



**Kazakhstan v.
Marat Zhylanbaev**

January 2025

TRIALWATCH FAIRNESS REPORT
A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

A. ABOUT THE AUTHORS

Covington & Burling LLP is strongly committed to public service. The firm is frequently recognized for pro bono service, including 12 times being ranked the number one pro bono practice in the U.S. by The American Lawyer. Much of the firm's pro bono work is anchored in meeting local needs, serving economically disadvantaged individuals and families in our surrounding communities, in addition to its long history of serving vulnerable clients and important causes throughout the U.S. and the world.

Professor Stephanie Farior, a professor of international law and human rights for over 30 years, is the past Director of the Legal and International Organizations Programme at Amnesty International's International Secretariat. She was a co-founder of the Center for Justice and Accountability as well as the Amnesty International-USA Legal Support Network, and served several terms on the Executive Council of the American Society of International Law (ASIL). Professor Farior has advised UN Special Rapporteurs and human rights treaty bodies, and served as an international law expert on Amnesty International missions to Pakistan, Malawi, Yemen, and India. A past Visiting Fellow of the University of Oxford, Professor Farior has published extensively on equality and non-discrimination under international law.

B. ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

TrialWatch is an initiative of the **Clooney Foundation for Justice**. Its mission is to expose injustice, help to free those unjustly detained and promote the rule of law around the world. TrialWatch monitors criminal trials globally against those who are most vulnerable — including journalists, protesters, women, LGBTQ+ persons and minorities — and advocates for the rights of the unfairly convicted. Over time, TrialWatch will use the data it gathers to publish a Global Justice Index evaluating countries' justice systems.

The legal assessment and conclusions expressed in this report are those of the authors and not necessarily those of the Clooney Foundation for Justice. Additionally, the Clooney Foundation for Justice assumes and accepts no responsibility for and gives no guarantees or warranties for the legal assessment, analysis, and opinion expressed herein. The views expressed are not necessarily those of CFJ, its Board of Directors, or its leadership.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
BACKGROUND INFORMATION	4
A. POLITICAL & LEGAL CONTEXT.....	4
B. CASE HISTORY.....	12
METHODOLOGY	24
A. THE MONITORING PHASE	24
B. THE ASSESSMENT PHASE	24
ANALYSIS	25
A. APPLICABLE LAW.....	25
B. PRE-TRIAL VIOLATIONS.....	25
C. VIOLATIONS AT TRIAL	30
D. ADDITIONAL FAIRNESS CONCERNS	37
CONCLUSION AND GRADE	57

EXECUTIVE SUMMARY



Professor Stephanie Fariior, member of the TrialWatch Experts Panel, assigned this trial a grade of “F”:

The proceedings as a whole failed to meet the fundamental right to fairness. The charges were based on an exceptionally broad and unforeseeable extension of the “extremism” law that was itself already vague and broadly worded. The prosecutor breached international standards by refusing to provide Mr. Zhylanbaev with a core piece of evidence that formed a basis for the charges. The charges appear to have an improper motive — to punish and deter political opposition — for several reasons: the charges asserted he was guilty based on his peaceful exercise of human rights, including the right to take part in political affairs and the rights to freedom of expression, association and assembly; the charges violated the prohibition of arbitrary arrest and detention; and the charges violated the prohibition of prosecution for acts that were not crimes when they were committed. In addition, the proceedings appear to be part of a pattern of persecution, as Mr. Zhylanbaev had previously been repeatedly held in administrative detention or arrested for peacefully participating in protests and rallies. He had also been arbitrarily detained when held in pretrial detention—not for a legitimate reason, but because of the nature of the charges.

The conduct of Mr. Zhylanbaev’s trial showed contempt for international fair trial rights. The court held the entire trial in closed rather than public session. Mr. Zhylanbaev was not allowed to see a copy of the court judgment that banned the organization that the charges claimed he supported, depriving him of the right to adequate time and facilities to prepare a defense. The court also violated a bedrock fair trial right to call and examine witnesses under the same conditions as witnesses against him, leaving the prosecution’s witnesses unchallenged and untested. The court found Mr. Zhylanbaev guilty of intentionally providing financial support to an alleged extremist organization even though the prosecution conceded it did not have the evidence to support that charge. In addition, the court violated the principle of *nullum crimen sine lege* by accepting the exceptionally broad and unforeseeable extension of the “extremism” law to allow the prosecution of Mr. Zhylanbaev in the first place. The foregoing actions also strongly suggest that the charges had an improper motive — to punish and deter political opposition.

The Clooney Foundation for Justice’s TrialWatch initiative monitored the trial of Marat Zhylanbaev, leader of *Alga, Kazakhstan!*, a political party in opposition to the sitting government in Kazakhstan. Mr. Zhylanbaev was prosecuted under Kazakhstan’s vague and overbroad “anti-extremism” legislation for his peaceful involvement with *Alga, Kazakhstan!*, which, unlike other opposition parties, Koshe Party and Democratic Choice of Kazakhstan (“DCK”), had not been banned as “extremist.”¹ The flawed proceedings against him violated Mr. Zhylanbaev’s fundamental rights provided under international law, such as the freedoms of expression, peaceful assembly, and association, and rendered his detention arbitrary.

Mr. Zhylanbaev is a public figure who first gained attention as an athlete before becoming a local elected official in Kazakhstan. Mr. Zhylanbaev formed his own political party, *Alga, Kazakhstan!*, in 2022. He has been a vocal critic of the Kazakhstan government — he participated in peaceful protests with other activists and sought to raise money to fund the campaigns of *Alga, Kazakhstan!* candidates.² In September 2023, he was formally charged with violating Kazakhstan’s “anti-extremism laws,” Article 405(2) and Article 258(2) of the Criminal Code of the Republic of Kazakhstan.

Throughout the proceedings, neither the prosecution nor the court alleged that Mr. Zhylanbaev had encouraged or taken part in violence. Instead, the court alleged that Mr. Zhylanbaev had effectively participated in the activities of DCK — another political party in opposition that the Kazakh authorities had previously banned as an “extremist organization” — citing the similarity between the goals of *Alga, Kazakhstan!* and DCK. The authorities further alleged that Mr. Zhylanbaev had provided financial and other support to the DCK. Any criminal charges under anti-extremism laws in Kazakhstan can only be sustained if specific intent to engage in the criminalized conduct is proven beyond a reasonable doubt. But the prosecution failed to show that Mr. Zhylanbaev had intentionally participated in the activities of the DCK, much less supported any extremist activities, nor was Mr. Zhylanbaev on notice that his actions would be considered as such. Instead, Mr. Zhylanbaev was prosecuted and convicted for engaging in a political debate with and criticizing the Kazakh authorities by peacefully exercising his rights guaranteed by the International Covenant on Civil and Political Rights, to which Kazakhstan is a party.

These actions strongly suggest that Mr. Zhylanbaev’s prosecution was not aimed at holding him liable for the alleged criminal violations, but rather was a tool employed by

¹ This designation process, in which the decisions to ban the Koshe Party and the DCK were likewise not disclosed to the defendants, is itself flawed and has been at issue in other cases monitored by TrialWatch.

² See Zhylanbaev, M.T., *Appeal to the Appeal Board of the City Court of Astana* (Dec. 19, 2023), p. 6 (hereinafter “Zhylanbaev Appeal to the Criminal Appeal Board”); Cassation Appeal (Mar. 9, 2024), p. 3 (hereinafter “Cassation Appeal”).

the authorities to intimidate and punish him for his lawful criticism of the ruling party of Kazakhstan.

Mr. Zhylanbaev was convicted and sentenced in a trial marred by severe irregularities that violated his fair trial rights under the ICCPR, including: the entire proceedings were closed to the public; the court barred the defense from questioning key prosecution witnesses; and the court did not respect Mr. Zhylanbaev's right to call his own witnesses. Additionally, Kazakhstan violated Mr. Zhylanbaev's right to have adequate facilities to prepare a defense and his right to be tried by an independent and impartial tribunal.

In addition, the court did not respect Mr. Zhylanbaev's right to be presumed innocent, as the outcome of the case appears to have been a foregone conclusion, with the proceedings merely a vehicle to punish Mr. Zhylanbaev for his peaceful political activities.

BACKGROUND INFORMATION



A. POLITICAL & LEGAL CONTEXT

Belying President Kassym-Jomart Tokayev’s promises to hold a dialogue “based on the recognition of pluralism of opinion” and to “protect the rights of every citizen,”³ “[o]pposition parties [in Kazakhstan] have been banned or marginalized via anti-extremism laws; their leaders have faced criminal charges and their followers have had their activities restricted.”⁴ Mr. Zhylyanbaev’s detention is an extension of these ongoing practices in Kazakhstan.

Suppressing Political Opposition Through Abuse of the Term “Extremism”

From independence in 1991 until 2019, Nursultan Nazarbayev, the former head of the Communist Party of Kazakhstan under Soviet rule, governed Kazakhstan. Various human rights organizations have documented that, throughout his nearly 30 years in power, President Nazarbayev “persistently suppressed dissent, prolonged his time in office through undemocratic votes, and used the levers of power to neutralize potential opponents.”⁵ Suppression of dissent continues to this day.

Among the political opponents targeted is Mukhtar Ablyazov, a former banker and government minister who helped to form the DCK in 2001.⁶ DCK advocated for democratic reform, including of Kazakhstan’s electoral and judicial systems, and an independent media.⁷ Shortly after the the DCK’s formation, then-Prime Minister Kassym-Jomart Tokayev stated, “Some of our citizens, representing the business elite, and even civil servants, who have become rich people over the 10 years of independence, have decided to wage an information war against their own government, insulting and

³ Statement from Kassym-Jomart Tokayev, Official Inauguration Ceremony of the Elected President of Kazakhstan (12 June 2019), available at https://www.akorda.kz/en/speeches/internal_political_affairs/in_speeches_and_addresses/statement-from-kassym-jomart-tokayev-official-inauguration-ceremony-of-the-elected-president-of-kazakhstan.

⁴ Freedom House, Freedom in the World 2024: Kazakhstan, available at <https://freedomhouse.org/country/kazakhstan/freedom-world/2024>.

⁵ *Nazarbaev Becomes Security Council’s Chairman For Life*, RADIO FREE EUROPE/RADIO LIBERTY (12 July 2018), available at <https://perma.cc/8LPU-RVVA>. See also, e.g., Marie Struthers et al., *Political Freedoms in Kazakhstan*, HUMAN RIGHTS WATCH (Apr. 5, 2004), available at <https://perma.cc/7W4B-WFFU>.

⁶ *Profile: Kazakh tycoon-dissident Mukhtar Ablyazov*, BBC News (Jan. 9, 2014), available at <https://www.bbc.com/news/world-europe-25666111>.

⁷ Galymzhan Zhakiyanov: Overview of Interviews and Press Articles (Mar. 2006), available at <https://perma.cc/QN8K-GNVN>; Profile on Mukhtar Ablyazov, available at <https://perma.cc/52UR-EF6T>.

blackmailing the government and parliament.”⁸ Members of the DCK holding public office were dismissed and criminal charges were pressed against them, including Abylyazov, who was charged with abusing his office and misappropriating funds.⁹ President Nazarbayev later pardoned and released Abylyazov in exchange for Abylyazov giving up his political ambitions.¹⁰ In 2009, Abylyazov fled Kazakhstan after again facing criminal charges, this time in connection with his leadership position at BTA Bank.¹¹

Though the DCK was first banned in the early 2000s, Abylyazov reestablished it in April 2017, and the movement quickly gained momentum.¹² On March 13, 2018, the Yesil District Court in Nur-Sultan (now Astana) ruled that the DCK was an “extremist organization.” Although the decision designating the DCK as “extremist” was sealed to the public, the Kazakh Prosecutor-General’s Office informed the public of its existence.¹³ The European Parliament and U.S. State Department have characterized the DCK as peaceful, in stark contrast to the Yesil District Court’s decision.¹⁴

On March 20, 2019, Kassym-Jomart Tokayev was appointed President of Kazakhstan after former President Nursultan Nazarbayev resigned before the end of his term.¹⁵ At the inauguration in June of that same year, Tokayev gave a speech in which he claimed that

⁸ *The story of ‘The Democratic Choice of Kazakhstan’ opposition movement*, Open Dialogue Foundation (Jan. 29, 2016), available at <https://en.odfoundation.eu/a/7250,the-story-of-the-democratic-choice-of-kazakhstan-opposition-movement/>.

⁹ *Id.*

¹⁰ Andriy Osavouliuk, *Report: Kazakhstan pursues former top managers of BTA Bank in order to obtain their testimonies against Mukhtar Abylyazov*, Open Dialogue Foundation (Feb. 10, 2017), available at <https://en.odfoundation.eu/a/8092,report-kazakhstan-pursues-former-top-managers-of-bta-bank-in-order-to-obtain-their-testimonies-against-mukhtar-ablyazov/>; Daisy Sindelar, *How Far Will Nazarbaev Go To Take Down Mukhtar Abylyazov?*, Radio Free Europe (June 7, 2013), available at <https://www.rferl.org/a/kazakhstan-nazarbaev-ablyazov/25010488.html>.

¹¹ *Id.*

¹² *Kazakhstan: Crackdown on Government Critics*, Human Rights Watch (July 7, 2021), available at <https://www.hrw.org/news/2021/07/07/kazakhstan-crackdown-government-critics>; *Report: The persecution of the DCK activists in Kazakhstan*, Open Dialogue Foundation (Apr. 2, 2018), available at <https://en.odfoundation.eu/a/8606,report-the-persecution-of-the-dck-activists-in-kazakhstan/>.

¹³ The Interdistrict Criminal Court of Astana City, *Judgment*, Case No. 7141-23-00-1/1030 (Nov. 29, 2023), p. 20 (hereinafter “Judgment”).

¹⁴ See e.g., European Parliament, *Resolution on the human rights situation in Kazakhstan, 2021/2544(RSP)*, (Feb. 10, 2021), ¶ 5., available at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0056_EN.html; U.S. State Department, *2020 Country Report on Human Rights Practices: Kazakhstan* (March 2021), p. 40, available at <https://www.state.gov/wp-content/uploads/2021/10/KAZAKHSTAN-2020-HUMAN-RIGHTS-REPORT.pdf>.

¹⁵ *Toqaev Inaugurated As Kazakhstan’s President Amid New Arrests* (June 12, 2019), available at <https://www.rferl.org/a/toqaev-inaugurated-as-kazakhstan-s-new-president-following-election-protests/29994824.html>.

the “goal is to ensure the unity of society and protect the rights of every citizen.”¹⁶ He also acknowledged in the speech that “citizens are deeply concerned about the development of dialogue between the government and the society.”¹⁷ Tokayev stated, “This dialogue should be based on the recognition of pluralism of opinion. Different views, but one united nation – this is the main guideline.”¹⁸

Not even a year after Tokayev’s speech, on May 19, 2020, the Yesil District Court ruled that the Koshe Party, otherwise known as the “Street Movement,” was also an extremist organization, stating that it was the DCK under another name.¹⁹ Like the previous decision declaring that the DCK was an extremist organization, the decision on the Koshe Party was not made public.

The Criminal Code of the Republic of Kazakhstan includes several provisions that the government — both under President Nazarbayev and now under President Tokayev — regularly uses to target opposition voices, two of which are Article 405 and Article 258. Articles 405(1) and (2) of the Kazakh Criminal Code criminalize, respectively, the “organization” of and “participation” in the “activities” of a banned extremist organization.²⁰ Article 258 criminalizes supporting an “extremist” organization through financial or other means.²¹ (Unlike Article 405, Article 258 does not require that the organization itself have previously been banned.) Because of the court decisions labeling the DCK and Koshe Party as extremist, however, even peaceful activities associated with these organizations are deemed criminal.

Article 405 of the Criminal Code provides in full that:

1. The organization of activities of a public or religious association or other organization concerning which there is judgment which took legal effect about prohibition of their activities or liquidation in connection with implementation by them of extremism or terrorism,

¹⁶ Official Website of the President of Kazakhstan, *Statement from Kassym-Jomart Tokayev Official Inauguration Ceremony of the Elected President of Kazakhstan* (June 12, 2019), available at http://president.kz/en/speeches/internal_political_affairs/in_speeches_and_addresses/statement-from-kassym-jomart-tokayev-official-inauguration-ceremony-of-the-elected-president-of-kazakhstan.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ U.S. Department of State, *2020 Country Report on Human Rights Practices: Kazakhstan* (Mar. 2021), p. 40.

²⁰ Criminal Code of the Republic of Kazakhstan, Art. 405, available at <https://www.refworld.org/legal/legislation/natlegbod/2014/en/122797>.

²¹ Criminal Code of the Republic of Kazakhstan, Art. 258, available at <https://www.refworld.org/legal/legislation/natlegbod/2014/en/122797>.

shall be punishable by a fine of up to six thousand monthly calculation indices, or correctional labor for the term of up to six years, or imprisonment for the same term, with or without deprivation of the right to hold certain positions or engage in certain activities for up to five years, with deportation of a foreigner or stateless person from the Republic of Kazakhstan for a period of five years.

2. Participation in the activities of a public or religious association or other organization, concerning which there is an enforceable court decision to ban their activities or liquidate them in connection with the implementation of extremism or terrorism, –

shall be punishable by a fine of up to two thousand monthly calculation indices, or correctional labor for the term of up to two years, or imprisonment for the same term, with or without deprivation of the right to hold certain positions or engage in certain activities for up to three years, with deportation of a foreigner or stateless person from the Republic of Kazakhstan for a period of five years.²²

Article 258 provides in full that:

1. Provision or collection of money and (or) other property, right to property or benefits of a property nature, as well as donation, exchange, donations, charitable assistance, rendering of information and other services or rendering of financial services to an individual or a group of persons or a legal entity committed by a person who was aware of the terroristic or extremist nature of their activity or that the provided property, rendered information, financial and other services will be used for carrying out terroristic or extremist activity or supporting a terroristic or extremist group, terroristic or extremist organization, illegal paramilitary forces, –

shall be punished by deprivation of liberty for a term of five to nine years with confiscation of property.

2. The same actions, committed repeatedly or by person with the use of his (her) official position or by person, exercising management functions in commercial or other organization, or by leader of public association, or by group of persons on previous concert, or on a large scale, -

²² Criminal Code of the Republic of Kazakhstan, Art. 405, available at <https://www.refworld.org/legal/legislation/natlegbod/2014/en/122797>.

shall be punished by deprivation of liberty for a term of seven to twelve years with confiscation of property.²³

Conviction under either subsection adds an individual to a list of those “connected with the financing of terrorism or extremism” maintained by the Financial Monitoring Agency, and results in strict limitations on an individual’s finances.²⁴

The lack of limiting criteria in the language of the articles gives Kazakh authorities extensive discretion to target dissenting voices. Indeed, the UN Human Rights Committee has expressed concern about the code’s “broad formulation of the concept of ‘extremism’” and “the use of such [criminal] legislation on extremism to unduly restrict freedoms of . . . expression, assembly and association.”²⁵ Similarly, a U.S. State Department report included that “NGOs and independent observers expressed concerns that terrorism and ‘extremism’ laws were applied overly broadly, in some cases against political opponents and adherents of non-violent religious movements.”²⁶

In another case monitored by TrialWatch, for instance, Ashkat Zheksebaev was prosecuted in 2021 under the anti-extremism laws for his exclusively peaceful social media posts and Telegram messages in support of the Koshe Party movement.²⁷ The indictment and judgment did not cite any specific instance of Zheksebaev calling for violence or even any instance in which Zheksebaev’s words or actions might be implicitly understood to be referring to violence; rather the activity described was merely routine political activity.²⁸

In January 2022, tensions between the government and its dissenters came to a head after Kazakh police detained protesters at a peaceful protest over income inequality and fuel prices in the oil-producing city of Zhanaozen.²⁹ Some of the detainees reportedly

²³ Criminal Code of the Republic of Kazakhstan, Art. 258, available at https://www.unodc.org/uploads/icsant/documents/Legislation/Kazakhstan/3_Penal_Code_of_the_RK.pdf.

²⁴ *Id.*; *Kazakhstan: Crackdown on Government Critics*, Human Rights Watch (July 7, 2021), available at <https://www.hrw.org/news/2021/07/07/kazakhstan-crackdown-government-critics>; *List of organizations and persons involved in the financing of terrorism and extremism*, Fin. Monitoring Agency (Sept. 1, 2022), available at <https://afmrk.gov.kz/ru/the-list-of-organizations-and-individuals-associations/perechen-organizacziy-i-licz,-svyazannyix-s-finan/current.html>.

²⁵ U.N. Human Rights Committee, *Concluding Observations on the Second Periodic Report of Kazakhstan*, CCPR/C/KAZ/CO/2 (2016), ¶¶ 13, 49.

²⁶ U.S. State Department, *2022 Country Reports on Human Rights Practices: Kazakhstan*, available at <https://www.state.gov/reports/country-reports-on-terrorism-2022/kazakhstan>.

²⁷ *Kazakhstan v. Askhat Zheksebaev et al.*, The Clooney Foundation (Nov. 2022).

²⁸ *Id.*, p. 6.

²⁹ *Kazakhstan: Protestors Arbitrarily Arrested, Beaten*, Human Rights Watch (Feb. 1, 2022), available at <https://www.hrw.org/news/2022/02/01/kazakhstan-protesters-arbitrarily-arrested-beaten#>.

were tortured and blocked from accessing lawyers.³⁰ Over the next weeks, the protests spread to other cities, including Almaty, where “Kazakh security forces used excessive force ... including lethal force such as shooting at protesters and rioters who posed no immediate threat.”³¹ Approximately 225 people were killed³² and over 9,900 were detained.³³ On January 5, the authorities shut down the internet nationwide,³⁴ and the next day Russian-led forces arrived in Kazakhstan as part of a “peacekeeping” mission³⁵ to help neutralize what Tokayev had labeled a “terrorist threat.”³⁶ UN experts condemned the label, stating that “Kazakhstan’s overly broad use of the word ‘terrorism’ in this context against protesters, civil society activists, human rights defenders, journalists and political parties appeared aimed at instilling fear and was deeply concerning,” and further “cautioned against the inaccurate, rhetorical and overly broad use of the term, noting such use was inconsistent with international law and undermined human rights for all in Kazakhstan.”³⁷

Immediately following the protests, Tokayev increased his power by taking over as head of Kazakhstan’s security council, a role that had been previously held by former President Nursultan Nazarbayev.³⁸ In 2023, the United Nations High Commissioner for Human Rights “called for independent investigations [into] . . . the January 2022 events in

³⁰ *Id.*

³¹ *Kazakhstan: No Justice for January Protest Victims*, Human Rights Watch (May 5, 2022), available at <https://www.hrw.org/news/2022/05/05/kazakhstan-no-justice-january-protest-victims>.

³² Ariel Cohen, *The Future of Western Energy Investments in Kazakhstan*, Forbes (Feb. 7, 2022), available at <https://www.forbes.com/sites/arielcohen/2022/02/07/the-future-of-western-energy-investments-in-kazakhstan/?sh=4d335f5054b4>.

³³ *Kazakh President Announces CSTO Troop Withdrawal, Criticizes Predecessor*, Radio Free Europe (Jan. 11, 2022), available at <https://www.rferl.org/a/kazakhstan-detains-10000-unrest/31648618.html>.

³⁴ On January 7, 2022, the internet was partly restored. See Nastassia Astrasheuskaya, *Voices from Kazakhstan: protesters unbowed despite bloody crackdown*, Financial Times (Jan. 14, 2022), available at <https://www.ft.com/content/e22f928c-e2ab-4656-be77-25203773aa95>.

³⁵ *Russian paratroopers arrived in Kazakhstan as unrest continues*, The Guardian (Jan. 6, 2022), available at <https://www.theguardian.com/world/2022/jan/06/shots-heard-in-kazakhstan-as-protests-enter-third-day>.

³⁶ Lance Davies, *Russia’s Response to Unrest in Kazakhstan: Risk Versus Reward*, RUSI (Jan. 10, 2022), available at <https://rusi.org/explore-our-research/publications/commentary/russias-response-unrest-kazakhstan-risk-versus-reward>.

³⁷ *Kazakhstan: UN experts condemn lethal force against protests, misuse of term ‘terrorists’*, OHCHR (Jan. 11, 2022), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=28019&LangID=E>.

³⁸ Nastassia Astrasheuskaya, *Kassym-Jomart Tokayev, the Kazakh president confronting a nation in turmoil*, Fin. Times (Jan. 7, 2022), available at <https://www.ft.com/content/bb057022-1add-4395-98c0-68ed567a3b34>.

Kazakhstan, urging authorities to ensure ‘justice, reparations and truth’ for all the victims.”³⁹

News reporters, online creators, and participants in opposing parties reported on and reacted to the January 2022 protests and the fallout from the government’s response. Some believe that the reporting drew the attention of authorities and ultimately resulted in more politically motivated prosecutions.⁴⁰

Due Process and Fair Trial Rights

Numerous organizations have also raised concerns about the failure to respect fair trial rights in Kazakh courts. Concerns include prosecutor-dominated trials, defense attorneys allowed to play only a minor role at trial and experiencing harassment from authorities, defendants not always having adequate time or facilities to prepare, and judges failing to investigate allegations that authorities extracted confessions through torture or duress.⁴¹

Freedom House has noted, for instance, that “[p]olitically motivated prosecutions and prison sentences against activists, journalists, and opposition figures are common.”⁴² Human Rights Watch also has observed “disproportionate use of force against protesters, arbitrary arrest and imprisonment, and ill-treatment and torture of detainees.”⁴³ According to Freedom House, “Judges are subject to political influence, and corruption is a problem throughout the judicial system.”⁴⁴ Citing Freedom House’s Nations in Transit Report for the year 2022, the U.S. State Department commented:

[W]hile the constitution provides for judicial independence, courts had yet to prove this independence in cases involving high-profile officials, political activists, and independent NGOs. Evaluators from the Group of European

³⁹ Human Rights Watch, *UN Human Rights Chief Calls for Reforms in Uzbekistan and Kazakhstan* (Mar. 20, 2023), available at <https://www.hrw.org/news/2023/03/20/un-human-rights-chief-calls-reforms-uzbekistan-and-kazakhstan>.

⁴⁰ *Kazakhstan: Opposition influencer sentenced to seven years in prison*, Eurasianet (Aug. 6, 2024), available at <https://eurasianet.org/kazakhstan-opposition-influencer-sentenced-to-seven-years-in-prison>.

⁴¹ U.S. State Department, *2020 Country Report on Human Rights Practices: Kazakhstan* (Mar. 2021), p. 14 (Domestic and international human rights organizations reported numerous problems in the judicial system, including lack of access to court proceedings, lack of access to government-held evidence, frequent procedural violations, unfair denial of defense counsel motions, and failure of judges to investigate allegations that authorities extracted confessions through torture or duress.).

⁴² Freedom House, *Freedom in the World 2020: Kazakhstan, 2020*, available at <https://freedomhouse.org/country/kazakhstan/freedom-world/2020>.

⁴³ *Human Rights Watch World Report 2023; Kazakhstan Events of 2022*, Human Rights Watch, available at <https://www.hrw.org/world-report/2023/country-chapters/kazakhstan>.

⁴⁴ Freedom House, *supra* note 42.

States Against Corruption noted the president heavily influenced key appointments in the judiciary, prosecution, specialized anticorruption bodies, and law enforcement.⁴⁵

According to the U.S. State Department, defense lawyers are additionally faced with “lack of access to government-held evidence, frequent procedural violations, [and] denial of defense counsel motions.”⁴⁶ The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has cited “an overreliance on ‘judicial experts’” by the Kazakh authorities and has noted that the weight courts give to these “judicial experts” opinions “per se violates the principle of equality of arms and has profound implications on fair trials.”⁴⁷ These fair trial violations can be seen in cases against defendants charged under anti-extremism laws in particular, such as in the cases of Ashkat Zheksebaev and Aigul Utepova — both of which were monitored by TrialWatch.⁴⁸

In Zheksebaev’s case, for instance, although his conviction relied in large part on the determination that Koshe was an extremist organization, he was denied access to the court decision laying out the reasoning for that determination.⁴⁹ Additionally, “the court refused defense requests to question the government ‘expert’ witnesses whose conclusions formed a key part of the prosecution’s case,” and instead held that “the availability of their written opinions sufficed.”⁵⁰ Similarly, in the case against Utepova, an independent journalist, the “court consistently and unreasonably ruled to the detriment of the defense and its convicting verdict relied almost entirely on the flawed findings of prosecution experts.”⁵¹

Mr. Zhylyanbaev’s arrest and trial took place against this backdrop.

⁴⁵ U.S. State Department, *supra* note 14, section 1(e).

⁴⁶ *Id.*, p. 14.

⁴⁷ U.N. Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/HRC/43/46/Add.1, (Jan. 22, 2020), ¶ 39, available at https://digitallibrary.un.org/record/3852204/files/A_HRC_43_46_Add-1-ES.pdf.

⁴⁸ *Kazakhstan v. Askhat Zheksebaev et al.*, The Clooney Foundation (Nov. 2022); *Kazakhstan v. Aigul Utepova*, The Clooney Foundation (Apr. 2022).

⁴⁹ *Kazakhstan v. Askhat Zheksebaev et al.*, The Clooney Foundation (Nov. 2022), pp. 4-5.

⁵⁰ *Id.* p. 5.

⁵¹ *Kazakhstan v. Aigul Utepova*, The Clooney Foundation (Apr. 2022), p. 3.

B. CASE HISTORY

Marat Zhylanbaev is a public figure who first gained public attention as an ultramarathon runner before becoming a local elected official in Kazakhstan. More recently, Mr. Zhylanbaev has been a vocal critic of the Kazakhstan government. In particular, following the events of January 2022, Mr. Zhylanbaev sought to found his own political party, *Alga, Kazakhstan!* (“Forward, Kazakhstan!”). His efforts to register *Alga, Kazakhstan!*, however, were repeatedly rejected by the authorities: twenty-one times in total, according to materials he submitted to court.⁵² The Kazakh government has repeatedly tried to stifle Mr. Zhylanbaev’s civil and political activities through administrative charges and criminal prosecution.

Administrative Arrests and Pretrial Detention

Kazakh law enforcement has long targeted Mr. Zhylanbaev with administrative charges for participating in rallies and campaigns.⁵³ In June and July 2022, following his application to register *Alga, Kazakhstan!*, Mr. Zhylanbaev was detained twice by the police for handing out leaflets calling for participation in *Alga, Kazakhstan!*, and was twice fined 306,000 tenge.⁵⁴

In February 2023, Mr. Zhylanbaev announced his intention to run as a candidate to Majilis, the lower house of the Parliament of Kazakhstan, in an election scheduled to be held in March 2023. The Kazakhstan Central Election Commission, however, denied Mr. Zhylanbaev’s application on technical grounds.⁵⁵ In March 2023, Mr. Zhylanbaev was further barred from competing as an independent candidate in the parliamentary election because he allegedly had engaged in “early campaigning” by posting a social media post that sought donations to pay the candidate registration fee.⁵⁶

Mr. Zhylanbaev continued to engage in peaceful activism and on March 17, 2023, reportedly gathered with several other activists outside the building of the European Union

⁵² Zhylanbaev Appeal to the Criminal Appeal Board, p. 3 (“Since May 2022, the organizing committee of the party ‘Alga, Kazakhstan’ has submitted 21 documents for registration of the party to the Ministry of Justice, but each time received groundless refusals.”).

⁵³ Court of Appeal of Astana City, *Appeal Judgment*, Case No. 7141-23-00-1/1030 (Jan. 19, 2024) (hereinafter “Appeal Judgment”), p. 6.

⁵⁴ See Human Rights Watch, *Kazakhstan: Government Critic on Trial for ‘Extremism’* (Nov. 8, 2023), available at <https://www.hrw.org/news/2023/11/08/kazakhstan-government-critic-trial-extremism>; Zhylanbaev Appeal to the Criminal Appeal Board, p. 6.

⁵⁵ *Id.* (“Zhylanbaev was barred from competing as an independent candidate in parliamentary elections after authorities accused him of ‘early campaigning’ because of a social media post in which he appealed for funds to pay the candidate registration fee”).

⁵⁶ *Id.*

Delegation to Kazakhstan to call on the Kazakh government to release political prisoners and agree to an international investigation into the January 2022 protests.⁵⁷

On or about May 3, 2023, Mr. Zhylanbaev was arrested for his alleged participation in the March 17, 2023, protest, and sentenced to twenty days' imprisonment on administrative charges. On May 23, 2023, shortly before Mr. Zhylanbaev was due to be released following the completion of his twenty-day sentence, Mr. Zhylanbaev was detained on a different set of charges, this time criminal. According to Mr. Zhylanbaev's defense counsel, Mr. Zhylanbaev was secretly taken, without his counsel's knowledge, by the investigator and special forces officers from the detention center where he was serving a twenty-day administrative sentence. According to Mr. Zhylanbaev's counsel, Mr. Zhylanbaev was first questioned as a suspect on May 25, 2023. On that same day, the investigative court ordered Mr. Zhylanbaev's two-month detention, which was later prolonged until Mr. Zhylanbaev's conviction on November 29, 2023.

In ordering both Mr. Zhylanbaev's initial pre-trial detention and extension of the same, the court primarily considered the nature of the offense and potential punishment faced by Mr. Zhylanbaev should he be found guilty. In fact, in its August 11, 2023, decision granting an extension of Mr. Zhylanbaev's pre-trial detention, the court wrote that it "[took] into account only the type of criminal punishment that may be applied if the suspect is found guilty, his suspicion of committing the crime, and the social danger of the act committed."⁵⁸

In its May 25, 2023, decision sanctioning Mr. Zhylanbaev's detention, the court acknowledged that Mr. Zhylanbaev's lawyer had requested that the court consider the presence of Mr. Zhylanbaev's residence, job, family, and children, and based on this, reject detention and instead "choose a preventive measure not associated with isolation from society."⁵⁹ The court, however, discounted this argument as irrelevant because "[t]he presence of residence, family, and children are not circumstances preventing the application of detention when the suspect is charged with a serious crime."⁶⁰ The court further stated that, given the potential for long-term imprisonment, Mr. Zhylanbaev, "while left at large, . . . may continue to commit crimes . . . or, under the threat of imprisonment, may hide from the court and investigation."⁶¹ Although the court engaged in a recitation of these factors, it did not cite any evidence justifying its conclusions.

⁵⁷ *Id.*

⁵⁸ Investigative Court of Astana City, No. 7195-23-00-2-3m/8700 (Aug. 11, 2023).

⁵⁹ Investigative Court of Asana, No. 7195-23-00-2-3m/5291 (May 25, 2023).

⁶⁰ *Id.*

⁶¹ *Id.*

On June 7, 2023, the court further rejected Mr. Zhylanbaev’s attorney’s challenge to the decision sanctioning Mr. Zhylanbaev’s pre-trial detention, in which Mr. Zhylanbaev’s attorney requested that the court apply a less-restrictive measure of restraint. The court determined that “[t]he failure of the court to determine the amount of bail [was] in accordance with . . . [p]rocedure, which [did] not provide for the establishment of bail in the event that there are sufficient grounds to believe the suspect will obstruct the proceedings or abscond from the investigation and the court.”⁶² The court cited no evidence to support that there were such grounds. The court dismissed Mr. Zhylanbaev’s lawyer’s argument that Mr. Zhylanbaev was “being persecuted . . . for political reasons,” concluding without further reasoning or evidence that “[a]ll other arguments stated by the lawyer . . . cannot be recognized as an unconditional basis for applying a less strict measure of restraint.”⁶³ The court stated that the decision was “final and [could not] be appealed or contested in cassation.”⁶⁴

Charges in the Criminal Case

On September 25, 2023, Mr. Zhylanbaev was formally charged in an indictment with violating Article 405(2) and Article 258(2) of the Criminal Code of the Republic of Kazakhstan. As discussed above, these provisions criminalize, respectively, knowing “participation” in the “activities” of an “extremist” organization and knowingly supporting an “extremist” organization through financial or other means.

In particular, the core allegation in the indictment was that Mr. Zhylanbaev provided various forms of assistance to the DCK. The indictment began by reciting the history of the DCK, despite the fact that Mr. Zhylanbaev was not a member of the DCK and had founded his own political party, *Alga, Kazakhstan!*. The indictment stated that Mr. Ablyazov founded the DCK in April 2017, and described the DCK as seeking the “incitement of social enmity and discord, [the] violent change of the constitutional order of the country,[the] undermining national security and [the] violent seizure of power.”⁶⁵ It further alleged that on March 13, 2018, a Yesil court in Astana City issued a decision finding that the DCK was an extremist organization, and banned the DCK from Kazakhstan.

The indictment claimed that Mr. Zhylanbaev “repeatedly” participated in “unsanctioned meetings announced by Ablyazov,” despite allegedly “knowing[] . . . that the activities of the DCK organization are recognized as extremist and banned in [Kazakhstan] by a court

⁶² Criminal Division of the Astana City Court Dauleshova G.G., No. 1am-710/23 (June 7, 2023).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ The Astana Police Department (as approved by the First Deputy Prosecutor of Astana City), *Bill of Indictment* (Sept. 25, 2023), p. 2 (hereinafter “Indictment”).

decision.”⁶⁶ The indictment further alleged that Mr. Zhylanbaev “kept in touch” with Mr. Ablyazov and his “foreign [h]eadquarters” using social media, and “receiv[ed] orders and instructions with the purpose of violent change of the constitutional order” of Kazakhstan.⁶⁷ Specifically, the indictment stated that Mr. Zhylanbaev repeatedly participated in “unsanctioned meetings” that coincided with ones called by the DCK.⁶⁸ According to the indictment:

- On December 15, 2021, Mr. Zhylanbaev allegedly participated in a meeting in Astana City that Mr. Ablyazov had announced over social media.⁶⁹
- In August 2022, Mr. Zhylanbaev allegedly submitted a prior notice to the local executive body of his intent to hold a rally, and subsequently participated in a rally in Astana City at a location that coincided with a meeting announced on social media by Mr. Ablyazov.⁷⁰
- On January 7, 2023, Mr. Zhylanbaev allegedly submitted a prior notice to the local executive body of his intent to hold a rally and was detained by local law enforcement as he was traveling to the rally.⁷¹
- On March 19, 2023, Mr. Zhylanbaev allegedly submitted a prior notice to the local executive body of his intent to hold a rally, and subsequently participated in a rally in Astana City at a location that coincided with a meeting announced on social media by Mr. Ablyazov.⁷²

In addition, the indictment alleged that Mr. Zhylanbaev “provided information, financial and other services” to the DCK by engaging in the following activities:

⁶⁶ Indictment, p. 2.

⁶⁷ *Id.*, p. 2.

⁶⁸ *Id.*, p. 2 (“realizing that the activities of the DCK organization are recognized as extremist and banned in the territory of the Republic of Kazakhstan by a court decision, and being an irreconcilable supporter of the extremist organization,” Mr. Zhylanbaev “repeatedly participated in unsanctioned meetings announced by Ablyazov M.K.”).

⁶⁹ *Id.*, p. 2.

⁷⁰ *Id.*, p. 2.

⁷¹ *Id.*, p. 3.

⁷² *Id.*, p. 3.

- On June 15, 2022, and February 17, 2023, Mr. Zhylanbaev allegedly filmed videos based on instructions from an alleged DCK leader, “in order to spread the ideology and illegal activities of the DCK extremist organization in the society.”⁷³
- On February 4, 2023, and February 14, 2023, Mr. Zhylanbaev allegedly transferred funds to alleged DCK supporters via their family members.⁷⁴

In support of these allegations, the indictment relied entirely on “expert” report No. 9295, dated August 18, 2023, that was prepared by an “expert political analyst” based on the analyst’s review of “data” that allegedly “confirm[ed]” Mr. Zhylanbaev’s criminal activity.⁷⁵ According to the report, the “submitted materials” contained “indications of participation in the activities of the DCK extremist organization,” but “no signs of organizing the activities of an extremist organization.”⁷⁶ The report nevertheless concluded that Mr. Zhylanbaev’s “statements, appeals, and declaration . . . are defined as a negative opinion about the situation in the Republic of Kazakhstan, the activities of representatives of the authorities, as well as inducement to join the ranks of ‘*Alga, Kazakhstan*’ to participate in protest actions, [and to] take actions aimed at changing the power in the country as a whole.”⁷⁷ Without citing or reviewing any of Mr. Zhylanbaev’s or DCK’s posts or statements, the indictment concluded that there were similarities between *Alga, Kazakhstan’s* “goals, tasks, methods and forms” and the “ideology of the DCK.”⁷⁸

Notably, the indictment did not allege that Mr. Zhylanbaev had engaged in violence or that the activities at issue entailed any sort of threat of violence.

Trial

Mr. Zhylanbaev’s trial began on October 30, 2023. His entire trial was closed to the public on the ground that two of the witnesses had alleged that they had received “threats and pressure in connection with their testimony against” Mr. Zhylanbaev, and “fear[e]d for the lives of their family members.”⁷⁹ On this basis, the court invoked Article 29 of the Code of Criminal Procedure of Kazakhstan, which permits the closure of a trial where “necessary for the safety of the victim, witness or other persons involved in [the] case, as well as their

⁷³ *Id.*, p. 5.

⁷⁴ *Id.*, pp. 5-6.

⁷⁵ *Id.*, p. 4-9.

⁷⁶ *Id.*, p. 4.

⁷⁷ *Id.*, p.4.

⁷⁸ *Id.*, p. 4.

⁷⁹ The Interdistrict Criminal Court of Astana City, *Ruling on Closure of Criminal Case*, Case No. 7141-23-00-1/1030 (Oct. 30, 2023).

family members or close relatives.” As the defense counsel noted, however, security measures had already been implemented during the pre-trial investigation phase to protect the identities of the two fact witnesses whose concerns allegedly formed the basis for closing the trial.⁸⁰ Accordingly, defense counsel argued, the court did not have an adequate basis for closing the trial to protect the safety of the — already anonymous — witnesses.⁸¹

As described above, the prosecution alleged that by participating in unsanctioned protests that coincided with ones called by the DCK,⁸² and because of ideological similarities between the DCK and *Alga, Kazakhstan!*, Mr. Zhylanbaev in effect “participated” in the “activities” of the DCK.⁸³ The prosecution further alleged that Mr. Zhylanbaev had provided both informational and financial support to the DCK based on the speeches and fundraising set out in the indictment.

In response to these allegations, Mr. Zhylanbaev explained that “his rallies could coincide with the events organized by M.K. Ablyazov [the leader of the DCK], but the latter did not persuade him or give him any instructions.”⁸⁴ Mr. Zhylanbaev acknowledged that he “liked the political programs of the D[C]K,” but asserted that “[d]emocratic parties [may] have similar demands because freedom of speech is paramount.”⁸⁵ Indeed, Mr. Zhylanbaev first met Mr. Ablyazov in 2023, when Mr. Zhylanbaev decided to run as a candidate for the Majilis (and after some of the events described in the indictment as “participation” in the DCK).⁸⁶

Mr. Zhylanbaev explained, moreover, that the video speeches and fundraising were part of an effort to organize and advance the objectives of *Alga, Kazakhstan!*'s election campaigning. He noted that he did not know the affiliation of the person to whom he turned for election advice (and who helped him with video production), and that the videos were aimed at eliciting support for *Alga, Kazakhstan!*, not the DCK.⁸⁷

⁸⁰ Cassation Appeal, p. 2.

⁸¹ *Id.*, p. 2.

⁸² Indictment, p. 2 (Zhylanbaev “repeatedly participated in unsanctioned meetings announced by Ablyazov M.K.”).

⁸³ *Id.*, pp. 1, 2, 10-11, 15.

⁸⁴ *Id.*, p. 5.

⁸⁵ *Id.* pp. 4-5.

⁸⁶ Cassation Appeal, p. 3.

⁸⁷ *Id.* pp. 5-6.

With respect to Mr. Zhylanbaev's alleged transfer of funds to DCK supporters, Mr. Zhylanbaev testified that the funds were for registering *Alga, Kazakhstan!* candidates for the March 2023 parliamentary elections.⁸⁸ The testimony of the two alleged DCK supporters who received funds from Mr. Zhylanbaev supported Mr. Zhylanbaev's claims. For example, one of the individuals who allegedly received funds "testified in court that she is a member of the organizing committee of the party *Alga, Kazakhstan!*," not the DCK.⁸⁹ Likewise, the other recipient testified that "[s]he does not know about the DCK program and has not familiarized herself with it. The indictment says she is a DCK supporter. But that is false information."⁹⁰

Exclusion of the Defense's Witnesses and Reliance on the Government's "Expert" Opinions

During the trial, the defense sought to call a fact witness (a member of *Alga, Kazakhstan!*) and an expert witness. Although the fact witness was important to the defense theory that Mr. Zhylanbaev had not been acting on behalf of the DCK but acting in election campaigning and promoting *Alga, Kazakhstan!*, the court rejected the request without explanation, according to defense counsel.⁹¹

In addition, the court refused to permit the defense to introduce its own expert to testify in court in response to the prosecution's expert witnesses, all of whom testified in court.⁹² As Mr. Zhylanbaev's defense counsel explained, Mr. Zhylanbaev's expert witness was central to the defense's theory that he did not express extremist ideas or participate in or support the activities of any extremist group.⁹³ Nevertheless, the court dismissed the defense expert witness's testimony because he was not an expert-philologist, and because the court determined that only a political expert would be appropriate to address the issues at hand.⁹⁴

Notwithstanding the court's dismissal of the defense's expert witness on these grounds, the court accepted testimony from several of the prosecution's own "expert" philologists

⁸⁸ *Id.*

⁸⁹ *Id.* pp. 9-10.

⁹⁰ *Id.* p. 8.

⁹¹ See Appeal to the Criminal Appeal Board of the City Court of Astana (Dec. 13, 2023), ¶ 6 (hereinafter "Appeal to Criminal Appeal Board"); Appeal Judgment, pp. 3-5.

⁹² Appeal Judgment, pp. 3, 6; Judgment, p. 23.

⁹³ Cassation Appeal, pp. 5-9.

⁹⁴ Judgment, p. 23 (stating that "he is a specialist-philologist and could not give an opinion on issues related to the scope of activity of the expert-politologist."). Although the prosecution had a political science expert examine the materials, it was also permitted to have expert philologists examine the materials.

on the same issue.⁹⁵ Although the indictment described the main goals of the DCK as “incitement of social enmity and discord, violent change of the constitutional order of the country, undermining national security and violent seizure of power,” these witnesses did not suggest or conclude that Mr. Zhylanbaev’s acts themselves qualified as incitement to violence or hatred. Rather, the witnesses appeared to base their conclusions solely on the fact that Mr. Zhylanbaev’s speech and activities diverged from the government’s narrative. For example, the witnesses testified that the DCK and *Alga, Kazakhstan!* had the “same goals,” and that *Alga, Kazakhstan!* sought to encourage “the formation of a negative opinion about the situation in the Republic of Kazakhstan [and] the activities of representatives of the authorities,” with the aim of “changing the government in the country as a whole.”⁹⁶ The witnesses further relied in support of these conclusions on social media posts by Mr. Zhylanbaev, in which he allegedly criticized President Tokayev for repressing political opposition,⁹⁷ alleged that the government had committed crimes against its citizens,⁹⁸ and promoted *Alga, Kazakhstan!* as an opposition political party.⁹⁹

As in the indictment, the court relied extensively on expert report No. 9295, and repeated much of the report’s conclusions that the prosecution had cited in the indictment as the basis for the charges against Mr. Zhylanbaev.¹⁰⁰

Access to Court Decisions

Throughout the trial, a central component of the prosecution’s theory of liability rested on allegations that Mr. Zhylanbaev had knowingly participated in the activities of an extremist organization, the DCK. The Yesil court’s decision banning the DCK as an extremist organization, however, is not public, and the court denied, without further explanation, the

⁹⁵ *Id.* pp. 9-16; Institute of Forensic Examinations of Astana, *Expert Opinion No.9295* (Aug. 18, 2023), pp. 2-3.

⁹⁶ Judgment, pp. 9-14.

⁹⁷ *Id.*, pp. 12-13 (“Tokayev said in March that he would ease the registration process, which is the opposite of tightening the screws. We get arrested, we get fined, we get harassed all the time. And also, the theme of this release of all political prisoners in Kazakhstan, on the contrary, recently political prisoners have been increasing.”).

⁹⁸ *Id.*, pp. 12-13 (“Nazarbayev’s inner circle has been robbing the people for 30 years . . . All those involved in crimes against the people should be arrested and their property confiscated in favor of the State.”); *id.* (“Can you trust Tokayev? After all, he ordered his own people to be shot ‘on sight and without warning’ and he encouraged Putin’s alien army to rule our country. Kazakhstan cannot change as long as it is ruled by the people of the old regime. Through their fault, only corruption and theft have developed in the country for more than 30 years.”).

⁹⁹ *Id.*, p. 13 (“There is no single party independent of the authorities in the current parliament. Therefore, there is no need to be surprised at the low standard of living of our people, legal lawlessness, and massive violations of human rights in our country. The current situation is a brake on the development of our country, and it must be changed”).

¹⁰⁰ *Id.*, p. 13-14.

defense counsel’s request for a copy of the Yesil court decision as “unfounded.”¹⁰¹ The prosecution did not otherwise explain during the trial why the DCK had been classified as an extremist organization under Kazakh law.

Judgment

On November 29, 2023, Mr. Zhylanbaev was convicted of violating Article 405(2) and Article 258(2) of the Criminal Code.

In reaching this determination, the trial court dismissed Mr. Zhylanbaev’s explanation that his rallies coincided with, but were not a part of, the DCK, and that his alleged activities in support of the DCK were in fact efforts to support Mr. Zhylanbaev’s own party, *Alga, Kazakhstan!*. Rather, the court relied entirely on the testimony of the prosecution’s own witnesses. In particular, the court cited the testimony of the two anonymous witnesses referenced above, who had expressed concern for their and their families’ security and who testified that they noticed “similarities” between the DCK and *Alga, Kazakhstan!* based on their review of different social media pages.¹⁰² For example, one of the anonymous witnesses testified that she noticed similarities between the political demands of the DCK and *Alga, Kazakhstan!*, such as “the return of the Constitution, closing of loans, [and] housing programs.”¹⁰³ Apart from these fact witnesses, the trial court based Mr. Zhylanbaev’s conviction almost entirely on the testimony of the prosecution’s experts, as discussed above.

On the basis of this testimony, the court concluded that Mr. Zhylanbaev, “knowing that there was a court decision to declare [the DCK] an extremist organization,” had “actively participated” in the “activities” of the DCK, in violation of Article 405(2).¹⁰⁴ Specifically, the trial court determined that due to Mr. Zhylanbaev’s “[s]ystematic participation in illegal rallies announced and organized by M.K. Ablyazov[,] . . . [Mr.] Zhylanbaev [w]as a supporter and follower of the ideas of [the DCK].”¹⁰⁵ In addition to Mr. Zhylanbaev’s alleged participation in the activities of the DCK, the court held that Mr. Zhylanbaev knowingly financed and provided information services to individuals engaged in extremist activities in violation of Article 258(2). According to the court, Mr. Zhylanbaev had provided support to the DCK by, among other activities, transferring funds to alleged DCK supporters.¹⁰⁶ The court reached this conclusion primarily on the basis of the

¹⁰¹ *Id.*, pp. 1, 20; Appeal Judgment, p. 7.

¹⁰² Judgment, pp. 6-7, 10.

¹⁰³ *Id.*, p. 6.

¹⁰⁴ *Id.*, p. 26.

¹⁰⁵ *Id.*, p. 3.

¹⁰⁶ *Id.*, pp. 17-18.

prosecution's allegations that Mr. Zhylanbaev had transferred funds to members of the DCK.¹⁰⁷ The recipients of the funds, however, testified that they were *not* members of the DCK and that the funds were intended for election campaigning for *Alga, Kazakhstan!*. Multiple witnesses likewise testified that Mr. Zhylanbaev collected the funds for *Alga, Kazakhstan!* campaigning, and the prosecution itself conceded that it did not have evidence linking the two funding recipients with the DCK.¹⁰⁸

Despite this testimony, the court concluded that both witnesses were affiliated with the DCK. The court reached this conclusion based on the fact that an alleged member of the DCK had recommended one of the two recipients to Mr. Zhylanbaev to assist with his speeches in support of *Alga, Kazakhstan!*.¹⁰⁹ Further, the court appears to have concluded that the second recipient was an alleged member of the Koshe Party, and accordingly that any funds she received should be considered to have been received by the DCK.¹¹⁰

In addition to Mr. Zhylanbaev's alleged involvement in transferring funds to DCK supporters, the trial court pointed to activities that it described as proving that Mr. Zhylanbaev had "provided information [and] financial and other services to individuals, knowing that they would be used by the organization [DCK], the activities of which are prohibited."¹¹¹ For example, the court concluded that Mr. Zhylanbaev had filmed a video advertising *Alga, Kazakhstan!* and criticizing the government, which in turn was shared on social media by an alleged member of the DCK. The trial court further determined that Mr. Zhylanbaev had provided support to the DCK by accepting comments and edits from an alleged member of the DCK (Ms. Aimagambetova) on his own political speech criticizing the government and promoting *Alga, Kazakhstan!*.¹¹² According to the court, the alleged member of the DCK who provided these edits instructed Mr. Zhylanbaev "to criticize the authorities of the [Republic of Kazakhstan] and other parties of Kazakhstan, unreasonably accusing them of dependence on the authorities."¹¹³ In addition, the court

¹⁰⁷ *Id.*, p. 20-26.

¹⁰⁸ *Id.*, pp. 8-10, 17-18, 22 (stating that it would "not consider the answer of the deputy prosecutor of Astana . . . that the prosecutor's office has no information about attributing Sarsenova J.Z. and Imangalieva B.E. to the participants of the banned organization").

¹⁰⁹ *Id.*, p. 21.

¹¹⁰ *Id.*, pp. 21-22 (holding that "[g]iven that the aims and objectives of the extremist organizations 'DCK' and 'Koshe Partasy' clearly show similarity and continuity in the forms and methods of their action, as well as the degree of interaction, the court considers that these organizations are in fact engaged in the same activities under different names.").

¹¹¹ *Id.*, pp. 20-21.

¹¹² *Id.*, pp. 18, 21.

¹¹³ *Id.*, p. 21.

stated that Mr. Zhylanbaev had privately messaged with an alleged member of the DCK about crowd funding for members of *Alga, Kazakhstan!* to pay the candidate registration fee for the elections.¹¹⁴

On this basis of Mr. Zhylanbaev's alleged participation in these activities, the court found Mr. Zhylanbaev guilty of knowingly supporting an "extremist" organization under Article 258(2). At times, however, the court also suggested these activities might constitute "participation" in the activities of an extremist organization under Article 405(2),¹¹⁵ eliding any distinction between the two offenses with which Mr. Zhylanbaev had been charged.

Upon finding Mr. Zhylanbaev guilty of both charges, the trial court sentenced him to seven years' imprisonment, as well as "deprivation of the right to engage in social and political activity, including the use of mass media and telecommunications networks" for three years.¹¹⁶

Appeal & Cassation Appeal

On December 13, 2023, Mr. Zhylanbaev appealed the trial court's conviction to the Criminal Appeal Board for the Astana City Court. As in his defense to the trial court below, Mr. Zhylanbaev explained that he had never been a member of the DCK, that mere interaction with Mr. Abylazov could not be considered a crime, and that the funds that Mr. Zhylanbaev had allegedly transferred to DCK supporters were for the purpose of collecting filing fees for *Alga, Kazakhstan!* candidates for the Majilis.¹¹⁷ Mr. Zhylanbaev's defense counsel further requested that the court of appeals permit the defense to present its expert witnesses, which the trial court had deemed to be inadmissible despite accepting testimony from witnesses introduced by the prosecution.¹¹⁸ According to defense counsel, "[t]he [trial] court's conclusions do not have a basis in fact, there is no evidence of any financing of banned organizations, and the similarities between the program of the *Alga, Kazakhstan!* opposition party and [the DCK's] program cannot serve as evidence of [Mr.] Zhylanbaev having been involved with [the DCK], since the slogans and demands of all the opposition parties share certain similarities."¹¹⁹

¹¹⁴ *Id.*, pp. 20-21.

¹¹⁵ See Appeal Judgment, p. 5; Judgment, p. 3.

¹¹⁶ Judgment, p. 26.

¹¹⁷ Appeal Judgment, pp. 5-6.

¹¹⁸ *Id.*, pp. 5-6.

¹¹⁹ *Id.*, pp. 5-6.

On January 19, 2024, the court of appeals rejected Mr. Zhylanbaev's appeal, as well as the efforts by the defense to present additional expert testimony.¹²⁰

In upholding the trial court judgment, the court of appeals concluded that Mr. Zhylanbaev had "participated" in the activities of the DCK based on the testimony of the anonymous fact witnesses and the prosecution's experts. For example, the court concluded that Mr. Zhylanbaev participated in the activities of the DCK based on "[t]he fact that the political demands of M. Ablyazov and M.T. Zhylanbaev were identical," and that both individuals "called for rallies indicating the same dates and locations."¹²¹ Under this theory, the court determined that the political rallies and other activities undertaken by Mr. Zhylanbaev on behalf of *Alga, Kazakhstan!* constituted participation in the events held by the DCK, and thus rendered Mr. Zhylanbaev's election campaign criminal.

With respect to Mr. Zhylanbaev's alleged provision of support to the DCK, the court of appeals likewise affirmed the trial court in its entirety, concluding that "[t]he fact that M.T. Zhylanbaev followed the orders and instructions of the [DCK] headquarters coordinator confirms that M.T. Zhylanbaev participated in [the DCK's] activities."¹²² The court further concluded that Mr. Zhylanbaev's alleged "video submissions, collection of funds, and [] transfer of funds on the orders of [the DCK] to specific individuals who were [DCK] supporters, serve[d] as evidence of the provision of informational, financial, and other services to the extremist [DCK] organization."¹²³

The court further affirmed the trial court's denial of defense counsel's request for a copy of the Yesil court decision banning the DCK as an extremist organization, on the grounds that the trial court had "correctly stated" that the Yesil court decision was a "well-known fact," despite the fact that the decision is not publicly available and the prosecution did not otherwise explain during the trial why the DCK had been classified as an extremist organization under Kazakh law.

On March 9, 2024, the defense filed a cassation appeal to the Kazakhstan Supreme Court. The Kazakhstan Supreme Court denied the appeal on June 5, 2024.¹²⁴ Mr. Zhylanbaev is currently still in custody.

¹²⁰ *Id.*, pp. 2-4.

¹²¹ *Id.*, p. 4.

¹²² *Id.*, p. 4.

¹²³ *Id.*, p. 7.

¹²⁴ Sania Toiken, *Supreme Court Finds "No Basis" to Review Zhylanbaev's Sentence* (June 5, 2024), <https://www.azattyq.org/a/32980442.html>.

METHODOLOGY



A. THE MONITORING PHASE

Because Mr. Zhylanbaev’s trial was closed to the public, TrialWatch was not present during Mr. Zhylanbaev’s trial or appeal. Accordingly, the following analysis is based on TrialWatch’s review of documents in Mr. Zhylanbaev’s case, including the indictment and judgment.

B. THE ASSESSMENT PHASE

To evaluate the trial’s fairness and arrive at a grade, TrialWatch Expert Stephanie Farior reviewed court documents and the draft of this report.

Ms. Farior concluded that the criminal proceedings against Mr. Zhylanbaev evinced an alarming disregard for international fair trial standards as well as for the rights to political participation, freedom of expression and association, peaceful assembly, and equality before the law without discriminating based on political opinion. The arrest itself violated the right not to be subjected to arbitrary arrest or detention, as it punished Mr. Zhylanbaev for peacefully expressing his views and assembling and associating with others. The charges themselves are based on an exceptionally broad and unforeseeable extension of the “extremism” law, asserting guilt simply because his views opposing the government were similar to the views of another opposition group that had been banned.

The conduct of Mr. Zhylanbaev’s trial showed contempt for international fair trial rights. The court held the entire trial in closed rather than public session. Mr. Zhylanbaev was not allowed to see a copy of the court judgment that banned the organization that the charges claimed he supported, depriving him of the right to adequate time and facilities to prepare a defense. The court also violated a bedrock fair trial right to call and examine witnesses under the same conditions as witnesses against him, leaving the prosecution’s witnesses unchallenged and untested. The court found Mr. Zhylanbaev guilty of providing financial support even though the prosecution conceded it did not have the evidence to support that charge. The court also violated the principle of *nullum crimen sine lege*, indicating a predetermined outcome by accepting the exceptionally broad and unforeseeable extension of the “extremism” law to allow the prosecution of Mr. Zhylanbaev in the first place. The foregoing actions strongly suggest that the charges had an improper motive — to punish and deter political opposition.

ANALYSIS



A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (“ICCPR”), ratified by Kazakhstan on January 24, 2006; jurisprudence and commentary from the United Nations Human Rights Committee, tasked with interpreting and monitoring implementation of the ICCPR; commentary from UN Special Procedures; and the Kazakh Constitution, Criminal Code, and Criminal Procedure Code. Notably, Article 4 of the Kazakh Constitution recognizes ratified international treaties as having primacy over domestic law. In addition, while the Republic of Kazakhstan is not party to the European Convention on Human Rights (“ECHR”), jurisprudence from the European Court of Human Rights (“ECtHR”) offers persuasive authority where relevant.¹²⁵

B. PRE-TRIAL VIOLATIONS

Arbitrary Detention

Article 9(1) of the ICCPR provides that “[n]o one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”¹²⁶

The United Nations Human Rights Committee has noted that with respect to detention, the concept of “arbitrariness” must be “interpreted broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”¹²⁷ Not only should pretrial detention be the exception and as short as possible, but also detention must be “lawful” (in accordance with domestic law) and “reasonable and necessary in all circumstances.”¹²⁸

In evaluating the reasonableness and necessity of detention, courts must undertake an “individualized determination” of the accused’s particular circumstances.¹²⁹ “Vague and

¹²⁵ Kazakhstan is not a member of the Council of Europe, although it does collaborate with the Council on regional initiatives. See “Central Asia,” Council of Europe, available at <https://www.coe.int/en/web/programmes/central-asia>.

¹²⁶ ICCPR, art. 9(1).

¹²⁷ Human Rights Committee, *İsmet Özçelik et al v. Turkey*, UN Doc. CCPR/C/125/D/2980/2017 (Sept. 23, 2019), ¶ 9.3.

¹²⁸ Human Rights Committee, *Cedeño v. Bolivarian Republic of Venezuela*, UN Doc. CCPR/C/106/D/1940/2010 (Dec. 4, 2012), ¶ 7.10.

¹²⁹ See U.N. Human Rights Committee, *General Comment No. 35*, UN Doc. CCPR/C/GC/35(Dec. 16, 2014), ¶ 38; Human Rights Committee, *Cedeño v. Bolivarian Republic of Venezuela*, UN Doc.

expansive [justifications] such as ‘public security’” fail to meet this standard.¹³⁰ Reference to the severity of the charges is likewise insufficient. As stated by the Committee, “[p]retrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances.”¹³¹ Courts must additionally examine whether non-custodial alternatives, such as bail and monitoring devices, “would render detention unnecessary in the particular case.”¹³² If exceptional circumstances exist that permit the imposition of detention, the accused is entitled to periodic review of whether detention is still necessary.¹³³ A judge “must order release” of an accused “[i]f there is no lawful basis for continuing the detention.”¹³⁴ In the recent case of *Umbetaliyev v. Kazakhstan*, the UN Working Group on Arbitrary Detention found that if the government does “not explain the threat posed by the conduct” of claimants “to the legitimate interests that States might invoke . . . namely respect for the rights, freedoms or reputations of others, national security, public safety, public order, [and] public health or morals,” “the arrest, trial and subsequent detention . . . is consequently arbitrary.”¹³⁵

No Legitimate Justification

The pretrial detention of Mr. Zhylanbaev violated the prohibition of arbitrary detention in Article 9 of the ICCPR. The Kazakh authorities had no legitimate justification for placing Mr. Zhylanbaev in pretrial detention and extending the same. Mr. Zhylanbaev was arrested and placed in pretrial detention on May 23, 2023.¹³⁶ He was not shown an arrest warrant at the time of his detention on criminal charges. Rather, according to Mr. Zhylanbaev’s defense counsel, Mr. Zhylanbaev was secretly taken, without his counsel’s knowledge, by the investigator and special forces officers from the detention center where he was serving a twenty-day administrative sentence. According to Mr. Zhylanbaev’s defense counsel, it was not until two days later, on May 25, 2023, that Mr. Zhylanbaev was first questioned as a suspect. On that same day, the investigative court ordered Mr.

CCPR/C/106/D/1940/2010, (Dec. 4, 2012), ¶ 7.10; Human Rights Committee, *Van Alphen v. the Netherlands*, UN Doc. CCPR/C/39/D/305/1988, (July 23, 1990) ¶ 5.8; Human Rights Committee, *Mikhail Marinich v. Belarus*, UN Doc. CCPR/C/99/D/1502/2006, (July 16, 2010), ¶ 10.4; Human Rights Committee, *Mukong v. Cameroon*, UN Doc. CCPR/C/51/D/458/1991, (Aug. 10, 1994), ¶ 9.8.

¹³⁰ Human Rights Committee, *General Comment No. 35*, UN Doc. CCPR/C/GC/35, (Dec. 16, 2014), ¶ 38.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*, ¶ 36.

¹³⁵ UNWGAD, *Concerning Azamat Umbetaliyev, Beket Mynbasov, Samat Adilov, Zhuldzybek Taurbekov, Zhasulan Iskakov, Nazim Abdrakhmanov, Ernar Samatov and Bolatbek Nurgaliyev (Kazakhstan)*, Opinion No. 33/2021, UN Doc. A/HRC/WGAD/2021/33 (Oct. 14, 2021), ¶¶ 69–70.

¹³⁶ *See supra* p. 13.

Zhylyanbaev's two-month detention, which was later prolonged until Mr. Zhylyanbaev's conviction on November 29, 2023. As a result, Mr. Zhylyanbaev spent more than six months in detention pending trial.

As noted above, legitimate grounds for detaining an individual pre-trial are risk of flight, risk of further commission of crime, and risk of interference with the evidence. The imposition of detention, including the extension of detention, must be necessary to achieve one of these objectives. In Mr. Zhylyanbaev's case, however, the relevant court orders disregarded these considerations and were instead based on the nature of the charges and severity of the sentence, if convicted. In fact, in the July 20, 2023, and August 11, 2023, decisions granting extensions of Mr. Zhylyanbaev's pre-trial detention, the court wrote that it "[took] into account only the type of criminal punishment that may be applied if the suspect is found guilty, his suspicion of committing the crime, and the social danger of the act committed."¹³⁷ The court here failed to undertake an "individualized determination" of Mr. Zhylyanbaev's particular circumstances and made its judgment despite the prosecution's failure to provide evidence that Mr. Zhylyanbaev posed a flight risk, would likely commit further crimes, or would likely tamper with evidence.

As such, based on the conduct reported, Mr. Zhylyanbaev's pretrial detention in a prison for six months, from May 25, 2023, to November 29, 2023, violated Article 9 of the ICCPR.

Deprivation of Liberty for Legitimate Exercise of Rights

The UN Human Rights Committee has stated that "[a]rrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant is arbitrary, including freedom of opinion and expression (art. 19), freedom of assembly (art. 21), [and] freedom of association (art. 22)."¹³⁸ The UN Working Group on Arbitrary Detention likewise deems detention resulting from "the legitimate exercise of human rights, such as arresting peaceful protesters for the mere exercise of their rights to freedom of opinion and expression, freedom of assembly and freedom of association" as arbitrary.¹³⁹ The Working Group "applies a heightened standard of review in cases in which the freedom

¹³⁷ In its May 25 2023, decision sanctioning Mr. Zhylyanbaev's detention, the court acknowledged that Mr. Zhylyanbaev's lawyer had "requested that the court consider the presence of the suspect's residence, job, family, and children, and based on this, asked to reject the sanctioning of detention and choose a preventive measure not involving isolation from society. The court, however, discounted this argument as irrelevant. The court further stated that, given the potential for long-term imprisonment, Mr. Zhylyanbaev, "while left at large, he may continue to commit crimes . . . or, under the threat of imprisonment, may hide from the court and the investigation." Although the court engaged in a rote recitation of these factors, it failed to cite any evidence justifying its conclusions.

¹³⁸ Human Rights Committee, *General Comment No. 35*, UN Doc. CCPR/C/GC/35 (Dec. 16, 2014), ¶¶ 17, 53.

¹³⁹ UNWGAD, Revised Fact Sheet No. 26, (Feb. 8, 2019), available at <https://www.ohchr.org/Documents/Issues/Detention/FactSheet26en.pdf>.

of expression and opinion is restricted or in which human rights defenders are involved.”¹⁴⁰

In *Elshibayev v. Kazakhstan*, the Working Group found the detention of a human rights defender arbitrary where the authorities had seemingly acted in response to the defender’s organization of peaceful rallies and exercise of his right to freedom of expression, including open criticism of the then-President in a speech uploaded to YouTube.¹⁴¹

Likewise, Mr. Zhylyanbaev’s deprivation of liberty was based on his exercise of protected rights — the right to freedom of expression, right to freedom of peaceful assembly, and right to freedom of association — under the ICCPR. The acts for which Mr. Zhylyanbaev was charged in the indictment constituted exclusively non-violent political speech, including the promoting of “Alga, Kazakhstan” and the organizing of “Alga, Kazakhstan’s” rallies. The indictment claims, for example, that Mr. Zhylyanbaev’s “statements, appeals and declarations . . . are defined as the formation of a negative opinion about the situation in the Republic of Kazakhstan, the activities of representatives of the authorities, as well as inducement to join the ranks of ‘Alga, Kazakhstan’ to participate in protest actions, take actions aimed at changing the power in the country as a whole.”¹⁴² Nowhere is it alleged that Mr. Zhylyanbaev encouraged or took part in violence. As will be discussed at further length below, speech that engenders criticism of and protest against the government is protected.

Thus, Mr. Zhylyanbaev’s arrest and detention appear to have been based on his exercise of the rights to freedom of expression, freedom of peaceful assembly, and freedom of association.¹⁴³ This rendered Mr. Zhylyanbaev’s deprivation of liberty arbitrary, in violation of Article 9 of the ICCPR.

Unlawful Detention

The UN Human Rights Committee has stated that under Article 9 of the ICCPR:

Any substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or

¹⁴⁰ UNWGAD, *Concerning Serikzhan Bilash (Kazakhstan)*, Opinion No. 43/20, UN Doc. A/HRC/WGAD/2020/43 (Dec. 14, 2020), ¶ 59; see also UNWGAD, *Concerning Azamat Umbetaliyev, Beket Mynbasov, Samat Adilov, Zhuldzybek Taurbekov, Zhasulan Iskakov, Nazim Abdrakhmanov, Ernar Samatov and Bolatbek Nurgaliyev (Kazakhstan)*, Opinion No.33/2021, UN Doc. A/HRC/WGAD/2021/33 (Oct. 14, 2021), ¶ 82.

¹⁴¹ UNWGAD, *Concerning Erzhan Elshibayev (Kazakhstan)*, Opinion No. 5/2021, UN Doc. A/HRC/WGAD/2021/5 (May 12, 2021), ¶¶ 4, 5, 60-62, 68.

¹⁴² Indictment, p. 4.

¹⁴³ See *infra*.

arbitrary interpretation or application. Deprivation of liberty without such legal authorization is unlawful.¹⁴⁴

The UN Working Group on Arbitrary Detention has likewise stated that “the principle of legality requires that laws be formulated with sufficient precision so that the individual can access and understand the law and regulate his or her conduct accordingly.” According to the Working Group:

[V]aguely and broadly worded provisions, which cannot qualify as *lex certa*, could be used to deprive individuals of their liberty without a specific legal basis, in violation of the due process of law upheld by the principle of legality.¹⁴⁵

Mr. Zhylyanbaev was detained and convicted pursuant to vague provisions of Articles 405 and 258 of the Kazakh Criminal Code that do not qualify as *lex certa*. Articles 405 and 258 are overly vague, rendering Mr. Zhylyanbaev’s deprivation of liberty on the basis of these provisions unlawful.

Article 405(1) criminalizes the “organization of activities of a public or religious association or other organization, concerning which there is an enforceable court decision to ban their activities or liquidate them in connection with the implementation of extremism or terrorism.” Article 405(2) criminalizes “[p]articipation in the activities of a public or religious association or other organization, concerning which there is an enforceable court decision to ban their activities or liquidate them in connection with the implementation of extremism or terrorism.”

There is, however, no definition of or limiting principles applied to the terms “[o]rganization,” “participation,” and “activities,” leaving their meaning uncertain. Could “[o]rganization” mean sending Telegram messages to other activists, or must it involve active solicitation of new members? The meaning of “activities” is similarly vague; “activities” could be events formally organized by the banned party, spontaneous and informal gatherings, or discussions about the party over social media or messaging platforms. Article 405 thus fails to provide individuals with fair notice of what conduct is prohibited.¹⁴⁶

Article 258, which prohibits the provision of financial or other support to extremist organizations, is likewise expansive. It is notably not limited to support for banned

¹⁴⁴ Human Rights Committee, *General Comment No. 35*, UN Doc. CCPR/C/GC/35 (Dec. 16, 2014), ¶ 22.

¹⁴⁵ UNWGAD, *Concerning Serikzhan Bilash (Kazakhstan)*, Opinion No. 43/20, UN Doc. A/HRC/WGAD/2020/43 (Dec. 14, 2020), ¶ 66; see also UNWGAD, *Waleed Abulkhair v. Saudi Arabia*, Opinion No. 10/2018, UN Doc. A/HRC/WGAD/2018/10 (July 4, 2018), ¶ 52.

¹⁴⁶ See UNWGAD, *Tran Du Thach v. Viet Nam*, Opinion No. 40/2022, UN Doc. A/HRC/WGAD/2022/40 (Nov. 4, 2022), ¶ 69.

organizations but also criminalizes support for organizations the defendant knew to be “extremist.”

In turn, the Law of the Republic of Kazakhstan “On Countering Extremism” defines extremism as

[A]ctions of individuals and (or) legal entities ... following extremist purposes ... : forcible change of the constitutional system, violation of the sovereignty of the Republic of Kazakhstan, integrity, inviolability and inalienability of its territory, undermining the national security and defense capacity of the state, forcible seizure of power or forcible retention of power, creation, management and participation in the illegal paramilitary forces, organization of armed rebellion and participation in it, incitement of social ... strife (political extremism)....¹⁴⁷

A wide range of acts is covered in Kazakh law by the term “extremism” — among other things, acts that potentially contravene Kazakhstan’s sovereignty or integrity; that undermine its security; and that incite strife — and none of the terms are defined. This, in turn, makes it difficult for an individual or organization to ensure that they avoid violating Article 258, since they may not be able to tell which organizations are “extremist.” The vague and overbroad wording of Articles 405 and 258 is susceptible to discriminatory enforcement in service of criminalizing political dissent and other protected free speech. Notably, various UN bodies have raised concerns about the “the broad formulation of the concepts of ‘extremism’ . . . under the [Kazakh] criminal legislation and the use of such legislation on extremism to unduly restrict freedoms of religion, expression, assembly and association.”¹⁴⁸

C. VIOLATIONS AT TRIAL

Right to a Public Trial

Article 14(1) of the ICCPR provides that “everyone shall be entitled to a fair and public hearing.” While this right is not absolute, the UN Human Rights Committee has made clear that even where a valid reason for excluding the public is invoked by a court, the exclusion must be narrowly tailored.¹⁴⁹ Thus, for instance, the Committee held in one

¹⁴⁷ Law on Countering Extremism, art. 1, available at https://adilet.zan.kz/eng/docs/Z050000031_.

¹⁴⁸ Human Rights Committee, *Concluding Observations on the second periodic report of Kazakhstan*, UN Doc. A/HRC/43/46/Add.1 (Aug. 9, 2016), ¶ 13; see also U.N. Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. A/HRC/43/46/Add.1 (Jan. 22, 2020), ¶¶ 14-15.

¹⁴⁹ See Human Rights Committee, *General Comment No. 32*, UN Doc. CCPR/C/GC/32 (Aug. 23, 2007), ¶ 29.

case “that the State party failed to explain why it was necessary to close the entire trial, including the hearings of the facts and evidence related to the charges of murder, robbery and illegal possession of weapons, instead of closing only part of the trial in order to protect rights of minors, or intimate and personal information of parties in the trial.”¹⁵⁰ In that case, the Committee found a violation of the right to a public trial.¹⁵¹

During Mr. Zhylanbaev’s trial, the trial court found that witnesses’ concerns over their security were justified and ordered the trial to proceed in a closed session.¹⁵² Even accepting the court’s justification for protecting the identities of two witnesses for security reasons,¹⁵³ there was no reason to close the entire trial, including the examination of experts, whose assessment was crucial to the court’s reasoning.

Right to Call and Examine Witnesses

The principle of equality of arms protected by Article 14(1) of the ICCPR requires “that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.”¹⁵⁴ The UN Human Rights Committee has found violations of Article 14(1) where courts have inexplicably denied requests to summon witnesses.¹⁵⁵ As an application of the equality of arms principle, Article 14(3)(e) of the ICCPR enshrines the right of defendants in criminal cases “to obtain the attendance and examination of witnesses on [their] behalf under the same conditions as witnesses against [them].”¹⁵⁶ 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.”¹⁵⁷ Article 14(3)(e)

¹⁵⁰ Human Rights Committee, *Y.M. v. Russian Federation*, UN Doc. CCPR/C/116/D/2059/2011 (May 13, 2016), ¶ 9.2. See also Human Rights Committee, *Saidov v. Tajikistan*, UN Doc. CCPR/C/122/D/2680/2015 (Sept. 20, 2018), ¶ 9.3.

¹⁵¹ Human Rights Committee, *Y.M. v. Russian Federation*, UN Doc. CCPR/C/116/D/2059/2011 (May 13, 2016), ¶ 9.2. See also Human Rights Committee, *Saidov v. Tajikistan*, UN Doc. CCPR/C/122/D/2680/2015 (Sept. 20, 2018), ¶ 9.3.

¹⁵² See *supra* p. 17; The Interdistrict Criminal Court of Astana, *Ruling on Closure of Criminal Case*, Case No. 7141-23-00-1/1030 (Oct. 30, 2023), p. 1.

¹⁵³ *Id.*

¹⁵⁴ Human Rights Committee, *General Comment No. 32*, UN Doc. CCPR/C/GC/32, (Aug. 23, 2007), ¶ 13.

¹⁵⁵ See Human Rights Committee, *Evrezov et al. v. Belarus*, UN Doc. CCPR/C/112/D/1999/2010 (Nov. 25, 2014), ¶ 8.9-9; Human Rights Committee, *Khomidova v. Tajikistan*, UN Doc. CCPR/C/81/D/1117/2002 (July 29, 2004), ¶ 6.5.

¹⁵⁶ ICCPR, art. 14(3)(e).

¹⁵⁷ Human Rights Committee, *General Comment No. 32*, UN Doc. CCPR/C/GC/32 (Aug. 23, 2007), ¶ 39.

does not establish an absolute right to call and examine witnesses but a right to call witnesses who are relevant,¹⁵⁸ if proposed in a timely manner in compliance with procedural requirements.¹⁵⁹

In *Allaberdiev v. Uzbekistan*, the Committee found a breach of Article 14(3)(e) where the accused was convicted of drug-related offenses.¹⁶⁰ In that case, defense counsel requested to call individuals involved with the investigation and individuals whom the accused alleged had planted the drugs.¹⁶¹ Although these witnesses were central to the defense theory that the case was fabricated, the court rejected the request, deeming the proposed testimony irrelevant.¹⁶² 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 eleven witnesses.¹⁶³

The right to call and examine witnesses includes the right to call expert witnesses.¹⁶⁴ In Mr. Zhylyanbaev’s case, the defense sought to call a fact witness who was a member of the *Alga, Kazakhstan!* organizing committee and an expert witness. Although the fact witness was important to the defense theory that Mr. Zhylyanbaev had not been acting on behalf of DCK but engaging in election campaigning and promoting *Alga, Kazakhstan!*, the court excluded the witness — without any explanation, according to defense counsel.¹⁶⁵ Similarly, the court excluded the defense expert witness from testifying in response to the prosecution’s expert witnesses, all of whom testified in court.¹⁶⁶ Mr. Zhylyanbaev’s expert witness was central to the defense theory that he did not express

¹⁵⁸ Human Rights Committee, *Saidov v. Tajikistan*, UN Doc. CCPR/C/122/D/2680/2015 (Sept. 20, 2018), ¶ 9.6.

¹⁵⁹ See Human Rights Committee, *Johnson v. Spain*, UN Doc. CCPR/C/86/D/1102/2002 (Mar. 27, 2006), ¶ 6.5; Human Rights Committee, *General Comment No. 32*, UN Doc. CCPR/C/GC/32 (Aug. 23, 2007), ¶ 39.

¹⁶⁰ Human Rights Committee, *Sirozhiddin Allaberdiev v. Uzbekistan*, UN Doc. CCPR/C/119/D/2555/2015 (May 18, 2017), ¶¶ 2.1–2.2, 8.8–8.9.

¹⁶¹ *Id.*, ¶¶ 2.1–2.2, 3.5.

¹⁶² *Id.*, ¶¶ 8.7–8.9.

¹⁶³ Human Rights Committee, *Saidov v. Tajikistan*, UN Doc. CCPR/C/122/D/2680/2015 (Sept 20, 2018), ¶ 9.6.

¹⁶⁴ See Human Rights Committee, *Pustovalov v. Russian Federation*, UN Doc. CCPR/C/98/D/1232/2003 (May 10, 2010), ¶ 8.4.

¹⁶⁵ See *supra* pp. 19–20; See Appeal to Criminal Appeal Board, ¶ 6.

¹⁶⁶ See *supra* pp. 19–20; Appeal Judgment, p. 3; Judgment, p. 23.

extremist ideas or participate in or support the activities of any extremist group.¹⁶⁷ The court excluded the defense expert witness without testing his arguments solely because he was an expert-philologist; the court determined that only a political expert would be appropriate to address the issues at hand.¹⁶⁸ Yet the court accepted testimony from prosecution expert-philologists on the same issue.¹⁶⁹

Given the lack of justification for the exclusion of the defense’s witnesses and that these witnesses were relevant to Mr. Zhylanbaev’s case, this conduct violated Article 14(3)(e).

Right to Equality of Arms (Use of Government “Experts”)

The court’s procedural decisions violated the core principle of the equality of arms. As noted above, the UN Human Rights Committee has explained that the principle of the equality of arms, as guaranteed by Article 14(1) of the ICCPR, requires “that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.”¹⁷⁰ The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has raised concerns about:

[The Kazakh authorities’] overreliance on ‘judicial experts’, notably those dealing with theology, philology and politics, in both pretrial and trial phases of extremism and terrorism procedures. Criminal charges of extremism are often brought solely on the basis of the opinions of experts whose requisite qualifications, independence and neutrality has not been established. ... In the view of the Special Rapporteur, the weight given to evidence analysis per se violates the principle of equality of arms and has profound implications on fair trials.¹⁷¹

The case against Mr. Zhylanbaev exemplifies this “overreliance.” Apart from Mr. Zhylanbaev’s social media posts and private messaging, the indictment and conviction

¹⁶⁷ See *supra* pp. 19-20; See Cassation Appeal, pp. 5-9.

¹⁶⁸ See *supra* pp. 19-20; Judgment, p. 23 (stating that “he is a specialist-philologist and could not give an opinion on issues related to the scope of activity of the expert-politologist”). Although the prosecution had a political science expert examine the materials, it was also permitted to have expert philologists examine the materials.

¹⁶⁹ Judgment, pp. 11-16; Institute of Forensic Examinations of Astana, *Expert Opinion No. 9295* (Aug. 18, 2023), pp. 2-3.

¹⁷⁰ Human Rights Committee, *General Comment No. 32*, UN Doc. CCPR/C/GC/32 (Aug. 23, 2007), ¶ 13.

¹⁷¹ Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. A/HRC/43/46/Add.1 (Jan. 22, 2020), ¶ 39.

relied solely on “expert” opinions, quoting their conclusions almost in full,¹⁷² to conclude that Mr. Zhylanbaev’s posts “contain signs of propaganda of extremist ideas and views” and “signs of participation in the activities of the DCK extremist organization.”¹⁷³ The judgment followed suit, basing the conviction almost exclusively on the testimony of the experts.¹⁷⁴ The judge’s refusal to allow the defense to call a responsive expert further compounded the denial of Mr. Zhylanbaev’s fair trial rights.¹⁷⁵

The court’s unquestioning reliance on the state witnesses’ findings, as well as the fact that the proposed defense expert was not allowed to testify, violated the equality of arms principle that is so central to the right to a fair trial.

Right To Be Presumed Innocent

Article 14(2) of the ICCPR guarantees that “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”¹⁷⁶ As the UN Human Rights Committee has explained:

The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act be treated in accordance with this principle.¹⁷⁷

In *Larranaga v. The Philippines* and *Ashurov v. Tajikistan*, the UN Human Rights Committee determined that the court’s failure to address serious evidentiary issues in its judgment violated the defendant’s right to be presumed innocent.¹⁷⁸ Likewise here, and as discussed below in more detail, the court accepted the prosecution’s assertions without requiring concrete evidence that Mr. Zhylanbaev intentionally participated in and

¹⁷² See *supra* pp. 16-17; See *e.g.*, Judgment, pp. 10-17; Institute of Forensic Examinations of Astana, Expert Opinion No.9295 (Aug. 18, 2023), pp. 8-11, 27.

¹⁷³ The Astana Police Department, Bill of Indictment (Sept. 23, 2023), pp. 3-5.

¹⁷⁴ See *supra* pp. 21-22; Judgment, pp. 15-16.

¹⁷⁵ See *supra* pp. 19; Appeal Judgment, p. 3; Judgment, p. 23.

¹⁷⁶ ICCPR, art. 14(2).

¹⁷⁷ Human Rights Committee, *General Comment No. 32*, UN Doc. CCPR/C/GC/32 (Aug. 23, 2007), ¶ 30; see also Human Rights Committee, *Saidov v. Tajikistan*, UN Doc. CCPR/C/122/D/2680/2015 (Sept. 20, 2018), ¶ 9.4.

¹⁷⁸ Human Rights Committee, *Larranaga v. The Philippines*, UN Doc. CCPR/C/87/D/1421/2005 (July 24, 2006), ¶ 7.4; Human Rights Committee, *Ashurov v. Tajikistan*, UN Doc. CCPR/C/89/D/1348/2005 (Mar. 20, 2007), ¶ 6.7.

supported extremist activities, and did not explain why it had rejected his defense that the conduct at issue was undertaken on behalf of his own opposition party and to finance the election campaigns of members of his party.¹⁷⁹ All told, the court presumed Mr. Zhylanbaev's guilt despite the fact that his guilt was not proven beyond a reasonable doubt and accepted the prosecution's claims over defense arguments without allowing the defense to mount a full defense. In doing so, the court fell far short of the requirement that it afford the accused the benefit of the doubt. This violated Mr. Zhylanbaev's right to the presumption of innocence.

Right to Have Adequate Facilities to Prepare a Defense

Under Article 14(3)(b) of the ICCPR, accused persons must have adequate time and facilities for the preparation of their defense. The UN Human Rights Committee has explained that "adequate facilities" entails access to documents and other evidence, including "all materials that the prosecution plans to offer in court against the accused or that are exculpatory."¹⁸⁰ The Committee has defined "exculpatory materials" not only as evidence demonstrating an accused's innocence but also as evidence that "could assist the defence."¹⁸¹ Restricted disclosure is justified only in limited circumstances, such as where necessary for national security or public safety. In the case of *Khoroshenko v. Russia*, for example, the Committee found that the complainant "did not receive [a] copy of the trial's records immediately after the first instance verdict was issued [and] that despite numerous requests, he was not given some documents he considered relevant for his defence."¹⁸² The Committee concluded that this conduct violated Article 14(3)(b).

In Mr. Zhylanbaev's case, the court refused to provide the defense with the Yesil court decision banning the DCK.¹⁸³ The court did not invoke national security or public safety grounds in denying the defense access to the decision, merely describing the defense's arguments in this regard as "unfounded."¹⁸⁴ The court's conduct was particularly egregious because the prosecution's case constituted a novel extension of the Yesil Court decision to the *Alga, Kazakhstan!* unregistered party, making access to the decision all the more crucial. Indeed, Mr. Zhylanbaev could not have contested the extent to which the platforms of the DCK and *Alga, Kazakhstan!* were or were not similar to what led the

¹⁷⁹ See *infra* pp. 42-45.

¹⁸⁰ Human Rights Committee, *General Comment No. 32*, UN Doc. CCPR/C/GC/32 (Aug. 23, 2007), ¶ 33 (internal citations omitted).

¹⁸¹ *Id.*

¹⁸² Human Rights Committee, *Khoroshenko v. Russian Federation*, UN Doc. CCPR/C/101/D/1304/2004 (Apr. 29, 2011), ¶ 9.7.

¹⁸³ See *supra* p. 20. Judgment, p. 20; Appeal Judgment, p. 7.

¹⁸⁴ See *supra* p. 20. Judgment, p. 20.

court to ban the DCK without access to the court's bases for deeming the former extremist. The court's refusal to provide a copy of the decision banning the DCK thus violated Mr. Zhylanbaev's right to adequate facilities, guaranteed by Article 14(3)(b) of the ICCPR.

Right to an Independent and Impartial Tribunal

Article 14(1) of the ICCPR guarantees the right to a hearing "by a competent, independent and impartial tribunal." This entails "actual independence of the judiciary from political interference."¹⁸⁵ In Mr. Zhylanbaev's case, the court rulings described above have consistently favored the ruling party and thereby removed opposition voices from the political arena. The violation of fair trial rights to silence opposition voices raises serious concerns about the tribunals' independence from political bias and influence.

Tribunals must also be impartial. Impartiality has two aspects: "First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbor 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. Second, the tribunal must also appear to a reasonable observer to be impartial."¹⁸⁶

The Committee has given a number of examples of what shows a tribunal's lack of impartiality. In *Khostikoev v. Tajikistan*, for example, the Committee found an Article 14(1) violation where court rulings hindered the preparation of an effective defense when it, *inter alia*, "ignor[ed] [counsel's] objections" and "refus[ed] to allow the possibility for the [defendant] to adduce relevant evidence."¹⁸⁷ Similarly, in *Toshev v. Tajikistan*, the Committee concluded that the court lacked impartiality where "several of the [defense] lawyers' requests were not given due consideration."¹⁸⁸

A number of features of the trial of Mr. Zhylanbaev would give a reasonable observer grounds for doubting the court's impartiality. First, as discussed above, the court closed the trial without adequate justification. Second, as described above, the court refused to order the prosecution to provide the defense with access to the court decision banning the DCK, which lay at the core of the prosecution's case.¹⁸⁹ Third, the court dismissed

¹⁸⁵ Human Rights Committee, *General Comment No. 32*, UN Doc. CCPR/C/GC/32 (Aug. 23, 2007), ¶ 19.

¹⁸⁶ *Id.* ¶ 21. See also Human Rights Committee, *Karttunen v. Finland*, UN Doc. CCPR/C/46/D/387/1989 (Nov. 5, 1992), ¶ 7.2; UNWGAD, *Ahmed Khaloui v. Tunisia*, Opinion No. 12/1994, UN Doc. E/CN.4/1995/31/Add.2 (Nov. 18, 1994), ¶ 6.

¹⁸⁷ Human Rights Committee, *Khostikoev v. Tajikistan*, UN Doc. CCPR/C/97/D/1519/2006 (Dec. 3, 2009), ¶¶ 7.2-8.

¹⁸⁸ Human Rights Committee, *Toshev v. Tajikistan*, UN Doc. CCPR/C/101/D/1499/2006 (Apr. 28, 2011), ¶ 6.6.

¹⁸⁹ Judgment, p. 20.

without explanation the defense's request to call a witnesses who could have testified to Mr. Zhylanbaev's participation in *Alga, Kazakhstan*!¹⁹⁰ and to call its own expert witness, who would have responded to the prosecution testimony,¹⁹¹ violating the defense right to call and examine witnesses. Fourth, as described above, the court's judgment dismisses all defense arguments and unequivocally accepts all prosecution allegations, ignoring significant flaws in the evidence to convict Mr. Zhylanbaev.¹⁹²

D. ADDITIONAL FAIRNESS CONCERNS

Principle of Legality

The principle of legality, *nullum crimen, nulla poena sine lege*,¹⁹³ is a core principle of criminal law and is "[o]ne of the fundamental guarantees of due process."¹⁹⁴ The ICCPR enshrines the legality principle in Article 15, which prohibits prosecution for acts that were not crimes when they were committed. This principle requires that "both criminal liability and punishment be[] limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty."¹⁹⁵ The reason is that "[i]t must be possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment."¹⁹⁶

The European Court of Human Rights has likewise held that under the principle of legality, only the law in place at the time of the alleged act can define a crime and this definition

¹⁹⁰ Appeal Judgment, p. 3.

¹⁹¹ *Id.* p. 3; Judgment. p. 23.

¹⁹² *See supra* pp. 21-23.

¹⁹³ The principle of legality is reflected in Article 11(2) of the Universal Declaration of Human Rights and is also enshrined in Article 15 of the ICCPR. *See* Universal Declaration of Human Rights, Article 11(2) ("No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed."); ICCPR, art. 15. The *nullum crimen* principle also features in other prominent human rights instruments, such as the European Convention on Human Rights (ECHR) and the American Convention on Human Rights (ACHR). *See* ECHR, art. 7; ACHR, art. 9.

¹⁹⁴ UNWGAD, *Waleed Abulkhair v. Saudi Arabia*, Opinion No. 10/2018, UN Doc. A/HRC/WGAD/2018/10 (July 4, 2018), ¶ 50.

¹⁹⁵ Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001), ¶ 7. *See also* Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, UN Doc. CCPR/C/GC/25 (Dec. 16, 2014), ¶ 22.

¹⁹⁶ Permanent Court of International Justice, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Advisory Opinion (Dec. 4, 1935), pp. 56-57.

must be clear and may not be extensively construed to the accused's detriment.¹⁹⁷ The ECtHR has developed a foreseeability test to determine if an offense is clearly defined, *i.e.*, when a person can know from the wording of the criminal-law provision and, if necessary, *via* the interpretation of the courts, what act or omission renders him liable.¹⁹⁸ Accordingly, any judicial interpretation or application of the rules of criminal liability must be (1) consistent with the essence of the offense and (2) reasonably foreseeable with legal advice if necessary.¹⁹⁹ The foreseeability of judicial interpretation relates both to the elements of the offense and to the applicable penalty.²⁰⁰ On the first requirement, the judicial interpretation must be reasonably in line with the wording of the provision of the criminal legislation in question as read in its context.²⁰¹ On the second requirement, the accused must have reasonably foreseen at the time of the alleged criminal act, if necessary with the assistance of a lawyer, that he risked being charged with and convicted of the crime in question.²⁰²

Mr. Zhylanbaev's prosecution and conviction violated the principle of legality. Specifically, the court expansively and unjustifiably interpreted Articles 405 and 258 of the Kazakh Criminal Code to find Mr. Zhylanbaev guilty of criminal offenses, despite the fact that Mr. Zhylanbaev could not reasonably have known that his peaceful political activity would be construed as extremist.

¹⁹⁷ See *Kokkinakis v. Greece*, Decision, ECtHR, App. No. 14307/88 (May 25, 1993), ¶ 52; see also *Sunday Times v. The United Kingdom*, Decision, ECtHR, App. No. 6538/74 (Apr. 26, 1979), ¶ 49; *Cantoni v. France*, Decision, ECtHR, App. No. 17862/91 (Nov. 11, 1996), ¶¶ 32–35.

¹⁹⁸ *Kokkinakis v. Greece*, Decision, ECtHR, App. No. 14307/88 (May 25, 1993), ¶ 52. The UN Human Rights Committee has also noted that “a particular act or omission gives rise to a conviction for a criminal offence . . . after a trial pursuant to which evidence is adduced to demonstrate that the elements of the offence have been proven to the necessary standard. If a necessary element of the offence, as described in national (or international) law, cannot be properly proven to have existed, then it follows that a conviction of a person for the act or omission in question would violate the principle of *nullum crimen sine lege*, and the principle of legal certainty, provided by article 15, paragraph 1.” See Human Rights Committee, *Nicholas v Australia*, UN Doc. CCPR/C/80/D/1080/2002 (Mar. 19, 2004), ¶ 7.5.

¹⁹⁹ *Plechkov v. Romania*, Decision, ECtHR, App. No. 1660/03 (Sept. 16, 2014), ¶ 75; *Sunday Times v. The United Kingdom*, Decision, ECtHR, App. No. 6538/74 (Apr. 26, 1979), ¶ 59; *SW v. United Kingdom*, Decision, ECtHR, App. No. 20166/92 (Nov. 22, 1995), ¶ 36; *Jorgic v. Germany*, Decision, ECtHR, App. No. 74613/01 (July 12, 2007), ¶ 100; *Korbely v. Hungary*, Decision, ECtHR, App. No. 9174/02 (Sept. 19, 2008), ¶ 71; *Vasiliauskas v Lithuania*, Decision, ECtHR, App. No. 35343/05 (Oct. 20, 2015), ¶¶ 141, 152, 155-157.

²⁰⁰ *Pessino v. France*, Decision, ECtHR, App. No. 40403 (Oct. 10, 2006), ¶¶ 35-36; *Dallas v. the United Kingdom*, Decision, ECtHR, App. No. 38395/12 (Feb. 11, 2016), ¶¶ 72-77; *Alimuçaj v. Albania*, Decision, ECtHR, App. No. 20134/05 (Feb. 7, 2012), ¶¶ 154-162; *Del Río Prada v. Spain*, Decision, ECtHR, App. No. 42750/09 (Oct. 21, 2013), ¶¶ 111-117; *Plechkov v. Romania*, Decision, ECtHR, App. No. 1660/03 (Sept. 16, 2014), ¶¶ 74-75.

²⁰¹ See *Jorgic v. Germany*, Decision, ECtHR, App. No. 74613/01 (July 12, 2007), ¶¶ 104-108.

²⁰² See *id.* ¶¶ 109-113.

The judicial application of Articles 405 and 258 of the Kazakh Criminal Code in this case is neither consistent with the essence of the offence nor reasonably foreseeable. As discussed in more detail below, both articles punish conduct aimed at intentional participation in or support of extremist activities, *i.e.*, forcible or violent change of government or constitutional order, incitement to racial, national or ethnic hatred, or incitement of religious discord or strife.²⁰³ Mr. Zhylanbaev neither participated in nor supported such activities, but instead sought to peacefully take part in a national election under the banner of his own newly created party, *Alga, Kazakhstan!*. The court nevertheless concluded that Mr. Zhylanbaev had engaged in extremist activities based primarily on alleged ideological similarities and alignment of platforms and actions between his party, *Alga, Kazakhstan!* and the DCK, an organization the Kazakh government has deemed extremist, and his alleged receipt of advice from members of the DCK regarding the promotion of *Alga, Kazakhstan!*. Such an expansive interpretation of Articles 405 and 258 is unreasonable and does not follow from reading the provisions of the criminal legislation. Mr. Zhylanbaev could not reasonably have foreseen at the time of the election campaign that his peaceful opposition to the government would be labeled as extremist activity and result in seven years of imprisonment.

Article 405.2 criminalizes participation in activities of an extremist organization, *i.e.*, one that has been liquidated or banned by a court.²⁰⁴ The criminal offence includes two elements: *first*, as explained by the Supreme Court of Kazakhstan, there must be an act (*actus reus*) of “[p]articipation in the group’s activities,” *i.e.*, direct performance by a person of the actions aimed at the functioning of the organization recognized by the court as extremist, including “joining the group (for example, taking an oath, membership in an organization engaged in . . . extremist activities, performing tasks and instructions of the group leader);”²⁰⁵ and *second*, there must be a specific intent (*mens rea*) to participate in extremist activities or in the preparation or commission of one or more criminal offenses of an extremist nature.²⁰⁶

The trial court, as affirmed by the appeals court, held that Mr. Zhylanbaev’s conduct satisfied the elements of Article 405(2).²⁰⁷ Broadly speaking, the court put forth a novel theory that the overlap between the political demands of the DCK and of Mr. Zhylanbaev

²⁰³ See Supreme Court of the Republic of Kazakhstan, *Normative Decree No. 11 On some questions of court practice on application of the legislation on terrorist and extremist crimes* (Dec. 8, 2017), ¶ 17.

²⁰⁴ Criminal Code of the Republic of Kazakhstan (hereinafter “CC”), Art. 405(2), available at https://www.unodc.org/uploads/icsant/documents/Legislation/Kazakhstan/3_Penal_Code_of_the_RK.pdf (Unofficial translation).

²⁰⁵ Supreme Court of the Republic of Kazakhstan, *Normative Decree No. 11 On some questions of court practice on application of the legislation on terrorist and extremist crimes* (Dec. 8, 2017), ¶ 21.

²⁰⁶ *Id.*; CC, arts. 19-20.

²⁰⁷ See *supra* pp. 21-23; Judgment, p. 26.

on behalf of *Alga, Kazakhstan!*, and calls for rallies by both — indicating the same dates and locations — constituted participation in activities of the DCK. The Court of Appeal explained the trial court’s decision in the following terms: “[t]he fact that the political demands of M. Abylazov and M.T. Zhylyanbayev were identical and that M. Abylazov and M.T. Zhylyanbayev called for rallies indicating the same dates and locations confirm that the latter was participating in the activities of D[C]K, since participation in the activities of an organization involves participation in the events held by said organization.”²⁰⁸ Under this theory, the court viewed political rallies and other activities undertaken by Mr. Zhylyanbaev on behalf of *Alga, Kazakhstan!* — even though *Alga, Kazakhstan!* had not been banned (and still has not been banned) by any court decision as extremist — as participation in the events held by the DCK and thus rendered Mr. Zhylyanbaev’s election campaign criminal. With respect to intent to participate in DCK activities, the court did not specifically analyze the intent prong of the crime, simply asserting that Mr. Zhylyanbaev knew that the DCK had been designated as extremist, as discussed further below.

Nothing in the court record supports the conclusion that Mr. Zhylyanbaev directly participated in the DCK’s activities. Reasonably assessed, the record shows only that Mr. Zhylyanbaev directly performed actions in the context of an election campaign (promotion of his political party on social media, fundraising appeals, *etc.*) aimed at the functioning of his *own* political party, *Alga, Kazakhstan!*, and not the DCK. As a baseline, overlap between political demands of the DCK and *Alga, Kazakhstan!* does not mean that participating in the activities of *Alga, Kazakhstan!* is equivalent to “participation” in the activities of the DCK. It is especially true for political demands that do not involve extremist activities or violence. For example, the court and the prosecution’s witness concluded that political demands from *Alga, Kazakhstan!*, such as “return of the Constitution, closing of loans, housing programs,” are similar to those of DCK and “indicate[] the similarity of ideas and political platforms between ‘DCK’ and ‘AK’.”²⁰⁹ An independent and fair-minded observer would not treat criticism of the political situation as extremism or consider it to be a distinguishing factor of organizations that engage in extremist activities. Under the court’s theory, a publication by a newspaper, for instance, criticizing Kazakhstan’s constitutional reform could also be considered extremism. Mr. Zhylyanbaev could not have foreseen that the creation of his party *Alga, Kazakhstan!*, social media posts advocating for and advertising his party and criticizing the government, and participation in rallies in support of his party, would make him an intentional participant in extremist activities.

This is particularly true given that there was no evidence that Mr. Zhylyanbaev was aware of any supposedly extremist activities by the DCK. Indeed, the DCK judgment allegedly exposing the DCK’s extremist activities was neither shared with Mr. Zhylyanbaev nor made

²⁰⁸ Appeal Judgment, p. 4.

²⁰⁹ Judgment, p. 7; Prosecutor’s Expert Opinion No. 9295 (Aug. 18, 2023), p. 17.

public.²¹⁰ While Mr. Zhylanbaev knew about the existence of the judgment banning DCK as an extremist organization,²¹¹ he could not have known without access to the substance of the judgment that “extremism in the activities of ‘D[C]K’” according to an opinion cited in the trial court’s judgment in his case, consists of the “formation of a negative image of the authorities, individual bodies and officials . . . ,”²¹² which in any event appears to be protected political speech and protest.

The court’s conclusion is all the more unreasonable given that nowhere does it establish Mr. Zhylanbaev’s intent to participate in DCK activities, stating only that “knowing[] that there was a court decision to declare D[C]K an extremist organization, [he] actively participated in the activities of D[C]K in Astana.”²¹³ Because the court unjustifiably construed Article 405 to convict Mr. Zhylanbaev, his prosecution and subsequent incarceration were arbitrary and without legal basis.

Turning to the second charge against Mr. Zhylanbaev, Article 258 criminalizes financing of or provision of other support to extremism²¹⁴ and requires (1) an act (*actus reus*) of “providing or collecting money or providing financial or information services to an individual or legal entity,” that is (2) committed by a person, who is aware (*mens rea*) of the “extremist nature of their activity or that the given property, provided information, financial and other kind of services will be used to carry out” extremist activities or provide support for an extremist group.²¹⁵

The trial court, as affirmed by the appeals court, held that Mr. Zhylanbaev knowingly financed and provided information services to individuals engaged in extremist activities.²¹⁶ The trial court came to this conclusion primarily on the basis of the prosecution’s allegations that Mr. Zhylanbaev had transferred funds to members of the DCK.²¹⁷ But the recipients of the funds testified that they were members of *Alga, Kazakhstan!*, not the DCK, and that the money was meant to be used for registering on

²¹⁰ Judgment, p. 20; Appeal Judgment, p. 7.

²¹¹ See Judgment, p. 19.

²¹² See *id.*, p. 17.

²¹³ *Id.*, p. 1.

²¹⁴ CC, art. 258.

²¹⁵ See Supreme Court of the Republic of Kazakhstan, *Normative Decree No. 11 On some questions of court practice on application of the legislation on terrorist and extremist crimes* (Dec. 8, 2017), ¶ 23.

²¹⁶ Judgment, p. 26; Appeal Judgment, p. 9.

²¹⁷ See *supra* pp. 21-23; Judgment, pp. 20-26.

behalf of *Alga, Kazakhstan!* in the upcoming elections.²¹⁸ Multiple witnesses likewise testified that Mr. Zhylanbaev collected the funds for *Alga, Kazakhstan!* campaigning.²¹⁹

Despite all this evidence, the court decided to conclude that Mr. Zhylanbaev had intentionally directed the funds to the DCK. For example, the court asserted that one of the two recipients was affiliated with the DCK because an alleged member of the DCK recommended the individual to Mr. Zhylanbaev to assist with his speeches in support of *Alga, Kazakhstan!*²²⁰ Yet this does not show that the recipient of funds was part of the DCK, let alone that the provision of funding would be tantamount to funding the group itself, as is required under Article 258.²²¹ The court's theory as to the second recipient of funds appears to have been that because she was an alleged member of the Koshe Party, any funds she received should be considered to have been received by the DCK.²²² This conflates two different groups, which were the subject of two different court decisions. It would not have been foreseeable that support provided to an individual allegedly affiliated with the Koshe Party would be considered support provided to the DCK, and all the more so without access to the underlying decisions designating these groups as extremist.

The extent of the lack of foreseeability of the eventual conviction is further evidenced by the court's rejection of the prosecution's own concession that it did not have evidence linking the two recipients of funding with the DCK.²²³ Indeed, the court said it would "not consider the answer of the deputy prosecutor of Astana . . . that the prosecutor's office has no information about attributing [the two fund recipients] to the participants of the banned organization."²²⁴

Accordingly, Mr. Zhylanbaev could not have foreseen that his transfer of funds to individuals who had disavowed any connection to the DCK would constitute the knowing provision of financial or other services to an extremist group in violation of Article 258. Moreover, even if these recipients of funds were affiliated with the DCK and intended to

²¹⁸ See *supra* pp. 18-19.

²¹⁹ See *supra* pp. 18-19; Judgment, pp. 8-10, 17-18.

²²⁰ Judgment, p. 21.

²²¹ The judgment itself articulates the standard as providing funding "knowing that they [the funds] would be used by the organization 'D[C]K.'" *Id.*, p. 20.

²²² *Id.*, pp. 21-22 (holding that "[g]iven that the aims and objectives of the extremist organizations 'D[C]K' and 'Koshe Partasy' clearly show similarity and continuity in the forms and methods of their action, as well as the degree of interaction, the court considers that these organizations are in fact engaged in the same activities under different names.").

²²³ *Id.*, p. 22.

²²⁴ *Id.*, p.22.

use the funds for DCK activities, there was no evidence to establish that Mr. Zhylanbaev knew as much, as is also required by Article 258.²²⁵

The court did point to specific activities undertaken by Mr. Zhylanbaev that it described as proving that he “provided information, financial and other services to individuals, knowing that they would be used by the organization ‘D[C]K’, the activities of which are prohibited.”²²⁶ These activities are the following: (i) Mr. Zhylanbaev filmed a video advertising his political party *Alga, Kazakhstan!* and criticizing the government that was shared on social media by an alleged member of the DCK;²²⁷ (ii) Mr. Zhylanbaev accepted comments and edits from an alleged member of the DCK on his political speech criticizing the government and promoting *Alga, Kazakhstan!*;²²⁸ and (iii) Mr. Zhylanbaev privately messaged with an alleged member of the DCK about crowd funding for members of *Alga, Kazakhstan!* to pay candidate registration fee for the elections.²²⁹

The fact that alleged members of the DCK engaged with Mr. Zhylanbaev with respect to the activities of *Alga, Kazakhstan!* does not transform Mr. Zhylanbaev’s promotion of *Alga, Kazakhstan!* activities into support for DCK activities. And even if these individuals were members of the DCK, their alleged actions were in support of *Alga, Kazakhstan!*, not DCK.

In short, Mr. Zhylanbaev’s prosecution, conviction, and incarceration on the ground that he violated Articles 405 and 258 through his alleged participation in DCK activities, transfer of money to two individuals allegedly affiliated with the DCK, and correspondence with alleged DCK members about his *Alga, Kazakhstan!* campaign were not reasonably foreseeable and violated the principle of legality under the ICCPR, rendering his detention arbitrary. Under the court’s broad interpretation of these provisions, any engagement in political activities in opposition to the government could easily be construed as extremist activities, as happened here.

Right to Freedom of Expression

Mr. Zhylanbaev’s prosecution, conviction, and sentencing violate his right to freedom of expression. Article 19 of the ICCPR protects “the right to freedom of expression,” which

²²⁵ See Supreme Court of the Republic of Kazakhstan, *Normative Decree No. 11 On some questions of court practice on application of the legislation on terrorist and extremist crimes* (Dec. 8, 2017), ¶ 23.

²²⁶ Judgment, p. 20. Notably, at different points the courts also describe these activities as constituting participation in the activities of an extremist organization under Article 405, blurring the line between the acts underlying the Article 258 charge and the acts underlying the Article 405 charge. See Appeal Judgment, p. 5; Judgment, p. 3.

²²⁷ *Id.*, pp. 20-21.

²²⁸ *Id.*, pp. 18, 21.

²²⁹ *Id.*, pp. 20-21.

encompasses “freedom to seek, receive and impart information and ideas of all kinds . . . in any . . . media of [the author’s choice].”²³⁰ Protected means of expression “include all forms of audio-visual as well as electronic and internet-based modes of expression.”²³¹ Article 19 only permits restrictions on speech that (i) are “provided by law”, (ii) have a legitimate aim, and (iii) are necessary and proportionate to achieve that aim. None of these requirements for limiting Zhylyanbaev’s speech has been met by the state.

The UN Human Rights Committee has emphasized the importance of freedom of expression protections when it comes to political rights. Indeed, it has noted in the context of Article 19 that in its General Comment No. 25 on participation in public affairs and the right to vote, the Committee “elaborated on the importance of freedom of expression for the conduct of public affairs and the effective exercise of the right to vote,” stating that [t]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential.” The Committee has further stressed that in “circumstances of public debate concerning public figures in the political domain and public institutions,” the “value placed by the Covenant upon uninhibited expression is particularly high.”²³²

Mr. Zhylyanbaev’s activities on behalf of *Alga, Kazakhstan!* and criticism of the government constitute protected expression under Article 19. With the exception of the allegation that Mr. Zhylyanbaev provided financial support to DCK, the charges under Articles 405 and 258 were based on speech (in particular, calls to attend unsanctioned rallies, social media posts promoting *Alga, Kazakhstan!* and criticizing the government, and videos posted online campaigning for *Alga, Kazakhstan!*) in which Mr. Zhylyanbaev did not call for or otherwise incite any form of violence, hostility, or discrimination. For example, the trial court reproduced four of Mr. Zhylyanbaev’s social media posts in the judgment as evidence of his guilt: one criticizing President Tokayev for repressions against political opposition in the context of the then-upcoming elections;²³³ two others containing allegations that

²³⁰ The UN Working Group on Arbitrary Detention has previously explained, that “under [no] circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest [...], be compatible with article 19 [of the ICCPR].” See UNWGAD, *Kem Sokha v. Cambodia*, Opinion No. 9/2018, UN Doc. A/HRC/WGAD/2018/9 (June 5, 2018), ¶ 42.

²³¹ U.N. Human Rights Committee, *General Comment No. 34, Article 19, Freedoms of Opinion and Expression*, UN Doc. CCPR/C/GC/34 (Sept. 12, 2011), ¶ 12.

²³² Human Rights Committee, *General Comment No. 34*, UN Doc. CCPR/C/GC/34 (Sept. 12, 2011), ¶ 38. See e.g., UNWGAD, *Kem Sokha v. Cambodia*, Opinion No. 9/2018, UN Doc. A/HRC/WGAD/2018/9 (June 5, 2018), ¶ 41; UNWGAD, *Mohammed Abbou v. Tunisia*, Opinion No. 41/2005, UN Doc. A/HRC/4/40/Add.1 (Feb. 2, 2007), ¶¶ 27-28; UNWGAD, *Su Changlan v. China*, Opinion No. 39/2015, UN Doc. A/HRC/WGAD/2015/39 (Feb. 25, 2016), ¶¶ 22-24, 27, 29-30. See also UNWGAD, *Pongsak Sriboonpeng v. Thailand*, Opinion No. 44/2016, UN Doc. A/HRC/WGAD/2016/44 (Jan. 17, 2017), ¶ 29.

²³³ Judgment, p. 12 (“Tokayev said in March that he would ease the registration process, which is the opposite of tightening the screws. We get arrested, we get fined, we get harassed all the time. And also,

the government had been committing crimes against citizens;²³⁴ and the fourth promoting *Alga, Kazakhstan!* as an opposition political party.²³⁵

The limitation imposed on Mr. Zhylanbaev's protected speech — *i.e.*, Mr. Zhylanbaev's criminal prosecution, conviction and sentencing — was unlawful because: (i) it was not provided by law; (ii) it was not in place to pursue a legitimate aim, and (iii) it was not necessary or proportionate for achieving a legitimate aim.²³⁶ His right to freedom of expression was therefore violated.

First, as a threshold matter, the charges against Mr. Zhylanbaev failed to meet the requirement that a limitation on expression be clearly and specifically prescribed by law. As discussed earlier in this report, Articles 405(2) and 258 are impermissibly vague, making it difficult for individuals to know in advance what acts are prohibited and affording the authorities excessive discretion, leading to arbitrary decision-making.²³⁷

Second, any limitation on expression must be in place to pursue a legitimate aim, listed in Article 19(3) as protection of the rights or reputations of others, or protection of national security, public order, or public health or morals. The state must demonstrate “in specific and individualized fashion [of] the precise nature of the threat ... [and] a direct and immediate connection between the expression and the threat.”²³⁸

With respect to the supposed threat, the court relied on expert findings characterizing Mr. Zhylanbaev's videos and social media posts as criticisms of, and supporting the formation of, negative opinions regarding the government.²³⁹ For example, one political expert

the theme of this release of all political prisoners in Kazakhstan, on the contrary, recently political prisoners have been increasing, and just to stop the repression of peaceful citizens who say anything.”).

²³⁴ *Id.* (“Nazarbayev's inner circle has been robbing the people for 30 years All those involved in crimes against the people should be arrested and their property confiscated in favor of the State.”); *id.*, p. 13 (“Can you trust Tokayev? After all, he ordered his own people to be shot ‘on sight and without warning’ and he encouraged Putin's alien army to rule our country. Kazakhstan cannot change as long as it is ruled by the people of the old regime. Through their fault, only corruption and theft have developed in the country for more than 30 years.”).

²³⁵ *Id.*, p. 13 (“There is no single party independent of the authorities in the current parliament. Therefore, there is no need to be surprised at the low standard of living of our people, legal lawlessness, and massive violations of human rights in our country. The current situation is a brake on the development of our country, and it must be changed”).

²³⁶ See Human Rights Committee, *Kim v. Republic of Korea*, UN Doc. CCPR/C/64/D/574/1994 (Nov. 3, 1999), ¶ 12.2. See also U.N. Human Rights Committee, *General Comment No. 34, Article 19, Freedoms of Opinion and Expression*, UN Doc. CCPR/C/GC/34 (Sept. 12, 2011), ¶¶ 33-35.

²³⁷ See *supra*.

²³⁸ U.N. Human Rights Committee, *General Comment No. 34, Article 19, Freedoms of Opinion and Expression*, UN Doc. CCPR/C/GC/34 (Sept. 12, 2011), ¶ 35.

²³⁹ Judgment, pp. 14-15 (expert testimony describing the posts “as the formation of negative opinions about the situation in the Republic of Kazakhstan, activities of the representatives of the authorities, and

opinion cited by the court found “signs of propaganda of extremist ideas and views,” stating that signs of propaganda “include discrediting the authorities [and] calling for a change in the constitutional order.”²⁴⁰ The same opinion cited by the court also found “signs of participation in the activities of the extremist organization” DCK.²⁴¹ But seeking to create negative opinions of the current government to pursue peaceful change to a country’s leadership through elections is not the kind of threat sufficient to justify restrictions on speech. Neither the prosecution nor court specified any other reasons why Mr. Zhylyanbaev’s speech might have threatened national security or public order.

Third, with respect to the necessity and proportionality requirements, even if a restriction pursues a legitimate aim, a restriction on speech is not deemed “necessary” if the aim could be achieved through means that are less restrictive of the right of free speech. A restriction can therefore still violate Article 19 and its test of necessity “if the protection could be achieved in other ways that do not restrict freedom of expression.”²⁴² A restriction must be the “least intrusive instrument amongst those which might achieve their protective function.”²⁴³ States must therefore meet a high threshold before instituting criminal prosecutions based on speech. As the Johannesburg Principles on National Security, Freedom of Expression and Access to Information declare:

No one may be punished for criticizing or insulting the nation, the state or its symbols, the government, its agencies, or public officials . . . unless the criticism or insult was intended and likely to incite imminent violence.²⁴⁴

Although the indictment describes the main goals of the DCK as “incitement of social enmity and discord, violent change of the constitutional order of the country, undermining national security and violent seizure of power,” the prosecution did not allege and the court did not find that Mr. Zhylyanbaev’s acts themselves constituted incitement to violence or hatred.²⁴⁵ Indeed, as discussed in this report, it appears that Mr. Zhylyanbaev’s speech

inducement to join the ranks of *Alga, Kazakhstan!* to commit actions aimed at changing the power in the country as a whole.”). The expert further noted that the materials at issue functioned “to inform several readers and listeners about the negative, from the point of view of the authors, socio-political, socio-economic situation in the country, negative characteristic of the activities of the authorities, as well as to inform about the activities of ‘*Alga, Kazakhstan!*’, ideology and plans of these organizations.” *Id.*, p. 12.

²⁴⁰ *Id.*, p. 14.

²⁴¹ *Id.*, pp. 3, 15-17.

²⁴² Human Rights Committee, *General Comment No. 34, Article 19, Freedoms of Opinion and Expression*, UN Doc. CCPR/C/GC/34 (Sept. 12, 2011), ¶¶ 33, 38.

²⁴³ *Id.* ¶ 34.

²⁴⁴ Johannesburg Principles on National Security, Freedom of Expression and Access to Information, UN Doc. E/CN.4/1996/39, ANNEX (Oct. 1, 1995), Principle 7.

²⁴⁵ Indictment, pp. 1-2, 4.

and activities were found to be criminal simply because they criticized the government. For instance, in the judgment, the trial court stated that Mr. Zhylanbaev had been instructed to “criticize the authorities of the [Republic of Kazakhstan] and other parties of Kazakhstan, unreasonably accusing them of dependence on the authorities.”²⁴⁶ Whether or not this criticism was well-founded, it is not necessary or proportionate to prosecute someone for expressing it. In one comparable case, after reviewing the substance of a detainee’s public proclamation, the UN Working Group on Arbitrary Detention found “no appeal for violence” and concluded that “vigorous political criticism” could not be regarded as unlawful.²⁴⁷

Finally, the court’s conviction of Mr. Zhylanbaev resulted not only in his sentence of incarceration for seven years but also a three-year ban on political and civic activism, including through social media.²⁴⁸ This measure impermissibly restricts protected speech, which—as detailed above—includes political discourse. Not only does this ban not pursue a legitimate aim, but the ban is also neither necessary nor proportionate given the ban’s expansiveness in prohibiting Mr. Zhylanbaev from engaging in any political activism for three years, without exception.

For these reasons, to the extent Mr. Zhylanbaev’s conviction and incarceration under Articles 405 and 258 was predicated upon his online speech, it violated his right to freedom of expression.

Right to Peaceful Assembly

Mr. Zhylanbaev’s prosecution, conviction and sentencing violated his right to peaceful assembly. The right to freedom of peaceful assembly is guaranteed under Article 21 of the ICCPR. Article 21 “protects the non-violent gathering by persons for specific purposes, principally expressive ones. It constitutes an individual right that is exercised collectively. Thus, inherent to the right is an associative element.”²⁴⁹ Article 21 protection extends to organized and spontaneous assemblies alike, as well as to participants, organizers, and anyone disseminating information about or otherwise facilitating assemblies.²⁵⁰ “Given that peaceful assemblies often have expressive functions, and that political speech enjoys particular protection as a form of expression, it follows that

²⁴⁶ Judgment, p. 21.

²⁴⁷ UNWGAD, *Khemais Ksila v. Tunisia*, Opinion No. 5/1999, UN Doc. E/CN.4/2000/4/Add.1 (May 4, 1998), ¶¶ 12-13; see e.g., *Sürek and Özdemir v. Turkey*, Decision, ECtHR, App. Nos. 23927/94 & 24277/94 (July 8, 1999), ¶ 61; *Dmitriyevskiy v. Russia*, Decision, ECtHR, App. No. 42168/06 (Oct. 3, 2017), ¶ 100.

²⁴⁸ Judgment, p. 26.

²⁴⁹ Human Rights Committee, *General Comment No. 37*, UN Doc. CCPR/C/GC/37 (July 23, 2020), ¶ 4.

²⁵⁰ *Id.* ¶¶ 13-14, 33-34.

assemblies with a political message should enjoy a heightened level of accommodation and protection.”²⁵¹

As is the case with respect to restrictions on the right to free expression, permissible restrictions on the right to freedom of peaceful assembly are strictly limited and must (i) be prescribed by law, (ii) serve a legitimate aim, and (iii) be necessary to achieve and be proportionate to that objective.²⁵² Legitimate aims are listed as protection of national security, public safety, public order, public health or morals, or the protection of the rights and freedoms of others. This is an “exhaustive list.”²⁵³

In the indictment, the authorities alleged that Mr. Zhylanbaev, “realizing that the activities of the DCK organization are recognized as extremist and banned in the territory of the Republic of Kazakhstan by a court decision, and being an irreconcilable supporter of the extremist organization, repeatedly participated in unsanctioned meetings announced by Ablyazov M.K.”²⁵⁴ In turn, the trial court found that due to his “[s]ystematic participation in illegal rallies announced and organized by M.K. Ablyazov . . . M.T. Zhylanbaev [w]as a supporter and follower of the ideas of this extremist organization.”²⁵⁵ Additionally, the prosecution and conviction were based on Mr. Zhylanbaev’s promotion of rallies for *Alga, Kazakhstan!* on social media.²⁵⁶

The purpose of the rallies at issue was political; they were organized to present criticisms of the government and advertise Mr. Zhylanbaev’s political party as a movement in opposition to the government.²⁵⁷ The UN Human Rights Committee has stressed that “assemblies with a political message should enjoy a heightened level of accommodation and protection.”²⁵⁸ Rather than protecting such assemblies in Mr. Zhylanbaev’s case, the authorities instead violated his right to engage in them.

The authorities failed to demonstrate how their restriction of Mr. Zhylanbaev’s right of peaceful assembly met the limitations requirements of Article 21. The government’s aim in charging Mr. Zhylanbaev with criminal offences appears to have been to stifle political

²⁵¹ *Id.* ¶ 32.

²⁵² *Id.* ¶¶ 28-29, 36-40.

²⁵³ *Id.* ¶ 41.

²⁵⁴ Indictment, p. 2.

²⁵⁵ Judgment, p. 3.

²⁵⁶ *Id.*, p. 13.

²⁵⁷ *Id.*, pp. 10-14 (“[W]e have applied for a rally, a peaceful rally for 21 August. The topic is the registration of a political party.”).

²⁵⁸ Human Rights Committee, *General Comment No. 37*, UN Doc. CCPR/C/GC/37 (July 23, 2020), ¶ 32.

dissent. Indeed, there was no indication in Mr. Zhylanbaev's posts that the rallies were intended to be, or might become, violent, and neither the indictment nor the judgment allege that the protests were in fact violent. That they were unsanctioned is not grounds for criminal proceedings: "[i]f the conduct of participants in an assembly is peaceful, the fact that certain domestic legal requirements pertaining to an assembly have not been met by its organizers or participants does not, on its own, place the participants outside the scope of the protection of Article 21."²⁵⁹

For these reasons, to the extent Mr. Zhylanbaev's conviction and detention under Articles 405 and 258 were predicated upon his attendance of peaceful rallies, his conviction and detention violated his right to peaceful assembly.

Right to Freedom of Association

Mr. Zhylanbaev's prosecution, conviction and sentencing violated his right under Article 22 of the ICCPR to freedom of association. In interpreting Article 22, the UN Human Rights Committee has stated that "the existence and operation of associations, including those that peacefully promote ideas not necessarily favourably viewed by the Government or the majority of the population, is a cornerstone of any democratic society."²⁶⁰ Article 22 prohibits governments from restricting freedom of association unless the restriction meets the same requirements outlined in Article 19 on freedom of expression and Article 21 on freedom of peaceful assembly. Restrictions on associations based on their divergence from the agenda of the ruling party violate the right to freedom of association.²⁶¹ Mr. Zhylanbaev was prosecuted and sentenced to seven years in prison for allegedly participating in the activities of a banned organization, the DCK. As discussed above, the indictment and trial record failed to show that the charged acts constituted participation in the activities of the DCK. Instead, it appears Mr. Zhylanbaev was prosecuted and convicted for participating in the activities of his own opposition political party, *Alga, Kazakhstan!*, which was not banned.

²⁵⁹ *Id.* ¶ 16.

²⁶⁰ See Human Rights Committee, *Communication No. 2165/2012, Pinchuk v. Belarus*, UN Doc. CCPR/C/112/D/2165/2012, (Nov. 17, 2014), ¶ 8.4. The Committee has found that a government's refusal to register a human rights organization, and the subsequent criminal conviction of the organization's co-founder on related tax-evasion charges (for operating a bank account with dedicated funds for the organization despite the organization's unregistered status), violated the founder's right to freedom of association. *Id.*, ¶ 8.6.

²⁶¹ As noted by the European Court of Human Rights, that an organization's "political programme [is] considered incompatible with the current principles and structures of the . . . State does not make it incompatible with the rules and principles of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself." See *Case of the United Macedonian Organization Ilinden-Pirin and Others v. Bulgaria*, ECtHR, App. No. 59489/00, (Oct. 20, 2005), ¶ 61.

The government presented no evidence showing that their restriction on Mr. Zhylanbaev's freedom of association met the requirements of legality, legitimacy and necessity. Any communication or contact he may have had with individuals who are members of another organization such as the DCK, without proof that the organization itself was engaged in extremist activities, is protected activity under Article 22.

For these reasons, to the extent that Mr. Zhylanbaev's conviction under Articles 405 and 258 was predicated upon his alleged participation in the activities of *Alga, Kazakhstan!* and the DCK, it violated his right to freedom of association.

Right to Take Part in Public Affairs

The wholesale ban on Mr. Zhylanbaev's political activities likewise violates his right to participate in public affairs. Article 25 of the ICCPR entitles "every citizen . . . without unreasonable restriction . . . [t]o take part in the conduct of public affairs, directly or through freely chosen representatives." As the UN Human Rights Committee has noted, citizens "take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves."²⁶² The Human Rights Committee has emphasized that a State may not ban someone from peaceful political activities just because the person's views do not align with those of the State: "No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of . . . political or other opinion."²⁶³

Notably, the Human Rights Committee has highlighted the interdependence of the exercise of political rights in Article 25 with the freedoms of opinion, expression, association and peaceful assembly:

In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and

²⁶² Human Rights Committee, *General Comment No. 25*, UN Doc. CCPR/C/21/Rev.1/Add.7 (Aug. 27, 1996), ¶ 8.

²⁶³ *Id.*

meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.²⁶⁴

In this regard, the Human Rights Committee has stated in applying Article 25 that “citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members.”²⁶⁵ The Committee’s General Comment notes, moreover, that:

The right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25. Political parties and membership in parties play a significant role in the conduct of public affairs and the election process.²⁶⁶

The criminal prosecution of Mr. Zhylanbaev for his peaceful political activities without reasonable or objective grounds, along with the subsequent sanctions imposed on him, violated his rights under Article 25.

Right to Equality Before the Law

The rights violations set out above demonstrate that the criminal proceedings against Mr. Zhylanbaev also violated his right to equality before the law. Article 26 of the ICCPR provides that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . political or other opinion.” The term “discrimination” in the Covenant means “any distinction, exclusion, restriction or preference” based on any of the prohibited grounds that has “the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”²⁶⁷ Beyond the specific guarantees in the ICCPR, Article 26 “prohibits discrimination in law or in fact in any field regulated and protected by public authorities.”²⁶⁸

²⁶⁴ *Id.*, ¶ 25.

²⁶⁵ Human Rights Committee, *Gauthier v. Canada*, UN Doc. CCPR/C/65/D/633/1995, (May 5, 1999), ¶ 13.4.

²⁶⁶ Human Rights Committee, *General Comment No. 25*, UN Doc. CCPR/C/21/Rev.1/Add.7, (Aug. 27, 1996), ¶ 26.

²⁶⁷ Human Rights Committee, *General Comment No. 18*, UN Doc. CCPR/C/GC/37, (Nov. 10, 1989), ¶ 7.

²⁶⁸ *Id.*, ¶ 12.

According to the UN Working Group on Arbitrary Detention, several non-cumulative indicators serve to establish the discriminatory nature of a prosecution based on actual or perceived political opinion. These include the following: (1) the deprivation of liberty was part of a pattern of persecution against the detained person, including for example through previous detention; (2) other persons with similarly distinguishing characteristics have also been persecuted; or (3) the context suggests that the authorities have detained a person on discriminatory grounds or to prevent them from exercising their human rights.²⁶⁹

These factors characterize the proceedings against Mr. Zhylanbaev, thereby demonstrating the discriminatory nature of his prosecution based on political opinion. *First*, the Kazakh authorities had a pattern of persecution against Mr. Zhylanbaev, having previously arrested and detained him on multiple occasions for alleged participation in an unsanctioned protest and for promotion of the *Alga, Kazakhstan!* activities.²⁷⁰ *Second*, Kazakhstan has persecuted other persons with similar characteristics, including opposition leaders like Mr. Zhylanbaev and political parties like *Alga, Kazakhstan!*, through a campaign of routinely arresting or intimidating vocal critics of Kazakhstan's government, particularly under Article 405.²⁷¹ *Third*, the context suggests that the authorities prosecuted Mr. Zhylanbaev in order to prevent him from exercising his rights to freedom of expression and freedom to take part in public affairs, as his detention took place within a wider crackdown on freedom of expression and peaceful political opposition by the authorities in Kazakhstan.²⁷²

²⁶⁹ See HRC, *Report of the Working Group on Arbitrary Detention*, UN Doc. A/HRC/36/37 (July 19, 2017), ¶ 48.

²⁷⁰ See *supra* pp. 12-13. See also Saniya TOYKEN, *Activist Marat Zhylanbayev was arrested for 20 days*, Radio Azzat (May 3, 2023), available at <https://rus.azattyq.org/a/32391196.html> (reporting that the sentence was for a protest outside of "the EU representative office and Western embassies").

²⁷¹ See *supra* pp. 6-10. See also Amnesty International, *Kazakhstan 2023* (2023), available at <https://www.amnesty.org/en/location/europe-and-central-asia/kazakhstan/report-kazakhstan/> ("Ten individuals were convicted and imprisoned following unfair trials for being supporters of unregistered peaceful opposition political parties or movements allegedly linked to the [DCK] movement, designated 'extremist' by a court in the capital, Astana, in 2018."); Human Rights Watch, *Kazakhstan: Baseless 'Extremism' Case Heads to Court* (Feb. 8, 2024), available at <https://www.hrw.org/news/2024/02/08/kazakhstan-baseless-extremism-case-heads-court> (Between 2018 and 2022, the authorities harassed and prosecuted many dozens of government critics on vague and overbroad criminal charges relating to the crime of "extremism."); Open Dialogue et al., *Repressions and Political Prisoners in Tokayev's "New Kazakhstan"* (Aug. 18, 2023), available at <https://en.odfoundation.eu/a/684292,repressions-and-political-prisoners-in-tokayevs-new-kazakhstan/>.

²⁷² See *supra* pp. 6-10. See also HRC, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. A/HRC/43/46/Add.1 (Jan. 22, 2020), ¶¶ 38-42.; Human Rights Watch, *Kazakhstan: Crackdown on Government Critics* (July 7, 2021), available at <https://www.hrw.org/news/2021/07/07/kazakhstan-crackdown-government-critics> ("Authorities in Kazakhstan have targeted at least 135 people across the country with criminal investigations and prosecutions for alleged participation in banned "extremist" political opposition groups."); Freedom House, *Freedom on the Net 2021: Kazakhstan* (2021), available at

In general, when a deprivation of liberty results from political expression, there is a strong presumption that it also constitutes a violation of international law on the grounds of discrimination based on political views.²⁷³ This presumption applies in favor of Mr. Zhylyanbaev, and is further supported by the record showing that Mr. Zhylyanbaev has been repeatedly arrested for his political activism.²⁷⁴ Consequently, the proceedings violated Mr. Zhylyanbaev's right to equality before the law under Article 26 of the ICCPR.

Improper Motive

The judicial proceedings instituted against Mr. Zhylyanbaev appear to be motivated by a desire to intimidate and punish him for exercising his rights. The ICCPR and European Convention on Human Rights prohibit the abuse of judicial proceedings to intimidate, discriminate against, or punish individuals for the exercise of their rights. The UN Human Rights Committee has repeatedly held that the ICCPR proscribes improperly motivated prosecutions.²⁷⁵ The European Court has gone further and established jurisprudence on evaluating whether a legal proceeding has been driven by improper motives.²⁷⁶ Among the criteria on which the Court has relied in determining whether an improper motive exists are the following: the political context in which the prosecution was brought;²⁷⁷ the timing of the proceedings;²⁷⁸ whether the court was independent from the executive authorities;²⁷⁹ whether "there was a political impetus behind the charges";²⁸⁰ whether the underlying acts giving rise to the defendant's prosecution were protected under human

<https://freedomhouse.org/country/kazakhstan/freedom-net/2021> ("Vaguely worded legislation leaves ample space for interpreting criticism and opinions as defamation or extremism.").

²⁷³ UNWGAD, *Thirumurugan Gandhi v. India*, Opinion No. 88/2017, UN Doc. A/HRC/WGAD/2017/88 (Jan. 23, 2018), ¶ 43.

²⁷⁴ See *supra* pp. 12-13.

²⁷⁵ Human Rights Committee, *Khadzhiyev and Muradova v. Turkmenistan*, UN Doc. CCPR/C/122/D/2252/2013, (Apr. 6, 2018), ¶ 7.7 (determining that prosecution for human rights and journalistic work violates the right to liberty protected by ICCPR Article 9(1)). See also Human Rights Committee, *Melnikov v. Belarus*, UN Doc. CCPR/C/120/D/2147/2012, (Sept. 4, 2017), ¶ 8.8; Human Rights Committee, *Nasheed v. Maldives*, UN Doc. CCPR/C/122/D/2851/2016, (Apr. 4, 2018), ¶¶ 2.19, 8.7.

²⁷⁶ European Court of Human Rights, *Guide on Article 18 of the European Convention of Human Rights, Limitations on Use of Restrictions and Rights* (Aug. 31, 2022), ¶ 57, https://www.echr.coe.int/Documents/Guide_Art_18_ENG.pdf.

²⁷⁷ *Merabishvili v. Georgia*, ECtHR, App. No. 72508/13, (Nov. 28, 2017), ¶¶ 320-322.

²⁷⁸ *Selahattin Demirtaş v. Turkey (no. 2)*, ECtHR, App. No. 14305/17, Dec. 22, 2020, ¶ 429; *Merabishvili v. Georgia*, ECtHR, App. No. 72508/13, (Nov. 28, 2017), ¶¶ 320-322.

²⁷⁹ See *Merabishvili v. Georgia*, ECtHR App. No. 72508/13, (Nov. 28, 2017), ¶ 324.

²⁸⁰ *Merabishvili v. Georgia*, ECtHR App. No. 72508/13, (Nov. 28, 2017), ¶ 320.

rights law;²⁸¹ whether the prosecution had reasonable suspicion to bring the charges;²⁸² how the criminal proceedings were conducted;²⁸³ and whether the ultimate decision was well-reasoned and based on law.²⁸⁴ Further, acknowledging that it is often difficult to adduce direct evidence of a State's bad faith, the ECtHR has held that proof of an illegitimate purpose may be shown by circumstantial evidence²⁸⁵ and a "combination of the relevant case-specific facts."²⁸⁶

The ECtHR's ruling in *Navalnyy v. Russia* provides useful guidance on abuse of process in the context of suppressing political dissidents such as Mr. Zhylyanbaev. In finding that the repeated arrest and detention of Navalny was a violation of Article 18 of the European Convention — specifically, that the proceedings were aimed at preventing Navalny from participating in the domestic political process²⁸⁷ — the ECtHR cited indicia such as patterns of harassment of the political opposition, the lack of justification for some of the arrests, and the flawed conduct of the proceedings against Navalny.²⁸⁸

Applying the ECtHR's criteria, it appears that Mr. Zhylyanbaev's prosecution was aimed not at affixing liability for the alleged criminal violations, but rather at using the judicial process to suppress dissent.

First, Mr. Zhylyanbaev's prosecution occurred in the context of the suppression of political opposition in Kazakhstan and coincided with his campaign for election to the Majlis.²⁸⁹ Mr. Zhylyanbaev himself has repeatedly been subject to judicial, law enforcement, and

²⁸¹ *Kavala v. Turkey*, ECtHR App. No. 28749/18, (Dec. 10, 2019), ¶¶ 223-224.

²⁸² *Khodorkovskiy v. Russia*, ECtHR App. No. 5829/04, (May 31, 2011), ¶ 258; *Khodorkovskiy and Lebedev v. Russia*, ECtHR App. Nos. 11082/06 and 13772/05, (July 25, 2013), ¶ 908.

²⁸³ *Navalnyy v. Russia*, ECtHR App. No. 29580/12, (Nov. 15, 2018), ¶ 171.

²⁸⁴ *Nastase v. Romania*, ECtHR App. No. 80563/12, (Dec. 11, 2014), ¶ 107.

²⁸⁵ *Merabishvili v. Georgia*, ECtHR App. No. 72508/13, (Nov. 28, 2017), ¶¶ 316-317; *Ibrahimov and Mammadov v. Azerbaijan*, ECtHR App. No. 63571/16, (Feb. 13, 2020), ¶ 147.

²⁸⁶ *Kavala v. Turkey*, ECtHR App. No. 28749/18, (Dec. 10, 2019), ¶ 220.

²⁸⁷ *Navalnyy v. Russia*, ECtHR App. No. 29580/12, (Nov. 15, 2018), ¶¶ 174-176.

²⁸⁸ *Id.*, ¶¶ 167-176 (noting another indicia of abuse is targeting of the defendant amongst similarly situated individuals).

²⁸⁹ Analogously, in *Demirtas v. Turkey* (No. 2) the European Court found that the fact that the applicant's detention was "not an isolated example" but followed "a certain pattern" and that it took place "during two crucial campaigns relating to the referendum and the presidential election" was evidence that it "pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate." *Selahattin Demirtas v. Turkey* (no. 2), ECtHR App. No. 14305/17 (Dec. 22, 2020), ¶¶ 428-429, 437.

administrative harassment in connection with his activism, indicating that he is a government target.²⁹⁰

Second, the authorities should have known that their application of the law in this case was inconsistent with international standards, given that UN treaty bodies and special procedures had already expressed concern regarding the vagueness of Kazakhstan's anti-extremism legislation and its susceptibility to abuse.²⁹¹ At the same time, as discussed above, there was a dearth of credible evidence in support of the charges against Mr. Zhylanbaev.²⁹²

Third, institutions such as the U.S. State Department and United Nations Human Rights Committee have noted serious problems with the independence of the judiciary in Kazakhstan, including the influence of the executive branch.²⁹³ In this case specifically, there are grounds to believe that there was a "political impetus behind the charges," given the effort to portray criticism of the ruling political party as criminal, coupled with the court's verdict imposing a three-year ban on Mr. Zhylanbaev's participation in political affairs, preventing him from future civic engagement.²⁹⁴

Fourth, as has been the focus of this report, the conduct of the criminal prosecution of Mr. Zhylanbaev was marred by procedural irregularities and violations of his fair trial rights,²⁹⁵ and the decision convicting Mr. Zhylanbaev was predicated upon an unforeseeable judicial interpretation of vague and overbroad provisions of the Criminal Code.²⁹⁶

²⁹⁰ For instance, in June and July 2022, Mr. Zhylanbaev was twice detained and fined by the police in Astana Central Park for handing out leaflets calling for participation in *Alga, Kazakstan!*. See *supra*, pp. 12-13. His efforts to register an opposition political party, *Alga, Kazakhstan!*, were also rejected by the authorities, reportedly twenty-one times. See *supra*, p. 12. See also Appeal to Criminal Appeal Board, p. 3 ("Since May 2022, the organizing committee of the party 'Alga, Kazakhstan' has submitted 21 documents for registration of the party to the Ministry of Justice, but each time received groundless refusals.").

²⁹¹ Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. A/HRC/43/46/Add.1, (Jan. 22, 2020), ¶ 22.; see also Human Rights Committee, *Concluding Observations on the second periodic report of Kazakhstan*, UN Doc. A/HRC/43/46/Add.1 (Aug. 9, 2016), ¶ 13.

²⁹² Analogously, in *Kavala v. Turkey* the European Court found that "the prosecuting authorities had [no] objective information in their possession enabling them to suspect, in good faith, the applicant." *Kavala v. Turkey*, ECtHR App. No. 28749/18 (Dec. 10, 2019), ¶¶ 223-224.

²⁹³ 5 U.S. State Department, 2019 Country Reports on Human Rights Practices: Kazakhstan Mar. 11, 2020, p. 9; Human Rights Committee, *Concluding Observations on the Second Periodic Report of Kazakhstan*, UN Doc. CCPR/C/KAZ/CO/2 (Aug. 9, 2016), ¶ 37.

²⁹⁴ See *supra*.

²⁹⁵ See *supra*.

²⁹⁶ See *supra*.

Against this backdrop, it appears that the proceedings against Mr. Zhylanbaev were a means of intimidating and punishing him for his criticisms of the ruling party of Kazakhstan and his activities in organizing a dissenting political party.

CONCLUSION AND GRADE



When Kazakhstan ran for a seat on the UN Human Rights Council in 2021, the government claimed that “[u]pholding universal human rights has been a priority commitment of Kazakhstan since the inception of its statehood. . . . Kazakhstan commits to ensuring national compliance with the international instruments it has ratified.” That commitment is conspicuously absent in the proceedings against Mr. Zhylyanbaev.

The extent to which the government will go to crush political dissent is evident from the fact that the government could not find an existing law that would clearly serve as the basis for prosecuting Mr. Zhylyanbaev. To bring any charges against him, the government resorted to creating an exceptionally broad and unforeseeable interpretation of its vague and broadly worded “extremism” law. Similarity between one’s opinions and those of another organization is now considered sufficient to show “participation” in that organization.

Instead of “ensuring national compliance with the international instruments it has ratified,” Kazakhstan is instead treating those instruments with contempt. The proceedings against Mr. Zhylyanbaev were so riddled with human rights violations that they strongly suggest the charges were driven by an improper motive: to punish and deter political opposition. In fact, the extensive list of human rights violations committed by the government underscores its determination to suppress Mr. Zhylyanbaev’s peaceful political dissent; these rights include:

- the right to be tried by an independent and impartial tribunal;
- the right to be tried in a public hearing;
- the right to call and examine witnesses under the same conditions as witnesses against him;
- the right of access to evidence being used against him;
- the right to freedom of expression, including the right to impart information and ideas;
- the right to freedom of peaceful assembly;
- the right to freedom of association;
- the right to be free from arbitrary detention;
- the right to equality before the law and equal protection of the law without discrimination based on political opinion; and

- the right not to be prosecuted for acts that were not crimes when they were committed.

It is time for the government to put an end to its abuse of law in its desperate attempt to demolish political opposition. The court should overturn Mr. Zhylanbaev's conviction, release him from prison, and remove his three-year ban on participation in political activities.

GRADE:

F