

Alexander Gerasimov v. Kazakhstan

*Reply to the Government's Response
before the UN Committee against Torture*

February 2011

Before the United Nations Committee against Torture

In the case of

Alexander Pavlovich GERASIMOV

against

the Republic of Kazakhstan

REPLY TO THE GOVERNMENT'S RESPONSE

to

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

tb-petitions@ohchr.org

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INTRODUCTION

1. On 22 April 2010, Alexander Gerasimov submitted a Communication to the UN Committee against Torture regarding the torture inflicted on him by police in the city of Kostanay in Kazakhstan on 27 and 28 March 2007. The Communication argued that (A) the treatment inflicted upon Mr. Gerasimov for the purposes of eliciting a confession amounted to torture (contrary to Article 1); (B) Kazakhstan failed to establish adequate safeguards against ill treatment during the initial period of detention, including by allowing unregistered detention that facilitated the torture (contrary to Article 2); (C) Kazakhstan failed to conduct a prompt and effective investigation into the allegations of torture (contrary to Articles 12 and 13); and (D) Kazakhstan failed to provide access to effective remedies including compensation and adequate reparation for the torture (contrary to Article 14). The Committee registered this Communication as number 433/2010.
2. On 18 January 2011, Kazakhstan responded to the Communication. The government claims that the General Prosecutor's officer ordered a check of Mr. Gerasimov's statement, and that as a result it cancelled its earlier decision refusing to open a criminal case. In the response, the government states that it has now initiated criminal proceedings against the police officers accused of torturing Mr. Gerasimov and that a new investigative team has been created, almost four years after the event. It also lists a number of general remedies in the form of policies, decrees and plans of action which it has recently put in place in response to allegations of torture.
3. However, according to the information received by the Kazakhstan International Bureau on Human Rights and the Rule of Law (KIBHR) on 21 February 2011, this renewed criminal investigation was dismissed and no charges have been brought. The main focus of the renewed investigation appears to have been the repeated interrogation of the victim, Mr. Gerasimov, and his family, and the psychiatric evaluation of the victim against his will. The manner in which the investigation was conducted appears to have been directed as pressuring Mr. Gerasimov to drop his complaint rather than pursuing a thorough investigation, especially in light of the pattern and practice of intimidation of those who make complaints of torture identified by the UN Special Rapporteur on Torture in 2010 as being a particular problem in Kazakhstan.
4. The Committee has before it clear and consistent evidence upon which it can make a finding of a violation of the Convention, and the arguments made in the original communication are re-iterated. Furthermore, on behalf of Mr. Gerasimov the following specific arguments are made in reply to the submissions of the government:
 - *A. Repeat Investigation is Ineffective.* The renewed investigation is no better than the previous investigation that was suspended over three years ago. It does not cure the failings identified in the communication to the Committee, as the renewed investigation also lacks independence, is delayed, is not effective, and has not resulted in any criminal prosecutions.
 - *B. Remedies.* While the recently introduced general remedies to combat torture outlined by the government are welcome, they are not sufficient to remedy the earlier complaint made by Mr. Gerasimov in the absence of proper reparations, which would have to include a recognition of human rights responsibility for the violations, a proper investigation, compensation and rehabilitation. Only a fully independent Commission of Inquiry will be sufficient to remedy the violation of the Convention, with full powers to summon witnesses and to recommend a criminal prosecution.

- *C. The Right of Petition.* In response to the first ever communication to the Committee against Torture, the government questioned the mental health of the author and ordered a psychiatric evaluation of him. Requests for a copy of the psychiatric report have been refused. The renewed investigation process has the characteristics of an attempt to intimidate the author into withdrawing his petition, and the Committee should be vigilant to ensure that there is no interference with the right of petition.

CIRCUMSTANCES OF THE CASE

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 neighbourhood. 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. The police also 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. Mr. Gerasimov 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, 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.

New Developments

7. On 6 December 2010, in response to the communication submitted to the Committee, a senior prosecutor of the 2nd Department of the office of the Prosecutor General of Kazakhstan adopted a resolution that required: *firstly*, that the decision of 1 February 2008 of the Regional Department for Combating Economic Crimes and Corruption (DCECC) refusing to initiate the criminal case against policemen Almukhambetov, Barakatov, Matashev should be cancelled, as it was rendered unlawfully and without grounds; and *secondly*, that a criminal case should be initiated against police officers of the Southern UIA of Kostanay, Almukhambetov, Barakatov and Matashev under Article 347-1 part 2 (a) of the Criminal Code of Kazakhstan, the offence of torture.¹ The resolution bases these orders on the fact that:

“Mr. Gerasimov’s statement ([together with statements of] his relatives, media publications) [indicate] that he was subjected to intentional infliction of physical suffering by officials with the aim to make him confess to the murder of Tarnautskaya; he was unlawfully held in the Southern DIA of Kostanay city for a [night and] day; this resulted in his hospitalization in the city hospital on March 28, 2007 after receiving the bodily injuries.” ... “[t]he claims of Gerasimov A.P. are confirmed by the statements of his wife, his adopted sons, Tzypina T.V. (friend of the applicant’s son), the forensic medical expert conclusions and the materials of the internal investigation. During the

¹Exhibit 1 - Resolution on the cancellation of the refusal to initiate a criminal case, Office of the Prosecutor General, 6 December 2010, at page 2.

inspection of the place of occurrence, Gerasimov A.P., his sons, Tzypina T.V. showed the rooms where they were questioned, beaten, subjected to violence (torture) and held overnight”².

8. The senior prosecutor’s resolution further describes the bodily injuries identified by the forensic medical examination of 4 May 2007 and confirmed by the forensic medical examination held by a commission of experts on 8 January 2008.³ The report notes that while Mr. Gerasimov and his adopted sons are not listed in the registry of the police station, the fact that they were unlawfully detained and brought to the police station was confirmed through the pre-investigation inquiry.
9. The resolution further stipulates that “Gerasimov gave consistent testimonies; the case file includes his photographs which show the traces of the bodily injuries. In addition, he immediately called for medical emergency help that excludes a possibility of getting bodily injuries in some other circumstances.”⁴ The prosecutor concludes that “the [internal] check files contain sufficient materials that indicate the elements of the crime under Article 347-1, para 2 (a) of the Criminal Code of Kazakhstan[...]and there are no circumstances [indicated] excluding criminal proceedings in this case.”⁵

Psychiatric Examination

10. On 8 January 2011, an investigator of the financial police Agaphonov D.P. ordered a psychiatric examination of Mr. Gerasimov.⁶
11. Mr. Gerasimov was extremely anxious about the interrogations which had taken place as part of the new investigation and the proposed examination, and his health deteriorated, such that on 14 January 2011 a doctor prescribed that he be hospitalized.⁷ The same day he wrote asking that the examination be postponed.⁸ Despite his request, the psychiatric examination was held on 18 January 2011.⁹
12. On 2 February 2011, Mr. Gerasimov’s counsel, Ms. Volochay, was allowed to see the psychiatric report on Mr. Gerasimov.¹⁰ The same day she filed an application requesting a copy of this report but as of 22 February 2011 she had received no reply to her application.¹¹

Further Interrogations

13. Mr. Gerasimov has been questioned on at least four occasions in the course of the renewed investigation: on 19 January, 21 January, 25 January and 2 February.¹² On these four occasions he had a lawyer, but there were also additional sessions prior to 19 January where he was questioned without a lawyer.¹³

² *Ibid*, at page 2.

³ *Ibid*, at page 2.

⁴ *Ibid*, at page 3.

⁵ *Ibid*, at page 3.

⁶ Exhibit 2 - Decision ordering forensic psychiatric examination, Investigator of the financial police Agaphonov, 8 January 2011.

⁷ Exhibit 3 - Gerasimov health statement, 14 January 2011.

⁸ *Ibid*.

⁹ Exhibit 4 - First Report of the lawyer Volochay, 2 February 2011, at para 2 .

¹⁰ *Ibid*, at para 6.

¹¹ Exhibit 5 - Second Report of the lawyer Volochay, 22 February 2011, at page 2.

¹² Exhibit 4 - First Report of the lawyer Volochay.

¹³ Exhibit 5 - Second Report of the lawyer Volochay, 22 February 2011, at page 1.

14. During questioning on 19 January 2011, Mr. Gerasimov gave a detailed statement about the torture that he was subjected to, which was consistent with his earlier statements. His testimony included the fact that he was threatened with sexual violence, and told that “if you do not confess we will send you to the basement or will rape you here ourselves.” Mr. Gerasimov again named a specific police officer, Almukhambetov, as having unzipping his trousers to suggest the possibility of the sexual violence. He explained that there were at least five police officers present, who tied his hands with a belt so that he could not resist. He again described the physical injuries that he had suffered, including blows to the kidney area inflicted by another officer, Barakatov, and suffocation with the polypropylene bag until he bled from his ears and nose. He also explained how he was forced to stand for a long time without permission to sit down, was hit on his head with a book, and spend a night and day without food. He repeated his evidence that all the actions of the officers were for the purpose of extracting a confession from him that he murdered Mrs. Tarnautskaya.¹⁴

Intimidation of Mr. Gerasimov and his Family

15. As explained in the Communication, in 2009 the Special Rapporteur on Torture complained of intimidation by the Kazakhstan authorities 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. . . Such behaviour, besides going counter to international standards, renders any complaints system meaningless and should be addressed in a determined manner.”¹⁵
16. The Special Rapporteur reported that “it appears that most detainees refrain from filing complaints because they do not trust the system or are afraid of reprisals”,¹⁶ and that detainees had suffered intimidation in preparation for his visit.¹⁷ As a result, the Special Rapporteur identified a need for the State to take measures to “protect complainants against reprisals”.¹⁸
17. Paragraphs 44 to 46 of the Communication detail threats that were made against Mr. Gerasimov in 2007, together with attempts at bribery, in order to persuade him to give up his complaint. Given this history of intimidation in Kazakhstan and against Mr. Gerasimov, it is not surprising that the circumstances of the renewed investigation have led to intimidation against Mr. Gerasimov and his family.
18. Anastasia Miller works at the Kostanay office of the Kazakhstan International Bureau for Human Rights, and has been working on the case of Mr. Gerasimov. In late January she received a call from Mr. Gerasimov who asked her to call his home phone. When she did so, Mr. Gerasimov’s wife, Anna Pschechenko, answered. She was nervous and was asking for help. She informed the lawyer that the family had just received a call from a prosecutor

¹⁴ *Ibid*, at page 1.

¹⁵ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to Kazakhstan*[A/HRC/13/39/Add.3](http://www2.ohchr.org/english/bodies/hrcouncil/docs/13specialsession/A.HRC.13.39.Add.3_en.pdf) at 59. Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13specialsession/A.HRC.13.39.Add.3_en.pdf.

¹⁶ *Ibid*, at para. 51.

¹⁷ *Ibid*, at paras. 22 and 73.

¹⁸ *Ibid*, at para. 80(c).

named Arman Kadralinov, who had said that unless Ms. Pshechenko and her sons went to the prosecutor's office to make statements then he would reopen the murder case that was the cause of the initial arrest and torture of Mr. Gerasimov.

19. At the request of the family, Ms. Miller then telephoned the prosecutor's office and spoke to Arman Kadralinov who confirmed that he had called the family in an attempt to ensure that they give evidence. When asked by Ms. Miller to refrain from putting pressure on the family, Kadralinov claimed that he was trying to help by conducting a thorough investigation.¹⁹
20. Ms. Miller explains that Mr. Gerasimov told her on several occasions that his family, in particular, his wife are very "tired" of his complaints about the torture he was subjected to; they want to "forget everything and just live" as they have small children. Due to the new interrogations Mr. Gerasimov has been absent from his job and the financial situation of his family has suffered as a result. Mr. Gerasimov told Ms. Miller on 18 February 2011 that his family puts strong pressure on him to withdraw his complaint, threatening him that he will not see his children, but he has not withdrawn his application. Mr. Gerasimov repeated several times that his wife is very worried about possible retaliation against their family for complaining.²⁰

Termination of the renewed investigation

21. On 21 February 2011, Arman Kadralinov informed Ms. Miller that the investigation had been terminated in accordance with Article 37 of the Criminal Procedure Code (circumstances excluding criminal investigation). Ms. Miller could not obtain a copy of the resolution terminating the case, but Mr. Kadralinov informed her that on 5 February 2011 Mr. Gerasimov refused the services of his lawyer and also informed the prosecutors that he has no "claims against the police". Kadralinov refused to send Mr. Gerasimov's statement to Ms. Miller, but said that Mr. Gerasimov put it into the mailbox of the regional prosecutor's office.²¹

REPLY TO GOVERNMENT SUBMISSIONS

22. The facts demonstrate that the renewed investigation was not effective, but instead resulted in Mr. Gerasimov and his family feeling further intimidated. While the general remedies to safeguard against torture that the government indicates will be introduced are a welcome development, they are not relevant to the decision as to whether or not there was a violation of the Convention in the past. Only a full Commission of Inquiry is adequate to remedy a violation of this nature. The intimidatory circumstances of the renewed investigation risk the effectiveness of the right of individual petition to the Committee.

A. Renewed Investigation is ineffective.

23. The renewed investigation is no better than the last investigation that was suspended over three years ago and does not cure the failings identified in the communication to the Committee, as the renewed investigation also lacks independence, is delayed, is not effective, and has not resulted in any criminal prosecutions. The renewed investigation merely compounds the earlier delays in the investigation outlined in the communication. The renewed investigation should not prevent this Committee from considering the case, and does not remedy any of the violations which Mr. Gerasimov suffered.

¹⁹ Exhibit 6 - Statement of Anastasia Miller, KIBHR lawyer, 21 February 2011.

²⁰ *Ibid.*

²¹ *Ibid.*

Delay

24. The legal standards for an effective investigation are set out in the communication to the Committee. In summary, they require that an investigation must be commenced promptly and conducted expeditiously. This Committee has found that an investigation into an allegation of torture which was not launched for three weeks,²² and took ten months to complete with unexplained gaps of between one and three months was an unacceptable delay.²³ The Human Rights Committee has considered that “a delay of over three years for the adjudication of the case at first instance, discounting the availability of subsequent appeals, was ‘unreasonably prolonged’”.²⁴ In the specific context of Kazakhstan, this Committee considered that delays of two months for the purposes of preliminary examination of torture complaints “may prevent timely documentation of evidence.”²⁵
25. Where a case was not promptly investigated, but the state has re-opened the investigation after communication to the Committee, this Committee has gone on to consider the merits of cases and find violations of the obligation to promptly investigate under Article 13 of the UNCAT.²⁶
26. In this case, the domestic investigation was suspended on 5 September 2007, and it remained suspended when Mr. Gerasimov filed his Communication with the Committee, at which point over three years had passed since the incident in question. By the time that the investigation was re-opened, almost four years had passed. There were no new facts which had only recently been discovered to justify this late re-opening. The Human Rights Committee has held that three years for the adjudication of a case is undue delay, but Mr. Gerasimov was forced to wait almost four years for the chance of a meaningful investigation commencing, only to see that investigation terminated three months later.

Ineffective Investigation

27. The re-starting of the investigation after the lapse of three years did not constitute an effective investigation. This new investigation could not cure any of the inadequacies in the original investigation: it would have been unable to cure the failure to preserve key evidence, such as the clothing fibers (see para. 143 of the original Communication), or the failure to conduct an adequate and independent medical examination in a timely fashion (see paras. 144 to 145 of the original Communication).
28. In addition, the renewed investigation has proven itself to be no more effective than the previous efforts. The primary focus of the re-opened investigation appeared to be the repeated interrogations of Mr. Gerasimov and his family, including a compulsory psychiatric evaluation of Mr. Gerasimov against his will, and forcing Mr. Gerasimov to engage in confrontations with the police officers and apparently even with his family members. It is unclear whether the investigators took any independent steps to investigate the conduct of the police themselves. No charges have been brought against any of the officers responsible for the torture of Mr. Gerasimov and the investigation has again been

²² Fifteen days before the complaint was taken up by a judge and another four days before an inquiry itself was launched.

²³ *Encarnación Blanco Abad v. Spain*, UNCAT, Views of 14 May 1998, U.N. Doc. CAT/C/20/D/59/1996, at para. 8.7.

²⁴ *Fillaistre and Bizoarn v. Bolivia*, UNHRC, Views of 5 November 1991, U.N. Doc. CCPR/C/43/D/336/1988, para. 5.2.

²⁵ UNCAT, *Concluding Observations on Kazakhstan*, U.N. Doc. CAT/C/KAZ/CO/2, 12 December 2008, at para. 24.

²⁶ *Ali Ben Salem v Tunisia*, UNCAT, Decision of 7 November 2007, U.N. Doc. CAT/C/39/D/269/2005, para. 16.7.

closed. The failure of the regional authorities to conduct any meaningful investigation even in the face of the findings of the senior prosecutor from the Prosecutor-General's office (see paras. 7 to 9, above) demonstrates that only a full independent Commission of Inquiry can be an adequate remedy in this case.

B. New General Remedies Do Not Cure the Prior Violations

29. While the general remedies to combat torture outlined by the government in their response to the Committee are welcome, they are not sufficient to remedy the complaint made by Mr. Gerasimov in the absence of proper reparations. Such reparations would include recognition of responsibility for the human rights violations, a proper investigation, compensation and rehabilitation, especially given that Mr. Gerasimov continues to suffer from the effects of his torture (see para. 6, above) which have only been exacerbated by the manner in which the re-opened investigation was conducted (see para. 11, above).
30. The new policies introduced in 2010 do not alter the fact that Kazakhstan violated its obligations under the UNCAT to Mr. Gerasimov in relation to his torture. The government has not explained how any of these new measures relate to Mr. Gerasimov's communication, or the violations which he suffered. It also has not provided any specifics or evidence of how these policies are being implemented or the impact that they are having. Such general statements do not affect or address the case before the Committee.

Commission of Inquiry

31. Only a fully independent Commission of Inquiry will be sufficient to remedy the violation of the Convention, with full powers to summon witnesses and to recommend a criminal prosecution.
32. The Istanbul Principles recommend that investigations into torture should be carried out by an "independent commission of inquiry or similar procedure".²⁷ 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. Investigation hearings "should be conducted in public, unless in-camera proceedings are necessary to protect the safety of a witness."²⁸ The Istanbul Principles require that the inquiry should issue a written report within a reasonable time 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."²⁹
33. The Istanbul Protocol suggests that Commissions of inquiry are especially relevant in the following contexts:

"In cases where involvement in torture by public officials is suspected ... an objective and impartial investigation may not be possible unless a special commission of inquiry

²⁷ Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, para. 2. These principles are set out in Annex I to the Istanbul Protocol: 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>.

²⁸ Istanbul Protocol, at paras. 113 and 114.

²⁹ Istanbul Principles, Article 5(b).

is established. A commission of inquiry may also be necessary where the expertise or the impartiality of the investigators is called into question.”³⁰

34. Specifically, this applies in circumstances where the victim was last seen unharmed in police custody or detention; the modus operandi is recognizably attributable to State-sponsored torture; persons in the state or associated with the state have attempted to obstruct or delay the investigation of the torture; the public interest would be served by an independent inquiry; or investigation by the regular investigative agency is in question because of lack of expertise or lack of impartiality or for other reasons, including the importance of the matter, the apparent existence of a pattern of abuse, complaints from the person or the above inadequacies or other substantial reason.³¹ All of these characteristics apply in the case of Mr. Gerasimov, and the only effective remedy for the violation of his rights under the Convention is therefore the creation of an independent Commission of Inquiry.

Characteristics of a Commission of Inquiry³²

35. *Composition.* A Commission of Inquiry must be composed in such a way as to ensure independence. This means that it should have competent, impartial and independent investigators with access to independent legal advice.³³ A single commissioner should in general not conduct investigations into torture; a single, isolated commissioner will be particularly vulnerable to State and other outside pressure.³⁴ Members must be chosen for their “recognized impartiality, competence and independence as individuals. In particular, they must be independent of any institution, agency, or person that may be the subject of the inquiry.”³⁵ This mirrors the requirement for all investigations that there be both hierarchical or institutional independence for investigators, and also practical independence.³⁶
36. *Terms of Reference.* The scope of a Commission of Inquiry should be set at its formation by creating a Terms of Reference, which gives legitimacy to the proceedings, assists the commission members in reaching consensus in defining the scope of the inquiry, and provides a measure by which the final report can be judged. The Terms of Reference should be neutral, and must not limit investigations in areas that might uncover State responsibility for torture.³⁷
37. *Notice.* The Commission should be widely publicized, and such notice should include the establishment of the Commission and the subject of the inquiry. It should include an invitation to submit relevant information and/or statements to the Commission, and instructions for persons wishing to testify.³⁸
38. *Power to Compel Testimony.* A Commission of Inquiry must have the authority to obtain all information necessary to the inquiry including the authority to compel testimony under

³⁰ Istanbul Protocol, para. 85.

³¹ Istanbul Protocol, para. 86; Minnesota Protocol Section D(1).

³² See generally Istanbul Protocol, Chapter III (Legal Investigations of Torture), Section D (Commission of Inquiry).

³³ Istanbul Protocol, paras. 109-111.

³⁴ Istanbul Protocol, para. 110.

³⁵ Istanbul Protocol, para. 75.

³⁶ *Paul and Audrey Edwards v. The United Kingdom*, ECtHR, Judgment of 14 March 2002, para.70; see also, Thomas Straw & Beedman, *Inquests, a Practitioner’s Guide*, Chapter 18 “Inquests and the European Convention on Human Rights,” Sections 18.65-18.67 (2 ed. Legal Action Group, London 2008).

³⁷ Istanbul Protocol, at para. 107.

³⁸ Istanbul Protocol, at para. 114; Minnesota Protocol Section D(11).

legal sanction, to order the production of documents including State and medical records, and to protect witnesses, families of the victim and other sources; the authority to conduct on-site visits, including at the location where the torture is suspected to have occurred; the authority to receive evidence from witnesses and organizations located outside the country; and the authority to issue a public report. The Commission must have the necessary budgetary and technical resources to fulfill this mandate.³⁹

39. *Witness Protection.* Any Commission of Inquiry must meet the procedural safeguards for investigations, which include that anyone implicated in the alleged torture shall be removed from any position of control over alleged victims, witnesses, families, and investigators.⁴⁰ The State must protect complainants, witnesses, those conducting the investigation and their families from violence, threats of violence or any other form of intimidation.⁴¹ Where necessary, witnesses can be protected by using in-camera proceedings.⁴²
40. *Investigator.* The primary investigator of a Commission of Inquiry “should have prior training or experience in documenting torture and in working with victims of trauma, including torture.” Where a person with that experience is not available, the investigator should make every effort to become informed about these issues and have access to international expert advice and assistance throughout the investigation.⁴³ The Commission should also have access to expertise in other areas which are relevant to the investigation, such as pathology, forensic science or psychiatry.⁴⁴
41. *Counsel.* Commissions of Inquiry should have impartial, expert counsel to assist them. Where the commission is investigating allegations of State misconduct, it would be advisable to appoint counsel outside the Ministry of Justice. Counsel should be insulated from political influence through civil service tenure or as a wholly independent member of the bar.⁴⁵ The inquiry should question witnesses, and parties should be allowed to submit written questions.⁴⁶
42. *Public Hearings.* In general, hearings should be conducted in public unless in-camera proceedings are necessary to protect the safety of a witness.⁴⁷
43. *Victim Participation.* Those alleging torture or their families should be informed of and have access to any hearing and all information relevant to the investigation, and must be entitled to present evidence.⁴⁸ All other interested parties should also have the opportunity to be heard.⁴⁹
44. *Final Report.* The Commission should issue a public report within a reasonable period of time, including any dissenting opinions that result from a non-unanimous result of the inquiry. The report should include the scope of the inquiry and terms of reference, procedures and methods, a list of witnesses, the time and place of each sitting, the

³⁹ Istanbul Protocol, at paras. 80 and 108; Minnesota Protocol Section D(3).

⁴⁰ Istanbul Protocol, at para 81.

⁴¹ Istanbul Protocol, at para 81 and 112.

⁴² Istanbul Protocol, at para. 113.

⁴³ Istanbul Protocol, at para. 90.

⁴⁴ Istanbul Protocol, at para.111.

⁴⁵ Istanbul Protocol, at para.111.

⁴⁶ Istanbul Protocol, at paras. 81 and 116.

⁴⁷ Istanbul Protocol, at para. 113.

⁴⁸ Istanbul Protocol, at para 116; Minnesota Protocol Section D(13); UNHCR: Principles on the Effective Prevention and investigation of extra-legal, arbitrary, and summary executions (Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989) paras. 12-13 and 16.

⁴⁹ Istanbul Protocol, at para 116; Minnesota Protocol Section D(13).

background of the inquiry, the specific events that occurred and the evidence for those findings, the law relied upon, the conclusions, and recommendations.⁵⁰

45. *Government Response*. The State should reply publicly to the Commission's report, indicating steps it intends to take in response, where appropriate.⁵¹
46. In finding a violation of the Convention, the Committee should urge the government of Kazakhstan to initiate a Commission of Inquiry to investigate the torture of Mr. Gerasimov which meets the international standards outlined above.

C. Right of Petition

47. In response to the first ever communication to the Committee against Torture, the government questioned the mental health of the author and ordered a psychiatric evaluation of him. Requests for a copy of the psychiatric report have been refused. The renewed investigation process has the characteristics of an attempt to intimidate the author into withdrawing his petition, and the Committee should be vigilant to ensure that there is no interference with the right of petition.
48. Any intimidation of the author of a communication hinders the right of individual submission, as established in Articles 13 and 22 of the Convention, the Istanbul Protocol and other international standards.
49. Article 13 of the Convention requires that a State must take steps to "ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."
50. Article 22 of the Convention provides for the right of individual communication to the Committee. In 2008, Kazakhstan made the required declaration which recognized the Committee's competence to receive claims from individuals subject to its jurisdiction who have claims under the Convention. By making this declaration, the State Party implicitly undertook that it would not interfere with the right of individuals to communicate with the Committee, as to do would render the right which it had recognized ineffective in practice.
51. The Committee has considered the right of submission in the context of arguments made by governments that individuals have abused the right to submission. In doing so, the Committee has interpreted the right of individual petition broadly.⁵² The right of individual communication has been considered by other tribunals. The European Court of Human Rights has found that hindering the right to petition may consist of any form of pressure on applicants to withdraw or modify their complaints, including improper indirect acts or contacts as well as direct coercion and flagrant acts of intimidation in respect of applicants or potential applicants, their families or their legal representatives.⁵³

⁵⁰ Istanbul Protocol Chapter III, para. 118.

⁵¹ Istanbul Protocol Chapter III, para. 119.

⁵² *Ali Ben Salim v. Tunisia*, UNCAT, Decision of 7 November 2007, U.N. Doc. CAT/C/39/D/269/2005 (Where the State claimed that the applicant had abused his right of submission due to his alleged political motivations and the allegedly slanderous content of the communication, while the applicant claimed he had merely exercised his right to an effective remedy, the Committee found that the applicant had not abused his right of submission).

⁵³ See e.g. *Akdivar and Others v. Turkey*, ECtHR, Judgment of 30 August 1996, paras. 104-5; European Court of Human Rights, *Key Case-Law Issues: Individual Petition*, 31 December 2007. Available at: http://www.echr.coe.int/NR/rdonlyres/DA9A7AF9-361D-4A0F-BCC8-F7CD0EE5469B/0/Key_caselaw_issues_Art_34_Individual_Petition_trad_eng.pdf

52. Chapter III of the Istanbul Protocol contains specific guidance on the need to protect victims of torture from retaliation and intimidation. Paragraph 88 provides that: “The State must protect alleged victims of torture, witnesses and their families from violence threats of violence, or any other form of intimidation that may arise pursuant to the investigation.” Paragraph 89 allows for victims to decline to cooperate with an investigation: “Investigators should explain to the person which portions of the investigation will be public information and which portions will be confidential. *The person has the right to refuse to cooperate with all or part of the investigation.* Every effort should be made to accommodate his or her schedule or wishes.”
53. As outlined in the facts above, as part of the new investigation the prosecution authorities conducted interrogations of Mr. Gerasimov and his family, and confrontations between him and the police officers, no fewer than four times with a lawyer present, and apparently on further occasions without a lawyer. Given that the initial order re-opening the investigation accepted that he had given clear and consistent testimony as to his torture that was supported by independent evidence, it is not clear why it was necessary to interrogate him so frequently. The renewed investigation does not appear to have produced any additional evidence in support of the allegation of torture, but was rather aimed at persuading Mr. Gerasimov to drop the case.
54. Of particular concern is the request by the prosecutor to subject Mr. Gerasimov to psychiatric evaluation, on pain of sanction. While there may be some benefit to such an evaluation if it is for the purpose of establishing the effect of torture upon a victim, the police ordered this evaluation on the basis that “it became necessary to establish the mental state of the victim, since there is a doubt in his ability to correctly perceive the circumstances relevant to the case”.⁵⁴ Instead of evaluating and recording the effects of the torture on Mr. Gerasimov, the purpose of the evaluation instead appears to have been to discredit or intimidate him.
55. The Committee against Torture has before it clear and convincing evidence to support the allegation of torture, which is sufficient for the Committee to make a finding. The Committee should be cautious to accept any evidence presented by the government at this late stage that attempts to absolve them of responsibility. Any evidence produced so long after the events in question is inherently less reliable than evidence obtained nearer in time to the incident.

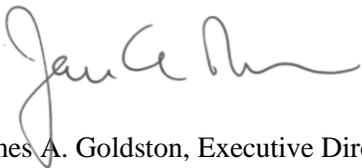
CONCLUSION

56. In light of the submissions above, the author re-iterates the arguments made in the original Communication:
- *Mr. Gerasimov was Tortured.* The treatment inflicted upon Mr. Gerasimov by state agents amounted to torture, contrary to Article 1. Police officers 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.

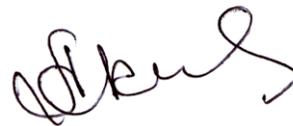
⁵⁴ Resolution Ordering a Psychiatric Examination, 8 January 2011.

- *Failure to Adopt Safeguards to Prevent Torture.* Kazakhstan failed to establish adequate safeguards against ill-treatment during the initial period of detention, contrary to Article 2. Numerous administrative and procedural failings allowed the torture of Mr. Gerasimov to occur. Specifically, Kazakhstan failed to adopt measures that effectively prevent unregistered detention; provide access to a lawyer; and allow medical examinations to take place.
- *Failure to Conduct an Effective Investigation.* Kazakhstan failed to conduct a prompt and effective investigation into the allegations of torture, contrary to Article 12 and Article 13. The investigation was not satisfactory for six reasons: (i) the investigation was not conducted in an independent and impartial manner; (ii) the investigation was not started or completed promptly; (iii) the investigation failed to undertake a number of essential steps; (iv) there was no provision for Mr. Gerasimov to be involved in the investigation, despite his best efforts; (v) the investigation was conducted in secret and no final report was published; and (vi) the investigation did not lead to any prosecutions but only to some unverifiable mild disciplinary sanctions of unnamed officers.
- *Failure to Provide Redress.* Kazakhstan failed to provide access to effective remedies including compensation, rehabilitation, and adequate reparation for the torture, contrary to Article 14. Despite his efforts to have his claim for ill-treatment by the police properly considered by the courts, Mr. Gerasimov continues to suffer the effects of his torture and receives no assistance for that suffering.

28 February 2011



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