



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2129/2012*, **

<i>Communication submitted by:</i>	Ramazan Esergepov (represented by his wife, Raushan Esergepova and by the Kazakhstan International Bureau for Human Rights and Rule of Law)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kazakhstan
<i>Date of communication:</i>	30 December 2010 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 23 January 2012 (not issued in document form)
<i>Date of adoption of Views:</i>	29 March 2016
<i>Subject matter:</i>	Author tried and convicted for publishing documents classified as secret
<i>Procedural issues:</i>	Admissibility – <i>ratione temporis</i> ; admissibility – exhaustion of domestic remedies
<i>Substantive issues:</i>	Arbitrary detention; conditions of detention; fair trial; preparation of defence; freedom of expression
<i>Articles of the Covenant:</i>	9 (1) and (2), 10 (1), 14 (1), (2) and (3) (b), (d) and (e), 17 (1) and (2) and 19 (1) and (2)
<i>Articles of the Optional Protocol:</i>	3, 5 (2) (a) and (b)

* Adopted by the Committee at its 116th session (7-31 March 2016).

** The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

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1. The author of the communication is Ramazan Esergepov, a national of Kazakhstan born in 1956. He claims to be a victim of violations, by Kazakhstan, of his rights under article 2 (3), read in conjunction with article 9 (5), and article 9 (1), (2) and (5), article 10 (1), article 14 (1), (2) and (3) (b), (d) and (e), article 17 (1) and (2) and article 19 (1) and (2) of the Covenant. The Optional Protocol entered into force for Kazakhstan on 30 September 2009. The author is represented by his wife, Raushan Esergepova, and by the Kazakhstan International Bureau for Human Rights and Rule of Law.

The facts as submitted by the author

2.1 The author is Editor-in-Chief of the *Alma-Ata INFO* newspaper. On 21 November 2008, the author published in the newspaper an article entitled “Who rules our country – the president or the NSC?”,¹ which he wrote. The article contained photocopies of two draft file reports of the Head of the National Security Committee Department of Zhambyl Region addressed to the Head of the National Security Committee of Kazakhstan. The photocopies were left at the office of the newspaper by an unidentified person; the newspaper had previously devoted 10 articles to the same topic. It followed from the content of the file reports that the National Security Committee of Kazakhstan, as well as some officials of the National Security Committee in the Zhambyl Region, had interfered in the activity of the President, the General Prosecutor’s Office, the Regional Prosecutor’s Office and courts. The files also contained references to violations of the Constitution, the principles of administration of justice and the presumption of innocence by a particular prosecutor and a judge. As he considered the information contained in the reports to be of public concern, the author published it in the newspaper.

2.2 On 1 December 2008, the author was summoned to the Investigative Department of the National Security Committee for Almaty for interrogation as a witness. Several Department officers tried to force him into a car and take him to Taraz, explaining that they were complying with a request made by officials of the National Security Committee of Zhambyl Region. No formal documents regarding his arrest and detention were produced or read out. The author was released on the same day only following interventions by his relatives and journalists.

2.3 On 3 December 2008, the Prosecutor for Medeu District in Almaty filed a suit before the Special Interdistrict Economic Court of Almaty against Zhuldyz Ltd., the owner of the newspaper, requesting that printing of the newspaper be suspended for three months in connection with the publication of the article. On 15 December 2008, the author submitted a complaint to the General Prosecutor’s Office and to the Head of the National Security Committee claiming that it was illegal to classify the Committee’s interdepartmental correspondence as secret. On 24 December 2008, the author, on behalf of Zhuldyz Ltd., filed a countersuit before the Special Interdistrict Economic Court of Almaty, raising the same claim.

2.4 On 25 December 2008, the author was hospitalized at the Cardiology Institute with ischemic cardiac disease, progressive stenocardia, third degree hypertension and diabetes myelitis. While in hospital, the author granted his wife a power of attorney valid for three years, to represent his interests in any civil or criminal matter. On 6 January 2009, the author’s medical treatment was interrupted by officers of the National Security Committee, who arrested him without providing any reasons for the arrest. They referred only to a verbal instruction from the National Security Committee of Zhambyl Region to arrest the author and deliver him to Taraz. In the course of the eight-hour journey to Taraz, the author was handcuffed, despite his physical condition. Upon arrival, he was placed in the

¹ NSC stands for National Security Committee.

temporary detention facility of Zhambyl Region where, because of the low temperature in the cell, he fell ill with bronchitis. On 9 January 2009, his detention was authorized by Court No. 2 of Taraz. It was only during the court hearing that the author learned about the charges brought by the National Security Committee against him and that his status of witness had been changed to suspect for the commission of crimes falling under articles 172 (3) and 228 of the Criminal Code. Subsequently, the articles cited were changed, with charges being brought under articles 172 (4), 228 and 339 (2) of the Criminal Code. The author claims that he never received any court document pertaining to his detention or its subsequent extension.

2.5 On 15 January 2009, the author's wife was informed by an investigator of the National Security Committee of Zhambyl Region that she could be recognized as her husband's legal representative only if she had security clearance to access material classified as secret. An appeal against that decision was filed with the Prosecutor's Office of Zhambyl Region on 22 January 2009 and rejected on 16 March 2009.

2.6 The author submits that given the interest of the National Security Committee of Zhambyl Region in the outcome of the case, its investigators could not ensure an objective and impartial criminal investigation. Therefore, on 2 February 2009, the author submitted a request to Court No. 2 of Taraz to delegate the criminal investigation to other bodies, claiming a violation of criminal process principles. He addressed similar requests to the General Prosecutor's Office of Kazakhstan and to the Prosecutor's Office of Zhambyl Region on 5 and 9 February 2009, respectively. Although the appeals were forwarded to Court No. 2 of Taraz, it never considered them.

2.7 On 3 February 2009, the press officer of the National Security Committee held a press conference where he presented to journalists a copy of a letter, allegedly written by the author to a businessman, M., as evidence confirming the author's financial interest in publicizing the National Security Committee's documents. The author maintains that the letter was fake.

2.8 On 10 February 2009, the Special Interdistrict Economic Court of Almaty recognized the National Security Committee's reports as secret and suspended the printing of the newspaper for one month. Neither the author, as Editor-in-Chief and author of the article, nor other representatives of the editorial staff had been admitted to the court hearings, on the ground that none of them were authorized to access secret materials.² On 18 March 2009, the author's appeal on behalf of Zhuldyz Ltd. was rejected by Almaty City Court. Subsequent appeals also proved unsuccessful: the supervisory review application was rejected on 7 May 2009, and on 13 August 2009 the Supreme Court upheld the decision of 10 February 2009 of the Special Interdistrict Economic Court of Almaty.

2.9 On 3 March 2009, the author's wife submitted to the National Security Committee of Almaty a request for access to secret materials in order to be able to represent her husband's interests in court. The request was rejected on 28 March 2009.

2.10 On 24 July 2009, the author's wife filed a civil complaint on behalf of the author to the Medeu District Court, claiming that the letters of the National Security Committee published in the newspaper disclosed no State secrets. She based her arguments on the provisions of article 17, part I, subparagraphs 4 and 6, and part II, of the Law on State secrets. On 29 September 2009, the Court terminated the proceedings on the ground that

² The author claims that the court did not take into consideration the legal opinion by an expert from a non-governmental organization and the opinion of a language expert, which both confirmed that the published letters did not contain any State secrets.

such claims could not be examined within civil proceedings. The decision was upheld by the Judicial Chamber for Civil Cases of the Almaty City Court on 8 December 2009.

2.11 On 8 August 2009, Court No. 2 of Taraz found the author guilty of criminal offences under articles 172 (1) and 339 (2) of the Criminal Code, sentencing him to three years of imprisonment and suspending his right to engage in publishing activities for two years.

2.12 On 22 October 2009, the Judicial Chamber for Criminal Cases of the Zhambyl Regional Court upheld the decision of Court No. 2 of Taraz upon appeal. The author's application for supervisory review before the Regional Court was rejected on 14 December 2009. A similar application was dismissed by the Supreme Court on 24 May 2010. The appeals submitted to the prosecutors also proved unsuccessful.

2.13 The author submits that the case materials have been classified as secret and that he has not been provided with the complete text of any procedural documents, including the sentence and the appeal decisions. Consequently, he was prevented from appealing effectively against the court decisions taken in his case and from exhausting all available remedies at the domestic level.

The complaint

3.1 The author claims that he was unlawfully arrested twice by officers of the National Security Committee before being accused of any crime: on 1 December 2008, when he was summoned for interrogation as a witness; and on 6 January 2009, when he was taken from the Cardiology Institute and detained in the temporary detention facility of Zhambyl Region. On neither occasion was he informed of the reasons for his arrest or of any formal charges against him. It was only in the course of the court hearing concerning the authorization of his arrest that the author learned about the charges against him. Therefore, he claims a violation of article 9 (1) and (2) of the Covenant.

3.2 The author also claims a violation of article 10 (1), because in the course of the investigation and legal proceedings, in the period from January to December 2009, he had no access to medical care and did not receive the treatment required for his illnesses in the medical unit of the detention facility. Neither did he receive treatment in the penal colony where he served his sentence.

3.3 As to his allegations under article 14 (1) of the Covenant, the author claims that the legal proceedings in his case did not meet the requirement of publicity. The court hearings were closed to the public on grounds of national security since the court considered that the case materials contained State secrets. The verdict was pronounced in closed session and after the trial a press release with the operative part of the sentence was issued. The author was not served a copy of the verdict and to date he has not been provided with its complete text. Furthermore, according to the author, the requirement of independence was not met, because the sentence was handed down by a judge whose brother was an official in the National Security Committee of Zhambyl Region. The author requested the recusal of the judge several times, but his requests were rejected.

3.4 The author submits that his right to the presumption of innocence was not respected, in violation of article 14 (2) of the Covenant. In the course of the preliminary investigation, the press secretary of the National Security Committee, during a press conference, made unverified statements about an alleged conspiracy between the author and a businessman from Taraz and presented a copy of a letter allegedly written by the author confirming the author's interest in publishing the National Security Committee's letters in the newspaper.

3.5 The author claims that, owing to the classification of documents as secret and the failure of the authorities to provide the majority of the documents related to his criminal and civil cases, he has been deprived of the possibility to prepare his defence and to

communicate with counsel of his own choosing, in violation of article 14 (3) (b) and (d) of the Covenant. The National Security Committee's investigative officer refused to allow two attorneys and the author's wife to participate in the process, invoking the absence of authorization for access to secret materials. During the court proceedings in the Taraz court, the author again requested to be defended by his wife and two attorneys, but his request was rejected for the same reason. On unspecified dates his wife and the attorneys filed numerous petitions requesting security clearance, but all were dismissed.³ The Court also dismissed the author's request to defend himself in person and assigned an ex officio lawyer to represent the author's interests, without the author's consent. The author refused the services of the latter.

3.6 The author also claims a violation of article 14 (3) (e), since the Court refused to summon several important witnesses requested by the author, such as officials of the National Security Committee and a prosecutor, whose testimonies could have had considerable significance for the outcome of the proceedings. The court also refused to appoint independent and impartial linguistic experts to analyse the letters of the National Security Committee that were published in the newspaper.

3.7 The author claims that his rights under article 17 (1) and (2) of the Covenant have been violated. He submits that in December 2008, during a press conference, officials of the National Security Committee stated that they had allegedly found other secret documents ready for publication during a search of the author's house. In addition, in a search at an unnamed businessman's company 2 billion tenge were found, allegedly meant for the author as a reward for the publication of secret information in his newspaper. Although the investigation did not reveal any evidence corroborating that information, it has been widely disseminated by the Head of the National Security Committee, who at the time was also the Kazakhstan representative to the Organization for Security and Cooperation in Europe (OSCE), in mass media and at OSCE meetings. The author maintains that his reputation was damaged as a result of the dissemination of defamatory information and that the principle of presumption of innocence was violated.

3.8 Finally, with reference to the Human Rights Committee's general comment No. 34 (2011) on the freedoms of opinion and expression, the author claims a violation of his rights under article 19 (1) and (2) of the Covenant. He alleges that he was convicted and sentenced to imprisonment for expressing his personal and critical opinion. He maintains that the files that he published did not contain information that could be viewed as State secrets in military, economy, education, science and technology, intelligence or counterintelligence spheres. The files did not contain any information disclosing forces, means and methods of investigation of criminal cases affecting security interests of the State party, nor did they contain information that posed a threat to the State's territorial integrity or political independence. Referring to the Committee's general comment No. 10 (1983) on freedom of opinion, the author considers that the restriction of his freedom of expression was not imposed on the grounds enumerated under article 19 (3) of the Covenant, since he merely disclosed possible misconduct by members of the security services as they investigated a local businessman, and such information by no means implicates the national security of the State. He further submits that the restriction was not imposed to protect the rights and reputation of others, because the possible wrongdoings of security officials had been the subject of previous articles and there appears to be no allegation by the Government that the article contained false information. Would that have been the case, he would have been charged with defamation. He also states that the

³ The author provides a copy of a letter dated 22 June 2009 from the National Security Committee to a judge in the Taraz court in which it is stated that the two lawyers and the wife of the author have been refused security clearance to access secret documents.

restriction was not necessary or proportionate under the terms of article 19. He was not a State official charged with a duty to maintain the confidentiality of State secrets, but a journalist, who fulfilled his duty to inform society of allegations of corruption. He maintains that his sentence of a prison term for publishing documents of significant public import was disproportionate, violated his freedom of expression, had a chilling effect on the press and human rights defenders in Kazakhstan and failed to meet the “necessity” requirement of article 19 (3).

State party’s observations on admissibility and the merits

4.1 In its submission dated 9 April 2012, the State party provides its observations on the merits of the communication. The State party submits that in accordance with article 19 of the Covenant and article 39 of the Constitution of the State party, human rights and freedoms may be subject to certain restrictions as are provided by law and are necessary for respect of the rights or reputations of others or for the protection of national security, public order or public health or morals. The Law on mass media prohibits the divulgence of information that constitutes a State secret or another secret guarded by the law; the promotion of propaganda about and justification of extremism or terrorism; the dissemination of information regarding technical methods and tactics of anti-terrorist operations during their conduct; the promotion of propaganda about illicit drugs; and the promotion of the cult of cruelty, violence and pornography. Under article 14 (1) of the Law on State secrets,⁴ information disclosing the forces, methods, sources, means and plans used in investigations and/or the status, organization and results of those investigations, and which has not been used in a criminal trial constitutes a State secret. The State party also refers to article 172 (1) of the Criminal Code, and concludes that the Law on State secrets does not contradict international law, including the Covenant.

4.2 The State party submits that, despite the above-mentioned limitations, on 27 November 2008, the author, in his capacity as Editor-in-Chief of the *Alma-Ata INFO* newspaper, published and posted on the newspaper’s website an article containing data regarding the activities conducted for an investigation into a criminal affair related to tax evasion. According to the assessment of the standing commission on the protection of State secrets of Zhambyl Region, the information published by the author constituted an official secret. The author compromised the State security body by attempting to prevent the comprehensive investigation of the case against M., the head of the company being investigated. Through tax evasion, M. and his associates caused damages to the State amounting to 23 billion tenge (about \$157 million). The publication of the article resulted in a great number of persons obtaining information regarding the forms and methods of the investigation and individuals cooperating with the investigation and resulted in losses for the State amounting to about 24.5 billion tenge. On 24 January 2009, M. fully admitted his guilt and was convicted.⁵ An officer from the investigative department was convicted for taking a bribe from M. and providing him with the secret documents published by the author. On 8 August 2009, the author was convicted for crimes under articles 172 (1) and 339 (2) of the Criminal Code, sentenced to a cumulative sentence of three years of imprisonment and his right to engage in publishing activities was suspended for two years.

4.3 The verdict was confirmed upon appeal on 22 October 2009 by the Judicial Chamber for Criminal Cases of the Zhambyl Regional Court. The punishment for divulging State secrets is in full compliance with the international standards. The sentencing of the

⁴ See <http://cis-legislation.com/document.fwx?rgn=1224>.

⁵ According to the court decisions, M., the owner of the company being investigated, had bribed a National Security Committee officer to give him classified documents regarding the investigation and then paid the author to publish those documents in the newspaper.

author is not related to his critical statements or political views. The prohibition on engaging in publishing activities for two years was intended to prevent him from committing further crimes, since he committed a crime through publishing and journalism. However, as a citizen of Kazakhstan, his freedom to hold an opinion and express it under article 19 had not been limited. The author was released from prison on 6 January 2012, having served his sentence.

4.4 During the trial the author and his wife filed 12 different motions to the court claiming biased consideration of his case. The motions were forwarded to the court with the explanation that in the event of disagreement with the first instance decision, the participants in a trial have the right to appeal. After the trial ended, six more complaints were filed by the author and his wife. The General Prosecutor's Office requested the file from the court, reviewed the case and provided a motivated response regarding the absence of grounds for filing a protest. Following two further complaints from the author and his wife, on 19 March 2010, the General Prosecutor's Office again requested the case file. The Zhambyl Prosecutor's Office reported that, on 17 March 2010, the case file had been sent to the supervisory review chamber of the Supreme Court. The author was advised that, should the Supreme Court reject his application, he would have the right to request the General Prosecutor's Office to file a protest motion against the decisions taken in his case. On 24 May 2010, the Supreme Court rejected the author's supervisory review application. Following that date, no other supervisory review applications were lodged with the Prosecutor's Office. In the light of the above, the State party maintains that at the time of the submission of his communication to the Human Rights Committee, the author had not exhausted all available domestic remedies and therefore his communication is inadmissible under article 5 (2) (b) of the Optional Protocol.

4.5 Regarding the author's claim that he had been unlawfully arrested by National Security Committee operatives, the State party submits that on 27 November 2008, the Investigative Department of Zhambyl Region initiated a criminal investigation against the author under article 172 (3) of the Criminal Code. On the same date a restraint order was issued for the author, according to which he was not to leave his town of residence without court permission, was not to interfere with the investigation and was to appear for questioning by the investigators. On 29 November 2008, during a search of the newspaper's premises, the author began swearing at the operatives and creating an obstruction. He became queasy, his blood pressure spiked and he refused to be present at the search. The emergency medical personnel summoned to the premises directed him to a cardiology hospital. The search continued in the presence of newspaper personnel and sworn witnesses. The author was summoned for questioning to the Investigative Department in Almaty on 1 December 2008. There he was informed that he should travel to the National Security Committee Department in Zhambyl for the purposes of the investigation; he was given a summons to appear in the National Security Committee office in Taraz, with which he complied. After leaving, accompanied by National Security Committee officers, the author suddenly jumped out of the vehicle and started shouting that he was being kidnapped. Attempts to calm him down were not successful and he was released and allowed to go home. Subsequently, an investigator issued an order for the author's forcible delivery to Taraz, in accordance with article 158 of the Criminal Procedure Code. On 6 January 2009, the author, who at the time was hospitalized in Almaty, was delivered by officers from the special forces, accompanied by a cardiologist, to the National Security Committee office in Taraz, where he was questioned. A medical certificate was provided by cardiology specialists that there were no medical restrictions regarding the transportation and questioning of the author. The author was not subjected to any illegal methods of interrogation, he was not handcuffed and his condition was satisfactory.

4.6 Also on 6 January, the author was placed in an investigative detention centre of the Department of Internal Affairs of Zhambyl Region. He was detained separately from other

detainees. On 8 January 2009, a criminal case was initiated and the author was presented with charges under article 339 of the Criminal Code. On the same date, an order for detention on remand was issued by the Taraz court. The author filed a complaint against the National Security Committee officers who detained him. His claims were examined and a decision was issued on 14 March 2009 by a senior inspector of the National Security Committee, refusing the request to open a criminal case against the officers. The Chief Military Prosecutor's Office concurred with the decision.

4.7 Regarding the author's claims of violations of his rights to defence and to be represented by a lawyer of his choice, the State party submits that his arguments are unfounded, since the case file contained classified documents. In accordance with article 53 of the Criminal Procedure Code, measures must be taken during trial to protect State secrets. Evidence that contains State secrets must be reviewed in closed sessions. Granting access to participants of a trial to secret information is defined in the Law on State secrets. Therefore the trial was held in closed sessions. During the pretrial investigation the author chose four attorneys, then refused their services. The judge presiding over the trial appointed an ex officio defender, who had security clearance, to represent the author. Taking into consideration that the lawyers chosen by the author did not have security clearance, three of the lawyers were issued permission to have access to confidential materials. The author was provided with summaries of the indictment and the verdict, since those documents contained classified information. The author's right to defence was thus respected.

4.8 The State party rejects the author's allegations that he was not given medical assistance upon arrest. It submits that the author was arrested on 6 January 2009 and placed in a temporary investigation detention centre, where he underwent a medical examination. His condition was assessed as satisfactory; he was diagnosed with hypertension and coronary artery disease. On 10 January 2009, he was moved to an investigation detention centre, where he was again examined by a medical doctor. He had no health-related complaints. During his stay in the centre he was examined twice per month; he contacted the medical centre on his own nine other times. He was given cardiac medication, diuretics and vitamins. He never filed a complaint regarding lack of medical treatment. On 16 December 2009, the author was moved to the Zhambyl Region Prison to serve his sentence. Upon arrival he underwent a medical examination. He had no health-related complaints. On 20 December 2009 he began complaining of headaches, queasiness and chest pain. He was hospitalized in the prison medical section, where he was diagnosed with diabetes, stenocardia and hypertension and was given medication. He remained in the medical section until 11 January 2010. On 9 February 2010, the author was taken to the Taraz hospital for consultation and a medical examination and was given appropriate medication. He was also hospitalized in the medical section of the prison between 12 and 30 July 2010 and was examined by a specialist on 8 November 2010 and 2 September 2011.

Author's comments on the State party's observations

5.1 In his comments dated 20 June 2012, the author submits that the information provided by the State party contains inaccuracies on the non-exhaustion of domestic remedies. He submits that he did file supervisory appeals to the Prosecutor's Office and to the Chairperson of the Supreme Court of Kazakhstan.⁶ The supervisory appeals were dismissed on the basis that criminal convictions could be appealed only by the participants of the court proceedings. The author claims that his wife and his lawyers were not allowed

⁶ The author provides copies of the relevant complaints, but they are illegible, so the dates are unclear.

to participate in court hearings. His court-appointed lawyer did not act to defend his position in court.

5.2 The author claims that his numerous complaints addressed to law enforcement bodies and international organizations never reached the intended addressees. He contends, therefore, that all the remedies available under national legislation have been exhausted.

5.3 The author also claims that, while the State party submitted that the criminal investigation against him had been initiated on 27 November 2008, in reality it was not initiated until 5 January 2009.⁷ He maintains that he was not informed that a restraint order had been issued against him on 27 November 2008, and that he found out about the order only from the State party's submission to the Human Rights Committee. He denies creating conflict during the search of the premises of his newspaper and states that the search was filmed; he also maintains that the search was conducted in violation of article 220 of the Criminal Procedure Code. The author reiterates that on 1 December 2008, National Security Committee operatives arrested him without presenting any documents, but he managed to avoid being taken with the help of journalists and relatives and asked for asylum at the embassy of the United States of America. In a press conference the next day, the National Security Committee stated that the author was a witness and that he could choose to give testimony either in Almaty or in Taraz. On 6 January 2009, the author was kidnapped from the hospital, without being allowed to complete his medical treatment. Upon arrival in Taraz his arterial tension was 100/190 and the medical doctor had to administer "an emergency shot". The author reiterates that he did not receive any medical treatment while in pretrial detention and that while he received medication in prison, whenever he complained of experiencing heart pain, the ambulance arrived a week later.⁸

5.4 The author reiterates most of his arguments regarding the legality of his conviction and maintains that the prosecution never proved that he obtained the published documents illegally.

State party's additional observations

6.1 In its observations dated 27 July 2012, the State party reiterates that the author was convicted and sentenced under articles 172 (1) and 339 (2) of the Criminal Code (see para. 4.2 above), that the verdict was confirmed upon appeal and that the Zhambyl Regional Court and the Supreme Court rejected supervisory review requests on 14 December 2009 and 24 May 2010, respectively. The State party reiterates that the author's claims regarding violations of his right to defence were unfounded, because the case file contained classified material.

6.2 The State party also reiterates that the author's claims that National Security Committee operatives had violated his rights had been subject to verification by the court. In this respect, it refers to ruling No. 7 of the Supreme Court of 28 December 2009 on the application of criminal and criminal-procedure legislation concerning respect for personal liberty and the dignity of the individual and the combatting of torture, violence and other cruel or degrading treatment and punishment, according to which courts should delegate the necessary verifications to the prosecution and prescribe a particular deadline for completion of the verification.

⁷ The author presents in evidence copies of two decisions of the senior investigator of the Investigative Department of the National Security Committee. The first decision, dated 27 November 2008, does not mention any names; the second, dated 5 January 2009, lists the author as a suspect.

⁸ The author provides two medical certificates dated December 2008 and one dated 25 September 2011 in evidence of the multiple health problems that he experienced.

Additional submissions by the author

7.1 In a communication dated 2 September 2013, the author submits that he was released on 6 January 2012, after serving his sentence. He had been arrested on 6 January 2009. On the basis of article 62 (1) of the Law on the calculation and commencement of punishment, stating that the period of punishment is calculated in months and years, and article 173 of the Criminal Executive Code, stating that when calculating a term in months, the term expires on the corresponding date of the last month, the author expected to be released before noon on 5 January 2012. However, the prison administration and the Prosecutor's Office informed him that he would be released on 6 January 2012 and that the usual practice was to release prisoners who had served their sentence on the date corresponding to the date of their arrest. On 15 March 2012, the author filed a claim with the Medeu District Court in Almaty, challenging the unlawful actions of the State officials in accordance with article 278 (1) and (2) of the Civil Procedure Code. On 24 April 2012, the Court rejected his appeal. On 1 June 2012, the Appellate Panel of Judges of the Almaty City Court upheld the ruling of the Medeu District Court. On 16 August 2012, the Court of Cassation in Almaty upheld the decisions of the lower courts upon cassation appeal. On 29 November 2012, the Supervisory Panel of Judges for Civil and Administrative Cases of the Supreme Court issued a decree granting a supervisory review; on 11 January 2013 the same panel issued a ruling partially satisfying the author's motion for supervision, but not awarding compensation to the author.

7.2 The author maintains that he was illegally deprived of his liberty from 5 to 6 January 2012, for one day after the expiry of his prison term. He maintains that this violated his rights under article 9 (1) of the Covenant and refers to the Human Rights Committee's jurisprudence.⁹ He also maintains that the fact that he was not awarded compensation for the late release from prison violates his rights under article 9 (5) of the Covenant and that he was not granted an effective remedy for the above violations by the State party, in violation of article 2 (3) of the Covenant.

State party's further observations

8.1 In its observations dated 27 November 2013, the State party submits that, on 11 January 2012, the Supreme Court issued a ruling declaring unlawful the actions of the Director of Prison 158/2, namely the belated release of the author. The Court also ruled that, since the release of prisoners who have served their sentences is not within the competence of the General Prosecutor's Office, the Zhambyl Prosecutor's Office or the Ministry of Internal Affairs, officers of those institutions did not violate the law. The Court did not award compensation for the belated release of the author.

8.2 In a communication dated 18 February 2016, the State party submits that the communication is inadmissible *ratione temporis* under article 1 of the Optional Protocol because the actions and decisions of the law enforcement and judicial authorities occurred before the entry into force of the Optional Protocol for Kazakhstan and could not be considered as continuous.¹⁰ The criminal case against the author was initiated on 27 November 2008; the Taraz court issued a verdict against him on 8 August 2009 and the verdict was confirmed by the second instance court on 22 October 2009.

8.3 On the merits of the communication, the State party reiterates that it should be declared unfounded, because the rights protected under article 19 (2) of the Covenant can

⁹ The author refers to communication No. 702/1996, *McLawrence v. Jamaica*, Views adopted on 18 July 1977, para. 5.5.

¹⁰ The State party refers to the Committee's decision in communication No. 2021/2010, *E.Z. v. Kazakhstan*, decision adopted on 1 April 2015.

be subjected to limitations as per article 19 (3). Referring to article 20 of its Constitution, the State party states that its national law is in full compliance with the above provisions. It submits that the publication of State secrets is considered as disclosure under article 1 of the Law on State secrets and is punishable under article 172 of the Criminal Code. The State party reiterates its previous submission regarding the legality of the verdict and the sentence.

8.4 The State party also reiterates that during the pretrial investigation and the trial the author selected four attorneys to represent him, then refused their services. On 13 April 2009, Court No. 2 of Taraz issued a ruling allowing three attorneys and three public defenders to participate in the author's defence, provided they presented proof of security clearance to access State secrets. Following a request from the Court, the National Security Committee Department in Zhambyl informed the attorneys of the procedure for security clearance, but they failed to follow the indicated procedure and to present security clearances to the Court. Thereafter, the author appointed another attorney, M., to represent him and the latter was granted security clearance. On 5 June 2009, however, the attorney informed the Court that he no longer represented the author. The author submitted a declaration that he refused the services of M. or of any other attorney and that he would like to represent himself. The Court took into consideration the requirement of article 71 (1) (9) of the Criminal Procedure Code in force at the time, according to which the participation of a defence attorney is mandatory if a prosecutor participates in the criminal trial, and appointed ex officio an attorney who had security clearance to represent the author.

Further submissions by the author

9.1 In his submission dated 26 February 2016, the author contests the State party's submission that his communication is inadmissible *ratione temporis*. He submits that, despite his protests, the appellate court reviewed his case on 22 October 2009, in his absence, but in the presence of the attorney appointed by the court ex officio. Neither the author nor the attorneys selected by him participated in the cassation proceedings (on 14 December 2009) nor in the supervisory review proceedings in the Supreme Court (date not specified). The author reiterates that the National Security Committee refused to allow his attorneys and his wife to participate in the process on the grounds of their lack of authorization for access to secret materials,¹¹ and maintains that the National Security Committee failed to implement the court ruling of 13 April 2009. The author contends that the Taraz court dismissed his request to defend himself in person and assigned, without the author's consent, an ex officio lawyer to represent his interests, and that the lawyer acted to the author's detriment. The author reiterates that his attempts to challenge the classification as secret of the published documents were rejected by the courts (see para. 2.10 above) and that he was thus denied the right to be defended by an attorney of his choice.

9.2 The author maintains that the criminal proceedings against him were instigated for the purpose of obstructing his freedom of speech, intimidating civil society and covering up corruption among State officials. He maintains that the verdict against him was illegal, since at the time only National Security Committee operatives, and not journalists, were liable under article 172 (1) and article 339 (2) of the Criminal Code, and notes that the provision was amended to include journalists only as of 16 November 2011.¹²

¹¹ See footnote 3 above.

¹² The author submits that article 172 was amended by the Law on amendments and additions to legislative acts on issues of improving law enforcement and further humanization of criminal legislation.

9.3 The author reiterates that he was illegally deprived of his liberty from 5 to 6 January 2012 and that, despite the fact that the Supreme Court recognized the illegal detention, no officials were punished.

Issues and proceedings before the Committee

Consideration of admissibility

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

10.2 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.

10.3 The Committee takes note that the State party has challenged the admissibility of the communication for non-exhaustion of domestic remedies under article 5 (2) (b) of the Optional Protocol on the ground that, after the Supreme Court rejected his supervisory review application on 24 May 2010, the author had the right to request the General Prosecutor's Office to file a protest motion against the decisions taken in his case. The Committee recalls its jurisprudence, according to which a petition to a prosecutor's office for supervisory review of court decisions that have taken effect does not constitute a remedy that has to be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol.¹³ The Committee further observes that, according to the State party's submission, after the trial ended, the author and his wife filed six more complaints to the General Prosecutor's Office, that the above complaints were reviewed together and that the Office reviewed the case and, on an unspecified date, provided a motivated response regarding the absence of grounds for filing a protest. Given those circumstances, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

10.4 The Committee notes that the alleged violations of article 9 of the Covenant, relating to the author's abduction by the National Security Committee officers on 1 December 2008 and on 6 January 2009, occurred prior to the entry into force of the Optional Protocol for the State party, that is, before 30 September 2009. The Committee also notes that the author's claims that his rights under article 17 (1) and (2) were violated refer to events that also took place before the entry into force of the Optional Protocol. The Committee is thus precluded *ratione temporis* from considering those claims, in accordance with article 1 of the Optional Protocol.

10.5 The Committee also notes that, while the first instance trial took place before the entry into force of the Optional Protocol for the State party, the second instance decision, fully confirming the verdict against the author, was issued on 22 October 2009, and the author's applications for supervisory review before the Regional Court and the Supreme Court were rejected on 14 December 2009 and 24 May 2010, respectively. Accordingly, the Committee is not precluded *ratione temporis* from considering the author's claims under articles 14 and 19 of the Covenant. Similarly, the Committee is not precluded *ratione temporis* from considering the author's claims under article 10, insofar as the above claims concern the period after 30 September 2009.

¹³ See communications No. 1873/2009, *Alekseev v. the Russian Federation*, Views adopted on 25 October 2013, para. 8.4; and No. 2114/2011, *Sudalenko v. Belarus*, Views adopted on 22 October 2014, para. 8.3.

10.6 The Committee further notes the author's allegations that the principle of presumption of innocence under article 14 (2) of the Covenant was not respected in his case, because in the course of the preliminary investigation, statements by a high-ranking government official were disseminated in mass media and during OSCE meetings. The Committee notes that the statement made by a Kazakh official in an OSCE meeting in response to a statement addressed to the Government of Kazakhstan was of a general nature and there is no indication in the information before it that shows how it would have affected the author's right to be presumed innocent. The Committee therefore considers the author's claim under article 14 (2) of the Covenant inadmissible under article 2 of the Optional Protocol as insufficiently substantiated.

10.7 In the Committee's view, the author has sufficiently substantiated, for the purposes of admissibility, his claims under article 9 (1) and (5) and under article 2 (3), read in conjunction with article 9 (1) and (5) (in relation to his belated release from prison after serving his sentence), article 10, article 14 and article 19 of the Covenant, and therefore proceeds with its consideration of the merits.

Consideration of the merits

11.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, as provided under article 5 (1) of the Optional Protocol.

11.2 The Committee notes the author's claims that his rights under article 10 (1) were violated because in the course of investigation and legal proceedings and his incarceration he had no access to medical care and did not receive the treatment required for his illnesses. The Committee, however, notes the State party's submission that the author received adequate medical care when required while he was in the investigative detention centre and while he was serving his sentence and provides detailed information regarding the medical services and treatment provided to the author (see para. 4.8). In the light of those circumstances, the Committee considers that the facts before it do not permit it to conclude that the author's rights under article 10 (1) of the Covenant have been violated.

11.3 The Committee takes note of the author's claim that his trial was not open to the public and that only a summary of the verdict was made public. The Committee also notes that in its decision dated 24 May 2010, the supervisory bench for criminal cases of the Supreme Court confirms that only excerpts of the indictment and the verdict were provided to the author because the criminal case was rated "strictly confidential". The Committee observes that the author was charged with publishing documents classified as secret that were already in the public space at the time of the trial. The State party failed to adequately explain what necessitated the secrecy of the proceedings, contending only that classified documents were involved and that the counsels for the author needed security clearance to access such documents. The Committee recalls its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, in which it stated that all trials in criminal matters must in principle be conducted orally and in public, unless the court decides to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning, must be made public.¹⁴ The Committee considers that the State party failed to justify the exclusion of the public from the author's trial and the failure to make the full verdict public under one of the

¹⁴ See general comment No. 32, para. 29.

justifications laid out in article 14 (1).¹⁵ In the absence of other pertinent information on file, the Committee considers that the State party violated the author's rights under article 14 (1) of the Covenant.

11.4 The Committee also notes the author's claim that owing to the restricted access to the majority of the documents related to his case, the author was deprived of his right to prepare his defence. The Committee observes that the State party in its submission has confirmed that the author was provided only with a redacted version of the indictment. The Committee recalls that "adequate facilities" within the meaning of article 14 (3) (b) must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court.¹⁶ The Committee further notes the State party's submission that the judge presiding over the trial appointed an ex officio defender, who had security clearance. The Committee, however, observes that the author refused the services of the State-appointed lawyer; furthermore, even if the lawyer had full access to the prosecution evidence, the author himself lacked information permitting him to instruct his lawyer and to refute the criminal charges against him.¹⁷ The Committee considers that the facts before it disclose a violation of the author's rights under article 14 (3) (b) of the Covenant.

11.5 The Committee further notes the author's contentions that he was not represented by a lawyer of his own choosing during the criminal proceedings because the lawyers that he chose were rejected by the court on the ground that they did not have security clearance, that the court dismissed the author's request to defend himself in person and assigned an ex officio lawyer to represent his interests, without his consent, and that the ex officio lawyer acted to the author's detriment. The Committee notes that the author has presented documentary evidence that his chosen lawyers were denied clearance to access secret documents on at least one occasion, on 22 June 2009. The Committee also notes the State party's submission that during the pretrial investigation the author had hired four attorneys, but had then refused their services; that during the trial the author appointed another attorney, M., to represent him and the latter was granted security clearance, but that on 5 June 2009 the author refused the services of that attorney and declared that he would like to represent himself; and that the judge presiding over the trial appointed an ex officio defender, who had security clearance, to represent the author, because domestic legislation requires the participation of a defence attorney in cases where a prosecutor participates. The Committee further notes the author's submission that, despite his protests, the appellate court reviewed his case on 22 October 2009, in his absence, but in the presence of the attorney appointed by the court ex officio, and that neither the author nor the attorneys selected by him participated in the cassation proceedings nor in the supervisory review proceedings in the Supreme Court. The Committee recalls that the right to a defence in criminal proceedings is a fundamental right, which entails the right to be tried in one's presence and through legal assistance of one's own choosing.¹⁸ The Committee also recalls that the interests of justice may require the assignment of a lawyer against the wishes of the

¹⁵ See also communication No. 2304/2013, *Mukhtar v. Kazakhstan*, Views adopted on 6 November 2015, para. 7.4.

¹⁶ See general comment 32, para. 33.

¹⁷ See communication No. 1937/2010, *Leghaei et al. v. Australia*, Views adopted on 26 March 2015, para. 10.4.

¹⁸ See, inter alia, communication Nos. 623/1995, 624/1995, 626/1995 and 627/1995, *Domukovsky, Tsiklauri, Gelbakhiani and Dokvadze v. Georgia*, Views adopted on 6 April 1998, para. 18.9; No. 52/1979, *Lopez Burgos v. Uruguay*, Views adopted on 29 July 1981; and No. 74/1980, *Estrella v. Uruguay*, Views adopted on 29 March 1983. See also communication No. 232/1987, *Pinto v. Trinidad & Tobago*, Views adopted on 20 July 1990, para. 12.5.

accused.¹⁹ However, any such restriction must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice²⁰ and domestic law should avoid any absolute bar against the right to defend oneself in criminal proceedings without the assistance of counsel.²¹ The Committee observes that the State party has not justified how the interests of justice in the present case required the participation of an ex officio defender, but rather has simply referred to article 71 (1) (9) of the Criminal Procedure Code, which requires participation of a defence attorney in all cases where a prosecutor is present. Accordingly, the Committee concludes that the facts in the instant case disclose a violation of the author's right under article 14, (3) (d) to be assisted by counsel of his choice.

11.6 The Committee takes note of the author's allegations that his rights under article 19 (1) and (2) of the Covenant were violated because of his conviction and the prohibition on engaging in publishing activities for two years, for publishing an article in which he expressed his personal critical opinion of documents sent to his newspaper; that the files that he published did not contain information that could be viewed as State secrets, nor did they contain any information disclosing forces, means and methods of investigation of criminal cases affecting security interests of the State party or information that posed a threat to the State's territorial integrity or political independence. The Committee also notes the author's submission that the limitation of his freedom of expression was not made for one of the purposes enumerated under article 19 (3) of the Covenant. The Committee further notes the State party's argument that the author was convicted for publishing an article containing classified data regarding activities conducted for an investigation into a criminal affair related to a tax evasion, and that article 172 (1) of the Criminal Code and the Law on State secrets are in accordance with international law.

11.7 The Committee recalls that article 19 (2) of the Covenant requires States parties to guarantee the right to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print. The Committee refers to its general comment No. 34, according to which freedom of opinion and freedom of expression are essential for any society and constitute the foundation stone for every free and democratic society (para. 2). Any restrictions on the exercise of these freedoms must conform to the strict tests of necessity and proportionality. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated (*ibid.*, para. 22).²²

11.8 The Committee recalls that article 19 (3) of the Covenant allows certain restrictions, but only as provided by law and necessary: (a) for respect of the rights or reputations of others; or (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. The Committee notes that if the State imposes a restriction on rights guaranteed under article 19 (2), it is up to the State party to demonstrate that such restriction is necessary in the case in question and does not operate in a way that is incompatible with the object and purpose of article 19 of the Covenant.²³

¹⁹ See communications No. 1123/2002, *Correia de Matos v. Portugal*, Views adopted on 28 March 2006, para. 7.4 and No. 2040/2011, *Zeynalov v. Estonia*, Views adopted on 4 November 2015, para. 9.6.

²⁰ See general comment No. 32, para. 37 and *Zeynalov v. Estonia*, para. 9.6.

²¹ See *Correia de Matos v. Portugal*, paras. 7.4 and 7.5.

²² See communications No. 1948/2010, *Turchenyak et al. v. Belarus*, Views adopted on 24 July 2013, para. 7.7; and No. 1991/2010, *Volchek v. Belarus*, Views adopted on 24 July 2014, para. 7.3.

²³ See *Turchenyak et al. v. Belarus*, para. 7.8; and *Volchek v. Belarus*, para. 7.4.

11.9 The Committee observes that in the present case the national authorities appear to justify the restriction of the author's freedom of expression on the ground of public order. The State party, however, fails to adequately justify how the publication of the documents in question jeopardized public order. The Committee notes that the author is a journalist whose main professional task is to inform society on issues of public interest, and also notes the author's claim that the published documents revealed corruption and abuse of power among State officials. The State party has not refuted that allegation, nor has it provided any specific argumentation as to why it was necessary to restrict the author's freedom of expression, beyond a general reference to the permissible grounds for restrictions under article 19 (3). In the absence of sufficient justification by the State party as to the way in which publishing the documents in question jeopardized the public order in the State party, the Committee concludes that the author's rights under article 19 (2) of the Covenant have been violated.

11.10 The Committee finally notes the author's claim he was illegally deprived of his liberty from 5 to 6 January 2012, because he was released from prison one day after the expiry of his prison term. The Committee also notes that the State party has not contested this claim, but has submitted that its Supreme Court declared that the illegal detention resulted from unlawful actions of the director of the prison, without granting any compensation to the author. The Committee considers that this constitutes a violation of the author's right under article 9 (5) of the Covenant. In the light of the above, the Committee will not consider whether the circumstances of the case constitute a separate violation of article 2 (3), read in conjunction with article 9 (5), for the same facts.

12. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of article 9 (5), article 14 (1) and (3) (b) and (d) and article 19 (2) of the Covenant.

13. 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 take appropriate steps to provide the author with adequate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future.

14. 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 and that, pursuant to article 2 of the Covenant, the State party 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 when it has been determined that a violation has occurred, 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 to have them widely disseminated in the State party.
