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**Advance Unedited Version**Distr.: General  
18 November 2020

Original: English

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**Human Rights Council**  
**Working Group on Arbitrary Detention****Opinions adopted by the Working Group on Arbitrary Detention at its eighty-eighth session, 24–28 August 2020****Opinion No. 43/2020 concerning Serikzhan Bilash (Kazakhstan)\*,\*\*,\*\*\***

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.
2. In accordance with its methods of work (A/HRC/36/38), on 19 December 2019 the Working Group transmitted to the Government of Kazakhstan a communication concerning Serikzhan Bilash. The Government replied to the communication on 17 March 2020. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
  - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
  - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
  - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
  - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
  - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability,

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\* Seong-Phil Hong did not participate in the discussion of the present case

\*\* An individual opinion of Elina Steinerte (partially dissenting) is contained in annex I. Another individual opinion of Sètondji Roland Adjovi (partially dissenting) is contained in annex II.

\*\*\* The annexes to the present document are reproduced in the language of submission only.

or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

## Submissions

### *Communication from the source*

4. Serikzhan Bilash is a 45-year-old Kazakh national, usually residing in Almaty. Prior to his arrest, Mr. Bilash served as the director of Ata-Jurt Eriktileri (“Volunteers of the Fatherland”), an organization he founded in 2017 which campaigns for the release of ethnic Kazakhs allegedly held by the Chinese Government in the Xinjiang province and which provides support to the relatives of those detainees. According to the source, despite repeated attempts by Mr. Bilash to register his organization, the Minister of Justice of Kazakhstan allegedly refused to grant the registration.

#### a. Arrest and detention

5. The source reports that, on 9 March 2019, six unidentified individuals arrived at Ata-Jurt’s offices in Almaty, Kazakhstan, where they proceeded to intimidate Ata-Jurt staff. They allegedly left only when the staff called the police. Mr. Bilash, concerned for his safety, decided to stay in a hotel room that night rather than returning home. He therefore subsequently checked into the Rahad Palace Hotel in Almaty.

6. According to the source, around 2:30am on 10 March 2019, Kazakh National Security officers arrived at the Rahad Palace Hotel and attempted to enter Mr. Bilash’s room with a key provided by the hotel administration. However, Mr. Bilash had closed the door’s chain-link security lock, which prohibited the officers from entering immediately. Mr. Bilash attempted to identify the officers and asked to see any documents that would show that they were legally permitted to enter his room. The officers allegedly provided no explanation and, without warning, and while Mr. Bilash was standing behind the door, kicked open the door, breaking the security lock and injuring Mr. Bilash who was left bleeding from his right foot. The source further reports that, noticing his injury, the officers pressured Mr. Bilash to sign a statement testifying that no one was injured during his arrest.

7. The source submits that, despite Mr. Bilash’s insistence on the reason for the officers’ presence in his room, they did not present any warrant, subpoena or any formal notice of the legal grounds for his arrest nor did they bring any specific charges against him. One officer, however, reportedly stated that Mr. Bilash has committed two crimes: he engaged in activities harmful to the relationship between Kazakhstan and China and he assisted a whistle-blower from the Xinjiang camps in obtaining private legal counsel in Kazakhstan. The officers proceeded to detain Mr. Bilash and put him on a flight to the capital, Nur-Sultan, 1,300 kilometres away from Almaty. The source further reports that, once in Nur-Sultan, he was allegedly transferred to the Ministry of Internal Affairs, where he was held at the order of the Ministry and interrogated by Kazakh National Security officers.

8. The source indicates that the Government did not notify Mr. Bilash’s family or the press about his detention. Later during the same day (10 March 2019), an online video showing the hotel room with marks of blood had caught the attention of several prominent news outlets. The National Security officers therefore pressured Mr. Bilash to contact his family and friends to notify them that he had not been killed and that he was in Nur-Sultan. While detained at the Ministry of Internal Affairs, Mr. Bilash also notified investigators that he was represented by his own lawyer. He was, however, not permitted to speak with his lawyer. Instead, the Ministry officials have reportedly attempted to provide him with a government-appointed lawyer, which he repeatedly refused.

9. The source submits that, later in the day, the police raided the Ata-Jurt offices, where they seized computers, cameras and hard-drives with information about and testimonies from individuals detained in Xinjiang. The office was reportedly later locked and sealed by the law enforcement officials, which has temporarily ceased the operation of Ata-Jurt’s headquarters.

b. Charges and investigation

10. The source submits that, on 11 March 2019, the authorities notified Mr. Bilash that he was under investigation for incitement to social, national, generic, racial, class or religious discord, under article 174 of the Kazakh Criminal Code.<sup>1</sup> The source further reports that the Office of the Prosecutor issued a press release on that same day stating that Mr. Bilash has violated the second paragraph of article 174 by calling for “jihad” against the Chinese people on 8 February 2019, while giving a talk at a meeting with members of the Uyghur community in Almaty. According to the source, the relevant statements made by Mr. Bilash at that meeting translate as follows in English: “Jihad today is not taking up a gun and fighting in Syria. Jihad is information and propaganda.”

11. The source indicates that, on 11 March 2019, the same day he was notified of the charges against him, Mr. Bilash was brought before a judge at the Specialized Inter-District Investigation Court of Nur-Sultan. At the hearing, the court ordered him to remain under house arrest in the city of Nur-Sultan for two months, pending investigation into the accusations that he had “incited ethnic discord”. Under the terms of the house arrest, Mr. Bilash was not permitted to return to his home in Almaty, despite the fact that the alleged acts for which he was being investigated have occurred in Almaty. As Nur-Sultan is 1,300 kilometers away from Almaty, Mr. Bilash has reportedly had to rent an apartment from an acquaintance to fulfil the terms of his detention order.

12. According to the source, while on house arrest, Mr. Bilash was repeatedly visited by plainclothes officers who used threats of force to pressure him into making several written and video-recorded statements. In one statement, the police reportedly coerced Mr. Bilash to pledge to stop raising the issue of ethnic Kazakhs detained in Xianjiang. In another statement, the police coerced him to state that he wanted to fire his legal counsel. During these interrogations, Mr. Bilash was also allegedly forced to sign several documents, some of which were blank.

13. The source reports that, on 15 March 2019, the officers visited him again and promised that they would “give [him] freedom by April” if he stepped down as director of Ata-Jurt. Officers stated that they would let another activist take over the organization, as long as Mr. Bilash was not involved. However, Mr. Bilash refused.

14. The source submits that, since the beginning of his house arrest, officers have visited Mr. Bilash over 20 times. The source further reports that, during the interrogations, officers often threatened him and his family with physical harm. On one occasion, officers allegedly brought along a photograph of a family member of Mr. Bilash, to make him aware that the Government knew the identity of his family members. The source adds that Mr. Bilash’s attorney has never been notified prior to interrogations and that, as a consequence, she has never been present during the questionings. In addition to those attempts to prevent Mr. Bilash’s lawyer from representing him, and to the alleged attempts by the police to have him fire his lawyer, the authorities have reportedly followed, harassed and intimidated Mr. Bilash’s lawyer.

15. The source states that, on 7 May 2019, Mr Bilash’s house arrest was extended by the Specialized Inter-district Examining Court. At the request of the prosecution and police investigators, his house arrest was reportedly further extended by the Court on 8 July until

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<sup>1</sup> Article 174 of the Code provides that:

1. *Intentional actions, directed to institution of social, national, generic, racial, class or religious hatred, insult of the national honour and dignity or religious feelings of citizens, as well as propaganda of exclusivity, superiority or inferiority of citizens on grounds of their relation to religion, class, national, generic or racial assignment, if these actions are committed publicly or with the use of mass media or information and communication networks, as well as by production or distribution of literature or other information media, promoting social, national, generic, racial, class or religious discord, - shall be punished by restriction of liberty for the term of two to seven years or imprisonment for the same term.*
2. *The same actions, committed by group of persons, group of persons on previous concert or repeatedly or connected with violence or threat of its use, as well as committed by person with the use of his (her) official position or leader of a public association – shall be punished by imprisonment for the term of five to ten years with deprivation of the right to occupy determined positions or to engage in a determined activity for the term of up to three years or without it.*

10 August 2019. The source indicates that the Court has provided no specific or individualized basis – such as Mr. Bilash’s flight risk, danger to society or likelihood of destroying evidence – that would justify the need for his continued detention and that, if convicted, Mr. Bilash could face a sentence between two and seven years in prison.

c. Indictment and alleged pressure to accept a plea agreement

16. According to the source, on 16 July 2019, the prosecution released its official indictment of Mr. Bilash, charging him with a single violation of article 174(1) of the Kazakh Criminal Code. Although Mr. Bilash was initially under investigation for violating the second paragraph of article 174, the prosecution only decided to indict Mr. Bilash under the first paragraph of article 174. The alleged reason for the change is that Mr. Bilash could not be considered the “*leader of a public association*”, as required under the second paragraph, due to the fact that the Government has repeatedly refused to register Ata-Jurt.

17. The source reports that, on 29 July 2019, a Nur-Sultan trial court found that Nur-Sultan was an improper venue to hear the case against Mr. Bilash because the conduct at issue occurred in Almaty. The Nur-Sultan court accordingly transferred Mr. Bilash’s case to Almaty, where the pre-trial process would begin anew. The court also reportedly ordered Mr. Bilash’s house arrest to be transferred to Almaty, an order that was set to enter into force on 14 August 2019.

18. Between the time the order was issued and when the order entered into force, Mr. Bilash was visited several times by law enforcement officers at his place of house arrest. During these visits, officials pressured Mr. Bilash to accept a plea deal.

19. The source indicates that, on 9 August 2019, District Court in Almaty opened criminal proceedings against Mr. Bilash concerning the subject of the Nur-Sultan trial, despite the Nur-Sultan court’s order to transfer the case only entering into force on 14 August 2019, and despite the fact that Mr. Bilash was still being detained under house arrest in Nur-Sultan.

20. According to the source, on 15 August 2019, Mr. Bilash was transferred from Nur-Sultan to Almaty, where he was placed under the house arrest at his home. At approximately 5:30pm on 15 August 2019, the Almaty District Court to which Mr Bilash’s case was now assigned, notified his legal representative that Mr. Bilash’s first hearing before this court would take place the following morning at 10:00am. The source further reports that, later that evening, Mr. Bilash’s lawyer discovered that the brakes of her car had been tampered with. She allegedly announced publicly that she believed the act was in retaliation for her representation of politically-targeted defendants, including Mr. Bilash.

21. The source reports that, the following morning, on 16 August 2019, Mr. Bilash’s lawyer went to the Almaty courthouse and discovered that the 10:00am hearing had been cancelled. The lawyer was then informed that the pre-trial hearing was scheduled for 7:30pm that evening. Around 5:30pm, Mr. Bilash was reportedly visited by his lawyer to discuss legal strategy. During the conversation, he expressed his intention to refuse the plea agreement. While this meeting was taking place, Almaty police officers arrived at Mr. Bilash’s house and insisted on escorting him to the court. The officers allegedly refused to allow his lawyer to accompany him and the lawyer was forced to go to the hearing separately.

22. According to the source, on 16 August 2019 at 7:15pm, when Mr. Bilash’s lawyer arrived at the courthouse, she was informed that he had not yet arrived. Contrary to what she was told, Mr. Bilash had already arrived and was inside the courthouse. While she was waiting, Mr. Bilash was being pressured to accept a plea agreement by a person who was later identified to hold the position of Presidential Advisor. The source further alleges that Mr. Bilash was forced to sign the plea deal, otherwise he would be imprisoned for the maximum of seven years under article 174 of the Kazakh Criminal Code. In the meantime, his lawyer eventually understood that Mr. Bilash was inside the courthouse and asked to see her client. The court staff reportedly ejected her from the courthouse and locked the doors and gates of the building behind her. The source indicates that she then made a public statement on social media describing the situation, which drew a crowd of supporters of Mr. Bilash to the courthouse.

23. The source further reports that Mr. Bilash's lawyer was allowed to re-enter the courthouse at 9:00pm and finally meet her client who looked very distressed, was pale and his hands were shaking. She reportedly stated her client was not in a position to continue with any of the proceedings in light of his health issues, which had included a heart attack in the past. The court clerks, however, proceeded to hold the hearing and Mr. Bilash and his lawyer were brought to a hearing room, which included the prosecutor, a judge and the Presidential Advisor referred to above. The prosecution requested to have the trial sealed but the lawyer objected because the trial did not raise any issue of classified material or state secrets. She further emphasized that the case was a simple case of incitement and that there were no grounds for overriding her client's right to an open and public trial. Despite the lawyer's objection, the judge ruled to close the trial to the public and the prosecution requested to have her removed as Mr. Bilash's counsel because they believed that she was acting against the interests of her client. The prosecution reportedly further alleged that Mr. Bilash desired a plea deal but that his lawyer was unwilling to allow him to accept one. In response, the lawyer explained that, in light of the conversation that she had with her client earlier in the evening, Mr. Bilash was not interested in a plea bargain and she requested some time to speak with her client confidentially to determine whether he had changed his mind about accepting a plea. The judge allegedly refused her request to meet with Mr. Bilash confidentially and instead proceeded to ask Mr. Bilash whether he desired a plea agreement. He answered that he would accept the agreement. The judge then recommended that a plea agreement be signed.

24. According to the source, Mr. Bilash's lawyer refused to sign the plea agreement, a necessary condition under Kazakh law. The source reports that the Court nonetheless proceeded to have Mr. Bilash sign the agreement. At this point, his lawyer reportedly left the courthouse because she was unwilling to participate in an agreement that she considered illegal as it was signed under coercion. The source indicates that the judge then assigned Mr. Bilash another lawyer who proceeded to sign off on the plea agreement. Mr. Bilash's new lawyer did not consult with the previous lawyer nor did he take time to adequately review any relevant case files concerning Mr. Bilash. Mr. Bilash then reportedly proceeded to sign the plea agreement, with the authorization of his new counsel. The source further reports that, under the agreement, Mr. Bilash pleaded guilty to violating article 174 of the Kazakh Criminal Code for inciting social discord against Chinese persons. Moreover, Mr. Bilash agreed to refrain from engaging in any public advocacy activity on behalf of any cause for the next seven years. Additionally, the source indicates that the agreement stipulates that Mr. Bilash is not allowed to leave Almaty for the next three months and must pay a fine amounting to approximately \$300. The court proceeded to recognize the plea, closed the criminal case against Mr. Bilash and released him from the courthouse at approximately 11.30pm. Mr. Bilash then publicly announced that he pleaded guilty to the crimes in exchange of his freedom. As a result of the agreement, he also stepped down as director of the organization Ata-Jurt.

d. Alleged continued harassment against Mr. Bilash

25. The source reports that Mr. Bilash continues to face harassment from the authorities despite the fact that he ended his public advocacy activities, as stipulated by the terms of the plea agreement allegedly forced upon him. In particular, the source indicates that the Almaty police visits him every week to question and harass him.

26. Finally, the source submits that the authorities have placed him on a financial blacklist and froze his bank account, a situation that prohibits him from transferring certain property or obtaining insurance. His credit cards were also allegedly not returned following their seizure at the time of his arrest. On 7 December 2019, when he reportedly attempted to transfer the ownership of his car to his brother, he was prohibited to do so due to the legal restrictions on him. When Mr. Bilash attempted to obtain a new insurance for his car, he was also denied it due to the fact he was on the blacklist.

e. Legal analysis

27. The source argues that Mr. Bilash's detention constitutes an arbitrary deprivation of liberty under categories I, II, and III of the Working Group on Arbitrary Detention.

i. Category I

28. The source submits that Mr. Bilash's detention is arbitrary due to the lack of any substantive evidence justifying his detention and because he was charged under article 174, a vague and overbroad provision of the Kazakh Criminal Code that does not provide a clear description of the activities that are prohibited. The source refers to the Working Group's finding that there is lack of a legal basis, for the purposes of category I, when an individual is arrested without substantive evidence to justify the arrest<sup>2</sup> and when the Government uses vague and/or overbroad laws to prosecute an individual.<sup>3</sup> The source further states that the Human Rights Committee has described article 174 as vague and overbroad<sup>4</sup> and stated that this article is applied extensively to individuals exercising their legitimate rights under international human rights law.<sup>5</sup>

29. The source further argues that the context surrounding Mr. Bilash's statements demonstrates that the Office of the Prosecutor General has mischaracterized Mr. Bilash's words pronounced on 8 February 2019 and that those statements cannot be interpreted so as to suggest that he committed any criminal activity under article 174 or otherwise. On the contrary, the source alleges that Mr. Bilash's speech encouraged non-violence.

30. The source submits that the Government violated article 15 (1) of the International Covenant on Civil and Political Rights (the "Covenant") and article 11 (2) of the Universal Declaration of Human Rights, both of which guarantee the right to know what the law is and what conduct violates the law. The source further argues that the detention of Mr. Bilash is arbitrary under category I as there is no substantive evidence justifying his detention and that the basis for it is both vague and overbroad, in violation of the Covenant and the Universal Declaration of Human Rights.

ii. Category II

31. The source argues that Mr. Bilash was detained on the basis of his exercise of fundamental rights or freedoms protected under international law, including the rights to freedom of expression, assembly, and association.

32. The source submits that the Government violated Mr. Bilash's right to freedom of expression, assembly, and association because he was detained on the basis of his advocacy on behalf of ethnic Kazakhs detained in the Chinese province of Xinjiang. According to the source, the Government repeatedly demonstrated that Mr. Bilash was detained because of this advocacy as: (1) National Security officers told him that his arrest was due to the impact of his work on Kazakhstan's relationship with China; (2) on 14 March, Government investigators pressured him to make statements promising to stop raising the issue of the oppression of ethnic Kazakhs in Xinjiang; (3) on 15 March, National Security officers promised that they would "give [him] freedom by April" if he stepped down as director of Ata-Jurt; (4) the Government's arrest of Mr. Bilash was closely followed by a Government raid on Ata-Jurt's office, during which officers seized advocacy materials unrelated to the allegations against Mr. Bilash. Lastly, the source argues that the Government allegedly attempted initially to charge Mr. Bilash under paragraph 2 of article 174 of the Criminal Code, a provision that, if he were convicted, would legally prohibit him from engaging in public advocacy activity for a period of up to three years.

33. The source claims that the Government violated Mr. Bilash's right to freedom of expression by detaining him on the basis of comments clearly protected under article 19 of the Covenant and article 19 of the Universal Declaration of Human Rights. According to the source, his statements amount to a discussion of religious interpretation as it applies to a matter of public concern, namely the matter of raising awareness of the internment of Muslims in Xinjiang. Accordingly, the source argues, those comments about adopting a non-violent interpretation of the concept of "jihad" in the Quran is an exercise of his right to

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<sup>2</sup> See opinion No. 58/2016, para. 21.

<sup>3</sup> See opinions No. 60/2013, para. 22; No. 44/2014, paras. 26-37.

<sup>4</sup> Human Rights Committee, concluding observations on Kazakhstan, CCPR/C/KAZ/CO/2, para. 49.

<sup>5</sup> *Ibid.*, paras. 47-49.

freedom of expression and were therefore mischaracterized, by the Office of the Prosecutor's General, as calling for "jihad" against China.

34. The source further states that, although the rights to freedom of expression, association and assembly are not absolute, none of the exceptions to these rights apply to Mr. Bilash's case. The Human Rights Committee has emphasized that such restrictions must not "put in jeopardy the right itself"<sup>6</sup> and that it is not sufficient for a government to merely invoke one of the exceptions, but must "specify the precise nature of the threat" posed by the protected activity,<sup>7</sup> establish "a direct and immediate connection between the expression and the threat", and demonstrate why the limitation was necessary.<sup>8</sup> Furthermore, in the case of the right to freedom of expression, the Human Rights Committee has been clear that paragraph 3 must never be used to justify "the muzzling of any advocacy of ... human rights".<sup>9</sup> The source argues that the arrest and detention of Mr. Bilash fall outside any possible legitimate restriction on the right to freedom of expression and would qualify as an attempt to muzzle Mr. Bilash's advocacy of human rights, and thus cannot be justified as a legitimate restriction on his rights to freedom of expression, assembly and association.

35. Additionally, the source states that none of the restrictions under article 19 (3) of the Covenant would justify the Kazakh Government's arrest or detention of Mr. Bilash because his statements neither place national security, public order, public health or morals at risk, nor violate the rights or reputations of others. Finally, the source argues that the law that the Government has accused Mr. Bilash of violating with his 8 February statements is too vague and overbroad to satisfy the "provided for by law" requirement under paragraph 3 of article 19 of the Covenant.

36. The source concludes that, by depriving Mr. Bilash of his freedom of expression and detaining him on the basis of his rights to freedom of association and assembly, the Kazakh Government violated his rights enshrined in articles 19, 21 and 22 of the Covenant, as well as articles 19 and 20 of the Universal Declaration of Human Rights and articles 20 (freedom of speech), 23 (freedom of association), and 32 (freedom of assembly) of the Constitution of Kazakhstan<sup>10</sup> and rendered his deprivation of liberty arbitrary under the category II.

iii. Category III

37. The source reports that Mr. Bilash was not informed of the legal grounds for his arrest when he was seized and detained on 10 March 2019. Moreover, the officers did not show Mr. Bilash a warrant for his arrest, and there is no indication that such a warrant exists. Accordingly, the source submits that Mr. Bilash's detention is unfounded, in violation of article 9 (1) of the Covenant, article 9 of the Universal Declaration of Human Rights, and principles 2 and 36 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (the Body of Principles).

38. The source argues that the Government violated article 9 (3) of the Covenant and principles 38 and 39 of the Body of Principles by denying Mr. Bilash's release pending trial. Mr. Bilash was brought before a judge and ordered to stay on house arrest for two months in Nur-Sultan, which is over 1,300 kilometres away from Almaty where the alleged crime has occurred and where Mr. Bilash is domiciled. The judge did not provide any individualized reasons about Mr. Bilash to justify detaining him in Nur-Sultan. Moreover, the source states that the court failed provide individual reasons for extending Mr. Bilash's house arrest for two months on 7 May 2019 and for an additional month on 8 July 2019. The source further argues that Mr. Bilash did not pose any flight risk that would justify those extensions. As a

<sup>6</sup> Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 21.

<sup>7</sup> Human Rights Committee, communication No. 926/2000, *Shin v. Republic of Korea*, adopted 16 March 2004, para. 7.2.

<sup>8</sup> Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 35.

<sup>9</sup> *Ibid*, para. 23.

<sup>10</sup> Constitution of Kazakhstan, articles 20, 23, 32, available at <http://mfa.gov.kz/en/hague/content-view/the-constitution-of-the-republic-of-kazakhstan>.

consequence, the source concludes that the denial of his pre-trial release is a violation of article 9 (3) of the Covenant and principles 38 and 39 of the Body of Principles.

39. The source states that the Government violated articles 14 (3) (b) and (d) of the Covenant, principles 18 (1) and (3) of the Body of Principles, Rule 119 of the Mandela Rules, and article 16 (3) of the Constitution of Kazakhstan by denying Mr. Bilash's right to assistance of counsel of his own choosing. Despite repeated notice of his chosen counsel, the Government reportedly coerced Mr. Bilash to fire his own lawyer to accept a state-appointed lawyer in her place. The source submits that, despite having notice that Mr. Bilash was represented by his chosen legal representative, the officers repeatedly interrogated him without her being present and without notifying her that interrogations were taking place. Lastly, throughout the course of Mr. Bilash's detention, his lawyer has been followed and harassed by Kazakh National Security officers, which has served to intimidate her, obstruct her work and interfere with her ability to represent Mr. Bilash.

40. In light of the above, the source concludes that Kazakhstan has violated articles 14 (3) (b) and (d) of the Covenant, principles 18 (1) and (3) of the Body of Principles, Rule 119 of the Mandela Rules and article 16 (3) of the Constitution.

41. The source submits that, on multiple occasions, the Government subjected Mr. Bilash to threats of harm to him and to his family, in order to obtain both written and video testimony from him. During Mr. Bilash's house arrest, he has been repeatedly coerced by National Security officers, with threats both to him and his family. Officers allegedly used coercion to obtain Mr. Bilash to promise to stop his advocacy on behalf of ethnic Kazakhs in China's detention camps, to refuse representation by his domestic lawyer and to sign several documents, some of which were blank. The source thus argues that, by using threats of harm to coerce testimony from Mr. Bilash, the Government of Kazakhstan violated article 14 (3) (g) of the Covenant and principle 21 (2) of the Body of Principles.

42. Finally, the source submits that the events surrounding the plea agreement that Mr. Bilash was allegedly forced to sign on 16 August 2019 further restricted his physical liberty, as well as his rights to expression, association and assembly, constituting additional human rights violations, including violations of articles 5, 9, 10, 11, 19 and 20 of the Universal Declaration of Human Rights, of articles 7, 9, 10, 14, 19, 21, 22 and 26 of the Covenant, of article 16 of the United Nations Convention against Torture and of Principles 1, 2, 5, 6, 11, 15, 16, 17, 18, 21, 35 and 36 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

43. In light of the above, the source concludes that the Government of Kazakhstan has denied many of Mr. Bilash's due process rights, thereby rendering his deprivation of liberty arbitrary under the category III.

#### *Response from the Government*

44. On 19 December 2019, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 17 February 2020, detailed information concerning the circumstances of Mr. Bilash's arrest and detention and clarification regarding the legal provisions which justified his detention, as well as their compatibility with the Government's obligations under international human rights law.

45. On 11 February 2020, the Government requested an extension of the deadline, in accordance with paragraph 16 of the Working Group's methods of work. The extension was granted, with a new deadline of 17 March 2020.

46. In its response of 17 March 2020, the Government stated Nur-Sultan police received a complaint from a lawyer in Nur-Sultan that referred to comments Mr. Bilash posted online and a speech given by Mr. Bilash on 8 February 2019.

47. The Government states that a copy of Mr. Bilash's 8 February 2019 speech was submitted to independent experts who concluded that Mr. Bilash's comments incited ethnic hatred. The Government stated that the expert report mentioned the following comments made by Mr. Bilash:

(a) “Every citizen regardless of his nation must stand together against national enemy.”

(b) “If my brother works for the Chinese, if my brother sells himself to the Chinese, I would kill him.”

(c) “And if the enemy who killed my seven fathers tells me to forget everything for our nations, work together against China, I am ready to fight against the enemy even together with the enemy who killed my father.”

(d) “So, if you desire to be worthy of Allah’s mercy and compassion, push all [other] matters aside, this is jihad.”

(e) “China needs to change this history. [Uygurs’] crime is that they are not Chinese. Their names are not Chinese. For this reason, they are the first to be destroyed.”

48. The Government submitted that the prosecutor authorized the police to detain Mr. Bilash based on the complaint and the expert report. It was submitted that Mr. Bilash’s arrest without a warrant was in conformity with Kazakhstan’s domestic laws.

49. The Government denied Mr. Bilash’s account of the arrest and states that it involved no forced entry, and that Mr. Bilash opened the door himself and was not harmed.

50. The Government submitted that Mr. Bilash chose to replace his lawyer and that it played no role in Mr. Bilash’s selection or retention of counsel. The Government adds that Mr. Bilash’s decision to enter into a guilty plea was freely taken, with the advice and consent of his new counsel.

51. The Government states that pursuant to his guilty plea, Mr. Bilash was sentenced to six months of house arrest and was restricted from working for social organizations and engaging in illegal activities for seven years. The Government notes that because Mr. Bilash received credit for time spent under house arrest, he was only incarcerated for an additional three months and 12 days.

*Additional comments from the source*

52. The source noted that the Government did not dispute that article 174 of the Kazakh Criminal Code is impermissibly vague and overbroad, nor did it contest that the prohibition on coerced testimony had been violated.

53. The source states that the reply was the first time that the Government was raising any issue with the five quoted statements, and that the Government’s initial allegations were that Mr. Bilash called for “jihad – a war against the Chinese”. The source submits that none of the five quoted statements fit that description.

54. The source adds that Mr. Bilash’s alleged statements are protected by the right to freedom of expression, and that the Government cannot discharge its burden of proof merely by stating that expert reports had concluded that Mr. Bilash’s public statements went beyond appropriate free speech.

55. The source referred to the criteria outlined in the *Rabat Plan of Action* for assessing whether the criminalization of hate speech complies with the right to freedom of expression.<sup>11</sup> The source contends that Mr. Bilash’s statements are protected expression as they were made: (i) in the context of public advocacy directed towards ending large-scale human rights violations in Xinjiang; (ii) by Mr. Bilash who is a human rights advocate and leader of an organization working to expose abuses of the Chinese government to an audience of persons who are seeking to learn more about the violations in Xinjiang; (iii) the statements are rhetorical devices that employ hyperbole and hypotheticals to make a dramatic point rather than specific calls for imminent violence against identifiable individuals; (iv) the speech was delivered to an audience in person and thus has limited reach; and (v) no evidence has been presented that actual violence or hatred resulted from Mr. Bilash’s speeches.

<sup>11</sup> Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, A/HRC/22/17/Add.4, para. 18.

## Discussion

56. The Working Group thanks the source and the Government for their timely submissions.

57. At the outset, the Working Group notes that Mr. Bilash has been released following his plea agreement after spending over five months under house arrest. Following his release, the Working Group has the option of filing the case or rendering an opinion as to the arbitrariness of the detention, in conformity with paragraph 17 (a) of its methods of work. In this particular case, the Working Group has decided to render the present opinion in conformity with paragraph 15 of its methods of work. In making this decision, the Working Group gives particular weight to the fact that, although Mr. Bilash has been released, the circumstances in which he was detained were serious and warrant further attention<sup>12</sup> as he was allegedly targeted for exercising his rights to freedom of expression and association and because Mr. Bilash was reportedly deprived of his liberty by way of house arrest for over five months prior to his plea agreement and for over three months thereafter.

58. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations (A/HRC/19/57, para. 68).

59. The Working Group reiterates that it applies a heightened standard of review in cases in which the freedom of expression and opinion appears to be restricted or where human rights defenders are involved.<sup>13</sup> Mr. Bilash's role as a prominent activist and human rights defender for the release of ethnic Kazakhs held by the Chinese government in Xinjiang province requires the Working Group to undertake this kind of strict scrutiny.<sup>14</sup>

60. The Working Group recalls that house arrest amounts to a deprivation of liberty provided that it is carried out in closed premises that the person is not allowed to leave.<sup>15</sup> The Working Group notes that Mr. Bilash was subjected to pre-trial detention by way of house arrest for over five months prior to his plea agreement. The source specifies that his house arrest took place as of 11 March 2019, in the city of Nur-Sultan, which is 1300 kilometres away from his own residence in Almaty, and he was not allowed to go back to his home in Almaty. While on house arrest, Mr. Bilash has been repeatedly visited by officers. On 29 July 2019, a court ordered a transfer of his house arrest to his residence in Almaty, and he was transferred on 15 August 2019.

61. The source has made a number of allegations with regard to the detention of Mr. Bilash and argued that it falls under categories I, II and III. The Working Group will consider each of these in turn.

### i. Category I

62. According to the information provided by the source, the National Security officers did not present any arrest warrant when they arrested Mr. Bilash, and used excessive force during the arrest. The Working Group notes that the Government has submitted in its reply that the arrest was carried out in full compliance with national legislation but has not substantiated such affirmation to rebut the allegation. In principle, and except for cases where

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<sup>12</sup> See opinions No. 55/2018, para. 59; No. 50/2017, para. 53(c).

<sup>13</sup> See opinions No. 13/2018, para. 22; No. 57/2017, para. 46; No. 41/2017, para. 95; No. 62/2012, para. 39; No. 54/2012, para. 29; and No. 64/2011, para. 20.

<sup>14</sup> Human rights defenders, in particular, have the right to study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through those and other appropriate means, to draw public attention to such matters, see the Declaration on Human Rights Defenders, article 6 (c). Human rights defenders have the right to investigate, gather information regarding human rights violations and report on them, see opinion No. 8/2009, para. 18.

<sup>15</sup> See, for example, opinions No. 37/2018, para. 25; No. 13/2007, para. 24; and Deliberation No. 1 on House Arrest, E/CN.4/1993/24, para. 20.

a person is arrested in flagrante delicto, arrest without a valid warrant must be considered ipso facto a violation of articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant, as well as principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.<sup>16</sup> Therefore, the Working Group considers that Mr. Bilash was arrested without a warrant and with excessive use of force, contrary to article 9(1) of the Covenant.

63. The source submitted that Mr. Bilash's detention is arbitrary because he was arrested without substantive evidence to justify the arrest since Mr. Bilash's 8 February 2019 speech cannot be interpreted as amounting to a crime. The Government's reply stated that there was probable cause to detain and question Mr. Bilash because two experts analysed the 8 February 2019 speech and concluded that the comments incited ethnic hatred. According to the source, Mr. Bilash was notified of the charges on 11 March 2019 and, on that same day, was brought before a judge at the Specialized Inter-District Investigation Court who ordered him to remain in house arrest pending investigation into the accusations. The Working Group recalls that, in principle, it is outside the scope of its mandate to reassess the sufficiency of the evidence upon which individuals are arrested,<sup>17</sup> therefore will not analyse if the arrest of Mr. Bilash was justified with sufficient evidence.

64. However, the Working Group considers that Mr. Bilash's pre-trial detention, which should be the exception rather than the rule, lacked a legal basis as the Court's order, and its repeated extension, was not based on an individualized determination that it was reasonable and necessary taking into account all the circumstances, for such purposes specified in law as to prevent flight, interference with evidence or the recurrence of crime, and as there was no consideration of alternatives, such as bail, electronic bracelets or other conditions, which would render detention unnecessary in the particular case. The Working Group concludes that the Government has violated article 9 of the Universal Declaration of Human Rights, article 9 (3) of the Covenant and principles 38 and 39 of the Body of Principle.<sup>18</sup>

65. The source submitted, and the Government did not refute, that article 174 of the Kazakh Criminal Code is overly broad as it relies on subjective language which criminalizes activities that insult feelings, national honour or dignity or that promote discord.

66. The Working Group recalls that vaguely and broadly worded provisions, which cannot qualify as *lex certa*, could be used to deprive individuals of their liberty without a specific legal basis and violate the due process of law upheld by the principle of legality in article 15 (1) of the Covenant and article 11 (2) of the Universal Declaration of Human Rights. As the Working Group has previously stated, 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.<sup>19</sup>

67. In this respect, the Working Group recalls that the Human Rights Committee, in its 2016 concluding observations on Kazakhstan, stated that:

The Committee remains concerned (see CCPR/C/KAZ/CO/1, para. 25) about laws and practices that violate freedom of opinion and expression, including: (a) the extensive application of criminal law provisions to individuals exercising their right to freedom of expression, including provisions on the broadly formulated offence of incitement to "social, national, clan, class or religious discord" ... The Committee notes that the above laws and practices appear not to comply with the principles of legal certainty, necessity and proportionality as required by the Covenant, including with the strict requirements of article 19 (3) of the Covenant (arts. 14 and 19).<sup>20</sup>

<sup>16</sup> See opinions No. 13/2020, para. 47; No. 6/2020, para. 40; No. 26/2018 para. 54; No. 27/2018, para. 68; No. 47/2018, para. 56.

<sup>17</sup> See opinions No. 8/2020, para. 71; No. 16/2017, para. 59; No. 12/2015, para. 11.

<sup>18</sup> See A/HRC/19/57, paras. 53-56.

<sup>19</sup> See, for example, opinions No. 62/2018, para. 57; No. 41/2017, paras. 98-101.

<sup>20</sup> CCPR/C/KAZ/CO/2, para. 49.

68. The Working Group further notes the views of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, following her visit to Kazakhstan in 2019:

Article 174 of the Criminal Code, the most commonly used article against civil society activists in Kazakhstan, broadly criminalizes incitement to social, national, tribal, class, racial or religious discord, all of which are extremely vague grounds, and fails to provide genuine protection to individuals belonging to minority groups. ... By providing for the limitation of the right to freedom of expression on extremely vague and subjective grounds not recognized by human rights law – referring, for example, to undefined terms such as “discord” or an “insult to national honour and dignity or religious feelings”, it fails to provide legal certainty for individuals to regulate their conduct accordingly. The Special Rapporteur holds that what constitutes incitement under article 174 is extremely imprecise and reiterates that, according to international standards, when judging expression as incitement, regard should be had to six elements: the general context; the speaker; intent; the content of the message or its form; the extent of the speech at issue; and the likelihood of harm occurring, including its imminence.<sup>21</sup> The lack of certainty is compounded by the subjectivity in determining what can be considered extremist. The Special Rapporteur notes that this is largely done on the basis of the opinions of government-appointed and security-cleared “experts” (linguists, philologists, psychologists, theologians and political scientists) who are called upon to determine whether any document, statement or group contains an extremist element. Once this opinion is obtained, it is very difficult in practice to refute or counter. The Special Rapporteur thus fully concurs with the assessment of the Human Rights Committee that the broad formulation of the concepts of “extremism”, “inciting social or class hatred” and “religious hatred or enmity” can be used to unduly restrict freedoms of religion, expression assembly and association (CCPR/C/KAZ/CO/2, para. 13).<sup>22</sup>

69. The Working Group concurs with the views expressed by the Human Rights Committee and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, in relation to the formulation of article 174 of the Criminal Code. The Working Group considers that along with the definitions of “inciting social or class hatred” and “religious hatred or enmity”, the criminalization of conduct “promoting social, national, generic, racial, class or religious discord” is also overly broad and lacks the requisite degree of legal certainty.<sup>23</sup>

70. Accordingly, the Working Group finds that the arrest and detention of Mr. Bilash lacks legal basis, and therefore his arrest and detention fall under category I.

ii. Category II

71. The source alleges, and the Government does not refute, that Mr. Bilash was the founder and director of Ata-Jurt Eriktileri, an organization that campaigns for the release of ethnic Kazakhs allegedly held by the Chinese government in the Xinjiang province. The source submitted that Mr. Bilash’s detention was arbitrary as he was detained on the basis of his exercise of fundamental rights or freedoms protected under international law, including the rights to freedom of expression, assembly and association. The Government submitted that whilst it supports the right of free speech, Mr. Bilash’s arrest pertained to speech that was designed to incite violence or hatred against others based on ethnic origin.

72. The Working Group recalls that freedom of expression and of opinion as expressed in article 19 of the Covenant are indispensable conditions for the full development of the person; they are essential for any society and in fact constitute the foundation for every free and democratic society. Moreover, “[g]iven that peaceful assemblies often have expressive functions, and political speech enjoys particular protection as a form of expression, it follows

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<sup>21</sup> Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

<sup>22</sup> A/HRC/43/46/Add.1, para. 15. See also A/HRC/29/25/Add.2, paras. 25, 30, 96(a).

<sup>23</sup> Opinion No. 62/2017, para 36.

that assemblies with a political message should enjoy a heightened level of accommodation and protection”.<sup>24</sup>

73. The Human Rights Committee has noted that freedom of expression includes the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, and that that right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions.<sup>25</sup> The permitted restrictions to that right may relate either to respect of the rights or reputations of others or to the protection of national security, public order or of public health or morals. The Committee went on to stipulate that restrictions are not allowed on grounds not specified in article 19 (3), even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.<sup>26</sup> Moreover, “paragraph 3 [of article 19] may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights”.<sup>27</sup> It should be noted that articles 21 and 22 of the Covenant permits restrictions to the right of association on the same three grounds.

74. The Working Group recalls that the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has indicated that the right to freedom of expression includes expression of views and opinions that offend, shock or disturb (A/HRC/17/27, para. 37). Even statements considered unacceptable, disrespectful and in very bad taste by the authorities are entitled to protection.

75. In the present case, it is clear to the Working Group that in fact the basis for the arrest and detention of Mr. Bilash was the exercise of his freedom of expression and freedom of association. The source alleges that upon Mr. Bilash’s arrest, a National Security officer stated that the arrest was for engaging in activities harmful to Kazakhstan’s relationship with China and for assisting a whistle-blower from the Xinjiang camps obtain legal counsel in Kazakhstan. The source further alleged, and the Government in its reply did not refute, that: (a) police officers coerced Mr. Bilash to make statements promising to stop raising the issue of the oppression of ethnic Kazakhs detained in Xinjiang; (b) National Security officers promised Mr Bilash that they would “give [him] freedom by April” if he stepped down as director of Ata-Jurt; and (c) on the day of Mr. Bilash’s arrest, police raided the Ata-Jurt office and seized materials pertaining to Ata-Jurt’s advocacy efforts that were unrelated to the allegations against Mr. Bilash. Notably, the Government’s reply states that pursuant to Mr. Bilash’s plea agreement, he is prohibited from working for social organizations for a period of seven years from the date of his conviction. Such a condition, which restricts Mr. Bilash’s ability to exercise his rights to freedom of expression and association, bears no connection to the alleged speech the subject of Mr. Bilash’s charges.<sup>28</sup> This leads the Working Group to conclude that the Government was targeting Mr. Bilash for exercising his rights to freedom of expression and association.

76. Based on the information available and having particular regard to the advocacy context in which the statements were allegedly made, the Working Group is of the view that none of Mr. Bilash’s statements has been shown to fall outside the scope of the right to freedom of expression, and that his detention resulted from exercising that right.

77. Moreover, there was no suggestion by the Government that any of the permitted restrictions on the freedom of expression found in article 19 (3) of the Covenant applied in Mr. Bilash’s case. As a result, the working Group refers the case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

78. The Working Group finds that Mr. Bilash’s deprivation of liberty was arbitrary, falling within category II, as it resulted from his exercise of the rights and freedoms

<sup>24</sup> HRC, General Comment No. 37, para. 32.

<sup>25</sup> See HRC, General Comment No. 34, para. 11.

<sup>26</sup> Ibid., para. 22.

<sup>27</sup> Ibid., para. 23.

<sup>28</sup> See, for example, opinion No. 26/2000, para. 11.

guaranteed under articles 19 and 20 of the Universal Declaration of Human Rights and articles 19, 21 and 22 of the Covenant.

iii. Category III

79. Given its finding that the deprivation of liberty of Mr. Bilash is arbitrary under category II, the Working Group wishes to emphasize that Mr. Bilash should not have been arrested and detained under house arrest, and no plea agreement with Mr. Bilash should have been reached. However, Mr. Bilash was arrested and so detained, and a plea agreement was concluded.

80. The source submitted that the Government has denied a number of Mr. Bilash's due process rights, given that he was denied the right to counsel of his own choosing and the ability to communicate with his counsel; and subjected to threats of harm in order to solicit coerced testimony. The Working Group will examine each of the source's arguments in turn.

81. The source argued that the Government has failed to provide evidence sufficient to justify detaining Mr. Bilash on house arrest before he was convicted of any crime. The Government, in its reply, stated that Mr. Bilash was detained by way of house arrest due to the serious nature of the offense, and to ensure that he could not continue to violate the law.

82. The source submitted that Government officers repeatedly interrogated Mr. Bilash during his period of pre-trial detention in the absence of his lawyer, pressured him to fire his lawyer, and interfered with his ability to consult with his lawyer prior to signing his plea agreement.

83. The Government submitted, in its reply, that Mr. Bilash replaced his attorney of his own free will without coercion. The Government has not otherwise sought to rebut the source's allegations.

84. The Working Group is of the view that the authorities failed to respect Mr. Bilash's right to legal assistance, which is inherent in the right to liberty and security of person and in the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. Mr. Bilash was interrogated on a number of occasions in the absence of his lawyer. He was also deprived of his right to legal counsel at the critical stage of the criminal proceedings, at which time authorities allegedly coerced him to agree to a plea agreement. The Working Group recalls that, in accordance with the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, persons deprived of their liberty should have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension. The Working Group therefore finds a violation of article 14 (3) (b) and (d) of the Covenant and of principle 18 (1) and (3) of the Body of Principles.

85. The Working Group is also concerned at the allegations of harassment towards Mr. Bilash's lawyer, which have not been contested by the Government, and wishes to underline that it is the legal and positive duty of the State to protect everyone on its territory or under its jurisdiction against any human rights violation and to provide remedies whenever a violation still occurs. The Working Group considers that this is a serious interference with the right to legal assistance in violation of article 14 (3) (b) of the Covenant.<sup>29</sup> It is the legal and positive duty of the State to protect everyone on its territory or under its jurisdiction against any violation of human rights and to provide remedies whenever such a violation occurs. The Working Group especially recalls that the Basic Principles and Guidelines state that legal counsel shall be able to carry out their functions effectively and independently, free from fear of reprisal, interference, intimidation, hindrance or harassment.<sup>30</sup>

86. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the case to the Special Rapporteur on the independence of judges and lawyers.

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<sup>29</sup> See opinions No. 70/2017 and No. 29/2017.

<sup>30</sup> United Nations Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, Principle 9, See also, for example, opinions No. 14/2017, No. 29/2017, No. 66/2019.

87. The source submitted, and the Government has not contested, that during Mr. Bilash's detention, the Government repeatedly subjected him to threats of harm directed both towards him and his family in order to coerce him to stop his advocacy, to fire his lawyer and to sign several documents, some of which were blank. The source further submitted that Mr. Bilash was coerced into agreeing to the plea agreement.

88. In the view of the Working Group, the repeated threats of harm described by the source appear to amount to a prima facie breach of the absolute prohibition of ill-treatment and torture,<sup>31</sup> which is a peremptory norm of international law and of the Convention against Torture. The Working Group notes that the threat of harm to one's family is one of the torture methods listed in paragraph 145 of the Istanbul Protocol. Thus, the Working Group reminds the authorities of Kazakhstan of their obligations enshrined in article 5 of the Universal Declaration of Human Rights and articles 7 and 10 of the Covenant.

89. As for the circumstances leading to the conclusion of the plea agreement, the Government has chosen not to rebut the source's allegation that: (a) in the early evening of 16 August 2019, Mr. Bilash advised his lawyer that he intended to refuse the plea agreement; (b) Mr. Bilash was separated from his lawyer, and pressured, by the Presidential Advisor, to accept a plea agreement otherwise he would be imprisoned for the maximum period of seven years under Article 174 of the Kazakh Criminal Code; (c) Mr. Bilash's lawyer was initially told that Mr. Bilash was not at the courthouse, and was later ejected from the premises when she insisted on seeing her client; (d) when Mr. Bilash's lawyer was permitted to see Mr. Bilash, he appeared distressed, pale, and his hands were shaking; (e) the Court refused Mr. Bilash's lawyer's request to adjourn the hearing and her request for time to speak with her client confidentially to determine whether he changed his mind about accepting the plea.

90. The Working Group reminds the Government that compelling a confession is a violation of article 14 (3) (g) of the Covenant to compel a confession. As the Human Rights Committee states in paragraph 41 of general comment No. 32 (2007), the burden is on the Government to prove that statements made by the accused were given of their own free will, particularly in the absence of legal representation. The Government has not proven that Mr. Bilash's signature to the plea agreement was given of his own free will.

91. The Working Group considers that the source has established that Mr. Bilash accepted the plea agreement under coercion and that article 14 (3) (g) of the Covenant has been violated. It follows that Mr. Bilash should not have been subjected to the terms of the plea agreement, including his further detention under house arrest.

92. The Working Group considers that the violations of Mr. Bilash's right to a fair trial are of such gravity as to give his deprivation of liberty an arbitrary character. Accordingly, his deprivation of liberty falls within category III.

### **Disposition**

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

The deprivation of liberty of Serikzhan Bilash, being in contravention of articles 3, 9, 11, 19 and 20 of the Universal Declaration of Human Rights and articles, 9, 10, 14, 15, 19, 21 and 22 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and III.

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

95. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to unconditionally annul Mr. Bilash's plea agreement with prejudice so that he is no longer bound by the prohibitions therein and does not face the risk of being re-prosecuted in relation to the charges in the case at hand, and accord him an

<sup>31</sup> See, for example, opinion No. 93/2017, para. 57.

enforceable right to compensation and other reparations, in accordance with international law.

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

97. The Working Group urges the Government to bring its laws, in particular Article 174 of the Kazakh Criminal Code, into conformity with the recommendations made in the present opinion and with the commitments made by Kazakhstan under international human rights law.

98. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on Special Rapporteur on the independence of judges and lawyers, and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

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

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

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

(a) Whether Mr. Bilash has been unconditionally released from the terms of his plea agreement with prejudice, and if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Bilash;

(c) Whether an investigation has been conducted into the violation of Mr. Bilash's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Kazakhstan with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

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

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

103. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.<sup>32</sup>

*[Adopted on 25 August 2020]*

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<sup>32</sup> Human Rights Council resolution 42/22, paras. 3 and 7.

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## Annex I

### Partially dissenting Opinion of Elina Steinerte

1. The majority of the Working Group in this Opinion concludes that the detention of Mr. Bilash is arbitrary under category I, *inter alia*, because of the vague provision contained in Article 174 of the Kazakh Criminal Law (see paras 65-69 of the Opinion). This is the first time in the entirety of the Working Group's mandate that the Working Group engaged in the examination of Article 174 of the Kazakh Criminal Code and the majority concluded that the said provision is overly broad and lacks the requisite degree of legal certainty. In other words, the majority of the Working Group determined that Article 174 of the Kazakh Criminal Law could not be invoked as a legal basis justifying the detention of Mr. Bilash. However, in making this determination, the majority of the Working Group chose to depart from the well-established jurisprudence of the Working Group without providing any explanation for doing so and I am unable to support such a departure.

2. In instances when faced, for the first time, with allegations of overly broad legal provisions invoked to justify deprivation of liberty, it is the established practice of the Working Group to examine these provisions and allude to the State concerned of the need to re-examine these in the light of the absolute prohibition of arbitrary detention. By doing this, the Working Group avails the State concerned with the possibility of bringing its national legalisation in compliance with the absolute prohibition of arbitrary deprivation of liberty. This is evident, for example, in Opinions No. 64/2020, para 38 No. 37/2020 paras 60-61; 16/2020, paras 64-72; 8/2020, paras 66-68; No. 36/2018, para. 51; No. 35/2018, para. 36; 41/2017, paras. 98–10.1<sup>33</sup>

3. In all these Opinions, faced with allegations of vague legal provisions for the first time, the Working Group analyses them and alludes the State concerned of the problem areas. The vague language of the provisions is considered as a factor contributing to the finding of arbitrary detention, but the Working Group does not establish that these legal provisions *per se* caused the occurrence of arbitrary deprivation of liberty. This is entirely appropriate as it is to be recalled that a finding of arbitrary detention under category I of the Working Group entails detention without legal basis. Therefore, declaring that a legal provision duly adopted by the national legislator cannot be invoked as legal basis justifying detention is very far-reaching and grave.

4. This is contrasted with instances when the Working Group is asked to *return* to the examination of legal provisions which it has already noted as vague and overly broad previously. In such cases, making clear reference to its previous jurisprudence which highlighted the issue with the legal provision at hand, the Working Group determines that the said provision(s) *per se* caused the arbitrary detention. This is evident, for example, in Opinions No. 36/2020 at para 54; No. 45/2019, para. 54; No. 9/2019, para. 39; 62/2018, paras 57-59; No. 46/2018, para. 62; 22/2018, paras 52-54. In all these Opinions the Working Group makes a clear reference to its previous jurisprudence concerning the legal provision(s) at hand and noting absence of progress in addressing the issues raised earlier, makes a finding of arbitrary deprivation of liberty, *inter alia*, on the basis of vague and overly broad legal provisions under category I.

5. In the present case, the majority of the Working Group, having no previous engagement with Article 174 of the Kazakh Criminal Code, declared the provision to be vague and overly broad, leading to finding under category I. In doing so, the majority relied entirely on the examination of this provision carried out by the Human Rights Committee in its 2016 Concluding Observations on Kazakhstan and the 2019 visit report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. The majority of the Working Group provided no explanation for taking such an approach in this case and I am unable to support it. Not only this departure contravenes the very principle of legality that the majority is seeking to uphold by creating

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<sup>33</sup> It should be noted that Opinions 64/2020 and 37/2020 was adopted during the very same session as the present Opinion.

inconsistencies in Working Group's jurisprudence. Such an approach may also have a chilling effect on the willingness of the States to engage constructively with the Special Procedures of the Human Rights Council. In the present case, a report by another UN Special Procedure mandate has served as a basis for the findings made by the majority of the Working Group. Although that report analyses the same provisions that the Working Group was required to analyse, it does so from the perspective of a different mandate and not from the point of view of prohibition of arbitrary deprivation of liberty. While it is not unusual for the Working Group to refer to the findings of treaty bodies and other Special Procedures' mandates, it has never based its findings under category I entirely on the assessment of such other bodies.<sup>341</sup>

6. Consequently, I respectfully submit that the concerns over the broad and vague formulation of Article 174 of the Kazakh Criminal Code in this case should have been considered by the Working Group as an element under category II.

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<sup>34</sup> The approach of the Working Group in this case can be contrasted with its approach in Opinion 8/2020 at para 67 where the Working Group while making its own analysis under category II also notes the views of the Special Rapporteur on freedom of religion or belief on the same legal provision.

## **Annex II**

### **Partially dissenting opinion of Adjovi Sètonджи Roland.**

1. The majority of the Working Group did not retain category V in the present case. I would like to express here my disagreement with such a position.
  2. The principle of this category of arbitrary detention is that the situation submitted to the Working Group would stem from a logic of discrimination in violation of the law. In the present case, however, the discrimination appears to me to be established by the circumstances.
  3. The authorities did not appreciate the activism of Mr. Bilash and that is why his organization was never registered although he submitted a renewed application to that effect. This is a first sign of unjustified differentiated treatment.
  4. As a result of harassment by unidentified individuals, and fearing for his safety, Mr. Bilash did not return home but took a room at the hotel. It was there that state agents attempted to enter his room with a key allegedly provided by the hotel. The security chain did not allow them to enter. While Mr. Bilash was talking to see their warrant, the agents broke down the door, injuring him as he started to bleed. This is another degree of differentiated treatment.
  5. The detention was the continuation of these two situations where it seems to me that discrimination is established. For this reason, I also conclude that the detention in this case is arbitrary under category V as defined by the methods of work.
  6. Furthermore, I fully associate myself with the partially dissenting opinion of my colleague, Steinerte Elina. It should be noted that, in the present case, the Working Group was composed of only four members, the fifth member having not participated in the session, and that the rules of procedure do not give a casting vote to the presiding member.
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