United Nations CCPR/C/121/D/2645/2015

International Covenant on Civil and Political Rights

Advance unedited version

Distr.: General
13 November 2017

Original: English
English, French and Spanish only

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2645/2015*, **

Communication submitted by:	Mr. Vladislav Chelakh (represented by Mr. Serik Sarsenov, the Kazakhstan International Bureau for Human Rights and Rule of Law)
Alleged victim:	Mr. Vladislav Chelakh
State party:	Kazakhstan
Dates of communication:	2 February 2015 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 22 December 2011 (not issued in document form)
Date of adoption of Views:	7 November 2017
Subject matter:	Trial and conviction of the author to life imprisonment
Procedural issues:	Substantiation of claims

* Adopted by the Committee at its 121th session (16 October to 10 November 2017).

** The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Ivana Jelic, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Anja Seibert-Fohr, Yuval Shany,and Margo Waterval.

Substantive issues:	Arbitrary detention; fair trial; right to counsel of his own choosing; right to have adequate time and facilities for the preparation of a criminal defence; right not to confess guilt
Articles of the Covenant:	9 (1) and 14 (1), (3) (b), (d) and (g)
Articles of the Optional Protocol:	1 and 3

1. The author of the communication is Mr Vladislav Chelakh, a Kazakh national born in 1992. He claims that Kazakhstan violated his rights under articles 9 (1) and 14 (1) and (3) (b), (d) and (g) of the Covenant. The author is represented by counsel, Serik Sarsenov. The Optional Protocol entered into force for Kazakhstan on 30 September 2009.

Factual background

2.1 On 25 November 2011, the author was called up for military service at military unit No. 8484. This military unit was part of the Kazakhstan Border Service, under the auspices of the Committee for National Security of Kazakhstan. Upon an order of his commander, he was sent to serve at the temporary border post called "Arkan Kergen", part of the "Sari Bokter" Border Division, a remote area on the Kazakhstan-China border.

2.2 On 10 May 2012, the author arrived at this border post together with his fellow servicemen. Several servicemen were already there. He submits that he started his military service without any issues, and had normal relationships with his fellow soldiers and his military commanders.

2.3 Starting from 28 May 2012, the border post failed to report to the main border division. On 30 May 2012, the commander of the division sent two specialists on military communication to the border post, to check the situation. When these two specialists arrived at the border post late in the afternoon that day, they found several burned bodies and scorched buildings. At a nearby house that belonged to the local huntsman (gamekeeper), Mr. K.R., they found Mr. K.R.'s body with multiple gunshot wounds.

2.4 An investigation unit arrived on 31 May 2012 and found 14 burned bodies of military servicemen and Mr. K.R. body. They also found pieces of exploded hand grenades, bullets and bullet shells from pistols and machine guns.

2.5 On 4 June 2012, the author was found hiding in a remote shepherds' house. He told the patrol that the border post was attacked by several unknown persons on 28 May 2012, his fellow servicemen were killed and he was able to escape. The author submits that from 16:50 on 4 June 2012, when he was apprehended and handcuffed, he considered himself to be under arrest.

2.6 The author submits that, in violation of article 68 (2) of the Criminal Procedure Code (CPC), he was not allowed to contact his family by phone, and he was not allowed to choose a lawyer. Instead, he was appointed a lawyer, Mr. T.G., chosen by the investigators.

2.7 From 23:16 on 4 June 2012 until 05:11 on 5 June 2012, the author was interrogated as a suspect. He stated that on the day of the incident, 28 May 2012, he was on duty. Around 05:00 in the morning he saw one of his fellow servicemen running and shouting "run, we are under attack", and ran away. He denied killing anyone. In violation of article 134 of the CPC, he was not allowed to meet with his lawyer in private and was "pressured" to write a confession[1]. The protocol of detention was completed at 5:35 on 5 June 2012 while the de

[1] No further detailed information about "pressure" is provided at this point. Kazakh law prohibits using evidence obtained under duress/torture, but the author claims this provision was ignored. He refers to articles 213, 216, and 218 of the CPC.

facto detention commenced at 16:00[2] on 4 June 2012, 13 hours and 35 minutes before that. Article 134 (1)[3] of the CPC requires no more than three hours from the moment of arrest.

2.8 On 6 June 2012, the author was charged with multiple murders under article 96 of the Kazakh Criminal Code (CC) and was interrogated as accused. On 16 July 2012, the author's privately retained counsel S.S. requested in writing to receive copies of the procedural documents concerning the author's interrogations as a suspect and as accused protocols, and the authors' testimony given at the crime scene. This motion was rejected by the investigative organ on 17 July 2012 with the argument that these documents had already been provided to the State-appointed counsels T.G. and B., who were on the case before S.S.

2.9 On 25 July 2012, the author retracted his confession, saying that it was obtained under deception (обман). The author also submits that he was interrogated during the night, which violates article 212 (2) of the CPC. [4] Articles 213, 216 and 218 CPC prohibit using evidence obtained under duress.

2.10 On 1 October 2012, the author was charged with additional crimes, including theft of private property, obtaining illegally state secrets, destruction of military equipment and defecting, under articles 145, 172, 175, 251, 255, 373 and 378 of the Criminal Code. Just one day later, he was informed that the preliminary investigation was completed and that his case would be sent to court for trial. On 2 October 2012, the author was officially notified that he could have access to the criminal file, together with his counsel B.[5] The file consisted of 56 volumes (250 pages each), and the author and his lawyer had only 15 days[6] to go through it and prepare for the trial. The allotted time was insufficient and did not accord with the provisions of article 275 (1-3) of the CPC.

2.11 During the trial, there were numerous breaches of CPC provisions. The court allowed the testimony of expert K.S., which, the author claims, does not have the necessary qualifications to be an expert on explosives. During the hearings, the author's position was often ignored. He complained to court about a number of violations during his arrest and detention, but his claims were ignored. Also, his lawyer requested the court to call a psychiatric expert, but the request was denied. During one of the hearings, the author's lawyer, S. S., was ill and could not participate. The court refused to postpone the hearing, and appointed another lawyer, S.E., who was not familiar with the case. During the trial, out of 47 reasoned written and oral motions of the defence, the court allowed only four. In the court hearing of 21 November 2012, counsel S.S. requested a new psychiatric expert opinion. The court refused the motion and noted that a psychiatric evaluation had been conducted during the pre-trial investigation and was concluded in August 2012.

2.12 The author submits that on 21 November 2012, frustrated with all procedural irregularities, he refused to participate in the court hearings. The judge insisted that the defendant participate in all court hearings, which the author considers a form of pressure to testify. Counsel S.S. was not able to participate in the court hearing on 29 November 2012

[2] There are discrepancies concerning the exact hour when the author was discovered in the remote hut, ranging between 16:00 and 16:50.

[3] Article 134 (1) CPC: Within a period of no longer than three hours after the actual detention, the investigator or the interrogating officer shall compile a report in which they shall indicate the reasons and motives, the place and the time of detention (with indication of hour and minutes), the results of personal search, as well as the time of the report compilation.

[4] The State party claims that interrogations can be carried out during night if there are extraordinary circumstances requiring it.

[5] The State party claims that all counsels were informed but the author's privately retained counsel was abroad expected to return on 14 October 2012.

[6] The author also refers to "10 working days".

which took place after the lunch break as he suffered a hypertensive crisis. Counsel Estiyarov requested the court to adjourn the court hearing as he was not able to provide the author with the necessary qualified legal aid. He was familiar only with three volumes containing the secret documents (to which counsel S.S. had no access) and had not studied the other 53 volumes. Counsel S.E. also made an alternative motion to be given time to study the rest of the file. The court rejected both motions on the ground that counsel S.E. became acquainted with the file during the pre-trial investigation and in the course of the trial. On 30 November 2012, a court hearing did not take place by reason of the absence of both counsels due to illness[7]. On the same day, the court appointed a new lawyer, Ms. Zh.S., as a defence counsel without the author's agreement. During the court hearing on 4 December 2012, in the absence of counsels S.S. and S.E., the new defence counsel Zh.S. represented the author alone. This appointed counsel was passive and did not submit any request to the court or take any action in the interest of her client. On the next day, when the court hearing took place with the participation of counsels S.S., S.E. and Zh.S., the latter stated that she had to study all 56 volumes of the case in two days, from 1 to 3 December 2012. On 11 December 2012, the specialised inter-district military court found the author guilty as charged, and sentenced him to life imprisonment.

2.13 On 6 February 2013, the appellate chamber on criminal case of the military court of the Republic of Kazakhstan rejected the author's appeal and upheld the first instance court decision. The author considers that the appeal court did not carry out an effective review of his criminal case as it failed to study all the evidence, as required by the CPC. The author's lawyer S.S.'s request to provide further explanation about the evidence was rejected. The appeal court also rejected the author's claims that his confession was obtained under psychological pressure. The author's cassation appeal was rejected by the cassation chamber of the military court of the Republic of Kazakhstan on 21 June 2013. On 4 February 2014, the Supreme Court of Kazakhstan rejected the author's supervisory appeal request. The author therefore contends that he exhausted all available domestic remedies.

The complaint

3.1 The author claims that his rights under article 9(1) were violated, since he was subjected to arbitrary detention. His arrest was not approved by a judge until 21:15 on 6 June 2012, 50 hours after his initial apprehension.

3.2 The author further submits that his right to a fair trial by a competent, independent and impartial tribunal under article 14(1) has been violated. He and his lawyer, Mr. S.S., had only 10 working days to study the criminal case file consisting of 56 volumes, in violation of his rights under article 14(3)(b). The appointment of a lawyer, Mr. T.G., was not lawful and against the author's will, since he asked to be represented by his privately retained lawyer, Mr. S.S. The appointment of another lawyer Zh.S. at a later stage of the proceedings was also unlawful and violated his right to legal assistance of his own choosing under article 14(3)(d). He further submits that he was compelled to confess guilt and testify against himself, and that his forced confession was considered as evidence against him, in violation of his rights under article 14(3)(g).

State party's observations on admissibility

4.1 The State party submitted observations on admissibility on 13 October 2015 and 2 March 2016 and 10 October 2016. The State party states that on 6 February 2013 the military appeal court of the Republic of Kazakhstan upheld the first instance court verdict. On 21 June 2013, the military cassation court rejected the author's cassation appeal since it found the

[7] It appears that the counsel S.S. also refused to participate in the trial in protest and in support of his client's decision not to be present at the hearings.

lower courts decisions lawful and substantiated. On 2 September 2013, the Supreme Court of the Republic of Kazakhstan dismissed the author's application for supervisory review. On 17 October 2013, the Prosecutor General of the Republic of Kazakhstan refused to initiate a protest of the judicial decisions through the supervisory review procedure. On 13 December 2013, the President's Pardon Commission rejected the author's application for pardon. On 4 February 2014, the Supreme Court of the Republic of Kazakhstan rejected another application for supervisory review. Thus the State party accepts that the author has exhausted all the available domestic remedies.

4.2 The State party maintains that the communication is inadmissible under articles 1 and 3 of the Optional Protocol and rule 96 (a) and (b) of the Rules of procedure since the submission is not signed by the author and does not contain a legal authorisation of his two representatives.

State party's observations on the merits

5.1 The State party submitted observations on the merits on 2 March 2016. It maintains that there was no violation of the author's rights under articles 9, 14 (3) (b), (d) and (g) of the Covenant.

5.2 The State party asserts that the principles of lawfulness, fairness and equality of arms (adversarial criminal proceedings) have been fully respected in the author's case. The author was found guilty based on the body of evidence collected by the operative investigative group. In his initial confession, the author specifically indicated that he murdered 15 servicemen. According to experts' conclusion the fire at the military buildings was not caused by the explosion of grenades and bullets. The author himself testified that at the border post there were no grenades and admitted that he burned the bodies and the buildings without using explosives.

5.3 On 5 and 6 June 2012, the author described to his cellmate in detail how he murdered the servicemen shooting them down. The author wrote a full confession during the period of 5 hours between the end of his first interrogation and the beginning of his second interrogation as a suspect. The State party challenges the author's counsel interpretation that this confession is inadmissible evidence in violation of article 179 of the Criminal Procedure Code as the author was already a suspect at the time he wrote the confession. In his confession, the author did not confess fully his guilt. Later on, he acknowledged that he had stolen some items from the local huntsman, Mr. K.R., a fact of which the investigators were not aware Furthermore, he described the exact circumstances of the theft of personal effects and firearms, his defection and the destruction of military equipment. The author confessed his guilt during the face-to-face interrogations on 6, 11 and 15 June, as well as during the on-site reconstruction in his presence conducted on 7 and 8 June at the crime scene. Furthermore, the forensic psychologist examination conducted after the author had retracted his confession concluded that no psychological pressure was applied to him. Numerous expert opinions[8] and pieces of evidence confirm the veracity of the author's statements at the initial confession, including the medico-forensic examination, forensic biological examination, forensic-ballistic examination of bullets and DNA analysis of corpses and remains of biological character, the crime scene examination, the examination of the logs kept by the huntsman K.R. of the citizens allowed in the frontier area, and the analysis of the evidence in its entirety. Furthermore, the State party adds that in his conversation with his cellmate on 13 June, the author confessed that he fired the shots using one machine gun, which is corroborated by the forensic ballistic examination of the bullets and bullet shells. In addition,

[8] From the documents on the file (verdict, appeal court decision) it transpires that all together 73 different expert examinations were conducted in the course of the trial.

all 6 persons passing by the frontier region at the time of the crime, registered in the huntsman's log, had an alibi.

5.4 On 25 July 2012, the author retracted his confession claiming that it was extracted by the law enforcement officers on 5 June 2012 under psychological pressure, lies and threats. As a result, a preliminary investigation (проверка) was opened against police officers. On 24 August 2012, the investigating body refused to initiate criminal proceedings owing to a lack of *corpus delicti*. The author also refused to participate in further investigative actions in that regard.

5.5 On 28 September 2012, the investigation into allegations that the author had been given psychotropic substances with the aim of extracting a confession was closed and the allegations dismissed. The numerous examinations of the author in that respect (medico-forensic on 6, 9 and 26 June and toxicological examinations on 26 June, 13 July and 28 September 2012) did not show any physical injury or any traces of drugs or other psychotropic substances in his body. Thus the State party denies the author was subjected to any psychological pressure or torture.

5.6 The video recordings of the pre-trial investigation demonstrate that the author described in detail and without any pressure the circumstances of the murders as if those were 'natural things'. He spoke about the murders in great detail and calmly to different people - to the police officers, to the psychologist and to his three cellmates. On 5 December 2012, the author stated again in the court room that he was subjected to psychological pressure and torture during the pre-trial investigation; he claimed that a witness B. deceived and pressured him. However, the author himself gave up his right to question the witness B.

5.7 In court, the author confirmed that he stole items from the murdered persons because 'they did not need them anymore'. He also stole from the safe secret military schemes of the location of military posts, his military ticket (ID) and maps of the area in order to facilitate his defection and escape after committing the murders. The State party maintains that the author's claims that he was not aware of the secrecy of the schemes owing to lack of knowledge of Kazakh language are without ground as he underwent military training and instructions.

5.8 The acts of the author were rightly qualified as defection from the army with entrusted arms, and during the preliminary investigation the author did not deny stealing a Makarov pistol. Furthermore, the author's defection was confirmed by the testimony of those servicemen who apprehended him on 4 June 2012 around 16.00h. At the moment of apprehension the author wore civilian cloths and had his military ticket (ID) in his pocket.

5.9 The State party submits that as transpires form the court transcripts, the counsel S.S. did not appear at the court hearing on 29 November 2012. The court continued the trial hearing with the participation of counsel S.E. This counsel stated not being able to provide qualified legal aid as he was not (sufficiently) familiar with the case file materials. At the time, the counsel S.E. had been involved in the case since 19 November 2012 (10 days). On 30 November 2012, both counsels S.E. and S.S. did not appear at the trial hearing. The first counsel S.E. informed the court that he was ill and needed to be hospitalised for treatment. As to counsel S.S., he provided no information as to his failure to appear. Thus, the author remained without professional legal assistance. In this light, on 30 November 2012, the trial judge sent a letter to the bar association of the town of Taldikorgan to appoint a defence counsel who has clearance to work with secret documents, to represent the author. On the same date, the counsel Zh.S. stepped in to defend the author and participated in two trial hearings. This appointment was necessary due to the failure of the two counsels to appear in court and in order to ensure legal assistance to the author.

5.10 On 4 June 2012 the author was transported by helicopter from the "Sari Bokter" Border Division to Usharal town at 20.25., a later time than what has been claimed by the

author . While in the "Sari Bokter" Border Division, the author's movements and freedom were not limited[9]. On 4 June 2012, at 21.00, the author was called for questioning, initially as a witness. However, the fact that he was in civilian clothes, and the information received in the meantime that a Makarov pistol was found in the remote shepherds' house, together with the author's military ticket (ID), money and valuables of the murdered servicemen, raised suspicion. The first investigative act with the participation of the author as a suspect began at 21.25. He was informed about his rights as a suspect in writing, and did not make any requests, including regarding a defence counsel. The investigator drew a protocol[10] and ensured that a state-appointed counsel, T. G., was present from the moment the author was interrogated as a suspect according to the law.

5.11 The State party rebuts the claim that the author was not informed about his right to inform his relatives immediately about his arrest and the location of his detention on the phone, as these rights were listed in the aforementioned protocol. The author chose another way to inform them about his detention and a written notification was sent on 5 June 2012 to his mother, at her address. On 9 July 2012 the author's mother visited him in his place of detention in the Alakolsky district.

5.12 All the investigative action, including the experts' examinations, took place with the participation of the defence counsel, Mr. T.G.[11] who had sufficient time for private discussion with the author before each investigative step.

5.13 As to the author's allegation that after his de facto detention as suspect, he was compelled to confess guilt and testify against himself, and that his forced confession was considered as evidence, the State party submits that on 4 June 2012 following the author transportation to the Border Division, he was recognised as suspect by ruling of the investigation team chief S.A.S., his rights were explained to him and his interrogation was conducted according to the law. In his confession, the author not only admitted committing the crime, but provided information about additional crimes such as the theft of the huntsman K.R. belongings which he had not confessed during the first interrogation as a suspect on 4 June 2012. Moreover, a confession (явка с повинной) could be accepted at any moment, including before the indictment. The author voluntarily provided information about the theft in the house of the huntsman although there were no suspicion/charges against him on this account.

5.14 The State party submits that as the confession was written by the author during his de facto detention, the document could not be referred to as a direct proof of his guilt. In the same time, the court assessed the information about the circumstances of the murders and other crimes in the confession together with all the evidence in the case. Thus the court concluded that the author's acknowledgement of guilt was fully corroborated in the course of the proceedings. In doing so, the court did not take as the basis for establishing the author's guilt his confession.

5.15 As to the allegation that the author and his lawyer did not have sufficient time to study the case file, the State party submits that following the author's new indictment (the author was charged with additional crimes) on 1 October, the author and his counsel B. were officially notified on 2 October that they could access the file. The author and his counsel B. started to examine the file on 3 October and did not request additional time.

5.16 The State party disputes the date on which the author signed the Protocol for completion of familiarization with the case file materials, claiming that the correct date is 26

[9] He was able to hide the wedding ring stolen by one of the murdered servicemen in the car taking him from the heliport to the Border Division.

[10] A copy of the protocol is not provided.

[11] The State party adds that this is confirmed by the counsel's signature on all the protocols.

October 2012 and not 21 October 2012, as stated by counsel S.S.. It argues that counsel S.S. was notified in writing several times and there was a case file review schedule established for familiarization with the case materials. However, the counsel was absent for a lengthy period of time outside of the country for private reasons. In the same time, the author and his defence counsels B. and M., as well as representatives of the victims, reviewed the entire case file and became familiarised with all the case materials. On 11 October 2012, counsel S.S. was informed in writing that the period to review the case file had begun[12] and that the author with his other counsel had been presented already with 50 volumes of the case file. On 22 October 2012, the head of the investigative team wrote to counsel S.S. again warning him to appear on 23 October. Since the investigating officer considered that the counsel S.S. was deliberately protracting the review of the case materials, the former issued an order on 23 October giving a deadline for consulting the materials until 26 October 2012.

5.17 The State party maintains that the author was fully able to study the file together with his two appointed counsels while his privately retained counsel was duly informed and had a real possibility to study the materials.

5.18 As to the counsel's disagreement with the judgement, the legal qualification of the author's acts, the establishment of his guilt, and the assessment of the evidence, the State party finds the author's counsel arguments without ground, based on subjective assumptions. It also rejects the author's counsel's claim that the motives of the crime were not established and proven. The State party submits that the author had suffered systematic harassment and insults by his fellow servicemen due to his nationality (Russian). The court established the crime motive based not solely on the author's testimony about his deteriorating relationship with fellow servicemen, but also on witness testimonies, operative investigative activities and expert examinations. The investigation relied on a forensic-phonographic expert examination to identify and study the voice of the author in the recorded conversations with his cellmate and with his mother, in which he described his motives and other details about the murders.

5.19 After killing the servicemen, the author murdered the only potential witness, the huntsman K.R., stole confidential documents and private items of the dead and threw ammunition all around the post to fake an attack. The author's counsel arguments about procedural violations during the examination of the crime scene, the discovered material evidence, their removal from the crime scene and packaging are groundless.

5.20 The State party also challenges the claim that the first interrogation at the night of 4 to 5 June 2012 was illegal. According to article 212 of the Criminal Procedural Code an interrogation during the night is allowed in urgent cases. As to the author's claim that he was subjected to arbitrary detention, the State party disagrees with the timing sequence presented by the author, and explains that at first the author was considered as one of the possible victims of the crime. Then, after being discovered in the remote refuge, he was transported by helicopter and arrived at the town of Ucharal at 20:25, where he was questioned first as a witness at 21:00. His rights as a suspect were explained to him at 21:25. The author was not immediately detained but transferred under the supervision of his military unit command and presented to the specialised prosecutor. As the author was transported from a remote area it took more than 3 hours to draw up the detention protocol.

5.21 As to the counsel's arguments that the author was not given copies of the procedural documents (protocols of his interrogations as a suspect and accused, as well as a copy of the authors' testimony given on the crime scene), the State party claims they are groundless. According to article 74 (2) (5) defence counsel has the right to familiarise himself with these

[12] According to information available counsel S.S. was expected to return from China on 14 October 2012.

documents, but not to receive copies of the documents about the investigatory actions in which the suspect, accused and the defence counsel have participated. The decision of 17 July 2012 rejecting the counsel's motion, indicated that the counsel was not precluded from studying the respective procedural documents. However, he declined to review the documents, insisting on receiving copies.

5.22 As to the author's counsel S.S. motions for the recusal of judges, all his arguments were based on the lack of trust in the court because his different motions (e.g. to return the case for additional investigation, about the allegedly unlawful appointment of the counsel Zh.S.) were rejected. The State party maintains that counsel S.S. did not provide any evidence that the judges were biased and partial in the author's case.

Author's comments on the State party's observations

6.1 On 21 April 2016, the author reiterated his main arguments while commenting on the observations of the State party. He maintains that the State party has not addressed nor rebutted the claims in his initial submission concerning his arbitrary detention and confession under psychological pressure. He also reiterates that he had not had adequate time for the preparation of his defence. On 30 September 2012, four days before the period to study the case file had formally started, his privately retained counsel S.S. travelled to China for medical treatment. Counsel S.S. was not informed of the date of the completion of the preliminary investigation. The author maintains that he had requested in writing to be allowed to study the case file together with his counsel, S.S., but his request was ignored. Furthermore, he submits that for five days, his counsel was able only to make copies of the written materials, was not able to study the material evidence and was not able to make copies of the videos of the investigative activities. He challenges the conclusion of the appeal court that he was given the possibility to study the case materials in their entirety together with his State-appointed counsels B. and M.. The author claims they did not study the case file together. Moreoever, he had refused the services of counsel M. because the appointed counsel did not provide any legal assistance to him.

6.2 The author reiterates that the motive of the multiple murders was not proven and disagrees with the assessment and conclusions of the court with regard to the circumstances of the servicemen and huntsman's murders. He challenges the findings of the expert opinions on which the court based its verdict and claims again that there were unidentified burned corpses at the crime scene (in accordance with his version that there were unknown attackers). The court's conclusion that the fire on the crime scene was not caused by an explosion is wrong as it is based on the opinion of expert K.S., who does not have the necessary qualifications to be an expert on explosives. He reiterates that the court did not allow one forensic medical expertise of the author requested by the defence. He maintains that the first instance court did not examine some evidence, that the judges abused their authority and that some of the evidence was falsified. He reiterates that during the pretrial investigation his defense counsel was not allowed to make copies of procedural documents.

6.3 As to the unlawful appointment of counsel T.G., the author claims the State party has not provided any proof to substantiate that he waived his right to a counsel of his own choosing. Same goes to the fact that the author was not allowed to contact his family by phone. The State party has not provided any evidence that he waived his right to call his relatives and a counsel of his choice, and instead requested that a letter be sent to his mother.

6.4 With regard to the issue of access to secret documents, the author's counsel rejects the State party's assertion that lawyers have to undergo independently the necessary clearance procedure, as this is not referred to in any legal norm. The court dismissed his motion on this matter illegally and failed to apply the general principle in article 15 (1) of the Criminal Procedure Code 'the body conducting the criminal process must protect the rights

and freedoms of citizens involved in it, create conditions for their implementation, and take timely measures to meet the legitimate demands of the participants in the process'.

State party's additional observations

7.1 In its Note verbale dated 10 October 2016, the State party reiterates its previous observations.

7.2 As to the alleged violations under article 14, with regard to the appointment of counsel Zh.S., the State party reaffirms it was in accordance with article 68 (3) of the Criminal Procedure Code and with article 14 (3) (c) of the Covenant, as everyone should be tried without undue delay. Counsels S.S. and S.E. were not participating in the court hearings since 29 November 2012 so it was justified to appoint a new counsel. Throughout the course of the pretrial investigation and the trial the author was represented by six defence counsels (Mr. T.G., Mr. B., Mr. S.S., Mr. M., Mr. S.E. and Ms. Zh.S.). Furthermore, the State party rebuts the argument of the defence counsel that his motions were ignored or denied by the court as false and unfounded. It claims the court reviewed all the motions in accordance with the law. Concerning the allegation of insufficient time and facilities for the preparation of the defence with the counsel of own choosing, the State party submits again that the appeal court reviewed this claim and concluded that the author studied in full the case file together with two of his counsels, while counsel S.S. did not study the file owing to his trip to China, notwithstanding that he was dully notified of the date of completion of the investigation. Several notifications were sent to him regarding the need of his participation in the investigative activities and study the case materials, which were ignored by counsel. The State party maintains that counsel S.S. was in an equal position with the counsel B. However, the latter did not raise any complaint regarding the time allocated to examine the case file. Article 72 (7) of the Criminal Procedure Code stipulates that in the event that several defense counsels participate in the proceedings in a criminal case, the procedural action where the participation of the defense counsel is necessary cannot be considered illegal because of the non-participation of all counsels involved.

7.3 All the challenges regarding the court's assessment of the evidence (motive of crime; premeditation on the part of the author in committing the crime; establishment of guilt; disagreement with the legal qualification of the author's acts) have been addressed by the State party and the author's claim that the court evaluated arbitrarily the evidence and denied him justice are unfounded.

7.4 Lastly, the State party submits again that counsel S.S. was informed about the need to have a clearance to access the secret documents in the file. The author was charged and subsequently found guilty under article 172 (1) of the Criminal Code (obtaining illegally state secrets). For four months after notification, counsel S.S. did nothing in this regard but send a request to the Judicial Department and to the Bar Association in the town of Almaty. The fact that he did not take any other action to secure his access to the 'secret documents' on the file demonstrates that his allegations are unfounded. On this particular charge (obtaining illegally state secrets), the author's defence was ensured by counsel M.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

8.3 The Committee notes the author's claim that he has exhausted all effective domestic remedies available to him. In the absence of any objection by the State party in that connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

8.4 The Committee notes the State party's submission that the communication is inadmissible under articles 1 and 3 of the Optional Protocol and rule 96 (a) and (b) of the Rules of procedure since it is not signed by the author and does not contain a legal authorisation of the two representatives who submitted it to the Committee. In this regard, the Committee notes that on 16 October 2013, the author authorised his counsel S.S. to represent him before the Committee and that copy of the authorization was submitted to the Committee. Moreover, the same privately retained counsel represented the author through the domestic proceedings as the only counsel of his own choosing (along with five more State-appointed counsels). Accordingly, the Committee finds that articles 1 and 3 of the Optional Protocol and rule 96 (a) and (b) of the Rules of procedure do not preclude it from considering the communication, as submitted by counsel S.S.

8.5 The Committee notes the author's claim under article 9 (1) that he was deprived of his liberty and subjected to arbitrary arrest. It notes that the author considered himself to be de facto under arrest from 16:50 on 4 June 2012, when he was apprehended and handcuffed by the border patrol. It also notes the author's contention that his arrest was not approved by a judge until 21:15 on 6 June 2012, 50 hours after his initial apprehension. The Committee also takes note of the State party's claim that after being found by the border patrol the author was taken, as a witness, from the remote border area to military unit No. 8484. The Committee also observes that as a serviceman the author was placed under the supervision of the commander in charge and questioned first as a witness and later as a suspect at 21.25 on 4 June 2012. On 6 June 2012 he was charged with multiple murders. In light of the circumstances of the case and the State party's explanation, the Committee considers that the author has failed to substantiate sufficiently his allegation that he was not brought promptly before a court or that his detention was otherwise arbitrary under article 9 of the Covenant. Accordingly, the Committee considers that these claims are inadmissible for lack of substantiation under article 2 of the Optional Protocol.

8.6 The Committee notes the author's claims under 14 (1) and 14 (3) (g) of the Covenant concerning procedural irregularities during the trial in relation to the assessment of the author's guilt, the examination of the evidence, the expert witnesses and their examination conclusions, and the classification of the author's crimes by the domestic courts. The Committee recalls its jurisprudence that it is not for it to substitute its views for the judgement of the domestic courts on the evaluation of facts and evidence in a case, unless the evaluation is manifestly arbitrary or amounts to a denial of justice, or that the court otherwise violated its obligation of independence and impartiality.[13]. If a jury or court reaches a conclusion on a particular matter of fact in the light of the evidence available, it is for the author to show that the decision was manifestly arbitrary or amounted to a denial of justice. In the present case, the Committee observes that the author disagrees with the Court's assessment and findings, but has not managed to show that the domestic court decisions, which were based on physical evidence, expert opinions and witness testimonies, were clearly arbitrary or

[13] See, inter alia, communications No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision of inadmissibility adopted on 2 November 2004, para. 7.3; and No. 1138/2002, *Arenz et al. v. Germany*, decision of inadmissibility adopted on 24 March 2004, para. 8.6. See also the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 26.

amounted to a manifest error or denial of justice. It therefore considers that the author's claims have not been sufficiently substantiated for purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol. The Committee also notes that the author's other claims under article 14 (1) of the Covenant, such as pressure from the presiding judge on him to be present at the hearings, are also of a general nature and have not been sufficiently substantiated for the purposes of admissibility.

8.7 The Committee notes the author's claim under article 14 (3) (b) that his only privately retained counsel S.S. had no access to case materials with secret status owing to lack of clearance. The Committee also notes the State party's claim that the privately retained counsel did not have clearance to work with secret documents because he did not make all the necessary steps to obtain it for four months after being notified of the need to obtain clearance. The Committee further notes that another lawyer, representing the author, had a security clearance and access to the documents with secret status. Accordingly, the Committee considers that this claim under article 14 (3) (b) has not been sufficiently substantiated for purposes of admissibility and declares it inadmissible under article 2 of the Optional Protocol.

8.8 The Committee notes the author's claim that the appointment of the counsel T.G. during the pre-trial phase was not lawful and violated his right to legal assistance of his own choosing under article 14 (3) (d). However, the Committee also notes that it is not clear from the file whether at the pre-trial investigation stage the author rejected explicitly to be represented by counsel T.G. and requested the participation of counsel of his own choice. Accordingly, the Committee considers that the author's claim concerning legal assistance of his own choosing at the pre-trial phase has not been sufficiently substantiated for purposes of admissibility and declares it inadmissible under article 2 of the Optional Protocol.

8.9 The Committee further notes the author's claim under article 14 (3) (g) that the trial court accepted his forced confessions as evidence. The Committee notes that the author's allegations in this respect are very general and inconsistent and that he does not provide specific information on the kind of pressure he allegedly was subjected to. The Committee also notes that the author's conviction was based, as the court decisions show, on several pieces of evidence and not just on the author's confession. Accordingly, the Committee considers that the author's claim has not been sufficiently substantiated for purposes of admissibility and declares it inadmissible under article 2 of the Optional Protocol.

8.10 As to the appointment of counsel Zh.S. at the hearings stage, the Committee notes that the court proceeded with her appointment owing to the absence of the author's two counsels. It recalls, in this connection, that the State party is under an obligation to "grant reasonable requests for adjournment",[14] and notes that the newly appointed counsel had only two days to study the voluminous file. Accordingly, the Committee considers that the author's claim under article 14 (3) (b) and article 14 (3) (d) concerning the right to have adequate time and facilities for the preparation of defence and to have legal assistance of one's choosing during the trial, has been sufficiently substantiated for purposes of admissibility.

8.11 In the Committee's view, the author has sufficiently substantiated, for the purposes of admissibility, his remaining claims under articles 14 (3) (b) and (d) of the Covenant and therefore proceeds with the consideration of the merits.

Consideration of the merits

9.1 The Committee has considered the present communication in light of all the information submitted by the parties, in accordance with article 5 (1) of the Optional Protocol.

[14] General Comment 32, para. 32.

9.2 Regarding the author's claims under article 14 (3) (b) of the Covenant, the Committee notes the author's claims that his only privately retained counsel S.S. was not given copies of some procedural documents; and that the author had to participate during some court hearings without the lawyer on his own choosing. It also takes note of the author's contention that he did not have adequate time and facilities for the preparation of his defence together with the counsel of his own choosing, as they were given only 10 working days (or 15 calendar days) to study the file, which consisted of 56 volumes, each 250 pages.

9.3 The Committee further notes the author's claim that his counsel had to be abroad for a certain period of time for medical treatment. It also takes note of the State party contention that there was a case file review schedule established for familiarization with the case materials, counsel S.S. was notified of the schedule for studying the case file materials in writing several times and did not notify the court of his absence owing to a health problem; and that the author was able to study different parts of the case file with his State-appointed lawyers as he and his counsel B. started to examine the file on 3 October and did not request additional time. The Committee further notes that counsel S.S was not able to participate in the court hearing on 29 November 2012 after the lunch break as he suffered a hypertensive crisis, while counsel S.E. requested the court to adjourn the court hearing as he was not able to provide the author with the necessary qualified legal aid, as he had not been able to study the complete case file. The newly appointed counsel Zh.S. had only two days to study the file. The Committee recalls that accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing. This provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms. There is an obligation to grant reasonable requests for adjournment, in particular when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed. [15] In the absence of other pertinent observations from the State party, the Committee considers that by not providing the author's newly appointed counsel Zh. S with the possibility to study the full case file, and to have the period for examining the file extended and the hearings adjourned, the author's rights under article 14 (3) (b) of the Covenant have been violated.

9.4 The Committee also notes the author's claim under article 14 (3) (d) that the appointment of the counsel Zh.S. during the trial was not lawful. Having found a violation of article 14 (3) (b) of the Covenant above, the Committee will not examine the author's claim under article 14 (3) (d).

10. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the information before it discloses a violation by the State party of the author's rights under article 14 (3) (b) of the Covenant.

11. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to provide compensation to the author for the violation suffered. The State party is also under an obligation to take all necessary steps to prevent the occurrence of similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party

[15] See General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, para.32; Communications No. 282/1988, *Smith v. Jamaica*, para.10.4; Nos. 226/1987 and 256/1987, *Sawyers, Mclean and Mclean v. Jamaica*, para.13.6; No. 913/2000, *Chan v. Guyana*, para.6.3; No. 594/1992, *Phillip v. Trinidad and Tobago*, para.7.2; No. 2304/2013, *Dzhakishev Mukhtar v. Kazakhstan*, para.7.5.

has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them widely in the official languages of the State party.