



## 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. 2535/2015\*, \*\*

<i>Communication submitted by:</i>	Lukpan Akhmedyarov (represented by counsel, Pavel Kochetkov, of Dignity)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kazakhstan
<i>Date of communication:</i>	29 April 2014 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 19 January 2015 (not issued in document form)
<i>Date of adoption of Views:</i>	23 July 2020
<i>Subject matter:</i>	Defamation lawsuit by a public official against a journalist
<i>Procedural issue:</i>	Exhaustion of domestic remedies; lack of substantiation
<i>Substantive issues:</i>	Freedom of expression; equality before the courts and tribunals; fair trial; right to equal protection of the law; freedom of movement
<i>Articles of the Covenant:</i>	2 (3), 11, 12, 14 (1), 19 and 26
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2) (b)

1. The author of the communication is Lukpan Akhmedyarov, a national of Kazakhstan born in 1978. He claims that the State party has violated his rights under articles 2 (3), 11, 12, 14 (1), 19 and 26 of the Covenant. The Optional Protocol entered into force for the State party on 30 September 2009. The author is represented by a counsel.

\* Adopted by the Committee at its 129th session (29 June–24 July 2020).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Furuya Shuichi, Christof Heyns, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.



**Facts as submitted by the author**

2.1 The author is a journalist and a human rights activist.<sup>1</sup> At the time of the events, he worked for the *Uralskaya Nedelya* newspaper, which was owned by Journalistskaya iniciativa.

2.2 On 2 February 2012, the author published an article about the family ties of several public officials serving in local executive bodies. The article contained the following extract about Mr. I.: “Marriages are contracted in heaven but their benefits are quite mundane. The proof is the career growth of Mr. I., a former physical education teacher and currently chief of the regional Department of Internal Affairs. In addition to his personal qualities, the main ideologist of the region has family ties to Mr. T., the country’s former Prime Minister.”<sup>2</sup> In an illustration accompanying the article, photographs of the public officials mentioned in the article were depicted as playing cards, symbolizing the clannishness of the authorities.

2.3 As a result of that and other articles, the author and *Uralskaya Nedelya* faced several defamation lawsuits brought by large oil and gas companies, the Department of Internal Affairs of Zapadno-Kazakhstanskaya region, and high-ranking public officials. The author was attacked in newspapers. His wife was subjected to pressure at her workplace and was told that her husband’s activities could affect her. Officers of the National Security Committee visited the *Uralskaya Nedelya* office and requested that the author be fired. On 7 March 2012, the author was stopped by the police three times in one day.<sup>3</sup>

2.4 On 19 April 2012, the author survived an assassination attempt. He was shot with an air pistol and stabbed eight times with a knife in the chest and near the heart. The author believes that the attack was revenge for his articles and for organizing protest meetings. He was in intensive care before being released from hospital on 2 May 2012. The investigation into the attack examined several possible motives, including the implication of government authorities and revenge by people about whom the author had written.

2.5 On 24 April 2012, while the author was still hospitalized, Uralsk City Court No. 2 started hearing a defamation case brought against him and Journalistskaya iniciativa by Mr. I. in relation to the article published on 2 February 2012.

2.6 In a hearing on 27 April 2012, Mr. I. confirmed before the presiding judge that the country’s former Prime Minister was one of his relatives.<sup>4</sup> He acknowledged that fact in the presence of the public and the media. On 19 July 2012 at 5 p.m., another judge was appointed to replace the presiding judge, allegedly due to a deterioration in the state of health of the presiding judge. The following day, the court partially accepted Mr. I.’s arguments, finding that the contested extract of the article published by the author contained false information and damaged Mr. I.’s professional reputation and that the depiction of his image as a playing card hurt his dignity. The court ruled that the author had violated article 65 of the Code of Civil Procedure by failing to provide evidence of Mr. I.’s family ties to the former Prime Minister, because the author refused to disclose the name of the person who had informed him about the ties.<sup>5</sup> The court ordered that the author and Journalistskaya iniciativa publish a formal apology in *Uralskaya Nedelya* within 10 days of the judgment becoming final, with a circulation of 17,600 copies. The apology was to be typed in the same font as the author’s article and to occupy 10 cm<sup>2</sup> on page 5 of the newspaper. The defendants were also ordered to jointly pay 5 million tenge (approximately \$33,000) as compensation for the moral damage caused to Mr. I. and 30,000 tenge (around \$200) as compensation for moral damage caused by the unlawful use of his image. A court fee of 1,618 tenge (around \$11) was imposed on each defendant.<sup>6</sup>

2.7 On 2 October 2012, the appellate judicial panel on civil and administrative affairs of Zapadno-Kazakhstansky Regional Court rejected the appeals of the author and of Journalistskaya iniciativa against that decision. On 6 December 2012, the cassation judicial

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<sup>1</sup> The author holds the Peter Mackler Award for Courageous and Ethical Journalism from Reporters Without Borders.

<sup>2</sup> Names omitted.

<sup>3</sup> The author believes that was connected to his application to organize a protest meeting.

<sup>4</sup> Reference is made to the minutes of the hearing held on 27 April 2012, which were not enclosed with the communication.

<sup>5</sup> While the author disclosed to the court the public agency where his source worked, he refused to provide the source’s name.

<sup>6</sup> According to the exchange rate of 20 July 2012.

panel of Zapadno-Kazakhstansky Regional Court partially quashed the first and second instance judgments with regard to the obligation to publish a formal apology. On 28 February 2013, the Supreme Court refused to initiate a supervisory judicial review. In a letter dated 9 July 2013, the author requested the Prosecutor General of Kazakhstan to lodge a prosecutorial protest against the judicial decisions. In a letter dated 6 August 2013, the chief of the Department of Litigating Parties' Appeals and Prosecutorial Petitions replied that it transpired from the author's application that, unlike *Journalistskaya iniciativa*, he had not requested a supervisory judicial review from the Supreme Court. The author was advised to appeal to the Prosecutor General's Office after exercising his right to bring an application before the Supreme Court.<sup>7</sup> The author believes that he has exhausted domestic remedies because he is no longer able to appeal against the judgments on his own.

### Complaint

3.1 The author claims that the State party violated his rights under article 19 of the Covenant by punishing him for expressing his opinion and for exercising his freedom to seek, receive and impart information and ideas of all kinds.

3.2 The author claims a violation of his right to a fair and public hearing by a competent, independent and impartial tribunal under article 14 (1) of the Covenant, and of his right to equal protection of the law under article 26 of the Covenant. He submits that domestic jurisdictions disregarded the adversarial principle and the principle of equality of arms and did not take into account his arguments and relevant provisions of international law.

3.3 The author claims that the decision of the first instance court was adopted with grave violations of substantive and procedural law, did not reflect the facts of the case, was politically motivated and had "elements of corruption". The new judge who was appointed on 19 July 2012 took one hour to hear the case and announced the verdict an hour after the hearing, disregarding the provisions of chapter 16 of the Code of Civil Procedure. The court violated the rights of the author's legal representative under article 47 of the Code of Civil Procedure and breached article 170 of the same Code by dismissing his motions to adjourn the hearing due to the change in judge. The court violated the principle of equality of arms by visibly favouring the claimant's position. It did not examine the material in the case file that indicated that Mr. I. had recognized his family ties to the former Prime Minister. Instead, the Court reached the deliberately false conclusion that Mr. I.'s ties to the former Prime Minister had not been established. The court stated, with reference to articles 141.3 and 143.1 of the Civil Code, that the author had to adduce evidence of the veracity of the imparted information. However, according to article 141.3, an individual who seeks judicial protection of his or her non-property rights has to prove their violation.

3.4 Whereas the case file contained two language expert assessments, the court took into account only one of them, without providing an explanation for its selective approach and despite the fact that the author's representative had repeatedly contested the legality of the selective assessment and had requested that another expert assessment be conducted instead. The contested assessment, conducted on 18 June 2012 by the Astana City Regional Forensic Research and Development Laboratory, referred to non-existent guidelines of the Ministry of Justice.<sup>8</sup> Instead of replying to the exhaustive list of questions drawn up by the court, the expert reformulated the questions, thereby contradicting articles 6, 18.1 (5) and 19 (2), (3) and (4) of the law on judicial expertise in Kazakhstan of 20 January 2010 and article 92, paragraphs 1 and 2, of the Code of Civil Procedure. By rejecting the author's request for another expert assessment, the court disregarded article 91.7 of the Code of Civil Procedure, according to which the court determines the exhaustive list of questions for the expert. The Court also did not take into account the provisions of paragraphs 4 and 8 of Supreme Court resolution No. 14 of 22 December 1989 on expertise in civil proceedings, according to which the court should order another expert assessment if an expert assessment is recognized as being illegal or unsubstantiated.

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<sup>7</sup> Whereas the judgment of the Supreme Court refers only to an appeal for supervisory judicial review by *Journalistskaya iniciativa*, the case file contains two appeals to the Supreme Court, dated 21 December 2012, one signed by the author and the other signed by the director of *Journalistskaya iniciativa*.

<sup>8</sup> The author states that the only document with a similar name available in the database of national legislation was no longer valid at the time the assessment was conducted.

3.5 The author argues that the first instance court overstepped its authority by ordering an official apology, which is not provided for in national legislation. The author believes that the order to publish an apology occupying 10 cm<sup>2</sup> was imprecise and absurd. He argues that the court did not take into account two relevant resolutions of the Supreme Court, No. 6 of 18 December 1992 concerning judicial application of legislation on the protection of honour, dignity and professional reputation, and No. 3 of 21 June 2001 concerning judicial application of legislation on compensation for moral damage.<sup>9</sup> The court arbitrarily satisfied the claimant's request for compensation for moral damage without providing any justification and despite the absence of any objective negative consequences for the claimant. The author submits that Mr. I. had confirmed to the court that the published article had not had any negative impact on his work. His allegation of damage caused to his professional reputation is his subjective assumption. The author believes that Mr. I.'s rights were not violated as far as his professional reputation is concerned. The court did not enquire into the financial situation of the defendants and did not take into account its own conclusions that the article did not damage the claimant's honour and dignity. The court's conclusion that the illustration depicting Mr. I. as a playing card affected his dignity and was not depicted "in a free form"<sup>10</sup> is unsubstantiated. The illustration is a visual metaphor that accompanies the text about staff appointments in the public sector. The illustration includes a photograph in which Mr. I. is posing in front of the media at a public meeting. The court indicated that, when calculating the amount of compensation, it took into account the public attention attracted by the article and the public's negative attitude towards the authorities, particularly the claimant. However, the court did not analyse which segment of the public read the article. Moreover, the court acknowledged that the public already had a negative opinion of the claimant, notwithstanding the author's article. The court heard two health experts because the claimant alleged that the moral damage he had suffered had led to his hospitalization. However, the claimant was hospitalized for planned preventive treatment relating to a chronic disease.<sup>11</sup> The court's conclusions in this regard are unsubstantiated and the experts' declarations were misinterpreted. Given the court's bias, the author's counsel submitted a well-substantiated motion for withdrawal of the judge, which was illegally dismissed. During the oral hearing, the author's counsel again expressed mistrust towards the judge, but this and his other arguments in oral proceedings were not reflected in the judgment.

3.6 The author claims that the State party violated article 2 (3) (a)–(c) of the Covenant because it did not ensure his right to a fair trial. His trial was politically motivated, his procedural rights were disregarded, and the court dismissed all the defence motions without providing any reasoning.

3.7 The author submits that half of his income is being deducted to pay for the enormous amount of compensation ordered by an unfair and unsubstantiated court judgment. The violation of his rights will continue for at least 10 more years because he cannot use this money for his family's needs, including those of his two minor children.

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<sup>9</sup> The author notes that, according to the first resolution, if contested information is recognized by the court as true or if it does not damage honour, dignity or reputation, requests for refutation are not granted. He also notes that, according to the second resolution, when determining the amount of compensation for moral damage, courts have to take into account both the subjective assessment by the citizen of the gravity of his or her moral and physical suffering and the objective evidence of the damage. They can, in addition, take into account the family and financial situation of the defendant.

<sup>10</sup> The court dismissed the author's argument that, since the claimant was a public figure, his consent to publish his photograph was not necessary "because this image was depicted not in a free form but in the form of a playing card, the ace of hearts, and the court therefore considers publication of the complainant's image in this form as insulting his dignity" (decision of 20 July 2012 of Uralsk City Court No. 2).

<sup>11</sup> The judgment refers to hospital records indicating that Mr. I. was hospitalized between 3 and 14 February 2012 due to acute exacerbation of chronic pancreatitis. The judgment also refers to statements from Mr. I.'s physician, according to whom this condition is most often caused by stress, and to statements from an expert proposed by the defence, according to whom the condition is provoked by bacteria present in the person's body, consumption of medication over a long period of time and stress. The court concluded that there was a causal link between the publication of the author's article on 2 February and Mr. I.'s hospitalization on 3 February.

3.8 The author's freedom of movement has also been limited because he has been prohibited from leaving the territory of the State party until he has paid the total amount of the financial compensation ordered by the court.

3.9 The author requests that the Committee confirm the alleged violations of the Covenant and recommend that the State party take all necessary measures to revoke the illegal judicial decision and sanction those responsible for its adoption.

#### **State party's observations on admissibility**

4.1 On 12 March 2015, the State party informed the Committee that the Prosecutor General's Office had requested materials relating to all civil proceedings mentioned in the communication. If, upon their examination, violations of law committed by the judicial authorities were revealed, a complaint would be lodged against those decisions, pursuant to the procedure provided for by civil procedural legislation.

4.2 Given that the possibility exists to scrutinize the legality and substantiation of judicial decisions and to order their revision, the State party claims that the author has not exhausted all available domestic remedies and contests the admissibility of the communication pursuant to article 5 (2) (b) of the Optional Protocol.

#### **State party's observations on the merits**

5.1 On 30 July 2015, the State party provided its observations on the merits.

5.2 Regarding the author's claims under article 19 of the Covenant, the State party argues that he was not subjected to discrimination of any kind. The author openly pursues his journalistic activities and expresses his views and opinions. Article 20 of the State party's Constitution guarantees freedom of expression and prohibits censorship. Everyone has the right to freely receive and impart information by any means that are not prohibited by law. This constitutional right is ensured by various penal sanctions for hampering the legal professional activities of journalists and other representatives of the media. On 1 January 2015, a new edition of the Criminal Code entered into force increasing criminal liability for impeding the legal professional activities of journalists. Criminal liability was introduced under 158 of the Code for creating conditions which impede the exercise by journalists of their legal professional activities or deprive them of such a possibility. A new article 159 was added to the Code providing for criminal liability for illegal limitation of the right of access to information resources.

5.3 Nevertheless, the State party notes that, pursuant to article 12 of the Constitution, the exercise of human rights and freedoms must not result in violation of the rights and freedoms of other individuals. Pursuant to article 21 of the law on the mass media, journalists are obliged not to impart information which does not reflect reality and they must respect the legal rights and interests of natural and moral persons. This provision is in compliance with article 19 (3) of the Covenant, according to which the exercise of the rights provided for in its paragraph 2 carries with it special duties and responsibilities. The freedom to impart information may therefore be subject to certain restrictions, such as are provided by law and are necessary for respect of the rights or reputations of others, or for the protection of national security or of public order, or of public health or morals. The State party submits that the judgment of the first instance court was based on article 145 of the Civil Code, according to which no one has the right to use images of other individuals without their consent. The court found that Mr. I. had not consented to the use of his image. The State party notes that, according to the psycholinguistic analysis of the author's article conducted on 18 June 2012 by the Astana City Regional Forensic Research and Development Laboratory, the general objective of the author's text was to provide information about Mr. I.'s career progression resulting from his family ties to Mr. T. While no information damaging the claimant's honour and dignity was revealed, the expert concluded that the text contained affirmations that Mr. I.'s career progression was linked to his family ties to Mr. T., which could be viewed as aiming to undermine Mr. I.'s professional reputation. The claimant presented hospital records indicating that he was treated in the regional clinical hospital between 3 and 14 February 2012, with the following diagnosis: "Chronic pancreatitis. Painful, acute exacerbation. A moderately severe state". According to Mr. I.'s physician, the illness had been provoked by stress. Taking into account these explanations, the court concluded that there was a causal link between the author's article and the claimant's illness. The court did not commit any

violation of substantive or procedural law. The decision was confirmed by higher judicial instances. The Prosecutor General's Office confirmed the legality of the judicial decisions.

5.4 Concerning the author's claims under article 2 of the Covenant, the State party notes that article 13.2 of its Constitution guarantees individuals the right to judicial protection of their rights and freedoms. Article 8 of the Code of Civil Procedure provides that everyone has the right to seek judicial protection against violation of their constitutional rights, freedoms and legal interests. Article 22 of the Code guarantees the freedom to contest judicial acts. Litigating parties have the right to the revision of judicial acts by a higher tribunal. The State party informs the Committee that, in addition to the lawsuit brought by Mr. I., its courts have examined three other defamation civil claims against the author. Upon the author's request, the legality and substantiation of all court judgments have been verified by higher judicial instances. Therefore, the author was ensured an effective remedy and the possibility of judicial protection, as required by article 2 (3) (a) and (b) of the Covenant.

5.5 The State party claims that it has respected the author's rights to equality before the law, the courts and tribunals and his right to a fair and public hearing by a competent, independent and impartial tribunal, as required by articles 14 (1) and 26 of the Covenant. Article 14.1 of the State party's Constitution provides for the principle of equality before the law and the courts. According to article 14.2 of the Constitution, no one shall be subjected to discrimination for reasons of origin, social status, financial status, occupation, sex, race, nationality, language, attitude towards religion, conviction, place of residence or for any other reason. The author was ensured his right to provide evidence to refute the claimant's allegations and the litigating parties enjoyed equal procedural rights. According to article 13 of the Code of Civil Procedure, justice in civil proceedings is administered pursuant to the principle of equality before the law and the courts. No citizen participating in civil proceedings can be favoured or discriminated against based on his or her origin, social, professional or financial status, sex, race, nationality, language, attitude to religion, conviction, place of residence or for any other reason.

5.6 The State party claims that its courts examined the civil claims against the author in compliance with article 16 of the Code of Civil Procedure, which stipulates that the judge assesses evidence according to his or her inner conviction based on impartial and thorough examination of evidence and is guided by law and conscience. No evidence has predetermined weight for the judge. The judge bases a procedural decision only on evidence, which can be examined by all litigating parties on an equal basis (Code of Civil Procedure, art. 15.3). The adversarial principle and the principle of equality of arms are guaranteed by article 15 of the Code of Civil Procedure. The parties have equal procedural rights and obligations. The judge is independent and obeys only the Constitution and the law. Any interference with the court's administration of justice is unacceptable and is legally punishable. Judges are not accountable for specific cases (Constitution, art. 77). The guarantees of independence of judges and their legal status are regulated by the constitutional law on the judicial system and the status of judges of 25 December 2000.

5.7 The State party notes that the author has provided no evidence that officers of the National Security Committee of the Zapadno-Kazakhstanskaya region requested that he be fired from the *Uralskaya Nedelya* newspaper or that his car was repeatedly stopped by the road patrol. These allegations have not been reported to regional law enforcement bodies.

5.8 Concerning the author's allegations of inefficient criminal investigation into his attempted murder, the State party submits that it has been established that on 19 April 2012, two unidentified persons wounded the author by stabbing him with a knife eight times and by firing at him twice. On 20 April 2012, a criminal case was opened. Three persons were arrested and confessed that they had committed the crime in exchange for US\$ 10,000 paid by Mr. T. On 10 July 2013, Mr. T. was convicted to 15 years of imprisonment and the other three individuals were convicted to 11 and 12 years of imprisonment. The judgment has become final. It has been established that Mr. T. and other unidentified persons were the main organizers of the crime. On 25 February 2013, the Ministry of Internal Affairs opened a criminal investigation into the organization of the attempted murder. On 24 August 2014, Mr. T. was convicted to 14 years of imprisonment.

5.9 The State party concludes that it has respected the provisions of articles 2 (3) (a) and (b), 14 (1), 19 and 26 of the Covenant and that the communication should be rejected as unsubstantiated.

**Author's comments on the State party's observations on the merits**

6.1 On 15 November 2016, the author submitted his comments on the State party's observations on the merits.

6.2 Regarding the State party's submissions under article 19 of the Covenant, the author considers the information about the introduction on 1 January 2015 of more stringent provisions on criminal liability under articles 158 and 159 of the Criminal Code to be irrelevant because these legal provisions did not exist at the time that his rights were violated. The author adds that the State party conceals the fact that the Criminal Code also includes the following provisions: article 131, on slander, article 174, on incitement to social, national, family, class and religious hatred, article 183 on consent to publication of information and materials in the press and other mass media and article 274 on deliberate imparting of false information, all of which can easily be used for the criminal prosecution of any journalist who touches upon subjects which are "uncomfortable" for the executive. Despite numerous proposals from human rights organizations and civil society, article 131 on slander remained in the new version of the Criminal Code and, in addition, a new article 274 was introduced providing sanctions of up to 10 years of imprisonment for the deliberate imparting of false information. The ambiguous wording of this provision makes it possible to apply it to any journalist who criticizes the authorities and imparts information about corruption. Therefore, the State party's arguments do not reflect the reality of journalists' legal activities being hampered and their facing the risk of criminal prosecution for dissident opinions.

6.3 Regarding the State party's observations under articles 14 (1) and 26 of the Covenant, the author submits that the existence of a "marvellous" Constitution and of provisions of domestic legislation does not in itself mean that they are respected. Neither the author nor his legal representative was able to exercise his legal rights. In violation of his representative's rights under article 47 of the Code of Civil Procedure and in violation of chapter 16 of the same Code, the oral motion for adjourning the hearing due to the change of judge was not granted. By failing to examine the materials in the case file indicating that the claimant had recognized his family ties to Mr. T, the court deliberately reached a false conclusion that the family ties had not been established.

6.4 In relation to the State party's claim that the author's case was examined by a competent court, he notes that he submitted 10 written requests for withdrawal of the judge. Each time, the judge went to the deliberation room and adopted decisions rejecting her own withdrawal. According to the author, this can be explained either by the judge's lack of competence or by flagrant arbitrariness. The author also challenges the judge's competence in view of the resolute part of the decision which orders the defendants to publish an official apology. First, national legislation does not provide for public apologies in defamation cases. Second, the requirement to publish an apology occupying 10 cm<sup>2</sup> is absurd. As for the court's alleged fairness and impartiality, the author notes that the court ordered him to pay an enormous amount of compensation (considering the social and economic situation in Kazakhstan) for publishing true information. The author underlines that four years after the facts, he is still having to pay compensation for the "moral damage" suffered by the former chief of the Department of Internal Affairs, as a result of which his family is undergoing economic hardship owing to judicial arbitrariness.

6.5 Regarding the State party's reference to the judicial language expert assessment as proof of legality and substantiation of the court decision, the author notes that the expert assessment was conducted with numerous violations of substantive law and the court's reference to it confirms the court's partiality. The author reiterates that the case file contained two linguistic assessments, but the court took only one of them into account, without providing reasons for such a selective approach. The author notes that he submitted many written requests for another expert assessment to be conducted due to the fact that the expert had overstepped her authority and gone beyond the questions formulated by the court, contrary to the provisions of article 91.7 of the Code of Civil Procedure. The author reiterates his previous submissions on the unlawful and subjective nature of this expert assessment. These violations of national law reveal direct violations of article 14 (1) of the Covenant and of paragraph 3 of the Committee's general comment No. 13 (1984).

6.6 The author submits that Mr. I.'s defamation claim is far-fetched because the disputed text contained no negative assessment, as recognized by both experts. The court satisfied Mr. I.'s claim for compensation for damage to his professional reputation by using the illegal

expert assessment and by applying a subjective and partial approach. After failing to examine the materials in the case file indicating that the claimant had recognized his family ties to Mr. T., the court deliberately reached a false conclusion that the family ties had not been established. The author submits that the State party failed to substantiate the degree of the alleged moral damage caused to the public official and to provide legal assessment of violations of substantive and procedural law committed by courts of all instances.

6.7 The author argues that the individuals who ordered his murder have not been identified. Nevertheless, he states that this criminal case has no relation to his communication and was mentioned only as part of the chronological story of his systematic persecution, which culminated in an attempt on his life.

6.8 The author concludes that the State party has violated articles 2 (3) (a) and (b), 11, 12, 14 (1), 19 and 26 of the Covenant.

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

7.1 On 29 May 2017, the State party provided its additional observations.

7.2 Concerning the author's claim that articles 131, 174, 183 and 274 of the Criminal Code enable criminal prosecution of journalists who touch upon subjects that are uncomfortable for the executive, the State party asserts that its criminal legislation does not favour censorship of information about public officials. A distinction is made between deliberate dissemination of false information and critical observations, which are not criminally punishable. According to article 17 of the Constitution, human dignity is inviolable. The State ensures the inviolability of its citizens' honour and dignity by imposing criminal liability for slander and imparting false information, taking into account the high public danger of these infractions. Slanderous allegations may cause irreparable harm to a person's family and personal life, undermine his or her reputation and damage his or her professional career and health. In 20 member States of the European Union that have become parties to international acts on the decriminalization of slander (defamation), including France, Germany, Italy, Poland and Spain, slander continues to be criminally punishable. Several States, such as the Russian Federation and Ukraine, have brought provisions on slander and insult back into their criminal legislation after having temporarily decriminalized them. According to many experts, decriminalization of slander led to impunity. The State party considers that it respects the balance between private and public interests with regard to criminal liability for defamation, in accordance with the Covenant.

7.3 The State party reiterates its observations on the compatibility of the provisions of article 12 of its Constitution and of article 21 of the law on the mass media with article 19 (3) of the Covenant with regard to permissible restrictions on the freedom to impart information.

7.4 The State party reiterates its observations regarding the effectiveness of the investigation into the author's attempted murder.

7.5 Concerning the author's claim that the State party did not substantiate the amount of compensation for moral damage that he had to pay to the public officials, the State refers to resolution No. 7 on the application by the courts of legislation on compensation for moral harm, adopted by the Supreme Court on 27 November 2015. Article 952 of the Civil Code provides for pecuniary compensation for moral damage. The amount of compensation is determined by the court on the basis of the criteria of reasonableness and justice. In order to determine the amount of compensation for moral damage, courts take into account both the subjective assessment by the citizen of the gravity of his or her moral and physical suffering and the objective evidence, such as the importance of individual tangible and intangible assets and rights (to life, health, freedom, inviolability of home, personal and family secret, honour and dignity, etc.), the degree of the moral and physical suffering experienced by the victim (deprivation of freedom, physical harm, loss of close relatives, loss or restriction of the ability to work, etc.) and, where relevant, the intent or negligence of the perpetrator. The court can also take into account other circumstances, particularly the family and financial situation of the person responsible for the moral damage.

7.6 The State party submits that the author did not adduce convincing evidence of the veracity of the information he imparted. Concerning his claim that the language expert analysis was illegal, the State party asserts that this claim is unsubstantiated. When recognizing the published information as damaging to Mr. I.'s professional reputation, the

court was guided by an independent expert assessment conducted at the court's order. The expert possessed the required work experience and qualifications, committed no violations while conducting the expertise and was warned about her potential criminal liability.

7.7 The State party concludes that the communication should be rejected as it is unsubstantiated pursuant to articles 2, 3 and 5 of the Optional Protocol.

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

#### *Consideration of admissibility*

8.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

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

8.3 The Committee takes note of the State party's argument that domestic remedies have not been exhausted owing to the possibility of prosecutorial review. However, the Committee recalls its jurisprudence, according to which a petition to a prosecutor's office requesting a review of court decisions that have entered into force and depending on the discretionary power of a prosecutor constitutes an extraordinary remedy and the State party must show that there is a reasonable prospect that such requests would provide an effective remedy in the circumstances of the case.<sup>12</sup> The Committee notes that, in a letter dated 9 July 2013, the author filed a supervisory review appeal to the Prosecutor General of Kazakhstan and that his appeal was denied on 6 August 2013. The Committee considers that the State party has not demonstrated that another petition for supervisory review to the Prosecutor General would have been an effective remedy in the author's case. Accordingly, the Committee finds that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

8.4 The Committee takes note of the author's allegations under articles 11 and 12 of the Covenant. Nevertheless, the Committee notes that the author does not explain why he believes that his right under article 11 of the Covenant not to be imprisoned merely on the ground of his inability to fulfil a contractual obligation has been violated. With regard to article 12, the Committee notes that, in his initial communication, the author claims that his right to liberty of movement has been violated due to the prohibition on his leaving the territory of the State party until he has paid the total amount of the compensation ordered by the court. However, the author does not provide any further information to substantiate this claim. Furthermore, the Committee notes that none of the author's claims under articles 11 and 12 of the Covenant appear to have been raised at any point during the domestic proceedings. Pursuant to articles 2 and 5 (2) (b) of the Optional Protocol, the Committee therefore declares these claims inadmissible for lack of substantiation and failure to exhaust domestic remedies, respectively.

8.5 The Committee notes the author's argument that his right to a fair hearing by a competent, independent and impartial tribunal under article 14 (1) of the Covenant was violated due to the unlawful and arbitrary nature of the court's order to publish an official apology. Nevertheless, the Committee notes that the decision of the first instance court was quashed by the court of cassation. With regard to the author's claim of a violation of article 14 (1) due to the unlawful dismissal of his multiple written requests for withdrawal of the judge, the Committee notes that these claims are not supported by the material in the case file. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol due to lack of substantiation.

8.6 With regard to the alleged violation of article 26 of the Covenant, the Committee considers that the author's claim that he was denied the right to equality before the law and to the equal protection of the law without any discrimination is insufficiently substantiated

<sup>12</sup> For example, *Suleymenova v. Kazakhstan* (CCPR/C/126/D/2416/2014), para. 8.3; *Toregozhina v. Kazakhstan* (CCPR/C/126/D/2311/2013), para. 7.3; and *Insenova v. Kazakhstan* (CCPR/C/126/D/2542/2015-CCPR/C/126/D/2543/2015), para. 8.3.

for the purposes of admissibility, and is thus inadmissible under article 2 of the Optional Protocol.

8.7 With regard to the author's claims under article 2 (3) of the Covenant that the State party failed to ensure his right to a fair trial, the Committee recalls its jurisprudence to the effect that the provisions of article 2 of the Covenant set forth a general obligation for States parties and cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol.<sup>13</sup> Consequently, the Committee declares this part of the communication to be incompatible with the provisions of the Covenant and inadmissible under article 3 of the Optional Protocol.

8.8 The Committee considers that the author has sufficiently substantiated his remaining claims under articles 14 (1) and 19 of the Covenant, for the purposes of admissibility. It therefore declares the communication admissible and proceeds with its 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 to it 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 the State party violated his right to a fair and public hearing by a competent, independent and impartial tribunal under article 14 (1) of the Covenant because of the court's biased approach to litigating parties, its refusal to take into account the arguments of the defence, the incorrect application of national law and the failure to take into account relevant international law.

9.3 The Committee recalls that the requirement of competence, independence and impartiality of a tribunal in the sense of article 14 (1) is not subject to any exception.<sup>14</sup> The requirement of impartiality has two aspects. First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial.<sup>15</sup> The Committee recalls that article 14 guarantees procedural equality and fairness only and cannot be interpreted as ensuring the absence of error on the part of the competent tribunal. It is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.<sup>16</sup>

9.4 The Committee notes the author's claim, unrefuted by the State party, that the first instance court started hearing the case while the author was hospitalized in a serious state, following the attempt on his life. The Committee also notes the author's claim that the first instance court concluded that the imparted information was false in nature, despite the existence of proof of its veracity in the minutes of a hearing. The Committee further notes the author's uncontested allegation that the first instance court exclusively based its findings on one of the two expert assessments available in the case file, without providing an explanation for this selective approach. In the light of all the above, and in the absence of any clarifications by the State party in this regard, the Committee considers that the material before it discloses a violation of article 14 (1) of the Covenant.

9.5 The Committee notes the author's allegations that his rights under article 19 of the Covenant were violated because he was ordered to pay compensation for moral damage caused to a public official following the court's finding that the author's article contained untrue information that was damaging to the professional reputation of the claimant and that

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<sup>13</sup> For example, *Delgado Burgoa v. Plurinational State of Bolivia* (CCPR/C/122/D/2628/2015), para. 10.7.

<sup>14</sup> Human Rights Committee, general comment No. 32 (2007), para. 19.

<sup>15</sup> *Ibid.*, para. 21.

<sup>16</sup> *Ibid.*, para. 26. For example, *Martínez Mercader et al. v. Spain* (CCPR/C/84/D/1097/2002), para. 6.3; *Riedl-Riedenstein et al. v. Germany* (CCPR/C/82/D/1188/2003), para. 7.3; and *Schedko v. Belarus* (CCPR/C/77/D/886/1999), para. 9.3.

an illustration accompanying the article had hurt the claimant's dignity. The Committee also notes the State party's argument that the court correctly applied its national law, which allows for restrictions to freedom of expression only as authorized by article 19 (3) of the Covenant. The Committee must thus determine whether the measures taken against the author can be justified under article 19 (3) of the Covenant.

9.6 The Committee refers to its general comment No. 34 (2011), according to which freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society and constitute the foundation stone for every free and democratic society (para. 2). According to article 19 (3) of the Covenant, the right to freedom of expression can be subject to certain restrictions, but only such as are provided by law and are 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 (para. 28). All restrictions imposed on freedom of expression must be provided by law. They may only be imposed on the basis of the grounds set out in subparagraphs (a) and (b) of article 19 (3) and they must conform to the strict tests of necessity and proportionality.

9.7 The Committee recalls that a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output (paras. 13 and 20). In circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high. Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant (para. 38). Moreover, the Committee recalls that States parties should recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources (para. 45).<sup>17</sup>

9.8 The Committee recalls that defamation laws must be crafted with care to ensure that they comply with article 19 (3) of the Covenant and that they do not serve, in practice, to stifle freedom of expression. All such laws should include such defences as the defence of truth. With regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. Where relevant, States parties should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party.<sup>18</sup>

9.9 Turning to the facts of the case, the Committee notes the State party's observation that the national courts established that the author's article and the accompanying illustration undermined Mr. I.'s reputation, hurt his dignity and caused him stress, leading to a deterioration in his state of health. Nevertheless, the Committee considers that it does not transpire from the material before it that, while assessing the proportionality of the restriction, the national courts took into account the public interest of the author's article, which was devoted to corruption among local public authorities, and the fact that the claimant was a high-ranking public official, in respect of whom the value of uninhibited expression in public debate is particularly high. The Committee also takes note of the author's argument, reiterated before the national courts and unrefuted by the State party, that Mr. I. recognized the veracity of the imparted information before the court and that his acknowledgement was

<sup>17</sup> According to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, if journalists were not able to promise confidentiality to their sources "many voices would remain silent and the public uninformed" (A/70/361, para. 14). On the need to protect in law and in practice the confidentiality of journalists' sources, see also Human Rights Council resolutions 33/2, paras. 12–13, and 39/6, paras. 13–14.

<sup>18</sup> Human Rights Committee, general comment No. 34 (2011), para. 47.

included in the minutes of the hearing. The Committee notes that by deducing the false nature of the imparted information from the author's refusal to disclose the name of his source, the national courts did not take into account the importance of protecting journalistic sources. The Committee also notes that, whereas the domestic courts recognized that the accompanying illustration damaged the claimant's dignity, they did not refute the author's argument that the photograph used in the illustration had been taken at a public event, where Mr. I. had posed in front of the media. The Committee further notes that the court ordered compensation without seemingly taking into account the aforementioned considerations. In the light of the above, and taking into account the disproportionate amount of compensation imposed on the author, the Committee considers that it does not appear that the national courts made an appropriate attempt to strike a fair balance between protection of the claimant's rights and reputation, on one hand, and the author's right to impart information of public interest and the public's right to receive it, on the other hand.

9.10 In the light of the above, the Committee considers that the State party has failed to justify that the restriction of the author's freedom of expression was proportionate to the legitimate aim pursued, as set out in article 19 (3) of the Covenant. Accordingly, the Committee concludes that the facts before it disclose a violation of the author's rights under article 19 of the Covenant.

10. 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 articles 14 (1) and 19 of the Covenant.

11. Pursuant to 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, including compensation for moral damage imposed on him and any legal costs incurred by him at the national and international levels. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant 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 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 official languages of the State party.

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