

# No. 22/2011 (Azerbaijan)

## Communication addressed to the Government on 2 March 2011

Concerning: Dmitri Pavlov, Maksim Genashilkin and Ruslan Bessonov

### The State is a party to the International Covenant on Civil and Political Rights.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights. The mandate of the Working Group was clarified and extended in Commission resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102. The mandate was extended for a further three-year period in Council resolution 15/18 of 30 September 2010.

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum-seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of the international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

#### **Submissions**

##### *Communication from the source*

3. The source informs that Mr. Pavlov, Mr. Genashilkin and Mr. Bessonov, aged 15, 14 and 16, were arrested on 14 March 2005 and taken to the police. Their parents were only informed that the children had been held in detention some eight hours after the arrest. Mr. Genashilkin, Mr. Bessonov and Mr. Pavlov, all minors at the time of the arrest, were denied prompt access to a lawyer, and were questioned without their lawyers being present on 14 and 15 March 2005. It was not until approximately 12.00 midnight on 16 March 2005 that Mr. Bessonov and Mr. Pavlov were first granted access to their lawyers, while Mr. Genashilkin first met with his lawyer on 17 March 2005. Mr. Pavlov was granted a meeting with his parents on 17 March 2005 and on the same day was released to be later re-arrested in August 2005.

4. The source reports that Mr. Bessonov was beaten in his genitals, tortured, had his legs tied with a rope, was strung up and had soles of his feet beaten with rubber sticks. While in police precinct No. 33 in the Surakhan district, Mr. Genashilkin was beaten on the legs and stomach causing him to lose consciousness at least twice and Mr. Pavlov was beaten on his head, face and legs. Mr. Pavlov was allegedly threatened with torture and harm to his family.

5. The source contends that, following such ill-treatment, coupled with the denial of food, water, sleep and prompt access to their lawyers and parents, the three detainees were compelled to sign false confessions incriminating each other for participation in the murder of Vusal Zeynalov on 15 February 2005.

6. According to the source, the proceedings against Mr. Bessonov and Mr. Genashilkin commenced in the Serious Crimes Court on 2 August 2005. During this hearing, Mr. Pavlov, who was considered a witness, withdrew his statement that he alleged had been extracted as a result of torture or other ill-treatment during his initial detention in March 2005. In that statement he indicated that he had been present and witnessed Mr. Bessonov and Mr. Genashilkin killing the victim. At the trial, Mr. Pavlov testified that, in fact, at the time the murder was allegedly committed, after 3.00 p.m. on 15 February 2005, he was attending a sports competition at the city stadium with friends, including his father who is a sports coach. His presence at the sports event from 3.00 p.m. to 5.30 p.m. was confirmed by a number of witnesses during the above-mentioned court hearing. Following testimonies of Mr. Pavlov and other witnesses, including sports coaches, who confirmed his presence at the competition, the court returned the case to the prosecutor's office for further investigation.

7. On 8 August 2005, the Surakhan district prosecutor's office laid charges against Mr. Pavlov for organizing a murder on the basis of a statement by Mr. Genashilkin, which had allegedly been coerced. The prosecution alleged in the indictment that Mr. Pavlov had killed the victim after 3.00 p.m. on 15 February 2005. This accusation was made despite the fact that evidence had already been presented to the court which refuted the possibility of Mr. Pavlov's presence at the scene of the crime after 3.00 p.m.

8. On 3 September 2005, the prosecution again amended the indictment and changed the time of the murder from 3.00 p.m. to 2.15-2.30 p.m. on 15 February 2005, notwithstanding the fact that the indictment, dated 11 June 2005, indicated that the victim's neighbours had heard "strange" noises, including a heavy blow, coming from the victim's apartment after 3.00 p.m. Upon further investigation, the case was again submitted to the Serious Crimes Court on 13 April 2006.

9. The Serious Crimes Court resumed hearings in June 2006. In one of the subsequent trial hearings, an investigator reportedly admitted that he had forged the signature of Mr. Pavlov's lawyer on a transcript of one of Mr. Pavlov's interrogations during the detention period in March 2005. This statement was recorded before Mr. Pavlov had access to his lawyer. The investigator also reportedly admitted that he had disposed of documentation relevant to the case. Reportedly, the court heard testimony from a number of people who confirmed Mr. Pavlov's alibi. According to the source, during the trial the court allegedly refused to allow a number of important defence witnesses to testify, including the mother of Mr. Pavlov and the doctors who had conducted medical examinations of the three boys.

10. In June 2007, Mr. Pavlov, Mr. Genashilkin and Mr. Bessonov were convicted of the murder of Mr. Zeynalov and each was sentenced to 10 years' imprisonment.

11. The three youths maintained their innocence and appealed against their conviction. In January 2008, the Baku Court of Appeal upheld their conviction and sentence in proceedings that reportedly fell short of international fair trial standards. This ruling was appealed to the Supreme Court with a request to overturn the decision of the Court of Appeal and to terminate criminal proceedings in this case.

12. In April 2008, the Supreme Court of Azerbaijan, having taken into account the circumstances of the case, ruled that the Baku Court of Appeal had violated the rights of Mr. Pavlov, Mr. Bessonov and Mr. Genashilkin to a fair trial.

13. In its judgement, the Supreme Court highlighted a number of violations. In particular, the Supreme Court found that the Baku Court of Appeal had refused to conduct an examination of

additional evidence and failed to provide for the right of the accused to question witnesses for the prosecution and witnesses for the defence. Moreover, the Serious Crimes Court and the Court of Appeal had arrived at their decisions on the basis of selective admission of confessions and had disregarded the fact that these confessions often contradicted each other. The lower courts had not provided any reasoning for their decision that some confessions were more plausible than others. The Supreme Court also noted that the protocols of the search and removal of items of evidence had been fabricated as confirmed during the proceedings in the Serious Crimes Court. Furthermore, according to the Supreme Court, the confessions had been obtained in violation of the right of the accused to the assistance of an interpreter, defence lawyer and their legal representatives during their detention. Finally, the Supreme Court held that some of the documents relating to investigation, including transcripts of interrogation and the protocol of familiarization with the criminal case, had been fabricated. Hence, such materials could not be considered as valid evidence.

14. Subsequently, the Supreme Court overturned the decision of the Court of Appeal of January 2008 and the case was returned to the Court of Appeal for review. The Baku Court of Appeal held a second review of the case in July 2008. During the second Court of Appeal hearings, evidence was presented which corroborated the defence claim that some of it was fabricated.

15. The source reports that the court decided that the testimony of Mr. Pavlov's father that his son was with him at the time of the crime was not plausible as his father was an interested party. However, the court did not take into account that at least seven other witnesses, unrelated to Mr. Pavlov, had similarly confirmed his alibi. In addition, defence lawyers claimed that other witnesses they wished to call had not been summoned to the court.

16. In July 2008, the Court of Appeal upheld the conviction of the three defendants. This decision was followed by another appeal to the Supreme Court. On 21 January 2009, the Supreme Court again overturned the July 2008 decision of the Court of Appeal and ordered another reconsideration of the case. In its judgement, the Supreme Court stated that the Court of Appeal had not sufficiently taken into account provision of the April 2008 judgement of the Supreme Court, had failed to conduct specific actions and, during its re-examination, had committed procedural violations.

17. On 18 June 2009, the Baku Court of Appeal finalized a third review of the case, upholding the conviction of the three defendants. Following another appeal to the Supreme Court, in November 2009 the latter upheld the original sentences on Mr. Pavlov, Mr. Genashilkin and Mr. Bessonov.

18. The source cites article 14, paragraph 1, of the International Covenant on Civil and Political Rights and principle 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which enshrine the rights to a fair trial and to be tried within a reasonable time. The source also refers to general comment No. 10 (2007) on children's rights in juvenile justice of the Committee on the Rights of the Child, which, with regard to article 37 (d) of the Convention on the Rights of the Child, under which the child deprived of liberty has the right to a prompt decision on his/her action to challenge the legality of the deprivation of his/her liberty, indicates that "the term 'prompt' is even stronger - and justifiably so given the seriousness of deprivation of liberty - than the term 'without delay' (art. 40, para. 2 (b) (iii) of the Convention), which is stronger than the term 'without undue delay' of article 14, paragraph 3 (c), of the International Covenant on Civil and Political Rights". The source alleges that the judicial proceedings against Mr. Pavlov, Mr. Genashilkin and Mr. Bessonov from the date of their detention in 2005 until the conclusion of their final appeal in 2009 were unreasonably prolonged. The source thus contends that their right to a fair trial within a reasonable time was not respected and that they were subject to other procedural violations of due process as exposed above.

19. In the light of the foregoing, the source alleges that serious procedural and other irregularities in the cases of Mr. Pavlov, Mr. Genashilkin and Mr. Bessonov over the past six years cast doubt on the accuracy of their convictions. Accordingly, the source submits that the deprivation of liberty of Mr. Pavlov, Mr. Genashilkin and Mr. Bessonov is arbitrary, since court reviews of the case are in total or partial non-observance of the guarantees enshrined in the right to a fair trial.

#### *Response from the Government*

20. In its response, the Government provided the Working Group with the information as follows.

21. Mr. Pavlov, Mr. Bessonov and Mr. Genashilkin were found guilty and convicted for having murdered with special cruelty Mr. Zeynalov, concerted beforehand, with the aim of revenge, on 15 February 2005. Namely, on 15 February 2005 Mr. Pavlov, Mr. Bessonov and Mr. Genashilkin decided to kill Mr. Zeynalov to take revenge, as he insulted them and did not let them smoke at the building.

22. They came to the building where Mr. Zeynalov lived and the latter, who was at that time at home alone, let them in. Mr. Pavlov quarrelled with Mr. Zeynalov and suddenly took out an axe brought with him and struck Mr. Zeynalov's head with it. When Mr. Zeynalov fell down, Mr. Pavlov kept on striking him on his head, broke his sinciput, skull, cut his cheek bones and caused a number of other injuries. Mr. Bessonov held Mr. Zeynalov's head and Mr. Pavlov cut Mr. Zeynalov's both carotid arteries in the jugular, his vein, cartilages, oesophagus with the knife he had brought with him. He then pulled open Mr. Zeynalov's shirt and struck on the left side of his chest several times with the knife, and then he gave the knife to Mr. Genashilkin who struck Mr. Zeynalov's stomach twice. By these acts Messrs. Pavlov, Bessonov and Genashilkin murdered Mr. Zeynalov by inflicting lengthy torture and by causing serious injuries.

23. The defence counsels for Mr. Genashilkin, Mr. Pavlov and Mr. Bessonov appealed the judgement. The Defence asked to quash it and acquit the accused, and the counsel for the victim asked imprisonment for life for each of the accused.

24. By judgement of the Baku Court of Appeal of 16 January 2008, the part of the original judgement related to Mr. Bessonov was revised and the regime of his imprisonment was changed to general one. The rest of the judgement remained unchanged.

25. The defence counsels for Mr. Pavlov and Mr. Bessonov filed cassation appeals from the judgement dated 16 January 2008 of the Baku Court of Appeal and asked to annul it and terminate the case. No appeal was brought on behalf of Mr. Genashilkin. Mr. M.I. Zeynalov, the descendant of the victim, objected to the appeals.

26. On 2 April 2008, the Supreme Court of the Republic of Azerbaijan granted in part the cassation appeals. The judgement of Baku Court of Appeal of 16 January 2008 was quashed and the case was returned to the Baku Court of Appeal for reconsideration. The Supreme Court found that the Court of Appeal violated the right of the accused to a fair trial. In particular, it found violations of their right to question the witnesses. The Supreme Court also found that the Court of Appeal wrongly refused to consider evidence introduced by the accused which might have had an essential importance for comprehensive, thorough and impartial adjudication of the case.

27. On 4 July 2008, Baku Court of Appeal partly revised the judgement of the Serious Crimes Court of Azerbaijan of 18 June 2007 and changed the Mr. Bessonov's imprisonment regime to general. The rest of the judgement was upheld.

28. The defence counsels for Mr. Pavlov, Mr. Bessonov and Mr. Genashilkin again appealed the decision of the Court of Appeal. The cassation appeals were partially granted by the Supreme Court's decision of 21 January 2009. The judgement of the Baku Appeal Court of 4 July 2008 was quashed and the criminal case against Mr. Pavlov, Mr. Bessonov and Mr. Genashilkin was returned to the Baku Appeal Court for reconsideration. The Supreme Court found that, when reconsidering the case, the Appeal Court did not sufficiently take into account some recommendations of the previous decision of the Supreme Court and also breached some procedural provisions.

29. On 18 June 2009, following the decision of the Supreme Court, the Baku Court of Appeal partly changed the judgement of the Serious Crimes Court of Azerbaijan of 18 July 2007 and replaced the Mr. Bessonov's regime of prison to general regime. The rest of the judgement remained unchanged.

30. On 4 November 2009, the Supreme Court of the Republic of Azerbaijan denied another cassation appeal of the Defence for Mr. Pavlov, Mr. Bessonov and Mr. Genashilkin, and upheld the convictions.

31. The Government informs that the Supreme Court found that some testimonies given by the accused during the preliminary investigation were either inconsistent or were not confirmed at the trial. Thus it was, in the cassation court's opinion, a sound decision that the courts of first instance preferred the pretrial statements of the accused and the evidence had been evaluated according to the requirements of the Criminal Procedural Code of Azerbaijan. The commission of the crime by the

accused was confirmed by the statements given by them during the preliminary investigation and other evidence.

32. As to the alleged violations of the rights of the accused, the Government admits that during the preliminary investigation the requirements of the Criminal Procedure Code had been violated by the investigator of the prosecutor's office of Surakhan district. The court of first instance had issued a special decision on the grave shortcomings made by the preliminary investigation bodies. However, according to the reply, in the court, the accused's right to impartial trial was fully observed.

33. In regard to the allegations of ill-treatment, the Government notes that these allegations were not proven either during preliminary investigation or during examination of the case in various judicial instances.

*Comments from the source*

34. The source reiterates that the primary fair trial concern that remains after the final Supreme Court judgement is that the convictions still appear to be based in part on confessions made by the three individuals, who were at the time children, which they have alleged to have been extracted as a result of torture or other ill-treatment.

35. The source notes that despite the Government's claim that the allegations of torture and ill-treatment had not been proven either during the preliminary investigation or in subsequent court hearings, it does not appear that any court conducted a thorough, impartial inquiry into the allegations of torture and other ill-treatment.

36. As to the report of the Special Rapporteur on the independence of judges and lawyers (A/HRC/4/25/Add.1, para. 41) which mentions that the authorities of Azerbaijan had indicated to him that the "investigation and forensic medical examination showed that neither violence nor torture was committed", the source reports that, according to the parents of Dmitri Pavlov, neither they nor their son had been questioned about the allegations of torture or other ill-treatment. The source expressed its concern that any investigation that did take place may not have been prompt, thorough, independent and impartial.

37. Although the Supreme Court found in its November 2009 judgement that one or more of the interrogations was carried out in the presence of a teacher, an interpreter and a defence counsel, the source maintains that in the days immediately following the arrests in March 2005 they were not informed promptly of their detention or whereabouts, and that the boys were questioned in their absence.

38. The source quotes the Human Rights Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial:

"Article 14, paragraph 3 (g), guarantees the right not to be compelled to testify against oneself or to confess guilt. This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt ... Domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence ... and that in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will."

39. The source notes that the reasons given by the Supreme Court for its third judgement contain no indication that the Court acknowledged the existence of an exclusionary rule as explained by the Human Rights Committee, let alone applied it in its judgement.

40. In the source's view, the primary reason actually given by the Court of Appeals and accepted by the Supreme Court for continuing to rely on the impugned and retracted confessions was not that the allegations of ill-treatment had been disproven by the prosecution, but that they "corresponded with the case findings".

41. According to the source, this approach appears to be inconsistent with the rule as stated above. The concerns in this case are only heightened by the fact that at the time the three individuals were "juvenile persons" within the meaning of international fair trial standards, and therefore should have been provided with "special protection" beyond the guarantees and protection accorded to adults.

42. The source reiterates that the Azerbaijani authorities should provide Mr. Pavlov, Mr. Genashilkin and Mr. Bessonov with a new, prompt retrial that fully complies with international human rights

standards and incorporates a thorough and independent investigation into the allegations of ill-treatment.

### **Discussion**

43. Pursuant to paragraph 8 (c) of its revised methods of work, in dealing with situations of arbitrary deprivation of liberty, the Working Group shall consider the cases where the total or partial non-observance of the international norms relating to the right to a fair trial is of such gravity as to give the deprivation of liberty an arbitrary character.

44. In the case under consideration, the Supreme Court of Azerbaijan did find that the accused's right to a fair trial had been violated by lower courts. At the same time, the Supreme Court did not agree with the arguments of the appellants that the accused were convicted as a result of those violations. The Supreme Court noted that the court of first instance had assessed the violations at the pretrial investigation and made a special ruling in this regard (see the Judgement of the Judicial Board for Criminal Cases of the Supreme Court of Azerbaijan of 4 November 2009).

45. However, the Working Group considers that, in accordance with paragraph 8 (c) of its revised methods of work, for the detention to be qualified as arbitrary it is not required that the person was "convicted as a result" of the violations of his rights. Rather, the Working Group shall examine whether the violations were of "such gravity as to give the deprivation of liberty an arbitrary character."

46. In the instant case, the Supreme Court in its ruling in April 2008 had found the following violations of the rights of the three teenagers to a fair trial:

(a) The "confessions" had been obtained in violation of the right of the accused to the assistance of an interpreter, defence lawyer, and their legal representatives during their detention;

(b) There had been a violation of the right of the accused to present additional evidence and question witnesses for the prosecution and defence;

(c) Some of the documents relating to investigative activities, including transcripts of interrogation and the protocol of familiarization with the criminal case, had been fabricated;

(d) The protocols of the search and removal of items of evidence had been fabricated.

47. The Working Group considers that these instances of non-observance of the international norms relating to the right to a fair trial (art. 14 of the Covenant on Civil and Political Rights) and their cumulative effect are of such gravity as to give the deprivation of liberty of the three teenagers an arbitrary character.

48. Considering that the defendants in this case were children, the above instances constitute violations of article 37 of the Convention on the Rights of the Child to which Azerbaijan is a party.

49. Furthermore, with respect to the "confessions" obtained in violation of the rights of the accused, the Supreme Court acknowledged that some of these statements had not been confirmed at the trial. And yet, the Supreme Court held that "it was a sound decision" of the court of the first instance to prefer to admit the pre-trial statements taken by investigator instead of the oral testimonies in court. As was noted by the Supreme Court, the inferior courts disregarded the fact that the confessions contradicted each other. However, the courts did not provide any reasoning for accepting some confessions and disregarding others. Indeed, a prior statement of the accused shall not be used to prove his guilt if it was obtained in violation of the internationally recognized rights of the accused, especially this concerns statements obtained in violation of article 7 of the Covenant (see Human Rights Committee general comment No. 32, para. 41).

50. The Government failed to provide any information on whether an independent and impartial investigation was conducted into the specific allegations of torture and ill-treatment. Instead, the Government merely contends, like in its submission to the Special Rapporteur on the independence of judges and lawyers (A/HRC/4/25/Add.1, para. 41), that these allegations "hadn't been proven either during preliminary investigation of the case, or during adjudication of the case in the courts". Indeed, as it was emphasized by the Human Rights Committee in its general comment No. 32, the burden is on the State to prove that statements made by the accused have been given of their own free will.

51. Considering the number and seriousness of violations in this case, the Working Group concurs with the finding of the Appeals Chamber of the International Criminal Court which held that "where

the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place .... Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial".\*

52. Thus, the deprivation of liberty of Mr. Pavlov, Mr. Bessonov and Mr. Genashilkin falls into category III of the categories applicable to the consideration of cases submitted to the Working Group.

53. The Working Group takes note of the fact that, according to the source, similar complaints concerning the same case and based on the same grounds are currently under consideration of the European Court of Human Rights.

#### **Disposition**

54. In the light of the foregoing, and without prejudice as to the contingent findings of the European Court of Human Rights, the Working Group renders the following opinion:

The deprivation of liberty of Mr. Pavlov, Mr. Bessonov and Mr. Genashilkin has been arbitrary, being in contravention of article 14 of the International Covenant on Civil and Political Rights and article 37 of the Convention on the Rights of the Child, to which Azerbaijan is a party, and falls into category III of the categories applicable to the consideration of the cases submitted to the Working Group.

55. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Pavlov, Mr. Bessonov and Mr. Genashilkin, and bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

56. The Working Group believes that, taking into account all the circumstances of the case, particularly the more than six years of their imprisonment or almost two thirds of the sentence imposed, the adequate remedy would be to release of Mr. Pavlov, Mr. Bessonov and Mr. Genashilkin, and accord them an enforceable right to compensation pursuant to article 9, paragraph 5, of the International Covenant on Civil and Political Rights.

[Adopted on 29 August 2011]

\* Judgement on the Appeal of Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, Case No. ICC-01/04-01/06 (OA 4), App. Ch., 14 December 2006, para. 39.