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Working Group on Arbitrary Detention

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Opinion No. 67/2018 concerning Iskander Yerimbetov (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 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 24 May 2018 the Working Group transmitted to the Government of Kazakhstan a communication concerning Iskander Yerimbetov. The Government replied to the communication on 21 July 2018. 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

(a) Context

4. Iskander Yerimbetov is a Kazakh citizen who was born in 1971 in Alma-Ata (now Almaty), Kazakhstan.

5. According to the source, Mr. Yerimbetov studied at Kazakhstan State University and graduated with a degree in mathematical logic in 1993. Early in his career, he was a market analyst and worked on the development of mathematical models for trading. He later pursued entrepreneurial opportunities in the communications, aviation and confectionary sectors in Kazakhstan. A licensed pilot, he was a founder and chairman of the board of directors of Sky Service, a light aviation company in Kazakhstan, and of Sky Tech, a helicopter and plane service and repair company. He was also the owner and chairman of the board of directors of Konfety Karagandy, a confectionery factory. At the time of his arrest, his businesses employed more than 500 people.

6. The source underlines that Mr. Yerimbetov is not politically active in any way in Kazakhstan. He is not a member of a political party, nor has he made financial contributions to political parties. He has operated exclusively in the sphere of business.

(b) Arrest and detention

7. The source reports that, on 13 November 2017, Mr. Yerimbetov and his wife were stopped in the parking lot of a shopping centre in Almaty by approximately 10 individuals dressed in civilian clothing. The source believes that the forces carrying out the arrest were likely a joint team from the National Security Committee, the National Anti-Corruption Bureau of the Agency for Civil Service Affairs and Anti-Corruption (the Anti-Corruption Bureau) and the Ministry of Internal Affairs. The individuals surrounded Mr. Yerimbetov's vehicle, preventing him from accessing it and leaving the area. They handcuffed him before searching his vehicle and seizing a number of personal belongings, including a telephone, a notebook, bank cards and cash; he has not been provided with an inventory of the items seized. Mr. Yerimbetov and his wife were then forced into separate vehicles and driven to their residence. At no point during the arrest, search or seizure was Mr. Yerimbetov shown any arrest warrant or identification, except by one officer who briefly waved what may have been identification. Despite his requests, Mr. Yerimbetov was not permitted to call a lawyer.

8. According to the source, Mr. Yerimbetov was not informed of the reason for his arrest at the time, nor was he told the legal basis for his arrest. In the confusion of the arrest, he only recalls great commotion and noise as he was manhandled and handcuffed. His wife, who had been separated from her husband, recalls an arresting officer stating something about the law, as the arrest was being recorded on a video camera, but she could not clearly hear what was being said.

9. At Mr. Yerimbetov's home, the arresting individuals reportedly ordered his wife to open the security gates "without tricks, otherwise we'll apply special measures". Next to the house there were a number of additional unmarked vehicles, and approximately 30 people waiting for their arrival. The majority of the individuals present were in civilian clothing. Some of them were masked, apparently being members of special forces, and were carrying sub-machine guns.

10. According to the source, the individuals began to conduct an armed search of the home, again without presenting a warrant, despite multiple requests by Mr. Yerimbetov's wife to that effect. She was ordered to wait on the lower level with the couple's minor children (aged 9 months, 6 years and 15 years). The search went on all night, for approximately 12 hours. From time to time, Mr. Yerimbetov's wife was ordered to move from one room to another with the children. More personal belongings were confiscated, including personal documents belonging to Mr. Yerimbetov's wife and the children (such as a marriage certificate, birth certificates, passports and photo albums), jewellery, computers and other information storage media, mobile phones belonging to members of the family including the minors, business documents and approximately $7,000 in cash (in United States dollars and tenge). No record

of the confiscated items has been provided to Mr. Yerimbetov and, at the time of submission by the source, none of the personal items have been returned to his family with the exception of his wife's and children's birth certificates and passports, which were finally returned only after a number of complaints.

11. Immediately after his home was searched, Mr. Yerimbetov was taken to a National Security Committee-controlled pretrial detention centre in Almaty, where he remains at the time of writing. He was held incommunicado for more than 24 hours, and his family was unaware of his whereabouts. Mr. Yerimbetov's wife was notified of his whereabouts on 15 November 2017. On that day, Mr. Yerimbetov was brought before a judge for a pretrial detention hearing pursuant to a request from the head of the inter-agency Investigative Group, which includes representatives from the Anti-Corruption Bureau, the Department of Investigations of the Ministry of Internal Affairs, the Department of Investigations of the National Security Committee, and the Committee of State Revenues of the Ministry of Finance. However, it is reportedly the National Security Committee that de facto controls the work of the Investigative Group and Mr. Yerimbetov's detention conditions.

12. On 15 November 2017, the head of the Investigative Group reportedly issued a "Decision on the Qualification of Acts Committed by Suspect", claiming that Mr. Yerimbetov had violated article 193 of the 1997 Criminal Code. On the same day, the Anti-Corruption Bureau also issued a decision stating that Mr. Yerimbetov was suspected of violating article 193 (3) (b) and (c) of the 1997 Criminal Code regarding the "legalization (laundering) of money and (or) other property obtained in a criminal way".

13. The source reports that neither Mr. Yerimbetov nor his lawyer received any information or evidence about the case before the hearing on 15 November 2017. At the hearing, Mr. Yerimbetov, who was assisted by a lawyer retained by a friend, was informed that he was a suspect in a money-laundering case. Specifically, he was informed that he was suspected of money-laundering as part of an "organized group" or "criminal community". According to the allegations, Mr. Yerimbetov was suspected of laundering more than 832,194,000 tenge (approximately $5 million as at 18 December 2013) of funds, allegedly obtained illegally through his many business properties and companies, over the previous 12 years. However, no copy of the document describing the allegations was provided that day, either to him or to his lawyer.

14. At the end of the hearing, which lasted approximately 15 minutes, the judge ordered the detention of Mr. Yerimbetov for two months. A court subsequently issued various extensions of his detention.

15. On 22 November 2017, some of Mr. Yerimbetov's assets were frozen in connection with the allegations of money-laundering. The source adds that, subsequently, in order to increase pressure on Mr. Yerimbetov and his family, more orders were made to freeze assets belonging to him and to close and distant relatives.

16. The source reports that, on 3 March 2018, the head of the Investigative Group issued a new decision with an entirely new set of accusations. Mr. Yerimbetov was informed that he was suspected of additional violations of the law related to fraud under article 177 (4) (b) of the 1997 Criminal Code and article 190 (4) (2) of the 2014 Criminal Code. Under both Criminal Codes, fraud is defined as "theft of another's property or acquisition of the right to another's property by false pretences or abuse of trust".

17. According to the source, the Government of Kazakhstan has thus labelled Mr. Yerimbetov a suspect regarding violations under the 2014 Criminal Code. However, the source submits that the allegations are politically motivated and pretextual. Allegedly, Mr. Yerimbetov was repeatedly told by the National Security Committee officers who interrogated him that everything would simply "go away" if his sister returned to Kazakhstan and offered evidence against Mukhtar Ablyazov (see paras. 22–26 below).

18. The source reports that, at the time when the submission was made, Mr. Yerimbetov was detained in a remand facility referred to as SI-1 (also known as Remand Unit S1 or Institution LA-155/1). SI-1 is under the formal control of the Criminal Corrections System Committee, a part of the Ministry of Internal Affairs. However, within SI-1, there are reportedly a number of cells that are under the de facto control of the National Security

Committee. Two or three National Security Committee guards, who are posted in a small room outside of Mr. Yerimbetov's cell, report directly and only to the National Security Committee. The guards bring Mr. Yerimbetov to meetings with his counsel and they restrict who is allowed access to him.

(c) Analysis of violations

19. The source asserts that the detention of Mr. Yerimbetov constitutes an arbitrary deprivation of his liberty under categories I and III.

(i) Category I

20. The source submits that the detention of Mr. Yerimbetov is arbitrary under category I as the Kazakh authorities lack a legal basis for his continued detention.

21. The source reiterates that the allegations against Mr. Yerimbetov, as referred to above, are patently false and that there is no evidence to support them. There is, however, ample evidence that the allegations are politically motivated and that Mr. Yerimbetov is merely an innocent victim of guilt by association. According to the source, that is evident when his case is understood in the wider context of the politics of Kazakhstan and from direct comments made by government officials.

22. In that respect, the source notes that the alleged "organized criminal group" of which Mr. Yerimbetov is suspected of being a member, according to the charging documents, is under the direction of Mukhtar Ablyazov, an opponent of the Government in Kazakhstan and former chairman and majority owner of BTA Bank. Thus, according to the source, Mr. Yerimbetov is fundamentally a hostage caught up in a political struggle between the Government of Kazakhstan and the exiled political opponent Mr. Ablyazov (who was the subject of opinion No. 49/2016 of the Working Group). Mr. Yerimbetov is allegedly one of many individuals in Kazakhstan who has had their freedom taken away as part of the Government's long-running campaign to neutralize political dissent generally and Mr. Ablyazov specifically. The source adds that the detention of Mr. Yerimbetov is intended to exert pressure on one of the associates of Mr. Ablyazov, Botagoz Jardemalie, who is Mr. Yerimbetov's sister. The source alleges that the Government wants Ms. Jardemalie, who has secured political asylum in Belgium, to return to Kazakhstan to testify against Mr. Ablyazov. The detention of Mr. Yerimbetov is therefore entirely politically motivated.

23. The source emphasizes that the arbitrary nature of Mr. Yerimbetov's imprisonment has been recognized from the very first months of his detention. On 4 December 2017, the Open Dialog Foundation issued a statement concluding that he had become a "new hostage … of the Kazakhstani regime".[1] Since then, many others have spoken out, including a number of Members of the European Parliament, the non-governmental organization (NGO) Coalition Against Torture in Kazakhstan, the Council of Europe, the Norwegian Helsinki Committee, Human Rights Watch and the Chair of the General Committee on Democracy, Human Rights and Humanitarian Questions of the Parliamentary Assembly of the Organization for Security and Cooperation in Europe. Mr. Yerimbetov was also the subject of a communication (UA KAZ 2/2018) sent by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on 26 January 2018.

24. The source reiterates that Mr. Yerimbetov has no personal or business connections with Mr. Ablyazov, and he has no political affiliations. However, his sister, Ms. Jardemalie, is a New York lawyer who has worked extensively with Mr. Ablyazov, including as a managing director of BTA Bank. She has reportedly been involved, in countries across Europe and Central Asia, in the legal defence of numerous victims of political persecution who have been targeted by the Government of Kazakhstan. A substantial proportion of her practice came to involve pro bono work for political activists, human rights defenders, journalists and other vulnerable people. She was granted political asylum in Belgium in 2013 due to the extraordinary risks she faced in the form of reprisals by Kazakhstan for her work against the Government. At the request of Kazakhstan, the International Criminal Police

[1] Available at http://en.odfoundation.eu/a/8467,iskander-yerimbetov-one-of-the-defendants-in-the-case-of-ablyazov-is-being-subjected-to-torture-in-the-detention-centre.

Organization (INTERPOL) published a red notice targeting Ms. Jardemalie for arrest on criminal charges in 2013, although it was later cancelled for non-compliance with INTERPOL rules against political abuses. Meanwhile, Ms. Jardemalie was reportedly the target of a politically motivated kidnapping plot, uncovered in 2015 and foiled by European police.

25. The source notes that Mr. Yerimbetov's legal counsel recently became aware of a document in the case file revealing that the initial "request to initiate a criminal case" against him came from BTA Bank. In that respect, the source notes that allegations relating to BTA Bank formed the basis of the extradition case in relation to Mr. Ablyazov in France, which was deemed to be fundamentally politically motivated.

26. As noted in paragraph 17 above, the National Security Committee officials interrogating Mr. Yerimbetov repeatedly made clear to him that they did not actually care about the allegations against him or keeping him in prison. Instead, on multiple occasions, they allegedly told him that he could walk free if he could just persuade his sister to return to Kazakhstan to give false testimony against Mr. Ablyazov. However, Mr. Yerimbetov has categorically refused to provide false testimony against himself, his sister, Mr. Ablyazov or any other innocent person. In addition, Ms. Jardemalie has rejected requests to return to Kazakhstan out of fear for her own life.

(ii) Category III

27. The source further asserts that the detention of Mr. Yerimbetov is arbitrary under category III because the Government denied him his due process rights under international treaties, in particular articles 7, 9 and 14 of the Covenant, articles 5, 10 and 12 of the Universal Declaration of Human Rights and principles 15, 18, 19, 24 and 36 (1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and under various provisions of domestic law.

(i) No reason for arrest, and arrest in violation of the Criminal Procedure Code

28. According to the source, Mr. Yerimbetov was not arrested in accordance with international or domestic law. The plain-clothed individuals who apprehended and arrested him in the shopping centre parking lot did not present any documentation to him or his wife, who was also taken into custody as they drove the couple back to their home in separate vehicles. At the time of his arrest, Mr. Yerimbetov was not informed in writing or verbally of the reason for his arrest. His wife recalls something being possibly said about Kazakhstani law by one of the arresting officers from a distance, but she does not know what was said; Mr. Yerimbetov himself did not hear anything. Repeated requests to call a lawyer were reportedly refused and Mr. Yerimbetov could not call a lawyer himself as the family's phones had been confiscated. A record of the arrest was not drawn up and signed by Mr. Yerimbetov within three hours, as required by law.

29. Two days after his arrest, Mr. Yerimbetov was reportedly finally told that he was suspected of committing money-laundering in connection with an "organized criminal group" allegedly under the direction of Mr. Ablyazov, as a means of securing testimony from his sister against Mr. Ablyazov. However, when it became clear that that strategy would not be successful, the Investigative Group allegedly changed tactics and issued a new set of allegations against Mr. Yerimbetov on 3 March 2018, relating to alleged fraud in his private businesses.

(ii) Illegal search of property and seizure of possessions

30. According to the source, the individuals who arrested Mr. Yerimbetov and searched his home and the offices of his business presented no form of court authorization before searching his property and confiscating items of personal and business property. Many private and personal items were seized by the authorities, including his wife's jewellery and the passports and birth certificates of their minor children, which are clearly unrelated to a case purportedly investigating Mr. Yerimbetov's financial transactions. The source thus submits that the Government failed to follow its own procedures during its arrest of Mr. Yerimbetov and the search and seizure of his possessions.

(iii) Incommunicado detention and impeded access to family

31. According to the source, Mr. Yerimbetov was detained incommunicado from his family from 14 November to 5 December 2017. They did not know his whereabouts for 24 hours, until his wife received a message via courier on 15 November 2017, informing her that Mr. Yerimbetov was detained in SI-1. For the next three weeks, the only contact that Mr. Yerimbetov had with the outside world was in the form of occasional visits from his lawyer, which were frequently denied.

32. The first time Mr. Yerimbetov had any contact whatsoever with his family was on 5 December 2017, when he was forced to call his parents by his interrogators. He was coerced into asking his parents to cancel their first press conference and telling them that he did not need a new lawyer, as one had already been selected to assist him. After his arrest, the first time Mr. Yerimbetov saw his parents was on 8 December 2017; the visit lasted only two or three minutes, and was in the presence of the head of the Investigative Group. Mr. Yerimbetov's parents were granted the status of members of his defence counsel team (sometimes referred to informally as "public defenders")[2] only on 22 December 2017, after they had publicly complained about the matter during a press conference in late December 2017. According to the source, this was an unjustified delay of almost six weeks after his arrest. The first time Mr. Yerimbetov's wife was permitted to visit him was on 17 January 2018, only after she had also been designated as a member of his defence counsel team.

33. Although family members are now permitted, as counsel, to visit Mr. Yerimbetov in detention, the authorities at the detention facility have reportedly dragged out the entry and security procedures repeatedly, with the effect of drastically limiting the amount of meeting time. Family members are not permitted to meet privately with Mr. Yerimbetov and must contend with listening devices and a guard who can enter the meeting room at any time. No telephone calls have been permitted at any point.

34. The source thus submits that, as the Government held Mr. Yerimbetov incommunicado for extended periods of time during the early stages of his detention and has since repeatedly manipulated, delayed and otherwise impeded his access to his family, his detention is arbitrary under category III.

(iv) Interference with access to legal counsel

35. At the time of his arrest, Mr. Yerimbetov was reportedly prevented from contacting a lawyer, despite numerous requests, or from having one provided. He was not permitted to speak to his lawyer before his first interrogation, and his lawyer was not present or even aware that an interrogation was taking place. Mr. Yerimbetov has been interrogated on several occasions during his detention, but only twice have such interrogations occurred in the presence of a lawyer. Mr. Yerimbetov's lawyer is not even informed of when these interrogations will occur.

36. Additionally, Mr. Yerimbetov's lawyer has been denied visits on multiple occasions. When Mr. Yerimbetov is able to meet with his lawyer, the discussions take place in rooms believed to be under surveillance with listening devices. He therefore does not speak freely with his lawyer, believing that he cannot have a normal confidential conversation. Furthermore, the authorities allegedly employ tricks to delay bringing in Mr. Yerimbetov to review the documents with his lawyer and/or other counsel. Even after he arrives, Mr. Yerimbetov reportedly finds it incredibly difficult to focus, given the head trauma he suffered as a result of the beatings, the torture, the inhumane conditions and the psychological torment he has experienced since his detention began (see paras. 45–51 below).

(v) Interference with the right to prepare a defence

37. In relation to the November 2017 allegations of money-laundering, Mr. Yerimbetov's counsel has reportedly received no evidence pertaining to that case, despite numerous requests for information. The source thus submits that it has been absolutely impossible for Mr. Yerimbetov to prepare any type of defence regarding the allegations against him.

38. With regard to the March 2018 allegations of fraud, the authorities have reportedly impeded the ability of Mr. Yerimbetov to prepare a defence in a number of ways. He was not

[2] See article 66 of the Criminal Procedure Code of Kazakhstan.

afforded his rights under domestic law to defend himself in the investigation process related to his qualification as a suspect of fraud. The source notes that Mr. Yerimbetov was not given the opportunity to be involved at all in the preparation of a defence against this second set of allegations. He was not given the opportunity to challenge the appointment of any experts or to request the appointment of additional experts to consult, nor was he permitted to pose additional or clarifying questions to the experts. Despite Mr. Yerimbetov not being involved in the investigation process, and without his knowledge, the investigators produced a number of "expert" examinations and audit reports.

39. The source adds that Mr. Yerimbetov and his counsel were not given adequate time to review documentation and evidence in the case files. Under article 296 (3) of the Criminal Procedure Code, limits cannot be placed on the time that the suspect and the defence counsel need in order to familiarize themselves with the case materials. In flagrant violation of that guarantee, on 2 March 2018, only one day before he was formally notified that he was suspected of committing fraud, Mr. Yerimbetov and his counsel were summoned to review the reports and audits. That meant that Mr. Yerimbetov was given less than 24 hours to review the alleged evidence against him.

40. According to the source, it took another two and a half weeks for the Investigative Group to share any more information with Mr. Yerimbetov and his counsel. When information was eventually provided to them, they were inundated with thousands of pages of documents. They were subsequently notified that the deadline for reviewing the case materials was 18 April 2018, which is a woefully insufficient amount of time for a lawyer to prepare, particularly given the artificial restriction on hours per day, materials and location. The source submits that all of those factors illustrate how the Government is putting artificial pressure on Mr. Yerimbetov's counsel to make it impossible for them to review documents in a meaningful way and prepare a defence.

(vi) Failure to provide the right to a public hearing

41. According to the source, only members of Mr. Yerimbetov's defence team, notably his lawyers, parents and wife, are permitted into the courtroom during hearings. Mr. Yerimbetov himself has been brought to only one of his own pretrial detention hearings, on 15 November 2017, and he was not even informed of the hearings on 9 January and 6 March 2018 until after they had been held. No other members of his family, of the press or of the public were allowed in.

42. In addition, Mr. Yerimbetov has never been brought to any of the hearings related to the due process abuses. No members of the public or journalists have been allowed to attend any of the hearings.

(vii) Violation of the right to the presumption of innocence

43. The source submits that Mr. Yerimbetov has not been afforded the right to the presumption of innocence. Since his arrest, numerous false statements about his case have been made public by the authorities through the media. He has reportedly been the subject of a sustained propaganda campaign in the State-controlled media and on social media platforms and obscure Internet sites, using information that could apparently only have been obtained if someone from the Investigative Group had illegally "leaked" that information. As such, he is effectively being tried in the court of public opinion before even being formally charged with any crime.

44. Furthermore, the source reports that the authorities have repeatedly arranged for external help to perpetuate their propaganda blitz against Mr. Yerimbetov, hiring or otherwise organizing investigations by outside "experts" to speak with Mr. Yerimbetov, and then using their allegedly independent testimony to further the Government's narrative that he is a criminal. For example, in many instances, the authorities have allegedly attempted to discredit what the parents of Mr. Yerimbetov have said about his torture by claiming that they are lying and citing fabricated reports, which the Government itself created.

(viii) Torture and cruel, inhuman or degrading treatment, and ongoing denial of medically appropriate detention conditions

45. The source submits that Mr. Yerimbetov has repeatedly been subjected to torture during his detention, as corroborated by numerous independent organizations. He was repeatedly interrogated by National Security Committee officials in the basement of SI-1 without a lawyer present. These interrogation sessions, which lasted for hours, occurred five or six times between 14 November and 5 December 2017. During these sessions, the National Security Committee authorities allegedly employed harsh coercive measures to try to force Mr. Yerimbetov to make a false confession, including threats to sentence him to 15 to 20 years in prison, to lock him in a cell with Islamic terrorists or inmates infected with HIV or tuberculosis and to arrest his 69-year-old father and 20-year-old son and subject them to violence.

46. From 28 November to 5 December 2017, Mr. Yerimbetov was allegedly held in "punitive confinement", ostensibly because he had nail clippers, apparently a prohibited item. He was locked in a small, filthy cell without access to natural lighting and with only a hole in the floor as a toilet. The cell was deliberately kept at cold temperatures, and Mr. Yerimbetov was stripped of his outer clothing. A mattress was brought into the room at 10 p.m. every night and removed by 6 a.m. every morning. During this period of time, Mr. Yerimbetov was told again that he could be released in exchange for a confession. However, he refused to confess to alleged crimes of which he is innocent.

47. The source submits that the authorities have further punished and retaliated against Mr. Yerimbetov in a number of cruel ways. According to domestic law, persons suspected of a crime and detained in pretrial detention may not be held in the same cell as convicted persons. However, Mr. Yerimbetov was transferred to a cell with six inmates convicted of serious crimes (e.g. assault or causing severe bodily injury). These inmates, whom Mr. Yerimbetov believes were acting under the direction of the National Security Committee authorities, allegedly subjected him to extreme physical and psychological abuse on numerous occasions between 6 and 12 December 2017, in further violation of his rights. He was allegedly beaten with a stick, which was provided by a security guard and wrapped in a wet towel so that the bruising would be less visible. He was strangled with a cord and by the hands of his cellmates. Furthermore, his cellmates threatened to rape him with a broomstick, drown him in the latrine bucket and stick HIV-infected needles under his fingernails.

48. On 15 December 2017, Mr. Yerimbetov reportedly wrote a note to his lawyer about the abuse and mistreatment in prison, stating: "My life in danger!" He continues to write handwritten notes affirming that he was tortured. On 8 March 2018, he was placed in solitary confinement, where he remained until 14 April 2018, when a new cellmate joined him.

49. The source asserts that these abusive tactics applied by the Government have gravely violated Mr. Yerimbetov's fundamental human rights.

50. The source reports that, on 18 January 2018, the Prosecutor's Office of Almaty opened a criminal investigation into the allegations of torture. In response, the Anti-Corruption Bureau issued a press release claiming that Mr. Yerimbetov had not been tortured and that medical investigations and visits by human rights investigators had proven the absence of torture. On 22 February 2018, the General Prosecutor's Office announced that the investigation had been closed, claiming that Mr. Yerimbetov had not complained of torture, and that there was no evidence that he had been tortured.

51. According to the source, Mr. Yerimbetov has been sick for more than two months due to the conditions in which he is being detained. These include a lack of treatment of wounds inflicted by beatings, minimal heating despite temperatures outside dipping as low as -30°C, dirty water and inadequate nutrition, the presence of bedbugs and rats, and insalubrious toilet facilities.

Response from the Government

52. On 24 May 2018, 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 detailed information about the current situation of Mr. Yerimbetov by 23 July 2018, and to clarify the legal provisions justifying his continued detention and its compatibility with the obligations of Kazakhstan under international human rights law, in particular with regard to the treaties ratified by the State. Moreover, the

Working Group called upon the Government of Kazakhstan to ensure Mr. Yerimbetov's physical and mental integrity.

53. In its reply of 21 July 2018, the Government of Kazakhstan denies the allegations made by the source and argues that, upon receipt of the complaints concerning torture and ill-treatment of Mr. Yerimbetov, the General Prosecutor initiated an investigation. However, Mr. Yerimbetov refused to cooperate with the investigation and even with the independent experts who were appointed. Despite that, the investigation proceeded and included a monitoring visit to the detention facility where Mr. Yerimbetov was held, by two prominent national human rights defenders. They were given unfettered access to the facility and to Mr. Yerimbetov and were able to speak with him in private. The Government has attached their report to the response, arguing that it exonerates the authorities of any allegations of ill-treatment and torture.

54. The Government further submits that Mr. Yerimbetov was arrested and is standing trial in Kazakhstan for violations of various Kazakh laws, and that the arrest and trial are not at all politically motivated. The Government explains that the trial relates to the theft and embezzlement of funds in connection with Mr. Yerimbetov's operation of an entity called Sky Services, as well as money-laundering charges from BTA Bank, which was run by Mr. Ablyazov. In that respect, the Government has provided a brief summary of the accusations made in Kazakhstan against Mr. Ablyazov.

55. In relation to the arrest of Mr. Yerimbetov, the Government contends that he controlled multiple companies that received money stolen from BTA Bank and worked in concert with several accomplices of Mr. Ablyazov.

56. The Government also contends that the arrest and detention of Mr. Yerimbetov have been carried out in conformity with Kazakh law. With reference to a copy of an accusing document that it has attached, the Government claims that it confirms that Mr. Yerimbetov's arrest and pretrial detention were carried out in a manner that complies with Kazakh law and procedure.

57. The Government submits that the arrest was recorded on a videotape, which confirms that all rights were read out to Mr. Yerimbetov upon his arrest. The Government further submits that, at the time, Mr. Yerimbetov was brought before a judge who determined the presence of prima facie evidence of crimes, and that Mr. Yerimbetov was a flight risk if released pending trial. On the basis of those two elements, it was decided to remand Mr. Yerimbetov in custody.

58. The Government also submits that Mr. Yerimbetov and his lawyer have been provided with an opportunity to review all evidence against him in connection with the charges, and they have in turn indicated that they will vigorously challenge the allegations. The Government therefore contends that the proceedings are ongoing and requests that the Working Group recognize that the proceedings are not politically motivated.

Further comments from the source

59. On 25 July 2018, the Working Group transmitted the response from the Government to the source for comments. In its response of 6 August 2018, the source reiterates its original submission that Mr. Yerimbetov's detention is arbitrary and falls under categories I and III.

60. Furthermore, the source informed the Working Group that on 22 October 2018, Mr. Yerimbetov had been convicted and sentenced to a seven-year prison sentence on fraud charges.

Discussion

61. The Working Group thanks the source and the Government for their submissions. The Working Group appreciates the cooperation and engagement of both parties in this matter.

62. The source has argued that the detention of Mr. Yerimbetov is arbitrary and falls under categories I and III. The Government, while not employing the categories of the Working Group, rejects the allegations made by the source. The Working Group shall proceed to examine the submissions under each of the two categories.

63. In relation to category I, the source has argued that the detention of Mr. Yerimbetov lacks a legal basis as his arrest and subsequent detention were politically motivated. The Government denies the allegations, arguing that Mr. Yerimbetov was arrested on strong suspicion of having committed a crime and because he was assessed to be at flight risk. The Government has submitted a copy of the suspect's detention record (often referred to as the "protocol"), in support of its claim.

64. The Working Group recalls that it considers a detention to be arbitrary and as falling under category I if such detention lacks a legal basis. As the Working Group has previously stated, in order for a deprivation of liberty to have a legal basis, it is not sufficient that there is a law that may authorize the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant (see opinions Nos. 46/2017, 66/2017, 75/2017 and 35/2018). The Working Group will therefore first examine whether there was a warrant at the time of Mr. Yerimbetov's arrest on 13 November 2017.

65. The Working Group notes that the source has submitted that no arrest warrant was presented to Mr. Yerimbetov at the time of his arrest. The Working Group observes that the Government has submitted for the perusal of the Working Group a copy of the record of detention of the suspect. However, the document clearly states that it was drafted on 14 November 2017 in the office of the Head of the Investigation Department of the Anti-corruption Service of Almaty following the arrest of Mr. Yerimbetov, which took place one day earlier, on 13 November 2017. The Working Group wishes to emphasize that the document itself states that the arrest was made on 13 November 2017, whereas the document is dated 14 November 2017. In other words, this record was drafted after the arrest took place, and it could thus not have been the legal document warranting the detention of Mr. Yerimbetov, contrary to what the Government has claimed. Moreover, the record was drafted by the Head of the Investigation Department of the Anti-corruption Service of Almaty, which cannot be considered to be a judicial authority empowered to issue an arrest warrant in accordance with article 9 of the Covenant.

66. Furthermore, the Government has presented a copy of the record of the personal search of the detained person to the Working Group. However, this record states that it was drawn up at 9.30 p.m. on 13 November 2017, which was after the arrest had already taken place. The Working Group therefore considers that it is not an arrest warrant and cannot be regarded as a document authorizing an arrest.

67. The Working Group observes that the Government has submitted a copy of the "Decision on the Qualification of Acts Committed by Suspect" for the perusal of the Working Group. However, that document cannot be construed as a warrant or other legal document authorizing the arrest of Mr. Yerimbetov either, as it was drafted on 15 November 2017 – in other words, after the arrest had taken place.[3]

68. Moreover, both the source and the Government have argued that the process of arrest was filmed with a video camera. In the view of the Government, the video proves that all due procedural guarantees were observed by the arresting authorities. The Working Group observes, however, that such a video is also not an arrest warrant that would have duly authorized the initial arrest of Mr. Yerimbetov.

69. Therefore, while the Government argues that there was a warrant authorizing the arrest of Mr. Yerimbetov on 13 November 2017, the Working Group observes that no such document has been submitted to the Working Group. To this end, the Working Group wishes to reiterate the principles established in its jurisprudence on how it deals with evidentiary issues. If the source has presented a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations (A/HRC/19/57, para. 68). On that basis, the Working Group concludes that Mr. Yerimbetov was arrested without a warrant, in breach of article 9 of the Covenant.

[3] See opinion No. 45/2018.

70. The source has submitted that Mr. Yerimbetov requested a lawyer at the time of his arrest but that request was denied. The Working Group observes that the Government has chosen not to reply to that allegation, and it therefore accepts the submission made by the source.

71. In that regard, the Working Group observes that, in order to establish that a detention is indeed legal, anyone detained has the right to challenge the legality of his or her detention before a court, as envisaged by article 9 (4) of the Covenant. The Working Group wishes to recall that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.[4] That right, which is in fact a peremptory norm of international law, applies to all forms of deprivation of liberty;[5] it applies to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes.[6] Moreover, it also applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.[7]

72. The Working Group notes that, in order to ensure an effective exercise of that right, detained persons should have access, from the moment of arrest, to legal assistance of their own choosing, as stipulated in the Basic Principles and Guidelines.[8] That was denied to Mr. Yerimbetov, which seriously adversely impacted his ability to effectively exercise his right to challenge the legality of his detention, thereby denying him his rights under article 9 (4) of the Covenant.

73. The Working Group thus concludes that, since the detention of Mr. Yerimbetov took place without an arrest warrant and since he was effectively prevented from exercising his right to challenge the legality of his detention, his arrest and detention is arbitrary and falls under category I.

74. The source has further submitted that the detention of Mr. Yerimbetov is arbitrary and falls under category III since he was prevented from having any contact with his family until 5 December 2017, since he was not allowed contact with his lawyer initially, since his lawyer was not allowed full access to his case file prior to the pretrial hearing on 15 November 2017, since he was given a mere 24 hours to review the evidence in relation to new charges brought against him in March 2018 and subsequently not allowed sufficient time to review the case materials, since court reviews of the need to remand him in custody took place on 9 January and 6 March 2018 behind closed doors and in his absence, and since his presumption of innocence was violated by a sustained propaganda campaign in State-controlled media, on social media platforms and on Internet sites. The source has also made allegations of torture and ill-treatment of Mr. Yerimbetov.

75. The Working Group notes that the Government has failed to respond to any of the allegations, with the exception of the allegations of torture and ill-treatment. In that respect, the Government has submitted that, upon receipt of the allegations of torture and ill-treatment, the General Prosecutor initiated an investigation on 21 February 2018. The Government has submitted a copy of the report of a monitoring visit conducted by two prominent local NGO representatives who were given full and unfettered access to Mr. Yerimbetov and to the detention facility he is held in. In the view of the Government, their report confirmed that Mr. Yerimbetov had not been ill-treated.

[4] A/HRC/30/37, paras. 2 and 3.
[5] Ibid., para. 11.
[6] Ibid., para. 47 (a).
[7] Ibid., para. 47 (b).
[8] Ibid., Principle 9, paras. 12–15.

76. Upon its examination of the said report, the Working Group is unable to agree with that conclusion by the Government. In fact, the Working Group observes that, at the very minimum, the report documents serious shortcomings in the health care provided to Mr. Yerimbetov and gives rise to serious concerns over his well-being. The Working Group wishes to remind the Government of the absolute nature of the prohibition of torture and ill-treatment as a peremptory norm of international law as well as of its prohibition in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Kazakhstan has been a party since 26 August 1998. In addition, torture and ill-treatment are strictly prohibited by principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and rule 1 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

77. The Working Group would like to express its concern at the allegations concerning the treatment of Mr. Yerimbetov during his pretrial detention and wishes to remind the Government 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, and that denial of medical assistance constitutes a violation of the Nelson Mandela Rules and of rules 24, 25, 27 and 30 in particular. The Working Group refers the case to the Special Rapporteur on torture.

78. The Working Group will now examine the alleged denial of Mr. Yerimbetov's fair trial rights, as submitted by the source. In the absence of any response by the Government in relation to the allegations, the Working Group accepts the submissions made by the source in that regard.

79. In relation to the review of the continued pretrial detention, which was held behind closed doors and in the absence of Mr. Yerimbetov, the Working Group recalls the statement made by the Human Rights Committee in paragraph 29 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial:

> Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons.

80. The Working Group notes that the Government has failed to produce any explanation as to why and how the court review hearings of Mr. Yerimbetov's continued pretrial detention would fall into any of the prescribed exceptions to the general obligation of public trials under article 14 (1) of the Covenant. The Working Group thus finds a violation of article 14 (1) of the Covenant. Moreover, by excluding Mr. Yerimbetov himself from the review of his pretrial detention, the court deprived him of the possibility to be heard and to defend himself, as envisaged in article 14 (3) (d) of the Covenant.

81. The Working Group has already observed that Mr. Yerimbetov's lawyer had to challenge the decision to remand him in custody on 15 November 2017 without access to his file, in breach of article 9 (4) of the Covenant. In the view of the Working Group, that also constituted a serious violation of the principle of equality of arms under article 10 of the Universal Declaration of Human Rights and article 14 (1) and (3) (b) of the Covenant, and a violation of Mr. Yerimbetov's rights to a fair hearing and to have adequate time and facilities for the preparation of his defence in full equality.[9]

82. The source has alleged that Mr. Yerimbetov was denied legal assistance on a number of occasions and was repeatedly interrogated in the absence of his lawyer. The Government,

[9] See, for example, opinions Nos. 89/2017, para. 56; 50/2014, para. 77; and 19/2005, para. 28 (b), in which the Working Group reached a similar conclusion on the violation of the principle of equality of arms when classified information is withheld from the defendant. See also opinions Nos. 18/2017, 2/2018 and 18/2018.

while it has had the opportunity to do so, has chosen not to respond to those allegations. The Working Group therefore finds a violation of article 14 (3) (d) of the Covenant. The Working Group finds a further breach of the same provision, as Mr. Yerimbetov's lawyer was not given full and prompt access to all of his client's case files in relation to the November 2017 and March 2018 hearings.

83. Moreover, the source has argued that, when Mr. Yerimbetov was presented with further charges in March 2018, he and his lawyer were given the deadline of 18 April 2018 for reviewing the material supporting the charges. The source has claimed that Mr. Yerimbetov and his lawyer were inundated with thousands of pages of documents and were unable to review such a large volume in the prescribed period of time. The source has further claimed that, prior to that, Mr. Yerimbetov and his lawyer were given a mere 24 hours to review the evidence in relation to the new charges brought against him in March 2018. The Government has made no submissions with regard to either of those allegations.

84. In relation to the former allegation, the Working Group observes that Mr. Yerimbetov and his lawyer had about a month to review the documents containing evidence on the new charges against him. Article 14 (3) (b) of the Covenant requires that everyone charged with a criminal offence be given adequate time and facilities to prepare for a defence. The Working Group accepts that Mr. Yerimbetov and his lawyer struggled to review the documents in the prescribed time. Moreover, the Working Group is troubled by the allegation that, in relation to the March 2018 charges, Mr. Yerimbetov and his lawyer were given a mere 24 hours to review the evidence against him in relation to the new charges, which is an extremely short period of time. Nevertheless, the source has failed to explain whether, on either of those occasions, the defence team submitted requests for more time to be provided and whether such requests were denied. Without such information, the Working Group is unable to conclude that there has been a breach of article 14 (3) (b) of the Covenant.[10]

85. The source has also alleged that Mr. Yerimbetov's right to the presumption of innocence has been breached by the State-controlled media, another allegation that the Government has chosen not to respond to.

86. In that regard, the Working Group notes that the source has simply made a statement that there has been a sustained State media campaign against Mr. Yerimbetov, but has failed to produce any concrete examples of such activity.[11] In the absence of any concrete examples of how Mr. Yerimbetov's presumption of innocence was violated, the Working Group is unable to make any findings in that respect.

87. The Working Group further notes the absence of a response from the Government in relation to allegations made by the source concerning the denial to Mr. Yerimbetov of contact with his family. The Working Group therefore finds a violation of principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

88. Noting all the above, the Working Group finds that the violations of Mr. Yerimbetov's fair trial rights have been of such gravity as to give his deprivation of liberty an arbitrary character (category III). In this regard, the Working Group notes in particular that Mr. Yerimbetov's lawyer was not given full access to his case file for the hearing on 15 November 2017, that Mr. Yerimbetov was denied the possibility of participating in the review hearings of his pretrial detention, that those hearings were held behind closed doors and that he was denied legal assistance during interrogations.

89. On 2 March 2015 and 8 November 2017, the Working Group sent letters to the Government of Kazakhstan, with a request for a country visit. While noting that the Government has expressed its readiness to arrange the visit, the Working Group reiterates that it would welcome the opportunity to conduct such visit in order to engage with the Government in a constructive manner and to offer its assistance in addressing its serious concerns relating to instances of arbitrary deprivation of liberty.

[10] See opinion No. 2/2018. See also *Grant v. Jamaica* (CCPR/C/56/D/597/1994) and *Sawyers and McLean v. Jamaica* (CCPR/C/41/D/226/1987).

[11] See paras. 43–44 above.

Disposition

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

> The deprivation of liberty of Iskander Yerimbetov, being in contravention of articles 3, 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III.

91. The Working Group requests the Government of Kazakhstan to take the steps necessary to remedy the situation of Mr. Yerimbetov 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.

92. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Yerimbetov immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

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

94. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture, for appropriate action.

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

Follow-up procedure

96. 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. Yerimbetov has been released and, if so, on what date;

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

(c) Whether an investigation has been conducted into the violation of Mr. Yerimbetov'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.

97. 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.

98. 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.

99. 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.[12]

[*Adopted on 20 November 2018*]

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