
Advance Edited Version

Distr.: General
11 May 2023

Original: English

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-sixth session, 27 March–5 April 2023

Opinion No. 11/2023 concerning Zhanbolat Mamai (Kazakhstan)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 51/8.

2. In accordance with its methods of work,¹ on 22 November 2022 the Working Group transmitted to the Government of Kazakhstan a communication concerning Zhanbolat Mamai. The Government replied to the communication on 23 January 2023. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

¹ [A/HRC/36/38](#).

Submissions

Communication from the source

4. Zhanbolat Mamai, born on 15 June 1988, is a national of Kazakhstan. He is a journalist, the coordinator of the Club of Kazakhstani Journalists, leader of the unregistered Democratic Party and editor-in-chief of the newspaper *Tribune*.
5. According to the information received, in June 2011 Mr. Mamai participated in a peaceful demonstration in Zhanaozen, in support of the rights of oil workers. Following this, in August 2011, after a trial with no evidence provided, nor the attendance of his lawyer or family, Mr. Mamai was sentenced to 10 days of administrative arrest for allegedly resisting police officers.
6. On 15 June 2012, after participating in another peaceful protest in Zhanaozen, Mr. Mamai was held in pretrial detention under article 132 of the Criminal Procedure Code, in the framework of a criminal case under article 174 of the Criminal Code, for inciting social hatred. He was detained in a pretrial centre in Aktau for approximately 28 days until July 2012, when all charges were dropped and the investigation closed. No trial took place.
7. On 10 February 2017, officials of the anti-corruption agency conducted a search of Mr. Mamai's apartment, as well of the editorial office of the *Tribune* newspaper, where he was editor-in-chief. The search was carried out within the framework of a criminal case for alleged money laundering, under article 133, part 3, of the Criminal Code. According to the source, this was a fabricated case and there was no evidence of criminal activity. However, Mr. Mamai was arrested on that same day and sent to a pretrial detention centre in Almaty.
8. Once in the pretrial detention facility, he was allegedly held in an area called the "press hut" from 15 to 19 February, alongside individuals who had been previously convicted and who cooperated with the prison administration by obtaining confessions from other persons through physical and moral pressure. The source claims that Mr. Mamai was tortured during this period in the "press hut". An investigation of this matter was initiated but dropped at a later stage. After seven months in pretrial detention, Mr. Mamai was sentenced, on 7 September 2017, to three years of restriction of freedom and three years of prohibition from engaging in journalistic activities.
9. On 18 September 2021, Mr. Mamai organized a peaceful demonstration with about 100 participants, at the end of which activists were detained. Mr. Mamai organized another peaceful demonstration on 4 January 2022, after which he was briefly detained and released that night.
10. The core of the source's submissions is the claim that Mr. Mamai was most recently arrested on 25 February 2022, when he was on his way back home from work. A police car and several civilian cars followed him all day. Later that day, at approximately 7 p.m., law enforcement officers from the Almaty City Police Department took Mr. Mamai, his wife and a colleague away, inside their car, in a tow truck. Around 10 police cars supported the operation. According to the source, the police did not show a warrant or other decision by a public authority, nor did they provide a specific reason for the arrest, even after being asked for an explanation, and no reference was made to the law. The police officers did not introduce themselves and did not show any documents. The source provides a link to a video of the alleged moment of the arrest.²
11. Mr. Mamai was reportedly taken to the Nauryzbay police station and only there was he informed of the charges he was facing. The prosecutor reportedly accused him of a violation of the legislation on the procedure for organizing and holding peaceful assemblies as the basis for his deprivation of liberty.
12. In addition, the source indicates that article 785 of the Code of Administrative Offences was used as the basis for the arrest. Article 785 relates to measures to ensure the proceedings in the case of an administrative offence and provides for the administrative

² https://www.facebook.com/watch/live/?ref=watch_permalink&v=666810044634229.

detention of an individual in order to prevent an administrative offence, establish the identity of a suspect and draw up a protocol on an administrative offence.

13. On 25 February 2022, the day of Mr. Mamai's arrest, a court imposed an administrative sanction on him, consisting of 15 days of administrative arrest, due to the fact that he allegedly did not notify the authorities that he was planning to hold a peaceful rally on 13 February 2022, nor did he receive approval from them. However, the source claims that, at the same time, article 32 of the Constitution provides for the right to hold a peaceful rally and Mr. Mamai issued notifications about his intention through the media.

14. According to the source, on 12 March 2022, after 15 days of administrative detention for the organization of peaceful assemblies, Mr. Mamai was criminally charged and his administrative detention was modified to two months of pretrial detention in a criminal case. He was transferred to a pretrial detention centre.

15. Mr. Mamai remained detained, as he was charged with violating article 274 of the Criminal Code, regarding the deliberate dissemination of false information, and article 378 on insulting a representative of the authorities. These acts were allegedly recorded by law enforcement agencies at a peaceful demonstration on 18 September 2021 and between 2 November and 9 December 2021.

16. In relation to the charge of insulting a representative of the authorities, the source claims that, according to national legislation, criticism of the authorities is not prohibited, and the criminal prosecution body has confused criticism and insult. In the present case, there was no insult. Concerning the charge of dissemination of deliberately false information, the source alleges that in Mr. Mamai's speeches he called on the Government to conduct a credit amnesty for citizens of Kazakhstan who had fallen into a difficult economic situation. In addition, he explained in a number of broadcasts some of the norms of the domestic legislation regarding the problem of loans for citizens, at a time when there was a national discussion about this matter.

17. Nevertheless, law enforcement agencies claimed that Mr. Mamai was going to hide from the criminal prosecution and authorities during the pretrial investigation. Article 136 of the Code of Criminal Procedure provides the grounds for the application of preventive measures; if there are sufficient grounds to believe that the accused will hide from the criminal prosecution, from authorities or the court, the body conducting the criminal process has the right to apply to these persons measures of restraint. Article 137 of the Code of Criminal Procedure provides for arrest and additional restrictions as preventive measures.

18. According to the information received, Mr. Mamai's pretrial detention was imposed, allegedly because he had previously violated a court order, whereby he had an "obligation to appear", when he requested permission to go to Kyrgyzstan to receive necessary medical treatment, which was denied. The source claims that the Code of Criminal Procedure indicates that the procedural measure of coercion "obligation to appear" does not provide for a prohibition from travel or from leaving the country. This measure only establishes a duty of timely arrival before the investigator or court at their request.

19. Furthermore, the source claims that the Code of Criminal Procedure specifies that pretrial detention can only be applied to persons suspected of crimes for which the sentence would be at least five years of imprisonment.

20. Article 147 of the Code of Criminal Procedure is applicable only with respect to a suspect, accused or defendant in the commission of a crime for which the law provides for a penalty of imprisonment for more than five years. Reportedly, for the criminal offence of insulting a representative of the authorities (article 378 (2) of the Criminal Code), the maximum punishment is 40 days of arrest. For the crime of dissemination of knowingly false information (article 274 (2), clause 3, of the Criminal Code) the maximum punishment is three years in prison. This allegedly means that the pretrial detention of Mr. Mamai is not in conformity with national law.

21. According to the source, during Mr. Mamai's pretrial detention he was notified of two additional criminal charges. These were the organization of riots, under article 272 of the Criminal Code, in relation to the events of January 2022, and dissemination of deliberately false information during public events under article 274 of the Criminal Code.

22. However, on the organization of riots, the source claims that Mr. Mamai was actually calling for fair elections, political competition, the registration of political parties and the resignation of the Chairman of the Security Council of Kazakhstan. He did not support any form of violence, which is a required element of the crime. In relation to the charge of dissemination of deliberately false information, the source claims that it was because Mr. Mamai passed information about the presence of protesters participating in a peaceful rally, while this was information circulating on the Internet and article 32 of the Constitution protects the right to peaceful assembly.

23. It is reported that, on 2 November 2022, the pretrial detention of Mr. Mamai was modified to house arrest, while the case was referred to the court with three charges under articles 378 (2), 274 (2), clause 3, and 400 of the Criminal Code.

24. Under the imposition of house arrest, Mr. Mamai cannot leave his house, except for a court appearance for legal proceedings and hospitalization for treatment. In addition, he is prohibited from conducting telephone conversations, sending correspondence and using any means of communication using social networks and the Internet with other people. He is also prohibited from communicating with others, except for close relatives, as well as from engaging in the organization of and participation in meetings, rallies and speeches, among others.

25. The source states that the norms of national law provide grounds for deprivation of liberty, for example, in cases where the suspect was going to hide from criminal prosecution, which is allegedly not the case for Mr. Mamai.

26. According to the source, Mr. Mamai exercised his rights under articles 18, 19, 20, 21 of the Universal Declaration of Human Rights and articles 18, 19, 21, 22, 25, 26 of the International Covenant on Civil and Political Rights. He was deprived of his liberty as a result of the exercise of these rights. In addition, it is alleged that Mr. Mamai was deprived of his liberty because of his political beliefs.

27. It is alleged that the arrest and detention of Mr. Mamai should be considered as illegal and arbitrary, given that he was initially summoned as a witness, with the right to defence, in a criminal case about insulting government officials and spreading deliberately false information. In addition, the authorities did not state who they were when he was detained, they did not notify him of the charges against him and did not explain why he was being detained.

28. The source alleges violation of articles 9 and 14 of the International Covenant on Civil and Political Rights, as the detention procedures were violated, the charges were not urgently reported and the preventive measure in the form of detention was disproportionate. The charges Mr. Mamai is facing are criminal offences for which detention is not provided and the violation of the obligation to appear is not relevant, since Mr. Mamai did not know about it.

29. Importantly, the source notes that, since 2011, many opposition parties have been denied registration and their leaders have been criminally prosecuted, with opposition parties being declared extremists by court decisions and disqualified.

Response from the Government

30. On 22 November 2022 the Working Group transmitted the allegations from the source to the Government of Kazakhstan under its regular communications procedure. The Working Group requested the Government to provide, by 23 January 2023, detailed information about the current situation of Mr. Mamai and to clarify the legal provisions justifying his continued detention, as well as its compatibility with the country's obligations under international human rights law, and in particular with regard to the treaties ratified by the State. Furthermore, the Working Group called upon the Government to ensure Mr. Mamai's physical and mental integrity. In the current context of a global pandemic, and in accordance with the World Health Organization recommendations of 15 March 2020 concerning the response to the coronavirus disease (COVID-19) in places of detention, the Working Group urged the Government to prioritize the use of non-custodial measures at all stages of criminal

proceedings, including during the pretrial phase, during the trial and sentencing and after sentencing.

31. On 23 January 2023 the Government submitted its reply, in which it stated that on 28 October 2022, the criminal case against Mr. Mamai was brought before District Court No. 2 of the Bostandyq District of Almaty under articles 378 (2), 274 (2), clause 3, and 400 of the Criminal Code.³

32. The Government submits that Mr. Mamai was committed to trial because, in September 2021, as the leader of the unregistered Democratic Party, he spoke at an unauthorized rally attended by representatives of the mass media and an audience of 300 persons, at which he publicly insulted representatives of the authorities and the law enforcement agencies. This video was posted on YouTube and on the *Azattyq* TV channel.

33. Furthermore, in November 2021, in an attempt to destabilize the political situation, he falsely announced a credit amnesty on his Facebook page. As a result, the Government Agency for the Regulation and Development of the Financial Markets suffered material damage in the amount of 2,492,596 tenge. Thereafter, in January, Mr. Mamai, taking advantage of a tense situation in the Mangystau region that had been caused by an increase in gas prices, posted the rallies that had taken place in Zhanaozen on his personal social media pages and then urged everyone to gather in Republic Square in Almaty. As he did not receive sufficient support from the residents, he went on an illegal march during which he actively encouraged the residents to gather in front of the Almaty Arena ice rink.

34. The Government states that the court order of 2 November 2022, under which proceedings were initiated against Mr. Mamai and he was placed in pretrial detention as a preventive measure, has been rescinded as he is being charged with the commission of misdemeanours and crimes of medium gravity. The preventive measure taken is house arrest, accompanied by the restrictions stipulated in article 146 (2) of the Code of Criminal Procedure.

35. The criminal case has currently reached the stage of the main trial in open court proceedings.

36. The Government further states that on 7 September 2017, District Court No. 2 of the Medeu district of Almaty found Mr. Mamai guilty of theft of items of special value and sentenced him to three years of restriction of liberty with confiscation of property and deprivation of the right to work as a journalist for three years. According to the sentence, Mr. Mamai, conspiring with two other persons, the organizers of a criminal association, laundered a large amount of money stolen from a bank, namely \$110,000, which is equivalent to 15,950,000 tenge at the exchange rate of the National Bank of Kazakhstan in February 2009. The verdict has become final since it has not been challenged in appellate or cassation proceedings. The Government emphasized that the charges are of a general criminal nature and are unrelated to the social and political activities of Mr. Mamai.

37. As to the previous proceedings, the Government states that on 16 August 2011, the Aktau Specialized Court for Administrative Offences ruled that Mr. Mamai had violated the law on peaceful assembly,⁴ fined him 15,120 tenge for failure to comply with the legitimate demands of the police and imposed an administrative sanction of 10 days of detention. On 25 August 2011, the court of appeal upheld the ruling. It was established that on 8 August 2011, Mr. Mamai violated the requirements of the Act on the Procedure for Organizing and Holding Peaceful Assemblies, Rallies, Marches, Pickets and Demonstrations by attending an illegal meeting. He also insulted police officers and deliberately disobeyed their lawful demands.

38. Moreover, on 3 December 2021, the Specialized Inter-district Administrative Court of Almaty ruled that Mr. Mamai was guilty of committing the administrative offence of failure to comply with a court judgment, court decision or other judicial act and imposed an

³ These refer to: organization of an illegal rally; insulting representatives of the authorities through the mass media; deliberate dissemination of false information that entails a danger of violating public order and causing substantial harm to the rights and legitimate interests of citizens.

⁴ Article 373 (1) of the Code of Administrative Offences, as amended in 2001.

administrative penalty in the form of a fine of 14,585 tenge. The ruling was not appealed and became final on 15 December 2021. The case concerned Mr. Mamai's failure to enforce a court order to refute, within 10 days, on YouTube and on the channel Demokratiyalyk Kazakhstan (Democratic Kazakhstan) the videos posted on 10, 11 and 13 April 2021 on Facebook and on 11 April 2021 on Instagram, and to take down those videos.

39. On 10 February 2022, in the course of monitoring the personal page of Mr. Mamai on Facebook, it was found that, in violation of the Act on the Procedure for Organizing and Holding Peaceful Assemblies, Rallies, Marches, Pickets and Demonstrations, he had announced the holding of a peaceful rally on 13 February 2022 in Independence Square under the slogan "Assembly in memory of those killed in Bloody January". On 25 February 2022, the Specialized Inter-district Administrative Court of Almaty ruled that Mr. Mamai had committed an offence under article 488 (7) of the Code of Administrative Offences (organizing and/or holding meetings, rallies, demonstrations, marches, pickets or other public events in breach of statutory procedure) and sentenced him to 15 days of administrative detention. On 2 March 2022, the court of appeal upheld the ruling.

Further comments from the source

40. The reply of the Government was submitted to the source for further comments, which were provided on 29 January 2023. The source stated that on 26 January 2023, a new indictment was drawn up and a new charge was brought against Mr. Mamai.

41. Mr. Mamai is thus charged with the following criminal offences:

(a) Under article 378 (2) of the Criminal Code, publicly insulting a government official or using the media or telecommunications networks to do so;

(b) Under article 274 (2), clause 3, of the Criminal Code, dissemination of deliberately false information that creates a risk of violation of public order or causing significant harm to the rights and legitimate interests of citizens or organizations, or the interests of a society or State protected by law, using the media or telecommunications networks;

(c) Under article 272, part 1, organization of mass riots accompanied by violence, riots, arson, destruction, destruction of property, use of firearms, explosives or destructive devices, as well as armed resistance to a government representative, including using funds obtained from foreign sources.

42. Mr. Mamai therefore faces a maximum sentence of imprisonment of up to 10 years.

43. In relation to the charges laid in 2022, the source notes that Mr. Mamai was charged with an insult, which presupposes he was responsible for the humiliation of the honour and dignity of a representative of the authorities. However, the words of Mr. Mamai had not targeted any concrete person, his criticism was directed against non-identifiable persons while a number of individuals considered that the insult was directed at them. The source denies any corpus delicti in the behaviour of Mr. Mamai.

44. The source further suggests that in his videos Mr. Mamai demanded that the authorities declare a credit amnesty due to the poor socioeconomic situation in the country, but in no video did he say that a credit amnesty had been declared by the State or any State body.

45. The source further alleges, in respect of the administrative offence of 16 August 2011, that Mr. Mamai was not detained at the rally itself, but subsequently at Aktau Airport and that he did not resist or commit illegal actions against police officers. His relatives were notified of his arrest a day later. The trial was held without the participation of a lawyer and video evidence was not allowed to be presented.

46. The source states that the case on administrative offences of 3 December 2021 is not connected to any deprivation of liberty and emphasizes that Mr. Mamai has not implemented the judgment, due to his disagreement with it, and that he plans to challenge it before the Human Rights Committee.

47. On the administrative offence of 25 February 2022, the source stresses that Mr. Mamai did not organize and did not participate in the rally. The actions of 13 February 2022 should be qualified as a traditional memorial event for the victims of the January tragedy (40 days after their deaths according to the relevant tradition).

Discussion

48. The Working Group thanks the source and the Government for their submissions. In determining whether the deprivation of liberty of Mr. Mamai is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for a breach of international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.⁵

49. The Working Group further notes that Mr. Mamai has been under house arrest since 2 November 2022 and recalls that house arrest amounts to deprivation of liberty when it is carried out in closed premises that the person in question is not allowed to leave.⁶

50. The source primarily complains about the period of Mr. Mamai's detention that began on 25 February 2022, providing the previous proceedings as an important background to it. It has made a number of allegations with regard to this detention which the Working Group addresses below.

Category I

51. According to the information provided by the source, the police officers who arrested Mr. Mamai on 25 February 2022 did not present an arrest warrant, provide a specific reason for the arrest or introduce themselves. The video of the arrest supports these allegations and the Government did not refute them.

52. In principle, and except for cases where a person is arrested in flagrante delicto, an arrest without a valid warrant must be considered a violation of articles 3 and 9 of the Universal Declaration of Human Rights and of article 9 (1) of the Covenant, as well as of principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.⁷ The Working Group therefore considers that Mr. Mamai was arrested without a warrant, contrary to articles 3 and 9 of the Universal Declaration and article 9 (1) of the Covenant, and his detention was thus arbitrary and falls under category I.

Category II

53. The Working Group reiterates that it applies a heightened standard of review in cases where the freedom of opinion and expression, freedom of peaceful assembly and of association and participation in political and public affairs are restricted, or where human rights defenders are involved.⁸ Mr. Mamai's role as a civil activist, who has been arrested, detained, prosecuted and released on multiple occasions since 2011 on charges relating to his journalistic and civil activity, requires the Working Group to undertake this kind of heightened scrutiny.

⁵ A/HRC/19/57, para. 68.

⁶ Opinions No. 13/2007, para. 24; and No. 37/2018, para. 25; and deliberation No. 1 (E/CN.4/1993/24, sect. II).

⁷ Opinions No. 26/2018, para. 54; No. 27/2018, para. 68; No. 47/2018, para. 56; No. 6/2020, para. 40; and No. 13/2020, para. 47.

⁸ Opinions No. 64/2011, para. 20; No. 54/2012, para. 29; No. 62/2012, para. 39; No. 41/2017, para. 95; No. 57/2017, para. 46; and No. 13/2018, para. 22. Domestic authorities and international supervisory bodies should apply the heightened standard of review of government action, especially when there are claims of a pattern of harassment (see opinion No. 39/2012, para. 45). See also Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, art. 9 (3).

54. The source alleges that Mr. Mamai's detention is arbitrary as he is detained on the basis of his exercise of his fundamental rights or freedoms protected under international law, including the rights to freedom of expression and of assembly. The Working Group recalls that the rights to freedom of opinion and expression, as protected by article 19 of the Covenant, are indispensable conditions for the full development of the person; they are essential for any society and in fact constitute the foundation for every free and democratic society. Moreover, according to the Human Rights Committee: "given that peaceful assemblies often have expressive functions, and political speech enjoys particular protection as a form of expression, it follows that assemblies with a political message should enjoy a heightened level of accommodation and protection".⁹

55. The Human Rights Committee has noted that freedom of expression includes the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, and that that right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions.¹⁰ The permitted restrictions to that right may relate either to respect for the rights or reputations of others, or to the protection of national security, of public order (*ordre public*), or of public health or morals. The Committee has also stipulated that restrictions are not allowed on grounds not specified in article 19 (3) of the Covenant, even if such grounds would justify restrictions to other rights protected therein. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.¹¹ Moreover, article 19 (3) "may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights".¹² It should be noted that articles 21 and 22 of the Covenant permit restrictions to the right of association on the same three grounds.

56. In the present case, it is clear to the Working Group that the basis for the arrest and detention of Mr. Mamai was the exercise of his right to freedom of expression and of association. In particular, he was convicted to 15 days' administrative detention after the authorities, having monitored his social media page, found out that he had organized a rally but failed to get authorization for it. The Government agreed that the rally was peaceful but then he was criminally charged for allegedly insulting public officials during that same public demonstration. However, the statement of the source that the criticism pronounced by Mr. Mamai did not concern any identifiable official remained unanswered. The Working Group notes that the Government has failed to explain how the criminal persecution of Mr. Mamai complies with international standards on freedom of opinion and expression and freedom of peaceful assembly and of association.

57. In that respect, the Working Group recalls that the Human Rights Committee, in its concluding observations of 2016 on Kazakhstan, stated that it remained "concerned about laws and practices that violate freedom of opinion and expression, including: (a) the extensive application of criminal law provisions to individuals exercising their right to freedom of expression, including provisions on ... defamation, insult, public insult or other encroachment on the honour and dignity of the President of Kazakhstan, public insult of a State official by the mass media or information communication networks, and dissemination of information known to be false; (b) the blocking of social media, blogs, news sites and other Internet-based resources ...; (c) interference with professional journalistic activity and the shutting down of independent newspapers and magazines, television channels and news websites for reportedly minor irregularities".¹³ The Human Rights Committee noted that the above-mentioned laws and practices appeared not to comply with the principles of legal certainty, necessity and proportionality, as required by the Covenant, including with the strict requirements of article 19 (3) of the Covenant. It recommended that the State party consider decriminalizing defamation and, in any case, countenance the application of criminal law only in the most serious of cases; repeal or otherwise revise the other legal provisions limiting freedom of expression, including provisions on insult, with a view to bringing them into

⁹ Human Rights Committee, general comment No. 37 (2020), para. 32.

¹⁰ Human Rights Committee, general comment No. 34 (2011), para. 11.

¹¹ *Ibid.*, para. 22.

¹² *Ibid.*, para. 23.

¹³ CCPR/C/KAZ/CO/2, para. 49.

conformity with its obligations under the Covenant; and refrain from using its criminal provisions and other regulations as tools to suppress the expression of dissenting opinions beyond the narrow restrictions permitted under article 19 of the Covenant.¹⁴

58. The Human Rights Committee remained further concerned about undue restrictions on the exercise of freedom of peaceful assembly, about arrests and about the intimidation of civil activists, and recommended that Kazakhstan ensure that all individuals fully enjoy, in law and in practice, their right to freedom of assembly, and revise all relevant regulations, policies and practices with a view to ensuring that any restrictions on freedom of assembly, including through the application of administrative and criminal sanctions against individuals exercising that right, comply with the strict requirements of article 21 of the Covenant. The Committee noted with concern reports indicating that associations, including political parties, could be held criminally responsible for carrying out their legitimate activities and recommended bringing the regulations and practices governing the registration and functioning of political parties and non-governmental organizations into full compliance with the provisions of articles 19, 22 and 25 of the Covenant.¹⁵

59. Based on the information available and having particular regard to the context in which the alleged crimes occurred, the Working Group is of the view that the Government failed to demonstrate that any of the permitted restrictions on freedom of expression, found in article 19 (3) of the Covenant, and on freedom of assembly, found in article 21, applied in Mr. Mamai's case. As a result, the Working Group refers the case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and to the Special Rapporteur on the rights to freedom of peaceful assembly and of association.

60. The Working Group thus finds that Mr. Mamai's deprivation of liberty is arbitrary, falling within category II, as it resulted from his exercise of the rights and freedoms guaranteed under articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 21 of the Covenant.

Concluding remarks

61. The Working Group wishes to express its concern about information received concerning new charges brought against Mr. Mamai only a couple of months after it communicated the present case to the Government and three days after the Government submitted its reply. It notes that it is of the utmost importance for the effective operation of the system of individual petitions under the special procedures that interested persons should be able to communicate freely with the Working Group and other protection mechanisms without being subjected to any form of repercussions from the authorities. Such repercussions might include not only direct coercion but also other acts that might be seen as an attempt to dissuade or discourage a person from pursuing an international remedy.

Disposition

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

The deprivation of liberty of Zhanbolat Mamai, being in contravention of articles 3, 9, 19 and 20 of the Universal Declaration of Human Rights and articles 9 (1), 19 and 21 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and II.

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

64. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Mamai immediately and accord him an

¹⁴ Ibid., para. 50.

¹⁵ Ibid., para. 54.

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

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

66. The Working Group urges the Government to bring its laws, in particular the relevant provisions of the Criminal Code, into conformity with the recommendations made in the present opinion and in the concluding observations of the Human Rights Committee and with the commitments made by Kazakhstan under international human rights law.

67. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association, for appropriate action.

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

Follow-up procedure

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

- (a) Whether Mr. Mamai has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Mamai;
- (c) Whether an investigation has been conducted into the violation of Mr. Mamai's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Kazakhstan with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

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

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

72. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.¹⁶

[Adopted on 28 March 2023]

¹⁶ See Human Rights Council resolution 51/8, paras. 6 and 9.