



# International Covenant on Civil and Political Rights

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## Human Right Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning Communication No. 2403/2014\*\*,\*\*

<i>Communication submitted by:</i>	Andrei Androsov (represented by counsel, Irina Vasilchenko and subsequently, Anastasia Miller)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kazakhstan
<i>Date of communication:</i>	20 January 2013 (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 28 May 2014 (not issued in document form)
<i>Date of adoption of Views:</i>	7 November 2017
<i>Subject matter:</i>	Torture while in detention
<i>Procedural issue:</i>	Non-substantiation of the claims
<i>Substantive issues:</i>	Torture; prompt and impartial investigation; arbitrary arrest – detention; fair trial.
<i>Articles of the Covenant:</i>	2(3); 7; 9(1), (3), (4); 14(1)
<i>Article of the Optional Protocol:</i>	2

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\* 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, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Ivana Jelic, Bamariam Koita, Marcia V.J. Kran, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Anja Seibert-Fohr, Yuval Shany and Margo Waterval.

1. The author of the communication is Mr. Andrei Androsov, born in 1980, citizen of Kazakhstan. He claims that the State party violated his rights under article 7, read alone and in conjunction with article 2(3), article 9 (1), (3) and (4), and article 14(1) of the Covenant. The Optional Protocol entered into force for the State party on 30 September 2009. The author is represented by counsel.

**The facts as submitted by the author**

2.1 The author submits that he is a recovering drug addict, but was not under influence of any drugs on 8 April 2010, when he was arrested and taken to the city of Rudny police department. There, a police officer, Mr. M.B, and his assistant pressured him to confess in committing several burglaries. They showed location of the apartment where these burglaries were committed. One of the police officers punched the author in the head and in the abdomen, and threatened to incarcerate him since “he is already a convict, and it would not be hard to catch” him again. The questioning was conducted without any formal documents and records; the author did not confess and was released that same day.

2.2 The author was arrested again on 12 April 2010. The police officers searched him, and found several paper bills that were marked “controlled purchase”, and some amount of heroin. The investigator in the case notified the prosecutor that he intended to seek pre-trial detention of the author. On 13 April 2010, the medical personnel of the temporary detention facility examined the author. The report, which was issued on 16 April 2010, found no injuries on the author’s body at the time of the examination. On 14 April 2010, the Rudny City Court decided to detain the author pending trial on charges of drug trafficking, without specifying the length of the detention.

2.3 On 13 April 2010, an officer, Mr. M.B., entered his cell, and promised him heroin in return for his confession to several crimes he didn’t commit. The author agreed and used heroin along with two other cellmates. This fact was discovered during the medical examination later that day. But since the fact of narcotic intoxication was not properly documented, and no forensic testing was done, the author could not complain further about the officer, Mr. M.B. Some other officers were subjected to a disciplinary punishment for not conducting a thorough personal check.

2.4 On 14 April 2010, a police officer entered the author’s cell, handcuffed him, hit him twice in the abdomen, and told him that he was being transferred to detention facility No. 161/1 in the city of Kostanai. The author submits that his hands were kept in handcuffs during the trip, which lasted about an hour. During the next two months, he was constantly transferred from a detention facility in the city of Rudny, to the one in Kostanai, and back again.

2.5 On 15 April 2010, when the author was detained in Kostanai, some cellmates told him that they were “seniors” in the cell, since they were also “assistants” of the administration of the detention facility. The author submits that his cellmates started beating him regularly after two weeks of his arrival. On 29 May 2010, he was beaten especially hard. Due to pressure from the facility administration, he was forced to write that he accidentally bumped into a metal bedframe.

2.6 On 7 June 2010, the author submitted a complaint regarding “unlawful actions” of the personnel of the Kostanai detention facility, but it was “without any results<sup>1</sup>”. The same day, he was transferred to the Rudny detention facility to read and study the indictment against him. His mother, who served as his defender, noticed bruises and injuries on her son’s body, and submitted a request to conduct a medical examination. On 8 June 2010, the author was

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<sup>1</sup> The author does not provide any details of this complaint, or its outcome.

brought to a trauma centre of the city of Rudny, where he was diagnosed with bruises on his chest. The author's complaint regarding beating was never thoroughly examined. On 9 June, the author's lawyer submitted a formal complaint.

2.7 The complaint was sent to the prosecutor's office, which forwarded it to the police department of the Kostanai Region. The police department refused to initiate a criminal investigation, arguing that it had ascertained that the personnel at the Kostanai detention facility committed no crimes.

2.8 During the trial, on 9 July 2010, the author's lawyer requested the court to consider the medical certificate issued on 8 June 2010. The certificate was made part of the trial records. On the same day, the court issued a decision and ordered examination of the author's claims regarding beatings, and drug use by inmates in both the Rudny and Kostanai detention centres. The court gave the authorities time until 20 July 2010 to conduct this examination.

2.9 On 15 July 2010, the Kostanai police department refused to initiate a criminal investigation, due to lack of crime, since the author himself had claimed that he fell from his second-level bed. On 25 July, the claims regarding Rudny facility were also dismissed, since the author changed his testimony. While the author initially complained about the fact that he was beaten for two months, he then retracted his statements, and explained that he received these injuries as a result of falling from his bed. These two decisions were combined into one letter from the prosecutor's office to the court. In this letter, the prosecutor's office agreed with the decision not to open a formal criminal investigation, since it was ascertained that no crimes were committed by personnel of the detention facilities.

2.10 On 3 September 2010, after numerous requests and complaints from the author and his lawyer, the prosecutor of the city of Kostanai decided to resume a preliminary examination into claims of mistreatment submitted by the author. On 22 September 2011, the preliminary examination was again discontinued. The author and his lawyer never received copies of the decisions, or materials of the examination file.

### **The complaint**

3.1 The author claims that the State party has violated his rights under article 7 separately and in conjunction with article 2 (3) of the Covenant. During his detention in Rudny city he was subjected to psychological pressure and was offered heroin in return for self-incrimination. In the detention facility 161/1 of the Kostanai city and in the city of Rudny, he was systematically beaten by his cellmates because of his refusal to follow up the orders of the detention facility administration. The author claims that the State party did not undertake an effective investigation of his complaints by a competent and impartial body because all the complaints were transmitted to the same police department of the Kostanai Region that supervises the detention facility 161/1 of the Kostanai city and were examined by the same officials. Moreover, the author and his counsel did not have access to all necessary procedural documents during the criminal proceedings

3.2 The author also claims that his rights under article 9, paragraphs 1, 3 and 4, of the Covenant were violated. He claims, for example, that on 8 April 2010, he was detained for four hours, that the detention was not registered and that he was not informed of the charges against him. The author claims that article 134 (1) of the Criminal Procedure Code of Kazakhstan requires the police to register the detention, if someone is detained for more than three hours. On 12 April 2010, he was detained at 6:55 pm, but the records indicate 20:40pm as the time in which detention commenced. On 14 April 2010, the court ordered the author's detention pending trial based on the seriousness of charges against him, without initially indicating the length of detention

3.3 The author further claims that the State party violated his rights under article 14(1). Article 11 of the Law on criminal investigations stipulates measures that can be taken by the police in investigating crimes. The police can organize a “controlled purchase” of the narcotic substance if there is information regarding criminal activity, but this information is not sufficient to initiate a criminal case. The ECHR has already ruled in *Vanyan v. Russian Federation* that while use of confidential informants per se does not violate the rights enshrined in the convention, the courts should not use their testimonies as a basis for a guilty verdict.

#### **State party’s observations on admissibility and merits**

4.1 On 25 November 2014, and 30 March 2015, the State party provided its observations on admissibility and merits of the communication. The State party confirms that on 12 April 2010, at 3:30 pm, the police officers organized a controlled purchase of narcotic substance. The same day, at 8:40 pm, the author was taken into custody by the police in the city of Rudny. On 14 April 2010, the Rudny City Court decided to keep the author in detention pending trial. The criminal investigation against the author was initiated on 15 April 2010, and completed on 9 June. On 18 June, the materials of the criminal investigation were forwarded to the criminal court for the Kostanai region.

4.2 On 25 August 2010, the author was sentenced to 14 years of imprisonment on charges of drug trafficking, to be served in a special regime prison. The jury’s guilty verdict was based on witness testimonies, search and seizure from the author himself, and video recording of the “controlled purchase”. The expert forensic examination which was carried out on 12 April 2010, concluded that the narcotic substance which was found, was heroin<sup>2</sup>.

4.3 On 3 November 2010, the cassation appeal court of the Kostanai region agreed with the lower court’s verdict and sentence. On 10 January 2011, the Supreme Court of Kazakhstan refused to initiate supervisory review proceedings.

4.4 The courts considered the author’s claims regarding mistreatment, but found them to be baseless. Furthermore, the author complained to the prosecutor’s office, which also considered the claims, which were responded to with detailed justification and explanations.

4.5 On 13 April 2010, the author was questioned by the prosecutor of the city of Rudny. The author did not have any complaints against police officers, and did not claim having been tortured or mistreated. During that questioning, the author claimed to be innocent of the crimes of which he was being accused.

4.6 It was also established on 13 April 2010 that the author and two other persons in detention were found to be under influence of narcotic substances. Based on this fact, the prosecutor’s office carried out an internal investigation as a result of which, the chief of temporary isolator unit and his deputies were subjected to a “disciplinary responsibility”.

4.7 As a part of the investigation into the author’s claims of mistreatment, the authorities questioned Mr. A.A., chief of temporary isolator in Rudny. He testified that the author was admitted on 12 April 2010, and before admission, the author was examined by medical personnel, who found no injuries on the author’s body. Subsequently, the court ordered author’s detention pending trial, and he was transferred to temporary detention facility No. 161/1 in Kostanai. After certain period of time, the author was transferred back to the temporary isolator in Rudny. There, the examination upon admission to the facility established that the author bore injuries, which were received in Kostanai. The complaint materials were forwarded to the facility No. 161/1.

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<sup>2</sup> Total weight of heroin is reported to be 2,746 grams.

4.8 The authorities also questioned Mr. M.B, deputy chief of police department in Rudny. He stated that the author was indeed brought to the police department for questioning based on information that he was selling drugs. The author refused to cooperate. The deputy chief rejected the claims that the author was tortured or mistreated while in his custody.

4.9 The author's complaints did not lead to a criminal investigation. The author himself testified and explained that his bruises were the result of his fall from the second-level bunk bed in his cell.

4.10 Based on the arguments mentioned above, the author's claims should be considered by the Committee as inadmissible.

#### **Author's comments on the State party's observations on admissibility and merits**

5.1 The State party submits that the "controlled purchase" was documented. But it does not specify who documented this process. The video of the event has no time stamp. The identity of the police officers who stopped and arrested the author is also not clear from the video.

5.2 Furthermore, the authorities never properly investigated the fact that the author and his cellmates were able to obtain and consume heroin in the detention centre. The State party never properly investigated the author's claims regarding torture and mistreatment.

#### **Additional submissions by parties**

##### *By the State party*

6.1 On 6 August 2015, 26 February 2016, 16 August 2016 and 27 June 2017<sup>3</sup>, the State party provided additional observations on admissibility and merits of the communication. The State party reiterates its previous position. It claims that the investigation into alleged beatings of the author was discontinued for following reasons. Several witnesses, including police officers, and author's cellmates, testified that they never saw anyone beating the author, and that he had fallen from his bunk bed and received injuries on his chest and shoulder. This was confirmed by the author's written statement dated 8 June 2010. The fact that the author was injured was never a secret. This fact was registered in the medical journal of the detention facility No. 161/1 of the city of Kostanai on 9 June 2010. Also, the author's claims that he was beaten by his cellmates, who were ordered to do so by the administration of detention facility No. 161/1, have "not been confirmed", and were rejected by testimonies as indicated above.

6.2 Regarding the use of heroin by the author and his cellmates on 13 April 2010, the authorities conducted a thorough investigation. As a result, several employees of the temporary isolator in the city of Rudny were disciplined. For example, one of the deputy chiefs of the isolator was fired, and another deputy was issued a strict reprimand. Officer, Mr. M.B, whom the author claimed had passed him heroin, denied ever doing so. There were no other witnesses of the alleged transfer of the drugs. Since no evidence of any crime was found, the criminal investigation was not launched.

6.3 The State party further investigated the claims filed by the author in April 2015, after the present communication was submitted to the Committee. A formal investigation into allegations of torture was initiated under articles 347-1(2)(a) – torture, and 307(2) – abuse of office powers. As part of the investigation, the prosecutor's office considered 11 petitions from the author and/or his representatives, and the author was provided with written

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<sup>3</sup> In these responses, the State party provides a comprehensive record of the investigations, including copies of witness statements and court decisions.

responses to each petition. The author took advantage of his right to appeal all procedural decisions, if he disagreed with the results. Since there was no evidence of any crimes committed, the investigation was discontinued on 2 July 2015.

6.4 The domestic courts also considered the author's complaints. In its verdict, the court indicates, for example, that the author did not bring his torture claims forward until later in the process, when these complaints were filed by his lawyer, Ms. Vasilchenko. This caused the author to change his testimony and declare that he was forced to write a confession because of the beatings he suffered from his cellmates at the behest of the administration of the detention centre. The Supreme Court upheld the lower court's decision on 10 January 2011, agreeing with the jury verdict and confirming the existence of equality of arms during the court hearings.

*By the author*

7.1 On 13 December 2015, 11 April 2016, and 17 February 2017, the author provided additional comments on the State party's submissions. The author submits that as a consequence of his communication to the Committee, the State party initiated another investigation that, nevertheless, was not effective, and was discontinued. The author indicates that he started to complain about torture on 7 June 2010. It is only after this complaint dated 7 June 2010, that the author was examined, and the bruises on his body documented. However, this did not lead to an effective investigation. Instead, on 9 June 2010, the author was forced to submit a statement that he was not tortured, but rather, fell from his second-story bunk bed.

7.2 Regarding the narcotic substances that were given to the author and his cellmates, the author insists that they were given to them by the police officers in order to make him confess crimes that he did not commit. While admitting that the author consumed drugs, the State party's authorities failed to launch an effective investigation into the author's allegations that he was given drugs in exchange for his testimony, including such actions as forensic analysis of hair and nails, through examination of the detention facility, etc. The author also indicates that Mr. M.B., the same officer who pressured him to confess and gave him drugs, was found guilty on several drug- and weapons-related charges on 15 August 2015.

7.3 The author further submits that the investigation into his torture allegations was not effective, according to principles reflected in the Istanbul Protocol. First, the investigation must be conducted promptly. His complaint was submitted to the prosecutor's office on 15 June 2010, but was not properly investigated for more than 1 year. The investigation must also be adequate – that is, the authorities should take all steps necessary to document injuries. However, the State party did not order a full medical forensic examination of the author. The investigation results must also be transparent – the State party must share all information obtained during the investigation.

## **Issues and proceedings before the Committee**

### *Consideration of admissibility*

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 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 takes note of the author's claim that he has exhausted all effective domestic remedies available to him in connection with his claims regarding mistreatment while in detention. In the absence of any objection by the State party in this respect, the

Committee considers that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met.

8.4 The Committee has noted the author's claims under articles 9(1), 9(3) and (4), and article 14(1) of the Covenant. In the absence of any further pertinent information on file, however, the Committee considers that the author has failed to sufficiently substantiate, for purposes of admissibility, these allegations. Accordingly, it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

8.5 The Committee considers that the author has sufficiently substantiated, for the purposes of admissibility, his claims under articles 7, read alone and in conjunction with article 2 (3) of the Covenant, declares them admissible and proceeds with their consideration of the merits.

*Consideration of the merits*

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

9.2 The Committee takes note of the author's claim that his treatment at the temporary isolator in the city of Rudny and the detention centre in the city of Kostanai, along with the State party's inability to effectively investigate the claims he submitted in that regard, amounted to torture, in violation of article 7, read alone and in conjunction with article 2(3) of the Covenant. The Committee observes that the State party, in response to the author's allegations, provided a detailed description regarding its actions and steps taken in response to the author's claims. The Committee notes that these claims were considered by the prosecutor's office, by the police, the trial court, and the Supreme Court of Kazakhstan. In addition to these detailed description, the State party provided copies of witness and expert statements, court decisions, decisions by the prosecutor's office, and others. The Committee notes the State party's argument that while some injuries were found on the author's body, it could not be ascertained, after an investigation which is described in details, that these injuries were caused by personnel of the temporary isolator in Rudny or detention facility in Kostanai. The Committee further notes that the description of facts and other materials as submitted by the author do not provide sufficient evidence to support his claims; neither has the author shown that his injuries were caused due to lack of adequate supervision of the conditions of detention. In these circumstances, and on the basis of the information before it, the Committee cannot come to a conclusion that the author was subjected to treatment in violation of article 7 and that the State party failed in its obligations under article 2(3) to investigate these claims.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any provision of the Covenant.

Annex :

Original : French

### Opinion individuelle dissidente de M. Olivier de Frouville

1. Dans cette affaire, le Comité a estimé qu'il n'était pas en mesure de conclure que l'Etat partie avait failli à l'obligation qui lui incombait, en vertu du paragraphe 3 de l'article 2, de mener une enquête sur les allégations de l'auteur (par. 9.2). Cette conclusion s'appuie sur des motifs qui ne sont pas conformes à la jurisprudence du Comité en matière d'évaluation des enquêtes menées sur des allégations de violation de l'article 7 du Pacte. Le Comité considère de manière constante que « dès lors qu'une plainte concernant des mauvais traitements prohibés par l'article 7 a été déposée, celle-ci doit faire l'objet d'une enquête rapide et impartiale de la part des autorités de l'Etat partie »<sup>4</sup>. Or il ressort clairement des faits tels que rapportés par l'auteur de la communication et par l'Etat partie que ce dernier n'a pas respecté son obligation de mener une enquête « rapide » sur les allégations de l'auteur.

2. Dans les paragraphes 2.5. à 2.10 des constatations, il est fait état des très nombreuses réclamations ou plaintes de l'auteur ou de son conseil au sujet des mauvais traitements qu'il aurait subis dans le centre de détention de Kostanaï à partir de début mai 2010. Aucune de ces réclamations ou plaintes n'a abouti à l'ouverture d'une enquête, comme le reconnaît d'ailleurs l'Etat partie (par. 4.9.) Selon l'Etat partie, l'auteur aurait reconnu que les ecchymoses, relevées sur son corps et ayant fait l'objet d'un certificat médical en date du 8 juin, seraient en fait dues à une chute de son lit superposé, dans sa cellule. Mais l'auteur explique qu'il a été forcé de donner cette explication, au demeurant assez ridicule (par. 2.5. et par. 7.1.) Les faits tels qu'exposés montrent que, dès qu'il était libre de s'exprimer, l'auteur a maintenu ses allégations de mauvais traitements, et cela jusque dans la communication qu'il a adressée au Comité.

3. Finalement, ce n'est qu'en avril 2015, soit cinq ans après les premières plaintes, en réaction au dépôt par l'auteur de sa communication au Comité, qu'une enquête officielle sur les allégations de torture a été ouverte mais classée sans suite « compte tenu de l'absence d'élément de preuve de la commission d'une quelconque infraction » (par. 6.3.) Outre le fait qu'on peut douter de l'impartialité d'une enquête qui semble se fonder uniquement sur les témoignages des personnes accusées d'avoir infligé les mauvais traitements ou de les avoir tolérés (par. 6.1.), cette enquête est tardive et ne saurait par conséquent être considérée comme respectant les exigences posées par le paragraphe 3 de l'article 2, en lien avec des allégations de violations de l'article 7 du Pacte.

4. Comme le Comité n'a pas pris en compte sa propre jurisprudence, ni ne l'a d'ailleurs même citée, son évaluation des faits dans le cas d'espèce s'en trouve faussée. Le Comité a également omis de se référer à l'évaluation plus générale qu'il avait faite de la situation au Kazakhstan dans ses observations finales de juin 2016. Dans ce document, le Comité avait pourtant relevé, au paragraphe 23 : « a) Le nombre élevé de cas de torture signalés et le grand nombre de plaintes pour torture rejetées d'emblée en raison de critères semble-t-il excessifs en ce qui concerne les éléments de preuve nécessaires pour qu'une enquête soit ouverte en vertu du nouveau Code de procédure pénale ; [...] c) La très faible proportion d'affaires dans lesquelles des poursuites sont effectivement engagées, la légèreté des peines prononcées et

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<sup>4</sup> Voir l'Observation générale no 20 du Comité des droits de l'homme: art. 7 (Interdiction de la torture et des peines ou traitements cruels, inhumains ou dégradants), 1992 (HRI/GEN/1/Rev.9), par. 14 ; et par ex. Ahmet Gunan c. Kirghizistan, comm. 1545/2017, 25 juillet 2011, par. 6.2.



le fait que les institutions chargées de l'application des lois participent aux enquêtes sur des allégations de torture ou de mauvais traitements qui les concernent ; »

5. De même, le Comité n'a pas non plus jugé utile de se référer à d'autres instruments ou standards, qui pourtant vont dans le même sens que la jurisprudence du Comité, comme les « Principes relatifs aux moyens d'enquêter efficacement sur la torture et autres peines ou traitements cruels, inhumains ou dégradants pour établir la réalité des faits »<sup>5</sup> ou le Protocole d'Istanbul, largement cité par l'auteur (par. 7.3.) Le Comité a également ignoré les conclusions d'autres organes compétents<sup>6</sup> ainsi que la jurisprudence du Comité contre la torture dans des cas individuels similaires concernant le même Etat partie<sup>7</sup>. Dans ces affaires, le Comité contre la torture est arrivé à la conclusion que l'Etat partie avait violé l'article 12 de la Convention contre la torture, notamment au motif que l'enquête avait été tardive : « [...] En vertu de l'article 12, l'enquête doit être immédiate, impartiale et efficace, la rapidité étant essentielle autant pour éviter que la victime continue de subir les actes prohibés que parce que, à moins que les tortures n'entraînent des effets permanents et graves, d'une façon générale, selon les méthodes employées, les marques physiques de la torture et, à plus forte raison, des traitements cruels, inhumains ou dégradants, disparaissent à brève échéance. »<sup>8</sup>

6. La sécurité juridique implique la cohérence dans l'interprétation du droit. A cet égard, il est important que le Comité des droits de l'Homme non seulement se fonde sur sa propre jurisprudence – ce qui devrait aller de soi – mais aussi qu'il prête attention à l'évolution du droit international et à la jurisprudence d'autres organes compétents statuant dans des cas similaires.

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<sup>5</sup> Résolution 200/43 de la Commission des droits de l'Homme et 55/89 de l'Assemblée générale.

<sup>6</sup> V. rapport du Rapporteur spécial sur la torture, M. Manfred Nowak, sur sa visite au Kazakhstan, A/HRC/13/39/Add.3, 16 décembre 2009, par. 76 : « Although the Special Rapporteur recognizes that impunity is not total, he found that existing complaints mechanisms are ineffective. The burden of proof rests on the alleged victim of ill treatment; therefore, only a small minority of perpetrators are actually brought to justice. »

<sup>7</sup> Gerasimov c. Kazakhstan, comm. 433/2010, 24 mai 2012 ; Evloev c. Kazakhstan, comm. n° 441/2010, 5 novembre 2013 ; Bairamov c. Kazakhstan, comm. n° 497/2012, 14 mai 2014.

<sup>8</sup> Ici Gerasimov c. Kazakhstan, cité dans la note n° 5, par. 12.5.