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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3006/2017**, ***

Communication submitted by:	Aleksandr Povstyuk (represented by Snezhanna Kim and Olga Peskov)
Alleged victim:	The author
State party:	Kazakhstan
Date of communication:	18 March 2014 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 15 November 2017 (not issued in document form)
Date of adoption of Views:	12 July 2023
Subject matter:	Arbitrary arrest and detention; denial of medical assistance; persons with disabilities; fair trial
Procedural issue:	Sufficient substantiation
Substantive issues:	Arbitrary arrest; arrest, transportation and pretrial detention of persons with disabilities; criminal conviction based on perjury
Articles of the Covenant:	2 (3), 7, 9 (1), (3) and (4) and 14 (1) and (3) (d) and (e)
Articles of the Optional Protocol:	2 and 5

1. The author of the communication is Aleksandr Povstyuk, a national of Ukraine born in 1983. He claims that Kazakhstan has violated his rights under article 7, read alone and in conjunction with article 2 (3), and articles 9 (1), (3) and (4) and 14 (1) and (3) (d) and (e) of the Covenant. The Optional Protocol entered into force for Kazakhstan on 30 September 2009. The author is represented by counsel.

* Reissued for technical reasons on 11 March 2024.

** Adopted by the Committee at its 138th session (26 June–26 July 2023).

*** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Farid Ahmadov, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Carlos Gómez Martínez, Laurence R. Helfer, Marcia V.J. Kran, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Kobauyah Tchamdja Kpatcha, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu.

Factual background

2.1 In his communication of 18 March 2014, supplemented on 23 September 2014 and 22 November 2016, the author and his father, to whom the author granted power of attorney, present the facts set out below.

2.2 In 2007, the author suffered a spinal fracture in a car accident. A plate was installed at the site of the fracture. Following that trauma, any physical activity caused him pain, and he walked with a crutch. At the time of the accident, the author did not have a criminal record.

2.3 On 9 May 2011, at 11 a.m., someone claiming to be a police officer rang the doorbell at the author's apartment and informed him that his neighbours had complained about a loud noise. When the author opened the door, two men rushed in and forcibly removed him from the apartment without presenting any documents or explaining their reasons. His father later contacted the municipal police but was told that the author had not been arrested and that no complaint had been submitted about noise in the apartment.

2.4 The author was brought to the transport police department for Kostanay station. His requests to call his pregnant wife were ignored. At 2.30 p.m., a senior investigator from the transport police told the author that he was going to be interrogated in connection with the murder of a train driver on 2 July 2006. The author, who in 2006 had worked as the director of a fuel depot, was told that he was suspected of having assaulted a member of the train crew. The author rejected the investigator's suggestion that he invite an attorney to the interrogation, stating that he had already testified about the assault as a witness in 2006. The author was not informed of his rights during the detention and interrogation on 9 May 2011, including his right not to testify against himself. He received no procedural documents about his status as a suspect or otherwise.

2.5 At 4.30 p.m., the investigator told the author that he was going to be arrested under article 132 of the Code of Criminal Procedure, which sets forth the grounds for an arrest. The author asked for an attorney. He was allowed to use the telephone but was unable to reach an attorney because it was a public holiday. He informed the investigator of that fact, but the latter said that he had no time to wait.

2.6 The author's arrest was recorded at 5 p.m. At 5.15 p.m., the author's father was informed that the author had been arrested and would be transported to Karaganda, where a murder and an assault had been committed in 2006. The investigator did not respond to the objections raised by the author's father, namely that the author had a fractured spine and that transporting him approximately 1,000 km in an off-road vehicle could negatively affect his health.

2.7 The author was transported in a car for 15 hours without a break and had no access to water or food. He was very uncomfortable and in pain.

2.8 Upon arriving in Karaganda on 10 May 2011, the investigator hastily arranged for an identity parade and a face-to-face confrontation between the author and B, a victim who had suffered injuries during the assault of 2 July 2006 and was an assistant of the murdered train driver, to be carried out in the presence of a duty attorney, without waiting for the author to retain counsel of his choosing.

2.9 On 2 June 2011, the author's father submitted a complaint to the Prosecutor General of Kazakhstan. According to the complaint, the author had been arrested at 11 a.m. on 9 May 2011 by police officers who had not shown their identity documents, and he had not been allowed to contact his family until 5 p.m., which prompted his family to submit a complaint of kidnapping. In the complaint to the Prosecutor General, his father also referred to the author's transportation to Karaganda in a car not adapted to his disability and to the fact that the identity parade and face-to-face confrontation had been conducted in the presence of a duty attorney, who had not raised objections to violations of criminal procedure law.

2.10 On 8 June 2011, the author submitted a complaint to the investigator, with copies sent to the Transport Prosecutor for Karaganda Province, the Chief Transport Prosecutor of Kazakhstan, the Prosecutor General of Kazakhstan and the Human Rights Commissioner. He complained about his violent arrest by unidentified men on 9 May 2011, which had resulted in his family reporting a kidnapping to the Kostanay municipal police in view of his

incommunicado detention for six hours, and his transportation for approximately 1,000 km to Karaganda in conditions incompatible with his health, despite his and his father's oral protests. The author noted that an X-ray examination had revealed that one of the screws used to fix his spinal plate in place had become detached[1] and suggested that its detachment might have been a consequence of his transportation. In addition, it was asserted in the complaint that, on 10 May 2011, the author had been placed in a temporary detention facility in Karaganda without medical assistance. On the basis of those allegations, the investigator was accused in the complaint of intentional harm to the author's health.

2.11 The author complained that the identity parade and face-to-face confrontation on 11 May 2011 had been conducted without the presence of counsel of his choosing. He alleged a violation of article 228 (1) of the Code of Criminal Procedure, noting that other men in the identity parade had had starkly different physical features, had worn different clothes and, unlike him, had been clean-shaven. The author also noted that, unlike the other men in the identity parade, he had been seated. He complained that the investigator had interrupted the face-to-face confrontation when B had become nervous and that the investigator had not recorded B's contradictory statements. Lastly, the author noted that the duty attorney had not raised any objections.

2.12 By letter of 13 June 2011, the Chief Transport Prosecutor informed the author's father that measures of prosecutorial response would not be adopted. According to the letter, the case file contained the following information: the author had been arrested at 2 p.m. on 9 May 2011; his arrest had been recorded at 5 p.m., within three hours of his detention; his family had been informed of his arrest within the legal deadline; and the identity parade and face-to-face confrontation had been conducted in conformity with legal requirements and in the presence of two attorneys. The author infers from the letter that the Chief Transport Prosecutor did not conduct an investigation into his alleged kidnapping and illegal arrest and instead relied on the documents in the criminal case file, without questioning witnesses. The author's father decided not to challenge that decision before the Prosecutor General of Kazakhstan because he considered such a remedy to be ineffective and to have already been exhausted by him in the light of his complaint to the Prosecutor General of 2 June 2011.

2.13 On 7 July 2011, the Investigative Committee of the Ministry of Internal Affairs responded to the complaint submitted by the author on 8 June 2011. The Committee rejected the author's claims of illegal acts by the transport police, stating that, from the moment of his arrest, he had been assisted by attorneys. On 12 July 2011, the National Human Rights Centre informed the author that, according to the Office of the Chief Transport Prosecutor and the Investigative Committee, his arrest had been recorded within three hours of his being detained, his family had been informed within the legal deadline and he had been provided with counsel from the moment of his arrest.

2.14 On 9 August 2011, the author submitted a complaint regarding procedural violations during his arrest and the identity parade to the Office of the Transport Prosecutor for Karaganda Province. On 15 August 2011, the Transport Prosecutor rejected the complaint, stating that the prosecutor's office had been notified of the author's arrest in due time, that the author had been provided with counsel and that the identity parade had been carried out in compliance with article 229 of the Code of Criminal Procedure.

2.15 On 11 May 2011, the author was indicted on charges of offences under article 179 (2) (a) and (g) of the Criminal Code.[2] On 12 May 2011, District Court No. 2 of Oktyabrsky District, Karaganda, ordered his placement in pretrial detention for two months. On 13 May 2011, the author appealed to the Karaganda Provincial Court, claiming that the court of first instance had not justified his arrest on the basis of a risk that he would flee from prosecution. He pointed to the fact that no arrest warrant had been issued against him, that he resided with his family, including a minor son, and that he had been interrogated in 2006 in connection with the same criminal case. With reference to medical documents attesting to his spinal fracture, the author claimed that he was hardly able to walk and was undergoing

[1] See para. 2.18 below.

[2] These articles of the Criminal Code cover robbery committed by a group of people, by prior conspiracy, accompanied by violence that is dangerous for the life and health of persons and with the use of arms or other objects used as arms.

rehabilitation treatment and that his placement in pretrial detention would negatively affect his health. On 17 May 2011, the Karaganda Provincial Court upheld the ruling of 12 May 2011, referring to the gravity of the offence, the fact that the author resided in Kostanay, whereas the investigation was being carried out in Karaganda, and the lack of evidence that his detention was incompatible with his health.

2.16 By orders of 12 and 19 May 2011, the investigator requested the author's placement in temporary detention in Karaganda until 22 May and 2 June 2011, respectively. Both orders were approved by the Transport Prosecutor for Karaganda Province. On 23 May 2011, the author asked District Court No. 2 to quash those orders, claiming that his detention was unnecessary and incompatible with his health. He referred to medical documents attesting to his spinal fracture and claimed that he had a disability that needed constant medical attention and that his detention without medical assistance might have irreversible effects on his health. On 26 May 2011, District Court No. 2 upheld the orders of 12 and 19 May 2011. While acknowledging that the author had been hospitalized between 23 and 26 June 2007 for a vertebral fracture, the Court considered that the defence had not provided proof that the author required ongoing medical assistance and noted that medical assistance was guaranteed in detention facilities. The author claims that he was not notified of the date of the court hearing and therefore could not provide medical certificates confirming what he describes as the "terrible" state of his health.

2.17 On 25 May 2011, the author was transferred to temporary detention facility AK-159/1. Upon arrival, he underwent an examination by a medical commission consisting of a psychiatrist, a tuberculosis specialist, a specialist in dermatology and venerology, a surgeon, a dentist and a general practitioner. On 30 May 2011, the medical commission diagnosed him with a traumatic injury of the spinal cord associated with a nerve conduction disorder and a compression fracture of the lower thoracic spine. Between 26 May and 7 June 2011, he received symptomatic treatment for his spinal fracture as prescribed by a neurologist. The state of his health was then assessed by the neurologist as satisfactory and as not requiring any rehabilitation treatment.[3]

2.18 In addition, the author alleges that, on the same day, namely 25 May 2011, he underwent an examination at a regional medical centre. It was concluded in the examination report that the plate and screws installed on his spine should be removed and that he required routine stabilization surgery and medical oversight by a neuropathologist and a neurosurgeon. According to the author, the examination revealed that one of the screws holding his spinal plate in place was damaged and had become detached, which was dangerous for his life and required urgent medical intervention.

2.19 On 26 May 2011, the author submitted a complaint to the investigator, claiming a risk to his health in the detention facility and pointing to the lack of grounds for believing that he might flee from prosecution. He requested the substitution of his pretrial detention with house arrest or a signature bond.

2.20 According to the information provided by the author, while awaiting medical examination in AK-159/1 on 25 May 2011, he was placed in horrifying conditions and given food that reminded him of pig feed. He was then transferred to the medical unit, where conditions were close to humane and the food was better but insufficient. He was injected with an unknown medicine. At 9 p.m., he asked for a doctor because of intense pain and received a pain-relieving injection. He felt worse and asked for an ambulance. His request was denied, and he was given two pills. His questions about the type of medicine given to him were ignored. Once he had taken the pills, he slept for almost 24 hours. He was then examined by a neuropathologist, who prescribed medicine for him. On 20 June, he asked for that medicine but was told that his case file contained no prescriptions. On 22 and 26 June, he again requested medicine from the director of the medical unit, who replied angrily that the author had completed his treatment. On 2 July, the author refused to be examined by an

[3] These facts are corroborated by several documents: a letter dated 4 July 2011 addressed to the author's father by the director of facility AK-159/1; a letter dated 18 July 2011 addressed to the author's father by the Deputy Director of the Penal Correction Department for Karaganda Province; and a medical certificate dated 20 September 2011 and signed by a general practitioner and the director of the medical unit of facility AK-159/1.

external doctor. On 8 July, four doctors tried to convince him to sign a refusal of treatment form. On 12 July, he was visited by the director of the medical unit and the chair of a commission.[4] He described abuses that he had witnessed in the detention facility. On the same day, he was transferred to another building. His clothes became wet because of the humidity. The toilet was located inside the cell, separated from the main area by a low barrier. The author noted that, owing to his health condition, it would be hard for him to use the toilet. The cell, not bigger than 20 m^2, was occupied by six persons. The author assumed that he had been transferred to that cell, which was worse, because of his complaint to the chair of the commission.

2.21 By letter of 13 June 2011,[5] the Chief Transport Prosecutor confirmed that the author's placement in pretrial detention was well founded. Referring to a certificate provided by the director of the AK-159/1 medical unit and dated 9 June 2011, the Chief Transport Prosecutor concluded that the state of the author's health was satisfactory and did not preclude his detention. By letter of 25 July 2011, the Office of the Chief Transport Prosecutor responded to the author's father that the court had correctly imposed the restrictive measure of pretrial detention. On 12 July 2011, the National Human Rights Centre reiterated the findings of the Transport Prosecutor General regarding the fact that the author's health did not preclude detention in AK-159/1.

2.22 By letter dated 18 July 2011, the Deputy Director of the Penal Correction Department for Karaganda Province informed the author's father that, on 12 July 2011, the author had refused to be examined by a medical commission. The letter mentioned that the author had undergone a medical examination at AK-159/1 on 25 May 2011, had received treatment for a traumatic spinal cord injury between 26 May 2011 and 7 June 2011 and had been examined by a neuropathologist on 5 June 2011.

2.23 On 1 August 2011, the author requested the Karaganda Provincial Court to quash the judgment of District Court No. 2 of 29 July 2011 authorizing the extension of his detention until 9 September 2011. He claimed that his detention was unnecessary, pointing to the fact that he had permanent residency, that he owned real estate, that he resided with his family, that he supported two children and that he had no criminal record. He claimed that his detention could have a grave and irreversible impact on his health because he required professional medical treatment outside the detention facility. On 15 August 2011, the Transport Prosecutor for Karaganda Province stated that there were no grounds for his release.

2.24 The author claims that the investigative authorities falsified evidence against him. He submits minutes of the interrogations of B, conducted in 2006 and 2011, pointing to many inconsistencies in B's testimonies. Having declared on 2 July 2006 that he had seen the faces of two assailants whom he did not know, B stated on 25 July 2006 and 20 April 2011 that he had not seen the assailants because of the darkness. However, on 29 April 2011, B identified the author and two other men from photos shown to him. B declared that he had known the author and had seen him threaten the train driver at the service depot prior to the murder. The other two men identified by B later proved their alibis, and B admitted that he had identified them by mistake. No attempt was made during the investigation to clarify the contradictions in B's statements, for instance, by interrogating other people present at the service depot during the alleged altercation between the author and the train driver.

2.25 The author points to inconsistencies in the statements of a witness, R. On 3 August 2006, R stated that he did not know who had committed the crime, whereas, on 22 April 2011, he said that he suspected employees of the fuel and energy facility and, on 10 May 2011, he said that he had heard the dying train driver accuse the author. Five witnesses contradicted R's statement that he had been present at the scene of the crime.

2.26 Another victim of the assault, M, also provided conflicting testimonies. At one of the interrogations, he pointed to another man and that man's associates as possible perpetrators. Despite the fact that a rifle and bullets similar to those used in the crime were found in their

[4] The author does not specify to which commission he refers.

[5] See para. 2.12 above.

possession, criminal proceedings against them were dropped, and the man in question was called as a witness during the author's trial.

2.27 On 15 August 2011, the Chief Transport Prosecutor rejected the author's request for the recusal of the investigator and the head of the detective team, following the author's complaint that, on 10 August 2011, both men had pressured him to have a conversation without his counsel present.

2.28 On 21 September 2011, the author complained to the Chief Transport Prosecutor that the investigator had not informed him of the end of the preliminary investigation and his right to examine the criminal case file and to request a supplementary investigation and had given him insufficient time to examine the case file, which consisted of 10 volumes. On 6 October 2011, the Office of the Chief Transport Prosecutor rejected the author's complaint.

2.29 On 15 December 2011, the Specialized Inter-District Court of Karaganda Province convicted the author of murder, robbery and fraud and sentenced him to 13 years of imprisonment in a maximum-security facility and to confiscation of his property. In relation to the murder and robbery, the court relied on what it called the "consistent" testimonies of B, who claimed on three occasions to have seen the author among the assailants: he made that claim in court, during his face-to-face confrontation with the author and during an on-site verification of witness statements on 31 May 2011. In addition, the court referred to what it called the "corroborating" testimony of R, who claimed to have heard the dying train driver accuse the author, and to the testimonies (both of which were read out in court) of two men who stated that the author had shared a cell with them and had confessed to having participated in the assault. M, another victim, who had been injured during the assault, stated in court that he had not seen the author because of the darkness. The author argues that the court rejected without justification all his motions to interrogate witnesses who could have confirmed his innocence.

2.30 On 12 December 2012, the author submitted a cassation appeal[6] to the Cassation Judicial Panel for Criminal Cases of the Karaganda Provincial Court. He challenged the falsification of witness statements by the investigators, the court's failure to summon several witnesses, inconsistencies in B's statements of 2006 and 2011 and his physical differences from the other men included in the identity parade. On 13 December 2012, the author's attorney provided his own submission to the Cassation Judicial Panel. Referring to the testimonies of victims and witnesses, the attorney stated that the author's conviction was based on evidence falsified by the investigators and obtained by perjury and that the court had not verified the veracity, admissibility and sufficiency of that evidence, pointing to inconsistencies in B's and R's statements. The attorney claimed that the author's former cellmates had provided false statements, which included details that could only have been known to the investigator, and referred to the fact the court had accepted the results of the identity parade even though B had previously been shown a photo of the author. On 8 February 2013, the Court returned the attorney's submission without examination on the grounds that the attorney had not participated in the trial and that his submission did not contain the author's signature. By a judgment of 19 February 2013, the Cassation Judicial Panel of the Karaganda Provincial Court excluded confiscation of property from the punishment and upheld the rest of the verdict, stating that the author's guilt had been proved by the statements of the train driver's widow, B and M,[7] the testimonies of eight witnesses, written evidence, including forensic medical and biological analyses, a forensic accounting analysis, a report on the identity parade, a report on the face-to-face confrontation and a report on the on-site verification of witness statements, and other evidence.

2.31 By decisions of 26 May 2012 and 18 June 2013, the Office of the Prosecutor General of Kazakhstan found that no violations of criminal procedure law had been committed that would warrant a protest against the author's conviction.

2.32 On 29 July 2013, the Supervisory Judicial Panel for Criminal Cases of the Supreme Court rejected the author's request for review, stating that his guilt in the murder and robbery

[6] The author did not appeal the verdict. See para. 5.6 below.

[7] Neither the train driver's widow nor M identified the author as an assailant, according to the verdict of 15 December 2011.

had been proved by the statements of B and M, from which, the panel concluded, it appeared that the author had personally shot at the train driver and B, those statements being consistent with testimonies, forensic medical reports, the reports on the identity parade, the on-site verification of testimonies and the face-to-face confrontation and other evidence.

2.33 On 11 April 2013, the author lodged a complaint against his conviction with the President of Kazakhstan.[8]

2.34 In May 2013, the author filed complaints with the Prosecutor General and the Prosecutor for Karaganda Province, claiming that the evidence against him had been falsified and requesting the initiation of criminal proceedings against the investigator, a detective major of police and other members of the detective team. He also requested the initiation of criminal proceedings against B and M for perjury.

2.35 On 28 June 2013, the Transport Police Department of the Ministry of Internal Affairs informed the author that the Ministry's Internal Security Department had conducted a preliminary investigation into alleged illegal acts on the part of transport police officers and had refused to initiate criminal proceedings against them.

2.36 On 4 June 2013, the author sent a letter to the Chair of the National Security Committee enquiring as to why criminal proceedings had been dropped against the person who had previously been the main suspect in the criminal case. The author claimed that his conviction was based on falsified evidence. On 25 June 2013, the Transport Prosecutor for Karaganda Province refuted the author's objections to the decision of 1 November 2006 refusing to initiate criminal proceedings against the former main suspect.

2.37 On 7 November 2014, the author requested the Chair of the Supreme Court to order a retrial, claiming that his conviction had been based on falsified evidence. He also complained that the Cassation Judicial Panel of the Karaganda Provincial Court had returned his counsel's submission without examination after its consideration of the case, despite the fact that the author had indicated that he wanted to be represented by the lawyer in question. On 25 April 2016, the Supreme Court rejected the author's cassation appeal, stating that his conviction was based on a thorough examination of the evidence and that his guilt in the murder and robbery had been proved by the statements of B and M, witness testimonies, expert reports, the reports on the identity parade, the on-site verification and the face-to-face confrontation and other case materials.

Complaint

3.1 The author claims a violation of article 7, read alone and in conjunction with article 2 (3), of the Covenant. He submits that his illegal detention by the transport police department for six hours without the possibility of contacting his family, his transportation for 15 hours without a stop for approximately 1,000 km in a car not adapted to his health condition and his placement in pretrial detention in conditions incompatible with his health amounted to cruel treatment. The author claims that, despite his complaints, the authorities failed to conduct a rapid, effective and thorough investigation and to punish those responsible.

3.2 The author claims that his arrest on 9 May 2011 amounted to arbitrary detention within the meaning of article 9 (1) of the Covenant. He was not given an explanation of the reasons for his arrest and was not provided with documents confirming the police officers' power to detain him. He was detained at the transport police department for six hours without charge and without his arrest being recorded in a timely manner. For almost six hours, he was not allowed to make a telephone call. Because it was a public holiday, he was unable to contact an attorney to represent him. He was pressured to plead guilty, and advantage was taken of his vulnerability as an ill person. He was detained in inappropriate conditions, without drinking water or food, without access to necessary medication, a doctor or a lawyer and unable to lie down, despite having intense back pain. He was transported for 15 hours approximately 1,000 km in a vehicle not adapted to his disability. He was not given food or drinking water, was not provided with an opportunity to use the toilet and was not offered medical assistance. He also claims that the indictment of 11 May 2011 did not meet the

[8] The complaint was forwarded to the Office of the Prosecutor General.

requirements of articles 177 and 207 of the Code of Criminal Procedure because it did not include a description of the incriminating act, the time and place of its commission or the nature and amount of the damage.

3.3 The author invokes a violation of article 9 (1) of the Covenant in relation to his pretrial detention. He refers to medical documents provided to the authorities according to which, in 2007, he had suffered a spinal trauma. He was undergoing rehabilitation, and his placement in pretrial detention had a negative impact on his health. He also refers to the medical assessment of 25 May 2011 by the regional medical centre, which, according to the author, concluded that he required urgent medical intervention. He was placed in a detention facility not adapted for someone so unwell. In addition, the investigating authorities did not justify their conclusion that he was a flight risk: no arrest warrant had been issued, he resided with his family, and he had been interrogated in connection with the same criminal case in 2006.

3.4 The author claims a violation of article 9 (3) and (4) of the Covenant because he was placed in pretrial detention on the sole basis of the gravity of the crime with which he was charged, without an examination of the legality and necessity of his detention. He refers to the Committee's Views in *van Alphen v. the Netherlands*,[9] in which it found that mere suspicion of a crime is not sufficient to justify an arrest and detention during an investigation.

3.5 The author claims a violation of article 14 (1) of the Covenant because he was convicted on the basis of the testimonies of people who, in 2006, had provided completely different statements. The falsification of evidence by the investigators undermined the fairness of his trial, resulting in an illegal and illogical court verdict. The author was convicted for having committed a murder and a robbery at a time not identified during the investigation, together with unidentified individuals, and with the use of unidentified weapons.

3.6 The author alleges a violation of article 14 (3) (d) and (e) of the Covenant.

3.7 The author requests the Committee to recommend that the State party provide him with an effective remedy, including an immediate, thorough and effective investigation into his cruel treatment and the punishment of those responsible; to re-examine his criminal case while respecting guarantees of a fair trial; and to provide full and adequate reparation for the moral damage that he suffered because of his cruel treatment, illegal arrest and placement in pretrial detention and because of the violation of fair trial guarantees, including compensation and rehabilitation.

State party's observations on admissibility and the merits

4.1 In its submission of 12 March 2021, the State party asserts that the author's guilt in the murder and fraud has been proved by evidence obtained and examined during the investigation and in court, including evidence provided by forensic medical, biological and handwriting experts and an accounting analysis.

4.2 In relation to the murder, B testified in court that he had known the author when the latter had been the director of the fuel depot. The author had required train crews to bring excess diesel to the depot for little or nothing in exchange. Five days prior to the assault, the train driver had refused to transport the extra diesel fuel. B had heard the author tell the murder victim that, if the latter did not agree when the terms were good, he would have to agree when the terms were bad. On the night of 1 to 2 July 2006, B and the train driver were at a railway passing station. A car stopped, and the driver, M, asked the time. Suddenly, five men, including the author, appeared and attacked B and the train driver. The author shot twice at B, who saw the author clearly. B then lost consciousness. Other railroad employees, including another train driver, R, arrived, followed by an ambulance and police officers. Two mobile telephones had been stolen. B confirmed his statements during a face-to-face confrontation and again on 31 May 2011 during a verification of the statements made by witnesses who had been present at the scene of the crime. B's testimony was in line with the statements of the author's former cellmates, who testified that, when they had shared a cell with him during his pretrial detention, the author had told them that he had participated in an

[9] CCPR/C/39/D/305/1988.

assault on a train driver. M stated in court that, at around 2 a.m. on 2 July 2006, he had asked a train driver and the latter's assistant the time, at which point the driver and the assistant had been assaulted by masked men. He had been ordered to lie face down and had then been kicked. Another person had sat on his back and punched him in the head. According to the forensic medical assessments, the train driver died of gunshot wounds, B sustained a closed brain and other injuries, and M sustained a gunshot injury to the right hip. Both B and M confirmed their initial testimonies.

4.3 The author's conviction for fraud was confirmed by his own confession, witness testimonies and an accounting analysis ordered by the court.

4.4 The State party submits that the appellate court reviewed the author's claims regarding his grave sickness. On 25 May 2011, in the AK-159/1 detention facility, he underwent a medical examination carried out by a psychiatrist, a specialist in tuberculosis, a specialist in dermatology and venerology, a surgeon, a dentist and a general practitioner, received treatment between 26 May and 7 June 2011 and was diagnosed with a traumatic spinal cord injury associated with a nerve conduction disorder. On 5 June 2011, he was examined by a neuropathologist, who confirmed that he had received the necessary treatment. The director of the AK-159/1 medical unit confirmed that the author's health did not preclude his placement in the facility. The author's father was informed about the author's health, as confirmed by the letter from the Deputy Director of the Penal Correction Department of 18 July 2011. On 12 July 2011, the author refused to be examined by a medical commission. The court examined medical documents related to the author's hospitalization between 23 April and 26 June 2007 in connection with his spinal trauma, according to which, following surgery on 26 June 2007, the author was discharged for ambulatory treatment. He has not been examined by a medical commission to establish that he has a disability. He has not provided any document issued after 2007 to confirm his ongoing need for medical assistance. On 20 September 2011, a deputy director of facility AK-159/1 of the Penal Correction Department for Karaganda Province informed the author's father that the author was refusing food in protest against his criminal prosecution and that he had been forced to provide a blood sample. The state of the author's health was assessed as satisfactory. A special message about his refusal of food was sent to the acting director of the Penal Correction Department for Karaganda Province and the senior assistant of the Prosecutor for Karaganda Province. The court noted that Act No. 333-1 of 30 March 1999 provided for medical assistance in temporary detention.

4.5 The State party cites provisions of its Constitution and other legislation that guarantee the independence of judges, the right to the judicial defence of rights and freedoms, equality before the law and tribunals, non-discrimination, comprehensive and objective examination of evidence, the public nature of court hearings, the presumption of innocence and the right to appeal procedural acts and decisions. The State party submits that the author's criminal case was examined by a competent, independent and impartial court in a public hearing. He was ensured the right to submit evidence in order to refute the charges. His rights to legal defence, to freedom and security, of access to a tribunal and to equality before the law and tribunals have been respected. The court objectively and thoroughly examined all the circumstances, heard all the witnesses and evaluated all the arguments of the defence. The author's appeals were examined by a cassation court and, on several occasions, by the Supreme Court. The State party concludes that it has respected articles 2 (3), 9 (1), (3) and (4) and 14 (1), (2), (3) (d) and (e) and (5) of the Covenant.

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

5.1 In his comments of 18 October 2021, the author states that the prison conditions are causing him suffering owing to his disability and reiterates that his conviction is based on insufficient evidence and inconsistency in the court's arguments. B changed his testimony four times. As for R, who allegedly arrived at the crime scene, no one except for B saw him there. M did not see the author among the assailants. The author confirms that he shared a cell with the two men who gave statements as his former cellmates but points to the absence of proof that he had confessed to them that he had committed the crime. There has been no face-to-face confrontation with those two men, and they were not heard in court.

5.2 Following the murder, the author was interrogated as a witness. He indicated where he had been at the time of the crime. In 2011, the minutes of that interrogation mysteriously disappeared.

5.3 The medical forensic report of 3 July 2006 indicates the reasons for the train driver's death and not the author's involvement in the crime. The forensic report of 11 July 2006 indicates the state of B's health and not the fact that the author had inflicted injuries on him. Another forensic medical report of 11 July 2006 indicates the injuries sustained by another person and not the author's involvement in the crime.

5.4 The court did not summon witnesses for the defence and summoned persons unfamiliar to the author. The court rejected the author's request to summon as witnesses the person who had served as the director of the Lokomotiv company in Karaganda Province in 2006, the manager of both B and the murdered train driver, and M, who had been the director of the Kazakh national railway company in Karaganda Province and was well informed about the crime. In 2006, another man had been the main suspect. For unclear reasons, not only had he not been prosecuted but, five years later, he was made a witness for the prosecution.

5.5 In relation to his conviction for fraud, the author states that the matter should have been dealt with in a civil case. It became a criminal matter because he pled guilty before the Economic Crimes and Corruption Department. In court, he recognized that his acts had resulted in economic damage to the company. However, he had not intended to commit fraud.

5.6 Disillusioned by his trial, the author did not submit an appeal. Instead, he and his attorney submitted two cassation complaints. The attorney's complaint was returned on the ground that he had not provided legal assistance to the author at the first hearing, despite the fact that he had been granted power of attorney as confirmed in a document signed by the author. The attorney submitted a complaint to the Supreme Court. At the preliminary hearing, without the attorney's arguments being heard, the author's request for supervisory review was rejected.

State party's additional observations

6.1 In its observations of 29 December 2021, the State party notes that the author was sentenced on 15 December 2011 to 13 years in prison. He was found guilty of murder, assault and fraud. The case was not examined in an appellate instance. The Cassation Judicial Panel of the Karaganda Provincial Court modified the verdict on 19 February 2013 to exclude property confiscation from the punishment. The author's and his attorney's requests for supervisory review and cassation appeals submitted to the Supreme Court were considered on the basis of an examination of the criminal case file. The author's requests for a supervisory review and cassation appeals were rejected by, respectively, a decision of the Supervisory Judicial Panel for Criminal Cases of 29 July 2013 and decisions of the Cassation Judicial Panel for Criminal Cases of 25 April 2016 and 23 January 2017.

6.2 In his cassation appeal of 2017, the author did not challenge the basis for his conviction. He requested only that the circumstances aggravating his guilt and punishment be disregarded.

6.3 The judicial authorities have examined and deemed to be unfounded the author's allegations of inconsistencies in B's testimonies, the lack of evidence of his guilt and the court's refusal to take into consideration his claims of violations of the Code of Criminal Procedure.

6.4 The author's guilt in the murder and the assault is confirmed by the statements made by B during the face-to-face confrontation and the on-site verification of witness statements conducted on 31 May 2011. B's testimony is consistent with the testimonies of other witnesses, forensic medical assessments and the reports on the identity parade, the on-site verification of testimonies and the face-to-face confrontation.

6.5 The author refused to accept a copy of the indictment during the preliminary investigation but was later informed of the indictment in court and did not object. In court, he refused to testify on the three occasions on which he was offered an opportunity to do so.

6.6 Although witnesses who resided outside the province were not heard in court, they submitted declarations to the effect that they were unable to be present at the hearing for financial and family reasons. They maintained the testimonies that they had given during the investigation. Their testimonies were read out in court in accordance with the law.

6.7 The fraud committed by the author was confirmed by his guilty plea before the Economic Crimes and Corruption Department for Kostanay Province.

6.8 The author's arrest, which was authorized by the judgment of District Court No. 2 of 12 May 2011, was justified by the fact that he resided in Kostanay, where he was arrested, whereas the investigation was being conducted in Karaganda. Since the author was accused of a serious crime, there were reasons to suspect that he might flee during the investigation. The appellate court upheld that decision on 17 May 2011. The Office of the Prosecutor General identified no violations that would justify quashing or modifying the judicial acts. The author received letters on 17 June 2013 and 21 April 2014 regarding the absence of grounds for cassation. Owing to the absence of new arguments, on 30 December 2016, correspondence with the author was terminated.

6.9 In relation to the author's health, the State party confirms that, according to his medical record, he underwent a medical examination on arrival at penitentiary facility No. 161/2 in Kostanay Province. According to his medical record, on 19 April 2007, he was diagnosed by a general practitioner with a traumatic spinal cord injury. The author regularly consults the staff of the medical unit of the facility and undergoes inpatient and outpatient treatment. He moves around on his own with a crutch. His illness is not incompatible with his prison sentence and is not included in the list of illnesses justifying release from prison established under Order No. 530 of the Ministry of Internal Affairs of 19 August 2014.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim 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.

7.2 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.

7.3 The Committee considers that the author has not sufficiently substantiated his claims, under article 9 (1), about the pressure to plead guilty allegedly put on him following his arrest. The Committee notes that, although the author complains about irregularities in the indictment of 11 May 2011, a copy of that indictment was not included with the communication, and the author has not outlined the steps taken to raise the alleged violations before the national authorities. Consequently, the Committee declares that part of the communication to be inadmissible under article 2 of the Optional Protocol.

7.4 The Committee takes note of the author's allegation under article 9 (4) in relation to his placement in pretrial detention. The Committee notes, however, that the legality of the author's detention was examined by District Court No. 2 and the Karaganda Provincial Court and that the author does not claim that the court hearings were unduly delayed. Consequently, the Committee considers that claim to be inadmissible under article 2 of the Optional Protocol.

7.5 The Committee observes that the author does not provide any arguments to support his claims about a violation of article 14 (3) (d) and (e) of the Covenant. Consequently, it declares that part of the communication to be inadmissible under article 2 of the Optional Protocol for lack of substantiation.

7.6 The Committee considers that the author has sufficiently substantiated his claims under article 7, read alone and in conjunction with article 2 (3), and articles 9 (1) and (3) and 14 (1) of the Covenant. The Committee declares those claims to be admissible and proceeds with its consideration of the merits.

Consideration of the merits

8.1 The Committee takes note of the author's claims, under article 7, read alone and in conjunction with article 2 (3), of the Covenant in relation to his transportation in an off-road car not adapted to his disability for 15 hours for approximately 1,000 km – the distance between Kostanay and Karaganda – and to the State party's failure to conduct a rapid, effective and thorough investigation into those acts and to punish those responsible. The Committee recalls its case law according to which conditions of detention may have a disproportionate effect on persons with disabilities, amounting to a violation of article 7.[10] The State party does not dispute that the author has a disability following a vertebral fracture sustained in 2007. Furthermore, both parties have indicated that the author uses a crutch to walk, which means that his disability is visible. The Committee takes note of the author's claims that he and his father warned the investigator about the danger to his health from transportation for a long distance in a car not adapted to his health condition. According to the information in the case file, which the State party does not dispute, despite those warnings, the author was transported approximately 1,000 km without any prior medical assessment of the compatibility of such transportation with his disability. The Committee takes note of the author's claim that the journey caused him severe back pain and that an X-ray examination on 25 May 2011 revealed that one of the screws holding his spinal plate in place had become detached, possibly as a result of the journey. The author claims that he was not given food or drinking water between his arrest at 11 a.m. on 9 May 2011 and his arrival in Karaganda at 10 a.m. on 10 May 2011 and that he was not allowed to use the toilet during the 15-hour trip. The Committee notes that the author complained to several prosecutorial and investigative authorities, but it appears from the case file that no investigation was conducted. Accordingly, the Committee concludes that the State party has violated its obligations under article 7, read alone and in conjunction with article 2 (3), of the Covenant in relation to the transportation to Karaganda.

8.2 The Committee takes note of the author's claims, under article 7, read alone and in conjunction with article 2 (3), of the Covenant in relation to his placement in pretrial detention in conditions incompatible with his health. The Committee recalls that the State party is under an obligation to observe certain minimum standards of detention, which include the provision of medical care and treatment for sick prisoners, in accordance with rule 24 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). That obligation includes ensuring conditions of detention suitable for persons with disabilities, such as the provision of necessary assistance and adequate medical treatment.[11] The Committee observes that the author underwent a medical assessment upon his placement in preliminary detention on 10 May 2011, was examined on several occasions by different medical professionals following his transfer to facility AK-159/1 on 25 May 2011 and received treatment following his complaints of pain. The Committee takes note of the author's decision to refuse a medical examination on 12 July 2011. It does not appear from the case file that the author has provided the national authorities with any medical documents attesting to an ongoing need for medical assistance of a kind incompatible with pretrial detention. In relation to the author's claim – based on the report of 25 May 2011 issued by the regional medical centre – that he required urgent surgery, the Committee notes that the report indicates only a need for routine surgery, and the author does not claim that the national authorities have created obstacles to his undergoing such surgery. Consequently, the Committee is of the view that the material before it does not disclose a violation of articles 7 and 2 (3) in relation to the author's placement in pretrial detention in conditions incompatible with his disability.

8.3 The Committee takes note of the author's claims, under article 9 (1) of the Covenant, in relation to his arrest without a warrant by police officers who did not present their identity documents and lied about the reasons for his arrest; his incommunicado detention for six hours; and the obstacles created during the investigation to his access to counsel of his choice. The Committee recalls that article 9 of the Covenant requires that persons deprived of liberty are to be informed, at the time of their arrest, of the reasons for the arrest, including

[10] *Dafnis v. Greece* (CCPR/C/135/D/3740/2020), para. 8.5.

[11] *Suleimenov v. Kazakhstan* (CCPR/C/119/D/2146/2012), para. 8.7.

enough factual specifics to indicate the substance of the complaint, such as the wrongful act and the identity of an alleged victim.[12] Article 9 also requires compliance with domestic rules providing important safeguards for detained persons, such as making a record of an arrest and permitting access to counsel.[13]

8.4 The Committee takes note of the author's claims that his wife and neighbour witnessed his arrest by police officers who refused to present the relevant documents and explain the real reasons for his arrest, prompting his family to file a complaint of kidnapping. The Committee notes the author's claim that his arrest was not registered within three hours of his detention, as required by domestic legislation. The Committee observes that the author's arrest on a public holiday and his immediate transportation to another city created obstacles to his rapidly finding and retaining an attorney. Despite that fact and the author's stated wish for the assistance of counsel of his choice, the police conducted the author's interrogation, an identity parade and a face-to-face confrontation – which later served as a basis for the author's conviction – in the presence of a duty attorney. Although the Committee accepts that rapid action may be needed in the context of an investigation, it notes that the author was arrested on suspicion of having committed a crime five years previously, on the basis of his identification by B 10 days before his arrest. The State party has not provided any justification for the author's hasty arrest, his transfer to Karaganda and the taking of the key investigative steps in circumstances that prevented him from accessing counsel of his choice. The Committee notes that the author complained about those violations to the investigative and prosecutorial authorities, the Human Rights Commission under the Office of the President of Kazakhstan and the National Human Rights Centre. However, despite the presence of witnesses to his arrest, his complaints were dismissed on the sole basis of information contained in documents prepared by the police officers and the investigator whom the author accused of the violations. In those circumstances, the Committee considers that the author's arrest was conducted in violation of article 9 (1) of the Covenant.

8.5 The Committee takes note of the author's claim that the State party has violated article 9 (1) and (3) because, when deciding on his placement in pretrial detention, the authorities considered only the gravity of the offence and not the low risk that he would flee from prosecution or the compatibility of detention with his health condition. The Committee recalls that pretrial detention should be the exception rather than the rule. Detention pending trial must be lawful and based on an individualized determination that it is reasonable and necessary, taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The seriousness of the alleged conduct cannot in itself justify the extension of pretrial detention. In addition, the authorities should periodically re-examine whether detention continues to be reasonable and necessary in the light of possible alternatives.[14]

8.6 The Committee notes that the only decisions of the national authorities in relation to the author's placement in pretrial detention that were attached to the communication were the rulings of the Karaganda Provincial Court of 17 May 2011 and of District Court No. 2 of 26 May 2011. Both courts examined the medical documents provided by the author and evaluated the compatibility of his detention with his health. In relation to the necessity of the author's detention, reference was made in the ruling of 17 May 2011 to the gravity of the offences with which the author was charged and to the fact that the investigation was being carried out in Karaganda, whereas the author resided in Kostanay. The necessity of the author's placement in detention was not addressed in the ruling of 26 May 2011. The Committee considers that those brief assessments do not meet the above-mentioned standards and that the author's pretrial detention was therefore incompatible with the guarantees of article 9 (1) and (3) of the Covenant.

8.7 The Committee takes note of the author's claims, under article 14 (1) of the Covenant, that his conviction was based on falsified evidence and perjury and that the investigative and judicial authorities did not attempt to resolve contradictions in the witness statements. The Committee recalls its jurisprudence according to which it is generally for the courts of States parties to review the facts and evidence in each case and to apply domestic legislation, unless

[12] General comment No. 35 (2014), paras. 24 and 25.

[13] Ibid., para. 23.

[14] Ibid., para. 38. See also *Cosme Ignacio Marino Demonte v. Argentina* (CCPR/C/123/D/2424/2014), para. 11.4.

it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.[15]

8.8 The Committee notes that, according to the verdict of 15 December 2011, the author's guilt in the murder and the robbery was established on the basis of the consistent testimonies of B, which were corroborated by the testimonies of R and the author's former cellmates. It appears from the minutes of the interrogations that B and R denied on multiple occasions that they were able to identify the assailants of the events of July 2006. However, B and R unequivocally accused the author during their interrogations by the investigator on 29 April 2011 and 10 May 2011, five years after the crime. The Committee notes that the courts did not address the contradictions in the statements of those key witnesses and even affirmed that B's testimonies had been consistent. The Committee notes that the author's photo was presented to B during the latter's interrogation on 29 April 2011, prior to the identity parade. In addition, the statements of the author's former cellmates were read out in court, and the author was not given the opportunity to cross-examine them. The Committee observes that, whereas the grounds (described above, in the present paragraph) in support of finding the author guilty of murder and robbery were described in the verdict of 15 December 2011, different grounds for upholding the verdict, including witness testimonies and forensic examinations that did not point to the author's guilt, were invoked in the decisions adopted on 12 December 2012 by the Cassation Judicial Panel of the Karaganda Provincial Court, on 26 May 2012 and 18 June 2013 by the Office of the Prosecutor General, on 29 July 2013 by the Supervisory Judicial Panel for Criminal Cases of the Supreme Court and on 25 April 2016 by the Supreme Court. It therefore appears that the cassation and supervisory review bodies dismissed the appeals without duly examining the case file or the author's allegations. In those circumstances, the Committee considers that the facts and information before it reveal a manifest error or denial of justice amounting to a breach of article 14 (1) of the Covenant.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation of article 7, read alone and in conjunction with article 2 (3), of article 9 (1) and (3) and of article 14 (1) of the Covenant.

10. 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: (a) to consider immediately releasing the author, to quash the author's conviction and, if necessary, to conduct a new trial, in accordance with the principles of a fair hearing, the presumption of innocence and other procedural safeguards; (b) to conduct a prompt investigation that is effective, thorough, impartial, independent and transparent into the inhuman and cruel treatment of the author, his arbitrary arrest and pretrial detention as well as into the alleged falsification of evidence and pressuring of witnesses to testify falsely against him by the investigators; (c) to prosecute, try and punish those responsible for the violations committed; and (d) to award the author comprehensive compensation and to provide him with appropriate medical and psychological rehabilitation. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

11. 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 official languages of the State party.

[15] General comment No. 32 (2007), para. 26. See also *Manzano et al. v. Colombia* (CCPR/C/98/D/1616/2007), para. 6.4; *Abdiev v. Kazakhstan* (CCPR/C/137/D/2618/2015), para. 7.6; and *Suleymanova and Israfilova v. Azerbaijan* (CCPR/C/133/D/3061/2017), para. 7.2.