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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its ninetieth session, 3–12 May 2021

#### Opinion No. 5/2021 concerning Erzhan Elshibayev (Kazakhstan)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.

2. In accordance with its methods of work,<sup>1</sup> on 10 December 2020 the Working Group transmitted to the Government of Kazakhstan a communication concerning Erzhan Elshibayev. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. 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 or her sentence or despite an amnesty law applicable to him or her) (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 Covenant (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 international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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<sup>1</sup> A/HRC/36/38.



## Submissions

### *Communication from the source*

4. Erzhan Elshibayev is a Kazakh citizen, normally residing in Zhanaozen in western Kazakhstan. He is a labour rights activist who also works as a truck driver, welder and metal worker. At the time of his arrest, he was 31 years old.

#### a. Context

5. According to the source, Mr. Elshibayev came to the attention of government officials in 2018 when he helped organize peaceful rallies primarily addressing high unemployment in the city of Zhanaozen. During a public protest on 16 February 2018, Mr. Elshibayev criticized the President at the time, Nursultan Nazarbayev, accusing him of corruption and mismanagement of the State budget. On 19 February 2020, a video of his remarks was uploaded to YouTube and was shared widely. The authorities reportedly began harassing and pressuring Mr. Elshibayev and other protestors. One city official approached Mr. Elshibayev and offered to find him a permanent job if he would “shut up”, referring to his involvement in the protest movement. However, Mr. Elshibayev did not cease his advocacy, and in early 2019 he reportedly became a target of the local police.

6. In this respect, the source adds that multiple international human rights monitors have found that critics and dissidents in Kazakhstan frequently face harassment, criminal penalties and imprisonment for publicly challenging government policies or practices. Human rights defenders are reportedly among those routinely targeted for their advocacy activities by the Government. Additionally, the Government has allegedly created a hostile environment for activists, and many civil society members working on politically sensitive issues are frequently targets of harassment by the Government. According to the source, civil society members have reported police surveillance of themselves, their places of work and their family members. The source also refers to the most recent review of Kazakhstan by the Human Rights Committee, in which the Committee expressed concern over the Government’s practice of using the Criminal Code to target individuals for merely exercising their right to freedom of expression.<sup>2</sup>

7. According to the source, the first police investigation against Mr. Elshibayev began on 2 March 2019, when police officers arrived at his home and demanded that he accompany them to the police station, alleging that he was involved in the theft of laptop computers from local government offices. The source adds that the police had no warrant for Mr. Elshibayev’s arrest and no evidence of his involvement in any theft, and he was released shortly after his arrest. No charges were brought against him. Though brief, this initial detention reportedly caused a notable public outcry, and the police department deputy assured the public that the police would cease their harassment of Mr. Elshibayev. Soon afterwards, the local police reportedly made allegations that Mr. Elshibayev had stolen a car. After interrogating him, police discovered that he, in fact, owned the car in question, and the investigation was dropped. The police then alleged that Mr. Elshibayev had been involved in the rape of his neighbour. However, after conducting several medical tests related to the rape investigation and after Mr. Elshibayev was able to provide an alibi, the police again dropped the investigation.

8. The source reports that in March 2019, the police decided to reopen an investigation into an alleged altercation in 2017. On 19 August 2017, Mr. Elshibayev was confronted by four young men while he was on his way to a job. The four men were seemingly drunk, and they asked Mr. Elshibayev for cigarettes and some money. When he refused, the men attacked him. While defending himself, Mr. Elshibayev hit one of the men in the head with a bottle. This man was injured and lost his vision in one eye. At the time, the police reportedly opened an investigation into the incident, but quickly closed it after Mr. Elshibayev and the four men agreed that neither side wanted to press charges. In 2019, the four men who had attacked Mr. Elshibayev supposedly requested that the case be reopened. According to the

<sup>2</sup> CCPR/C/KAZ/CO/2, para. 49.

source, the statements of the four men were identical, and several of the signatures on the official complaint documents appeared forged.

b. Arrest and detention

9. On 24 March 2019, Mr. Elshibayev was reportedly visited by police at his home and summoned to the Department of Internal Affairs in the city of Zhanaozen to meet with an investigating officer. The investigating officer did not present a warrant for the arrest, and as far as the source is aware, no warrant for Mr. Elshibayev's arrest was ever issued. After having been questioned at the office of the Department of Internal Affairs about the 2017 altercation, Mr. Elshibayev was transferred to the local police station in Aktau, where he was detained. On 26 March 2019, Mr. Elshibayev was reportedly brought before the investigative court in Zhanaozen, where a judge ordered that he be placed in pretrial detention for two months and confirmed formal charges against him under article 106 (2) (7) (intentional infliction of grievous bodily harm for hooligan motives) and article 293 (hooliganism) of the Criminal Code. According to the source, the judge's stated reason for ordering Mr. Elshibayev into pretrial detention was that he was under investigation.

10. Mr. Elshibayev was subsequently transferred to Aktau detention centre, where he was held in custody until his trial. While in pretrial detention, officers allegedly attempted to pressure him into refusing an interview with a journalist from the independent media outlet Radio Free Europe/Radio Liberty and to coerce him into testifying that another well-known individual had financed the protests that he had organized. According to the source, Mr. Elshibayev refused to agree to these demands.

c. Trial proceedings

11. The source reports that on 27 June 2019, the first pretrial hearing in Mr. Elshibayev's case began, and in early October 2019 his trial began before Aktau City Court. For several hearings at the beginning of his trial, he was reportedly not permitted to be physically present in court. Instead, an online broadcasting system was used to allow him access to the proceedings from the detention centre. Due to a poor Internet connection, the broadcasting system was reportedly dysfunctional, making it impossible for Mr. Elshibayev to participate fully in some parts of the trial. The court did not provide any justification, either orally or in writing, for refusing to allow Mr. Elshibayev to participate in the hearings in person.

12. The source reports that throughout the course of the trial, serious discrepancies arose between witness testimonies obtained during the investigation and trial stages. During the trial, the four men involved in the incident reportedly testified that they had been pressured by the police to file complaints requesting that the case against Mr. Elshibayev be reopened. Moreover, the man whom Mr. Elshibayev had hit in the head testified during the trial that he had no complaints against Mr. Elshibayev for what had happened during the incident, and requested that the judge find him innocent. Ultimately, the judge reportedly refused to accept Mr. Elshibayev's self-defence claim and rejected the four men's allegations of coercion, and on 17 October 2019, the trial judge convicted Mr. Elshibayev on both counts and sentenced him to five years in prison.

13. Following his conviction, Mr. Elshibayev's attorney filed an appeal on behalf of his client before Zhanaozen City Court in Mangistau Region. However, on 25 November 2019, the appellate court upheld the trial court's decision. The source notes that none of the other four men involved in the altercation on 19 August 2017 were charged or tried for their role in the events for which Mr. Elshibayev was convicted.

d. Current status

14. The source reports that following his conviction by the appellate court, Mr. Elshibayev was transferred to penal colony ICH-167/9 in Lenger. While in prison, the authorities allegedly beat and pressured Mr. Elshibayev. While visiting Mr. Elshibayev in prison on 12 March 2020, his relatives noticed severe bruising on his body from beatings. They filed a complaint on his behalf to the Prosecutor General's Office, notifying the Prosecutor General of the torture and mistreatment suffered. As far as the source is aware, there has been no government response to the complaint.

15. After the submission of the first complaint alleging mistreatment, prison officials reportedly began harassing Mr. Elshibayev frequently, subjecting him to insulting and degrading treatment. On 17 August 2020, Mr. Elshibayev submitted a second official complaint to the prison authorities, alleging that two prison officials were responsible for mistreating him. As far as the source is aware, prison officials failed to conduct an investigation into these allegations. Instead, on 15 August 2020, they reportedly placed Mr. Elshibayev in solitary confinement until the end of August, claiming that he was at risk of harming himself. Mr. Elshibayev's solitary confinement was further extended for an additional 30 days, until the end of September.

16. The source reports that on 20 October 2020, Mr. Elshibayev was transferred to another prison, penal colony NEK-169/5 in the city of Kyzylorda. Prison officials did not provide a justification for the transfer. Moreover, they provided no forewarning of the transfer, notifying Mr. Elshibayev's family only on the day of the transfer. The source adds that Mr. Elshibayev's family currently resides in the city of Aktau, which is approximately 2,142 kilometres and a 31 hour drive from Kyzylorda. Given the transfer, Mr. Elshibayev's family members have not been able to visit him to determine his current status.

e. Legal analysis

17. The source submits that the arrest and continuing detention of Mr. Elshibayev constitutes arbitrary deprivation of his liberty under categories I, II and III.

i. Category I

18. The source submits that, in the present case, Mr. Elshibayev's detention is arbitrary under category I because the Government lacks any substantive evidence to justify his detention and because the Government charged Mr. Elshibayev under a vague and overbroad provision of the Criminal Code.

19. In this respect, the source submits that the Government's conviction and detention of Mr. Elshibayev is not founded on any reasonable evidence against him. Mr. Elshibayev was convicted of two charges with hooliganism as an element of the crime. Hooliganism is defined in the Criminal Code as a particularly insolent violation of public order, with a clear disrespect for society, accompanied by the use of force against citizens or the threat of its use, the destruction of or damage to another's property, or the commission of indecent acts, characterized by exceptional cynicism.

20. According to the source, the Government possessed no evidence that Mr. Elshibayev engaged in any activity that would reasonably fall under the legal definition of hooliganism presented in the Criminal Code. Mr. Elshibayev's detention resulted from an altercation in which he acted in self-defence against attacks by four belligerent men. Immediately following the altercation, the investigating police found that no crime had been committed. Moreover, none of the four men suggested that Mr. Elshibayev had acted other than in self-defence, and the man who had been most injured claimed that he did not blame Mr. Elshibayev for the incident. Nothing in Mr. Elshibayev's conduct on the day of the altercation reflected "insolence", "disrespect" or "cynicism." Accordingly, the source asserts that the Government lacked a basis for detaining him on hooliganism grounds. Moreover, the police reportedly decided to revisit the incident only after Mr. Elshibayev had gained a reputation as a prominent activist and after three other unsuccessful and baseless investigations against him, suggesting that the charges related to the 2017 incident were merely pretextual in basis. The source adds that charges that are pretextual cannot be considered to have an adequate basis to justify detention. Accordingly, the source submits that Mr. Elshibayev's detention is arbitrary under category I because there is no basis, in either evidence or fact, for the detention.

21. The source also submits that in the present case, the legal definition of hooliganism under Kazakh law serves as the basis for both of the charges brought against Mr. Elshibayev. The source notes, however, that the definition of hooliganism, contained in article 293 of the Criminal Code, is too vague, making it subject to overly broad and arbitrary applications, as is the case here. The source adds that the definition of hooliganism relies on highly indeterminate and subjective terms and phrases, such as "insolent violation of public order",

“disrespect for society” and “force . . . characterized by exceptional cynicism”. Because “insolence” means the demonstration of rudeness, arrogance and a lack of respect, the term is highly subjective since there is no objective standard as to what counts as rude or respectful. For similar reasons, the use of the phrase “disrespect for society” relies heavily on one’s individual perspectives as to what amounts to “society” and what constitutes showing “disrespect” to the collective. Moreover, it is not clear how a use of force can be exhibited in a “cynical” form, not to mention an “exceptional[ly] cynic[al]” form.

22. The source also adds that owing to the pervasive inclusion of indeterminate and subjective terms in article 293, there is no way for an individual to determine *ex ante* whether their actions will, for example, have the effect of being interpreted as disrespectful, insolent or cynical. As a result, the vagueness of article 293 reportedly permits the authorities to apply article 293 arbitrarily, as is the case for Mr. Elshibayev. Accordingly, his detention is arbitrary under category I because the law that provides the purported basis for his detention, article 293 of the Criminal Code, is vague, in violation of article 15 (1) of the Covenant and article 11 (2) of the Universal Declaration of Human Rights.

ii. Category II

23. The source further asserts that the detention of Mr. Elshibayev is arbitrary under category II as it resulted from the peaceful and legitimate exercise of his rights to freedom of expression, assembly and association. The source adds that these rights are protected under both international and Kazakh law, in particular articles 19 (2) and 21 of the Covenant, articles 19 and 20 (1) of the Universal Declaration of Human Rights and articles 20 (1) and 32 of the Constitution of Kazakhstan.

24. The source submits that Mr. Elshibayev’s advocacy of the right to work of those in his community is a protected activity under his rights to freedom of expression and assembly. However, despite the express protections under international and Kazakh law mentioned above, the Government arrested and detained him because of these very activities. The source adds that the Government has demonstrated, in both word and deed, that the arrest and detention of Mr. Elshibayev is as a result of his advocacy activities. There was no investigation into Mr. Elshibayev before he began engaging in activism, and he was allegedly targeted only after he became a prominent voice in the youth unemployment movement. Once Mr. Elshibayev had become a recognized activist, a city official allegedly attempted to bribe him into ending his participation in the unemployment protests. Moreover, the police reportedly demonstrated, through their series of baseless investigations, that their targeting of Mr. Elshibayev was merely pretextual. According to the source, police officers repeatedly attempted to find Mr. Elshibayev guilty of some crime.

25. The source adds that it took four attempts at investigating Mr. Elshibayev before the police could find charges to bring, and the charges that they ultimately brought required the police to reopen an investigation from 2017 by pressuring the four men that attacked Mr. Elshibayev to file new complaints against him. Furthermore, after he was detained under investigation for the incident in 2017, the police allegedly explicitly pressured him to refuse an interview with the Radio Free Europe/Radio Liberty about his protest activities. According to the source, the conduct of officials made it clear that the grounds for Mr. Elshibayev’s detention related to his advocacy activities. The source adds that these events show that an objective of the Government’s investigation and detention of Mr. Elshibayev is to end his advocacy efforts. Accordingly, the Government’s detention of Mr. Elshibayev constitutes a violation of his rights to freedom of expression and assembly.

26. The source also submits that although the rights to freedom of expression and assembly are not absolute, the arrest and detention of Mr. Elshibayev fall well outside any possible legitimate restriction on these rights. As discussed above, the Government allegedly targeted Mr. Elshibayev based on his advocacy and protests surrounding youth unemployment. For this reason, the Government’s actions allegedly qualify as an attempt to muzzle Mr. Elshibayev’s advocacy of human rights, namely the right to work, and thus cannot be justified as a legitimate restriction on his rights to freedom of expression and assembly. The source adds that none of the restrictions provided for under articles 19 (3) and 21 of the Covenant justify the Government’s arrest or detention of Mr. Elshibayev, because neither his involvement in the protests nor his criticism of the President had placed national

security, public order, public health or morals at risk, nor did those actions violate the rights or reputations of others. The source notes that peaceful assemblies that call for the protection of the right to work fall well within the scope of articles 19 and 21, and to hold otherwise would be to jeopardize the right itself. As a result, Mr. Elshibayev's involvement in the protests cannot trigger any of the exceptions to articles 19 and 21. Moreover, Mr. Elshibayev's criticisms of the President did not violate the rights of others, as the President was a public figure and Mr. Elshibayev's criticisms related to the President's actions in his capacity as such.

27. Accordingly, the source submits that Mr. Elshibayev's detention does not fall within the scope of the exceptions to the rights to freedom of expression, assembly and association, and the Government has acted in violation of articles 19 and 21 of the Covenant and articles 19 and 20 of the Universal Declaration of Human Rights, making his detention arbitrary under category II.

### iii. Category III

28. The source submits that Mr. Elshibayev's arrest and continued detention post-conviction is arbitrary because it is unjust, inappropriate and unreasonable. As noted above, he was reportedly targeted for investigation and arrest because of his engagement in the youth unemployment movement in Zhanaozen. The source adds that the pretextual nature of this targeting, and the trial that followed, renders his detention unjust and unreasonable. Moreover, to further highlight the arbitrariness of Mr. Elshibayev's detention, the source notes that none of the other four men involved in the incident were investigated, charged, tried or convicted for their involvement, even though those men were responsible for instigating the events in question. According to the source, the arbitrary focus on Mr. Elshibayev makes his arrest and prosecution inappropriate, given the Government's general lack of interest in prosecuting the men responsible for the events. Accordingly, the detention of Mr. Elshibayev is unfounded, in violation of article 9 (1) of the Covenant and article 9 of the Universal Declaration of Human Rights.

29. According to the source, Mr. Elshibayev was brought before a judge on 26 March 2019 and ordered to remain in pretrial detention, where he stayed until trial. The judge did not provide any individualized reasons to justify detaining Mr. Elshibayev. The source adds that even if the court had attempted to provide a justification, no legitimate reasons would have been found for his continued detention. Mr. Elshibayev has no history of violence, except in self-defence, and thus is not a threat to society. His home and family is in Zhanaozen, and thus he does not pose a flight risk. There is reportedly no risk that he might destroy evidence against him if released, since no such evidence exists. Accordingly, the source submits that the pretrial detention of Mr. Elshibayev is unfounded, and the denial of his pretrial release is a violation of article 9 (3) of the Covenant and principles 38 and 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

30. The source further submits that Mr. Elshibayev's trial did not meet the standard of fairness required under international law. First, owing to the Government's unjustified decision to try Mr. Elshibayev by video link, and as a result of Internet outages, he was effectively denied the right to attend a significant portion of his trial in person. The source adds that because Mr. Elshibayev was in custody at the time of his hearing, the Government had no excuse for not allowing him to attend the hearings.

31. The source also asserts that the court failed to give equal weight to the defence evidence or any prosecution evidence that favoured the defendant's case. The court did not recognize or credit Mr. Elshibayev's strong self-defence claim, which was clearly well founded as he was the one attacked at the time of the alleged crime. Moreover, the trial judge failed to consider the in-court testimony of the other men involved in the incident, who testified at trial that the events were not Mr. Elshibayev's fault and that they did not blame him for the incident. The source adds that the failure to consider strong evidence in favour of the defence demonstrates a clear bias on the part of the judge in favour of the prosecution. According to the source, the trial judge's selective consideration of the evidence thus demonstrates a lack of equality of arms, the absence of a presumption of innocence, and unfairness in the proceedings. The source adds that the conviction of Mr. Elshibayev amounts

to a violation of his right to be presumed innocent. The source submits that, for these reasons, the Government violated article 14 (1), (2) and (3) (d) of the Covenant and article 11 (1) of the Universal Declaration of Human Rights.

*Response from the Government*

32. On 10 December 2020, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 8 February 2021, detailed information about the current situation of Mr. Elshibayev, and to clarify the legal provisions justifying his continued detention and its compatibility with the obligations of Kazakhstan under international human rights law, in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government of Kazakhstan to ensure Mr. Elshibayev's physical and mental integrity.

33. On 20 December 2020, the Government requested an extension in accordance with paragraph 16 of the Working Group's methods of work, which was granted the following day with a new deadline of 10 March 2021. The Working Group regrets that, despite the extension, it did not receive a response from the Government.

**Discussion**

34. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

35. In determining whether Mr. Elshibayev's deprivation of liberty is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.<sup>3</sup> In the present case, the Government has chosen not to challenge the *prima facie* credible allegations made by the source.

36. The source has alleged that the arrest and detention of Mr. Elshibayev falls under categories I, II and III. The Working Group shall proceed to examine the allegations in turn, noting that the Government has chosen not to contest these allegations although it had the opportunity to do so.

*i. Category I*

37. The source has argued that there was no reasonable evidence for the arrest and detention of Mr. Elshibayev and that he was detained for his activism under the vaguely formulated article 293 of the Criminal Code. The source submits that because of this, the arrest and detention of Mr. Elshibayev falls under category I. The Government has chosen not to address these allegations.

38. The Working Group notes the extensive submissions concerning the scope of evidence that was available to the authorities to justify the arrest, charging, remand in custody and subsequent conviction of Mr. Elshibayev. While the Working Group considers that it is entitled to assess the proceedings of the court and the law itself to determine whether they meet international standards,<sup>4</sup> it has consistently refrained from taking the place of the national judicial authorities or acting as a kind of supranational tribunal when it is urged to review the judiciary's application of domestic law.<sup>5</sup> It is outside of the Working Group's mandate to reassess the sufficiency of the evidence or to deal with errors of law allegedly committed by the domestic court.<sup>6</sup>

39. The Working Group also notes the submissions by the source concerning article 293 of the Criminal Code. However, in the present case, as will be evident from the discussion

<sup>3</sup> A/HRC/19/57, para. 68.

<sup>4</sup> Opinion No. 33/2015, para. 80.

<sup>5</sup> Opinion No. 40/2005, para. 22.

<sup>6</sup> See opinions No. 15/2017, No. 49/2019, No. 58/2019 and No. 60/2019.

under category II below, the given provision was a mere pretext for the proceedings against Mr. Elshibayev. Indeed, there were numerous attempts by the authorities to use other provisions of the Criminal Code against Mr. Elshibayev, but this does not mean that such provisions lacked the requisite degree of legal certainty.

40. However, the Working Group recalls that detention is considered arbitrary under category I if it lacks a legal basis. As it has previously stated, for a deprivation of liberty to have a legal basis, it is not sufficient that there is a law that may authorize the arrest; the authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant.<sup>7</sup> Indeed, international law on deprivation of liberty includes the right to be presented with an arrest warrant, which is procedurally inherent in the right to liberty and security of person and the prohibition of arbitrary detention, under articles 3 and 9 of the Universal Declaration of Human Rights, article 9 (1) of the Covenant and principles 2, 4 and 10 of the Body of Principles.<sup>8</sup> In accordance with principle 4 of the Body of Principles, any form of detention or imprisonment should be ordered by, or be subject to the effective control of, a judicial or other authority under the law, whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

41. In the present case, Mr. Elshibayev was detained twice: on 2 March 2019, when the police arrived at his home and demanded that he accompany them to the police station, and he was released later the same day; and on 24 March 2019. On neither of these two occasions did the police present an arrest warrant duly authorizing the deprivation of liberty of Mr. Elshibayev, as required under article 9 (1) of the Covenant.

42. Moreover, Mr. Elshibayev was remanded in custody pending trial and according to the source, the decision of the judge to impose pretrial detention was based not on an individualized assessment of Mr. Elshibayev's circumstances and of whether alternatives to detention would be suitable, but rather on the mere fact that an investigation against him was still ongoing.

43. The Working Group recalls that it is a well-established norm of international law that pretrial detention should be the exception and not the rule, and that it should be ordered for as short a time as possible.<sup>9</sup> Under article 9 (3) of the Covenant, it should not be the general rule that persons awaiting trial should be detained in custody, but release may be subject to guarantees to appear for trial and at any other stage of the judicial proceedings. It follows that liberty is recognized as a principle and detention as an exception in the interests of justice.<sup>10</sup>

44. To give effect to this principle, pretrial detention must be based on an individualized determination that it is reasonable and necessary, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.<sup>11</sup> The courts must examine whether alternatives to detention, such as bail, would render custodial measures unnecessary.<sup>12</sup> In the present case, the court failed to comply with the requirements of article 9 (3) of the Covenant and pretrial detention was imposed upon Mr. Elshibayev in violation of this provision.

45. Noting that the two arrests of Mr. Elshibayev were carried out in breach of article 9 (1) of the Covenant and that he was subsequently placed in pretrial detention in violation of article 9 (3) of the Covenant, the Working Group concludes that the detention of Mr. Elshibayev lacked a legal basis and falls under category I.

<sup>7</sup> See, for example, opinions No. 46/2017, No. 66/2017, No. 75/2017, No. 93/2017, No. 35/2018 and No. 79/2018.

<sup>8</sup> Opinions No. 88/2017, para. 27; No. 3/2018, para. 43; and No. 30/2018, para. 39.

<sup>9</sup> Opinions No. 28/2014, para. 43; No. 49/2014, para. 23; No. 57/2014, para. 26; No. 1/2020, para. 53; and No. 8/2020, para. 54. See also Human Rights Committee, general comment No. 35 (2014), para. 38; and A/HRC/19/57, paras. 48–58.

<sup>10</sup> A/HRC/19/57, para. 54.

<sup>11</sup> Human Rights Committee, general comment No. 35 (2014), para. 38.

<sup>12</sup> Ibid.; opinion No. 83/2019, para. 68; and United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37, annex), guideline 15.



ii. *Category II*

46. The source has further submitted that the detention of Mr. Elshibayev falls under category II, as he was detained solely for his activism and freedom of expression as protected by article 19 of the Covenant. The Working Group notes the absence of a Government reply to these allegations.

47. The Working Group recalls that freedom of opinion and freedom of expression, as provided for in article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant, are indispensable conditions for the full development of the person. They are essential for any society, and in fact constitute the foundation stone for every free and democratic society. Freedom of expression includes the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, and that right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions and commentary on public affairs.<sup>13</sup>

48. In the present case, the Government of Kazakhstan has chosen to provide no explanation of the arrest, detention and sentencing of Mr. Elshibayev. The source, on the other hand, has presented numerous examples of attempts by the authorities initially to stifle and silence Mr. Elshibayev's activism (see para. 5 above), then to incriminate him and bring proceedings against him, including accusations that he had stolen his own car. The authorities finally succeeded in these attempts by resurrecting an old case against Mr. Elshibayev. The Working Group takes particular note here of the uncontested submissions by the source of the testimonies presented by the other four men that they were pressured by the police to request that the case be reopened (see para. 12 above). Equally, the Working Group must highlight that the four men, who were equally involved in the alleged altercation, were not prosecuted at all. Rather, Mr. Elshibayev was the sole defendant in this case. A pattern in the authorities' attitude against Mr. Elshibayev is evident to the Working Group, and the Government has chosen not to address any of the allegations.

49. It is therefore clear to the Working Group that the basis for the arrest and subsequent detention of Mr. Elshibayev was his freedom of expression and political activism. While freedom of expression and freedom of assembly are not absolute rights, the Human Rights Committee has stated that when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Article 19 (3) of the Covenant may never be invoked as a justification for the muzzling of any advocacy of multiparty democracy, democratic tenets and human rights. Moreover, the permitted areas of restrictions on the right to freedom of expression may relate either to respect of the rights or reputations of others, or to the protection of national security or of public order (*ordre public*) or of public health or morals. Restrictions are not allowed on grounds not specified in article 19 (3), even if such grounds would justify restrictions on other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.<sup>14</sup> It should be noted that article 21 of the Covenant permits restrictions on the right of assembly on similar grounds.

50. Furthermore, the present case reveals interference with Mr. Elshibayev's right to participate in public life, as protected under article 25 of the Covenant. Noting the failure of the Government to respond to the allegations, the Working Group finds a violation of article 21 of the Universal Declaration of Human Rights and article 25 of the Covenant.

51. According to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and to draw public attention to matters relating to the observance of human rights.<sup>15</sup> The source has demonstrated that Mr. Elshibayev was detained for the exercise of his rights covered by the Declaration.

<sup>13</sup> Human Rights Committee, general comment No. 34 (2011), paras. 2 and 11.

<sup>14</sup> *Ibid.*, paras. 21–23.

<sup>15</sup> General Assembly resolution 53/144, annex, articles 1 and 6 (c). See also General Assembly resolution 74/146, para. 12.

The Working Group has in the past concluded that being a human rights defender is a status protected by article 26 of the Covenant.<sup>16</sup>

52. Noting all of the above, the Working Group concludes that the detention of Mr. Elshibayev resulted from the legitimate exercise of his right to freedom of expression and his right to participate in public life, as protected by articles 19, 25 and 26 of the Covenant, and is therefore arbitrary, falling under category II. The Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, for appropriate action.

*iii. Category III*

53. Given its finding that the deprivation of liberty of Mr. Elshibayev is arbitrary under category II, the Working Group wishes to emphasize that no trial should have taken place. However, the trial did take place, and the source has submitted that the detention of Mr. Elshibayev was arbitrary and falls under category III since: (a) Mr. Elshibayev's trial rendered it unreasonable; (b) the court hearing took place by video link, which was of such poor quality that he was unable to participate effectively; (c) the court failed to consider evidence in favour of Mr. Elshibayev; and (d) the court failed to act in an impartial manner. The Working Group observes that the Government has failed to respond to any of these specific allegations, although it had the opportunity to do so.

54. The Working Group observes the uncontested allegations by the source that the court failed to consider all the evidence during the trial and, in particular, that it failed to consider evidence in favour of Mr. Elshibayev. Moreover, the testimony of the four men, clearly stating that they had been pressured by the police to request the reopening of the case and that Mr. Elshibayev was not in fact to blame for the altercation, was also disregarded. In the absence of any response from the Government, the Working Group finds that the court acted in a manner that promoted the interests of the prosecution and failed in its duty of impartiality to Mr. Elshibayev, in breach of the principle of equality of arms, and of article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant. The Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

55. Furthermore, the source has argued that Mr. Elshibayev was required to appear in court by video link and that, owing to the poor Internet connection, he was unable to participate effectively in large parts of the hearing. The Government has chosen not to respond to these allegations.

56. The Working Group recalls that article 14 (3) (d) of the Covenant entails the right of meaningful participation in the court proceedings, and indeed the physical presence of detainees at the hearing gives the opportunity for inquiry into their treatment in custody and the lawfulness of their detention, and serves as a safeguard for the right to security of person.<sup>17</sup> The Working Group accepts that there may be legitimate circumstances that warrant an appearance of the defendant by video link. However, in the present case, the Government has presented none and, according to the source, no justification was provided by the court either.

57. Even if such legitimate reasons existed, it was the duty of the court to ensure that the right of Mr. Elshibayev to meaningfully participate in the proceedings was safeguarded. This clearly was not the case, and the Working Group therefore finds a breach of article 14 (3) (d) of the Covenant.

58. Furthermore, the Working Group recalls the right of anyone arrested or detained on a criminal charge to be tried within a reasonable time and without undue delay, as encapsulated in articles 9 (3) and 14 (3) (c) of the Covenant. In the present case, Mr. Elshibayev was arrested on 24 March 2019 and his trial did not commence until October 2019. In principle, the delay of seven months from the moment of arrest to the beginning of the trial is not automatically a breach of articles 9 (3) and 14 (3) (c) of the Covenant, as there may be

<sup>16</sup> See, for example, opinions No. 48/2017, No. 50/2017, No. 88/2017, No. 19/2018 and No. 36/2020. See also A/HRC/36/37, para. 49.

<sup>17</sup> Human Rights Committee, general comment No. 32 (2007), para. 10, and general comment No. 35 (2014), paras. 34 and 42. See also the Body of Principles, principles 32 (2) and 37.

legitimate reasons justifying such a delay. In the present case, however, the Working Group notes that Mr. Elshibayev was detained and placed in pretrial detention purely for exercising his rights protected by the Covenant (see paras. 46–52 above). The Working Group therefore finds that the delay of seven months between the arrest and trial of Mr. Elshibayev, who should not have been tried at all for the exercise of his rights, constituted a breach of articles 9 (3) and 14 (3) (c) of the Covenant.<sup>18</sup>

59. Noting all of the above, the Working Group finds that the violation of Mr. Elshibayev's fair trial rights was of such gravity as to render his continued detention arbitrary under category III.

*iv. Category V*

60. While the source has made no submissions under category V, the Working Group has already highlighted what appears to be a pattern in the authorities' conduct and attitude towards Mr. Elshibayev, which culminated in his arrest, pretrial detention and sentencing. As discussed in detail above under category II, this pattern in attitude was based on Mr. Elshibayev's activism and the exercise of his right to freedom of expression. The Working Group reiterates that it applies a heightened standard of review in cases in which the freedom of expression and opinion is restricted or in which human rights defenders are involved.<sup>19</sup>

61. In the discussion above concerning category II, the Working Group established that Mr. Elshibayev's detention resulted from the peaceful exercise of his rights under international law. When it is established that detention results from the active exercise of civil and political rights, there is a strong presumption that the detention constitutes a violation of international law on the grounds of discrimination based on political or other views.<sup>20</sup>

62. The Working Group finds that Mr. Elshibayev was deprived of his liberty on discriminatory grounds, that is, owing to his status as a human rights defender, in violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant. His deprivation of liberty is thus arbitrary under category V. The Working Group refers the present case to the Special Rapporteur on the situation of human rights defenders, for appropriate action.

*v. Concluding remarks*

63. The Working Group is obliged to remark on what appears to be the continuing harassment of Mr. Elshibayev even as he has been sentenced and is serving that sentence.

64. The Working Group notes the uncontested allegations that Mr. Elshibayev was held in solitary confinement in what appears to be a further retaliation for his activism. The Working Group recalls that according to rule 45 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), the imposition of solitary confinement must be accompanied by certain safeguards: solitary confinement must only be used in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to authorization by a competent authority. These safeguards do not appear to have been observed in the present case. Prolonged solitary confinement, in excess of 15 consecutive days, is prohibited under rules 43 (1) (b) and 44 of the Nelson Mandela Rules.<sup>21</sup>

<sup>18</sup> Human Rights Committee, general comment No. 32 (2007), para 35, and general comment No. 35 (2014), para. 37. See also opinions No. 15/2020, No. 16/2020, No. 29/2020 and No. 51/2020.

<sup>19</sup> Opinions No. 64/2011, para. 20; No. 54/2012, para. 29; No. 62/2012, para. 39; No. 41/2017, para. 95; No. 57/2017, para. 46; and No. 88/2017, para. 25. Domestic authorities and international supervisory bodies should apply the heightened standard of review of government action, especially when there are claims of a pattern of harassment (opinion No. 39/2012, para. 45). See also the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, article 9 (3).

<sup>20</sup> Opinions No. 88/2017, para. 43; No. 13/2018, para. 34; No. 59/2019, para. 79; and No. 36/2020, para. 75.

<sup>21</sup> Opinion No. 52/2018, para. 79 (d); and No. 61/2020, para. 85.

65. Equally, the source has submitted unchallenged allegations of ill-treatment and torture inflicted upon Mr. Elshibayev and referred to two official complaints submitted by him and by his family to the authorities, which appear to have been left unanswered. The Working Group reminds the Government of Kazakhstan of the absolute prohibition of ill-treatment and torture, which is a peremptory norm of international law and is contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, principle 6 of the Body of Principles and rule 1 of the Nelson Mandela Rules. It is also the obligation and the duty of the State to conduct a prompt and impartial investigation into all allegations of torture and ill-treatment. In particular, it is the duty of the public prosecution to take appropriate action when allegations of torture and ill-treatment are brought to its attention, as they were in the present case. The failure to do so violates paragraphs 12 and 16 of the Guidelines on the Role of Prosecutors. The Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

66. Lastly, the Working Group notes the uncontested allegation that Mr. Elshibayev was suddenly and without an explanation or even a notification to his family transferred to a different detention facility more than 2,000 kilometres away from his home city, making it impossible for his family to visit him. This action appears to constitute further retaliation by the authorities against Mr. Elshibayev for his activism, and is also a breach of the Nelson Mandela Rules, in particular rules 43, 58 and 59.

67. On 2 March 2015 and 8 November 2017, the Working Group sent letters to the Government of Kazakhstan, with a request for a country visit. While noting that the Government has expressed its readiness to arrange the visit, the Working Group refers to the standing invitation by the Government to visits of the special procedures and reiterates that it would welcome the opportunity to conduct such a visit in order to engage with the Government in a constructive manner and to offer its assistance in addressing its serious concerns relating to instances of arbitrary deprivation of liberty.

### **Disposition**

68. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Erzhan Elshibayev, being in contravention of articles 2, 3, 7, 9, 10, 19 and 21 of the Universal Declaration of Human Rights and articles 2 (1), 9, 14, 19, 25 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

69. The Working Group requests the Government of Kazakhstan to take the steps necessary to remedy the situation of Mr. Elshibayev without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

70. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Elshibayev immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate release of Mr. Elshibayev.

71. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Elshibayev and to take appropriate measures against those responsible for the violation of his rights.

72. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

73. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

#### **Follow-up procedure**

74. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Mr. Elshibayev has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Elshibayev;
- (c) Whether an investigation has been conducted into the violation of Mr. Elshibayev's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Kazakhstan with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

75. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

76. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

77. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.<sup>22</sup>

*[Adopted on 3 May 2021]*

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<sup>22</sup> Human Rights Council resolution 42/22, paras. 3 and 7.