Advance Edited Version

Distr.: General
27 June 2017

Original: English

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-eighth session, 19-28 April 2017

Opinion No. 16/2017 concerning Max Bokayev and Talgat Ayanov (Kazakhstan)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/33/66), on 14 February 2017 the Working Group transmitted to the Government of Kazakhstan a communication concerning Max Bokayev and Talgat Ayanov. The Government replied to the communication on 17 April 2017. 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).

Submissions

Communication from the source

4. Max Bokayev is a 43-year-old Kazakh national, usually residing in Atyrau, Kazakhstan. According to the source, Mr. Bokayev is the head of the non-governmental organization Arlan and a human rights defender working for the protection of the environment, freedom of expression and the fight against torture. He has been a member of the Extractive Industries Transparency Initiative since 2011. He is also a member of the Zhanaozen-2011 international committee under the Journalists in Trouble public foundation, the initiator of the Azat Coalition (freedoms and liberties on the Internet), and an active participant in the national preventive mechanism. In 2016, he was appointed head of the regional group of the mechanism in the Atyrau region in western Kazakhstan.

5. Talgat Ayanov is a 32-year-old Kazakh national. He is a lawyer and activist and usually resides in Atyrau.

Background

6. The source reports that between April and May 2016, several protests were held in Kazakhstan, gathering hundreds of citizens calling for the abolition of amendments to the Land Code that were introduced in November 2015. During the protests, many individuals were reportedly detained and sentenced to administrative detention for "preparation of illegal rallies" or "hooliganism".

7. According to the source, the Government launched a smear campaign via mass media platforms accusing the protesters of planning violent attacks and blaming a Kazakh businessman for leading the protest movement in order to plot a coup to destabilize the country.

Arrest and detention

8. In this context, Mr. Bokayev and Mr. Ayanov were reportedly arrested on 17 May 2016 in the city of Atyrau on the basis of an "administrative protocol" issued by the Department of Interior Affairs. They were reportedly arrested for the role they had played in organizing peaceful demonstrations that took place in April and early May 2016 against amendments to the Land Code, which they deemed contrary to human rights standards; for their statements posted on social media; and for making public their intention to participate and encouraging others to take part in peaceful protests on 21 May 2016.

9. On 17 May 2016, the specialized inter-district administrative court of Atyrau reportedly sentenced Mr. Bokayev and Mr. Ayanov to 15 days of administrative detention for "organizing an unsanctioned assembly" (article 488 of the Administrative Offences Code), although the rally of 21 May had not yet taken place. The source also states that Mr. Bokayev and Mr. Ayanov had sent requests for authorization to hold demonstrations on 21 May to the relevant local authorities in Atyrau, in accordance with national laws.

10. During the administrative arrest, Mr. Bokayev and Mr. Ayanov were reportedly detained under the custody of the Department of Interior Affairs at the administrative detention centre in Atyrau. After the criminal case was opened, they were detained in the custody of the National Security Committee.

11. The source reports that on 31 May 2016, one day before the end date of their administrative detention, the National Security Committee issued an order charging Mr. Bokayev and Mr. Ayanov with the offence of "propaganda or public calls to seize or retain power, or violent change of the constitutional order" under article 179.1 of the Criminal Code. They were subsequently transferred to the pretrial detention centre of in Atyrau.

12. On 3 June 2016, the investigation judge of Atyrau city court No. 2 remanded them for two months in pretrial detention. Mr. Bokayev's request to be placed under house arrest for health reasons (he reportedly suffers from chronic hepatitis C and needs constant medical care) was rejected.

13. According to the source, on 21 July 2016, the charge under article 179.1 of the Criminal Code was replaced with charges for "institution of social discord" (article 174 of the Criminal Code), "dissemination of knowingly false information" (art. 274) and "violation of the procedure of organization and holding of meetings, rallies, pickets, street processions and demonstrations" (art. 400).

14. On 27 August 2016, the investigation judge of Atyrau city court No. 2 decided to extend their pretrial detention.

Trial proceedings

15. The source reports that the trial of Mr. Bokayev and Mr. Ayanov started before city court No. 2 on 12 October 2016. On 28 November 2016, a judge of Atyrau's City Court No. 2 found them both guilty of "institution of social discord" (article 174 of the Penal Code), "dissemination of knowingly false information" (art. 274) and "violation of the procedure of organization and holding of meetings, rallies, pickets, street processions and demonstrations" (art. 400). They were sentenced to five years' imprisonment in a penal colony of ordinary regime and prohibited from engaging in social activities for three years after their release.

16. According to the source, on 9 December 2016, Mr. Bokayev and Mr. Ayanov's lawyers appealed the sentence and the appeal process began on 16 January 2017 before the criminal division of the Atyrau regional court.

17. On 20 January 2017, the criminal division of the Atyrau regional court reportedly upheld on appeal the sentencing of first instance of Mr. Bokayev and Mr. Ayanov to five years in prison and a three-year ban on engaging in social activities after their release on the charges against them under articles 174, 274 and 400 of the Penal Code.

18. According to the source, the lawyers of Mr. Bokayev and Mr. Ayanov intend to appeal the decision to the Supreme Court.

19. On 27 January 2017, Mr. Bokayev and Mr. Ayanov were transferred from the Atyrau pretrial detention centre to a pretrial detention facility in Aktobe, more than 500 km away from Atyrau, their home city.

20. On 30 January 2017, relatives of Mr. Bokayev and Mr. Ayanov reportedly received two separate letters issued by the pretrial detention centre. The first one, issued on 25 January, informed them that the two men would be transferred to the penal colony in Atyrau. This was confirmed verbally to both the men. The second letter, issued on 30 January 2017, informed the relatives of the two human rights defenders that they would be transferred to the penal colony of Petropavlovsk in northern Kazakhstan, which is 1,500 km from Atyrau, where their relatives live, to serve their sentence. According to the source, that is in violation of the law of Kazakhstan, which requires people convicted of an offence to be kept at their place of residence.

21. At the time of the submission by the source, Mr. Bokayev and Mr. Ayanov remain in the pretrial detention facility in Aktobe, pending their transfer to the penal colony of Petropavlovsk. Their relatives have not been informed of a possible date for their transfer to Petropavlovsk, as according to article 91.7 of the Criminal and Executive Code, the authorities are requested to take measures in respect of security and confidentiality during transfer processes.

Joint action by special procedures

22. Mr. Bokayev was the subject of a joint urgent appeal sent by the Working Group and other special procedure mandate holders[1] on 9 May 2016. The Working Group acknowledges receipt of the replies from the Government of Kazakhstan, dated 18 and 19 May 2016 and 29 September 2016. Mr. Bokayev and Mr. Ayanov were also the subjects of

[1] The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the right to freedom of peaceful assembly and of association and the Special Rapporteur on the situation of human rights defenders.

a joint allegation letter sent by the Working Group and other special procedure mandate holder[2] on 4 November 2016. The Working Group acknowledges receipt of the reply from the Government of Kazakhstan, dated 4 January 2017.

Category I

23. According to the source, deprivation of liberty is recognized by law under article 16 of the Constitution of Kazakhstan, which states that arrest and detention shall be allowed only in cases stipulated by law and with the sanction of a court with the right of appeal of an arrested person. Without the sanction of the court, a person can be detained for a period not exceeding 72 hours. Moreover, article 147 of the Criminal Procedure Code states that pretrial detention is possible for those accused of serious crimes for which the law prescribes a sentence exceeding five years. If there is a suspicion that a suspect might leave Kazakhstan or hide from the court or police, the court may decide to deprive the suspected person of his or her liberty.

24. On 27 August 2016, the investigation judge of Atyrau city court No. 2 decided to extend the pretrial detention of Mr. Bokayev and Mr. Ayanov and rejected their request to be detained under house arrest. The prosecutor argued that Max Bokayev had a lot of friends inside and outside Kazakhstan and so there was a fear that he would leave the country.

25. However, the source notes that Mr. Bokayev did not have access to a lawyer when he was arrested on 17 May 2016, in violation of the law. Furthermore, the initial administrative arrest of Mr. Bokayev and Mr. Ayanov was illegal, as they were arrested in relation to an alleged offence that had not yet been committed. They were reportedly arrested and put under administrative detention for organizing an unsanctioned assembly (article 488 of the Administrative Offences Code), i.e. the demonstrations on 21 May that had not taken place at the time of their arrest.

26. The source therefore considers the arrest of Mr. Bokayev and Mr. Ayanov to be illegal according to national legislation and arbitrary, falling within category I of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

Category II

27. The source considers that the detention of Mr. Bokayev and Mr. Ayanov result directly from their exercise of universally recognized human rights, in particular the right to freedom of expression, which is protected under article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights, to which Kazakhstan has been a State party since 24 January 2006, as well as the right to freedom of peaceful assembly, which is protected under article 20 of the Universal Declaration of Human Rights and article 21 of the Covenant.

28. Moreover, according to the source, the detention of Mr. Bokayev and Mr. Ayanov constitutes a violation of their right to equality before the law, as they have been discriminated against on the basis of their status as human rights defenders, in violation of article 26 of the Covenant.

29. The source refers to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders) which, although not legally binding in itself, acts as a guide to the interpretation of other legally binding international instruments, including the Covenant. Article 11 of the Declaration

[2] The Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the right to freedom of peaceful assembly and of association, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on the situation of human rights defenders.

states that: “Everyone has the right, individually and in association with others, to the lawful exercise of his or her occupation or profession.” In relation to the arrest, detention and sentencing of Mr. Bokayev and Mr. Ayanov, it is apparent to the source that the two human rights defenders have been deprived of the right to carry out their legitimate human rights-related occupations.

30. The source also refers to article 12 (2) of the Declaration on Human Rights Defenders whereby: “The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.” The source submits that in this case, the State has not only failed in its duty to take the necessary measures to prevent and halt the discrimination against Mr. Bokayev and Mr. Ayanov on the basis of their status as human rights defenders, but has actively participated in these arbitrary actions through the politically-motivated misuse of the criminal justice system. The source submits that their arrest, detention and sentencing must be considered both “arbitrary” and “retaliatory” under article 12 (2) of the Declaration; and that the arrest and detention were procedurally flawed, lacked sufficient evidence and were a direct consequence of the legitimate human rights activities of the two men.

31. The source thus considers that the detention of Mr. Bokayev and Mr. Ayanov is aimed at sanctioning and preventing their legitimate human rights activities and their detention is therefore to be considered as arbitrary, falling within category II of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

Category III

32. The source submits that since their arrest, the rights of Mr. Bokayev and Mr. Ayanov under articles 9 and 14 of the Covenant and articles 9 and 10 of the Universal Declaration of Human Rights have been violated. The judicial process against them revealed significant irregularities, leading to the violation of several international rights to a fair trial.

33. According to the source, violations of the rights of Mr. Bokayev and Mr. Ayanov to a fair trial and of the principle of equality of arms include violations of the rights of the accused, including the right to have proceedings before an independent and impartial court; the right to adequate time and facilities to prepare a defence; the right to examine witnesses; the right to translate documents; and the right to equality before the courts. Access to trial monitors was reportedly also restricted, and Mr. Bokayev and Mr. Ayanov’s lawyers were not given access to some of the information contained in the criminal case against them, or did not have enough time to analyse the case materials.

34. The source submits that during the hearings on 12, 13, 17 and 18 October 2016, important procedural violations were registered that amount to violations of internationally recognized right to a fair trial. In particular, the key evidence submitted by the prosecution was based on expertise provided by official experts representing the Centre for Forensic Expertise under the Ministry of Justice of Kazakhstan. These experts, political scientists, philologists and psychologists had analysed texts placed on the Facebook pages of Mr. Bokayev and Mr. Ayanov, including their posts and the comments of other people, and concluded that they had incited social discord between such social groups as “society and authorities” or “people and members of the parliament or police”. During the first two hearings, most of the motions filed by the lawyers were reportedly dismissed by the judge. On 17 and 18 October 2016, the court decided to proceed with the examination of the witnesses. The witnesses presented by the prosecutors were allowed to testify via videoconference from a court in Astana, despite motions filed by the defence lawyers, requesting that the witnesses should be brought to Atyrau. Mr. Bokayev and Mr. Ayanov reported that due to the poor quality of the sound, they could not hear clearly what the witnesses were saying, thus affecting their right to defence.

35. Moreover, according to the source, the health of Mr. Bokayev, who has been living with chronic hepatitis C for five years, deteriorated considerably during his pretrial detention. He has reportedly been denied adequate medical care, including access to antiviral therapy and has developed additional health complications. On 3 June 2016, Mr. Bokayev's request to be placed under house arrest for health reasons was rejected by the investigation judge of Atyrau city court No. 2. On 18 October 2016, Mr. Bokayev requested a break during the hearing, on the grounds that he was not feeling well, but the judge dismissed his request arguing that he was "simulating faintness".

36. The source refers to the Standard Minimum Rules for the Treatment of Prisoners, whereby the provision of health care for prisoners is a State responsibility and prisoners should enjoy the same standards of health care that are available in the community without discrimination. Furthermore, the Rules provide that prisoners who require specialist treatment must be transferred to specialized institutions or outside hospitals when such treatment is not available in prison. Failure to provide adequate health care to prisoners may violate the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment under article 7 of the Covenant and under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, both of which have been ratified by Kazakhstan.

37. Finally, the source notes with great concern that it is very likely that Mr. Bokayev and Mr. Ayanov have been or will soon be transferred to the penal colony of Petropavlovsk to serve their sentence. Petropavlovsk is 1,500 km from Atyrau, where their relatives live, and there is no direct train or flight. This is in violation of the law of Kazakhstan, which requires that persons convicted of an offence be kept at their place of residence. Moreover, the source fears for the physical and psychological integrity of Mr. Bokayev and Mr. Ayanov, especially if they were to be arbitrarily transferred to the Petropavlovsk, where detention conditions are reportedly known to be particularly harsh.

38. The source thus observes a flagrant violation of the fair trial rights of Mr. Bokayev and Mr. Ayanov, meaning that their detention is arbitrary, falling within category III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

Category V

39. As stated above, the arrest and detention of Mr. Bokayev and Mr. Ayanov took place because of their peaceful exercise of their rights to freedom of expression and peaceful assembly. Accordingly, the source submits that their detention is arbitrary, falling within category V of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

40. The source considers that the arrest and detention of Mr. Bokayev and Mr. Ayanov is arbitrary, as it seems merely aimed at sanctioning and preventing them from exercising their rights to freedom of expression and peaceful assembly, including in their capacity as human rights defenders, through a form of judicial harassment that violates the fundamental guarantees enshrined in both Kazakh and international law. The source thus submits that Mr. Bokayev and Mr. Ayanov should be immediately and unconditionally released from prison.

Response from the Government

41. On 14 February 2017, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 16 April 2017, detailed information on the current situation of Mr. Bokayev and Mr. Ayanov and any comments on the source's allegations. The Government of Kazakhstan replied within the set time limit.

42. The Government states that on 28 November 2016, Mr. Bokayev and Mr. Ayanov were found guilty of inciting social and national hatred; of insulting the national honour through the use of mass media; and of spreading the information known to be false, therefore posing a danger to public order. Mr. Bokayev and Mr. Ayanov have been sentenced to five years in prison and were barred from engaging in activism for three years

after their release, in accordance with articles 174.2, 274.4 and 400 of the Criminal Code. On 20 January 2017, the Appeals Court upheld the earlier sentience. On 20 February 2017, the Supreme Court dismissed the application for review filed by the legal defence on 13 February 2017 on behalf of Mr. Bokayev and Mr. Ayanov. The application was dismissed on the basis of breach of article 30.1 of the Criminal Procedural Code concerning the language of criminal court proceedings.

43. The Government further states that on 17 May 18 May 2016, respectively, Mr. Bokayev and Mr. Ayanov were found guilty of an administrative offence of organizing an unlawful manifestation. They were sentenced to 15 days of administrative arrest, in accordance with article 488.3 of the Code of Administrative Offences.

44. The Government submits that the prosecution of Mr. Bokayev and Mr. Ayanov was carried out in full compliance with national legislation. Mr. Bokayev and Mr. Ayanov were transferred from the penitentiary facility in Atyrau to the penitentiary facility in northern Kazakhstan, in accordance with the applicable legislation. Mr. Bokayev receives regular medical care for his chronic health condition. The state of health of both Mr. Bokayev and Mr. Ayanov is currently satisfactory. Mr. Bokayev and Mr. Ayanov have not presented any complaints regarding the use of force, psychological pressure or any other actions (or inaction) of the penitentiary staff.

Discussion

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

46. The source has submitted, and the Government of Kazakhstan has not challenged the submission, that Mr. Bokayev and Mr. Ayanov were arrested on 17 May 2016 in the city of Atyrau on the basis of an "administrative protocol" issued by the Department of Interior Affairs. They were arrested for the role they had played in organizing peaceful demonstrations, which took place in April and early May 2016 against amendments to the Land Code of Kazakhstan, which they deemed contrary to human rights standards; for their statements posted on social media; and for making public their intention to participate and encouraging others to take part in peaceful protests on 21 May 2016. The source has submitted that the arrest falls within category I, as it cannot be justified under article 488 of the Administrative Offences Code, given that the demonstrations on 21 May had not taken place at the time of the arrest. The Government argues that the arrest was in relation to earlier protests, the statements posted on social media and to the protest planned for 21 May 2016, and was carried out in full compliance with national legislation.

47. The Working Group notes that Mr. Bokayev and Mr. Ayanov were not only arrested in relation to the forthcoming protest on 21 May 2016. Rather, as the source submits, the authorities had invoked a number of reasons for their arrest, which also included the role they had played in organizing demonstrations that took place in April and early May 2016 and for their statements posted on social media. Arrest warrants were issued and Mr. Bokayev and Mr. Ayanov were charged and brought before a judge who authorized their detention as stipulated in article 488 of the Administrative Offences Code. It is not, in principle, for the Working Group to reassess whether the national judiciary made a correct decision or to deal with errors of law allegedly committed by a domestic court.[3] The Working Group is therefore unable to conclude that there was no legal basis for the detention of Mr. Bokayev and Mr. Ayanov that would render their detention arbitrary under category I.

48. The source has submitted that the detention of Mr. Bokayev and Mr. Ayanov is arbitrary and falls within category II, since their detention was a direct result of their exercise of the right to freedom of expression (article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant), as well as the right to freedom of peaceful assembly (article 20 of the Universal Declaration of Human Rights and article 21 of the

[3] See opinion No. 15/2017.

Covenant). The source also argues that they have been discriminated against on the basis of their status as human rights defenders, in violation of article 26 of the Covenant. The Government of Kazakhstan has argued that their detention was in relation to the criminal acts of inciting social and national hatred and insulting the national honour and identity through the use of mass media, which was carried out by persons previously convicted for such crimes (aggravating circumstances). The Government submits that the prosecution of Mr. Bokayev and Mr. Ayanov was carried out in full compliance with national legislation.

49. At the outset, the Working Group notes that freedom of opinion and freedom of expression, as expressed in article 19 of the Covenant, are indispensable conditions for the full development of the person; they are essential for any society and in fact constitute the foundation stone for every free and democratic society.[4]

50. Freedom of expression includes the right to seek, receive and impart information and ideas of all kinds regardless of frontiers and this right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions.[5] Moreover, the permitted restrictions to this right may relate either to respect of the rights or reputations of others or to the protection of national security or of public order (*ordre public*) or of public health or morals. As the Human Rights Committee has stipulated that: Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated."[6] It should be noted that article 21 of the Covenant permits restrictions to the right of assembly on the same three grounds.

51. In the present case, the Government of Kazakhstan in its response to the submissions made by the source have only cited a number of what it considers to be criminal acts committed by Mr. Bokayev and Mr. Ayanov, without any explanation as to what actions have led to these violations. It is quite clear to the Working Group that in fact the basis for the arrest and subsequent detention of Mr. Bokayev and Mr. Ayanov was their exercise of freedom of expression and freedom of assembly. There is no evidence that any of their actions were violent, that they incited violence or indeed that their actions led to violence by others. Although freedom of expression and freedom of assembly are not absolute rights, the Human Rights Committee states that "when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself".[7] Moreover, "paragraph 3 [of article 19] may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights".[8]

52. The Working Group notes that this is not the first time that the two individuals in question have been arrested and prosecuted in relation to the exercise of their rights to freedom of expression and freedom of assembly. As the Government of Kazakhstan has explained, following the initial arrest, Mr. Bokayev and Mr. Ayanov were detained for the longest prescribed period of time, as this was deemed to be a repeat offence. The Working Group thus finds a violation of article 26 of the Covenant and considers that Mr. Bokayev and Mr. Ayanov have been discriminated against on the basis of their status as human rights defenders.[9]

53. The Working Group therefore concludes that the detention of Mr. Bokayev and Mr. Ayanov was due to their exercise of the rights to freedom of expression and freedom of assembly and was contrary to article 26 of the Covenant. Their detention was arbitrary, falling within category II of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

[4] See Human Rights Committee general comment No. 34 (2011) on the freedoms of opinion and expression, para. 2.
[5] Ibid., para. 11.
[6] Ibid., para. 22.
[7] Ibid., para. 21.
[8] Ibid, para. 23.
[9] See opinion No. 45/2016.

54. Furthermore, Mr. Bokayev, together with seven other individuals, was the subject of an urgent appeal by the Working Group and three other special procedure mandate holders on 9 May 2016. In that appeal, grave concern was expressed about the alleged arbitrary arrest of protesters, human rights defenders and journalists across the country, including the above-mentioned individuals, which appeared to be linked to their human rights and journalistic activities, for legitimately expressing their rights to freedom of peaceful assembly and association and freedom of opinion and expression.

55. The detention of Mr. Bokayev and Mr. Ayanov was also the subject of an allegation set out in a letter dated 4 November 2016 from the Working Group and five other special procedure mandate holders. in that letter, the authors expressed serious concern at the allegations of persecution and ongoing arbitrary detention of the two environmental human rights defenders, which appeared to be linked to their peaceful defence of land rights in Kazakhstan and their exercise of their legitimate rights to freedom of expression and of peaceful assembly.

56. The Working Group notes that the status of human rights defender is increasingly becoming a basis for the detention of human rights activists around the world. That runs contrary to the Declaration Human Rights Defenders and the Working Group has in the past recognized the arbitrariness of such detention.[10] The Working Group notes that the submissions made by the source reveal a pattern of persecution by the authorities of Mr. Bokayev and Mr. Ayanov on the basis of their political opinions and activities as human rights defenders. That is further substantiated by the fact that in the present case they were sentenced as repeat offenders. The Working Group thus concludes that their detention is arbitrary and falls within category V of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it. The Working Group refers the present case to the Special Rapporteur on the situation of human rights defenders.

57. The source has also submitted that the detention of Mr. Bokayev and Mr. Ayanov was arbitrary, falling within category III, as there were violations of the rights of the accused, including the right to have proceedings before an independent and impartial court; the right to adequate time and facilities to prepare a defence; the right to translate documents; and the right to equality before the courts. The Government in its response has not addressed any of these allegations, even though it had the opportunity to do so. The Working Group therefore considers these allegations established prima facie.

58. The source has provided detailed information with regard to the right to examine witnesses, whereby the source notes that some witnesses were allowed to testify through videoconference from a court in Astana, despite motions filed by the defence lawyers requesting that the witnesses be brought to the trial in Atyrau. Mr. Bokayev and Mr. Ayanov reported that due to the bad quality of the sound, they could not hear clearly what the witnesses were saying, thus affecting their right to defence. The source has also contested the substance of some of the expert witnesses presented by the prosecution. The Government of Kazakhstan did not address these submissions in its response.

59. In relation to the number of submissions made on the substance of the expert statements, the Working Group must once again recall that it is does not fall within its mandate to reassess the sufficiency of the evidence or to deal with errors of law allegedly committed by a domestic court.[11] However, the Working Group notes that the inability to examine witnesses in person impedes the ability to assess the credibility of the witnesses and severely and adversely affects the right to defend oneself, which is a serious violation of the rights to due process. The Working Group thus considers that the information presented in relation to the ability of Mr. Bokayev and Mr. Ayanov to examine witnesses discloses a serious violation of article 14 (3) (e) of the Covenant.

60. The source has also made submissions regarding the transfer of Mr. Bokayev and Mr. Ayanov to the penal colony of Petropavlovsk in northern Kazakhstan to serve their sentences. Petropavlovsk is 1,500 km from their home town, Atyrau. The source notes that

[10] Ibid.

[11] See opinion No. 15/2017.

this is in violation of the law of Kazakhstan, which requires that persons convicted of an offence are kept at their place of residence. The Government of Kazakhstan did not address these submissions in its response.

61. The Working Group notes that in the present case, the source has not explained how this transfer is affecting the ability of Mr. Bokayev and Mr. Ayanov to obtain a fair trial. In fact, the Working Group understands that their lawyers intend to appeal the decision of the Atyrau regional court to the Supreme Court, which is indicative of the ability of the defence team of Mr. Bokayev and Mr. Ayanov to continue its work.

62. However, the Working Group considers that the serious violations of the right to examine witnesses and the number of other due process breaches listed by the source are all together of such gravity as to render the detention of Mr. Bokayev and Mr. Ayanov arbitrary and falling within category III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

63. The source has submitted that Mr. Bokayev suffers from a serious chronic health condition and is not receiving the requisite medical attention in detention for his condition. The Government of Kazakhstan contests this submission and argues that the Mr. Bokayev's health is regularly monitored and that he has received a number of regular treatments.

64. The Working Group notes that the concern over Mr. Bokayev's health was expressed in the letter of 4 November 2016 and takes this opportunity to remind the Government of Kazakhstan that in accordance with article 10 of the Covenant, all persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person.

Disposition

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

> The deprivation of liberty of Max Bokayev and Talgat Ayanov, being in contravention of articles 9, 10, 19 and 20 of the Universal Declaration of Human Rights and of articles 9, 14, 19, 21 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories II, III and V.

66. The Working Group requests the Government of Kazakhstan to take the steps necessary to remedy the situation of Max Bokayev and Talgat Ayanov 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.

67. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Max Bokayev and Talgat Ayanov immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law.

68. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to the Special Rapporteur on the situation of human rights defenders.

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. Bokayev and Mr. Ayanov have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Bokayev and Mr. Ayanov;

(c) Whether an investigation has been conducted into the violation of Mr. Bokayev's and Mr. Ayanov'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 information within six months of the date of the 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 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. [12]

[*Adopted on 21 April 2017*]

[12] See Human Rights Council resolution 33/30, paras. 3 and 7.