected to a combination of different forms of ill-treatment whereby he was kicked and punched, threatened with sexual violence, restrained with force, hooded, and suffocated (using a dry, rather than water technique) several times until he lost consciousness. The entire process was outside the law.
85. Lastly, the failure to provide medical treatment for the effects of torture amounts to an additional violation. Detainees must be provided with adequate medical assistance.<sup>101</sup> The failure to take effective steps to treat a patient such as admitting them to hospital is also prohibited conduct.<sup>102</sup> Less severe situations will still be degrading treatment due to the humiliation caused by the stress and anxiety suffered by the lack of medical assistance,<sup>103</sup> or where it causes “considerable mental suffering diminishing his human dignity.”<sup>104</sup>

#### Medical Evidence Corroborating the Allegations of Torture

86. The medical evidence as described in the facts in paragraphs 32 to 36 above indicates that Mr. Gerasimov’s injuries were both serious and long lasting, causing him severe pain and suffering. He was kept in the Neurosurgical Unit of the Kostanay City Hospital for 13 days as he was diagnosed with a severe concussion, cuts on his head, and bruises on his right kidney area and lower back as a result of a beating. He needed to be hospitalized for 13 days, after which he was diagnosed with a shifted kidney and persistent bacterial infections of both kidneys.
87. In addition to the physical injuries, the ill-treatment caused long-lasting psychological damage. In August 2007, Mr. Gerasimov continued to suffer from headaches, hand tremors, vertigo and irrational fears.<sup>105</sup> He was later diagnosed with Post Traumatic Stress Disorder (PTSD) and spent one month in the Kostanay

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<sup>98</sup> The Greek Case, *ibid.* The acts complained of included death threats, humiliating acts, and threats against family members.

<sup>99</sup> *Dikme v. Turkey*, see note 93 above, at para. 95.

<sup>100</sup> *Altun v. Federal Republic of Germany*, Eur. Comm. H.R. Decision of 3 May 1983, at para. 8 (the applicant was extradited in order to prosecute him for a political offence). See also: *Saadia v. Tunisia*, Decision of the Committee Against Torture, CCAT/C/41/291/2006, para. 2.5, 15.4 (2008) (taking into a consideration the totality of the facts of the case, including a disproportionate sentence of three months for insulting an official after physical abuse immediately prior to the sentence, and finding a violation of the CAT). Available at: <http://www1.umn.edu/humanrts/cat/decisions/291-2006.html>.

<sup>101</sup> *Kudla v. Poland*, ECtHR Judgment of 26 October 2000, at para. 94.

<sup>102</sup> *McGlinchey v. the United Kingdom*, ECtHR Judgment of 29 April 2003, at 57-58.

<sup>103</sup> *Sarban v. Moldova*, ECtHR Judgment of 4 October 2005, at para. 83 & 89-91.

<sup>104</sup> *Hummatov v. Azerbaijan*, ECtHR Judgment of 29 November 2007, at para. 121.

<sup>105</sup> See note 38 above (Exhibits 18 & 19), Neurologist Notes (2 and 6 Aug. 2007).

Regional Psychiatric Hospital undergoing treatment.<sup>106</sup> The most common psychiatric diagnosis among torture survivors is PTSD, and torture survivors have elevated rates of PTSD.<sup>107</sup> As recognized by this Committee, PTSD is a non-obvious but real trace of violence.<sup>108</sup>

The Allegations are Consistent with Widely Reported Patterns of Torture in Kazakhstan

88. Mr. Gerasimov's description of his torture is consistent with the most frequently used torture techniques reportedly used during non-formal interrogations in Kazakhstan. The torture most often consists of beatings on various parts of the body that do not leave physical traces, suffocation by the use of plastic bags, and threats of violence or the use of sexual violence.<sup>109</sup>
89. In 2008, the Committee against Torture expressed its concern "about consistent allegations concerning the frequent use of torture and ill-treatment, including threat of sexual abuse and rape, committed by law enforcement officers, often to extract 'voluntary confessions' or information to be used as evidence in criminal proceedings, so as to meet the success criterion determined by the number of crimes solved."<sup>110</sup> During his visit to Kazakhstan in May 2009, the UN Special Rapporteur on Torture carried out numerous visits to places of detention where he interviewed detainees, and "received 'many credible allegations' of beatings with hands and fists, plastic bottles filled with sand, and police truncheons. He was also told of kicking, asphyxiation through plastic bags and gas masks used to obtain confessions from suspects."<sup>111</sup> His interviews established that *dry submarino* is a frequently administered method of torture during interrogations in Kazakhstan. The Special Rapporteur visited a male detainee in Sizo, Almaty who reported that, during his interrogation, a gas mask was placed over his head and he nearly fainted or suffocated due to the decreased airflow.<sup>112</sup> He visited another detainee near the border crossing with Uzbekistan who reported that plastic bags were used to suffocate him in order to obtain a confession.<sup>113</sup> Another victim told him that she

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<sup>106</sup> See note 38 above (Exhibit 20), Psychological Examination (7 Aug. 2007).

<sup>107</sup> Basoglu M, Jaranson JM, Mollica R & Kastrup M., "Torture and mental health: a research Overview," in Gerrity E, Keane TM, Tuma F, (eds), *The Mental Health Consequences of Torture*, (New York: Kluwer Academic/Plenum Publishers, 2001), at pages 35-62.

<sup>108</sup> *Bouabdallah Ltaief v. Tunisia*, Views of the Committee against Torture, 20 November 2003, at para. 10.5. Available at: <http://www1.umn.edu/humanrts/cat/decisions/tunisia189-2001.html>.

<sup>109</sup> Alternative Report of Nongovernmental Organizations of Kazakhstan on the Implementation of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2008, at 10. ("Alternative NGO Report on Kazakhstan") Available at: [http://www2.ohchr.org/english/bodies/cat/docs/Alternative\\_Report\\_KAZAKHSTAN\\_en.doc](http://www2.ohchr.org/english/bodies/cat/docs/Alternative_Report_KAZAKHSTAN_en.doc).

<sup>110</sup> Committee against Torture, Concluding Observations on Kazakhstan, CAT/C/KAZ/CO/2, 41<sup>st</sup> Session 2008, at para. 7. Available at: <http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.KAZ.CO.2.pdf>.

<sup>111</sup> Press Release of Manfred Nowak, U.N. Human Rights Council Special Rapporteur on Torture. Available at: <http://www.un.org/apps/news/story.asp?NewsID=30781&Cr=torture&Cr1=>.

<sup>112</sup> Special Rapporteur on Torture Report on Mission to Kazakhstan (Exhibit 51), see note 87 above, at para. 41.

<sup>113</sup> *Ibid.* para. 94.



was beaten and a plastic bag was put over her head when she denied allegations of drug trafficking.<sup>114</sup> The Special Rapporteur also interviewed Mr. Denis Polienko in Astana who stated that a plastic bag was placed over his head when he told his interrogators that he would report their abusive behavior to the prosecutor.<sup>115</sup> Professor Nowak concluded that, “the use of torture and ill-treatment certainly goes beyond isolated instances.”<sup>116</sup>

#### Reverse Burden of Proof

90. The UN Special Rapporteur on Torture has frequently noted that where an individual suffers harm while in the custody of the State, the burden shifts to the government to provide a satisfactory and plausible explanation supported by evidence.<sup>117</sup> The UN HRC has consistently maintained that in cases of mistreatment in custody, the state has total control of the available evidence and therefore the burden of proof must be reversed in order to prevent torture in an effective way:

“the burden of proof cannot rest alone on the author of the communication, especially considering that the author and the State Party do not always have equal access to the evidence and that frequently the State Party alone has access to the relevant information.”<sup>118</sup>

91. In one case, the respondent state failed to respond to allegations that the victim disappeared while in custody, allegations that were supported by evidence of his torture in detention collected by his daughter from ex-prisoners.<sup>119</sup> The UN HRC found violations of Articles 7, 9, and 10(1) of the ICCPR and described the evidence of torture as “overwhelming,” holding that where “further clarification depends on information exclusively in the hands of the State Party, the Committee

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<sup>114</sup> *Ibid.* para. 103.

<sup>115</sup> *Ibid.* para. 124.

<sup>116</sup> *Ibid.*

<sup>117</sup> Special Rapporteur on Torture Report on Mission to Kazakhstan (Exhibit 51), see note 87 above, at para. 53 & p. 21. See also: Report of the Special Rapporteur on Torture, UN Doc.A/56/156, July 2001, at para. 12(j). Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/445/79/PDF/N0144579.pdf?OpenElement>; Report of the Special Rapporteur on Torture – Mission to Sri Lanka, U.N. Doc. A/HRC/7/3/Add.6, 26 February 2008, at p. 25, para. h. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/111/35/PDF/G0811135.pdf?OpenElement>; Report of the Special Rapportuer on Torture, Addendum – Mission to Indonesia, U.N. Doc. A/HRC/7/3/Add.7, 10 March 2008, at p. 21. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/114/90/PDF/G0811490.pdf?OpenElement>; Report of the Special Rapporteur on Torture – Follow-up made after visits to visits to Azerbaijan, Brazil, Cameroon, China (People’s Republic of), Denmark, Georgia, Indonesia, Jordan, Kenya, Mongolia, Nepal, Nigeria, Paraguay, the Republic of Moldova, Romania, Spain, Sri Lanka, Uzbekistan and Togo, U.N. Doc. A/HRC/13/39/Add.6, at p. 21. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/116/20/PDF/G1011620.pdf?OpenElement>.

<sup>118</sup> *Bouroual v. Algeria*, UN HRC Decision of 30 March 2006, at para. 9.4. Available at: <http://www.unhchr.ch/tbs/doc.nsf/0/0aef3b15e0b6c761c125719a00486e57?Opendocument>; *Eduardo Bleier v. Uruguay*, UN HRC Views of 24 March 1980, at para. 2.4, 13.3 & 14. Available at: [http://www.bayefsky.com/pdf/119\\_uruguay30vws.pdf](http://www.bayefsky.com/pdf/119_uruguay30vws.pdf).

<sup>119</sup> *Eduardo Bleier v. Uruguay*, *Ibid.* para. 13.3.

may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party.”<sup>120</sup>

92. While this Committee appears yet to have directly considered the reverse burden of proof in this context it has accepted it in other situations, finding that “the prosecution should carry the burden of proof where there are allegations that a confession was extracted under torture”<sup>121</sup> and also applying it in cases related to the non-refoulement obligation.<sup>122</sup>
93. The ECtHR has also held that the burden shifts to the state when physical evidence of torture is present. It has held that “[w]here an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 [torture] of the Convention.”<sup>123</sup> The ECtHR will draw an adverse inference where the government fails to provide evidence in support of its explanation of events and is in a unique position to be able to do so: “[w]here the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, such as in cases where persons are under their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.”<sup>124</sup>
94. The Inter-American Court of Human Rights (“Inter-American Court”) also shifts the burden of proof to the state when evidence of torture is presented. In a case where an autopsy revealed evidence of severe torture, the Inter-American Court emphasized “that . . . before he was captured by the military, he was in normal physical conditions, in view of which the State should reasonably explain what happened to him.”<sup>125</sup>
95. Kazakhstan does not recognize the reversal of the burden of proof. The UN Special Rapporteur on Torture noted this failure in his report on the mission to Kazakhstan as a “key problem.”<sup>126</sup> The Rapporteur indicated that “[a]ccording to international standards, if allegations of torture or other forms of ill-treatment are raised by a

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<sup>120</sup> *Ibid.* para. 13.3 & 13.4. See also *Bouroual v. Algeria*, see note 118 above, at para. 9.4.

<sup>121</sup> Committee against Torture, Report on Brazil produced by the Committee under Article 20 of the Convention and reply from the government of Brazil, CAT/C/39/2 28 July 2008.

<sup>122</sup> *A.S. v. Sweden*, Decision of the Committee against Torture of 24 November 2000, U.N. Doc. CAT/C/25/D/149/1999, at para. 8.6. Available at:

[http://www.bayefsky.com/pdf/117\\_sweden\\_cat\\_vws149.pdf](http://www.bayefsky.com/pdf/117_sweden_cat_vws149.pdf) (English) and

<http://www1.umn.edu/humanrts/cat/decisions/Fdecisions/sweden149-1999.html> (French); *Chedli Ben*

*Ahmed Karou v. Sweden*, Decision of the Committee against Torture of 8 May 2002, U.N. Doc. A/57/44 at 198, at para. 10. Available at: <http://www1.umn.edu/humanrts/cat/decisions/185-2001.html>.

<sup>123</sup> *Selmouni v. France*, ECtHR Judgment of 28 July 1999, at para. 87.

<sup>124</sup> *Khadzhaliyev and others v. Russia*, ECtHR Judgment of 6 November 2008, at para. 79, 83, 86, 89, 91-93; *Takhayeva and Others v. Russia*, ECtHR Judgment of 18 September 2008, at para. 68, 77, 80.

<sup>125</sup> *Juan Humberto Sánchez*, Inter-Am. Ct. H.R. Judgment of 7 June 2003, at para. 100.

<sup>126</sup> Special Rapporteur on Torture Report on Mission to Kazakhstan (Exhibit 51), see note 87 above, at para 53.

defendant during trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and similar ill-treatment.”<sup>127</sup> He recommended that Kazakhstan “shift the burden of proof to the prosecution, to prove beyond a reasonable doubt that the confession was not obtained under any kind of duress, and consider video and audio-taping interrogations.”<sup>128</sup>

## **B. Failure to Adopt Safeguards to Prevent Torture**

96. Numerous administrative and procedural failings allowed the torture of Mr. Gerasimov to occur. Kazakhstan has failed in its positive obligation to put in place effective safeguards to prevent torture, in breach of Article 2 of the Convention. Specifically, it has failed to adopt measures that effectively (1) prevent unregistered detention, (2) provide access to a lawyer, and (3) allow medical examinations to take place.

### Legal Standards

97. Article 2 UNCAT provides that “[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”
98. International human rights law recognizes the vital importance of safeguards to protect persons who are taken into custody and are designed to minimize the risk of torture.<sup>129</sup> These include the right to have their detention notified to a third party of their choice, the right of access to a lawyer and the right of access to a doctor of their choice.<sup>130</sup> General Comment No. 2 of the Committee against Torture outlines the safeguards that are required, which include the maintenance of an official detention register and measures to ensure “the right of detainees to be informed of their rights, the right to promptly receive independent legal assessment, independent medical assistance, to contact relatives, to establish and maintain impartial mechanisms for inspecting and visiting places of detention and confinement, and the availability of detainees and persons at risk of torture and ill-treatment to judicial and other remedies that will allow them to have their complaints promptly

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<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.* p. 22.

<sup>129</sup> General Assembly Resolution 55/89, 4 December 2000, *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (the Istanbul Principles)*. Available at: <http://www2.ohchr.org/english/law/investigation.htm> ; *See also*: Commission on Human Rights Resolution 2003/33, *Torture and Other Cruel, Unusual or Degrading Treatment or Punishment*. Available at: <http://www.arabhumanrights.org/publications/tbased/cat/hrc-cat-res-2003-32.pdf> (drawing the attention of governments to the Principles on Effective Investigation and Documentation of Torture and strongly encouraging them to reflect upon them as a useful tool in combating torture).

<sup>130</sup> European Committee on Prevention of Torture, *12<sup>th</sup> General Report on the CPT's Activities*, CPT/Inf/E, 2002, at para.40. Available at: <http://www.cpt.coe.int/EN/annual/rep-12.htm>.

and impartially examined, to defend their rights, and to challenge the legality of their detention.”<sup>131</sup>

99. The Committee has provided further examples of measures which, if they were in place in Kazakhstan, would have prevented the torture of Mr. Gerasimov. Despite the fact that Kazakhstan ratified the Convention in 1998, such measures were never put in place, and two years after accepting the right of individual petition, they are still not in place. These positive duties include the following:
- a) All detainees must be registered, which should include information as to the identity of the detainee, the date, time and place of the detention, the identity of the detaining authority, the grounds for detention, state of health of detainee at the time of being taken into custody and any changes thereto, time and place of interrogations, and dates and times of any transfer or release.<sup>132</sup>
  - b) Medical staff in prisons should be independent doctors, rather than members of the prison service.<sup>133</sup>
  - c) Doctors should be trained to identify signs of torture.<sup>134</sup>
  - d) Audio and video taping facilities should be introduced for interrogations.<sup>135</sup>
  - e) Police officers should wear a form of personal identification so that they are identifiable to any person who alleges ill-treatment.<sup>136</sup>
100. In respect of Kazakhstan, in 2008 the Committee against Torture issued Concluding Observations following the review of Kazakhstan’s second periodic report. The Committee expressed concern on a number of areas where the safeguards were insufficient, including:
- “(a) the failure to acknowledge and record the actual time of apprehension of a detainee, as well as unrecorded periods of pre-trial detention and investigation;
  - (b) Restricted access to lawyers and independent doctors and failure to notify detainees fully of their rights at the time of apprehension;
  - (c) The failure to

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<sup>131</sup> Committee against Torture, *General Comment No. 2*, CAT/C/GC/2, 24 January 2008, at para. 8 & 13. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/402/62/PDF/G0840262.pdf?OpenElement>.

<sup>132</sup> Committee against Torture, Concluding Observations on the United States, CAT/C/USA/CO/2, 36<sup>th</sup> Session 2006, at para. 16. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/432/25/PDF/G0643225.pdf?OpenElement>.

<sup>133</sup> Committee against Torture, Concluding Observations on Argentina, CAT/C/CR/33/1, 10 December 2006, at para. 6. Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.33.1.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.33.1.En?OpenDocument).

<sup>134</sup> Committee against Torture, Concluding Observations on Uzbekistan, A/57/44, 6 June 2002, at para. 115. Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.28.7.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.28.7.En?Opendocument).

<sup>135</sup> Committee against Torture, Concluding Observations on Greece, CAT/C/CR/33/2, at para. 6. Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.33.2.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.33.2.En?Opendocument); Committee against Torture, Concluding Observations on the UK, A/51/44, 9 July 1996, at para. 63. Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/d789915c58e86bc4c12563e20038f407?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d789915c58e86bc4c12563e20038f407?Opendocument).

<sup>136</sup> Concluding Observations on Germany, A/53/44, 11 May 1996, at para. 196.

introduce, through the legal reform of July 2008, habeas corpus procedure in full conformity with international standards (art. 2).”<sup>137</sup>

101. The Committee recognized that there are “insufficient safeguards governing the initial period of detention” in Kazakhstan and recommended the Government to:

“[...] promptly implement effective measures to ensure that a person is not subject to *de facto* unacknowledged detention and that all detained suspects are afforded, in practice, all fundamental legal safeguards during their detention. These include, in particular, from the actual moment of deprivation of liberty, the right to access a lawyer and an independent medical examination, to inform a relative and to be informed of their rights, including as to the charges laid against them, as well as being promptly presented to a judge. The State party should ensure that all detained persons are guaranteed the ability to challenge effectively and expeditiously the lawfulness of their detention through *habeas corpus*.”<sup>138</sup>

102. More recently, the UN Special Rapporteur on Torture has made additional recommendations that are specific for Kazakhstan. Some of these recommendations echo the earlier conclusions of the Committee and others provide additional guidance to Kazakhstan regarding the necessary reforms, many of which may have prevented the torture of Mr. Gerasimov had they been in place at the time of his detention. The recommendations include the following:

- “Register persons deprived of their liberty from the very moment of apprehension, and grant access to lawyers and allow for notification of family members from the moment of actual deprivation of liberty.”<sup>139</sup>
- “Allow access to independent medical examinations without the interference or presence of law enforcement agents or prosecutors at all stages of the criminal process, and provide independent medical check-ups of persons deprived of their liberty, particularly after entry or transfer between places of detention.”<sup>140</sup> In addition, “[e]nsure that medical staff in places of detention are truly independent from the organs of justice administration, that is by transferring them from the Ministry of Justice to the Ministry of Health.”<sup>141</sup>
- “Transfer temporary detention isolators from the Ministry of the Interior, and investigation isolators from the National Security Committee to the Ministry of

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<sup>137</sup> Committee against Torture, Consideration of Reports Submitted under Article 19 of the Convention – Kazakhstan, U.N. Doc. CAT/C/KAZ/Z, 12 December 2008, at para. 9. Available at: <http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.KAZ.CO.2.doc>.

<sup>138</sup> *Ibid.*

<sup>139</sup> Special Rapporteur on Torture Report on Mission to Kazakhstan (Exhibit 51), see note 87 above, at para. 81-a.

<sup>140</sup> *Ibid.* para. 80-e.

<sup>141</sup> *Ibid.* para. 82-f.

Justice and raise the awareness of Ministry of Justice staff regarding their role in preventing torture and ill-treatment.”<sup>142</sup>

103. Similar criticisms and recommendations have also been made by Amnesty International. A 2010 report indicates that the safeguards provided by Kazakhstan law are inadequate and not appropriately enforced. Amnesty International notes that the 2008 recommendations of the Committee against Torture were not implemented as required in a twelve month period.<sup>143</sup> Amnesty International echoes the recommendations of the U.N. Special Rapporteur on Torture and indicates that Kazakhstan should

- “ensure that the law is amended so that individuals deprived of their liberty are registered promptly, from the moment of apprehension, and not only after a three-hour time limit;”
- “ensure that all people deprived of their liberty are informed promptly of the reasons for their detention, of any charges against them, and allowed prompt and regular access to a lawyer of their choice, as well as to relatives and an independent medical practitioner;”
- “ensure that all individuals deprived of their liberty are given prompt, regular, and confidential access to medical examinations at all stages of the criminal process without interference from security forces, prosecutors or prison personnel;”

#### Failure to Register Detention

104. The detention of Mr. Gerasimov was not properly registered, meaning that he was held in secret, with no formal notification of his detention to his family or a lawyer, allowing the subsequent torture to occur.

105. The Committee against Torture has considered that an incommunicado regime facilitates the commission of acts of torture and ill-treatment.<sup>144</sup> Article 11 of the UNCAT provides that “[e]ach State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.” The UN HRC has recognized the importance of this duty in the prevention of torture:

“[t]o guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names

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<sup>142</sup> *Ibid.* para. 82-b.

<sup>143</sup> See Exhibit 52: Amnesty International, *Kazakhstan: No Effective Safeguards Against Torture* (2010), p. 12 (“Amnesty International 2010 Report on Kazakhstan”).

<sup>144</sup> Committee against Torture, *Conclusions and Recommendations of the Committee Against Torture Regarding Spain*, CAT/C/CR/29/3, 23 December 2002, para. 10. Available at: <http://www.unhcr.ch/tbs/doc.nsf/0/42b1281f2012fe98c1256dc60036312a?Opendocument>.

of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings.”<sup>145</sup>

106. In Kazakhstan, there are many allegations of detainees being held in the basements and offices of police stations without any registration or notification of their whereabouts, contributing to the widespread practice of ill-treatment by the police.<sup>146</sup> Article 134 of the Criminal Procedure Code of Kazakhstan (“CPC”) requires that a person’s arrest is registered within three hours, but does not require registration of *de facto* detention prior to arrest. If the individual is not arrested then there is no need to register the detainee, allowing the police to circumvent Article 134.<sup>147</sup>
107. In his recent report on Kazakhstan, the UN Special Rapporteur on Torture considered that the failure to make a note of the first moment of detention means that it is not clear when the clock starts for the application of the three hour rule, such that the rule does not operate as a safeguard against torture.
- “Many safeguards are not effective in practice: a major gap in this regard is the fact that the *de facto* apprehension and delivery to a police station is not recorded, which makes it impossible to establish whether the three hour maximum delay for the first stage of deprivation of liberty is respected. Indeed the Special Rapporteur received many allegations that the first hours of (unrecorded) detention were used by law enforcement organs to obtain confessions by means of torture.”<sup>148</sup>
108. As noted above, the UN Special Rapporteur on Torture has recently concluded that criminal procedure in Kazakhstan must be reformed so as to “[r]egister persons deprived of their liberty from the very moment of apprehension.”<sup>149</sup>
109. The recent Amnesty International report underscores the weaknesses of the current registration system that are criticized by the UN Special Rapporteur on Torture. The report notes that, although the Department of Internal Affairs confirmed that police officers are under strict orders to inform everyone deprived of their liberty of their rights, when questioned further about when they are informed, the Department stated “after three hours, in accordance with the law,” indicating that a record is made only after formal detention has commenced.<sup>150</sup> The problem is compounded

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<sup>145</sup> United Nations Committee on Human Rights, *General Comment No. 20 (Article 7)*, 44th Sess., para. 11 (1992). Available at:

<http://www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5?Opendocument>.

<sup>146</sup> Alternative NGO Report on Kazakhstan, *supra* note 109, at 9.

<sup>147</sup> *Ibid.* 7.

<sup>148</sup> Special Rapporteur on Torture Report on Mission to Kazakhstan (Exhibit 51), see note 87 above, at para. 68.

<sup>149</sup> *Ibid.* at para. 81-a.

<sup>150</sup> Amnesty International 2010 Report on Kazakhstan (Exhibit 52), see note 143 above, at p. 11.

by the fact that the names of the detaining officers are not recorded in the detention register and instead the investigating officer enters the details of the case in the log and signs it. Amnesty International states that “in practice this omission in law allows law enforcement officers to use torture or other ill-treatment with virtual impunity from the actual moment of apprehension until formal detention since their participation is not formally recorded and therefore is difficult to prove.”<sup>151</sup>

110. In this case, the three hour rule was rendered pointless by the fact that the police did not register the initial *de facto* detention of Mr. Gerasimov. The officers of the Southern UIA were free to torture Mr. Gerasimov in an office on the third floor of the premises of a Kostanay City police station because Mr. Gerasimov’s situation as a detained person had not been registered. He was locked in an office in the police station without any record or registration of his detention being made or entered until the morning of 28 March 2007, more than 12 hours following his initial detention at about 19:30 hours on the evening of 27 March 2007.

#### Failure to Provide Access to a Lawyer

111. Mr. Gerasimov was not provided with a lawyer at any stage during his detention. This failure to provide adequate safeguards allowed the torture of Mr. Gerasimov to occur.
112. Detention without access to a lawyer violates human rights law.<sup>152</sup> The U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment sets out detainees’ rights to consult and communicate with a lawyer without delay or censorship and in full confidentiality.<sup>153</sup> The UN Special Rapporteur on Torture has stressed that a detainee’s access to a lawyer must be prompt and that the lawyer should be independent from the state.<sup>154</sup> This Committee has found that this is an important safeguard against torture.<sup>155</sup>
113. Article 68 of the CPC requires police to read the accused person their legal rights, which include the right to a lawyer,<sup>156</sup> although this obligation is not triggered until

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<sup>151</sup> *Ibid.*

<sup>152</sup> G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 14(3)(b); *Wight v. Madagascar*, Views of the Human Rights Committee of 1 April 1985, , CCPR/C/OP/2 at 151, at para. 17. Available at: <http://www1.umn.edu/humanrts/undocs/newscans/115-1982.html>.

<sup>153</sup> Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. Doc. A/RES/43/173 annex (9 Dec. 1988). Available at: <http://www.un.org/documents/ga/res/43/a43r173.htm>.

<sup>154</sup> United Nations Special Rapporteur on Torture, Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38, E/CN.4/2003/68, 17 Dec. 2002, para. 26. Available at: [http://www.unhcr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/15adfcf7edee4c65c1256cbb00367508/\\$FILE/G0216049.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/15adfcf7edee4c65c1256cbb00367508/$FILE/G0216049.pdf).

<sup>155</sup> Committee against Torture, *G.K. v. Switzerland*, U.N. Doc. CAT/C/30/D/219/2002, 12 May 2003, at para. 6.3.

<sup>156</sup> Constitution of the Republic of Kazakhstan, art. 16 (providing all detained or arrested persons the right to legal counsel from the time of their detention or arrest).



the detention or arrest is registered. Thus, detainees often are not read their rights until well after their detention begins.<sup>157</sup>

114. The UN Special Rapporteur on Torture recently commented that the lack of registration of detention in Kazakhstan “is exacerbated by the fact that, at that stage, there is no right of access to a lawyer.”<sup>158</sup>

#### Failure to Provide Access to a Doctor

115. Mr. Gerasimov was not allowed to see a doctor or any medically-trained personnel while he was detained. This lack of access facilitated his torture. The doctor would have been able to confirm that he had no injuries when he went into detention, or would have seen the injuries immediately after they were inflicted, either of which could have been used to establish criminal responsibility for the torture.
116. This Committee has outlined in General Comment No. 2 the guarantees that must exist in order to protect persons deprived of their liberty from torture, which include the right to “independent medical assistance.”<sup>159</sup> The UN HRC has stated that this protection requires that each person detained be afforded prompt and regular access to doctors.<sup>160</sup> The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment indicated that “a proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided wherever necessary. This care and treatment shall be provided free of charge.”<sup>161</sup> The UN Special Rapporteur on Torture has stated that “at the time of arrest, a person should undergo a medical inspection, and medical inspections should be repeated regularly and should be compulsory upon transfer to another place of detention.”<sup>162</sup>
117. With regard to Kazakhstan, the UN Special Rapporteur on Torture recently considered the system for medical examinations in Kazakhstan and found that it was insufficient to satisfy the requirements of the Convention. He noted that “[w]hile medical personnel employed by the Ministry of the Interior and the penitentiary administration do perform check-ups on arrival, they clearly lack the independence to take action against colleagues with whom they work on a daily basis.”<sup>163</sup> The Rapporteur concludes that it is not possible to have an independent

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<sup>157</sup> See note 109 above, Alternative Report, at para. 7.

<sup>158</sup> Special Rapporteur on Torture Report on Mission to Kazakhstan (Exhibit 51), see note 87 above, at para. 68.

<sup>159</sup> Committee against Torture, General Comment 2, CAT/C/GC/2, 28 January 2008, para. 13. Available at: <http://daccess-ods.un.org/TMP/7576951.98059082.html>.

<sup>160</sup> Human Rights Committee, General Comment 20, 10/03/92, at para. 11. Available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument).

<sup>161</sup> Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, see note 153 above, at principle 24.

<sup>162</sup> Report of the Special Rapporteur on Torture, see note 117 above.

<sup>163</sup> Special Rapporteur on Torture Report on Mission to Kazakhstan (Exhibit 51), see note 87 above, at para. 53.

medical examination at all, as doctors must be authorized to conduct examinations and prisoners will be accompanied by staff during the examination:

“An examination by these staff members can therefore not be considered independent; consequently, it needs to be done by an outside medical expert. Since independent medical examinations must, however, be authorized by the supervising authority – such as the investigators, the prosecutors, or the penitentiary authorities – that authority has ample opportunity to delay authorization so that injuries deriving from torture are healed by the time the examination takes place. Moreover, the Special Rapporteur was informed that, when an examination is conducted outside the detention facility, the law enforcement officer in charge of the case normally accompanies the detainee and stays with him or her during the examination.”<sup>164</sup>

118. Amnesty International has identified other inadequacies in the medical examination offered by the Republic of Kazakhstan. As a matter of practice, medical personnel examine detainees after their formal detention has been registered and when they are about to be admitted to an IVS detention centre. A critical flaw in this system is that “this is not to launch an investigation into torture if signs of abuse are discovered on the body of the detainee, but to ensure that the detainee, his lawyer or his family cannot claim that the injuries were sustained in the IVS.”<sup>165</sup>
119. Mr. Gerasimov was detained in the evening of 27 March 2008 and not released until the evening of 28 March 2008. At no time during that period was he seen by a doctor. His injuries were severe enough that he required emergency care as soon as he was released, and was admitted to the Kostanay City Hospital that evening for the injuries he received at the hands of the police. The failure to have any system in place for independent medical examinations of detainees allowed the torture to occur.

### **C. Failure to Conduct an Effective Investigation**

120. No prompt, impartial and effective investigation has been undertaken into the torture of Mr. Gerasimov that was able to bring about the prosecution of those responsible for his treatment, contrary to Article 12 and Article 13 UNCAT.
121. Where there is an allegation that acts of torture have been committed by State authorities, States are required to undertake an effective investigation, even in the absence of a formal complaint.<sup>166</sup> Article 12 UNCAT provides that “[e]ach State Party shall ensure that its competent authorities proceed to a prompt and impartial

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<sup>164</sup> *Ibid.*

<sup>165</sup> Amnesty International 2010 Report on Kazakhstan (Exhibit 52), see note 143 above, at p. 22.

<sup>166</sup> Committee against Torture, *Henri Unai Parot v. Spain*, U.N. Doc. CAT/C/14/D/6/1990, (9 June 1995), at para. 10.4. Available at: <http://www1.umn.edu/humanrts/cat/decisions/catD-Spain2.htm>; Committee against Torture, *Encarnación Blanco Abad v. Spain*, U.N. Doc. CAT/C/20/D/59/1996, 14 May 1998, at para. 8.6 (stating that it is enough for the victim to bring the facts of the alleged torture to the attention of the State).

investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.” Article 13 UNCAT states: “Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined its competent authorities.” This standard for an effective investigation is also affirmed by the UN HRC,<sup>167</sup> the European Court of Human Rights (“ECtHR”),<sup>168</sup> and the Inter-American Court.<sup>169</sup>

122. Here, the State Party failed to conduct a satisfactory investigation for the following reasons:

- *1. Lack of Independence and Impartiality.* The investigation was not conducted in an independent and impartial manner.
- *2. Undue Delay.* The investigation was not started or completed promptly.
- *3. Inadequacy.* The investigation failed to undertake a number of essential steps.
- *4. No Participation.* There was no provision for Mr. Gerasimov to be involved in the investigation, despite his best efforts.
- *5. Lack of Transparency.* The investigation was conducted in secret and no final report was published.
- *6. No Finding of Responsibility.* The investigation did not lead to any prosecutions but only to some unverifiable mild disciplinary sanctions of unnamed officers.

#### 1. Lack of Independence and Impartiality

123. The only investigation undertaken failed to satisfy the requirements for independence and impartiality in international law, as the factual investigation was conducted by police from the same unit as those who are alleged to have committed the torture and was supervised by their hierarchical superiors.

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<sup>167</sup> *Eduardo Bleier v. Uruguay*, UN HRC Decision of 29 Mar. 1982, at para. 15.

<sup>168</sup> *Assenov & Others v. Bulgaria*, see note 84 above, at para. 102; *Veznedaroğlu v. Turkey*, ECtHR Judgment of 11 April 2000, at para. 32.

<sup>169</sup> *Maritza Urrutia Case*, Inter-Am. Ct. H.R. Judgment of 27 Nov 2003, at para. 104 & para. 82-98. Available at: <http://www1.umn.edu/humanrts/iachr/C/103-ing.html> (finding a “violation of Article 5 of the American Convention in relation to Article 1(1) thereof”); *Velasquez Rodriguez v. Honduras*, Inter-Am Ct. H.R. Judgment of 29 July 1988, at para. 176 & 188; *El Amparo Case affirmed in Inter-Am. Ct. H.R. Judgment of 14 September 1996*, at para. 61 (stating that “[c]ontinuation of the process for investigating the acts and punishing those responsible is an obligation incumbent on the State wherever there has been a violation of human rights, an obligation that must be discharged seriously and not as a mere formality”). Available at: <http://www1.umn.edu/humanrts/iachr/C/28-ing.html>; *Suarez Rosero Case*, Inter-Am. Ct. H.R. (Ser. C) No. 44, 20 January 1999, at para. 79 (referring to operative paragraph 6 of the *Suarez Rosero Case*, Judgment of November 12, 1997, Series C. No. 35, which provides “Ecuador must order an investigation to determine the persons responsible for the human rights violations referred to in this judgment and, where possible, punish them,” and reiterating that the duty is “incumbent on the state whenever there has been a violation of human rights, an obligation that cannot be discharged as a mere formality”). Available at: <http://www1.umn.edu/humanrts/iachr/C/44-ing.html>.

124. This Committee has held that investigations of torture committed by the police should not be undertaken by or under the authority of the police.<sup>170</sup> Similarly, in its consideration of State Party reports, the Committee against Torture has criticized the absence in several countries (including Kazakhstan see paragraph 126 below) of independent bodies to investigate torture, particularly in respect of torture by police officers, as the police would ordinarily be the institution tasked with the investigation of allegations of torture.<sup>171</sup>
125. The ECtHR has found this requirement to include hierarchical, institutional and practical independence: “[f]or an investigation into torture or ill-treatment by agents of the State to be regarded as effective, the general rule is that the persons responsible for the inquiries and those conducting the investigation should be independent of anyone implicated in the events .... This means not only that there should be no hierarchical or institutional connection but also that the investigators should be independent in practice.”<sup>172</sup> The European Court has found that a non-impartial investigation is not cured by having independent oversight in circumstances where the actual investigation was conducted by police officers indirectly connected with the operation under investigation,<sup>173</sup> and that investigations “lacked independence where members of the same division or detachment as those implicated in the alleged ill-treatment were undertaking the investigation.”<sup>174</sup> The Inter-American Court has also held that the right to an effective remedy requires an impartial and effective investigation of the alleged facts.<sup>175</sup>

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<sup>170</sup> Committee against Torture, Concluding Observations on Hungary, U.N. Doc. CAT/C/HUN/CO/4, 6 Feb. 2007, at para. 16(a). Available at: <http://www.unhcr.org/refworld/docid/45f6baaa2.html>.

<sup>171</sup> Committee against Torture, Concluding Observations on Kazakhstan, U.N. Doc. CAT/C/KAZ/CO/2, 12 December 2008, at para. 24. Available at: <http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.KAZ.CO.2.doc> (“CAT 2008 Concluding Observations on Kazakhstan”); Committee against Torture, Concluding Observations on Latvia, U.N. Doc. CAT/C/CR/31/3, 5 Feb. 2004, at para. 6(b). Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.31.3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.31.3.En?OpenDocument); Committee against Torture, Concluding Observation on of CAT, Lithuania, U.N. Doc. CAT/C/CR/31/5, 5 Feb. 2004, at para. 5(e). Available at: <http://www.unhchr.ch/tbs/doc.nsf/0/0b6238b4f8d93c3cc1256e6800365bd9?Opendocument>; Committee on Torture, Concluding Observations on Cambodia, U.N. Doc. CAT/C/CR/31/7, 5 Feb. 2004, at para. 6(f). Available at: <http://www.unhcr.org/refworld/country,,CAT,,KHM,4562d8cf2,41173fab4,0.html>; Committee on Torture, Concluding Observation on Moldova, U.N. Doc. CAT/C/CR/30/7, 27 May 2003, at para. 6(e). Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.30.7.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.30.7.En?OpenDocument); Committee Against Torture, Concluding Observations on Cyprus, U.N. Doc. CAT/C/CR/29/1, 18 Dec. 2002, at para. 4(1). Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.29.1.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.29.1.En?Opendocument).

<sup>172</sup> *Bati and Others v. Turkey*, ECtHR Judgment of 3 September 2005, at para. 135.

<sup>173</sup> *Kelly and Others v. the United Kingdom*, ECtHR Judgment of 4 May 2001, at para. 95 & 114.

<sup>174</sup> *Mikheyev v. Russia*, ECtHR Judgment of 26 January 2006, at para. 110 (citing *Güleç v. Turkey*, Judgment of 27 July 1998, paras. 80-82).

<sup>175</sup> *Juan Humberto Sánchez v. Honduras*, Inter-Am. Ct. H.R. (Ser. C) No. 99, 7 June 2003, at para. 127. Available at: <http://www.wfrrt.net/humanrts/iachr/C/99-ing.html>.

126. In Kazakhstan, the examination of criminal complaints is conducted by the Department of Internal Security within the relevant Regional DIA, which is controlled by the Ministry of Internal Affairs of the Republic of Kazakhstan.<sup>176</sup> In 2008, the Committee against Torture noted that “the preliminary examinations of reports and complaints of torture and ill-treatment by police officers are undertaken by the Department of Internal Security, which is under the same chain of command as the regular police force, and consequently do not lead to prompt and impartial examinations.”<sup>177</sup>

*Investigation by the Southern UIA and the Regional DIA*

127. In this case, the police officers accused of torturing Mr. Gerasimov worked for the Southern UIA, which was also the first organization to receive a complaint from Mr. Gerasimov (see paragraph 38 above). The same officers then conducted a preliminary internal investigation, and issued a decision refusing to initiate a criminal investigation.<sup>178</sup> The investigator from the Southern UIA who issued the first decision not to initiate a criminal investigation was also the investigator who had initially issued the decision to question Mr. Gerasimov when he was first taken into custody.

128. Following the intervention of the Prosecutor’s Office, the case was sent for investigation to the Department of Internal Security of the Regional DIA, the direct hierarchical superiors of the Southern UIA, and therefore also not an independent investigation.

*Investigation by the DCECC*

129. Mr. Gerasimov’s complaint was forwarded to the Kostanay DCECC on 30 July 2007. The Kostanay DCECC falls under the umbrella of the Agency for Combating Economic & Corruption-Related Crimes of the Republic of Kazakhstan, which is directly subordinate to the President of Kazakhstan.<sup>179</sup>

130. The DCECC did not undertake any new investigations but merely relied on the reports produced by the investigation previously undertaken by the Southern UIA and the Regional DIA. Consequently, the decision of the DCECC not to prosecute the case was not based on any independent or impartial investigation.

131. In Kazakhstan, the absence of a specialized impartial body responsible for the examination of torture complaints results in a practice of ineffective investigation of allegations of torture.<sup>180</sup> Investigations of torture are undertaken by the very police who are alleged to have committed the torture. This has been explicitly acknowledged by the Committee against Torture which recommended in 2008 that

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<sup>176</sup> See Exhibit 25: Diagram #5: Investigative Structure with the Republic of Kazakhstan.

<sup>177</sup> See note 171 above, Concluding Observations on Kazakhstan, at para. 24.

<sup>178</sup> See note 51 above (Exhibit 14), Regional Prosecutor’s Office Letter of 19 July 2007.

<sup>179</sup> See note 176 above (Exhibit 25), Diagram #5: Investigative Structure with the Republic of Kazakhstan.

<sup>180</sup> *Alternative Report of Nongovernmental Organizations of Kazakhstan on the Implementation of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, see note 86 above.

Kazakhstan “adopt measures to ensure in practice prompt, impartial and effective investigations into all allegations of torture and ill-treatment and the prosecution and punishment of those responsible, including law enforcement officials and others. Such investigations should be undertaken by a fully independent body.”<sup>181</sup> The UN Special Rapporteur on Torture has stated that the “police investigate torture allegedly perpetrated by its own officials” and that the “almost total absence of official complaints . . . raises suspicion that in fact, there is no meaningful complaint mechanism” and concluded that “it appears that most detainees refrain from filing complaints because they do not trust the system or are afraid of reprisals.”<sup>182</sup> The UN Special Rapporteur on Torture recommends that Kazakhstan should “establish an effective and independent criminal investigation and prosecution mechanism that has no connection to the body investigating or prosecuting the case against the alleged victim.”<sup>183</sup>

## 2. Undue Delay in the Investigation

132. While the commencement of the internal police inquiry by the Southern UIA was relatively prompt, it was not, for the reasons noted above, independent or impartial. No genuine and independent investigations were commenced promptly or conducted with expedience.
133. The Committee against Torture has held that promptness relates not only to the time within which an investigation is commenced, but also to the expediency with which an investigation is conducted. In *Encarnación Blanco Abad v. Spain*, the complainant alleged during her first arraignment on terrorism-related charges that she had been tortured. It then took 15 days before the complaint was taken up by a judge and another four days before an inquiry was launched. The investigation took ten months, with gaps of one to three months between investigative actions during the process. The Committee found this to be an unacceptable delay.<sup>184</sup>
134. The promptness requirement is also reiterated in General Comments of the UN Human Rights Committee to the ICCPR<sup>185</sup> and judgments of the ECtHR.<sup>186</sup> The ECtHR has found the lack of a prompt investigation amounts to a failure to

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<sup>181</sup> See note 171 above, CAT 2008 Concluding Observations on Kazakhstan, at para. 24.

<sup>182</sup> Special Rapporteur on Torture Report on Mission to Kazakhstan (Exhibit 51), see note 87 above, at para. 49 & 51. See also: Amnesty International 2010 Report on Kazakhstan (Exhibit 52), see note 152 above, at p. 20 & 21 (stating that in practice “one section of law enforcement investigates members of another section of law enforcement and quoting the recommendations of the Special Rapporteur on Torture”).

<sup>183</sup> *Ibid.* p. 21, para. 80(e).

<sup>184</sup> *Encarnación Blanco Abad v. Spain*, UNCAT Decision of 14 May 1998, at para. 8.7.

<sup>185</sup> UNHRC, General Comment No. 20, see note 145 above, at para. 14.

<sup>186</sup> *Bati and Others v. Turkey*, see note 172 above, at para. 136 (stating that “[i]t is beyond doubt that a requirement of promptness and reasonable expedition is implicit in this context.”); *Aksoy v. Turkey*, ECtHR Judgment of 18 December 1996, at para. 98 (while it is “true that no express provision exists in the Convention as such as can be found in Article 12 of the 1984 United Nations Convention against Torture . . . which imposes a duty to proceed to a ‘prompt and impartial’ investigation whenever there is a reasonable ground to believe that an act of torture has been committed . . . such a requirement is implicit in the notion of an ‘effective remedy’ under Article 13.”).

effectively investigate. In making such a finding, the Court considers the start of the investigation,<sup>187</sup> delays in taking statements,<sup>188</sup> and the length of time taken during initial investigations.<sup>189</sup> The Court has concluded that an investigation should be undertaken promptly in order to recover and preserve evidence, including medical evidence and witness statements (when memories are fresh), related to the alleged torture to aid in any potential prosecution of those responsible.<sup>190</sup>

135. In 2008 the Committee against Torture noted with regard to Kazakhstan that “the lengthy period for preliminary examination of torture complaints, which can last up to two months, may prevent timely documentation of evidence.”<sup>191</sup>
136. The manner in which Kazakhstan investigated the allegations of torture against Mr. Gerasimov demonstrates a lack of promptness in the investigations. The first complaint was submitted to the Southern UIA on 5 April 2007, only eight days after the torture. Only the preliminary investigation was commenced within a month of the complaint, with interviews of Mr. Gerasimov, his stepsons and three police officers. However, a proper criminal investigation was neither commenced promptly nor conducted expediently due to the constant procedural wrangling over whether or not an investigation should proceed. A number of important investigative acts were significantly delayed. The medical examination of Mr. Gerasimov was not conducted until 23 April 2007, over three weeks after he was released from the hospital. The scientific examination of the clothes worn by Mr. Gerasimov and the officers accused of torture was not conducted until 16 July 2007, over three months after the alleged torture, only to note that the utility of the test may have been compromised as the officers had washed their clothes since the evening of 27 March 2007.

### 3. Inadequacy of the Investigation

137. The State Party failed to undertake a number of steps that were essential for any investigation to be effective, including failing to (a) interview key witnesses, (b) preserve important evidence and (c) conduct a proper medical examination.
138. The Committee against Torture has observed that investigations must be thorough in seeking to ascertain the material facts.<sup>192</sup> Similarly, the UN HRC has consistently

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<sup>187</sup> *Çiçek v. Turkey*, ECtHR Judgment of 27 February 2001, at para. 149; *Timurtaş v. Turkey*, ECtHR Judgment of 13 June 2000, at para. 89. See also: *Tekin v. Turkey*, ECtHR Judgment of 9 June 1998, at para. 67; *Labita v. Italy*, ECtHR Judgment of 6 April 2000, at para. 133; *Taş v. Turkey*, ECtHR Judgment of 14 November 2000, at para. 70-72 (finding that the investigation was not prompt where the public prosecutor did not begin until two years after the incident).

<sup>188</sup> *Assenov & Others v. Bulgaria*, see note 84 above, at para. 103.

<sup>189</sup> *Labita v. Italy*, see note 187 above, at para. 133-236.

<sup>190</sup> See, e.g. *Assenov & Others v. Bulgaria*, see note 84 above.

<sup>191</sup> See note 171 above, CAT 2008 Concluding Observations on Kazakhstan, at para. 24.

<sup>192</sup> *Ristic v. Yugoslavia*, CAT Views of 11 May 2001, at para. 9.6. Available at: <http://www1.umn.edu/humanrts/cat/decisions/yugoslavia1998.html> (holding that a proper investigation would have included additional more thorough steps, such as an exhumation and new autopsy).

held that States have a duty to investigate cases of torture thoroughly.<sup>193</sup> Furthermore, State authorities must make a serious attempt to learn what happened and “should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions.”<sup>194</sup>

139. The ECtHR has also identified the steps that State authorities should take in conducting their investigation, including the need for prompt questioning of witnesses and searches for evidence at the detention area, and execution of objective medical examinations by qualified doctors.<sup>195</sup> The ECtHR has stated in a number of cases that the right to an effective remedy is denied when there is a failure to take certain specific steps in an investigation. Some of these key steps include taking fingerprints, performing a medical examination that fully examines the injuries on a victim’s body, and results in “a complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings,”<sup>196</sup> taking initiative in investigating all the circumstances of the abuse, and taking reasonable steps available to “secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence . . .”<sup>197</sup> and “where appropriate, a visit to the scene of the crime.”<sup>198</sup> The ECtHR has also indicated that a medical examination must also provide “a complete and accurate record of injury and an objective analysis of clinical findings.”<sup>199</sup>
140. The Istanbul Protocol, or the “Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,” outlines the standards for an effective investigation.<sup>200</sup> The Istanbul Principles are annexed to the Protocol and provide a more succinct statement of many of the recommendations contained in the Protocol.<sup>201</sup> Several requirements of the Istanbul Protocol were violated in Mr. Gerasimov’s case.

*a) Interviewing Key Witnesses*

141. The investigation into the ill-treatment of Mr. Gerasimov was inadequate in a number of respects. The only interviews conducted with Mr. Gerasimov and his stepsons were as part of a preliminary police inquiry, rather than with the

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<sup>193</sup> *José Vicente et. al. v. Colombia*, UNHRC Views of 29 July 1997, at para. 8.8. Available at: <http://www1.umn.edu/humanrts/undocs/612-1995.html>; *Stephens v. Jamaica*, UNHRC Views 18 October 1995, at para. 9.2. Available at: <http://www1.umn.edu/humanrts/undocs/session55/vws37355.htm> (noting that the applicant’s complaint . . . “was acknowledged but neither investigated thoroughly nor expeditiously.”).

<sup>194</sup> *Corsacov v. Moldova*, ECtHR Judgment of 4 April 2006, at para. 69 (citing *Assenov and Others v. Bulgaria*, see note 84 above, at para. 103).

<sup>195</sup> *Salman v. Turkey*, ECtHR Judgment of 27 June 2000, at para. 106 (in the context of a right to life investigation); *Tanrikulu v. Turkey*, ECtHR Judgment of 8 July 1999, at para. 109; *Gül v. Turkey*, ECtHR Judgment of 2002, at para. 89.

<sup>196</sup> *Gül v. Turkey*, *ibid.*

<sup>197</sup> *Paul and Audrey Edwards v. the United Kingdom*, Judgment of 14 March 2002, at para. 71.

<sup>198</sup> *Cennet Ayhan and Mehmet Salih Ayhan v. Turkey*, ECtHR Judgment of 27 June 2006, at para. 88.

<sup>199</sup> *Paul and Audrey Edwards v. the United Kingdom*, see note 197 above, at para. 71.

<sup>200</sup> Istanbul Protocol, see note 94 above.

<sup>201</sup> *Ibid.* at Annex 1, p. 59-60.



thoroughness and detail necessary for a full criminal investigation that satisfies the UNCAT. In addition, the investigation failed to interview key witnesses including:

- a) The stepsons of Mr. Gerasimov, who were only interviewed for the preliminary investigation.
- b) The ambulance crew and emergency doctor who first saw Mr. Gerasimov on 28 March 2007, who could have given evidence as to his injuries.
- c) Patients at the hospital who could have confirmed visits to Mr. Gerasimov by police officers who attempted to coerce him to withdraw his complaints.
- d) Vitaliy Povornitsiy, who notified Mrs. Gerasimov that Mr. Gerasimov's stepson Anatoly had been detained.<sup>202</sup>
- e) Medical personnel at the hospital where Mr. Gerasimov was treated after he was tortured.
- f) Mr. Gerasimov's co-workers, to ascertain the state of his health prior to his detention and torture.

142. Due to the closed nature of the investigative process it is not clear which police officers were spoken to. Certainly, no confrontation was ever organized between them and Mr. Gerasimov or with the other witnesses mentioned above, and neither was Mr. Gerasimov invited to comment on the evidence that had been gathered.

*b) Preserving Evidence*

143. The investigative process also failed to recover, preserve and examine material evidence immediately following its receipt of Mr. Gerasimov's complaint. For example, the scientific examination of clothing fibers was not conducted until 16 July 2007, well after the police officers had washed their clothing worn on 27 March 2007, rendering it pointless.

*c) Independent Medical Evidence*

144. The Istanbul Principles require that a full medical report is obtained in cases of torture. Experts must act "in conformity with the highest ethical standards" and must produce a prompt written report that includes details regarding the circumstances of the examination, including a record of the history of the alleged torture, a record of the physical and psychological examination, an opinion as to the probable relationship of the physical and psychological findings to the alleged torture, and a clear statement on the authorship of the report.<sup>203</sup> After the subject and his or her representative are given the opportunity to record their views about the examination process in the written report, the written medical report will be deemed complete, and it is the state's responsibility to ensure that the written results

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<sup>202</sup> See note 26 above (Exhibit 31), Gerasimov Appeal (Fenko Letter) to Reverse Ruling to Refuse Initial Criminal Proceedings (20 May 2008).

<sup>203</sup> *Ibid.* at para. 6(a-b).

are communicated to both the subject and his or her representative and to the investigating authority.<sup>204</sup>

145. The medical examination of Mr. Gerasimov was entirely inadequate, and did not meet the standards necessary to satisfy the investigative element of Articles 12 and 13 UNCAT. It was not prompt, as it was not conducted until 23 April 2007, some three weeks after the ill-treatment occurred. There was no assessment of how the injuries were caused, or when they were caused. There were no conclusions as to whether the injuries were consistent with his allegations made by Mr. Gerasimov. There was no diagnosis as to how long the injuries might last. There was no opportunity given to Mr. Gerasimov to record his views in the process. These shortcomings mean that the medical report fails to satisfy the requirements for an effective investigation.

#### 4. No Opportunity for Participation by the Victim in the Investigation

146. Mr. Gerasimov has been excluded from effective participation in the investigative process, breaching international standards which require that the victim is involved.
147. This Committee found violations of Articles 12 and 13 of the Convention in circumstances where “the public prosecutor never informed the complainant about whether an investigation was being or had been conducted after the criminal complaint was filed,” effectively preventing the complainant from pursuing a private prosecution of his case.<sup>205</sup>
148. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Standards require that “the victim (or, as the case may be, the victim’s next-of-kin) must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.”<sup>206</sup> The ECtHR has interpreted this duty to include providing the victim with access to the case files, finding that an internal police investigation into illegal detention and torture failed to meet the requirements of a public investigation because neither the victims nor their family members were granted access to the materials of the investigation or informed of the decision of the investigation.<sup>207</sup>

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<sup>204</sup> *Ibid.* at para. 6(c).

<sup>205</sup> Committee against Torture, Commc’n No. 207/2002, (*Dragan Dimitrijevic v. Serbia and Montenegro*), para.5.4, UN Doc. CAT/C/33/D/207/2002 (19 Nov. 2004) (emphasis added). See also CAT, Commc’n No. 161/2000, (*Hajrizi Dzemajl et al. v. Yugoslavia*), para.9.5, UN Doc. CAT/C/29/D/161/2000 (21 Nov. 2002) (holding that the state party’s “failure to inform the complainants of the results of the investigation by, inter alia, not serving on them the decision to discontinue the investigation, effectively prevented them from assuming “private prosecution” of their case”); CAT, Commc’n No. 207/2002, (*Dragan Dimitrijevic v. Serbia and Montenegro*), para.5.4, UN Doc. CAT/C/33/D/207/2002 (19 Nov. 2004); CAT, Commc’n No. 171/2000, (*Jovica Dimitrov v. Serbia and Montenegro*), UN Doc. CAT/C/34/D/171/2000 (23 May 2005); CAT, Commc’n No. 172/2000, (*Danilo Dimitrijevic v. Serbia and Montenegro*), UN Doc. CAT/C/35/D/172/2000 (16 Nov. 2005).

<sup>206</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [CPT], *The CPT Standards*, at 88, CPT/Inf/E (2002) (rev. 2009).

<sup>207</sup> *Chitayev and Chitayev v. Russia*, ECHR Commc’n No. 59334/00. See also *Hugh Jordan v. the United Kingdom*, Commc’n No. 24746/94 (investigation into a shooting death by a police officer failed to involve

149. Mr. Gerasimov was interviewed only once, and by officers of the very police station where the torture occurred. While he was visited by some of the police who tortured him while he was in hospital, it was not to consult with him on the investigation, but rather to inform him that the officers had denied the behaviour, to be told to withdraw the complaint, and to be offered money to withdraw the complaint. He was never consulted on the substance of the investigation or given the opportunity to make representations. In addition, he was not and has not been provided with adequate access to the case file. He played no part in the disciplinary proceedings against the police officers, and has only been told in general terms what happened at the conclusion of that process. The entire investigation has been carried out without any regard to his rights as a victim to be able to participate in the process.

#### 5. Lack of Transparency of the Investigation

150. The investigation into the alleged torture of Mr. Gerasimov has not been conducted with the degree of transparency that is required under international law. This includes the need to ensure public awareness of the existence of such investigations; conduct hearings in public where appropriate; and to make the details and the outcome of such investigations public.

151. The process itself must be public. The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Istanbul Protocol”) requires that investigations should be carried out by an “independent commission of inquiry or similar procedure,”<sup>208</sup> that there should be “wide notice of the establishment of a commission and the subject of the inquiry” so as to allow witnesses to come forward, and that investigation hearings “should be conducted in public, unless in-camera proceedings are necessary to protect the safety of a witness.”<sup>209</sup> The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Standards state that torture investigations require a “sufficient element of public scrutiny of the investigation or its results, to secure accountability in practice as well as in theory” and that, “in particularly serious cases, a public inquiry might be appropriate. . . .”<sup>210</sup>

152. In addition, this Committee has recommended the establishment of a centralized public register of both complaints of torture and ill-treatment and of the results of investigations, to ensure openness and impartiality.<sup>211</sup> The CPT also considers that

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“a sufficient element of public scrutiny”); *Finucane v. the United Kingdom*, ECHR Commc’n No.29178/95 (police investigation into a political murder failed to meet the standard for an effective public investigation).

<sup>208</sup> Istanbul Protocol, see note 94 above, at Article 5(a).

<sup>209</sup> *Ibid.*, Istanbul Protocol, Articles 113 and 114.

<sup>210</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [CPT], *The CPT Standards*, at 88, CPT/Inf/E (2002) (rev. 2009). According to the Standards, “the degree of scrutiny required may well vary from case to case.” (underline omitted).

<sup>211</sup> See A/56/44, § 97(e); see also Nowak and McArthur at 437.

public authorities should “register all representations which could constitute a complaint.”<sup>212</sup>

153. This Committee requires that the findings of the report are properly publicized, and that State are “obliged to ensure that every allegation of torture [is] thoroughly investigated and the results made public.”<sup>213</sup> The Istanbul Protocol requires that the public inquiry should issue within a reasonable time a written report that includes “the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. Upon completion, the report shall be made public.”<sup>214</sup>
154. The internal police inquiry undertaken into the allegations made by Mr. Gerasimov was done behind closed doors. He was only informed of the mild disciplinary sanctions after the event and was never called to give evidence or to give his opinion. Despite the severity of the allegations made by him, there have been no public hearings, no public access to the investigation process, and no publication of a final report.

#### 6. No Finding of Responsibility

155. The purported investigation into the ill-treatment of Mr. Gerasimov has been so hindered by the acts and omissions of the police and prosecutorial authorities that it has not been capable of bringing to justice those accused of responsibility for the torture.
156. The Committee against Torture has observed that investigations should seek to ascertain the facts and identify the perpetrators.<sup>215</sup> The ECtHR has held that, to satisfy the investigative requirement of the prohibition on torture, an investigation should be capable of leading to the identification and punishment of those responsible for any ill treatment and that it “must be ‘effective’ in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities ...”<sup>216</sup>

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<sup>212</sup> *Ibid.* at 88. To this end, “appropriate forms should be introduced for acknowledging receipt of a complaint and confirming that the matter will be pursued.”

<sup>213</sup> Committee against Torture, Summary Record of the 245<sup>th</sup> Meeting, para. 37, U.N. Doc. CAT/C/SR.245 (11 June 1996); *see also* Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary*, Oxford University Press (2008) at 437.

<sup>214</sup> *Ibid.* Art. 5(b) (the report “shall also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based and list the names of witnesses who testified, with the exception of those whose identities have been withheld for their own protection. The State shall, within a reasonable period of time, reply to the report of the investigation and, as appropriate, indicate steps to be taken in response”).

<sup>215</sup> *Encarnación Blanco Abad v. Spain*, CAT Decision of 14 November 1994, at para. 8.8. Available at: <http://www1.umn.edu/humanrts/cat/decisions/59-1996.html>; *Dzemajl v Yugoslavia*, CAT Decision of 2 December 2002, at para. 9.4. Available at: <http://www.unhcr.org/refworld/country,,CAT,,SRB,,3f264e774,0.html> (stating that a “criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person who might have been involved therein.”)

<sup>216</sup> *Aksoy v. Turkey*, *see note 186 above*, at para. 95.

157. The disciplinary proceedings against the police officers are insufficient to satisfy the requirement in Article 4(2) of the Convention that those who are found guilty of torture must be punished in accordance with a national law that should provide appropriate penalties taking into account the grave nature of the offense. In *Coronel et al. v. Colombia*, the UN HRC also held that “if the violation that is the subject of the complaint is particularly serious ... remedies of a purely disciplinary and administrative nature cannot be considered sufficient or effective.”<sup>217</sup>
158. Even criminal proceedings will not be enough to satisfy the requirement if the eventual sentence is not sufficiently severe. This Committee has recommended amendment of national laws that do not provide for severe penalties for people convicted of torture.<sup>218</sup> In *Guridi v. Spain*, a sentence given to three civil guards of four years imprisonment for torture was reduced to one year and they were then pardoned. The Committee recalled the duty of State Parties to impose appropriate penalties and found that “the imposition of lighter penalties and the granting of pardons to the Civil Guards are incompatible with the duty to impose appropriate punishment.”<sup>219</sup> Prominent commentaries to the CAT have indicated that sentences as long as three years are insufficient punishment for the offense of torture.<sup>220</sup>
159. In *Okkali v. Turkey*, the ECtHR reached similar conclusions on the obligation of Member States to prosecute violations of the prohibition of torture. In a case where police officers received a minimum penalty of one year imprisonment and three months suspension from duty, the Court found that the judges had “exercised their discretion more in order to minimize the sentence of an extremely serious unlawful act than to show that such acts can not be tolerated” and held that the criminal system was not sufficiently dissuasive and the “outcome of the disputed proceedings did not provide appropriate redress.”<sup>221</sup>
160. In this case, the investigation failed to ascertain and attribute criminal responsibility for Mr. Gerasimov’s torture. The investigations that were undertaken by the Southern UIA, the Regional DIA and the DCECC did not lead to a criminal trial, but only to disciplinary proceedings that allegedly resulted in lenient sanctions against several unnamed individuals who were present or who were monitoring

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<sup>217</sup> *Coronel et al. v. Colombia*, HRC, 67<sup>th</sup> Session, Comm. No. 778/1997, 29 September 1996, para. 6.2. Available at: <http://www.wfrrt.net/humanrts/undocs/778-1997.html>.

<sup>218</sup> Committee against Torture, Concluding Observations on the Republic of Korea, CAT/C/KOR/CO/2, 25 July 2005, at para. 7 & 8; Committee against Torture, Concluding Observations on Tajikistan, CAT/C/TJK/CO/1, 7 December 2006, at para. 5; Committee against Torture, Concluding Observations on South Africa, CAT/C/ZAF/CO/1, 7 December 2006, at para. 13 & 14 (recommending that South Africa should “include appropriate penalties that take into account the grave nature of the offense, in order to fulfill its obligations under the Convention to prevent and eliminate torture and combat impunity”). See also: concluding observation on the *Czech and Slovakian Federal Republic Reports*, (cited in “Nowak CAT Commentary,” *Ibid.*, at A4 para. 34).

<sup>219</sup> *Guridi v. Spain*, Decision of the CAT, 8 February 2002, U.N. Doc. CAT/C/34/D/212/2002, at para. 6.7. Available at: <http://www1.umn.edu/humanrts/cat/decisions/212-2002.html>.

<sup>220</sup> Nowak CAT Commentary, see note 1 above, at A4 para. 34 (citing CAT/C/SR.51 at para. 31, CAT/C/SR.78 at para. 4).

<sup>221</sup> *Okkali v. Turkey*, ECtHR Judgment of 12 February 2007, at para. 78.

those present during Mr. Gerasimov's detention. In particular, according to the letter of the Regional DIA, it appears that it imposed mild disciplinary actions (their precise nature unknown) against ten staff members for violating a police regulation that requires the registration of detainees within three hours of their arrest,<sup>222</sup> which was not a severe enough punishment to deter torture and to provide the victims with redress. Due to the lack of transparency of the entire process, it is not even possible to verify whether these sanctions were related to Mr. Gerasimov's case.

#### **D. Failure to Provide Redress**

161. International law requires access to legal remedies for torture, including compensation and rehabilitation. However, the law in Kazakhstan effectively prohibits Mr. Gerasimov from bringing civil proceedings for compensation.
162. Article 14(1) of the UNCAT provides that “[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”
163. This Committee against Torture has stated that there must be a civil procedure available, regardless of the outcome of any criminal procedure,<sup>223</sup> as “the State is itself responsible for compensation and redress.”<sup>224</sup> The UN HRC explained that, “[i]f the alleged offence is particularly serious, as in the case of violations of basic human rights ... purely administrative and disciplinary remedies cannot be considered adequate and effective.”<sup>225</sup> As part of the general right of access to a court, the ECtHR has found that the duty to provide effective remedies to victims of ill-treatment includes compensation.<sup>226</sup> Similarly, Article 2(3) ICCPR has been interpreted by the UN HRC as placing an obligation on States to use their resources not only to investigate and punish violators, but to compensate victims of human rights violations.<sup>227</sup>
164. Torture requires specific and appropriate remedies. The UN HRC has held that the nature of the remedy – whether judicial, administrative or other – should be in accordance with the rights violated and the effectiveness of that remedy in granting

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<sup>222</sup> See note 56 above (Exhibit 15), Regional DIA Letter (28 June 2007).

<sup>223</sup> Summary Record of the 10th meeting of the UN Committee against Torture, Consideration of the initial periodic report of Sweden, CAT/C/SR.10, 18 April 1989.

<sup>224</sup> CAT/C/SR.10 No. 25; CAT/C/SR.12 No. 16; CAT/C/SR.91, No. 67; CAT/C/SR.95, No. 33; CAT/C/SR. 109, No. 27, A/47/44, No. 337 (Committee as a whole).

<sup>225</sup> *José Vicente et. al. v. Colombia*, see note 193 above, at para. 5.2. Available at: <http://www1.umn.edu/humanrts/undocs/612-1995.html>; See also: *Bautista de Arellana v Colombia*, UNHRC Views of 27 October 1995, at para. 8.2. Available at: <http://www1.umn.edu/humanrts/undocs/session55/vws56355.htm>.

<sup>226</sup> *Aksoy v Turkey*, see note 186 above, at para. 90.

<sup>227</sup> See Human Rights Committee, CCPR General Comment 7, para 1 (1982). Available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/7e9dbcf014061fa7c12563ed004804fa?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/7e9dbcf014061fa7c12563ed004804fa?Opendocument).

appropriate relief for the violation.<sup>228</sup> Similarly, the Inter-American Court has established that for remedies to be effective, they must be suitable to address the legal right that has been infringed.<sup>229</sup> In *Assenov v. Bulgaria*, the ECtHR recognized the special nature of the crime of torture and other forms of ill-treatment, particularly when it is committed by State authorities, and the requirement of specific remedies.<sup>230</sup> Following the same reasoning, the Inter-American Commission on Human Rights explained in *Catalán Lincoleo* that torture and other similar grave crimes such as forced disappearance and summary execution are of such gravity that they require specific measures.<sup>231</sup>

165. In Kazakhstan, there are obstacles that make a civil claim impossible. The right to compensation for harm caused by the actions of law enforcement officials is recognized only after conviction of the officials by a criminal court.<sup>232</sup> In addition, victims of torture are not included in the list of those eligible for compensation for harm sustained in pre-trial detention as a result of unlawful actions by law enforcement officials in Article 40 of the Criminal Procedure Code.<sup>233</sup> Furthermore, under the Criminal Procedure Code damages are only available for “unlawful actions of state bodies in charge of criminal proceedings,” and the list of such “unlawful actions” does not include torture as it is defined by Article 347-1 of the Criminal Code. This Committee has previously concluded that where the absence of criminal proceedings deprives the applicant of the possibility of filing a claim for compensation, there is a violation of Article 14 UNCAT.<sup>234</sup>
166. The UN Special Rapporteur on Torture recently considered this problem in Kazakhstan and concluded that there was no provision for either financial compensation or rehabilitation of torture victims, resulting in a situation where there have been no examples of successful claims:

“Regrettably, there is no legal obligation in Kazakh domestic legislation for financial compensation or rehabilitation of torture victims. Although article 40 of the criminal procedure code provides for compensation of harm caused as a result of unlawful acts of the body leading or carrying out criminal proceedings, the list of unlawful acts does not include torture or ill-treatment. A resolution of the Supreme Court of 9 July 1999 (No. 7) on the practical application of the legislation on the compensation for the harm caused by unlawful actions of the

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<sup>228</sup> Human Rights Committee, Concluding Observations on Finland, UN Doc. CCPR/C/79/Add.91, (4 August 1998), at para. 10. Available at: <http://www.unhchr.ch/tbs/doc.nsf/0/54886f511e909063802566560037d4e4?Opendocument>.

<sup>229</sup> *Velasquez Rodriguez v Honduras*, see note 169 above, at para. 64.

<sup>230</sup> See *Assenov v Bulgaria*, see note 84 above, at para 102.

<sup>231</sup> *Samuel Alfonso Catalán Lincoleo v. Chile*, Inter-Am. Comm. H.R. Report No. 61/01 of 16 April 2001, at para. 36. Available at: <http://www.cidh.org/annualrep/2000eng/ChapterIII/Merits/Chile11.771.htm>.

<sup>232</sup> *Alternative Report of Nongovernmental Organizations of Kazakhstan on the Implementation of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, see note 109 above, at p. 29-30.

<sup>233</sup> *Ibid.*

<sup>234</sup> *Jovica Dimitrov v. Serbia and Montenegro*, Decision of the CAT, Communication No. 171/2000, U.N. Doc. CAT/C/34/D/171/2000 (2005), at p. 7 (3)

bodies in charge of the criminal process, which serves as a guideline for judges, refers to the “use of violence, cruel and degrading treatment” and lists “arrested, accused and convicted persons” as eligible for compensation. The civil code, however, in its article 923, appears to limit the acts and conditions giving victims the right to compensation, since torture and ill-treatment are not listed. Furthermore, the civil procedure is only initiated once criminal proceedings against the perpetrator or offender have started; this clearly contradicts the requirements of article 14 of the Convention against Torture. The Special Rapporteur was not informed of any case where torture victims have received compensation or rehabilitation, even if torture had been found by the criminal court.”<sup>235</sup>

167. Amnesty International has also criticized Kazakhstan because there is “no obligation to offer financial compensation even in cases where torture by law enforcement officers has been proven beyond a reasonable doubt . . . [t]he law excludes individuals who have been subjected to torture from recovering monetary damages through civil remedies.”<sup>236</sup> Amnesty International also notes that the civil code provides inadequate protection because it does not list torture or ill treatment as grounds for compensation.<sup>237</sup>
168. Mr. Gerasimov has made strenuous efforts to have his claim for ill-treatment by the police properly considered by the courts. Despite all those efforts there has been no real attempt to investigate the criminal liability of those who mistreated him, without which a civil claim is impossible. He continues to suffer the effects of his torture and receives no assistance for that suffering.

## VII. CONCLUSION

169. In light of the above, Mr. Gerasimov respectfully requests that the Committee:
- a) *Declare* that the State Party, the Republic of Kazakhstan, has breached the following Articles of the UNCAT: Article 1 in conjunction with Article 2(1), and Articles 12, 13, and 14;
  - b) *Recommend* that the Republic of Kazakhstan adopt all necessary action to:
    - Fully investigate the circumstances of the torture and ill-treatment of Mr. Gerasimov and, based on the results of such investigation, take appropriate measures against those responsible for that treatment; and

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<sup>235</sup> Special Rapporteur on Torture Report on Mission to Kazakhstan (Exhibit 51), see note 87 above, at para. 63.

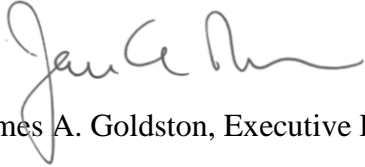
<sup>236</sup> Amnesty International 2010 Report on Kazakhstan (Exhibit 52), see note 143 above, p. 27.

<sup>237</sup> *Ibid.*

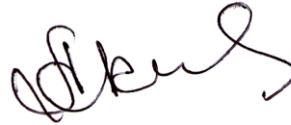


- Adopt measures to ensure that Mr. Gerasimov receives full and adequate reparation for the harm he has suffered, including compensation and rehabilitation.

22 April 2010



James A. Goldston, Executive Director  
Rupert Skilbeck, Litigation Director  
Masha Lisitsyna, Project Manager  
Open Society Justice Initiative  
New York, USA



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

## VIII. LIST OF SUPPORTING DOCUMENTS

Exhibit 1 (a)	Discharge Epicrisis – ENG
Exhibit 1 (b)	Discharge Epicrisis – RUS
Exhibit 2 (a)	S. Pshechenko Complaint (29 Mar. 2007) – ENG
Exhibit 2 (b)	S. Pshechenko Complaint (29 Mar. 2007) – RUS
Exhibit 3	Photo #1: Facial Injuries (29 March 2007)
Exhibit 4	Photo #2: Lower Back (29 March 2007)
Exhibit 5	Photo #3: Lower Back (Close Up) (29 March 2007)
Exhibit 6 (a)	Urologist Notes (11 April 2007) – ENG
Exhibit 6 (b)	Urologist Notes (11 April 2007) – RUS
Exhibit 7 (a)	Neurologist Notes (11 April 2007) – ENG
Exhibit 7 (b)	Neurologist Notes (11 April 2007) – RUS
Exhibit 8	Urologist Notes (19 April 2007) – ENG
Exhibit 9 (a)	Prosecutor General’s Office Letter (6 June 2007) - ENG
Exhibit 9 (b)	Prosecutor General’s Office Letter (6 June 2007) - RUS
Exhibit 10 (a)	Gerasimov Complaint (12 June 2007) – ENG
Exhibit 10 (b)	Gerasimov Complaint (12 June 2007) – RUS
Exhibit 11 (a)	Gerasimov Complaint (13 June 2007) – ENG
Exhibit 11 (b)	Gerasimov Complaint (13 June 2007) – RUS
Exhibit 12 (a)	National Security Committee Letter (13 June 2007) – ENG
Exhibit 12 (b)	National Security Committee Letter (13 June 2007) – RUS
Exhibit 13 (a)	City Prosecutor’s Office Letter (18 June 2007) – ENG
Exhibit 13 (b)	City Prosecutor’s Office Letter (18 June 2007) – RUS
Exhibit 14 (a)	Regional Prosecutor’s Office Letter (19 June 2007) – ENG
Exhibit 14 (b)	Regional Prosecutor’s Office Letter (19 June 2007) – RUS
Exhibit 15 (a)	Regional DIA Letter (28 June 2007) – ENG
Exhibit 15 (b)	Regional DIA Letter (28 June 2007) – RUS
Exhibit 16 (a)	Ultrasound (1 Aug. 2007) – ENG
Exhibit 16 (b)	Ultrasound (1 Aug. 2007) – RUS
Exhibit 17 (a)	Neurologist Notes (1 Aug. 2007) – ENG

Exhibit 17 (b)	Neurologist Notes (1 Aug. 2007) – RUS
Exhibit 18 (a)	Neurologist Notes (2 Aug. 2007) – ENG
Exhibit 18 (b)	Neurologist Notes (2 Aug. 2007) – RUS
Exhibit 19	Neurologist Notes (6 August 2007) ENG
Exhibit 20 (a)	Psychological Examination (7 Aug. 2007) – ENG
Exhibit 20 (b)	Psychological Examination (7 Aug. 2007) – RUS
Exhibit 21	Sick Leave Papers (Aug. - Sept. 2007) – ENG
Exhibit 21	Sick Leave Papers (Aug. - Sept. 2007) – RUS
Exhibit 22 (a)	Regional DCECC Decision (5 Sept. 2007) – ENG
Exhibit 22 (b)	Regional DCECC Decision (5 Sept. 2007) – RUS
Exhibit 23 (a)	Gerasimov Appeal to the Regional Prosecutor to Reverse the Ruling to Refuse to Initiate Criminal Proceedings (12 Sept. 2007) – ENG
Exhibit 23 (b)	Gerasimov Appeal to the Regional Prosecutor to Reverse the Ruling to Refuse to Initiate Criminal Proceedings (12 Sept. 2007) – RUS
Exhibit 24 (a)	Bureau for Human Rights Letter (20 Sept. 2007) – ENG
Exhibit 24 (b)	Bureau for Human Rights Letter (20 Sept. 2007) – RUS
Exhibit 25 (a)	Regional Prosecutor’s Office Letter (25 Sep. 2007) – ENG
Exhibit 25 (b)	Regional Prosecutor’s Office Letter (25 Sep. 2007) – RUS
Exhibit 26 (a)	Ministry of Internal Affairs Letter (3 Dec. 2007) – ENG
Exhibit 26 (b)	Ministry of Internal Affairs Letter (3 Dec. 2007) – RUS
Exhibit 27 (a)	Follow-up Letter from Fenko to the 12 September 2007 Petition for Criminal Liability for Gerasimov’s Beating (22 January 2008) – ENG
Exhibit 27 (b)	Follow-up Letter from Fenko to the 12 September 2007 Petition for Criminal Liability for Gerasimov’s Beating (22 January 2008) – RUS
Exhibit 28 (a)	Regional DCECC Decision – Ruling of Refusal to Initiate Criminal Proceedings (1 Feb. 2008) – ENG
Exhibit 28 (b)	Regional DCECC Decision – Ruling of Refusal to Initiate Criminal Proceedings (1 Feb. 2008) – RUS
Exhibit 29 (a)	Regional Prosecutor’s Office Letter (19 Mar. 2008) – ENG
Exhibit 29 (b)	Regional Prosecutor’s Office Letter (19 Mar. 2008) – RUS

Exhibit 30 (a)	City Court Decision (25 Mar. 2008) – ENG
Exhibit 30 (b)	City Court Decision (25 Mar. 2008) – RUS
Exhibit 31 (a)	Gerasimov Appeal (Fenko Letter ) to Reverse Ruling to Refuse to Initiate Criminal Proceeings (20 May 2008) – ENG
Exhibit 31 (b)	Gerasimov Appeal (Fenko Letter ) to Reverse Ruling to Refuse to Initiate Criminal Proceeings (20 May 2008) – RUS
Exhibit 32 (a)	Prosecutor General’s Office Letter (11 June 2008) – ENG
Exhibit 32 (b)	Prosecutor General’s Office Letter (11 June 2008) – RUS
Exhibit 33 (a)	Letter of authorization signed by Gerasimov (5 March 2009)
Exhibit 33 (b)	Letter of authorization signed by Gerasimov (5 March 2009)
Exhibit 34	Videotaped Interview with Mr. Gerasimov (14 April 2009)
Exhibit 35	Photo #5: Alexander Gerasimov (April 2009)
Exhibit 36	Photo #5: Sergey Pshechenko (April 2009)
Exhibit 37	Photo #6: Exterior of Alexander Gerasimov’s Home (April 2009)
Exhibit 38	Photo #7: Interior of Alexander Gerasimov’s Home (April 2009)
Exhibit 39 (a)	Mr. Gerasimov’s Statement (18 November 2009) – ENG
Exhibit 39 (b)	Mr. Gerasimov’s Statement (18 November 2009) – RUS
Exhibit 40	Statement of Anastasia Knaus Regarding the Date of Gerasimov’s Statement – ENG
Exhibit 41	Diagram #1: Third Floor of the Southern UIA / Police Station
Exhibit 42	Diagram #2: Office on the Third Floor of the Southern UIA / Police Station
Exhibit 43	Diagram #3: Kazakhstan
Exhibit 44	Diagram #4: Regions within Kazakhstan
Exhibit 45 (a)	Diagram #5: Investigative Structure within the Republic of Kazakhstan (ENG)
Exhibit 45 (b)	Diagram #5: Investigative Structure within the Republic of Kazakhstan (RUS)
Exhibit 46 (a)	Criminal Code Article 308 – ENG
Exhibit 46 (b)	Criminal Code Article 308 – RUS
Exhibit 47 (a)	Criminal Procedure Code, Article 68 – ENG
Exhibit 47 (b)	Criminal Procedure Code, Article 68 – RUS
Exhibit 48	Criminal Procedure Code, Article 134

- Exhibit 49 Criminal Procedure Code, Article 138
- Exhibit 50 Mr. Gerasimov's Passport
- Exhibit 51 Manfred Nowak, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – Mission to Kazakhstan, 16 December 2009
- Exhibit 52 Amnesty International, Kazakhstan: No Effective Safeguards Against Torture (2010)