

PETITION TO:

UNITED NATIONS WORKING GROUP ON ARBITRARY DETENTION

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In the Matter of

Erzhan Elshibayev
Citizen of the Republic of Kazakhstan

v.

Government of the Republic of Kazakhstan

Petition for Relief Pursuant to Resolutions 1991/42, 1994/32, 1997/50, 2000/36, 2003/31, 6/4,
15/18, 24/7¹

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¹ Resolutions 1991/41, 1994/32, 1997/50, 2000/36, and 2003/31 were adopted by the UN Commission on Human Rights to extend the mandate of the Working Group on Arbitrary Detention. The Human Rights Council, which “assume[d]... all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights...” pursuant to UN General Assembly Resolution 60/251, GA Res. 60/251, March 15, 2006, at ¶ 6, later extended the mandate through Resolutions 6/4, 15/18, and 24/7.

TABLE OF CONTENTS

I. IDENTITY3

II. ARREST.....3

III. DETENTION3

IV. DESCRIBE THE CIRCUMSTANCES OF THE ARREST AND/OR THE
DETENTION AND INDICATE PRECISE REASONS WHY YOU CONSIDER
THE ARREST OR DETENTION TO BE ARBITRARY4

 A. Statement of Facts..... 4

 1. Human Rights Context in Kazakhstan4

 2. The Situation of Erzhan Elshibayev.....5

 B. Legal Analysis 8

 1. Arbitrary Deprivation of Liberty under Category I.....8

 2. Arbitrary Deprivation of Liberty under Category II10

 3. Arbitration Deprivation of Liberty under Category III13

V. INDICATE INTERNAL STEPS, INCLUDING DOMESTIC REMEDIES TAKEN
ESPECIALLY WITH THE LEGAL AND ADMINISTRATIVE AUTHROITIES,
PARTICULARLY FOR THE PURPOSE O F ESTABLISHING TH EDETENTION
AND, AS APPROPRIATE, THEIR RESULTS OR THE REASONS WHY SUCH
STEPS OR REMEDIES WERE INEFFECTIVE OR WHY THEY WERE NOT
TAKEN15

VI. FULL NAME AND ADDRESS OF THE PERSONS SUBMITTING THE
INFORMATION16

**QUESTIONNAIRE TO BE COMPLETE D BY PERSONS
ALLEGING ARBITRARY ARREST OR DETENTION**

I. IDENTITY

1. *Family Name:* Elshibayev
2. *First Name:* Erzhan
3. *Sex:* Male
4. *Age at the Time of Detention:* 31
5. *Nationality:* Kazakh
6. (a) *Identity Document (if any):* Unknown
(b) *Place of Issue:*
(c) *On (date):*
(d) *No.:*
7. *Profession and/or activity (if believed to be relevant to the arrest/detention):* In addition to his activism, Elshibayev worked as a truck driver and a welder and metal worker.
8. *Address of usual residence:* Zhanaozen, Village Rakhat 2-13, Kazakhstan.

II. ARREST

1. *Date of arrest:* March 24, 2019
2. *Place of arrest (as detailed as possible):* Aktau Police Station.
3. *Did they show a warrant or other decision by a public authority?* No.
4. *Authority who issued the warrant or decision:* N/A
5. *Relevant legislation applied (if known):* Article 293 (“Hooliganism”) of the Criminal Code.

III. DETENTION

1. *Date of detention:* March 24, 2019.
2. *Duration of detention (if not known, probable duration):* From March 24, 2019 to the present day.
3. *Forces holding the detainee under custody:* Ministry of Internal Affairs, Committee of the Criminal-Executive System.
4. *Places of Detention (indicate any transfer and present place of detention):* Between March 24 to 26, 2019, Elshibayev was held in pre-trial detention in the jail of the Aktau Police Station. On March 26, he was transferred to the Aktau Detention Center, where he was held until his conviction. Following his conviction, he was transferred to penal colony ICH-167/9 in Lenger, and on October 20, 2020, he was transferred to penal colony NEK-169/5 in the city of Kyzylorda.
5. *Authorities that ordered the detention:* Investigative Court in Zhanaozen.
6. *Reasons for the detention imputed by the authorities:* Authorities allege that Elshibayev engaged in hooliganism during a fight that occurred in August of 2017.

7. *Relevant legislation applied (if known)*: Paragraph 7, part 2 of Article 106 (“Intentional infliction of grievous bodily harm from hooligan motives”) and Article 293 (“Hooliganism”) of the Criminal Code.

IV. DESCRIBE THE CIRCUMSTANCES OF THE ARREST AND/OR THE DETENTION AND INDICATE PRECISE REASONS WHY YOU CONSIDER THE ARREST OR DETENTION TO BE ARBITRARY

A. Statement of Facts

Part 1 of the Statement of Facts provides background information on the current human rights context in Kazakhstan in order to illustrate the Kazakh Government’s pattern of violating the rights of activists. Part 2 of the Statement of Facts details the circumstances surrounding the arrest and continuing detention of Elshibayev.

1. **Human Rights Context in Kazakhstan**

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.² Human rights defenders are among those most routinely targeted for their advocacy activities by the Kazakh Government.³ Additionally, the Government has created a hostile environment for activists, and many civil society members working on politically sensitive issues are frequently targets of government harassment.⁴ Civil society has reported police surveillance of themselves, their places of work, and their family members.⁵

In its most recent review of Kazakhstan, the UN Human Rights Committee expressed concern over the Government’s practice of using the Kazakh Criminal Code to target individuals for merely exercising their right to freedom of expression.⁶ Furthermore, the Human Rights Committee emphasized the need for Kazakhstan to “[r]efrain from using its criminal provisions and other regulations as tools to suppress the expression of dissenting opinions”⁷ On several prior occasions, the government has been found to use charges of hooliganism under Article 293 of the Criminal Code to detain and intimidate individuals engaging in public protests.⁸

² Human Rights Watch, *World Report 2019: Kazakhstan*, <https://www.hrw.org/world-report/2019/country-chapters/kazakhstan>; Freedom House, *Freedom in the World 2019: Kazakhstan*, <https://freedomhouse.org/report/freedom-world/2019/kazakhstan>.

³ Amnesty International, *Amnesty International Report 2017/18: Kazakhstan*, 47, available at <https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF>. For example, see the case of Kazakh human rights activist Yelena Semyonova. See Freedom House, *supra* note 2.

⁴ See Freedom House, *supra* note 2; United States Department of State, *2018 Country Reports on Human Rights and Practices: Kazakhstan*, available at <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/kazakhstan/> [hereinafter “US State Department Report”].

⁵ US State Department Report, *supra* note 4.

⁶ United Nations Human Rights Committee, *Concluding Observations on Kazakhstan*, UN Doc. CCPR/C/KAZ/CO/2, para. 49 (Aug. 9, 2016), available at <https://undocs.org/ccpr/c/kaz/co/2>.

⁷ UN Human Rights Committee, *supra* note 6, para. 50.

⁸ In May 2016, activists Makhabet Abzhan and Maksat Nurpbayev were each detained for 10 days on hooliganism charges to prevent them from attending an unauthorized land protest. *Kazakhstan Arrests Activists Ahead of Land Protests*, Reuters (May 18, 2016), <https://www.reuters.com/article/us-kazakhstan-protests-idUSKCN0Y90Q8>. Similarly, in 2018, activist Zhanar Sekerbayeva was charged and convicted of hooliganism for holding banners at a protest against the stigma and taboos around menstruation. Zhanar Sekerbayeva, “*My Activism Isn’t Motivated by Kindness. It’s Motivated by Anger*”, Amnesty International (July 2, 2019), <https://www.amnesty.org/en/latest/campaigns/2019/07/zhanar-sekerbayeva-from-feminita-on-why-anger-motivates-her-activism/>.

2. The Situation of Erzhan Elshibayev

a. Background Information

Erzhan Elshibayev is a Kazakh labor rights activist who came to the attention of government officials in 2018 when he helped organize peaceful rallies primarily addressing high unemployment in the town of Zhanaozen in western Kazakhstan.⁹

During a public protest on February 16, Elshibayev criticized then-president Nursultan Äbishuly Nazarbayev, accusing him of corruption and mismanagement of the state budget.¹⁰ On February 19, a video of these remarks was uploaded to YouTube and was shared widely.¹¹

Authorities began harassing and pressuring Elshibayev and other protestors. One city official approached Elshibayev and offered to find Elshibayev a permanent job if he would “shut up” and be quiet, referring to Elshibayev’s involvement in the protest movement.¹² Elshibayev did not cease his advocacy, and in early 2019 he became a target of local police.

b. Investigations

The first police investigation began on March 2, 2019, when police officers arrived at Elshibayev’s 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.¹³ The police had no warrant for Elshibayev’s arrest and no evidence of his involvement in any theft, and he was released shortly after his arrest.¹⁴ No charges were brought against him. Though brief, this initial detention caused a notable public outcry, and police department deputy, Bolatbek Akshalov, assured the public that the police would cease their harassment of Elshibayev.¹⁵

Soon after, local police made allegations that that he had stolen a car.¹⁶ After interrogating Elshibayev, police discovered that he, in fact, owned the car in question, and the investigation was dropped.¹⁷ Then, police alleged that Elshibayev was involved in a rape of his neighbor. However, after taking several medical tests related to the rape investigation and after Elshibayev was able to provide an alibi, the police again dropped the investigation.¹⁸

In March 2019, Police decided to re-open an investigation into an alleged 2017 altercation. On August 19, 2017, Elshibayev was confronted by four young men while he was on his way to a job.¹⁹ The four men were seemingly drunk, and they asked Elshibayev for cigarettes and some money. When he refused, the men attacked him. While defending himself, Elshibayev hit one of the men in the head with a bottle. This man was injured and lost vision in one eye. At the time, the police opened an investigation into the incident, but quickly closed it after Elshibayev and the four men agreed that neither side wanted to press charges.²⁰ In 2019, the four men who attacked

⁹ Confidential Source A. B., on file with author.

¹⁰ *Id.*

¹¹ *Id.*

¹² Kazakhstan International Bureau for Human Rights, *One for All* (Oct. 23, 2019), https://bureau.kz/novosti/sobstvennaya_informaciya/odin_za_vsekh/?fbclid=IwAR2sG2V85mEx3o5idbLta ppG7M7Wq-aI2I8W1m42ebJne_z4gCI7icmAj6k.

¹³ Sania Toyken, *Zhanaozen Court Issues Warrant for Arrest of Activist Erzhan Elshibayev*, RFE/RL (Mar. 26, 2019), <https://rus.azattyq.org/a/29842762.html>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Confidential Source A. B., on file with author.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Confidential Source B.C., on file with author.

²⁰ *Id.*

Elshibayev supposedly requested the case to be reopened.²¹ The statements of the four men were identical, and several of the signatures on the official complaint documents appeared forged.²²

c. *Arrest*

On March 24, 2019, Elshibayev was visited by police at his home and summoned to the Department of Internal Affairs in the city of Zhanaozen to meet with investigator Dzhanabayev Mangaspal.²³ The investigating officer did not present a warrant for the arrest, and as far as the source is aware, no warrant for Elshibayev's arrest was ever issued.²⁴ After questioning Elshibayev at the Department of Internal Affairs office about the 2017 altercation, Elshibayev was transferred to the local police station in Aktau, where he was detained in the police station jail.

On March 26, Elshibayev was brought before the Investigative Court in Zhanaozen, where a judge ordered that he be placed in pre-trial detention for two months²⁵ and confirmed formal charges against him under paragraph 7, part 2 of Article 106 ("Intentional infliction of grievous bodily harm from hooligan motives")²⁶ and Article 293 ("Hooliganism")²⁷ of the Criminal Code.²⁸ The judge's stated reasons for ordering Elshibayev into pre-trial detention was that he was under investigation. He was transferred to the Aktau Detention Center, where he was held in custody until his trial.²⁹

While in pre-trial detention, officers attempted to pressure Elshibayev to refuse an interview with journalist Sonia Toyken from Radio Free Europe/Radio Liberty (RFE/RL) and to coerce him into testifying that Mukhtar Ablyazov had financed the protests he had organized.³⁰ Elshibayev refused to agree to the officers' demands.³¹

d. *Trial*

On June 27, 2019, the first pre-trial hearing in Elshibayev's case began,³² and in early October 2019 his trial began before the Ataku City Court.³³ For several hearings at the beginning

²¹ Sania Toyken, *Zhanaozen Court Issues Warrant for Arrest of Activist Erzhan Elshibayev*, RFE/RL (Mar. 26, 2019), <https://rus.azattyq.org/a/29842762.html>.

²² Confidential Source C.D., on file with author.

²³ *Id.*

²⁴ *Id.*

²⁵ *Kazakh Activist in Restive Town Arrested, Charged with Hooliganism*, RFE/RL (Mar. 26, 2019), <https://www.rferl.org/a/kazakh-activist-in-restive-town-arrested-charged-with-hooliganism/29843539.html>.

²⁶ Article 106 – **Intentional infliction of grievous harm to health**. – (1.) Intentional infliction of grievous harm to health shall be punished by restriction of liberty for the term of three years to seven years or imprisonment for the same term. (2.) The same action, committed: . . . (7) for hooligan motives. . . .

²⁷ Article 293 – **Hooliganism** – Hooliganism, in other words particularly insolent violation of public order, expressing a clear disrespect for society, accompanied by use of force to the citizens or the threat of its use, as well as destruction of damaging of another's property, or commission of indecent acts, characterizing by exceptional cynicism.

²⁸ Sania Toyken, *Zhanaozen Activist Transferred to a Prison in Another Region*, RFE/RL (Dec. 14, 2019), https://rus.azattyq.org/a/kazakhstan-zhanapzen-etapirovanie-erzhana-elshibekova/30325755.html?fbclid=IwAR2DlIdB-oiDO2jtB1F2VuUmap_WdII3rMf_qixj_fuhdnt-9n7D_Jnbcv4.

²⁹ Confidential Source C.D., on file with author.

³⁰ Confidential Source A.B., on file with author.

³¹ *Id.*

³² Sania Toyken, *Zhanaozen Activist Tried Under Criminal Charges After Unemployment Protests*, RFE/RL (Jun. 28, 2019), <https://rus.azattyq.org/a/30025491.html>.

³³ *Id.*

of his trial, he was not permitted to be physically present in court.³⁴ Instead, an online broadcasting system was employed to allow him access to the proceedings from the detention center.³⁵ Due to a poor internet connection, the broadcasting system was dysfunctional, making it impossible for Elshibayev to fully participate in some parts of the trial.³⁶ The court did not provide any justification, either orally or in writing, for refusing to allow Elshibayev to participate in the hearings in person.³⁷

Throughout the course of the trial, serious discrepancies arose between witness testimony obtained during the investigation and trial stages.³⁸ At trial, the four men involved in the incident testified that they had been pressured by police to file complaints requesting reopening of the case against Elshibayev.³⁹ Moreover, the man who Elshibayev hit in the head testified at trial that he had no complaints against Elshibayev for what happened during the incident and requested that the judge find him innocent.⁴⁰ Ultimately, the judge refused to accept Elshibayev's self-defense claim and rejected the four men's allegations of coercion, and on October 17, 2019, the trial judge convicted Elshibayev on both counts and sentenced him to five years in prison. Following his conviction, Elshibayev's attorney filed an appeal on Elshibayev's behalf before the Zhanaozen City Court of Mangystau Region. However, on November 25, 2019, the appellate court upheld the trial court's decision.⁴¹

None of the other four men involved in the altercation on August 19, 2017 were charged or tried for their role in the events for which Elshibayev was convicted.⁴²

e. *Current Status*

Following conviction, Elshibayev was transferred to penal colony ICH-167/9 in Lenger. While in prison, authorities have beaten and pressured Elshibayev.⁴³ After visiting Elshibayev in prison on March 12, 2020, his wife and a friend observed severe bruising on Elshibayev's body from beatings received in prison.⁴⁴ On March 30, Elshibayev's wife filed a complaint on his behalf to the Prosecutor General notifying the chief prosecutor of the torture and mistreatment suffered by her husband. As far as Elshibayev and his wife are aware, there has been no government response to the complaint.

After the first complaint alleging mistreatment was submitted, prison officials began harassing Elshibayev frequently, subjecting him to insulting and degrading treatment. On August, 17, 2020, Elshibayev submitted a second official complaint to prison authorities alleging that two prison officials were responsible for mistreating him.⁴⁵ As far as Elshibayev or his family are aware, officials failed to conduct an investigation into allegations. Instead, on August 15, officials placed

³⁴ *Erzhan Elshibayev*, Tirek.info (Oct. 16, 2019), <http://tirik.info/s-suda-e-elshibaeva-16-10-19-g-zhanaozen/>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Confidential Source C.D., on file with author.

³⁸ Sania Toyken, *Zhanaozen Activist Tried Under Criminal Charges After Unemployment Protests*, RFE/RL (Jun. 28, 2019), <https://rus.azattyq.org/a/30025491.html>.

³⁹ Confidential Source C.D., on file with author.

⁴⁰ Confidential Source A.B., on file with author; Confidential Source C.D., on file with author.

⁴¹ Kazakhstan International Bureau for Human Rights, *Zhanaozen Activist Reportedly Beaten in Prison* (Mar. 13, 2020), https://bureau.kz/kk/menshikti-aqparat/zhanaozendik_belsendi/.

⁴² Confidential Source C.D., on file with author.

⁴³ Confidential Source A.B., on file with author.

⁴⁴ Kazakhstan International Bureau for Human Rights, *Zhanaozen Activist Reportedly Beaten in Prison* (Mar. 13, 2020), https://bureau.kz/kk/menshikti-aqparat/zhanaozendik_belsendi/.

⁴⁵ Dilara Isa, *Elshibayev Announced Pressure on Him in Prison; Prosecutor's Office is Talking About Starting an Investigation*, RFE/RL (Aug. 17, 2020), <https://rus.azattyq.org/a/30787847.html>.

Elshibayev in solitary confinement until the end of August,⁴⁶ claiming he was at risk of harming himself.⁴⁷ Elshibayev's solitary confinement was further extended an additional 30 days to the end of September.⁴⁸

On October 20, Elshibayev was transferred to another prison, penal colony NEK-169/5 in the city of Kyzylorda.⁴⁹ Prison officials did not provide a justification for the transfer. Moreover, officials provided no forewarning of the transfer, notifying Elshibayev's family on the day of.⁵⁰ Elshibayev's family currently reside in the city of Aktau, which is approximately 2,142 Kilometers from Kyzylorda, about a 31-hour drive by car. In light of the transfer, Elshibayev's wife and children have not been able to visit him to determine his current status.

B. Legal Analysis

The arrest and continuing detention of Elshibayev is arbitrary under Categories I, II, and III of the Working Group's Revised Methods of Work.⁵¹ The detention is arbitrary under Category I because Elshibayev is being detained without sufficient legal justification. The detention is arbitrary under Category II because it resulted from Elshibayev peaceful and legitimate exercise of his rights to freedom of expression, assembly, and association. The detention is arbitrary under Category III because the Government's arrest and detention of Elshibayev failed to meet the minimum international standards of due process.

1. **Arbitrary Deprivation of Liberty under Category I**

A detention is arbitrary under Category I when there is no legal basis or justification for it.⁵² The Working Group has found lack a legal basis for the purposes of Category I when the government fails to support its legal basis for the detention with "enough factual specifics to indicate the substance of the complaint, such as the wrongful act."⁵³ and when the Government uses vague and/or overbroad laws to prosecute an individual.⁵⁴ In the present case, Elshibayev's

⁴⁶ Confidential Source D.E., on file with author.

⁴⁷ Dilara Isa, *Elshibayev Announced Pressure on Him in Prison; Prosecutor's Office is Talking About Starting an Investigation*, RFE/RL (Aug. 17, 2020), <https://rus.azattyq.org/a/30787847.html>.

⁴⁸ Confidential Source D.E., on file with author.

⁴⁹ Confidential Source E.F., on file with author.

⁵⁰ *Id.*

⁵¹ An arbitrary deprivation of liberty is defined as any "depriv[ation] of liberty exception on such grounds and in accordance with such procedures as are established by law." *International Covenant on Civil and Political Rights*, G.A. Res 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966), 999 UNTS 171, entered into force on Mar. 23, 1976 (hereinafter "ICCPR"), at art. 9(1). An arbitrary deprivation of liberty is expressly prohibited under international law. *Id.*; *See also Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810 (hereinafter "UDHR"), at art. 9, (1948) ("No one shall be subjected to arbitrary arrest, detention or exile."); *Body of Principles for the Protection of Persons under Any Form of Detention or Imprisonment*, G.A. Res. 47/173, 43 UN GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (hereinafter "Body of Principles"), at principle 2 ("Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law . . .").

⁵² A Category I deprivation of liberty occurs "[w]hen it is impossible for the government to invoke any legal basis under domestic law for detaining the individual . . ." Report of the Working Group on Arbitrary Detention, 16th session, A/HRC/16/47, Annex 8(b) (Jan. 19, 2011), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/102/76/PDF/G1110276.pdf?OpenElement>.

⁵³ *Hoang Duc Binh v. Vietnam*, UN Working Group on Arbitrary Detention, Opinion No. 45/2018, paras. 42-43 (Oct. 1, 2018), <https://undocs.org/A/HRC/WGAD/2018/45>.

⁵⁴ *61 Individuals v. United Arab Emirates*, UN Working Group on Arbitrary Detention, Opinion No. 60/2013, para. 22 (Nov. 22, 2013), <http://hrlibrary.umn.edu/wgad/60-2013.html>; *Judicaël et al. v. Republic*

detention is arbitrary under Category I because the Government lacks any substantive evidence to justify his detention and because the Government charged Elshibayev under a vague and overbroad provision of the Kazakh Criminal Code.

a. *The Government of Kazakhstan Did Not Have an Evidentiary Basis to Justify Arresting and Detaining Elshibayev*

The Government's conviction and detention of Elshibayev is not founded on any reasonable evidence against him. Elshibayev was convicted of two charges with hooliganism as an element of the crime. Hooliganism is defined in the Kazakhstan Criminal Code as a

particularly insolent violation of public order, expressing a clear disrespect for society, accompanied by the use of force to the citizens or the threat of its use, as well as destruction of damaging another's property, or commission of indecent acts, characterized by exceptional cynicism.⁵⁵

The Government possessed no evidence that Elshibayev engaged in any activity that would reasonably fall under the legal definition of hooliganism presented in the Criminal Code. Elshibayev's detention resulted from an altercation where he acted in self-defense against attacks by four belligerent men. Immediately following the altercation, the investigating police found that no crime was committed. Moreover, none of the four men suggested that Elshibayev acted other than in self-defense, and the man who was most injured claimed that he did not blame Elshibayev for the incident. Nothing in Elshibayev's conduct on the day of the altercation reflected "insolen[ce]," "disrespect," or "cynicism." Accordingly, the Government lacked a basis for detaining him on hooliganism grounds.

Moreover, police decided to revisit this incident only after Elshibayev gained a reputation as a prominent activist and after three other unsuccessful and baseless investigations into him, suggesting that the charges related to the 2017 incident were merely pretextual in basis. Charges that are pretextual cannot be considered to have an adequate basis to justify detention. Accordingly, Elshibayev's detention is arbitrary under Category 1 because there is no basis, in either evidence or fact, for the detention.

b. *Article 293 of the Kazakh Criminal Code Is Vague*

Article 15(1) of the International Covenant on Civil and Political Rights ("ICCPR")⁵⁶ and Article 11(2) of the Universal Declaration of Human Rights ("UDHR")⁵⁷ both guarantee individuals the right to know what the law is and what conduct violates the law. In its General Comment No. 35, the Human Rights Committee states that "[a]ny substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application."⁵⁸ Moreover, the Human Rights

of Congo, UN Working Group on Arbitrary Detention, Opinion No. 44/2014, paras. 26-37 (Feb. 4, 2015), <http://hrlibrary.umn.edu/wgad/44-2014.pdf>.

⁵⁵ Kazakhstan Criminal Code, art. 293(1).

⁵⁶ ICCPR, *supra* note 51, art. 9(1) ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.").

⁵⁷ UDHR, *supra* note 51, art. 11(2) ("No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.").

⁵⁸ UN Human Rights Committee, General Comment No. 35: Article 9 (Liberty and Security of Persons), UN Doc. CCPR/C/GC/35, para. 22 (Dec. 16, 2014), *available at* <https://undocs.org/ccpr/c/gc/35>

Committee finds that a law “must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly. . .”⁵⁹

In the present case, the legal definition of hooliganism under Kazakh law serves as the basis for both of the charges brought against Elshibayev. However, the definition of hooliganism, as described 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 definition of hooliganism relies on highly indeterminate and subjective terms and phrases, such as “*insolent* violations of public order,” “*disrespect* for society,” and “force . . . characterized by exceptional cynicism.” Because “insolence” means demonstration of rudeness, arrogance, and a lack of respect, the term is highly subjective because there is no objective standard of what counts as rude or respectful. For similar reasons, the use of the phrase “disrespect for society” would rely heavily on one’s individual perspectives concerning what amounts to what society is and what it would take to show 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.

Due 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, Article 293’s vagueness permits the Kazakh authorities to arbitrarily apply Article 293, as is the case for 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 the ICCPR and UDHR.

2. Arbitrary Deprivation of Liberty under Category II

A detention is arbitrary under Category II of the Working Group’s Revised Methods of Work when it results from the exercise of fundamental rights or freedoms protected under international law, including the rights to freedom of expression and assembly.⁶⁰ The Government arrested and detained Elshibayev on the basis of his exercise both of these rights.

a. *Elshibayev’s Detention Is a Restriction on His Right to Freedom of Expression and Assembly*

The rights to freedom of expression and assembly are protected under both international and Kazakh law. Article 19(2) of the ICCPR, to which Kazakhstan is a party, provides that “[e]veryone shall have the right of freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”⁶¹ The right to freedom of expression is vital to the work of human rights defenders. In its General Comment 34, the Human

[hereinafter “General Comment No. 35”]; UN Human Rights Committee, *Concluding Observations on Mauritius*, UN Doc. CCPR/CO/83/MUS, para. 12 (Apr. 27, 2005), available at <https://undocs.org/CCPR/CO/83/MUS>; UN Human Rights Committee, *Concluding Observations on Russia*, UN Doc. CCPR/C/RUS/CO/6 (Nov. 24, 2009), para. 24, available at <https://undocs.org/CCPR/C/RUS/CO/6>.

⁵⁹ UN Human Rights Committee, General Comment No. 34: Article 19 (Freedom of Expression), UN Doc. CCPR/C/GC/34, para. 25 (Sep. 12, 2011), available at <https://undocs.org/CCPR/C/GC/34> [hereinafter “General Comment No. 34”].

⁶⁰ A detention is arbitrary under Category II “when the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13-14 and 18-21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18-19, 21-22 and 25-27 of the International Covenant on Civil and Political Rights.” *Methods of Work of the Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/33/66, para. 8b [hereinafter “Revised Methods of Work”].

⁶¹ ICCPR, *supra* note 51, art. 19(2).

Rights Committee explicitly stated that the right to freedom of expression under Article 19 of the ICCPR protects canvassing and discussion of human rights.⁶² Moreover, the Working Group has recognized the right of human rights defenders “to investigate, gather information regarding and report on human rights violations.”⁶³ Furthermore, the right to freedom of expression is also protected under Article 19 of the UDHR as well as under Article 20(1) of the Constitution of Kazakhstan.⁶⁴

Article 21 of the ICCPR provides that “[t]he right of peaceful assembly shall be recognized.”⁶⁵ This right is also protected by Article 20(1) of the UDHR.⁶⁶ The Human Rights Council has specifically called for states to fully respect and protect the rights of all individuals to assemble peacefully, especially for persons espousing minority or dissenting views or beliefs and human rights defenders.⁶⁷ Article 32 of the Kazakhstan Constitution guarantees the right to peaceful assembly, which explicitly includes the right to “hold meetings, rallies and demonstrations, street processions and pickets.”⁶⁸

In the present case, Elshibayev’s advocacy on behalf of the right to work⁶⁹ for 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 Elshibayev because of these very activities.

The Kazakhstan Government has demonstrated, in both word and deed, that the arrest and detention of Elshibayev is a result of his advocacy activities. There was no investigation into Elshibayev before he began engaging in activism, and he was targeted only after he became a prominent voice in the youth unemployment movement. Once Elshibayev became a recognized activist, a city official attempted to bribe Elshibayev in exchange for ending his participation in the unemployment protests. Moreover, the police demonstrated, via their series of baseless investigations, that their targeting of Elshibayev was merely pretextual. Officers repeatedly attempted to find Elshibayev guilty of some crime. It took four attempts at investigating him before

⁶² General Comment No. 34, *supra* note 59, para. 11.

⁶³ *Hassan Ahmed Hassan Al-Diqqi v. United Arab Emirates*, UN Working Group on Arbitrary Detention, Opinion No. 8/2009, UN Doc. A/HRC/13/30/Add.1 (Sep. 1, 2019), para. 18, *available at* <https://undocs.org/A/HRC/13/30/Add.1>. Although the Working Group came to this conclusion by referencing 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, it noted that “in the Working Group’s view” the rights and principles of the Declaration “are based on human rights standards enshrined in the Universal Declaration of Human Rights and in the Charter of the United Nations.” *Id.*

⁶⁴ UDHR, *supra* note 51, at art. 19 (stating “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers”); Constitution of Kazakhstan, art. 20(1) (stating “The freedom of speech and creative activities shall be guaranteed. Censorship shall be prohibited”).

⁶⁵ ICCPR, *supra* note 51, art. 21.

⁶⁶ UDHR, *supra* note 51, art. 20.

⁶⁷ UN Human Rights Council, Res. 15/21, UN Doc A/HRC/RES/15/21, para 1, (6 Oct. 2010), *available at* <https://undocs.org/A/HRC/RES/15/21>.

⁶⁸ Constitution of Kazakhstan, arts. 20, 23, 32, *available at* <http://mfa.gov.kz/en/hague/content-view/the-constitution-of-the-republic-of-kazakhstan>.

⁶⁹ The right to work, including the obligations of States to work towards achieving the full realization of the right, is well established under international human rights law and most notably guaranteed under Article 6 of the International Covenant on Economic, Social and Cultural Rights, which Kazakhstan ratified on January 24, 2006. Elshibayev’s advocacy work sought to promote this right and to encourage the Kazakh Government to uphold its obligations in this respect under international human rights law. Accordingly, Elshibayev is a human rights defender.

they could find charges to bring, and the charges that the police ultimately brought required the police to reopen an investigation from 2017 by pressuring the four men that attacked Elshibayev to file new complaints against him. Furthermore, after he was detained under investigation for the incident in 2017, police explicitly pressured him to refuse an interview with the independent media outlet RFE/RL about his protest activities. The conduct of officials made it clear that the grounds for Elshibayev's detention related to his advocacy activities.

These events show that the Government has, as an objective of its investigation and detention of Elshibayev, the goal of ending his advocacy efforts. Accordingly, the Government's detention of Elshibayev constitutes a violation of his rights to freedom of expression and assembly.

b. *None of the Exceptions under Articles 19 or 21 Apply in This Case*

Although the rights to freedom of expression and assembly are not absolute, none of the exceptions to these rights apply to Kazakhstan's restriction of Elshibayev's rights. Under international law, the rights to freedom of expression⁷⁰ and assembly⁷¹ may only be restricted in limited circumstances, and the Human Rights Committee has established a three-part "strict test of justification" in analyzing limitations on such fundamental rights.⁷² For a given limitation to be permissible, the limitation must (1) be provided for by law, (2) serve an enumerated purpose, and (3) be necessary to achieve that purpose.⁷³ The enumerated purposes for which a Government may restrict these fundamental rights are to protect national security, public safety and public order, public health, and the fundamental rights and freedoms of others.

The Human Rights Committee has emphasized that such restrictions must not "put in jeopardy the right itself."⁷⁴ It is not sufficient for a government to merely invoke one of the enumerated exceptions, but must "specify the precise nature of the threat" posed by the protected activity,⁷⁵ establish a "direct and immediate connection between the expression and the threat," and demonstrate why the limitation was necessary.⁷⁶ Furthermore, in the case of the right to freedom of expression, the Human Rights Committee has been clear that paragraph 3 never be used to justify "the muzzling of any advocacy of . . . human rights."⁷⁷

The arrest and detention of Elshibayev falls well outside any possible legitimate restriction on the right to freedom of expression. As discussed above, the Government targeted Elshibayev on the basis of his advocacy and protest surrounding youth unemployment. For this reason, the Government's actions would qualify as an attempt to muzzle Elshibayev's advocacy of human

⁷⁰ Article 19(3) of the ICCPR provides that "The exercise of the [right to freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For the respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health and morals." See ICCPR, *supra* note 51, art. 19(3).

⁷¹ Article 21 of the ICCPR provides that "No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others." See ICCPR, *supra* note 51, art. 21.

⁷² *Park v. Republic of Korea*, UN Human Rights Committee, Communication No. 628/1995, UN Doc. CCPR/C/64/D/628/1995, para. 10.3, (3 Nov. 1998).

⁷³ *Shin v. Republic of Korea*, UN Human Rights Committee, Communication No. 926/2000, UN Doc. CCPR/C/80/D/926/2000, para 7.2 (16 March 2004).

⁷⁴ General Comment No. 34, *supra* note 59, para. 21.

⁷⁵ *Sohn v. Republic of Korea*, UN Human Rights Committee, Communication No. 518/1992, UN Doc. CCPR/C/54/518/1992, para. 10.4 (July 19, 1992).

⁷⁶ General Comment No. 34, *supra* note 59, para. 35.

⁷⁷ *Id.*, at para. 33.

rights, namely the right to work, and thus cannot be justified as a legitimate restriction on his rights to freedom of expression and assembly.

Additionally, none of the Article 19(3) and Article 21 exceptions would justify the Kazakh Government's arrest or detention of Elshibayev because neither his involvement in the protests nor his criticism of Nazarbayev placed national security, public order, public health or morals at risk, nor did those actions violate the rights or reputations of others. As noted above, the Human Rights Committee has emphasized that the restrictions on the right to freedom of expression must not "put in jeopardy the right itself."⁷⁸ Here, peaceful assemblies that call for the protection of the right to work fall well within the scope of articles 19 and 20 and to hold otherwise would "put in jeopardy the right itself." As a result, Elshibayev's involvement in the protests cannot fall within any of the exceptions to articles 19 and 21. Moreover, Elshibayev's criticisms of Nazarbayev do not violate the rights of others as Nazarbayev is a public figure and Elshibayev's criticisms relate to Nazarbayev's actions in his capacity as such.

Accordingly, Elshibayev's detention does not fall within the scope of the exceptions to the rights to freedom of expression and assembly, and the Government has acted in violation of articles 19 and 20 of the ICCPR as well as articles 19 and 20 of the UDHR, making his arbitrary as defined under Category II.

3. Arbitration Deprivation of Liberty under Category III

According to Category III of the Working Group's Revised Methods of Work, a deprivation of liberty is arbitrary "[w]hen the total or partial non-observance of international norms relating to the right to a fair trial, spelled out 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."⁷⁹

Due process is at the core of the right to a fair trial. The minimum international standards of due process are established in the ICCPR, the UDHR, and the Body of Principles for the Protection of All persons under Any Form of Detention or Imprisonment (the "Body of Principles"), and the United Nations Standard Minimum Rules for the Treatment of Prisoners (the "Mandela Rules").⁸⁰

a. *Kazakhstan Violated Elshibayev's Right Not to Be Subjected to Arbitrary Arrest or Detention*

Article 9(1) of the ICCPR, which confirms the right to liberty and freedom from arbitrary detention, guarantees that "No one shall be subjected to arbitrary arrest or detention."⁸¹ This right is reiterated by Article 9 of the UDHR.⁸² The Human Rights Committee has emphasized that the "notion of "arbitrariness" [in Article 9 of the ICCPR] is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality."⁸³

In the present case, Elshibayev's arrest and continued detention post-conviction is arbitrary because it is unjust, inappropriate, and unreasonable. As noted above, Elshibayev was targeted for investigation and arrest because of his engagement in the youth unemployment movement in

⁷⁸ *Id.*, at para. 21.

⁷⁹ Revised Methods of Work, *supra* note 60, Category III, para. c.

⁸⁰ *Id.* at Category III, paras. 7(a)-(b).

⁸¹ ICCPR, *supra* note 51, art. 9(1).

⁸² UDHR, *supra* note 51, art. 9.

⁸³ General Comment No. 35, *supra* note 58, para. 12.

Zhanaozen. The pretextual nature of this targeting, and the trial that followed, renders his detention unjust and unreasonable. Moreover, to further highlight the arbitrariness of Elshibayev's detention, none of the other four men involved in the incident were investigated, charged, tried, or convicted for their involvement, despite the fact that those men were responsible for instigating the events in question. The arbitrary focus on 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 pre-trial detention of Elshibayev is unfounded, in violation of Article 9(1) of the ICCPR and Article 9 of the UDHR.

b. *Kazakhstan Violated Elshibayev's Right to Release Pending Trial*

Article 9(3) of the ICCPR guarantees an individual's right to release pending trial, establishing that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody"⁸⁴ The Human Rights Committee has clarified that "[d]etention pending trial must be 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. . . ."⁸⁵ Moreover, principles 38 and 39 of the Body of Principles further confirm that, except in special cases, a criminal detainee is entitled to release pending trial.⁸⁶

In the present case, Elshibayev was brought before a judge on March 26, 2019 and ordered to remain in pre-trial detention, where he stayed until trial. The judge did not provide any individualized reasons about Elshibayev to justify detaining him. Even if the court had attempted to provide a justification for keeping Elshibayev in detention, the court would not find any legitimate reasons for detention. Elshibayev has no history of violence, except in self-defense, and thus is not a threat to society. His home and family is in Zhanaozen, and thus he does not pose a flight risk. And there is no evidence that Elshibayev might destroy if he is released. Accordingly, the pre-trial detention of Elshibayev is unfounded, and the denial of his pre-trial release is a violation of Article 9(3) of the ICCPR and principles 38 and 39 of the Body of Principles.

c. *The Government Violated Elshibayev's Right to a Presumption of Innocence and Equality of Arms*

Article 14(1) of the ICCPR guarantees the right "to a fair and public hearing by a competent, independent and impartial tribunal."⁸⁷ One of the key tenets of a fair hearing is the principle of equality of arms, which requires that both parties have the same procedural rights.⁸⁸ Furthermore, Article 14(2) of the ICCPR guarantees that "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty."⁸⁹ This right is reiterated in Article 11(1) of the UDHR.⁹⁰ Article 14(3)(d) of the ICCPR also establishes the right of defendants "[t]o be tried in his presence. . . ."⁹¹ The Human Rights Committee has emphasized that States may never "[d]eviat[e] from fundamental principles of fair trial, including the presumption

⁸⁴ ICCPR, *supra* note 51, art. 9(3).

⁸⁵ General Comment No. 35, *supra* note 58, para. 38.

⁸⁶ Body of Principles, *supra* note 51, prin. 38, 39.

⁸⁷ ICCPR, *supra* note 51, art. 14(1)

⁸⁸ UN Human Rights Committee, General Comment No. 32: Article 14 (Right to equality before courts and tribunals and to a fair trial), UN Doc. CCPR/C/GC/32, para. 8 (Aug. 23, 2007), *available at* <https://undocs.org/ccpr/c/gc/32> [hereinafter "General Comment No. 32"].

⁸⁹ ICCPR, *supra* note 51, art. 14(2).

⁹⁰ UDHR, *supra* note 51, art. 11(1).

⁹¹ ICCPR, *supra* note 51, art. 14(3)(d).

of innocence. . . .”⁹² This right requires that the prosecution bear the burden of proving the charge against a defendant beyond a reasonable doubt.⁹³

Elshibayev’s trial did not meet the standard of fairness required under international law. First, due to the governments unjustified decision to try Elshibayev by video conference, he was effectively, due to internet outages, denied the right to attend a significant portion of his trial in person. Because Elshibayev was in custody at the time of his hearing, the government has no excuse for not allowing him to attend the hearings.

Second, the government failed to give equal weight to the defense evidence or any prosecution evidence that favored the defendant’s case. The court did not recognize or credit Elshibayev’s strong self-defense 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 Elshibayev’s fault and that they did not blame him for the incident. The failure to consider strong evidence in favor of the defense demonstrates a clear bias on behalf of the judge in favor of the prosecution. Accordingly, the trial judge’s selective consideration of the evidence demonstrates a lack of equality of arms, the absence of a presumption of innocence, and unfairness in proceedings.

Accordingly, the conviction of petitioners amounts to a violation of his right to a presumption of innocence. For these reasons, the Government violated articles 14(1), 14(2), and 14(3)(d) of the ICCPR and Article 11(1) of the UDHR.

3. Conclusion

Kazakhstan targeted, arrested, and detained Elshibayev for his advocacy activities concerning youth unemployment in Zhanaozen. Since the arrest, the Kazakh Government has repeatedly violated Elshibayev right to a fair trial, including by failing to provide him with the reasons for his arrest, denying his release pending investigation and trial, and his right to equality of arms. For the forgoing reasons, the continuing detention of Elshibayev is a violation of international law and is thus illegal.

V. INDICATE INTERNAL STEPS, INCLUDING DOMESTIC REMEDIES TAKEN ESPECIALLY WITH THE LEGAL AND ADMINISTRATIVE AUTHROITIES, PARTICULARLY FOR THE PURPOSE O F ESTABLISHING TH EDETENTION AND, AS APPROPRIATE, THEIR RESULTS OR THE REASONS WHY SUCH STEPS OR REMEDIES WERE INEFFECTIVE OR WHY THEY WERE NOT TAKEN

Following Elshibayev’s trial conviction in October 2019, his attorney appealed the trial judgement. However, in November 25, 2019, the appellate court upheld the trial court’s conviction.

⁹² General Comment No. 32, *supra* note 88, para. 34.

⁹³ *Id.* at para. 30.

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