

PETITION TO:
UNITED NATIONS
WORKING GROUP ON ARBITRARY DETENTION

Chair-Rapporteur: Ms. Leigh Toomey (Australia)
Vice-Chair: Ms. Elina Steinerte (Latvia)
Mr. Seong-Phil Hong (Republic of Korea)
Ms. Miriam Estrada-Castillo (Ecuador)
Mr. Mumba Malila (Zambia)

In the Matter of
Alnur Ilyashev,
Citizen of the Republic of Kazakhstan
v.
Government of the Republic of Kazakhstan

Petition for Relief Pursuant to Human Rights Council Resolutions 1991/42, 1994/32, 1997/50, 2000/36, 2003/31, 2006/102, 6/4, 15/18, 24/7, 33/30, and 44/22.¹

Submitted by:

Maran Turner
Adam Lhedmat
Freedom Now
1750 K Street NW
7th Floor
Washington, DC 20006
United States of America
+ 1 (202) 223-3733 (tel)
+ 1 (202) 223-1006 (fax)
alhedmat@freedom-now.org

Joshua Newcomer
McKool Smith, PC
600 Travis St.
Suite 7000
Houston, TX 77401
+1 (713) 485-7316 (tel)
+1 (713) 485-7344 (fax)

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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.

**QUESTIONNAIRE TO BE COMPLETED BY PERSONS ALLEGING ARBITRARY
ARREST OR DETENTION**

I. IDENTITY

1. *Family Name:* Ilyashev
2. *First Name:* Alnur
3. *Sex:* Male
4. *Age at the Time of Detention:* 42
5. *Nationality:* Kazakhstani
6. (a) *Identity document (if any):* Unknown
(b) *Place of Issue:* N/A
(c) *On (date):* N/A
(d) *No.:* N/A
7. *Profession and/or activity (if believed to be relevant to the arrest/detention):* Mr. Ilyashev is a Kazakhstani human rights activist.
8. *Address of usual residence:* 36 Zhambyl street, apt. 4, Almaty, Kazakhstan

II. ARREST

1. *Date of arrest:* April 17, 2020
2. *Place of arrest (as detailed as possible):* Mr. Ilyashev was first arrested on April 17, 2020, at approximately 20:20, at the office of his relatives, located at Samal-1 micro district, building 29, office 5A, Almaty, where he was staying overnight regularly during the COVID-imposed isolation.
3. *Did they show a warrant or other decision by a public authority?* No, the arresting officers did not show a warrant and did not explain the reason for his arrest.
4. *Authority who issued the warrant or decision:* No warrant was issued.
5. *Relevant legislation applied (if known):* No legislation was cited at the time of arrest.

III. DETENTION

1. *Date of detention:* Mr. Ilyashev was first detained on April 17, 2020, after which he was held in pretrial detention through his trial until his conviction. Following Mr. Ilyashev's conviction, he was placed on a restricted liberty order on June 22, 2020 and currently remains under the force of that order.
2. *Duration of detention (if not known, probable duration):* Mr. Ilyashev's pretrial and trial detention lasted from April 17, 2020, to June 22, 2020. Mr. Ilyashev's restricted liberty order has lasted from June 22, 2020, to present, and his sentence is for three years total.
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):* From the morning of April 18, 2020, to the night of May 6, 2020, he was detained in the Temporary Detention Center of the Department of Internal Affairs of Almaty, at 84 Karasai Batyr Street/55 Masanchi Street, Almaty. From there, at night, he was taken to the Investigative Isolation Center (SIZO) in Almaty – "Institution LA-155/18" at 73 Krasnogorskaya Street, Almaty, where he was held until June 22, 2020. He is presently confined to his home town.
5. *Authorities that ordered the detention:* Investigating Magistrate Judge (pre-trial detention); Medeu District Court No. 2 of the City of Almaty (Judge Makharadze) (conviction).

6. *Reasons for the detention imputed by the authorities:* Authorities allege that Mr. Ilyashev disseminated knowingly false information in a state of emergency in breach of Article 274, Part 4, Paragraph 2 of the Criminal Code of the Republic of Kazakhstan.
7. *Relevant legislation applied (if known):* Article 274, Part 4, Paragraph 2 of the Criminal Code of the Republic of Kazakhstan.

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

Alnur Ilyashev was arrested, tried, and convicted for exercising his freedom of expression and his sentence violates his freedoms of expression, association, and assembly. Part 1 of the Statement of Facts provides background information on the current human rights context in Kazakhstan, which shows the Kazakh Government's pattern of violating the rights of activists, using the pretext of overbroad criminal statutes. Part 2 of the Statement of Facts details the circumstances surrounding the arrest and continuing detention of Mr. Ilyashev.

1. Kazakhstan's Pattern of Repression and Human Rights Abuses

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 Kazakhstani 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

In its most recent review of Kazakhstan, the UN Human Rights Committee expressed concern over the Government's practice of using the Kazakhstan Criminal Code to target individuals for merely exercising their right to freedom of expression, including by applying provisions on the broadly formulated offence of dissemination of information known to be false.⁵ 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"⁶

The Government has more recently used the pretext of the COVID-19 pandemic to jail peaceful critics and intimidate other civic activists.⁷ On March 15, 2020, the Government declared a state of emergency due to the COVID-19 pandemic. It extended the state of emergency until May 11, 2020, when it was lifted. Using COVID-19 as a pretext, it cracked down on civic society during and after the declared state of emergency, applying its vague laws to suppress opposition critics. The Government targeted Mr. Ilyashev as part of its crackdown.

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 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> (hereinafter "HRC Concluding Observations").

⁶ UN Human Rights Committee, *supra* note 5, para. 50.

⁷ Amnesty, *supra* note 3.

2. The Situation of Alnur Ilyashev

a. Mr. Ilyashev's background

Alnur Ilyashev is an advocate of human rights and peaceful civic participation. He seeks the development of political competition in Kazakhstan and the creation of an independent multi-party democratic system.⁸ He also campaigns for the strict observance of the law and the Constitution by the authorities. For example, in 2019, he drew attention to Kazakhstan's unduly restrictive law governing peaceful assemblies, which requires the authorities' prior permission for any street protest.⁹ Mr. Ilyashev repeatedly requested permission to hold a rally, but the Government refused 35 times. His court challenges were all unsuccessful. Finally, permission was granted in June 2019, after which he organized a peaceful assembly that was attended by more than 100 people. Thereafter, however, he faced increasing government monitoring and harassment.

Mr. Ilyashev also worked with other members of civic society to try to form a new political party. In early March 2019, the civil activist Sanavar Zakirova decided to establish a political party called "Our Right."¹⁰ Mr. Ilyashev, alongside the activist Marat Turymbetov, decided to support her.¹¹ But, on the day of the founding congress of the party, the police summoned Mr. Ilyashev to the police station for an interview.¹² The interview itself was short, but the authorities kept him there for 3 hours in order to interfere with the establishment of the party.¹³ The police in front of the building where the congress was to be held warned that should people gather again, it would be considered as a demonstration held without approval from the authorities.¹⁴ As a result, the founding congress was cancelled.

Because of this violation of their rights, Mrs. Zakirova, Mr. Ilyashev, and Mr. Turymbetov sued the Almaty authorities and the ruling Nur Otan Party for obstructing the creation of Our Rights.¹⁵ Officials of Nur Otan counter-sued, claiming the plaintiffs had discredited the party's "honor and dignity." The Zhetysu district court found the activists guilty of disseminating false information, ordered them to withdraw their statements, and required them to pay the Nur Otan officials 6 million tenge (roughly US\$15,000). The activists appealed, and on January 23, 2020, the Almaty appellate court upheld the judgment. Since January 2020, all three activists have been charged with other criminal offenses.¹⁶

⁸ The Last Word of Alnur Ilyashev (June 22, 2020), as reported in The Clooney Foundation for Justice's Amicus Brief in Support of Mr. Alnur Ilyashev, 6 Sept. 2020, at ¶ 8.

⁹ The Human Rights Committee has also criticized Kazakhstan's overly restrictive laws and regulations regarding the right to peaceful assembly and association. CCPR/C/KAZ/CO/2 at ¶¶ 51-54.

¹⁰ Madina Aimbetova, *Freedom of expression in Kazakhstan still a distant prospect, says prosecuted activist*, GLOBAL VOICES, 15 July 2020, available at <https://globalvoices.org/2020/07/15/freedom-of-expression-in-kazakhstan-still-a-distant-prospect-says-jailed-activist/>; Ilyashev Interview.

¹¹ Ilyashev Interview.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Nur Otan v. Activists. Photo Report*, ÅDÅMDÅR, available at <https://adamdar.ca/en/post/nur-otan-v-activists-photo-report?lang=en-US>.

¹⁶ In addition to Mr. Ilyashev, Mrs. Zakirova was arrested and convicted of an alleged assault at a political rally, which has been described as politically motivated. *Kazakh Court Upholds Prison Sentence Of Well-Known Rights Activist*, RadioFreeEurope / RadioLiberty, available at <https://www.rferl.org/a/kazakh-court-upholds-prison-sentence-of-well-known-rights-activist/30868566.html>; *Kazakh Civil Rights Activist Gets One Year In Prison For 'Inflicting Bodily Damage'*, RadioFreeEurope / RadioLiberty, available at <https://www.rferl.org/a/kazakh-rights-activist-zakirova-prison-bodily-damage/30727554.html>. Mr. Turymbetov was arrested on charges under section 274 for posting analyses of the spending of officials at the Housing Construction Saving Bank of Kazakhstan based on publicly available information. Andrea Grishin, *Kazakhstan: Emergency Triggered Witch-Hunting*, Central Asian Bureau for Analytical Reporting, available at <https://cabar.asia/en/kazakhstan-emergency-triggered-witch-hunting>.

b. Mr. Ilyashev’s Peaceful Online Activism and Private Facebook Posts

Mr. Ilyashev’s activism continued prior to his current arrest. On February 29, 2020, Mr. Ilyashev participated in a Facebook live event that was critical of the Government. Again, on March 21, 2020, Mr. Ilyashev and eight other activists recorded a joint video message to former president Nursultan Nazarbayev that was published on YouTube-channel BASE (БӘСЕ). The message called for Nazarbayev to use his substantial wealth to fund assistance for COVID-19 and also called for the resignation of the current Government.¹⁷

Finally, at the end of March 2020, Mr. Ilyashev posted messages on his private Facebook page that were critical of the Nur Otan Party and its officials. It was these messages that ostensibly resulted in his indictment, trial, and conviction. The first, on the afternoon of March 6, 2020, stated that: “The mountain gave birth to a mouse...”¹⁸ This comment is derived from a fable and expressed Mr. Ilyashev’s opinion about the smallness of the US\$41 million donated to the “Birgemiz” Public Fund to aid those in need due to COVID-19. The Fund was launched with much fanfare at the request of the leader of the Nur Otan Party, but the fundraising fell well short of needs.¹⁹ As the defense explained to Mr. Ilyashev’s trial, “[t]he mountain gave birth to a mouse...” is an expression used “when one talk[s] about great hopes but little results.”²⁰ In expressing his opinion, Mr. Ilyashev relied on publicly reported information in a news article on the subject.²¹

The second post was from March 28, 2020, and asked the opinionated question: “Nur Otan – ‘Party of crooks and thieves’?!”²² This opinion was specifically a criticism of the chairman of the Kyzylorda regional branch of the Nur Otan Party, who had been elected in July 2019 and then detained by the Government on suspicion of committing a crime.²³ In stating his opinion, Mr. Ilyashev included links to the news articles announcing the chairman’s arrest.²⁴

The third post was from March 30, 2020, and “bemoaned ‘crisis media looting’” and expressed that “many people already know the habits of the ‘ruling’ party of usurpers, as they have no illusions about its ‘great generosity.’”²⁵ This post was commentary on an article titled “Nur Otan continues to support socially vulnerable groups of the population,” which described assistance provided to families by the Nur Otan Party during the COVID-19 pandemic, and which was accompanied by photographs of food bags.²⁶ But, Mr. Ilyashev believed the article and photos were misleading because he, with others, had packed many similar food bags without the aid of any member of the Nur Otan Party.²⁷

¹⁷ Ilyashev Interview.

¹⁸ 6 March 2020 Facebook post; Ilyashev Interview; Trial monitors, as documented in *Kazakhstan: Preliminary Report on Proceedings Against Human Rights Activist Alnur Ilyashev*, American Bar Association, Center for Human Rights, Sept. 3, 2020 (hereinafter, “ABA Preliminary Report”).

¹⁹ 6 March 2020 Facebook post; Ilyashev Interview; Trial monitors, as documented in ABA Preliminary Report, supra note 18.

²⁰ 6 March 2020 Facebook post; Ilyashev Interview; Trial monitors, as documented in ABA Preliminary Report, supra note 18.

²¹ 6 March 2020 Facebook post; Ilyashev Interview; Trial monitors, as documented in ABA Preliminary Report, supra note 18.

²² 28 March 2020 Facebook post; Ilyashev Interview; Trial monitors, as documented in ABA Preliminary Report, supra note 18.

²³ 28 March 2020 Facebook post; Ilyashev Interview; Trial monitors, as documented in ABA Preliminary Report, supra note 18.

²⁴ 28 March 2020 Facebook post; Ilyashev Interview; Trial monitors, as documented in ABA Preliminary Report, supra note 18.

²⁵ 30 March 2020 Facebook post; Ilyashev Interview; Trial monitors, as documented in ABA Preliminary Report, supra note 18.

²⁶ 30 March 2020 Facebook post; Ilyashev Interview; Trial monitors, as documented in ABA Preliminary Report, supra note 18.

²⁷ 30 March 2020 Facebook post; Ilyashev Interview; Trial monitors, as documented in ABA Preliminary Report, supra note 18.

Thus, Mr. Ilyashev’s commentary served as a “critical assessment” of the article and the act of attributing merit to only the Nur Otan Party.²⁸

c. Mr. Ilyashev’s arrest

Mr. Ilyashev was arrested on April 17, 2020. The authorities did not inform Mr. Ilyashev that he was a suspect in a criminal investigation under Article 274 of the Kazakh Criminal Code until the next day.²⁹ While his criminal prosecution was based on the three posts to his personal Facebook account described above that criticized the Nur Otan Party, those posts were not the genesis of the investigation against him. In fact, he was initially targeted because of the civil case between him and the Nur Otan Party and the March 2020 YouTube video directed at Nazarbayev. The initial report regarding alleged criminal violations of Article 274 did not mention his Facebook messages at all.³⁰ Yet, after his arrest, the police investigator claimed that Mr. Ilyashev’s posts sought to influence public opinion about the “incompetence of the activities of the Nur Otan party” in response to the COVID-19 pandemic and thereby “may lead to negative consequences.”³¹

The police searched the house of his relatives (where Mr. Ilyashev was isolating to comply with COVID-19 precautions), his place of work,³² his car,³³ his parents’ house, and his ex-wife’s apartment. These searches were performed without documentation of the protocols employed, logging of information and material collected, recording of the search, or memorialization of who was in attendance. Multiple addresses were searched at night, without a justification of urgency, in violation of Kazakhstan criminal procedure. The electronic information used to prosecute Mr. Ilyashev was not authenticated by through required descriptions of the process and means used to collect it.

Although his relatives did not resist the searches in any way, the police applied significant force against them, including his elderly parents, his 17-year-old daughter, and his brother. The simultaneous searches were executed by a large number of officers in the rapid deployment police task force, as if the family and relatives of Mr. Ilyashev were a threat to society.³⁴ When a search was conducted at Mr. Ilyashev’s ex-wife apartment, it was conducted without the presence of his ex-wife or other adults, but in the presence of his minor daughter and her friend. During the search, his daughter had a panic attack, had trouble breathing, and lost consciousness. Police officers did not call his ex-wife for more than an hour, and only after the mother arrived did they call an ambulance for his daughter’s medical emergency.³⁵

d. Pretrial detention

After his arrest, Mr. Ilyashev spent 20 days in the Temporary Detention Facility of Almaty. In the Temporary Detention Facility, he was placed with individuals convicted for grave crimes. On May 5, he was indicated for allegedly spreading “false information” that “threatens public order” and causes “substantive harm” to “protected interests of society” during the state of emergency. On May 6, he was transferred to an Investigative Isolation Center (SIZO) in Almaty. When Mr. Ilyashev was transferred

²⁸ 30 March 2020 Facebook post; Ilyashev Interview; Trial monitors, as documented in ABA Preliminary Report, supra note 18.

²⁹ ABA Preliminary Report, supra note 18 (documenting trial defense).

³⁰ Unified Register of Pre-Trial Investigations (ERDR), case N207500031000571.

³¹ Indictment of Alnur Ilyashev, 6 May 2020.

³² Decree on the conduct of search of Alnur Ilyashev’s place of work (Almaty, m/d Samal-1, building 29, office A5), submitted by the investigator of the Police department of the city of Almaty, Captain of Police A. Kuzenbai on 16 April 2020 and authorized by investigating magistrate on 17 April 2020.

³³ Decree on the conduct of search of Alnur Ilyashev’s car Hyundai Accent (Plate Number: 314 IQA 02), submitted by the investigator of the Police department of the city of Almaty, Captain of Police A. Kuzenbai on 16 April 2020 and authorized by investigating magistrate.

³⁴ Ilyashev Interview.

³⁵ *Id.*

to the Pretrial Detention Center, he thinks he became infected with COVID-19. One morning he was coughing up blood and had difficulties breathing at night.³⁶

The Government denied Mr. Ilyashev's request for pretrial release, and he was held until his trial began.³⁷ The investigators asserted that if he were not incarcerated he could "impede the objective investigation of a criminal case and [could] continue his criminal activity while at liberty, creating a mood of protest in society, leading to destabilizing the situation in the Republic of Kazakhstan."³⁸ Beyond these oblique references to threats to society, the government provided no other purported justification for his pretrial detention.³⁹

Mr. Ilyashev was only able to meet with his lawyers twice prior to his trial, due in part to COVID-related restrictions. Other than these two meetings, Mr. Ilyashev could only communicate with his lawyers from the pre-trial detention center "via a smartphone made available to detainees." Despite being detained for almost two months before trial, Mr. Ilyashev was only able to make WhatsApp calls from this phone four times, for five to ten minutes each time.⁴⁰

Furthermore, the results of the expert evaluation of Mr. Ilyashev's posts and statements were not provided to either the lawyers or Mr. Ilyashev himself.⁴¹ The Government also demanded that his lawyers sign impermissible non-disclosure agreements for the information provided in the pre-trial investigation.

e. Mr. Ilyashev's Trial

The trial of Mr. Ilyashev began on June 12, 2020 and consisted of six hearings over the course of ten days.⁴² Because of the quarantine resulting from the COVID-19 epidemic, the trial was held remotely through video-conferencing software and Mr. Ilyashev was not physically present either in the court or with his lawyers.⁴³ He faced hostility from the Court throughout the proceedings. On June 12, Mr. Ilyashev filed a petition requesting the suspension of the proceedings until he could attend in person, but the Court denied his request.⁴⁴ He also requested the participation of his brother as legal counsel, which was also denied.

Technological problems hampered Mr. Ilyashev's defense and the Court's response deprived him of a fair trial. For significant parts of the trial, Mr. Ilyashev and his counsel were either unable, or limited in their ability, to participate in the proceedings.⁴⁵ They were frequently disconnected from audio and video feeds.⁴⁶ The interruptions in the video and audio feed meant that Mr. Ilyashev was often unable to hear witnesses, his lawyers, the prosecutor, and the judge, and they too were equally unable to hear him. The technical problems prevented his lawyers from making and joining motions,

³⁶ *Id.*

³⁷ Trial monitor, as reported in ABA Preliminary Report, *supra* note 18 (citing monitor notes from 23 July 2020).

³⁸ Resolution to Authorize a Preventative Measure in the form of Incarceration for a Period of 2 Months, Senior Investigator of Department of Internal Affairs, Criminal Investigation Division, Police Department of Almaty (April 18, 2020).

³⁹ Interview of trial monitor.

⁴⁰ Trial monitor, as reported in ABA Preliminary Report, *supra* note 18.

⁴¹ Ilyashev Interview.

⁴² The trial was monitored by the American Bar Association Center for Human Rights monitored monitors. ABA Preliminary Report, *supra* note 18; AMICUS BRIEF IN SUPPORT OF MR. ALNUR ILYASHEV, CFJ, Appendix A, pg. 22, available at <https://cfj.org/wp-content/uploads/2020/09/Amicus-Brief-in-Support-of-Mr.-Alnur-Ilyashev.pdf> (hereinafter, "AMICUS BRIEF").

⁴³ ABA Preliminary Report, *supra* note 18; Ilyashev Interview.

⁴⁴ ABA Preliminary Report, *supra* note 18; Ilyashev Interview.

⁴⁵ ABA Preliminary Report, *supra* note 18; Ilyashev Interview.

⁴⁶ ABA Preliminary Report, *supra* note 18; Ilyashev Interview.

presenting arguments, questioning witnesses, and consulting with Mr. Ilyashev.⁴⁷ At one point on June 15, Mr. Ilyashev even lamented that “I am the main person involved and I cannot hear anything.”⁴⁸

These interruptions directly impacted the ability of Mr. Ilyashev and his lawyers to present his defense. In one instance, on June 18, a disconnection cut short the defense attorney’s cross-examination of the prosecution’s main witness, its expert Roza Amangeldievna Akbarova.⁴⁹ Ms. Akbarova testimony was the prosecution’s principal evidence that Mr. Ilyashev’s Facebook posts had created a danger of disturbing the public order.⁵⁰ In particular, Ms. Akbarova, who is an expert in religion and psychology, not the issues on which she opined, concluded Mr. Ilyashev’s three Facebook posts could cause members of the public to harbor a negative attitude toward the Nur Otan Party, thereby making it more likely that they would disobey social isolation rules or engage in other acts of civil disobedience.⁵¹ She opined: “[t]he dissemination of such materials during a period of stressful, unstable emotional state of the majority of the population, associated with the need for self-isolation, and observance of quarantine regulations, as well as loss of income, attracts a large number of people-allies to publish socio-political views. [...]” In other words, the danger posed by Mr. Ilyashev’s post was that other people might agree with his criticisms.

Yet, on June 18, the Court truncated Mr. Ilyashev’s lawyers’ cross-examination of Ms. Akbarova, apparently because of low battery on Ms. Akbarova’s phone.⁵² The Court promised that Mr. Ilyashev’s counsel could resume cross-examination the next day, but when the trial reconvened on June 19, the Court denied Mr. Ilyashev’s counsel the opportunity to continue his cross-examination because the witness was infirm.⁵³ Mr. Ilyashev’s lawyers objected that the cross-examination was crucial, but the Court ordered the trial to proceed. At other times, problems with the virtual proceedings likewise prevented Mr. Ilyashev and counsel from making motions, presenting arguments, and questioning witnesses.⁵⁴

The Government’s use of remote trial technology also prevented Mr. Ilyashev from consulting with his counsel and did not allow for confidential discussions. No confidential video breakout rooms were provided for his defense, and he was only allowed to communicate with his counsel over the main, and frequently inoperative, video feed, in the presence of the prosecutors.⁵⁵ There was no mechanism allowing him to consult with his lawyers in real time on courtroom developments or to receive their legal advice and guidance.⁵⁶ With the single exception of short period after the court recessed on June 19 and removed other participants from the video feed, Mr. Ilyashev was not allowed to consult with his counsel confidentially.⁵⁷

Despite these difficulties, the presiding judge took no steps to suspend the proceedings until resolution of the technical problems and pressed forward with the trial despite the impediment to Mr.

⁴⁷ ABA Preliminary Report, *supra* note 18; Ilyashev Interview.

⁴⁸ ABA Preliminary Report, *supra* note 18; Ilyashev Interview.

⁴⁹ ABA Preliminary Report, *supra* note 18; Ilyashev Interview.

⁵⁰ ABA Preliminary Report, *supra* note 18; Ilyashev Interview.

⁵¹ Argument of V.I. Voronov (June 22, 2020) (further explaining that Ms. Akbarova concluded: The consequences of such NEGATIVE attitudes under the conditions of a state of emergency in society’s mass consciousness can cause civil acts of disobedience, including unauthorized rallies during the state of emergency, and, as a result, mass non-compliance with the quarantine, which in turn will lead to a massive spread of the disease, social tension, looting and rioting, as a result, it will be damaging to citizens and organizations.”), as described in AMICUS BRIEF, *supra* note 42.

⁵² ABA Preliminary Report, *supra* note 18; Ilyashev Interview.

⁵³ ABA Preliminary Report, *supra* note 18; Ilyashev Interview.

⁵⁴ ABA Preliminary Report, *supra* note 18; Ilyashev Interview; AMICUS BRIEF, *supra* note 42, at 25.

⁵⁵ ABA Preliminary Report, *supra* note 18; Ilyashev Interview.

⁵⁶ ABA Preliminary Report, *supra* note 18; Ilyashev Interview.

⁵⁷ ABA Preliminary Report, *supra* note 18; Ilyashev Interview.

Ilyashev's defense.⁵⁸ Indeed, Mr. Ilyashev's counsel could not even consult with him about his motion on June 12 to postpone the proceedings until he could attend them in person. The Court denied his motion without allowing the consultation requested by his lawyers.⁵⁹

The Court also refused to allow the defense to present and question other witnesses who were integral to the defense, including witnesses to attest the food drive to attest to the truth of Mr. Ilyashev's statements, subscribers to Mr. Ilyashev's Facebook posts who could testify about their reactions to them, and defense experts.⁶⁰ The presiding judge rejected the majority of the witnesses, largely without providing any basis. In one instance, the presiding judge refused to let a witness testify because "she was not sitting in the same room as the lawyer, even though the witness was online and ready to testify."⁶¹

Mr. Ilyashev's lawyers made a range of procedural motions throughout the trial, and because Judge Makharadze consistently ruled against motions intended to facilitate to his right to present a fair defense, Mr. Ilyashev's counsel moved for the recusal of Judge Makharadze. That motion was also denied.

f. Sentence and on-going deprivation of liberty

After trial, the Court found Mr. Ilyashev guilty and sentenced him to three years of restricted liberty, 100-hours per year of forced labor, and a ban on political and civic activism for five years. The restriction on liberty order prohibits Mr. Ilyashev from changing his place of permanent residence and from changing his place of employment without notifying the government. Furthermore, under the terms of the judgment, Mr. Ilyashev is subjected to regular monitoring by parole officers, who have the authority to request additional restrictions upon Mr. Ilyashev's movement. On January 14, 2021, parole officers filed a formal request with the courts to impose a curfew on Mr. Ilyashev between the hours of 10PM and 6AM. At the time of submission, the Court has yet to address the request.

Mr. Ilyashev appealed his conviction, but his appeal was denied. The Court concluded that: "Considering the situation with coronavirus at a time when people were literally panicking, your posts, of course, had a negative effect. Therefore, we concluded that you are guilty."⁶²

B. Legal Analysis

The arrest and continuing detention of Mr. Ilyashev is arbitrary under Categories I, II, and III of the Working Group's Revised Methods of Work.⁶³ The detention is arbitrary under Category I because Mr. Ilyashev is being detained without sufficient legal justification. The detention is arbitrary under Category II because it resulted from Mr. Ilyashev's peaceful and legitimate exercise of his rights to freedom of expression and association. The detention is arbitrary under Category III because the

⁵⁸ ABA Preliminary Report, *supra* note 18; Ilyashev Interview.

⁵⁹ ABA Preliminary Report, *supra* note 18; Ilyashev Interview.

⁶⁰ AMICUS BRIEF, *supra* note 42, at 18.

⁶¹ Trial monitors on 18 June and 19 June, and 23 June Monitor information, as reported in ABA Preliminary Report, *supra* note 18.

⁶² Grishin, CABAR, *supra* note 16.

⁶³ 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." ICCPR, *supra* note 72, at art. 9(1). An arbitrary deprivation of liberty is expressly prohibited under international law. *Id.*; UDHR, *infra* note 73, 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 . . .").

Government's arrest and detention of Mr. Ilyashev failed to meet the minimum international standards of due process.

1. Arbitrary Detention under Category I

A detention is arbitrary under Category I when there is no legal basis or justification for it. The Working Group has found a lack of 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,”⁶⁴ and when the Government uses vague or overbroad laws to prosecute an individual.⁶⁵ In the present case, Mr. Ilyashev's detention is arbitrary under Category I because the Government lacks any evidence of a non-protected wrongful act to justify his detention and because the Government charged Ilyashev under a vague and overbroad provision of the Kazakh Criminal Code that the Government applies in an arbitrary fashion to target opposition civic activists.

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

The Government's conviction and detention of Mr. Ilyashev is not founded on any evidence against him. Mr. Ilyashev was convicted of disseminating knowingly false information under Article 274, which requires proof of:

Dissemination of knowingly false information, creating a danger of violation of public order or infliction of substantial harm to the rights and legal interests of citizens or organization or the interests of society or the state, protected by the Law.⁶⁶

The Government possessed no evidence that Mr. Ilyashev engaged in any activity that would reasonably fall under this definition. At trial, in effect, the Government skipped over the element of dissemination of “knowingly false information.” Mr. Ilyashev's conviction resulted from three Facebook posts criticizing Nur Otan Party officials as ineffective or corrupt. The Government presented no evidence that his criticisms were false.⁶⁷ His criticisms are, by definition, judgments and opinions. Even if considered statements of fact, the Government did not show them to be false; rather, the Government claimed that Mr. Ilyashev had not verified them.⁶⁸ There are at least three flaws with prosecuting him under this theory: First, the government is improperly shifting the burden onto Mr. Ilyashev to prove his innocence (as discussed below). Second, the theory that he “failed to verify” is inherently inconsistent with the “knowingly false” element of Article 274—if the purported facts were unverified (either way), the statement cannot be “knowingly false.” In effect, the government is criminalizing his conduct as a reckless disregard for the truth, but that is not what Article 274 authorizes. Third, Mr. Ilyashev cited and linked to the exact sources of information, some of which were the Government itself, so the “failed to verify” theory is not credible.

Nor did the Government present any viable evidence that Mr. Ilyashev's three Facebook posts created a danger of “substantial harm to the interests of society or the state.” The main witness for the

⁶⁴ *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>.

⁶⁵ *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 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>.

⁶⁶ Kazakhstan Criminal Code, art. 274.

⁶⁷ ABA Preliminary Report, *supra* note 18; Ilyshev Interview.

⁶⁸ Regarding the possibility of verifying government information, the Kazakhstan government is not transparent, making claims regarding government efficacy difficult or impossible to verify. Not only does Kazakhstan score quite low on Transparency International's corruption index (<https://www.transparency.org/en/countries/kazakhstan>), it has been also been criticized by monitors such as the OECD for the limitations of its access to information law. See <https://www.osce.org/fom/203606>; <https://www.oecd-ilibrary.org/sites/3a8d6a0e-en/index.html?itemId=/content/publication/3a8d6a0e-en>.

government—Ms. Akbarova—claimed that statements criticizing the government were more problematic during the COVID-19 pandemic and social isolation because other people might agree with the criticism.⁶⁹ The expert’s most tangible theory appears to have been that agreement with Mr. Ilyashev’s criticism of the ruling party would result in generalized opposition to the Government, resulting in non-compliance with social isolation rules.⁷⁰ But, the Government presented no evidence that Mr. Ilyashev called for noncompliance with social isolation rules or for any civil disobedience at all (nor did he – and his three Facebook post prove he did not); thus, the Government proved no danger of substantial harm tied to his actual words.⁷¹ Nor did the Government present any evidence that there was any actual substantial non-compliance as a result of his words. In fact, at the time of his speech, Mr. Ilyashev was socially isolating himself. Moreso, his posts were critical of the Nur Otan Party, which is not the same as Government.

More fundamentally, the potential for agreement with criticism of government is neither a danger to the violation of public order, nor a source of harm to the rights of others. In fact, it is the exact type of expression and freedom of thought and conscience that are protected by the ICCPR,⁷² Universal Declaration of Human Rights (“UDHR”),⁷³ and Kazakhstan law.⁷⁴

The elements of an Article 274 violation do not change under a state of emergency, but here the Government cited to the existence of an emergency to absolve itself of the burden of proving that his posts were false and that they created a danger of substantial harm. This is a violation under Category I.

b. *Article 274 of the Kazakh Criminal Code Is Vague and Its Application is Overbroad*

Article 15(1) of the ICCPR and Article 11(2) of the UDHR 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.” Moreover, the Human Rights Committee finds that a law “the principle of legality requires that laws be formulated with sufficient precision so that the individual can access and understand the law, and regulate his or her conduct accordingly.”⁷⁵ In particular, the Human Rights

⁶⁹ ABA Preliminary Report, *supra* note 18; Ilyashev Interview.

⁷⁰ ABA Preliminary Report, *supra* note 18; Ilyashev Interview.

⁷¹ ABA Preliminary Report, *supra* note 18; Ilyashev Interview.

⁷² Kazakhstan is a party to the International Covenant on Civil and Political Rights (“ICCPR”). *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”); UN Human Rights, Office of the High Commissioner, Ratification Status for Kazakhstan, available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=89&Lang=EN. See also UN Status of Treaties, International Covenant on Civil and Political Rights (confirming that Kazakhstan has ratified, and has no reservations to the ICCPR), available at https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#EndDec.

⁷³ *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810 (hereinafter “UDHR”).

⁷⁴ Article 4 of the Kazakhstan Constitution establishes that international agreements are part of the law of Kazakhstan and that “[i]nternational agreements ratified by the Republic have primacy over its laws.” Constitution of Kazakhstan, Art. 4, https://www.akorda.kz/en/official_documents/constitution. The Constitution further reinforces that Kazakhstan must respect the principles and norms of international law and that “[h]uman rights and liberties shall belong to everyone by virtue of birth, be recognized as absolute and inalienable, and define the contents and implementation of laws and other regulatory and legal acts.” *Id.* at Art. 8. Moreover, the Constitution forbids that “[r]estriction of the rights and freedoms of citizens for political reasons shall not be allowed in any form.” *Id.* at Art. 39 ¶ 3. In addition to these substantive rights, the ICCPR and Kazakhstan Constitution have enshrined the right to due process and fair trial. *E.g.*, ICCPR, Art. 14; Constitution, *supra* at 11, arts. 13, 16, and 77.

⁷⁵ Opinion No. 22/2018 concerning Liu Feiyue and Huang Qi (China) ¶ 53.

Committee has warned Kazakhstan that its code provisions criminalizing the dissemination of knowingly false information are ripe for misuse because they are too vague.⁷⁶

Indeed, the legal crime of “dissemination of knowingly false information” under Kazakh law is too vague and overbroad. In fact, the Government’s prosecution of Mr. Ilyashev for his three Facebook posts in this case proves that the law is ripe for misuse by a Government intent on suppressing criticism. The definition relies on highly indeterminate phrases, such as “*a danger of violation of public order*” and “*infliction of substantial harm to . . . the interests of society or the state.*” For example, the phrase “interests or society or the state” would depend heavily on an individual’s perspective concerning what society is and what it would take to harm the interests of the collective society. In this case, the Government’s position is that speech critical of the ruling party risked inflicting a substantial harm to the interests of the state merely because it was critical of the ruling party during a declared state of emergency. In this context, according to the Government, the law would apply to all speech critical of the Government.

From the point of view of the accused, due to the subjective terms in Article 274, there is no way for an individual to determine *ex ante* whether their actions will, for example, have the effect of being interpreted by a state expert as being harmful to the interests of society or the state in a way completely untethered from the specific criticism offered. The prosecution in this case depended entirely on an expert’s opinion regarding the psychological status of a society that is dealing with a pandemic – something that would be entirely unknowable to an individual who posts messages on a private Facebook page. At minimum, in order to not run afoul of the law, Mr. Ilyashev would have had to have been a social psychologist and accurately predicted that others *might* react in a way that he did not advocate and which they did not, in fact, react.

Article 274’s vagueness also permitted the Kazakh authorities to arbitrarily apply its knowledge requirement. In this case, the court accepted the Government’s claim that it had met its burden to show the statements were “knowingly false” under Article 274 by asserting that Mr. Ilyashev failed to verify his comments. But, “failure to verify” does not equate to either falsity or knowledge of falsity. A person can “fail to verify” a true fact, and the “failure to verify” itself proves the lack of subject knowledge on Mr. Ilyashev’s part that his statements were false (which they were not).

Accordingly, his detention is arbitrary under Category I because the law that provides the purported basis for his detention, Article 274 of the Criminal Code, is vague in violation of the ICCPR and UDHR.

2. Arbitrary Detention 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, association, and assembly.⁷⁷ The Government arrested and detained Mr. Ilyashev on the basis of his exercise of these rights.

a. The Government’s Detention of Ilyashev Is a Restriction on His Right to Freedom of Expression

⁷⁶ HRC Concluding Observations, *supra* note 5, at ¶ 49.

⁷⁷ 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”].

The right to freedom of expression is protected under both international and Kazakh law. Article 19(2) of the ICCPR 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.”⁷⁸ The Human Rights Committee has clarified that Article 19 of the ICCPR “protects all forms of expression and the means of their dissemination.”⁷⁶ This includes “all forms of audio-visual as well as electronic and internet-based modes of expression.”⁷⁷ This right is also protected under Article 19 of the UDHR and Article 20(1) of the Constitution of Kazakhstan.⁷⁹

In interpreting Article 19 of the ICCPR, the UN Human Rights Committee has emphasized the importance of safeguarding political debate and citizenry’s capacity to criticize political officials. The Committee, for example, has stated that “[t]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential.”⁸⁰ In the Committee’s words: “all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition.”⁸¹

Mr. Ilyashev’s criticism of the Government is squarely within his right to freedom of expression, and the Government violated Mr. Ilyashev’s freedom of expression when it arrested and sentenced him for Facebook postings critical of the ruling party.

First, the charge of “dissemination of knowingly false information” under Article 274 of is facially a violation of an individual’s freedom of expression because it vaguely criminalizes a broad swath of speech acts. The Human Rights Committee has previously criticized Kazakhstan for employing a similarly vague restriction on speech to silence critics and warned the Government about vagueness of the crime of knowing dissemination of false information in particular. The Government’s flouting of those admonitions is evident from the arrest and conviction of Mr. Ilyashev for nothing more than relatively mild criticism of the ruling party.

Second, Mr. Ilyashev was targeted for his Facebook posts (and other speech) critical of the ruling party. Mr. Ilyashev’s posts did not advocate for violence, did not call for disobedience of COVID-related social isolation or quarantines, and did not seek any action at all. Rather, they were simply critical of the Nur Otan Party, which falls squarely within protected speech. Therefore, his detention violated his right to freedom of expression both *de jure* and *de facto*.

Moreover, Mr. Ilyashev’s sentence proves that the objective of his arrest, prosecution, and detention was to place arbitrary burdens on his right to freedom of expression and (as discussed next) association. The sentence includes a five year-ban on political and civic activism - serving the political, cultural and professional needs of society, including creating and taking part in the activities of political parties, public associations and foundations. This is a direct affront to his rights to freedom of expression and association, in addition to being entirely divorced from the less-than-two-month duration of the state of emergency from March 15, 2020 to May 11, 2020.

The Government arbitrarily detained and prosecuted Ilyashev as a direct result of his speech. His postings are political criticism and fall under the protections of Articles 19 of the ICCPR and UDHR. Because, as discussed below, the restrictions place on Mr. Ilyashev’s speech do not fall within

⁷⁸ ICCPR, *supra* note 72, art. 19(2).

⁷⁹ UDHR, *supra* note 73, 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”).

⁸⁰ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 13.

⁸¹ *Id.* at para. 38.

the narrow exceptions contained in Articles 19(3), his continued detention is arbitrary pursuant to Category II.

b. The Government's Detention of Ilyashev Is a Restriction on His Right to Freedom of Association and Assembly.

Article 20(1) of the UDHR provides that “[e]veryone has the right to freedom of peaceful assembly and association.” Article 21 of the ICCPR commands that “[t]he right of peaceful assembly shall be recognized,” and Article 22(1) provides that “[e]veryone shall have the right to freedom of association with others . . .” The Human Rights Committee has specifically called for states to fully respect and protect the rights of all individuals to associate freely, especially for persons espousing minority or dissenting views. In General Comment No. 25 to the ICCPR, the Human Rights Committee noted that “the right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by Article 25 [right to participate in public affairs].”⁸² The Kazakhstan Constitution likewise protects freedom of association and assembly.⁸³

Mr. Ilyashev’s conviction implicates, and his sentence violates, his rights to association and assembly. According to the Government, Mr. Ilyashev’s Facebook posts created a danger of substantial harm because others might associate with him in his criticism of the Government. Indeed, in one of the posts, he specifically identifies others with whom he had worked to provide food assistance to victims of the COVID pandemic.⁸⁴

But, regardless of whether the posts themselves implicate the freedom of association, the sentence imposed by the Court necessarily infringes his freedoms of association and assembly. The sentence includes a five year-ban on political and civic activism - serving the political, cultural and professional needs of society, including creating and taking part in the activities of political parties, public associations and foundations. This affront to his rights is divorced both from the COVID-19 pretext offered by the Government to support his conviction and from the context of his Facebook posts altogether, and it is undisputedly a violation of the rights protected by Article 20(1) of the UDHR and Article 22(1) of the ICCPR. Accordingly, his sentence is arbitrary pursuant to Category II.

c. None of the narrow exceptions to the freedoms of expression, association, and assembly apply to Mr. Ilyashev’s conduct.

According to the Human Rights Committee, any restrictions on protected speech must (i) be prescribed by law; (ii) serve a legitimate objective; and (iii) be necessary to achieve and proportionate to that objective.⁸⁵ As stated by the Committee, “[w]hen a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat . . . in particular by establishing a direct and immediate connection between the expression and the threat.”⁸⁶ Objectives deemed legitimate under Article 19(3) of the ICCPR include the protection of public morals, public health, national security, and the rights and reputation of individuals.⁸⁷ Notably, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has specified that under Article 19 only the gravest of speech

⁸² Human Rights Committee, General Comment No. 25, UN Doc. CCPR/C/21/Rev.1/Add.7, at ¶ 26.

⁸³ Kazakhstan Constitution at arts. 23 & 32.

⁸⁴ 30 March 2020 Facebook post; Ilyashev Interview.

⁸⁵ Human Rights Committee, *Kim v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/574/1994, 1999, para. 12.2.

⁸⁶ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 35.

⁸⁷ *Id.*

offenses should ever be criminalized: child pornography, incitement to terrorism, public incitement to genocide, and advocacy for national, racial, or religious hatred.⁸⁸

Where a restriction pursues a legitimate objective, it can still “violat[e] the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression.”⁸⁹ The necessity requirement overlaps with the proportionality requirement, as a restriction must be the “least intrusive instrument amongst those which might achieve their protective function.”⁹⁰ States must thereby meet a high threshold to institute criminal prosecutions for the exercise of speech. As stated by the Committee, “the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties.”⁹¹ The Human Rights Committee has emphasized that such restrictions must not “put in jeopardy the right itself.”⁹² And, 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.”⁹³

In this case, the Government detained Mr. Ilyashev to muzzle his advocacy for human rights and directly challenged his right to freedom of expression, putting in jeopardy the right itself. Mr. Ilyashev was jailed, tried, and convicted for no reason other than his criticism of Nur Otan. His three posts were critical of Nur Otan and engaged with contemporaneous news reporting and political dialogue: The March 6 post commented on reports about the fundraising by Nur Otan for COVID-19 pandemic relief. The March 28 post responded to a news report regarding the Government’s detention of a Nur Otan Party official. And, the March 30 post refuted a news report in which Nur Otan took credit for food assistance during the pandemic. These posts were entitled to heighten protection.

The Government’s suppression of Mr. Ilyashev’s freedom of expression fails to serve any legitimate objective and is not necessary or proportionate to any legitimate objective. The expression—criticism of Nur Otan for corruption and ineptitude—was in no way related to the alleged threat—mass disobedience of social isolation. Mr. Ilyashev did not call for any protests or acts at all. As evidenced by the Government’s own convoluted theory presented by Ms. Akbarova, there is no direct and immediate connection between the expression and the threat. And this reveals the Government’s pretext. Although the Government claimed that his detention was based on his “dissemination of knowingly false information” that created a “substantial danger,” in actuality none of his Facebook postings was false or dangerous. None of his posts called directly or indirectly for protests or violence or could reasonably be considered to threaten national security, public order, public health or morals, or the rights or reputations of others. Although the prosecution claimed to be protecting public order, it failed to present any specific and individualized information about the precise nature of the threat to public order and to establish a direct and immediate connection between the Facebook posts and the purported danger. The Government was merely using the veil of crime to silence criticism, which is not an acceptable purpose under Article 19(3) of the ICCPR. To the contrary, political discourse, journalism, and criticism of political authority have all been explicitly recognized as protected speech, and “the criminalization of speech is only appropriate where grave crimes have been committed.”⁹⁴

⁸⁸ UN General Assembly, Promotion and Protection of the Right to Freedom of Opinion and Expression, Sixty Sixth Session, U.N. Doc. A/66/290, August 10, 2011, para. 40; *see also* Human Rights Council, Report of the Special Rapporteur on the promotion and protection of fundamental freedoms and human rights while countering terrorism, A/HRC/31/65, April 29, 2016, para. 38; Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39, October 1, 1995, Principle 7.

⁸⁹ *Id.* at para. 33.

⁹⁰ *Id.* at para. 34.

⁹¹ *Id.* at para. 38.

⁹² General Comment No. 34, *supra* note 86, para. 21.

⁹³ *Id.*, at para. 33.

⁹⁴ *Id.* at 10-13.

The sentence in this case was also not necessary and proportionate to the Government's state objective of ensuring compliance with quarantines imposed due to the COVID pandemic. The Government's state of emergency due to COVID expired on May 11, 2020, which was before Mr. Ilyashev's trial; thus, as of that date, any necessity was gone, and any danger of substantial harm was no more, as was the Government's pretext that members of society are more susceptible to join criticism of the Government while on lock down. Yet, Mr. Ilyashev was detained for another 11 days, is now serving three years of restricted liberty, and is banned from political and civic expression and association for five years.

3. Arbitrary Detention under Category III

Kazakhstan's detention of Mr. Ilyashev also amounts to an arbitrary deprivation of liberty under Category III of the Working Group's Revised Methods of Work.⁹⁵ Due process is one of the tenets of the right to a fair trial. The minimum international standards of due process are established in the ICCPR, the UDHR, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (the "Body of Principles"),⁹⁶ and the United Nations Standard Minimum Rules for the Treatment of Prisoners (the "Mandela Rules"). The Constitution of Kazakhstan likewise ensures the rights of criminal defendants.⁹⁷

a. Kazakhstan Violated Ilyashev'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"⁹⁸ 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. . . ."⁹⁹ Moreover, principles 38 and 39 of the Body of Principles confirm that, except in special cases, a criminal detainee is entitled to release pending trial.¹⁰⁰ The Kazakhstan Constitution likewise restricts pretrial detention.¹⁰¹

In the present case, Mr. Ilyashev was arbitrarily denied his right to release pending trial. On April 18, 2020, a judge ordered him to remain in pre-trial detention, where he remained until trial. Mr. Ilyashev has no history of violence and is not a threat to society. He currently resides in Kazakhstan, as does his family, and thus he does not pose a flight risk. Likewise, his alleged criminal activity was posting his opinions on his private Facebook account, which is an exercise of his fundamental rights, not a crime. He should not have been arrested and no trial should have occurred for these acts, so this is not a valid basis to continue his pretrial detention.

To justify pretrial detention, the prosecutor did not point to any specific evidence that it feared Mr. Ilyashev might destroy, and the prosecutor did not specify what particularized risk Mr. Ilyashev posed or how the investigation might be hampered.¹⁰² Instead, the prosecutor argued that Mr. Ilyashev

⁹⁵ According to Category III, a deprivation of liberty is arbitrary "[w]hen 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."

⁹⁶ *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").

⁹⁷ Kazakhstan Const. arts. 16, 77.

⁹⁸ ICCPR, *supra* note 72, art. 9(3)

⁹⁹ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 38.

¹⁰⁰ Body of Principles, *supra* note 96, prin. 38, 39

¹⁰¹ Kazakhstan Const. art. 16(2).

¹⁰² ABA Preliminary Report, *supra* note 18; Ilyashev Interview.

might foster a mood of protest.¹⁰³ Notably, however, although the Government used the COVID-related state of emergency to justify its prosecution of Mr. Ilyashev, that state of emergency ended on May 11, 2020, yet he was not freed from detention even then. So, even under the Government's theory, there was no basis for his continuing detention after that point. This reveals the pretext of the Government's claim. Accordingly, the pre-trial detention of Mr. Ilyashev was 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.

b. The Government Violated Mr. Ilyashev's Right to Fair Hearing by an Impartial Judge

Article 14(1) of the ICCPR guarantees the right "to a fair and public hearing by a competent, independent and impartial tribunal."¹⁰⁴ 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.¹⁰⁵ Article 14(3)(d) of the ICCPR also establishes the right of defendants "[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing."¹⁰⁶ The accused also has the right "[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."¹⁰⁷ 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."¹⁰⁸ This right is reiterated in Article 11(1) of the UDHR.¹⁰⁹ The Human Rights Committee has emphasized that States may never "[d]eviat[e] from fundamental principles of fair trial, including the presumption of innocence. . . ."¹¹⁰ This right requires that the prosecution bear the burden of proving the charge against a defendant beyond a reasonable doubt.¹¹¹

The Human Rights Committee has made clear that States cannot "invoke states of emergency" to justify "deviat[ion] from fundamental principles of fair trial":¹¹² "[t]he Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency."¹¹³ In order to protect the right to a fair trial, the presiding judge cannot interfere with the presentation of the defendant's case and must maintain a neutral environment for the presentation of evidence.¹¹⁴ For example, the judge must not interfere with the legitimate cross-examination of the prosecution's witnesses and the presentation of defense evidence.¹¹⁵

¹⁰³ Ilyashev interview; Resolution to Authorize a Preventative Measure in the form of Incarceration for a Period of 2 Months, Senior Investigator of Department of Internal Affairs, Criminal Investigation Division, Police Department of Almaty (April 18, 2020).

¹⁰⁴ ICCPR, *supra* note 72, art. 14(1)

¹⁰⁵ 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"].

¹⁰⁶ ICCPR, *supra* note 72, art. 14(3)(d).

¹⁰⁷ ICCPR, *supra* note 72, art. 14(3)(e)

¹⁰⁸ ICCPR, *supra* note 72, art. 14(2).

¹⁰⁹ UDHR, *supra* note 73, art. 11(1).

¹¹⁰ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 34.

¹¹¹ *Id.* at para. 30.

¹¹² Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, August 31, 2001, para. 11.

¹¹³ *Id.* at ¶ 16. In this vein, the European Court has held that where proceedings are conducted by video-feed, the court must ensure that "the [defendant] is able to follow the proceedings and to be heard without technical impediments." European Court of Human Rights, *Sakniovskiy v. Russia*, App. No. 21272/03, November 2, 2010, para. 98

¹¹⁴ Human Rights Committee, *Gridin v. Russian Federation*, U.N. Doc. CCPR/C/69/D/770/1997, July 18, 2000, para. 8.2; General Comment No. 32, *supra* note 110, para. 34.

¹¹⁵ *Id.*

Mr. Ilyashev's trial did not meet the standard of fairness required under international law. First, the Government's decision to try Mr. Ilyashev by video conference, over his objection, prejudiced his defense. Trial monitors documented many instances of technical problems during trial, including internet outages and audio/video feed disruptions, the low-battery failure of the Government's expert's phone (only during cross-examination), and other interruptions. Due to these failures, the Government denied Mr. Ilyashev the right to attend a significant portion of his trial in person. Mr. Ilyashev objected to the technological failures during his trial, and the Government continued to violate his rights. While the COVID-19 pandemic may necessitate alternative trial arrangements in some circumstances, it cannot justify the Government's refusal to provide technology sufficient to allow the accused to participate in his defense, hear the testimony against him, and confront the evidence and witnesses presented against him. And, Mr. Ilyashev's trial commenced after the expiration of the declared state of emergency related to COVID-19, so the justification is unfounded.

Second, the presiding judge interfered with the defense's presentation of evidence by preventing Mr. Ilyashev's counsel from proffering the testimony of more than half of their proposed witnesses, including experts, by cutting short the cross-examination of the Government's key witness (after promising to allow the cross-examination to continue), and by rejecting all of the various motions presented by Mr. Ilyashev's counsel to ensure that Mr. Ilyashev could attend trial and participate in his defense. 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, and her selective consideration of the evidence demonstrates a lack of equality of arms, the absence of a presumption of innocence, and unfairness in proceedings. And, the Court's refusal to suspend the trial to allow for resolution of the technical issues violated Mr. Ilyashev's rights under Article 14(1) and 14(3)(d). 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.

c. The Government Violated Mr. Ilyashev's Right to Effectively Participate in his Defense and Consult with His Lawyers.

Article 14(3)(d) of the ICCPR also establishes the right of defendants "[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing."¹¹⁶ This includes the rights attend, hear and view the proceedings, and consult with lawyers.¹¹⁷ Article 14(3)(b) likewise requires that the defendant "have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing." This right requires that defendants "be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications." Thus, according to the UN Human Rights Committee, the Government violates a defendant's rights where a defendant "was only granted a few moments each day during the trial to communicate with counsel."¹¹⁸

The above-document technological problems with Mr. Ilyashev's video trial inhibited his ability to effectively participate in his trial. The trial court violated Mr. Ilyashev's right to a fair trial and to a defense because "problems with the virtual proceedings continuously prevented Mr. Ilyashev and counsel from making motions, presenting arguments, and questioning witnesses."¹¹⁹

The presiding judge also violated Mr. Ilyashev's right to consult in confidence with his lawyers. Mr. Ilyashev was entirely unable to communicate with his counsel in real time during the proceedings. When he was able to speak with them during short breaks, it was over the main court's open video feed

¹¹⁶ ICCPR, *supra* note 72, art. 14(3)(d).

¹¹⁷ ICCPR, *supra* note 72, art. 14(3)(b), (d) and (f).

¹¹⁸ Human Rights Committee, *Rayos v. Philippines*, U.N. Doc. CCPR/C/81/D/1167/2003, July 27, 2004, para. 7.3.

¹¹⁹ ABA Primary Report, *supra* note 18, at 4.

with the prosecutors present. He was afforded no way to communicate in confidence, save for one single opportunity after adjournment on June 19, 2020. The technical problems also hindered his ability to confer with counsel. Trial monitors documented numerous instances where Mr. Ilyashev's counsel could not consult with him at vital junctions, including on motions related to suspending the proceedings until he could attend in person, suspending the proceedings when Mr. Ilyashev was sick, and recusal of the presiding judge.¹²⁰ Because of its denial of Mr. Ilyashev's right to consult with counsel to prepare and participate in his defense, the Government violated Article 14(3)(b) and severely infringed his right to a fair trial.

d. The Government Violated Mr. Ilyashev's Right to Call Witnesses and Cross-Examination Government Witnesses.

Under Article 14(3)(e) of the ICCPR, all persons accused of a crime are entitled "[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." In the words of the UN Human Rights Committee, this provision "is important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution."¹²¹ While the right to call witnesses is not unlimited, the defendant must be allowed to call witnesses who are relevant, if proposed in a timely manner in compliance with procedural requirements.¹²² The Working Group has concluded that "the inability to examine witnesses in person impedes the ability to assess the credibility of the witnesses and severely and adversely affects the right to defend oneself, which is a serious violation of the rights to due process."¹²³

The Court denied Mr. Ilyashev the opportunity to call witnesses whose testimony was relevant to his defense. Mr. Ilyashev timely followed all procedural requirements in seeking to call nine fact witnesses with directly relevant information, including information related to the truth of the Mr. Ilyashev's posts and their impact on the recipients, and three experts. According to trial monitors, the Court denied Mr. Ilyashev the right to present the majority of these witnesses. For most, it offered no justification for the denial.¹²⁴

The Court also denied Mr. Ilyashev's right to have his counsel cross-examine the prosecution's main expert. Ms. Akbarova was the prosecution's sole witness attesting that Mr. Ilyashev's three posts would cause a substantial harm to the public order and was the only Government witness listed on the indictment. After Ms. Akbarova called into trial from her cell phone, she lost connection, allegedly due to her cell phone battery. The Court stated that cross-examination would resume the next day, but when Court resumed, the Judge announced that Ms. Akbarova was ill and would not participate. Over the defense objection that the cross-examination of Ms. Akarova was central to the defence, the Court ordered the case to proceed without the cross examination.¹²⁵ The Government's effort to prevent Mr. Ilyashev from presenting favorable witnesses and cross-examining unfavorable witnesses was a severe violation of his right under Article 14(3)(e) of the ICCPR.

4. Conclusion

¹²⁰ ABA Primary Report, *supra* note 18 (citing Trial monitors).

¹²¹ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 39.

¹²² Human Rights Committee, *Johnson v. Spain*, U.N. Doc. CCPR/C/86/D/1102/2002, March 27, 2006, para. 6.5; Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 39.

¹²³ Opinion No. 16/2017 concerning Max Bokayev and Talgat Ayanov (Kazakhstan), ¶ 59.

¹²⁴ ABA Primary Report, *supra* note 18

¹²⁵ ABA Primary Report, *supra* note 18 (citing Monitors Notes 18-19 June 2020).

Kazakhstan targeted, arrested, and detained Mr. Ilyashev for his civic activism in drawing attention to the Government's suppression of the freedoms of association and assembly and for his criticism of the Government's corruption. After his arrest, the Government repeatedly violated Mr. Ilyashev's right to a fair trial, including by denying his release pending investigation and trial, his right to consultation with counsel and to participate in his trial, and his presumption of innocence. The sentence imposed by the Government is a direct affront to the freedoms of expression, association, and assembly protected by international law and the Kazakhstan Constitution. For the forgoing reasons, the detention of Mr. Ilyashev and continuing restriction on his freedoms 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 Mr. Ilyashev's trial conviction in June 22, 2020, his attorney appealed the trial judgement. However, on September 15, 2020, the Almaty City Court upheld the trial court's conviction.

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

Joshua Newcomer
McKool Smith P.C.
600 Travis St., Suite 7000
Houston, TX 77002
United State of America
+1(713) 485-7316 (tel.)
+1(713) 485-7344 (fax)
jnewcomer@mckoolsmith.com

Maran Turner
Adam Lhedmat
Freedom Now
1750 K Street NW, 7th Floor
Washington, DC 20006
United States of America
+1(202) 223-3733 (tel.)
+1(202) 223-1006 (fax)
alhedmat@freedom-now.org