
AMICUS BRIEF IN SUPPORT OF MR. ALNUR ILYASHEV

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Submitted by
The Clooney Foundation for Justice
Before the Almaty City Court

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I. INTRODUCTION AND STATEMENT OF INTEREST

1. The Clooney Foundation for Justice (“CFJ”) is an organization founded by George and Amal Clooney to advocate for justice through accountability for human rights abuses. TrialWatch is a CFJ initiative that monitors and grades the fairness of trials of vulnerable people around the world, including journalists, women and girls, minorities, LGBTQ persons, and human rights defenders. Using this data, TrialWatch advocates for victims and is developing a Global Justice Ranking measuring national courts’ compliance with international human rights standards.

2. As part of CFJ’s TrialWatch initiative, the American Bar Association’s (“ABA”) Center for Human Rights (“CHR”) monitored the trial of Alnur Ilyashev (“Mr. Ilyashev”), an activist charged with “disseminat[ing] 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.¹ He was put on trial for three posts on Facebook “that criticized the ruling Nur Otan party for corruption and incompetence, including in response to the COVID pandemic.”² Article 274 prohibits the “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 ... committed ... in the conditions of emergency situation or in the face of the enemy, or in time of war, or upon implementation of public measures ...”³

3. The proceedings against Mr. Ilyashev before the Medeu District Court No. 2 of the City of Almaty, Republic of Kazakhstan (“Kazakhstan”) began on June 12, 2020 and concluded on June 22, 2020.⁴ They were held entirely via video conferencing software. The trial monitor attended each of the hearings virtually and reported on them.

4. The trial court convicted Mr. Ilyashev and sentenced him to three years of “personal restraint” and 100 hours of forced labor per year.⁵ It also imposed a ban on engaging in civil and social activities and serving the political, cultural and professional needs of society—including creating and taking part in the activities of political parties—for five years, required Mr. Ilyashev to make a large payment to the Victim Compensation Fund, and instructed Mr. Ilyashev to pay the State’s court fees.⁶ The judgement stated that Mr. Ilyashev had posted “false information”—which he knew to be a public danger to the citizens of the Republic of Kazakhstan—in violation of public

¹ See Indictment of Alnur Kairatovich Ilyashev on Suspicion of Committing a Criminal Offense Under Article 274, Section 4, Paragraph 2 of the Criminal Code of the Republic of Kazakhstan (May 5, 2020) [hereinafter: Ilyashev Indictment].

² American Bar Association Center for Human Rights, Kazakhstan: A Preliminary Report on Proceedings Against Human Rights Activist Alnur Ilyashev at 1 (August, 2020) [hereinafter: Preliminary Report].

³ Criminal Code of the Republic of Kazakhstan, Art. 274 (translated into English), available at https://www.unodc.org/res/cld/document/penal-code_html/New_penal_code.pdf.

⁴ Preliminary Report at 1.

⁵ Sentence in the Name of the Republic of Kazakhstan, No. 7525-20-00-1/174 (June 22, 2020) [hereinafter: Ilyashev Sentence].

⁶ *Id.*

order, and had thus caused substantial harm to the “rights and legal interests of citizens and organizations”.⁷

5. In August, 2020, TrialWatch published a Preliminary Report on the proceedings (“Preliminary Report”), authored by CHR staff, summarizing and analyzing the trial monitor’s observations and court filings. A copy of the report is appended to this brief. *See* Appendix A. The Preliminary Report concludes that the proceedings “were marred by severe violations of Mr. Ilyashev’s right to a fair trial.”⁸

6. In particular, the Preliminary Report finds that 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.”⁹ It also concludes that the court breached Mr. Ilyashev’s right to participate effectively in his trial, his right to communicate with counsel, his right to call and examine witnesses, and his right to be tried by an impartial tribunal. Finally, it concludes that Mr. Ilyashev’s prosecution and conviction violated his right to freedom of expression, finding that though the prosecution claimed to be protecting public order, it “not only failed to present any “specific and individualized” information about the “precise nature of the threat [to public order]” but also failed to establish “a direct and immediate connection between [Mr. Ilyashev’s posts]... and the threat”, and notes that “the criminalization of speech is only appropriate where grave crimes have been committed.”¹⁰

7. Based on the Preliminary Report and the underlying materials on which it was based, including the trial monitor’s notes, CFJ submits this amicus brief in support of Mr. Ilyashev’s appeal and urges the Almaty City Court to remedy the fair trial and freedom of expression violations to which Mr. Ilyashev was subjected. Specifically, the Almaty City Court should overturn the trial court’s verdict and acquit Mr. Ilyashev.

II. FACTUAL BACKGROUND

A. Mr. Ilyashev’s History of Activism

8. Mr. Ilyashev is a 42-year-old civil activist.¹¹ According to his concluding statement at trial, Mr. Ilyashev seeks the development of political competition in Kazakhstan and the creation of an independent multi-party democratic system.¹²

⁷ *Id.* (finding that “[t]he analysis of the evidence collected in the case and examined by the court gives reason to believe that they are admissible, reliable, and sufficient to find Ilyashev A. K. guilty under Article 274, Part 4, Clause 2 of the Criminal Code of the Republic of Kazakhstan, since he, in his posts from March 26 to March 31, 2020, during the state of emergency, disseminated knowingly false information, endangering public order and causing substantial harm to the rights and legal interests of citizens and organizations using information and communication networks”).

⁸ Preliminary Report at 1.

⁹ *Id.* at 4.

¹⁰ *Id.* at 10-13.

¹¹ Ilyashev Indictment; Preliminary Report at 1.

¹² The Last Word of Alnur Ilyashev (June 22, 2020).

9. Prior to Mr. Ilyashev’s conviction on June 22, 2020, he had not been previously convicted of a criminal offense, although he had been the subject of a civil suit by the Nur Otan Party for allegedly discrediting the party’s “honor and dignity,” to which investigators in the instant case, and the trial court in its judgment, referred.¹³

B. Mr. Ilyashev’s Posts on Social Media and Arrest

10. On March 15, 2020, Kazakhstan introduced by decree a state of emergency due to the COVID-19 pandemic.¹⁴ During the state of emergency—which initially lasted from 8:00 a.m. on March 16, 2020 until 7:00 a.m. April 15, 2020, and was then prolonged until May 11, 2020—Mr. Ilyashev self-isolated at his home in Almaty.¹⁵

11. Mr. Ilyashev was prosecuted for three statements he posted to his personal Facebook account during this state of emergency. The first, on the afternoon of March 26, 2020, stated that: “The mountain gave birth to a mouse...”.¹⁶ This was a comment on what he perceived as the smallness of the U.S. \$41 million total donated to the “Birgemiz” Public Fund to aid those in need due to COVID-19; the Fund was launched at the request of the leader of the Nur Otan Party.¹⁷ As the defense explained, “[t]he mountain gave birth to a mouse...” is an expression used “when one talk[s] about great hopes but little results.”¹⁸ Further, as also noted by Mr. Ilyashev’s defense, Mr. Ilyashev relied on information already publicly available in a media article to make this comment.¹⁹

12. The second post was from March 28, 2020 and included the words “Party of crooks and thieves?”²⁰ This phrase was meant as a critique of the chairman of the Kyzylorda regional branch of the Nur Otan Party who had been elected in July 2019 and then detained on suspicion of committing a crime.²¹ As with respect to the first post, Mr. Ilyashev also relied on information already available in media articles to make this criticism.²²

13. The third post was from March 31, 2020 and “bemoaned “crisis media looting”.²³ The post also used the phrase “and many people already know the habits of the ‘ruling’ party of

¹³ Ilyashev Indictment; Ilyashev Sentence.

¹⁴ Ilyashev Sentence.

¹⁵ See *id.*; ICJ, The Impact of Anti-COVID-19 Pandemic Measures on Access to Justice in Azerbaijan, Kazakhstan, Kyrgyzstan, Russia, Ukraine and Uzbekistan, para. 29 (2020).

¹⁶ Ilyashev Indictment.

¹⁷ See Motion on the Inclusion of the Proposed Wording for a Decision on the Issues Referred to in Article 390 Part 1 Paragraphs 1-6 of the CCP as well as the Text of the Oral Argument, Nazkhanov and Associates, in the Interests of Defendant A.K. Ilyashev (June 18, 2020) [hereinafter: Ilyashev Motion and Text of the Oral Argument]; Preliminary Report at 2. See also Expert Opinion No. 659, Public Center for Information and Document Disputes at the Public Foundation “Әділ соз” (May 2, 2020) [hereinafter: Expert Opinion No. 659].

¹⁸ See Ilyashev Motion and Text of the Oral Argument.

¹⁹ *Id.*

²⁰ Ilyashev Indictment; Preliminary Report at 2.

²¹ See Expert Opinion No. 659.

²² *Id.*

²³ Preliminary Report at 2.

usurpers, as they have no illusions about its ‘great generosity’.”²⁴ 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.²⁵ Mr. Ilyashev had been involved in the packing of bags similar to those depicted along with other individuals and, according to the defense, without the aid of any member of the Nur Otan Party.²⁶ Thus, the phrase served as a “critical assessment” of the article and the act of attributing merit to only the Nur Otan Party.²⁷

14. Mr. Ilyashev was arrested on April 17, 2020.²⁸ On the same day, the police searched Mr. Ilyashev’s home, place of work and car, and the homes of four of his relatives.²⁹ According to Amnesty International, the police used significant force against Mr. Ilyashev’s relatives during the search, including his father, mother, daughter and brothers.³⁰ Further, according to defense counsel, a copy of the search protocol was not provided to Mr. Ilyashev.³¹

15. After an 18 day investigation, on May 5, 2020, the Senior Investigator of the Department of Internal Affairs of the Criminal Investigation Division of the Police Department of Almaty (“Investigative Department”) submitted a proposed indictment of Mr. Ilyashev to the Deputy Prosecutor of the City of Almaty.³² The proposed indictment alleged that Mr. Ilyashev had criminal intent: namely, that he had authored his posts “[i]n order to destabilize the situation in the Republic of Kazakhstan.”³³ The proposed indictment was then approved by the Deputy Prosecutor on May 15, 2020 for submission to the court, and shared with Mr. Ilyashev on May 18, 2020.³⁴

16. In particular, the indictment theorized that the Facebook “posts [were] aimed at forming an opinion on the failure of the activities of public associations and public authorities, which could lead to negative consequences during this period” and suggested that they “created a danger of negative consequences inciting to acts of civil disobedience, namely, mass non-observance with the quarantine requirements.”³⁵ Mr. Ilyashev on the other hand claimed that by making these posts he was exercising his right to freedom of expression and pursuing political diversity in the Republic of Kazakhstan.³⁶

²⁴ *Id.*

²⁵ Expert Opinion No. 659.

²⁶ Ilyashev Motion and Text of the Oral Argument; Preliminary Report at 2.

²⁷ Expert Opinion No. 659. *See also* Ilyashev Sentence (claiming that Mr. Ilyashev called the act of attributing merit exclusively to Nur Otan “media looting”).

²⁸ Ilyashev Motion and Text of the Oral Argument.

²⁹ *See* Information Provided by Trial Monitor (July 23, 2020). *See also* Ilyashev Sentence.

³⁰ *See* Information Provided by Trial Monitor (July 23, 2020); Amnesty International, Urgent Action: Activist Jailed For Criticism During Pandemic (April 27, 2020), <https://www.amnesty.org/download/Documents/EUR5722272020ENGLISH.pdf>.

³¹ Ilyashev Motion and Text of the Oral Argument. *See also* Information Provided by Trial Monitor (July 23, 2020).

³² Ilyashev Indictment.

³³ *Id.*

³⁴ *See id.*; Information Provided by Trial Monitor (July 23, 2020).

³⁵ Ilyashev Indictment.

³⁶ Ilyashev Sentence.

17. Mr. Ilyashev was kept in detention until his trial began. 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.”³⁷ Mr. Ilyashev was only able to meet with his lawyers twice in the pre-trial detention center, in advance of his trial, due to COVID-related restrictions.³⁸ 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.”³⁹ Despite being detained for almost two months before trial, Mr. Ilyashev was only able make WhatsApp calls from this phone four times, for five to ten minutes each time.⁴⁰

C. Mr. Ilyashev’s Trial

18. Mr. Ilyashev’s trial began on June 12, 2020 and consisted of six hearings over the course of ten days.⁴¹ Because of the conditions of the “declared quarantine”, the trial was held entirely online through video-conferencing software—TrueConf and Zoom.⁴²

19. For a significant part of the trial, Mr. Ilyashev and his counsel were periodically either unable or limited in their ability to participate in the proceedings because of severe technical difficulties with the videoconferencing technology.⁴³ Mr. Ilyashev and his lawyers were consistently disconnected from the audio and video feeds, and their inability to hear or see the proceedings was noted to the trial court several times.⁴⁴ At one point, Mr. Ilyashev noted “I am the main person involved and I cannot hear anything.”⁴⁵ Though Mr. Ilyashev filed a petition at the outset of the trial requesting the suspension of the proceedings until he could attend in person, the court denied his request.⁴⁶ The trial continued despite these debilitating technical problems.⁴⁷

20. On June 18, 2020, Mr. Ilyashev’s lawyers’ cross-examination of the prosecution’s expert Roza Amangeldievna Akbarova was truncated—apparently because of low battery on Ms.

³⁷ 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) [hereinafter: Ilyashev Resolution to Authorize Incarceration].

³⁸ Preliminary Report at n.48.

³⁹ *Id.*

⁴⁰ *Id.*; Ilyashev Resolution to Authorize Incarceration.

⁴¹ Preliminary Report at 3.

⁴² *Id.* (“Due to the pandemic, the trial took place over video conference.”); Notes from Trial Monitor (June 12, 2020); Notes from Trial Monitor (June 18, 2020).

⁴³ See Preliminary Report at 4; Notes from Trial Monitor (June 12, 2020) (describing how the TrueConf system froze and disconnected multiple times, participants were consistently unable to hear or see Judge Makharadze or Mr. Ilyashev, and Mr. Ilyashev’s lawyers asked the Judge, “Can you hear me, Your Honor?”). See also Notes from Trial Monitor (June 15, 2020) (noting that on June 15, 2020, Mr. Ilyashev’s lawyer asked why the trial court did not provide a normal connection, and that at one point, Mr. Ilyashev could not hear a motion that his lawyer made on his behalf); Notes from Trial Monitor (June 18, 2020).

⁴⁴ Preliminary Report at 4; Notes from Trial Monitor (June 12, 2020) (noting that on June 12, 2020, Mr. Ilyashev’s lawyer stated “Why is Ilyashev not in court?” and “Honorable court, please note that Alnur Ilyashev is not on TrueConf.”).

⁴⁵ Notes from Trial Monitor (June 15, 2020).

⁴⁶ Notes from Trial Monitor (June 12, 2020).

⁴⁷ *Id.*

Akbarova’s phone.⁴⁸ An expert opinion, to which Ms. Akbarova substantially contributed, was the principal prosecution evidence that Mr. Ilyashev’s Facebook posts had created a danger of disturbing the public order.⁴⁹ Specifically, Ms. Akbarova had concluded that the COVID-19 context amplified the alleged impact of Mr. Ilyashev’s social media posts:

“[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. That is, the more communicants that participate in the discussion, while engaging with endorsing comments, the greater the likelihood of influencing the political preferences of a wide range of people.”⁵⁰

Indeed, Ms. Akbarova’s expert opinion was so fundamental that excerpts were included verbatim in the trial court’s judgment.⁵¹

21. Not only was cross-examination cut short on June 18, after the loss of connection, but despite the court’s ostensible agreement that the defense could continue the questioning of Ms. Akbarova the next day—on June 19, 2020—the defense was given no further opportunity to cross-examine Ms. Akbarova. Instead, she told the court on June 19 that she was suffering from an urgent illness, although this was never confirmed by any medical documents shared with the defense.⁵² Then, as the Preliminary Report notes, “[o]verruling defense objections that Ms. Akbarova’s cross-examination was crucial to Mr. Ilyashev’s defense, the court ordered that the trial proceed.”⁵³

22. The virtual nature of the proceedings also had implications for Mr. Ilyashev’s ability to consult his lawyers. As noted by the Preliminary Report, during the courtroom proceedings Mr. Ilyashev “was only able to speak to his lawyers in a handful of instances, during short breaks in the trial ... almost never confidentially...”.⁵⁴ During these breaks, Mr. Ilyashev was limited to using the court’s open video feed, to which the prosecution was also sometimes logged in.⁵⁵ The only instance when he was permitted to consult with his lawyers privately

⁴⁸ Preliminary Report at 9 (noting that “[a]fter approximately an hour, the connection was lost – supposedly because of Ms. Akbarova’s phone battery”); Notes from Trial Monitor (June 18, 2020) (explaining Ms. Akbarova stated that she allegedly had 1% battery left on her phone, and that the connection was then interrupted).

⁴⁹ Preliminary Report at 12 (explaining that the prosecution’s case regarding the connection between Mr. Ilyashev’s posts and the threat to public order “revolved around Ms. Akbarova’s expert opinion.”); *cf.* Expert Conclusion No. 2304 (April 17, 2020).

⁵⁰ 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.”).

⁵¹ *See* Ilyashev Sentence.

⁵² *See* Notes from Trial Monitor (June 18, 2020) (explaining that the expert’s questioning by Mr. Ilyashev’s defense team was interrupted due to a loss of communication); Notes from Trial Monitor (June 19, 2020); Argument of V.I. Voronov (June 22, 2020).

⁵³ Preliminary Report at 9.

⁵⁴ *Id.* at 6.

⁵⁵ *Id.* at 7.

occurred on June 19, 2020, when “the court recessed, [and] other participants were removed from the video feed to permit Mr. Ilyashev to consult with his defense team.”⁵⁶ Though defense counsel asked the trial court to give Mr. Ilyashev greater ability to meet with his lawyers privately and confidentially numerous times, the trial court did not grant these requests and continued the proceedings regardless.⁵⁷

23. Based on the court’s behavior during the proceedings, Mr. Ilyashev’s attorneys moved to recuse Judge Z. I. Makharadze for violating the rights of Mr. Ilyashev and his attorneys.⁵⁸ The motions to recuse Judge Z. I. Makharadze were denied.⁵⁹

24. On June 22, 2020, Mr. Ilyashev was found guilty of violating Article 274.⁶⁰ The trial court concluded that Mr. Ilyashev’s Facebook posts “contain[ed] negative information regarding the non-governmental organization (NGO) ‘Nur Otan Party’, expressed in the affirmative form and in the form of value judgements.”⁶¹

III. MR. ILYASHEV’S TRIAL VIOLATED INTERNATIONAL LAW

25. The rights to a fair trial and to freedom of expression are fundamental tenets of international human rights law.⁶² Article 14(1) of the International Covenant on Civil and Political Rights (“ICCPR”) guarantees equality before courts and tribunals and the right to a fair and public trial.⁶³ Article 19(2) of the ICCPR guarantees the right to freedom of expression, including the

⁵⁶ *Id.* at 7.

⁵⁷ *See* Preliminary Report at 7 (“His lawyers requested that the proceedings be adjourned so as to discuss the matter with Mr. Ilyashev. The court did not permit such consultations and proceeded with the denial of Mr. Ilyashev’s petition.”); Notes from Trial Monitor (June 15, 2020).

⁵⁸ Preliminary Report at 7 (“Mr. Ilyashev’s lawyers made a range of procedural motions throughout the trial, including motions for the recusal of Judge Makharadze.”).

⁵⁹ *See, e.g.*, Notes from Trial Monitor (June 16, 2020).

⁶⁰ Ilyashev Sentence.

⁶¹ *Id.*

⁶² Universal Declaration of Human Rights Arts. 10 and 19, G.A. Res. 217 (III) A, U.N. Doc. A/RES/3/217(III) (Dec. 10, 1948) (recognizing that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him” and that “[e]veryone 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”). *See also* Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 2. (asserting that “[t]he right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.”).

⁶³ ICCPR, Art. 14(1) (“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”).

freedom to impart information through any media, including new media.⁶⁴ Kazakhstan is a party to the ICCPR, and must fulfill its obligations under this treaty “in good faith.”⁶⁵

26. Kazakhstan has recognized the binding nature of its treaty obligations. Article 4 of the Kazakhstan Constitution recognizes that international agreements form part of the law of Kazakhstan and guarantees that “[i]nternational agreements ratified by the Republic have primacy over its laws.”⁶⁶ The Constitution also states that Kazakhstan must respect the principles and norms of international law.⁶⁷

27. Deviating from the fundamental principles of fair trial is prohibited at all times.⁶⁸ Moreover, Kazakhstan has not formally derogated from the ICCPR due to the COVID-19 pandemic.⁶⁹ While Article 4 of the ICCPR allows a party to take measures derogating from its obligations under the treaty in a time of “public emergency which threatens the life of the nation and the existence of which is officially proclaimed,” the party must give formal notice of such derogation, which Kazakhstan has not done.⁷⁰ Further, while Kazakhstan did declare a state of emergency from March 16 to April 15, 2020—extended until May 1, 2020, and then May 11, 2020—this domestic state of emergency had expired before Mr. Ilyashev’s trial began.

28. The COVID-19 pandemic has had an impact on access to justice in Kazakhstan, however. The International Commission of Jurists (“ICJ”) has observed that, after the pandemic began, all court hearings were “recommended to be held via video conferencing software, including via mobile app TRUECONF or other applications and with any device.”⁷¹ Further, visits

⁶⁴ See ICCPR, Art. 19(2) (“Everyone shall have the right to 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.”). See also Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, July 11-29, 2011, para. 15. (explaining that “[t]here is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries...” and that “States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.”).

⁶⁵ 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.

⁶⁶ Constitution of Kazakhstan, Art. 4, https://www.akorda.kz/en/official_documents/constitution.

⁶⁷ *Id.* at Art. 8.

⁶⁸ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 6. (asserting that “[d]eviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.”). See also Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, August 31, 2001, para. 16.

⁶⁹ Center for Civil and Political Rights, Tracking Tool – Impact of States of Emergencies on Civil and Political Rights, available at <http://ccprcentre.org/ccprpages/tracking-tool-impact-of-states-of-emergencies-on-civil-and-political-rights>.

⁷⁰ ICCPR, Art. 4. See also Center for Civil and Political Rights, Tracking Tool – Impact of States of Emergencies on Civil and Political Rights, available at <http://ccprcentre.org/ccprpages/tracking-tool-impact-of-states-of-emergencies-on-civil-and-political-rights>; ICJ, The Impact of Anti-COVID-19 Pandemic Measures on Access to Justice in Azerbaijan, Kazakhstan, Kyrgyzstan, Russia, Ukraine and Uzbekistan, para. 29. (2020).

⁷¹ ICJ, The Impact of Anti-COVID-19 Pandemic Measures on Access to Justice in Azerbaijan, Kazakhstan, Kyrgyzstan, Russia, Ukraine and Uzbekistan, para. 29. (2020).

to detention centers were stopped on April 4, 2020, and “lawyers could only see their clients via videoconference.”⁷²

29. For the reasons given below and in the attached Preliminary Report, Mr. Ilyashev’s trial violated Kazakhstan’s obligations under the ICCPR. *First*, Kazakhstan violated Mr. Ilyashev’s right to a fair trial under Article 14 of the ICCPR by violating his right to a defense, denying him the right to communicate confidentially with counsel, and infringing his right to obtain the attendance and examination of witnesses. *Second*, Kazakhstan violated Mr. Ilyashev’s right to freedom of expression under Article 19 of the ICCPR by convicting Mr. Ilyashev under Article 274 of the Criminal Code of the Republic of Kazakhstan for lawful expression and without any showing that such expression presented a threat to public order, much less that his prosecution or conviction was a necessary or proportionate response to any such threat.⁷³

A. The Trial Court Violated Mr. Ilyashev’s Right to a Fair Trial

30. Article 14(1) of the ICCPR guarantees the right to a fair and public trial.⁷⁴ In particular, Article 14 provides that defendants have the right “[t]o be tried in [their] presence, and to defend [themselves] in person or through legal assistance of [their] own choosing,” to “communicate with counsel of [their] own choosing” and to “examine, or have examined, the witnesses against [them] and to obtain the attendance and examination of witnesses on [their] behalf under the same conditions as witnesses against them.”⁷⁵ In this case, Kazakhstan violated Mr. Ilyashev’s right to a fair trial by (i) denying him the ability to present a defense due to the technical difficulties that prevented him and his lawyers from hearing and participating in the proceedings, (ii) precluding Mr. Ilyashev from communicating confidentially with counsel, and (iii) denying him the ability to obtain the attendance of and examine witnesses.

i. The Trial Court Violated Mr. Ilyashev’s Right to a Defense

31. Article 14(3)(d) of the ICCPR provides that every defendant has the right to “be tried in [their] presence” and “to defend [themselves] in person.”⁷⁶ These rights are critical to the right to a fair trial because they facilitate the exercise of other rights⁷⁷—that is, at their core, they protect the right of the defendant to participate in their own defense. Likewise, as the Preliminary Report explains, where circumstances under the control of the court render the defendant unable even to present a defense, Article 14(1) of the ICCPR is also violated.⁷⁸

⁷² *Id.* at para. 20.

⁷³ See Ilyashev Sentence.

⁷⁴ ICCPR, Art. 14(1).

⁷⁵ ICCPR, Art 14(3)(d), 14(3)(b), 14(3)(e).

⁷⁶ ICCPR, Art. 14(3)(d).

⁷⁷ *Cf.* ECtHR, *Colozza v. Italy*, Appl. No. 9024/80/1985, February 12, 1985, para. 27 (“[I]t is difficult to see how [a defendant] could exercise [their] rights without being present,” including their right to examine or have examined witnesses or their right to an interpreter if they do not understand the language used in court.). While the European Court of Human Rights’ jurisprudence is not binding on Kazakhstan, since Kazakhstan is not party to the European Convention on Human Rights, it is relevant here because unlike the ICCPR, the European Convention does not have an explicit right to be tried in one’s presence. Thus, the European Court of Human Rights has had greater occasion to consider whether and under what circumstances video proceedings respect the right to a fair trial.

⁷⁸ Preliminary Report at 3-4 (citing *Gridin v. Russian Federation*).

32. CFJ does not and need not take a position on whether and under what circumstances virtual proceedings may be compatible with Article 14(3)(d) of the ICCPR,⁷⁹ but the crux of Article 14(3)(d), namely the defendant’s right to participate in the presentation of, and put on, a defense, must be respected in any virtual proceedings. Indeed, the European Court of Human Rights has looked to whether “the arrangements for the conduct of the proceedings respected the rights of the defense.”⁸⁰ In particular, the European Court of Human Rights has explained in assessing the use of video for proceedings, at a minimum “it must be ensured that the [defendant] is able to follow the proceedings, to see the persons present and hear what is being said, but also to be seen and heard by the other parties, the judge and witnesses, without technical impediment.”⁸¹

33. In this case, Mr. Ilyashev’s right to participate in, and put on, his defense was violated because the video conferencing software used by the court was so defective that it made it impossible for Mr. Ilyashev to see and to understand the proceedings.⁸² As noted by Mr. Ilyashev during the trial, “I am the main person involved and I cannot hear anything.”⁸³ Thus, the core of what Article 14(3)(d) is meant to safeguard was not respected.

34. Article 14(3)(d) of the ICCPR also protects the right of a defendant to present their defense through legal counsel.⁸⁴ The UN Human Rights Committee has found a violation of the right to a defense where “the Court or other relevant authorities hinder appointed lawyers from fulfilling their task effectively.”⁸⁵ In *Kulov v. Kyrgyzstan*, for instance, the Committee found a violation because “obstacles” were created for the defendant’s lawyers’ participation in the case, such as being unable to access the case file without permission from the National Security Service, which required “presenting their full CVs and filling out a special form.”⁸⁶

⁷⁹ Cf. International Commission of Jurists, *The Courts and COVID-19* (May 5, 2020) (“There will be some matters in which face-to-face in-person hearings will be indispensable (see e.g. as regards criminal matters, ICCPR article 14(3)(d) right ‘to be tried in his presence’.”), available at <https://www.icj.org/wp-content/uploads/2020/05/Universal-ICJ-courts-covid-Advocacy-Analysis-brief-2020-ENG.pdf>. See also ICJ, *The Impact of Anti-COVID-19 Pandemic Measures on Access to Justice in Azerbaijan, Kazakhstan, Kyrgyzstan, Russia, Ukraine and Uzbekistan*, para. 42. (2020) (“[i]t is difficult to see how in any circumstances proceeding with a criminal trial... in which the accused is deprived of his or her right to physical presence, by imposing participation restricted to video-conferencing or other such means only, could be compatible with the right to a fair trial[.]”), and Notes from Trial Monitor (June 15, 2020) (noting that Mr. Ilyashev and his counsel had requested that the proceedings be delayed until he could participate in person).

⁸⁰ See ECtHR, *Marcello Viola v. Italy*, Appl. No. 45106/04/2006, October 5, 2006, para. 72-74 (noting that the Court considered as part of this analysis whether, on account of technical difficulties, “the link between the hearing room and the place of detention will not be ideal.”).

⁸¹ ECtHR, *Yevdokimov and Others v. Russia*, Appl. No. 27236/05, 44223/05, 53304/07, 40232/11, 60052/11, 76438/11, 14919/12, 19929/12, 42389/12, 57043/12 and 67481/12, February 16, 2016, para. 43.

⁸² Preliminary Report at 3-4; Notes from Trial Monitor (June 12, 2020) (noting that on June 12, 2020, Mr. Ilyashev’s attorney stated “Why is Ilyashev not in court?” and “Honorable court, please note that Alnur Ilyashev is not on TrueConf.”).

⁸³ Notes from Trial Monitor (June 15, 2020).

⁸⁴ See ICCPR, Art. 14(3)(d); ICCPR, Art. 14(3)(b).

⁸⁵ See Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 38. See also Human Rights Committee, *Carlos Correia de Matos v. Portugal*, U.N. Doc. CCPR/C/86/D/1123/2002, March 28, 2006, para 7.3.

⁸⁶ Human Rights Committee, *Kulov v. Kyrgyzstan*, U.N. Doc. CCPR/C/99/D/1369/2005, November 11, 2004, paras. 3.10, 8.7.

35. In this case, it was not only Mr. Ilyashev who was denied secure, consistent online access to the trial, but also Mr. Ilyashev’s lawyers.⁸⁷ As the Preliminary Report recounts, on June 15, when one of Mr. Ilyashev’s lawyers moved for the examination of three witnesses, his feed was repeatedly interrupted and the lawyer was “unable to present the motion in full.”⁸⁸ Likewise, when one lawyer moved to suspend the proceedings, he was disconnected. The judge turned to another defense counsel who could only say: “I did not hear the motion, but I, of course, support [my colleague]. But I repeat that neither I nor Ilyashev heard this motion.”⁸⁹

36. Just as Mr. Ilyashev was denied the right to participate in and present his own defense, so too the court’s failure to act in the face of egregious technical difficulties resulted in a violation of his right to defend himself through counsel. Just as the defendant’s lawyers in *Kulov* were limited in the information they could access and the ease with which they could access it, so Mr. Ilyashev’s lawyers were consistently denied access to critical information—namely what was happening at trial.⁹⁰

ii. *The Trial Court Violated Mr. Ilyashev’s Right to Communicate with Counsel*

37. Article 14(3)(b) of the ICCPR provides that defendants have the right “[t]o have adequate time and facilities for the preparation of [their] defence and to communicate with counsel of [their] own choosing.” The UN Human Rights Committee has made clear that this entails both the right to *sufficient time* to consult with counsel and the right to *private, confidential* consultations.⁹¹ For instance, in *Rayos v. the Philippines*, the Committee found a violation of this right because the defendant “could only consult with counsel for a few moments during each day of the trial,” which resulted in him not “hav[ing] adequate time and facilities to prepare his defence.”⁹² Likewise, in *Sirageva v. Uzbekistan*, the UN Human Rights Committee found that because the defendant was not permitted to meet with his lawyer privately to prepare his defense, Article 14(3)(b) of the ICCPR was violated.⁹³

38. *First*, in this case, Mr. Ilyashev’s access to his lawyers during the trial was significantly restricted. As the Preliminary Report concludes, once the hearings began, Mr. Ilyashev “was only able to speak to his lawyers in a handful of instances, during short breaks in the trial” using the court’s open video feed, to which the prosecution was sometimes logged in.⁹⁴ Further, though the proceedings consisted of six hearings over the course of ten days,⁹⁵ Mr.

⁸⁷ See Preliminary Report at 3-4.

⁸⁸ *Id.* at 5.

⁸⁹ *Id.*

⁹⁰ See Notes from Trial Monitor (June 12, 2020); Notes from Trial Monitor (June 15, 2020).

⁹¹ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 34. See also Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 35. (noting that “[s]tates parties should permit and facilitate access to counsel for detainees in criminal cases from the outset of their detention.”).

⁹² Human Rights Committee, *Rayos v. Philippines*, U.N. Doc. CCPR/C/81/D/1167/2003, July 27, 2004, paras. 3.9, 7.3.

⁹³ Human Rights Committee, *Sirageva v. Uzbekistan*, U.N. Doc. CCPR/C/85/D/907/2000, November 1, 2005, para. 6.3.

⁹⁴ Preliminary Report at 6-7.

⁹⁵ *Id.* at 3.

Ilyashev was only permitted to confidentially communicate with his counsel once, on June 19, 2020, when “the court recessed, [and] other participants were removed from the video feed ...”⁹⁶ Critically, for most short breaks in the proceedings, the open nature of the video feed meant that Mr. Ilyashev and his lawyers could not consult privately.

39. Such limited communication is not sufficient under the Committee’s holding in *Rayos*—where a violation of the ICCPR was found because the defendant could only communicate with his counsel for a few minutes each day of trial. In Mr. Ilyashev’s case, during trial he had only minimal opportunities to speak with counsel privately, given the public nature of the virtual proceedings’ video feed and the presence of the prosecution during breaks in the trial.⁹⁷ And, of course, he could not communicate with them in real-time, in order to agree on strategy. Rather, despite the fact that defense counsel continuously requested the trial court’s permission to meet with Mr. Ilyashev with more frequency, the trial court refused, and continued the proceedings regardless.⁹⁸

40. *Second*, Mr. Ilyashev’s discussions with his lawyers during trial (and potentially before trial) were not confidential, in violation of his right to confidential communication with counsel. The phones at the pre-trial detention center, which Mr. Ilyashev used for WhatsApp messages, were not reserved for his exclusive use, raising concerns regarding confidentiality.⁹⁹ More critically, during the trial, Mr. Ilyashev was limited to using the public, court-run video link for his limited consultations with counsel during breaks in the proceedings, to which the prosecution could also log in.¹⁰⁰

41. Requiring Mr. Ilyashev to use a public platform for his communications with counsel during trial violated his right to confidential communication with counsel. In *Sakhnovskiy v. Russia*, the European Court of Human Rights noted that because “the applicant had to use the video-conferencing system installed and operated by the State ... the applicant might legitimately have felt ill at ease when he discussed his case ...”¹⁰¹ Here, not only did Mr. Ilyashev need to use the court’s video-conferencing link, but the platform was indisputably not private: the prosecution was generally logged into the proceedings and could hear all communications.¹⁰²

42. As the Preliminary Report indicates, this cannot but have had profound implications for Mr. Ilyashev’s defense, as he and his lawyers were unable to confidentially consult together in real time regarding the defense to present in court.¹⁰³

⁹⁶ *Id.* at 7.

⁹⁷ See Information Provided by Trial Monitor (July 23, 2020). Cf. Human Rights Committee, *Rayos v. Philippines*, U.N. Doc. CCPR/C/81/D/1167/2003, July 27, 2004, paras. 3.9, 7.3; ECtHR, *Sakhnovskiy v. Russia*, Appl. No. 21272/03/2010, November 2, 2010, para. 103 (noting that though the applicant was able “to communicate with the newly-appointed lawyer for fifteen minutes, immediately before the start of the hearing” this was not sufficient time to discuss the case and ensure that the applicant had sufficient knowledge of the legal proceedings, given the “complexity and seriousness” of the case itself.).

⁹⁸ See Notes from Trial Monitor (June 15, 2020).

⁹⁹ See Preliminary Report at n.48.

¹⁰⁰ *Id.* at 6-7.

¹⁰¹ ECtHR, *Sakhnovskiy v. Russia*, Appl. No. 21272/03/2010, November 2, 2010, para. 104.

¹⁰² Preliminary Report at 6-7.

¹⁰³ *Id.*

iii. *The Trial Court Violated Mr. Ilyashev's Right to Obtain the Attendance and Examination of Witnesses*

43. Article 14(3)(e) provides that a defendant has the right “[t]o examine, or have examined, the witnesses against [them] and to obtain the attendance and examination of witnesses on [their] behalf under the same conditions as witnesses against them.” The UN Human Rights Committee has explained that the right to call and examine witness “is important for ensuring an effective defence by the accused and their counsel” and has stressed that “the accused [must have] the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.”¹⁰⁴ This right applies to both fact and expert witnesses.¹⁰⁵

44. While the defendant’s right to call and examine witnesses is not unlimited, the defendant must be allowed to call *relevant* witnesses,¹⁰⁶ if they comply with relevant procedural rules,¹⁰⁷ and ask appropriate questions of prosecution witnesses.¹⁰⁸ Thus, the UN Human Rights Committee has previously held that Article 14(3)(e) was violated where there was no reason adduced for denying a defense request to call witnesses.¹⁰⁹ Likewise, in *Dugin v. Russian Federation*, the Committee found a violation where the court did not permit full cross-examination of a key witness who had given a statement during the pre-trial investigation.¹¹⁰ And the European Court of Human Rights has explicitly found a violation of the corollary right to examine witnesses under the European Convention where the court relied on expert views, but the expert was not subject to cross-examination by the defense.¹¹¹ The UN Human Rights Committee has also explicitly contemplated the possibility that effective cross examination may require postponing the proceedings.¹¹²

45. In Mr. Ilyashev’s trial, neither aspect of this right—neither his right to call witnesses, nor his right to examine witnesses—was respected. First, Mr. Ilyashev’s defense team

¹⁰⁴ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 39. *See also Sirozhiddin Allaberdiev v. Uzbekistan*, U.N. Doc. CCPR/C/119/D/2555/2015, March 21, 2017, para. 8.8.

¹⁰⁵ *See* Human Rights Committee, *Pustovalov v. Russian Federation*, U.N. Doc. CCPR/C/98/D/1232/2003, May 10, 2010, para. 8.4.

¹⁰⁶ Human Rights Committee, *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, September 20, 2018, para. 9.6.

¹⁰⁷ *See* Human Rights Committee, *Johnson v. Spain*, U.N. Doc. CCPR/C/86/D/1102/2002, March 27, 2006, para. 6.5;

¹⁰⁸ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 39; ECtHR, *Doorson v. the Netherlands*, Appl. No. 20524/92, March 26, 1996, para. 70 (“principles of fair trial also require

that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.”).

¹⁰⁹ Human Rights Committee, *Litvin v. Ukraine*, U.N. Doc. CCPR/C/102/D/1535/2006, September 15, 2011, para. 10.4.

¹¹⁰ Human Rights Committee, *Dugin v. Russian Federation*, U.N. Doc. CCPR/C/81/D/815/1998, July 5, 2004, para. 3.1. (“The author’s counsel states that the surviving victim, Chikin, was not present during the proceedings in the Orlov court, even though the Court took into account the statement he had made during the investigation ... [But] Dugin could not cross-examine him on these matters, and was thus deprived of his rights under article 14, paragraph 3 (e), of the Covenant.”).

¹¹¹ *See* ECtHR, *Balsyte-Lideikiene*, Appl. No. 72596/01, November 4, 2008.

¹¹² *See* Human Rights Committee, *Reid v. Jamaica*, U.N. Doc. CCPR/C/39/D/250/1987, July 21, 1990, para. 10.4.

requested that twelve witnesses be called, including nine fact witnesses and three defense experts (R. Karymsakova, D. Satpayeva and A. Kairzhanova).¹¹³ The trial court only allowed the defense to examine two fact witnesses and one expert without, for the most part, providing any explanation for why the other witnesses were refused.¹¹⁴ These witnesses were relevant—with some potentially able to testify to the factual circumstances surrounding Mr. Ilyashev’s third Facebook post and the experts able to provide a perspective on the views of the prosecution expert—but as the Preliminary Report concludes, “[t]he court rejected the majority of the witnesses but mostly did not offer any basis for its rulings.”¹¹⁵ Just as in *Dugin*, this lack of reasoning for rejecting relevant witnesses, whom “the defense properly moved” to examine, is inconsistent with the ICCPR.¹¹⁶

46. Second, on June 18, 2020, Mr. Ilyashev’s lawyers were denied the opportunity to fully cross-examine the prosecution’s expert, Ms. Akbarova, due to a loss of connection.¹¹⁷ Though the trial court agreed to continue the questioning of Ms. Akbarova the next day, Ms. Akbarova claimed that she was suffering from an unconfirmed urgent illness and the cross-examination was never resumed.¹¹⁸ There was no explanation for why her cross-examination could not be resumed at a subsequent point. As discussed above, Ms. Akbarova was a key witness for the prosecution and her findings were fundamental to trial court’s judgment.¹¹⁹ By depriving Mr. Ilyashev’s counsel of the ability to fully examine Ms. Akbarova, the trial court “deprived [the defense] of the opportunity to receive answers to important questions” and violated Mr. Ilyashev’s right to obtain the examination of witnesses.¹²⁰

47. Ultimately, by refusing Mr. Ilyashev’s lawyers the right to call relevant witnesses without providing any explanation, and by premitting cross-examination of a key expert without justification, the trial court violated Mr. Ilyashev’s right to a fair trial under Article 14(3)(e) of the ICCPR.

¹¹³ Preliminary Report at 8-9; Information Provided by Trial Monitor (July 23, 2020) (noting that three of the witnesses participated together with Mr. Ilyashev in the packaging of charitable aid, and that six of the witnesses were members of the public who subscribed to the social media account of Mr. Ilyashev). *See also* Ilyashev Motion and Text of the Oral Argument.

¹¹⁴ Information Provided by Trial Monitor (July 23, 2020). As noted by the Preliminary Report at n.72, “[i]n one instance, the court refused to hear a witness because it said that she was not sitting in the same room as the lawyer, even though the witness was online and ready to testify”.

¹¹⁵ Preliminary Report at 9.

¹¹⁶ *Id.*

¹¹⁷ *Id.* (“The court also cut short defense questioning of the prosecution expert, Ms. Akbarova.”); Notes from Trial Monitor (June 18, 2020) (explaining Ms. Akbarova stated that she allegedly had 1% battery left on her phone, and that the connection was then interrupted).

¹¹⁸ *See* Notes from Trial Monitor (June 18, 2020) (explaining that the expert’s questioning by Mr. Ilyashev’s defense team was interrupted due to a loss of communication); Argument of V.I. Voronov (June 22, 2020).

¹¹⁹ *See* Ilyashev Sentence.

¹²⁰ *See* Argument of V.I. Voronov (June 22, 2020) (noting that Mr. Voronov—a lawyer for the defense—was denied the opportunity to ask Ms. Akbarova critical questions, such as “[w]hat information during the objective investigation presented to you is false?” and “[i]s there information in the materials you have examined which allows you to judge that the information is KNOWINGLY false unto the defendant A. K. Ilyashev?”).

B. Kazakhstan Violated Mr. Ilyashev’s Right to Freedom of Expression

48. Under Article 19 of the ICCPR, Kazakhstan has an obligation to respect the right to freedom of opinion and expression.¹²¹ This includes “political discourse,”¹²² with the UN Human Rights Committee highlighting the importance of protecting dissenting political opinions.¹²³ Indeed, the Committee has made clear that the right “[includes] the right of individuals to criticize or openly and publicly evaluate their Governments without fear of interference or punishment.”¹²⁴

49. Under Article 19(3), the right to freedom of expression may “be subject to certain restrictions,” but only where those “are provided by law and are necessary: (a) For respect of the rights or reputations of others; [or] (b) For the protection of national security or of public order (ordre public), or of public health or morals.” The UN Human Rights Committee has further clarified that restrictions “may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3” and must “be directly related to the specific need on which they are predicated.” Further, restrictions “must conform to the strict tests of necessity and proportionality.”¹²⁵

50. The Committee has clarified that the link to one of the enumerated bases for restricting speech must be specific. In *Tae-Hoon Park v. Republic of Korea*, for instance, the Committee found that an invocation of national security by “reference to the general situation in the country and the threat posed by ‘North Korean communists’” failed to “specify the precise nature of the threat which [the state] contend[ed] that the author’s exercise of freedom of expression posed.”¹²⁶ Further, in order for a restriction to meet the requirements of necessity and proportionality it must be the “least intrusive instrument amongst those which might achieve their protective function.”¹²⁷

51. The UN Human Rights Committee has previously expressed concern about laws in Kazakhstan that violate freedom of opinion and expression.¹²⁸ Furthermore, the Committee has called on Kazakhstan to repeal laws limiting freedom of expression, in order to bring its laws into conformity with its obligations under the ICCPR.¹²⁹

¹²¹ ICCPR, at Art. 19(1).

¹²² *Id.* (“Everyone shall have the right to hold opinions without interference.”) and 19(2) (“Everyone shall have the right to 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.”). See also Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 11.

¹²³ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 11.

¹²⁴ Human Rights Committee, *Rafael Marques de Morais v. Angola*, Communication No. 1128/2002, March 29, 2005.

¹²⁵ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 22.

¹²⁶ Human Rights Committee, *Tae-Hoon Park v. Republic of Korea*, Communication No. CCPR/C/64/D/628/1995, November 3, 1998, at para. 10.3.

¹²⁷ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 34.

¹²⁸ Human Rights Committee, Concluding Observations on the Second Periodic Report of Kazakhstan, U.N. Doc. CCPR/C/KAZ/CO/2, August 9, 2016, para. 49.

¹²⁹ *Id.* at para. 50.

52. In this case, Mr. Ilyashev’s conviction for violating Article 274 of the Criminal Code—for posting criticism of the Nur Otan Party on his personal Facebook account—is a direct assault on his right to freedom of expression.¹³⁰ Mr. Ilyashev’s Facebook posts constituted protected political speech insofar as they communicated an opinion on the actions of a political party. Indeed, Mr. Ilyashev’s first Facebook post, “The mountain gave birth to a mouse...”, criticized the Nur Otan Party’s COVID-19 fundraising effort.¹³¹ Mr. Ilyashev’s second post, “Party of crooks and thieves?”, used a political expression popular in Russia to criticize the chairman of the Kyzylorda regional branch of the Nur Otan Party, who had been detained on suspicion of committing a crime.¹³² And, Mr. Ilyashev’s third post, which included the phrase “and many already know the habits of the ‘ruling’ party of usurpers, as they have no illusions about its ‘great generosity’” was an effort to argue that the Nur Otan Party was unjustifiably seeking to claim credit for the work of others.¹³³ At trial, as the defense expert Mr. Satpayev concluded, “criticism of one of the political parties in Kazakhstan, as shown in the materials presented... is an expression of opinion.”¹³⁴ Likewise, one of the defense experts whose opinion was solicited prior to trial, Ms. Karymsakova, found that “[t]he predominant part of the information at issue in the texts of publications on A.K. Ilyashev’s Facebook page submitted to the study represents evaluative [i.e. opinion] information.”¹³⁵

53. In disregard of international standards, the trial court concluded that Mr. Ilyashev’s Facebook posts were not protected speech because they “contain[ed] negative information regarding the non-governmental organization (NGO) ‘Nur Otan Party’” and hence constituted a threat to public order.¹³⁶ But the court was neither able to show how the prosecution of Mr. Ilyashev’s speech was “directly related to” the need to protect public order, nor how his prosecution and conviction were a necessary and proportionate response to any such threat.

54. *First*, the court failed to articulate with any specificity the alleged link to public order. Instead, the trial court relied on the attenuated theory that Mr. Ilyashev’s criticism of the Nur Otan Party during a time of self-isolation, loss of income and unstable emotions due to the COVID-19 pandemic would have greater chance of influencing the political sphere and causing public harm.¹³⁷ This, according to the trial court, could lead to “acts of civil disobedience, including unauthorized rallies during the state of emergency, and, as a result, mass non-compliance with quarantine...”¹³⁸ While the trial court asserted in conclusory fashion that there was a “probability of negative consequences,” its reasoning piles speculation on top of speculation and does not “specify the precise nature of the threat” as called for in *Tae-Hoon Park*.¹³⁹ As the Preliminary Report concludes, “[i]t does not follow from the mere existence of the pandemic and

¹³⁰ See Ilyashev Sentence; Ilyashev Indictment.

¹³¹ See Ilyashev Motion and Text of the Oral Argument.

¹³² See Ilyashev Sentence; Expert Opinion No. 659.

¹³³ See *Id.*

¹³⁴ Conclusion of An Expert, May 28, 2020.

¹³⁵ Expert Opinion No. 659. See also Conclusion of An Expert (May 28, 2020) (noting that in Mr. Ilyashev’s posts “there is no call to action for a civic uprising.”).

¹³⁶ Ilyashev Sentence.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

the peculiar emotional state engendered therein that critical commentary will lead to “mass non-observance of quarantine,” “looting,” and “financial losses.””¹⁴⁰

55. *Second*, Mr. Ilyashev’s prosecution under Article 274 was neither necessary nor proportionate, both because Article 274 is itself overbroad and because criminal penalties for speech are only permissible in the rarest of circumstances—a threshold Mr. Ilyashev’s posts certainly did not meet.

56. The UN Human Rights Committee has made clear that “[r]estrictions [on expression] must not be overbroad.”¹⁴¹ But Article 274 is vague on its face as it does not define the threshold for “creating a danger.”¹⁴² Indeed it was just this lack of clarity that allowed the leaps of logic the court employed to find Mr. Ilyashev guilty.

57. The Committee has further explicitly stated that “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”¹⁴³ and has held that “[t]he principle of proportionality must also take account of the form of expression at issue,”¹⁴⁴ stressing that “the value placed . . . upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.”¹⁴⁵ Here, the court essentially relied on the extent to which Mr. Ilyashev’s posts cast aspersions on the Nur Otan party—akin to an insult—without accounting for the importance of public debate on the government’s response to COVID-19. In that respect, the court ignored the balance it was required to strike: contrary to the court’s holding, criminalizing insults is not necessary and the intrusive sentence imposed was disproportionate in light of the value of Mr. Ilyashev’s speech.

58. In conclusion, Mr. Ilyashev’s conviction violates his right to freedom of expression, as protected by Article 19 of the ICCPR.

IV. CONCLUSION

59. For the foregoing reasons, CFJ urges the Almaty City Court to remedy the fair trial and freedom of expression violations to which Mr. Ilyashev was subjected. Specifically, CFJ urges the Almaty City Court to overturn the trial court’s verdict and acquit Mr. Ilyashev.

¹⁴⁰ Preliminary Report at 12.

¹⁴¹ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 34.

¹⁴² *See* Criminal Code of the Republic of Kazakhstan, Art. 274 (translated into English), available at https://www.unodc.org/res/cld/document/penal-code_html/New_penal_code.pdf.

¹⁴³ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 38.

¹⁴⁴ *Id.* at para. 34.

¹⁴⁵ *Id.*

Respectfully submitted,



Stephen Townley
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September 6, 2020



09.06.2020

Appendix A



KAZAKHSTAN: A PRELIMINARY REPORT ON PROCEEDINGS AGAINST HUMAN RIGHTS ACTIVIST
ALNUR ILYASHEV¹

SEPTEMBER 2020

From June 12 to June 22, 2020, the American Bar Association Center for Human Rights monitored the trial of Alnur Ilyashev, in Kazakhstan, as part of the Clooney Foundation for Justice’s TrialWatch initiative.² Mr. Ilyashev is a human rights activist and blogger. He was prosecuted for “disseminat[ing] knowingly false information ... in a state of emergency”³ on the basis of three Facebook posts that criticized the ruling Nur Otan party for corruption and incompetence, including in response to the COVID pandemic. The proceedings - held over videoconference because of COVID - were marred by severe violations of Mr. Ilyashev’s right to a fair trial. In particular, the trial demonstrated the potential perils of virtual hearings. Due to technical issues, the feed was constantly interrupted, with the result that the defense was prevented from making motions, presenting arguments, and questioning witnesses. The presiding judge took no steps to remedy this abuse of the defense’s rights. The trial further violated Mr. Ilyashev’s right to freedom of expression. The prosecution was based solely on Mr. Ilyashev’s criticism of Nur Otan, speech that warranted heightened protection given its role in public debate. This report presents a preliminary analysis of Mr. Ilyashev’s trial and highlights specific violations of Kazakhstan’s obligations under the International Covenant on Civil and Political Rights (ICCPR).⁴ A full report is forthcoming.

Background

Alnur Ilyashev is a Kazakh human rights activist and blogger. On April 17, 2020, he was arrested by the police.⁵ According to the defense, the authorities informed Mr. Ilyashev the following day

¹ This report was prepared by staff attorneys of the American Bar Association Center for Human Rights and reflects their views. It has not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association as a whole. Further, nothing in this report should be considered as legal advice in a specific case. Additionally, the views expressed in this report are not necessarily those of the Clooney Foundation for Justice.

² TrialWatch monitors and grades the fairness of trials of vulnerable people around the world, including journalists, women and girls, minorities, LGBTQ persons and human rights defenders. Using this data, TrialWatch advocates for victims and is developing a Global Justice Ranking measuring national courts’ compliance with international human rights standards.

³ Article 274(4), Criminal Code of the Republic of Kazakhstan.

⁴ Kazakhstan ratified the ICCPR in 2006.

⁵ Amnesty International, “Kazakhstan: Activist Jailed for Criticism During the Pandemic: Alnur Ilyashev”, April 27, 2020. Available at <https://www.amnesty.org/download/Documents/EUR5722272020ENGLISH.pdf>.

that he was a suspect in a criminal investigation under Article 274 of the Kazakh Criminal Code, which proscribes the “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.” The investigation was based on a series of Facebook posts that Mr. Ilyashev made in March 2020.⁶

The first post, which included the phrase “The mountain gave birth to a mouse”, referenced the ruling Nur Otan party’s purported failure in raising just 41 million USD for the Birgemiz Public Fund - launched to provide relief to those suffering due to the COVID pandemic.⁷ The second post, which included the phrase “Party of Crooks and Thieves?”, commented on the arrest of a prominent member of the Nur Otan party.⁸ The third post responded to a news article hailing Nur Otan for its assistance to the needy during the pandemic.⁹ The post bemoaned “crisis media looting”: according to Mr. Ilyashev, the picture attached to the article appeared to be from a food drive in which he and others had participated - seemingly without any support from Nur Otan. The post further noted: “And many people already know the habits of the ‘ruling’ party of usurpers, as they have no illusions about its ‘great generosity.’”

Article 274(4)(2) provides for a sentencing enhancement in the event that the underlying acts occurred during a state of emergency.¹⁰ On March 15, 2020, Kazakhstan declared a state of emergency due to the COVID-19 pandemic.¹¹ Based on the fact that the three posts were made during the declared state of emergency,¹² the authorities asserted that this subsection was applicable, meaning that the potential penalty was up to seven years imprisonment.¹³

On April 18, the day Mr. Ilyashev was reportedly informed of the investigation, a judge granted the investigator’s request that Mr. Ilyashev be detained for two months pending trial.¹⁴ Mr. Ilyashev was transferred to a temporary detention facility.¹⁵ On May 6, he was transferred to a pretrial detention center.¹⁶ On May 15, the Prosecutor’s Office of Almaty formally approved his indictment.¹⁷ In indicting Mr. Ilyashev, the prosecution relied almost exclusively on screenshots

⁶ Prosecutor’s Office of Almaty, Indictment, May 5, 2020.

⁷ Facebook Post, March 26, 2020. Available at <https://www.facebook.com/alnur.ilyashev/posts/10158160532082748>.

⁸ Facebook Post, March 28, 2020. Available at <https://www.facebook.com/717497747/posts/10158168692607748/?d=n>.

⁹ Facebook Most, March 31, 2020. Available at <https://www.facebook.com/alnur.ilyashev/posts/10158178234797748>.

¹⁰ Article 274(2) proscribes “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 ... committed ... in the conditions of emergency situation or in the face of the enemy, or in time of war, or upon implementation of public measures.” Available at https://online.zakon.kz/document/?doc_id=31575252&doc_id2=31575252#activate_doc=2&pos=312;-98&pos2=3983;-57.

¹¹ Prosecutor’s Office of Almaty, Indictment, May 5, 2020.

¹² The state of emergency ended on May 11, 2020.

¹³ Prosecutor’s Office of Almaty, Indictment, May 5, 2020.

¹⁴ Information Provided by Monitor, July 23, 2020.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

of his posts and the assessment of a purported political science expert, Roza Akbarova,¹⁸ who evaluated whether there were “any signs of information in [Mr. Ilyashev’s posts] that create[d] the danger of disturbing public order during a state of emergency or causing substantial harm to the interests of society, the state and its citizens.”¹⁹

Mr. Ilyashev’s trial began on June 12 before Court No. 2 of the Medeu District of Almaty. Due to the pandemic, the trial took place over video conference. The TrialWatch monitor applied to the court to observe the trial, was granted permission, and logged into the video feed. Over six hearings stretching ten days, the prosecution and defense presented witnesses and arguments. Notably, the defense moved for the recusal of the presiding judge, Zalina Makharadze, multiple times throughout the proceedings.²⁰ At closing, the prosecution requested that Mr. Ilyashev be sentenced to three years in prison and be banned from political and civic activism for five years.²¹ On June 22, Judge Makharadze sentenced Mr. Ilyashev to three years of restricted movement, including regular check-ins with a probation officer, and a five year ban on political and civic activism.²²

Consistent with the TrialWatch methodology, this Preliminary Report is based on the monitor’s notes as well as documents from the case file, such as the indictment and judgement.²³ Likewise, the Report covers not only procedural violations but also the content of the charges themselves, as the latter reflect the overall fairness of the trial.²⁴

Mr. Ilyashev’s appeal against his conviction is pending before the Almaty City Court.

Right to a Fair Trial and Right to a Defense

¹⁸ Prosecutor’s Office of Almaty, Indictment, May 5, 2020.

¹⁹ Expert Opinion No 2304, April 17, 2020. Two assessments conducted by experts in “forensic psychological and philological research” were appended to Ms. Akbarova’s conclusions. Ms. Akbarova relied upon these assessments, which evaluated whether Mr. Ilyashev’s posts contained negative information and could have engendered negative public opinion, in formulating her conclusions.

²⁰ Monitor’s Notes, June 15, 2020; Monitor’s Notes, June 16, 2020; Monitor’s Notes, June 18, 2020; Monitor’s Notes, June 19, 2020; Monitor’s Notes, June 22, 2020.

²¹ Monitor’s Notes, June 19, 2020.

²² Monitor’s Notes, June 22, 2020; Court No. 2 of Medeu District of Almaty, Judgment, June 22, 2020.

²³ See, e.g., American Bar Association TrialWatch Fairness Report, “Kyrgyzstan v. Gulzhan Pasanova”, April 2020, pg. 15 (Methodology). Available at

https://www.americanbar.org/content/dam/aba/administrative/human_rights/kyrgyzstan_vs_gulzhan_pasanova.pdf.

See also Organization for Security and Cooperation in Europe, “Trial Monitoring: A Reference Manual for Practitioners”, 2012, pgs. 12, 41-42, 154. Available at

<https://www.osce.org/files/f/documents/5/f/94216.pdf#page=16>; Office of the High Commissioner for Human Rights, “Trial Observation and Monitoring of the Administration of Justice”, pgs. 38-39. Available at

<https://www.ohchr.org/Documents/Publications/MonitoringChapter22.pdf>; International Commission of Jurists,

“Trial Observation Manual”, pg. 13. Available at https://courtmonitoring.org/wp-content/uploads/trial_observation_manual_international-commission-of-jurists.pdf.

²⁴ See, e.g., American Bar Association TrialWatch Fairness Report, “Uganda v. Stella Nyanzi”, February 2020, Annex: Grading Methodology. Available at

https://www.americanbar.org/content/dam/aba/administrative/human_rights/fairnessreport-uganda-stella-nyanzi.pdf.

See also Office of the High Commissioner for Human Rights, “Trial Observation and Monitoring of the Administration of Justice”, pg. 23; International Commission of Jurists, “Trial Observation Manual for Criminal Proceedings”, 2009, pgs. 20-21. Available at <https://www.icj.org/wp-content/uploads/2009/07/trial-observation-manual-Human-Rights-Rule-of-Law-series-2009-eng.pdf>.

Under Article 14(1) of the ICCPR, all defendants facing criminal charges “shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” The UN Human Rights Committee has found violations of Article 14(1) where the defense is obstructed in making its case. In *Gridin v. Russian Federation*, for example, the trial court failed to control the hostile environment within the courtroom, which “made it impossible for defence counsel to properly cross-examine the witnesses and present his defence.”²⁵ The Committee thus concluded “that the conduct of the trial ... violated the author's right to a fair trial within the meaning of article 14, paragraph 1.”²⁶

The Committee has reached similar conclusions under Article 14(3)(d), which provides that individuals facing criminal charges have the right to “defend [themselves] in person or through legal assistance of [their] own choosing.” As stated by the Committee, Article 14(3)(d) is violated “if the Court or other relevant authorities hinder appointed lawyers from fulfilling their task effectively.”²⁷

In the present case, Mr. Ilyashev’s right to a fair trial - including his right to defend himself - was compromised, in contravention of Article 14(1) and Article 14(3)(d). Similar to *Gridin*, where the hostile atmosphere in the courtroom hindered the defense’s ability to make its case, problems with the virtual proceedings continuously prevented Mr. Ilyashev and counsel from making motions, presenting arguments, and questioning witnesses.²⁸ Several episodes that transpired at the hearing on June 15 are illustrative. At the beginning of the hearing, one of Mr. Ilyashev’s lawyers, Mr. Nazkhanov, moved for the examination of three witnesses.²⁹ His connection was repeatedly interrupted.³⁰ The following exchange ensued, as documented by the monitor:

Defendant Ilyashev says he cannot see the prosecutor. Attorney Nazkhanov tries to speak again and reads his motion. The attorney's connection is lost again. The judge shouted: “The court can see and hear you all!” The prosecutor shouts: “The prosecutor also can see and hear everyone!” Ilyashev answers: “Neither the prosecutor, nor Nazkhanov can be seen or heard.” But the judge says, “We can see everyone, everyone is connected, we can hear everyone very well.” Ilyashev starts to get angry: “You can see everyone, but we do not see anyone! How do you feel about the criminal process? Either speak into the microphone or speak louder.” The judge asked the attorney to continue. The defendant shouts: “I cannot hear you, citizen Makharadze!” Here again, all participants in the process and journalists got disconnected from the conference and they reconnected again.³¹

²⁵ Human Rights Committee, *Gridin v. Russian Federation*, U.N. Doc. CCPR/C/69/D/770/1997, July 18, 2000, para. 8.2.

²⁶ *Id.*

²⁷ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 38.

²⁸ Monitor’s Notes, June 12, 2020; Monitor’s Notes, June 15, 2020; Monitor’s Notes, June 18, 2020.

²⁹ Monitor’s Notes, June 15, 2020.

³⁰ *Id.*

³¹ *Id.*

Mr. Nazkhanov was unable to present the motion in full. Judge Makharadze ultimately permitted the defense to examine two of the three proposed witnesses. Later on June 15, Mr. Nazkhanov moved to suspend the trial on the basis of Mr. Ilyashev's poor health.³² The connection again cut out. Judge Makharadze asked another defense attorney, Mr. Voronov, for his opinion on the motion, to which Mr. Voronov responded: "I did not hear the motion, but I, of course, support him. But I repeat that neither I nor Ilyashev heard this motion."³³ Given the technological difficulties, the two were prevented from commenting on the matter and making arguments.

Similar issues arose during the questioning of witnesses. The feed cut out during the defense's examination of prosecution expert Roza Akbarova, who called into the hearing on her mobile phone.³⁴ After Ms. Akbarova stated that her phone battery was about to die, the connection dropped entirely and the defense was precluded from further examination.³⁵

In light of the above, the court's failure to suspend the proceedings pending resolution of the technical problems severely undermined the defense's presentation of its case, in violation of Article 14(1) more generally and Article 14(3)(d) specifically. Notably, the UN Human Rights Committee has made clear that States cannot "invoke states of emergency" to justify "deviat[ion] from fundamental principles of fair trial":³⁶ "[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."³⁷ 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."³⁸

Without taking a position on whether and under what circumstances virtual proceedings may be compatible with the right to a fair trial, it is beyond doubt that such proceedings must comply with due process. In Mr. Ilyashev's case, the adjustments occasioned by COVID-19 could not justify the repeated abuse of his fundamental right to present a defense.

Right to Effective Participation

An accused's ability to effectively participate in the proceedings against him is widely considered a key component of the right to a fair trial. As stated by the European Court of Human Rights, Article 6 - the European Convention's elaboration of the right to a fair trial - "read as a whole, guarantees the right of an accused to participate effectively in a criminal trial, which includes, *inter alia*, not only his or her right to be present, but also to hear and follow the proceedings."³⁹ This understanding of the right to a fair trial is affirmed by various subcomponents of Article 14 of the ICCPR: the right to interpretation in court, which aims to ensure that the accused is able to follow

³² Id.

³³ Id.

³⁴ Monitor's Notes, June 18, 2020.

³⁵ Id; Monitor's Notes, June 19, 2020.

³⁶ Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, August 31, 2001, para. 11.

³⁷ Id. at para. 16.

³⁸ European Court of Human Rights, *Sakhnovskiy v. Russia*, App. No. 21272/03, November 2, 2010, para. 98.

³⁹ European Court of Human Rights, *Murtazaliyeva v. Russia*, App. No. 36658/05, December 18, 2018, para. 91.

the proceedings;⁴⁰ the right to be tried in one's presence, which implies the ability to hear and follow the proceedings;⁴¹ the right to defend oneself in person, which of necessity assumes the ability to hear and follow the proceedings;⁴² and the right to communicate with counsel, which likewise assumes that the accused is able to hear and follow the proceedings and confer with counsel accordingly.⁴³

The problems with the video feed described above meant that Mr. Ilyashev was often unable to hear witnesses, his own lawyers, the prosecutor, and the judge - and that they were equally unable to hear him.⁴⁴ This violated his right to effective participation in the trial.

Right to Communicate with Counsel

Under Article 14(3)(b) of the ICCPR, a defendant is entitled to “have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.” According to the UN Human Rights Committee, this provision requires that a defendant be afforded sufficient opportunity to meet with counsel and discuss the case: in *Rayos v. The Philippines*, for example, the Committee found a violation of Article 14(3)(b) where a defendant “was only granted a few moments each day during the trial to communicate with counsel.”⁴⁵ As stated by the European Court, defendants must be able to confer with counsel in real time during the proceedings.⁴⁶

Article 14(3)(b) also 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.”⁴⁷

With respect to the courtroom proceedings in the present case, the authorities did not afford Mr. Ilyashev sufficient opportunity to communicate with counsel.⁴⁸ Mr. Ilyashev was only able to speak to his lawyers in a handful of instances, during short breaks in the trial (almost never confidentially, as discussed below).⁴⁹ Moreover, the authorities did not set up any channel for Mr. Ilyashev to either provide real time input in response to courtroom developments or receive the

⁴⁰ ICCPR, Article 14(3)(f).

⁴¹ Id. at Article 14(3)(d).

⁴² Id.

⁴³ Id. at Article 14(3)(b).

⁴⁴ Monitor's Notes, June 12, 2020; Monitor's Notes, June 15, 2020.

⁴⁵ Human Rights Committee, *Rayos v. Philippines*, U.N. Doc. CCPR/C/81/D/1167/2003, July 27, 2004, para. 7.3.

⁴⁶ See European Court of Human Rights, *Yaroslav Belousov v. Russia*, App. Nos. 2653/13 & 60980/14, October 4, 2016, paras. 149-154; European Court of Human Rights, *Mariya Alekhina and Others vs. Russia*, App. No. 38004/12, July 17, 2018, paras. 169-173. See also Organization for Security and Cooperation in Europe, “Results of Trial Monitoring in the Republic of Kazakhstan”, 2007, pgs. 97-98, 102-103. Available at <https://www.osce.org/astana/24153?download=true>.

⁴⁷ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 34.

⁴⁸ With respect to the pretrial detention center, Mr. Ilyashev relayed that his lawyers were only able to meet with him twice before trial and once during the trial due to COVID-related restrictions. Apart from these meetings, Mr. Ilyashev recounted that his sole means of communication from the pretrial detention center was via a smartphone made available to detainees. According to Mr. Ilyashev, over the two plus months of his detention, he could only access the phone four times and in each instance, made Whatsapp calls that lasted five to ten minutes.

⁴⁹ Monitor's Notes, June 16, 2020; Monitor's Notes, June 18, 2020; Monitor's Notes, June 19, 2020; Information from Monitor, August 17, 2020.

benefit of real time legal expertise and assistance. The deprivation of such consultations parallels that condemned by the UN Human Rights Committee in *Rayos* as a violation of Article 14(3)(b).

With respect to the confidentiality of the communications, Mr. Ilyashev was restricted to discussing the case with his lawyers over the open video feed during court breaks, sometimes with the prosecution present.⁵⁰ Throughout the trial, the sole allowance made for private consultations occurred at the hearing on June 19: when the court recessed, other participants were removed from the video feed to permit Mr. Ilyashev to consult with his defense team.⁵¹

The conduct of the proceedings demonstrates the importance of real time confidential consultations. On June 12, for example, Mr. Ilyashev petitioned the court to postpone the proceedings pending the possibility to be tried in person.⁵² At one point Mr. Ilyashev went off screen, after which an officer at the detention facility stated that Mr. Ilyashev did not want to participate in an online trial.⁵³ His lawyers requested that the proceedings be adjourned so as to discuss the matter with Mr. Ilyashev.⁵⁴ The court did not permit such consultations and proceeded with the denial of Mr. Ilyashev's petition.⁵⁵

Meanwhile, Mr. Ilyashev's lawyers made a range of procedural motions throughout the trial, including motions for the recusal of Judge Makharadze.⁵⁶ Mr. Ilyashev was unable to confer with counsel about strategy at these vital junctures. Constant interruptions of video-feed, described above, were also a cause for concern. At many points Mr. Ilyashev's lawyers did not know whether Mr. Ilyashev was able to hear the proceedings - and vice versa.⁵⁷ There was little opportunity for clarification and no opportunity for confidential clarification.

As noted above, the UN Human Rights Committee has asserted that States cannot "invoke states of emergency" to justify "deviat[ion] from fundamental principles of fair trial."⁵⁸ The European Court has further stated that where proceedings are conducted by video feed, fair trial rights must be respected, including by ensuring that "effective and confidential communication with a lawyer is provided for."⁵⁹

In the present case, Mr. Ilyashev's right to effective and confidential communication with counsel under Article 14(3)(b) was violated. In light of the virtual nature of the hearing, the authorities should have established alternate channels of communication so as to facilitate proper consultations.

Right to Call and Examine Witnesses

⁵⁰ Monitor's Notes, June 16, 2020; Monitor's Notes, June 18, 2020; Information from Monitor, August 17, 2020.

⁵¹ Monitor's Notes, June 19, 2020; Information from Monitor, August 17, 2020.

⁵² Monitor's Notes, June 12, 2020.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ See Monitor's Notes, June 15, 2020; Monitor's Notes, June 18, 2020.

⁵⁷ See Monitor's Notes, June 12, 2020; Monitor's Notes, June 15, 2020.

⁵⁸ Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, August 31, 2001, para. 11.

⁵⁹ European Court of Human Rights, *Sakhnovskiy v. Russia*, App. No. 21272/03, November 2, 2010, para. 98.

Under Article 14(3)(e) of the ICCPR, all persons accused of a crime are entitled “to obtain the attendance and examination of witnesses on [their] behalf under the same conditions as witnesses against [them].” 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.”⁶⁰ Article 14(3)(e) does not establish an absolute right to call and examine witnesses but a right to call witnesses who are relevant,⁶¹ if proposed in a timely manner in compliance with procedural requirements.⁶²

In *Allaberdiev v. Uzbekistan*, the Committee considered a case in which the accused was charged and convicted of drug-related offenses.⁶³ Defense counsel requested to call, among others, individuals involved with the investigation and individuals whom the accused alleged had planted the drugs.⁶⁴ Although these witnesses were central to the defense theory that the case was fabricated, the court rejected the request, deeming the proposed testimony irrelevant.⁶⁵ The Committee found a breach of Article 14(3)(e).⁶⁶ Similarly, in *Saidov v. Tajikistan*, the Committee found a violation of Article 14(3)(e) where the court, “stating that the witnesses requested were too close to the accused and were interested in the outcome,” prevented the accused from calling 11 witnesses.⁶⁷ Notably, the right to call and examine witnesses encompasses experts.⁶⁸

Violations of Article 14(3)(e) can occur where the court excessively curtails defense questioning. In *Larranaga v. The Philippines*, for example, the Committee ruled that the presiding court violated Article 14(3)(e) not only by refusing to call proposed defense witnesses without adequate justification but also by cutting short the defense’s cross-examination of a key prosecution witness.⁶⁹

In Mr. Ilyashev’s case, the defense properly moved to call nine witnesses; three individuals who had participated in the aforementioned food drive with Mr. Ilyashev, who could testify about the Nur Otan party’s involvement in the drive and Mr. Ilyashev’s post in this regard, and six subscribers to Mr. Ilyashev’s social media account, who had viewed the posts at issue and could testify about their reactions to the posts.⁷⁰ The defense further requested to call three experts -

⁶⁰ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 39.

⁶¹ Human Rights Committee, *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, September 20, 2018, para. 9.6.

⁶² 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.

⁶³ Human Rights Committee, *Sirozhiddin Allaberdiev v. Uzbekistan*, U.N. Doc. CCPR/C/119/D/2555/2015, May 18, 2017, paras. 2.1-2.21.

⁶⁴ *Id.* at para. 3.5.

⁶⁵ *Id.*

⁶⁶ *Id.* at paras. 8.8-8.9.

⁶⁷ Human Rights Committee, *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, September 20, 2018, para. 9.6.

⁶⁸ See Human Rights Committee, *Pustovalov v. Russian Federation*, U.N. Doc. CCPR/C/98/D/1232/2003, May 10, 2010, para. 8.4.

⁶⁹ Human Rights Committee, *Larranaga v. The Philippines*, U.N. Doc. CCPR/C/87/D/1421/2005, July 24, 2006, para. 7.7.

⁷⁰ See Monitor’s Notes, June 18, 2020.

including a political scientist, philologist, and a psycholinguist - who could speak to the content and potential consequences of Mr. Ilyashev's posts.⁷¹ As documented by the monitor, the court rejected the majority of the witnesses and experts but mostly did not offer any basis for its rulings.⁷² Given the lack of justification and that the witnesses were relevant to Mr. Ilyashev's case, this conduct violated Article 14(3)(e).

The court also cut short defense questioning of the prosecution expert, Ms. Akbarova. Ms. Akbarova had concluded that Mr. Ilyashev's posts were likely to occasion disruption of public order and harm to citizens and organizations.⁷³ As mentioned above, Ms. Akbarova's assessment was the centerpiece of the prosecution's case: the sole evidence listed in the indictment are records of the investigator's questioning of Mr. Ilyashev (during which he claimed innocence), screenshots of his posts, records of the investigator's questioning of Ms. Akbarova, and the expert opinion of Ms. Akbarova.⁷⁴

At the hearing on June 18, Ms. Akbarova called into the video feed on her mobile phone. After approximately an hour, the connection was lost - supposedly because of Ms. Akbarova's phone battery.⁷⁵ The court resolved to continue her cross-examination the following day.⁷⁶ At the hearing on June 19, the court announced that Ms. Akbarova had fallen ill and would not be able to participate.⁷⁷ Overruling defense objections that Ms. Akbarova's cross-examination was crucial to Mr. Ilyashev's defense, the court ordered that the trial proceed.⁷⁸ The court prematurely terminated the defense interrogation of the prosecution's central witness, an additional and severe violation of Article 14(3)(e).

Right to an Impartial Tribunal

Article 14(1) of the ICCPR mandates judicial impartiality. As stated by the UN Human Rights Committee: "judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. ... [T]he tribunal must also appear impartial to a reasonable observer."⁷⁹ The Committee has held that unreasonable decision-making can violate Article 14(1). In *Khostikoev v. Tajikistan*, the Committee found an Article 14(1) violation due to rulings that hindered the preparation of an effective defense, such as "ignor[ing] [counsel's] objections" and "refus[al] to allow the possibility for the author to adduce

⁷¹ Monitor's Notes, June 19, 2020.

⁷² See Monitor's Notes, June 18, 2020; Monitor's Notes, June 19, 2020; Information Provided by Trial Monitor, July 23, 2020. In one instance, the court refused to hear a witness because it said that she was not sitting in the same room as the lawyer, even though the witness was online and ready to testify.

⁷³ Expert Opinion No 2304, April 17, 2020.

⁷⁴ Prosecutor's Office of Almaty, Indictment, May 5, 2020.

⁷⁵ Monitor's Notes, June 18, 2020.

⁷⁶ Id.

⁷⁷ Monitor's Notes, June 19, 2020.

⁷⁸ Id.

⁷⁹ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 21. See also Human Rights Committee, *Karttunen v. Finland*, U.N. Doc. CCPR/C/46/D/387/1989, November 5, 1992, para. 7.2.

relevant evidence.”⁸⁰ Similarly, in *Toshev v. Tajikistan*, the Committee concluded that the court lacked impartiality where “several of the lawyers’ requests were not given due consideration.”⁸¹

In the present case Judge Makharadze conducted the proceedings in a manner that undermined the defense’s ability to present its case. As described above, Judge Makharadze refused to stop the proceedings despite technical difficulties that prevented the defense from making arguments and examining witnesses, even denouncing the defense for raising such concerns.⁸² Judge Makharadze impeded the defense’s cross-examination of the prosecution’s key witness, Ms. Akbarova.⁸³ Judge Makharadze also denied defense motions to establish a means of confidential communication between Mr. Ilyashev and his lawyers. In sum, Judge Makharadze exhibited bias by “act[ing] in ways that improperly promote[d] the interests of one of the parties to the detriment of the other,” in contravention of Article 14(1). Additional incidents indicative of the court’s partiality will be discussed in full in the forthcoming report.

Right to Freedom of Expression

The prosecution of Mr. Ilyashev violated his right to freedom of expression. Under Article 19 of the ICCPR, “[e]veryone shall have the right to freedom of expression.” While freedom of expression can be limited in certain situations, including states of emergency, Mr. Ilyashev’s case did not meet the criteria required to impose restrictions.

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.”⁸⁴ 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.”⁸⁵

According to the 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.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 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.”⁸⁸

⁸⁰ Human Rights Committee, *Khostikoev v. Tajikistan*, U.N. Doc. CCPR/C/97/D/1519/2006, December 3, 2009, paras. 7.2-7.3.

⁸¹ Human Rights Committee, *Toshev v. Tajikistan*, U.N. Doc. CCPR/C/101/D/1499/2006, April 28, 2011, para. 6.6.

⁸² See Monitor’s Notes, June 12, 2020; Monitor’s Notes, June 15, 2020.

⁸³ Monitor’s Notes, June 19, 2020.

⁸⁴ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 13.

⁸⁵ *Id.* at para. 38.

⁸⁶ See Human Rights Committee, *Kim v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/574/1994, 1999, para. 12.2.

⁸⁷ *Id.*

⁸⁸ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 35.

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 the latter means that 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. 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 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 offenses should ever be criminalized: child pornography, incitement to terrorism, public incitement to genocide, and advocacy for national, racial, or religious hatred.⁹²

With respect to states of emergency, derogations from Article 19 must likewise meet necessity and proportionality standards: according to the Human Rights Committee,

such measures are limited to the extent strictly required by the exigencies of the situation ... the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. ... This condition requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation.⁹³

If a State Party decides to pursue derogation in a state of emergency, it must “immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated.”⁹⁴

In accordance with the above standards, the prosecution of Mr. Ilyashev violated his right to freedom of expression. All three of his posts concerned criticism of the ruling Nur Otan party,

⁸⁹ Id. at para. 33.

⁹⁰ Id. at para. 34.

⁹¹ Id. at para. 38.

⁹² 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.

⁹³ Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, August 31, 2001, paras. 4-5.

⁹⁴ ICCPR, Article 4(3).

protected speech under the ICCPR. Moreover, Mr. Ilyashev’s commentary was situated within a broader public dialogue on political issues: the first post was a response to reports about the funds raised by Nur Otan to deal with the COVID pandemic; the second post was a response to a news article about the detention of a leading Nur Otan member; and the third post was a response to a news article about Nur Otan’s purported assistance to those facing economic challenges because of the pandemic. As established by the UN Human Rights Committee, this form of engagement with current events warrants heightened protection.

Given that Mr. Ilyashev’s speech was protected by Article 19, the imposition of any restrictions required demonstration of a legitimate objective as well as demonstration “in specific and individualized fashion [of] the precise nature of the threat ... [and] a direct and immediate connection between the expression and the threat.” Assuming that the prosecution possessed the legitimate objective of protecting public order and was not solely aimed at silencing dissent, the authorities not only failed to present any “specific and individualized” information about the “precise nature of the threat” but also failed to establish “a direct and immediate connection between the expression and the threat.” The prosecution’s case in this regard revolved around Ms. Akbarova’s expert opinion. Ms. Akbarova, however, was unable to cite specific indicia of the likelihood of disruption, instead making vague and conclusory statements:

taking into account the peculiarities of the emotional state of the majority of the population in the conditions of the state of emergency, is the danger of negative consequences in the form of implementation of acts of civil disobedience, namely, mass non-observance of quarantine, which, in its turn, will lead to a wide spread of the disease, social tension, acts of looting and, as a consequence, to financial losses of citizens and organizations.⁹⁵

It does not follow from the mere existence of the pandemic and the peculiar emotional state engendered therein that critical commentary will lead to “mass non-observance of quarantine,” “looting,” and “financial losses.” This assessment falls far short of Article 19 standards.

With respect to the necessity and proportionality requirements, the institution of criminal proceedings was not the “least intrusive instrument amongst those which might achieve their protective function.” As detailed above, the criminalization of speech is only appropriate where grave crimes have been committed, such as incitement to terrorism or advocacy for national, racial, or religious hatred.

Kazakhstan has not formally derogated from Article 19, as required by the ICCPR when states exercise their right to derogation, and Mr. Ilyashev’s trial occurred after Kazakhstan’s official state of emergency had expired. It is also unclear whether derogation would be applicable in any event given that Article 19 already permits restrictions - subject to the stringent test discussed above - to safeguard public health and public order. Indeed, the UN Human Rights Committee has advised with regard to COVID-19 that: “States parties should not derogate from Covenant rights or rely on a derogation made when they are able to attain their public health or other public policy objectives by invoking the possibility to restrict certain rights, such as article 12 (freedom of

⁹⁵ Expert Opinion No 2304, April 17, 2020.

movement), article 19 (freedom of expression) or article 21 (right to peaceful assembly), in conformity with the provisions for such restrictions set out in the Covenant.”⁹⁶

However, even assuming that derogation in a state of emergency was applicable, the authorities failed to meet the requisite standards. As discussed above, in invoking a state of emergency to derogate from the freedoms established in the ICCPR, States must demonstrate that the measures imposed are necessary to meet or proportional to the exigencies of the situation. In Mr. Ilyashev’s case, Ms. Akbarova’s opinion - the prosecution’s primary evidence as to the potential threat posed by Mr. Ilyashev’s posts - contained only vague references to the pandemic, the emotional state of the population, and the ensuing risk of looting and losses: this assessment could have applied to any critical opinion expressed during COVID-19.⁹⁷ As such, the prosecution of Mr. Ilyashev did not entail the “careful justification” required under the ICCPR.

Conclusion

The proceedings against Mr. Ilyashev violated his right to a fair trial and right to freedom of expression, both protected by the ICCPR. In order to fulfill its obligations under the ICCPR, Kazakhstan must remedy these abuses. More broadly, Kazakhstan must ensure that any criminal proceedings conducted virtually comply with fundamental principles of due process.

⁹⁶ Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, U.N. Doc. CCPR/C/128/2, April 30, 2020, para. 2(c).

⁹⁷ Id.