

Report on the arrest, detention and trial of Azimzhan Askarov



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Cover photo: Supreme Court of Kyrgyzstan, December 2011.

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Report on the arrest, detention and trial of Azimzhan Askarov

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I. INTRODUCTION

1. Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realisation of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.
2. This report analyses and evaluates, with reference to international legal standards, the investigation, trial and Supreme Court appeal hearing in the case of Azimzhan Askarov, a prominent human rights defender working in the South of Kyrgyzstan, who was convicted of serious crimes, including the murder of a police officer, taking place during the violent ethnic clashes in the South of Kyrgyzstan in June 2010. The detention and trial of Azimzhan Askarov, in common with many of the trials taking place in the aftermath of the June 2010 violence, prompted widespread international concern regarding compliance with the international human rights law obligations of Kyrgyzstan.
3. It was in light of these concerns that on 5 December 2011 the ICJ received a request from the Human Rights Council of Kyrgyzstan to observe the hearing at the Supreme Court of the Kyrgyzstan of the case against Azimzhan Askarov and seven other persons. The ICJ was requested to examine the facts related to the case and to provide a legal analysis to the case. The ICJ Secretary General appointed a mission of three legal experts: Róisín Pillay, Director of the ICJ Europe Programme, Daniyar Kanafin, lawyer from Kazakhstan, and Dr Eva Rieter, Senior Researcher at the Department of International Law, Radboud University Nijmegen.¹ Nikolai Kovalev, Assistant Professor at the Department of Criminology of Wilfrid Laurier University in Canada, and Temur Shakirov, Associate Legal Advisor at the ICJ Europe Programme, were also involved in the legal analysis of the case and the drafting of the report. Ian Seiderman, ICJ Legal and Policy Director, provided legal review of the report.
4. The Mission arrived in Bishkek on 19 December 2011 with the goal of the collecting first-hand information, gathering documents, and conducting personal interviews with a range of actors to ensure that a full and objective assessment of the case could be carried out. The mission was present at the Supreme Court hearing of the case on 20 December. The mission also met with the Prosecutor General of the Kyrgyz Republic, with defence lawyers of Azimzhan Askarov, with representatives of the victim in the case, with Kyrgyz NGOs, and with representatives of the Organisation for Security and Cooperation in Europe (OSCE) office in Kyrgyzstan. Delegates of the mission were also able to meet with Mr Askarov himself in prison, and to hear his detailed account of his arrest, detention and trial. The ICJ wishes to express its thanks to all those who met with the mission in Bishkek, who provided information and documents to the mission, and who advised on the case.
5. The ICJ was able to obtain access to most of the available materials of the case including the minutes of the interrogation of Azimzhan Askarov, interrogation materials of the suspects, complaints of the defence lawyers to different state authorities, replies of those authorities, testimonies of different actors, medical reports, court decisions and monitoring reports of NGOs as well as other relevant documents. At a later stage, the ICJ addressed the Prosecutor General's Office and the Supreme Court of the Kyrgyz Republic with letters requesting additional information. However, no replies were received.

¹ The Kyrgyz Republic: ICJ Concludes Mission on the case of human rights defender Azimjan Askarov, http://www.icj.org/dwn/database/Askarov_Mission_Statement_ENG.pdf.

International Human Rights Law Obligations of the Kyrgyz Republic

6. Kyrgyzstan is a party to many of the principal UN international human rights law treaties including *inter alia*: the International Covenant on Civil and Political Rights and its two Optional Protocols, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and its first two Optional Protocols, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, and the Convention on the Rights of Persons with Disabilities.²

Context: the ethnic conflict of 2010

7. The events which led to the conviction of Azimzhan Askarov and seven other persons took place amidst a general situation of extreme violence, including ethnically-motivated killings, rape and other sexual violence, beatings, and violent clashes which erupted in June 2010 between ethnic Kyrgyz and ethnic Uzbek citizens in the South of Kyrgyzstan.³ The ethnic violence followed the removal of the Kyrgyz government in April 2010, which exacerbated an already unstable situation in the region. Sporadic acts of violence, with some ethnic overtones, took place in April and in May, and in early June the regularity of ethnic clashes increased. On 10 June, the frequency and level of such clashes grew significantly. On 11 June 2010, there began a full-scale conflict involving hundreds of deaths and injuries, and destruction of property, leading to the displacement of tens or even hundreds of thousands of people. The population in certain parts of Southern Kyrgyzstan responded to violence and rapidly spreading rumours of potential attacks by armed gangs, by erecting barricades to protect their villages, homes and property. Such constructions were often to no effect, and were easily removed by attackers equipped with APCs. On 12 June, the violence spread to Jalal-Abad province and lasted throughout the following day; and only on 14 June did the situation begin to stabilise.
8. One such incident of road blocking took place in the village of Bazar-Korgon after local residents heard rumours of a forthcoming attack on their village. The police that came to unblock the road were beaten and one police officer was killed. Later the village was attacked, as a result of which more than 20 people were killed and more than two hundred houses were burnt. The killing of the police officer and the blocking of the road resulted in the prosecution and conviction of Azimzhan Askarov and seven other people.⁴ The ICJ is not aware of any convictions for the death of the other 20 people or for the destruction of property in the village.
9. This report is confined to an examination of the human rights violations alleged to have taken place during the arrest, detention and trial of Azimzhan Askarov, and does not examine the wider context in which these events took place. However, the killings and road-blocking in Bazar-Korgon can only be understood when they are seen in light of the ethnic conflict and breakdown of the rule of law which engulfed the region between 10 and 14 June 2010. It is also essential to bear in mind that the investigation and trial took place in

² For a full list visit: <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>.

³ Among many others: The Report of the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan in June 2010, paras. 124–134; Human Rights Watch, “Where is the Justice?”, Interethnic Violence in Southern Kyrgyzstan and its Aftermath, <http://www.hrw.org/reports/2010/08/16/where-justice-0>; Amnesty International, Kyrgyzstan: Partial truth and selective justice: The aftermath of the June 2010 violence in Kyrgyzstan, <http://www.amnesty.org/en/library/info/EUR58/022/2010/en>, etc.

⁴ Ms Mamadaliyeva Minyura Tirkashevna, Mr Kochkarov Muhammadzakir Mamashakirovich, Mr Malavkhunov Sanjarbek Zhamaldinoich, Mr Mirzalimov Shukurbek Saidkulovich, Mr Rozubaev Dilshotbek Tohtasinovich, Mr Rasulov Elmurad Muminzhanovich, Mr Abduraimov Isroilbek Mgomatshakirovich.

a deeply divided society in the immediate aftermath of a conflict in which both communities had experienced terrible losses and trauma. The prevailing atmosphere was one of intense ethnic hostility and fear where the rule of law had recently broken down and the institutions of the State, including the judiciary, were fragile.

Azimzhan Askarov

10. Azimzhan Askarov, born on 17 May 1951 is the Director of “Air” human rights organisation. He is a human rights defender who lived and worked in Bazar-Korgon in the South of Kyrgyzstan. He was a member the Djalal-Abad branch of the Artists’ Union after his education in the Art School in Tashkent. From 1996 he worked in the field of human rights and in 2002 he founded the organisation “Air”.
11. At the time of his arrest, Azimzhan Askarov’s work involved inquiries into complaints of citizens with regard to the actions of the Bazar-Korgon police department; monitoring of places of detention; and inquiries into deaths in police custody. He was particularly known for his investigations into two cases of serious human rights violations by the police of Bazar-Korgon. One was the 2003 case of Zulkhumor Tukhtanazarova, a young woman repeatedly raped over an eight month period while illegally detained in Bazar-Korgon police department; she became pregnant and was brought by the police to hospital where an abortion was carried out. As a result of Azimzhan Askarov’s investigations into the case, two police investigators were fired and criminal proceedings were initiated against four police officers. The second case was that of Yarkinay Mamadzhanova, a suspect who had made self-incriminating statements under duress confessing to murder. As a result of Azimzhan Askarov’s investigations, the “murdered” person entered the courtroom in the middle of the process and the case against Ms Mamadzhanova was terminated while the prosecutor of Bazar-Korgon district was dismissed.

The arrest and trial of Azimzhan Askarov

12. Azimzhan Askarov took part in gatherings and meetings of people during the ethnic clashes on 12 and 13 June. One such gathering took place on the border with Uzbekistan at the Seidikum border crossing, when people tried to flee to Uzbekistan during the clashes. Another such gathering took place the near his village of Bazar-Korgon at the bridge crossing Kara-Ungur river on 553.5 km of Bishkek-Osh highway. During a conflict between the police and the people on the bridge, a police officer was killed. Azimzhan Askarov was arrested on 15 June 2010⁵ on suspicion of committing a number of criminal acts related to this killing, including murder and incitement to ethnic hatred. There are credible allegations that he was severely beaten and ill-treated for several days. During this time, he did not see a lawyer of his choosing, and did not have access to medical help or an independent doctor. Following a visit of his lawyer where he disclosed information about torture he did not have access to his lawyer for several weeks. His lawyer’s complaints about torture were never properly investigated.
13. There are credible allegations that, during the trial and appeal, Azimzhan Askarov and seven other co-defendants in the case were heavily beaten. One such instance happened in the courtroom. Lawyers were insulted and attacked during the hearings, witnesses for the defence were not allowed to testify or even enter the courtroom and were physically attacked on the street. Insulting comments were made throughout the hearings and there were instances of hanging insulting posters outside the court and inside the courtroom. Azimzhan Askarov’s life sentence was upheld by the upper instances including the Supreme Court. Neither the investigation nor the courts gave a detailed account of the events on the bridge and ignored complaints of ill-treatment of the defendants including Mr Askarov.

⁵ The date is contested, see *infra* para. 44.

14. Further appeals did not lead to the initiation of any criminal investigation into the allegations of ill-treatment amounting to torture. Mr Askarov is currently serving his life sentence in prison.

The Report

15. This report pursues two main objectives. The first is to set out the course of the events which led to Mr Askarov's arrest and the events which took place during his pre-trial detention and trial. The second is to provide a legal analysis and evaluation of the possible violations of the Kyrgyz Criminal Procedure Code and of Kyrgyzstan's international human rights law obligations.
16. Chapter 2 of this report analyses the available information to describe, to the extent possible, the events in the case. This account relies principally on official documents including the motions, documents released or compiled by governmental bodies, court decisions, and witness testimonies presented to the Supreme Court. It also relies on the ICJ's interviews in Bishkek, in particular with Azimzhan Askarov as well as on his diary,⁶ and on trial monitoring reports. To describe the sequence of the events in detail is critical, as there have been consistent reports and allegations of torture and ill-treatment, including pictures with bruises on Mr Askarov's body. However the state authorities have never addressed these allegations and no official investigations have been initiated.
17. The Mission did not purport to establish the facts in a judicial manner. However the ICJ sought to ensure that only first-hand information is used with regard to establishing of the facts of the case and that only those facts which are either supported by official documents submitted to or issued by state bodies or were directly reported to the Mission by relevant persons, were relied on.
18. Chapter 3 of the report analyses the events of the case in light of Kyrgyzstan's international human rights obligations and in light of the Constitution and criminal law of the Kyrgyz Republic. It considers possible breaches of those legal obligations in relation to Mr Askarov and others involved in the case. The international law and standards analysis is informed by the treaties to which the Kyrgyzstan is a party. Where appropriate examples are drawn from the case law of the jurisprudence of the European Court of Human Rights as well as other international jurisdictions.

⁶ The diary was used as evidence of ill-treatment and was attached to an appeal of 14 January 2011 requesting initiation of criminal investigation into the allegations of torture based on the facts described in it. Thus the diary can be considered as a procedural document, see *infra* para. 137 .

II. FACTUAL CIRCUMSTANCES OF THE CASE

19. In this Chapter, the facts of the case are presented, inasmuch as they can be established from the accounts, often contradictory, of the various actors. The following account relies on official court documents, interviews conducted by the ICJ with Azimzhan Askarov and others, as well as, in some places, on reports by reliable NGOs and the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan (KIC).⁷ It should be noted that the ICJ has not carried out a thorough first-hand fact-finding investigation of the case, beyond the interviews it conducted, and review of the documents available to it. In particular, the ICJ relied on its interview with Azimzhan Askarov as a reliable direct source; the allegations he made are not taken as verified, but rather as allegations from a credible source. The ICJ representatives were present at the Supreme Court hearing in the case, but not at the first instance trial or at the Court of Appeal. The role of the ICJ is not to make final determinations on the facts, but rather to review the credible allegations of violations, the fairness of the procedures before and during the trial, as well as in the measures taken to prevent and investigate allegations of violations of human rights. Nevertheless, an analysis of the events in the case below is essential to this task.

Events preceding the murder of Myktybek Sulaimanov

20. The ethnic conflict of June 2010 escalated on 9 June and spread quickly on 10 June, primarily in Osh. The KIC report mentions that by 12 June the tensions had risen in Jalal-Abad.⁸ On the morning of 12 June, according to Mr Askarov's account, rumours started to spread of a planned "massacre" in the village of Bazar-Korgon, the administrative centre of the Bazar-Korgon region located in the Jalal-Abad province bordering with Uzbekistan's Andizhan province.⁹ The head of the local administration proposed to take women and children to a safer place, across the border with Uzbekistan. Most of the people were heading to Pakhta-Abad region of Andizhan province (Uzbekistan), which is 20 km from Bazar-Korgon village (Kyrgyzstan), in order to cross into Uzbekistan through the Seidikum border crossing. Thus, on the bridge crossing the canal, dividing Kyrgyzstan and Uzbekistan, next to Chek village, around 500 persons gathered wishing to cross into the territory of Uzbekistan in search of refuge.¹⁰ According to Kubatbek Artykov, head of Bazar-Korgon regional administration (a position with the title of "akim"), there were about 1000 persons on the border at that time.¹¹ Both sides of the border were reinforced with special security measures.¹² Mr Askarov, who came there to monitor and document the events,¹³ states that he decided to return home in order to bring his mother, daughter and grandchildren over the border to Uzbekistan.¹⁴
21. As he was about to leave, according to Mr Askarov, akim Kubatbek Artykov, Mr Artykov's bodyguard, and imam Tojidin Kori came to the bridge. According to the Bazar-Korgon court decision, as well as Mr Askarov and Mr Artykov himself, Mr Artykov requested Mr

⁷ The Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan in June 2010 was established in at the request of President Roza Otunbayeva to investigate the facts and circumstances relevant to incidents that took place in southern Kyrgyzstan in June 2010, qualify the violations and crimes under international law, determine responsibilities and make recommendations, particularly on accountability measures. A report was issued following the Inquiry.

⁸ The Report of the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan in June 2010, para. 178.

⁹ National Agency of the Kyrgyz Republic on municipality affairs [Rus], http://namsu.org.kg/index.php?option=com_content&view=article&id=96%3A2011-05-14-06-15-56&catid=2%3A2010-07-08-13-10-59&Itemid=3&lang=ru.

¹⁰ Interview of the ICJ mission with Azimzhan Askarov on 20 December 2011.

¹¹ Sentence of Bazar-Korgon District Court of 15 September 2010, Nohoken.

¹² Appeal of Azimzhan Askarov to the President of the Kyrgyz Republic Atanbaev A.Sh., <http://vof.kg/?p=3470>.

¹³ *Ibid.*

¹⁴ Interview of the ICJ mission with Azimzhan Askarov of 20 December 2011.

Askarov to assist in returning the people back to their homes. Mr Askarov inquired about provision of safety guarantees for the people, to which the head of local administration responded, according to Mr Askarov, negatively.¹⁵ According to Mr Artykov he himself said: "As the head of the region I promise that the Kyrgyz population will not do anything bad to the Uzbek population and they will not be accepted in Uzbekistan".¹⁶ The conversation lasted for about a minute, after which Mr Askarov got into his car and went home.¹⁷

22. The prosecution alleged, and the Kyrgyz courts later found, that during this conversation Mr Askarov was involved in a hostage-taking attempt. According to the Court of first instance's verdict, Mr Askarov "agitated <...> the citizens of Uzbek ethnicity to take K. Artykov as hostage and thus while attempting to commit the crime becoming the accomplice of the criminal act. However, according to the circumstances beyond his control, the crime was not actually committed".¹⁸ For example, two witnesses said that they "saw Karabayev M., Askarov A., Mamadaliyeva M. shout "Take akim as hostage!" when akim Artykov was speaking to people".¹⁹ The akim himself testified that he was talking to Mr Askarov at that time.²⁰
23. However, according to Mr Askarov, the conversation between him and the akim took place in direct proximity to more than ten Uzbek border guards and customs officers, in front of whom Mr Askarov could not have possibly shown aggression.²¹ It is also notable that, despite the fact that the imam, Tojidin Kori, witnessed the conversation, he was not called as a witness at the trial.²² This point was especially highlighted in a complaint to the Supreme Court: "[T]he district imam Tajidin, the border guards who had seen akim Artykov talking to people, should also be questioned as witnesses. If they were questioned, they would tell everything as it was. The reason why investigators and prosecutors did not question Imam Tajidin and border guards at the trial is that the falsity of charges against Askarov that he tried to take Artykov hostage would be proven in court. They, being scared, did not bring Imam Tajidin and border guards to the trial. But neither the investigating authorities, nor the judge, questioned Imam Tajidin or border guards, who saw these events as key witnesses. If imam Tajidin and border guards were questioned in court, they would have testified that no one tried to take Artykov hostage and that all this was a lie. The relatives of the victims did not give us, the lawyers, an opportunity to bring Tajidin and border guards to questioning".²³ The accusation of attempted hostage-taking was confirmed by only two witnesses (Tashiyev K.Sh, and Kochkarov B.Z.),²⁴ who were respectively the bodyguard and driver of Mr Artykov, despite the fact that there were many witnesses of their short conversation who also could have made statements about the conversation that took place.²⁵ Defendant Ms Mamadaliyeva, who was also questioned on this point, said that Askarov was there, but she did not hear what they were "speaking" about.²⁶ The Supreme Court, based on the oral testimony of the akim and his bodyguard and driver, decided as follows: "Under the abovementioned circumstances, the panel of

¹⁵ Sentence of Bazar-Korgon District Court of 15 September 2010.

¹⁶ *Ibid.*

¹⁷ Human Rights Centre "Citizens against corruption": Detailed description of Mr Askarov on arrest and court hearings, page 4; taken from the website of the International Federation for Human Rights (FIDH), http://www.fidh.org/IMG/pdf/_zapis_A-_Askarova.pdf.

¹⁸ Sentence of Bazar-Korgon District Court of 15 September 2010.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Interview of the ICJ mission with Azimzhan Askarov of 20 December 2011.

²² Resolution of the Supreme Court of the Kyrgyz Republic of 20 December 2011, Bishkek.

²³ Complaint on sentences of Bazar-Korgon District Court of 15 September 2010 and Jalal-Abad Regional Court of 10 November 2010 to the Judicial Board on Criminal Cases and Administrative Offenses of the Supreme Court of the Kyrgyz Republic from lawyer Abdimalip Abylakimov, 22 November 2010.

²⁴ Sentence of Bazar-Korgon District Court of 15 September 2010.

²⁵ Appeal of Azimzhan Askarov to the President of the Kyrgyz Republic Atanbaev A.Sh., *op. cit.*

²⁶ Resolution of the Supreme Court of the Kyrgyz Republic of 20 December 2011.

judges decided that there is no reason to doubt the accuracy of the conclusions of the court."²⁷

24. The ICJ notes that it is impossible to establish with any certainty what happened on the bridge without calling the eye-witnesses and gathering enough factual information presented by both defence and prosecution.
25. After the exchange described above with the akim, Mr Askarov returned home and brought to the exact same location his mother, daughter, and grandchildren.²⁸ Upon his return, Mr Askarov did not find the akim and the imam there, and he heard from his staff member that there were some arguments which had taken place in his absence.²⁹ (Mr Askarov states that he became aware of the accusation that he threatened to take somebody hostage only about a month after his arrest.³⁰)
26. Mr Askarov states that by the evening he had returned to his office in the town centre and that one of the leaders of the Uzbek community suggested to him that they inspect the barricades. Upon their arrival they noticed that Saidullaeva and Jalalabadskaia streets were blocked with a trailer and cut down trees, after which Mr Askarov returned to the office and stayed there until the evening.³¹ The court decisions do not mention this. As mentioned earlier in the report, barricades were built in many places in Osh and Jalal-Abad in order to protect villages and residential areas (makhallas) from intrusion. Such barricades were not always helpful in preventing attacks, as armoured fighting vehicles were often used to remove them and to clear the way for the crowds which followed.³²
27. At 21:00 Mr Askarov took part in a gathering of Bazar-Korgon villagers in Saidullaeva Street. He was asked to document any possible invasion of armed persons. With this purpose, until 5 a.m. on 13 June he stayed at the place of possible intrusion.³³ This was next to the bridge crossing Kara-Unkur river, which was blocked by, according to court decision "around 500–600 unidentified by the investigation persons of Uzbek ethnicity".³⁴ The Court did not specify in its judgment how the ethnic background of such a large group of "unidentified" persons could have been identified during the procedure. Mr Askarov fell asleep in the car, and, according to his own account, at 5 a.m. on the morning of 13 June he asked the driver to take him home.³⁵ His arrival home was confirmed by numerous witnesses' reports, including from his neighbours.³⁶
28. This account of events was challenged in court, however. According to the statements of police officers and other witnesses, which were accepted in the judgment of the court, Mr Askarov did not return home but stayed at the bridge. They state that he was present at the police officers' arrival at the bridge and actively participated in organisation of the attack on police officers and in the murder of one of them.³⁷ (See para. 35 *infra*.)
29. The ICJ has not been able to find any convincing evidence that the courts or the investigation examined the details of Mr Askarov's claim that he travelled home early in the

²⁷ Resolution of the Supreme Court of the Kyrgyz Republic of 20 December 2011.

²⁸ Human Rights Centre "Citizens Against Corruption": Detailed description by A. Askarov of arrest and court hearings, from the website of the International Federation for Human Rights (FIDH), http://www.fidh.org/IMG/pdf/_zapis_A-Askarova.pdf, pages 4, 5.

²⁹ Interview of the ICJ mission with Azimzhan Askarov of 20 December 2011.

³⁰ *Ibid.*

³¹ *Ibid.*

³² The Report of the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan in June 2010 (*op. cit.*); The Chronicles of Violence: the Events of June 2010 in the South of Kyrgyzstan; other reports.

³³ Interview of the ICJ mission with Azimzhan Askarov of 20 December 2011.

³⁴ Sentence of Bazar-Korgon District Court of 15 September 2010.

³⁵ Interview of the ICJ mission with Azimzhan Askarov of 20 December 2011.

³⁶ At the disposal of ICJ there are notarized statements of neighbours of Mr Askarov, presented to the Supreme Court of the Kyrgyz Republic, where they testified that they saw Azimzhan Askarov on 13th of June at approximately 8:00–8:30 a.m.

³⁷ References to the statements of police officers, other witnesses and sentences.

morning. It seems clear that the fact of his return home is a critical factual consideration in respect of the case against him. Both the investigation and the courts of all instances seemed to pay considerable attention to oral testimony of the witnesses of the prosecution, mostly police officers, who confirmed Mr Askarov's presence on the bridge with one voice. The ICJ does not know of any other material evidence of his presence there except for this testimony. In fact, the Supreme Court stated: "The testimony of the victims and the witnesses on the mentioned circumstances of the case during the investigation and at judicial hearings are constant and identical, which is why the judicial board considers that there are no reasons not to believe these testimonies".³⁸ Further testimony from other persons including drivers and neighbours who saw Mr Askarov, or further efforts by the Court to find out about Mr Askarov's assertions that he had spent night at home, could have clarified the picture. In their absence, the Supreme Court concluded that the defence "...did not bring to any extent reasonable argument in order to refute or to not trust the testimony of the victims and witnesses and other evidence brought".³⁹

30. The ICJ is not in a position to confirm or refute the allegations. However, it is striking that the courts did not carry out an inquiry into Mr Askarov's alleged return home.
31. On 13 June, clashes took place in different parts of Jalal-Abad, including in Bazar-Korgon village.⁴⁰ Twenty-three people died, 50 were injured and 205 houses were destroyed as a result of the violence.⁴¹ One of the victims was a police officer, Myktybek Sulaimanov, who was killed on the bridge over the Kara-Ungur river, next to Bazar-Korgon village.⁴² Neither the case materials nor the court decisions provide for an accurate determination of the sequence and the detail of events at the bridge on that day. Interviews of witnesses for the prosecution, as well as the courts' verdicts on the case, contain an insufficient amount of factual information and state summarily that Mr Askarov and others were at the bridge and gave orders to attack the police officer.⁴³ However, as noted above, according to the statements of Mr Askarov and witnesses for the defence, Mr Askarov returned home to sleep at 5 a.m. and was not at the bridge at 8.30 when the attack on the police officer took place.⁴⁴
32. The following can be stated with relative accuracy: after learning that the bridge next to Bazar-Korgon village, crossing Kara-Ungur river on 553.5 km of Bishkek-Osh highway was blocked, 16 police officers of Bazar-Korgon ROVD including the chief of the ROVD Mr Mergentaev Mamyrgyzan and the chief of Bazar-Korgon district unit of the National Security Service, Mr Joldoshev Sydyvakas, with three officers, came to the bridge.⁴⁵ The exchange of the officers with the group of people on the bridge grew into a physical conflict during which one police officer, Mr Sulaimanov, was killed (the number of possible casualties amongst civilians on the bridge was never determined by the courts and remains unknown).
33. According to the court's findings, after their arrival at the bridge the law-enforcement officers "demanded to stop actions of the *Uzbek diaspora* (italicised by the ICJ) and to unblock the road. While not complying with their legitimate demands Mr Askarov called,

³⁸ Resolution of the Supreme Court of 20 December 2011.

³⁹ *Ibid.*

⁴⁰ The Report of the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan in June 2010, para. 185.

⁴¹ Appeal to the Chairperson of Supreme Court of the Kyrgyz Republic of Bazar-Korgon Village residents.

⁴² *Ibid.*

⁴³ The ICJ has at its disposal the statements of police officers who testified that they had seen Mr Askarov on the bridge. However, the investigation had never taken testimony of any persons who could have testified in favour of Askarov.

⁴⁴ Among other documents supporting this position see: the Interview Report of Mr Askarov as a witness of 15 September 2010; the Interview Report of Mr Askarov as a suspect of 16 June 2010, Statements of Azimzhan Askarov in Court; Diary of Azimzhan Askarov; statements of the defence witnesses.

⁴⁵ Sentence of Bazar-Korgon District Court of 15 September 2010; Sentence of the Jalal-Abad Regional Court of 10 November 2010; The Report of the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan in June 2010.

armed with firearms and knives, Mr Rozumaev D., Mr Rasulov E., Mr Kochkarov M. and *other persons of Uzbek ethnicity* (italicised by the ICJ) unidentified by the investigation “to take the chief of police as hostage, and to kill the rest of the officers”, but they rendered resistance to the unarmed police officers who had arrived to implement their service duty. As a result, the officers of Bazar-Korgon ROVD <...> received minor injuries, and the body of Mr Sulaimanov, who died at the crime scene, was burned to conceal the crime”.⁴⁶

34. It should be noted that the testimony that the police officers arrived unarmed to confront the armed crowd has been questioned by the residents of Bazar-Korgon,⁴⁷ whose statements point out that 15 out of 16 police officers, surrounded by the crowd of 500-600 persons, managed to escape without serious injuries. The criminal investigation into the murder of Mr Sulaimanov at the bridge was initiated by the Prosecutor’s office of Bazar-Korgon on the same day.⁴⁸
35. The claimed location of Mr Askarov at home during these events has been corroborated by a number of witnesses. Several of his neighbours stated that they saw him on the morning of 13 June.⁴⁹ These statements were provided in written form and notarised. On the way to the scene Mr Askarov met approximately 20 persons.⁵⁰ However, neither the Bazar-Korgon Court at first instance, nor the appeal courts, summoned these eyewitnesses to provide their statements personally.⁵¹ As to the supposition that the body was burnt “in order to conceal the crime”, the decision does not provide any details as to how such a conclusion was reached.
36. On 13 June, after Mr Askarov states that he was told by his wife that a police officer was killed, he went out and met many of his neighbours who were discussing the death.⁵² He stopped a car of a butcher, Mr Batyrzhan, who drove him to his office.⁵³ On arriving at his office, Mr Askarov met Mr Umurzakov Maripzhan, who said that negotiations with law-enforcement officers were taking place.⁵⁴ They went to Saidullayev street and the negotiators said that they had come to an agreement and there would be no conflict in Bazar-Korgon. At this point, a young man standing nearby fell down, shot by a police officer.⁵⁵ Mr Askarov took him to the hospital (he was found to be dead), where later that day 13 more persons were taken⁵⁶ and there were three more dead bodies there.⁵⁷ Gradually the shooters started approaching the hospital. During all of this time, Mr Askarov was constantly in touch with Ms Aziza Abdrasulova, a human rights defender, via telephone.⁵⁸
37. On 14 June, after two days of violence, the situation began to stabilise.⁵⁹ However, many people remained in their places of refuge, since shooting, looting, sexual assault and

⁴⁶ Sentence of Bazar-Korgon District Court of 15 September 2010.

⁴⁷ Appeal to the Chairperson of Supreme Court of the Kyrgyz Republic of Bazar-Korgon Village residents, *op. cit.*

⁴⁸ Criminal case No. 166-10-159 on signs of crimes, provided by art. art. 92(2) paras. 4, 6, 9, 10, 15, 16; 299(2) paras. 1, 3; 233(1) (2) (3) and 340 of the Criminal Code of the Kyrgyz Republic; Press release of the Prosecutor General’s office of the Kyrgyz Republic of 19 January 2011. <http://www.prokuror.kg/?news/shownovelty/117>; Resolution 166-10-159 of 13 June 2010 on initiation of criminal case, signed by Prosecutor of Bazar-Korgon Bakirov A.A.

⁴⁹ Scanned copies of 13 witness statements are at ICJ’s disposal.

⁵⁰ *Ibid.*

⁵¹ Interview of the ICJ Mission with Nurbek Toktakunov; Interview of the ICJ mission with Azimzhan Askarov.

⁵² Human Rights Centre “Citizens Against Corruption”: Detailed description by A. Askarov of arrest and court hearings, *op. cit.*, page 2.

⁵³ *Ibid.*

⁵⁴ Appeal of Azimzhan Askarov to the President of the Kyrgyz Republic Atanbaev A.Sh., *op. cit.*

⁵⁵ *Ibid.*

⁵⁶ Presence of Mr Askarov in the hospital is confirmed by the witness’s statements, provided in Supreme Court of the Kyrgyz Republic. For security reasons the names of the witnesses are not mentioned in the report, however the documents are at the disposal of the Supreme Court of the KR.

⁵⁷ Human Rights Centre “Citizens Against Corruption”: Detailed description by A. Askarov of arrest and court hearings, *op. cit.*, page. 2.

⁵⁸ Interview of the ICJ mission with Azimzhan Askarov; Meeting of the ICJ mission with Kyrgyzstan NGOs.

⁵⁹ The Report of the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan in June 2010, para. 195.

hostage taking continued.⁶⁰ Mr Askarov spent 14 June at home. On that day lead responsibility for the case was given to Jamila Turazhanova, Deputy Prosecutor of Bazar-Korgon district.⁶¹

Arrest and detention of Mr Askarov

38. On 15 June, the shooting having died down, Mr Askarov went outside and started documenting the aftermath of what had occurred. He documented people killed, wounded, houses belonging to ethnic Uzbeks destroyed and burned down.⁶² According to Mr Askarov's account, at approximately 11:00 a vehicle with police officers arrived (amongst them Bahtiyar Karimov, criminal investigator of Bazar-Korgon Police Department (ROVD), who invited him for a discussion with the chief of ROVD. In the ROVD there was a discussion with the deputy chief on operative work named Azizbek, who presented Mr Askarov with a list of influential persons of Bazar-Korgon and asked which of them was distributing weapons (assault rifles) to the people. According to Mr Askarov, since he named no one, after 30 minutes of conversation the deputy chief said that he "wanted to do it "the good way", but "apparently, Mr Askarov did not understand that" after which he handed Mr Askarov over to the police officers.⁶³
39. Mr Askarov states that he was taken to the yard and was made to collect empty plastic bottles on the territory of ROVD and that a ten-year old son of one of the police officers began to kick him and force him to obey his commands.⁶⁴ Mr Askarov states that he was forced to collect cigarette butts and was filmed, after which the beatings by several people proceeded.⁶⁵ He was kicked by several men, including two criminal investigation agents of ROVD, a ROVD driver, the chief of the Isolator of Temporary Detention (hereinafter IVS), and the ten-year old son of a police officer.⁶⁶
40. Mr Askarov told the ICJ mission that during the beatings one of the aggressors stepped on his neck and when he began foaming at the mouth, somebody yelled "stop that, you're going to kill him!" Mr Askarov states that the Chief of Police Custody violently trampled Mr Askarov's left hand, saying "this is for critical articles against us, have your bitters. We are going to torture you in such a way that you'll die slowly. You have never had an idea who the police officers are. Now we have an opportunity to bring it to your mind. We are going to kill you anyway, but you'll die slowly...".⁶⁷ After the beatings subsided Mr Askarov was forced to sing the national anthem of Kyrgyzstan.⁶⁸ He was made to stand and was repeatedly kicked in the groin, and was beaten with a rifle butt in his torso, after which he could not lie down or move around without his cellmates' assistance.⁶⁹
41. From 16:45 to 19:15 the interrogation took place of Mr Askarov as a witness by Prosecutor Turazhanova. Mr Askarov pointed out that during the crowd's attack at the police officers' he had been at home and learned about what had happened from his wife.⁷⁰ After this Mr Askarov states that he was put in a cage (intended for detention of arrested persons)

⁶⁰ The Report of the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan in June 2010, para. 196.

⁶¹ Decision of 14 June 2010 On Forming up an Investigation Group.

⁶² Interview of the ICJ mission with Azimzhan Askarov.

⁶³ *Ibid.*; Diary of Azimzhan Askarov, page 3.

⁶⁴ Human Rights Centre "Citizens Against Corruption": Detailed description by A. Askarov of arrest and court hearings, *op. cit.*, page 2.

⁶⁵ Diary of Azimzhan Askarov, page 4.

⁶⁶ Interview of the ICJ mission with Azimzhan Askarov.

⁶⁷ *Ibid.*

⁶⁸ Human Rights Centre "Citizens Against Corruption": Detailed description by A. Askarov of arrest and court hearings, *op. cit.*, page 2.

⁶⁹ Brief Report of Questioning of Mr Askarov Azimzhan in the Court on consideration of legality of his arrest, by Nurbek Toktakunov.

⁷⁰ Interrogation report of witness Mr Askarov Azimzhan of 15 June 2010, Bazar-Korgon.

where he saw his brother Hakimzhan Askarov, who had come out to search for his brother (Azimzhan Askarov), and had been arrested, beaten and taken to the ROVD for 72 hours.⁷¹ Police officers had allegedly demanded money from him, but he did not pay.⁷² Each person passing by demanded that Mr Askarov come to them and hit him at least once in the chest or head or hurled insults at him.⁷³ The beatings were so strong that Mr Askarov thought he would die of them and he asked his brother Hakimzhan to bury him with dignity after they returned his body to the family.⁷⁴

42. On 16 June, at night, according to Mr Askarov's account, the group of police officers wanted to take Mr Askarov to the inner yard, but one of the commanding police officers⁷⁵ stopped that from happening and took Mr Askarov to his office, where Mr Askarov stayed until approximately 4 a.m.⁷⁶ During his stay in the office he heard loud noise and screaming. Upon his return to the cell, Mr Askarov saw two severely beaten inmates along with his brother. Mr Askarov states that the beatings were so severe that one of the detainees, Mirzalimov Shurik, was not recognizable.⁷⁷ Mr Askarov described this in his diary as follows: "When I went down to the monkey-house the three with my brother were in such a terrible state that it was impossible to even look at them".⁷⁸ On the third day, Hakimzhan Askarov was released.⁷⁹
43. According to the interrogation report, the interrogation of Mr Askarov as a suspect started at 09:20 a.m. and continued till 09:40 a.m.⁸⁰ Mr Askarov made statements that he was not at the bridge on the morning of 13 June.⁸¹ According to Mr Askarov, during the interrogation he was asked to point to some "influential Uzbeks" from a list of names, those who were allegedly distributing weapons.⁸² According to his account, upon Mr Askarov's refusal to provide false testimony, the lieutenant colonel on duty told him that his wife and daughter would be brought over and would be raped in front of him until he provided the statements needed for the interrogators.⁸³ The group of police officers then went out to bring his wife, but returned in 30–40 minutes without her, since she had already been taken by relatives to the territory of Uzbekistan.⁸⁴ At the same time the beatings continued. Mr Askarov states that one of the criminal police agents hit him with a pistol handle, seriously injuring his head, which bled so badly that the police officers grew frightened and demanded that Mr Askarov stop the bleeding himself. He took off his sweater and covered his head. After this, the duty officer of ROVD, a lieutenant colonel, arrived and they then put a plastic bag on Mr Askarov's head, and the lieutenant colonel suggested to poison Mr Askarov with chlorine vapours, but one of police officers prevented this from happening, and took the bag off Mr Askarov's head.⁸⁵

⁷¹ Appeal to the Head of PA "Voice of freedom", Coordinator of Center of rehabilitation of victims of tortures Mr Bagyshbaev S.B. from Mr Hakimzhan Askarov и Ms Turdihan Askarova, of 27 July 2010.

⁷² Interview of the ICJ mission with Azimzhan Askarov; N.B. After the unrest there were some reports of money extortion from the relatives of the detainees in order to obtain ransom for them; e.g. Human Rights Watch: Where is the Justice? Interethnic Violence in Southern Kyrgyzstan and its Aftermath, August 2010, page. 7.

⁷³ Interview of the ICJ mission with Azimzhan Askarov.

⁷⁴ *Ibid.*

⁷⁵ The name is at the disposal of the ICJ.

⁷⁶ Interview of the ICJ mission with Azimzhan Askarov.

⁷⁷ *Ibid.*

⁷⁸ Diary of Azimzhan Askarov, page. 4.

⁷⁹ Appeal to the Head of PA "Voice of freedom", Coordinator of Center of Rehabilitation of Torture Victims Mr Bagyshbaev S.B. from Mr Hakimzhan Askarov и Ms Turdihan Askarova, of 27 July 2010.

⁸⁰ Interrogation report of the suspect of 16 June 2010.

⁸¹ *Ibid.*

⁸² Interview of the ICJ mission with Azimzhan Askarov.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

44. The arrest was registered only on the evening of 16 June.⁸⁶ This fact was challenged by defence lawyers, but the Supreme Court decided on this point that Mr Askarov had been arrested on 16 June rather than 15 June.⁸⁷ The Supreme Court based its conclusions on the fact that there was a record (protocol) of his detention dated 16 June and that Mr Askarov did not mention the fact of illegal detention when he was interrogated in the presence of his lawyer. The court's reasoning on the proof of Mr Askarov not being held in detention from 15 to 16 June is particularly striking: "When he [Mr Askarov] was interrogated in the presence of lawyer Myrzakulov on 16 June 2010, he gave testimony that when he had gone out he was detained near his office by the police officers on 15 June 2010 and was brought [to the police department], however he did not testify that he was illegally detained in the department of internal affairs. Thus there is no evidence that A. Askarov was illegally detained from 15 June to 16 June 2010 at ROVD."⁸⁸ It is not clear whether the Supreme Court meant that Mr Askarov was released and then arrested again or that he was never arrested on 15 June 2010. An article by Ferghana news agency, reporting that Azhamhan Askarov had been arrested was published on 15 June 2010: "As it became known to Ferghana.Ru today in Bazar-Korgon district of Jalal-Abad region of Kyrgyzstan, law enforcement authorities have arrested a local human rights activist and the head of the human rights organisation "Air", Azimzhan Askarov. According to the human rights organisation "Justice"—which has started leading the network of human rights organisations in the region, including the "Air", Azimzhan Askarov, being a local resident, observed the happenings in the Bazar-Korgon village during the last few days, made photos and video, documented the killings and pogroms."⁸⁹ Already on 17 June it became known that the detention was dated 16 June with the following allegations in the same news agency: "The arrest warrant must be issued by the Court within 48 hours from the moment of detention. However, as it became known, the police falsified the arrest report, stating that the detention was allegedly made on 16 June. The extra day was used to expose the human rights defender to new torture."⁹⁰
45. According to the official arrest report, Mr Askarov was arrested on 16 June.⁹¹ The report indicates that Mr Askarov received a copy of the arrest report, but this is contradicted by Mr Askarov, who states that he was not told of his rights as a suspect and no access was granted to him by defence lawyers.⁹² According to Mr Askarov, the main demands of the officers were about rendering false testimony on a list of persons provided to him and providing his video and photo cameras.⁹³
46. Official reports show that on the same the prosecutor Jamila Turazhanova conducted a "confrontation" between Mr Askarov and the police officers of the group that had been attacked on the bridge. Mr Askarov had not been granted defence lawyers at this point.⁹⁴ Four of the officers provided statements indicating that they heard Mr Askarov's shouting calls to take the chief hostage and to kill the rest. The rest were saying that they saw Mr Askarov at the bridge on the morning of 13 June, but could not figure out what exactly he was shouting.⁹⁵ It is important to note that a distinct feature of minutes of this meeting is that they mainly contain general information and state no details of what was happening on the bridge.⁹⁶

⁸⁶ Interrogation report of witness Mr Askarov Azimzhan of 15 June 2010, Bazar-Korgon. Interrogation was done by the deputy prosecutor Ms J. Turazhanova.

⁸⁷ Resolution of the Supreme Court of 20 December 2011.

⁸⁸ Resolution of the Supreme Court of the Kyrgyz Republic of 20 December 2011.

⁸⁹ Ferghananews.com: "Kyrgyzstan: Authorities in the South are not looking for extremists but blocking civil activists and public figures", <http://www.ferghananews.com/news.php?id=14993>.

⁹⁰ Ferghananews.com, "A Human Rights Defender Azimzhan Askarov is arrested and being tortured", 17 June 2010, <http://www.ferghananews.com/news.php?id=15022&mode=snews>.

⁹¹ Arrest report of the suspect of 16 June 2010.

⁹² Interview of the ICJ mission with Azimzhan Askarov.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ Identification parade reports at the disposal of the ICJ.

⁹⁶ *Ibid.*

47. According to the press release of the Prosecutor's Office, a medical examination was conducted on 16 June 2010 (conclusion No. 197 dated June the 16th, 2010). No injuries were found on Mr Askarov's body.⁹⁷ However, according to Mr Askarov, doctors visited him for the first time only after lawyer Nurbek Toktakunov requested this (see *infra* para. 62).⁹⁸
48. Mr Askarov states that on 17 June he was taken to the second floor of ROVD to the investigator's office, where interrogation through beatings continued almost all day.⁹⁹ He states that after each reply, he was struck in the area of kidneys. According to Mr Askarov, he was not provided with a defence lawyer at this point and he did not sign any of the false statements presented to him.¹⁰⁰
49. Mr Askarov states that in the evening of 17 June, the prosecutor Ms Turazhanova arrived and expressed anger at the fact that the ROVD officers had had three days "to work on him"—i.e. to acquire the required statements through violent coercion, but that Mr Askarov nonetheless could not be forced to acquiesce.¹⁰¹ He alleges that, during the beatings, the prosecutor stood behind Mr Askarov's back, asking "where is your video camera?"¹⁰²
50. Mr Askarov was subsequently taken to the investigator's office in ROVD where he alleges that the beatings continued.¹⁰³ Nonetheless, Mr Askarov gave no confirming "confession", after which he was taken to the prosecutor's office. (The ROVD and the Prosecutor's Office are located across the street from each other.) The same day, Ms Turazhanova signed a resolution of bringing Mr Askarov to account as an accused.¹⁰⁴ Mr Askarov's note was included in the document: "I am absolutely outraged at the charges against me as I was not at the bridge."¹⁰⁵
51. Also on that day, Prosecutor Turazhanova signed a resolution on execution of the medical examination.¹⁰⁶ The resolution described the crime of which Mr Askarov was accused and the examination was ordered "on the case" rather than with regard to the complaint about the beatings.¹⁰⁷ At the same time, an additional medical examination was conducted the results of which indicated that Mr Askarov's injuries should be classified as "minor, causing no health disturbance."¹⁰⁸ According to the Prosecutor General's Office press release, Mr Askarov explained when questioned about it that the injuries had been inflicted by another inmate, Mr Mahmudzhanov, since Mr Askarov's actions had led to the arson of his house and numerous deaths.¹⁰⁹ Besides "the interviewed police officers of Bazar-Korgon district <...> explained, that none of the police officers had ever beaten Mr Askarov."¹¹⁰ According to Mr Askarov, Ms Turazhanova was dictating what should be written in the conclusion: that Mr Askarov was pushed by his cellmate and received minor injuries. Upon examination by medical personnel of the district hospital, they insisted on urgent hospitalization, but this was not acted on.¹¹¹

⁹⁷ Press release of Prosecutor General's Office of 19 January 2011 <http://www.prokuror.kg/?news/shownovelty/117>.

⁹⁸ Interview of the ICJ mission with Azimzhan Askarov.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ Resolution on Involving As an Accused of 17 of June 2010, signed by J. Turazhanova, A. Askarov and P. Myrza-kuolov.

¹⁰⁵ *Ibid.*

¹⁰⁶ Decision of conducting medical examination of 17 June 2010.

¹⁰⁷ *Ibid.*

¹⁰⁸ Press release of Prosecutor General's Office of 19 January 2011, <http://www.prokuror.kg/?news/shownovelty/117>.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ Interview of the ICJ mission with Azimzhan Askarov.

52. In the evening, Mr Askarov received the appointed defence lawyer. According to Mr Askarov his name was Syrga (according to the court's decision his name was Mr Myrzakulov).¹¹² The lawyer came to the office of Ms Turazhanova, and with Mr Askarov was taken to the court. According to Mr Askarov, the defence lawyer defended the police position, saying that Mr Askarov did not respect the police, and that if he had not provided information to external sources, this would not have happened.¹¹³ Mr Askarov claims that the lawyer did nothing to defend him. Moreover, according to Mr Askarov, he was a lawyer with a bad reputation for cooperating with law enforcement bodies, beating his clients together with the police, and against whom Askarov had once tried to initiate disbarment proceedings.¹¹⁴
53. After this Mr Askarov was taken to the District Court of Bazar-Korgon for the hearing on detention pending trial. The Court was busy and so he was confined to the cell, where he alleges that the guards there turned on their cell phone cameras and demanded that the inmates insult the President of Uzbekistan, Mr Karimov, which Mr Askarov refused to do.¹¹⁵ The judge took about five minutes to conclude that they had to be kept in detention and Mr Askarov only managed to say he was not guilty, but the judge never asked him anything.¹¹⁶
54. The District Court of Bazar-Korgon¹¹⁷ had agreed to the request of the prosecutor, Ms Turazhanova, on detention of Mr Askarov since "if detention had not been chosen as a preventive measure, [Mr Askarov] could have escaped from the investigation and the court, could have hampered the investigation and Court proceedings and committed other serious crimes. Because of his actions, the Prosecutor's Office staff received injuries, and the police captain Sulaimanov was killed".¹¹⁸ Thus the Court came to the conclusion that Mr Askarov's actions led to injuries and death, before the actual trial took place. The Court came to the conclusion that "since on these charges no other preventive measure is possible, the judge considered it legitimate to put Mr Askarov Azimzhan Kambarovich under detention."¹¹⁹
55. The detainees were taken back from the Court by an UAZ vehicle. Mr Askarov states that the vehicle was stopped half way through the journey and he was badly beaten. Upon arrival at the ROVD he was put in another vehicle and brought to his home, where they demanded that he find the video and photo cameras. However nothing was found because, as he later found out, his wife had taken the video and photo camera to his colleagues in Jalal-Abad.¹²⁰ According to the official record of the search and seizure, 35 pieces of video tapes were taken from his house.¹²¹
56. On 18 June, the prosecutor of Jalal-Abad Province, Mr Kanybek Turdumambetov, stated that Mr Askarov's body indicated no injuries.¹²²
57. On 20 June, Mr Askarov had an opportunity to meet with representatives of "Spravedlivost" NGO, Ms Valentina Gritzenko and Mr Abdumali Abylakimov and a representative of Human Rights Watch, Ms Anna Neistat, which was the first meeting since his arrest with persons he knew.¹²³ Police officers were present at the meeting.¹²⁴ Ms Gritzenko later

¹¹² Resolution of Bazar-Korgon District Court of 17 June 2010.

¹¹³ Interview of the ICJ mission with Azimzhan Askarov.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ Resolution of Bazar-Korgon District Court of 17 June 2010.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ Interview of the ICJ mission with Azimzhan Askarov.

¹²¹ Record of execution of search and seizure of 17 June 2010.

¹²² Kyrgyzstan: The Prosecution Believes Human Rights Defender A. Askarov is Guilty of Organising Mass Disorders and Incitement to National Hatred with the Use of Violence, <http://www.fergananews.com/news.php?id=15034>, art. of 23 June 2010.

¹²³ Interview of the ICJ mission with Azimzhan Askarov.

¹²⁴ *Ibid.*

asked Mr Nurbek Toktakunov to be the lawyer for Mr Askarov. As a result of this meeting, Mr Askarov learned that the decision of Bazar-Korgon District Court had been appealed by lawyer Abylakimov.¹²⁵

58. On 22 June, Mr Nurbek Toktakunov arrived from Bishkek to Bazar-Korgon in order to meet with Mr Askarov. According to Mr Toktakunov the deputy prosecutor Ms Turazhanova denied him a private meeting with Mr Askarov, referring to the decision of a "steering council,"¹²⁶ and, when he referred to the Criminal Procedure Code of the Kyrgyz Republic, Ms Turazhanova responded that "in this case criminal procedures do not work."¹²⁷
59. Thus, Mr Toktakunov was not able to meet with Mr Askarov privately and the meeting took place in the presence of a police officer.¹²⁸ During the meeting, Mr Toktakunov asked Mr Askarov to lift up his shirt and having seen bruises,¹²⁹ took pictures of the injuries which were later made public.¹³⁰ Mr Askarov states that, since at this interview he could not talk about the use of torture in the presence of the ROVD officer, he whispered and wrote about this to his defence lawyer on a piece of paper.¹³¹
60. The Prosecutor's General office's press release stated that during questioning Mr Askarov explained that the "police officers did not beat him up."¹³² However, Mr Toktakunov's motion to the Prosecutor's Office on 25 June 2010 pointed to possible ill-treatment by police officers: "Askarov during an additional interrogation said that he was not subjected to torture but was beaten by another detainee in the temporary detention room. Taking into account the vulnerability of my client in the Bazar-Korgon ROVD, surrounded by the colleagues of Sulaimanov, who is being accused of a killing, I put under question his testimony and continue to insist on initiating a criminal case under article 305 of the Criminal Code of the Kyrgyz Republic (torture)."¹³³
61. Mr Askarov alleges that, as a result of Mr Toktakunov's publishing the photographs of Mr Askarov's injuries he had no access to his defence lawyer for about a month. However the reasons for obstacles to such visits cannot be confirmed.¹³⁴ In any case, Mr Askarov was also prevented from seeing his family members until his transfer to Nohoken.¹³⁵ Mr Askarov states that subsequently the beatings in ROVD were not as severe as before, but nonetheless continued. One police officer beat him and made him sing the anthem of the Kyrgyz Republic. Since Mr Askarov did not know all the lyrics of the anthem, the police agent demanded that the lyrics must be memorized by his return, otherwise the beatings would continue.¹³⁶
62. On the same date, 22 June, Mr Toktakunov requested that a forensic medical examination be urgently conducted, as he had "every reason to believe that torture was used with

¹²⁵ Human Rights Centre "Citizens Against Corruption": Detailed description by Mr Askarov of arrest and court hearings, *op. cit.*, page 2.

¹²⁶ Application on initiation of the criminal case of 23 June 2010, addressed to the Prosecutor of Jalal-Abad Region Turdumambetov K.J. from Mr Toktakunov N.A. It is not clear what decision of "a steering council" Turazhanova meant, but the ICJ could not obtain a copy of such a decision.

¹²⁷ *Ibid.*

¹²⁸ *Ibid*

¹²⁹ *Ibid.*; Complaint to the decision of the prosecutor in order, provided by the art. 131 CPC to Jalal-Abad City Court from lawyer Toktakunov in the interest of Mr Azimzhan Askarov Kambarovich, detained in IVS of Bazar-Korgon ROVD, of 14 July 2010.

¹³⁰ Interview of the ICJ mission with Nurbek Toktakunov.

¹³¹ Interview of the ICJ mission with Azimzhan Askarov.

¹³² Press release of the Prosecutor General's office of the Kyrgyz Republic of 19 January 2011, <http://www.prokuror.kg/?news/shownovelty/117>; also, for example, the letter of Prosecutor General's Office to Mr Toktakunov of 20 January 2011.

¹³³ Intercession of 25 June 2010 addressed to the Prosecutor of Jalal-Abad Region Mr Turdumambetov K. J. from defence lawyer Mr Toktakunov in the interest of Mr Azimzhan Askarov Kambarovich, held in detention of Police Custody of Bazar-Korgon ROVD.

¹³⁴ Interview of the ICJ mission with Azimzhan Askarov.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

regard to him [Mr Askarov].”¹³⁷ He also mentioned that he believed that Mr Askarov could not be frank in front of the guards and he requested a private meeting and initiation of a criminal case with regard to use of torture.¹³⁸ The request of Mr Toktakunov for provision of forensic medical examination was refused, with reference to the previous examination, which had found no evidence of beatings. A request for access to the conclusions of the forensic medical examination was also refused.¹³⁹ Mr Toktakunov was also denied access to other materials of the case.¹⁴⁰

63. On this day, representatives of the Ombudsman, Mr Tursunbek Akun, visited Mr Askarov, who gave them information about the beatings, in written form.¹⁴¹
64. On 23 June, representatives of the Ombudsman’s office visited Mr Askarov again. In the presence of the chief and deputy chiefs of ROVD he spoke with the Ombudsman, Mr T.Akun, over the phone and told him about the use of violence against him.¹⁴²
65. On the same day, Mr Toktakunov submitted a complaint to Jalal-Abad province Prosecutor’s Office regarding the injuries he had found on his client’s body. The complaint sought to initiate a criminal case under article 305 of the Kyrgyz Republic Criminal Code (torture) addressed to the prosecutor of Jalal-Abad Province Mr K.J. Turdumambetov. Attached to the complaint were photographs of Mr Askarov’s bruises.¹⁴³ In it he also complained about the refusal for access to the resolution on appointment and the results of medical forensic examination.¹⁴⁴
66. After submitting the application, Mr Toktakunov and Ms Batykan from “Spravedlivost” came from Jalal-Abad to Bazar-Korgon ROVD in order to meet with Mr Askarov. There a group of people approached them, saying that they were the relatives of the killed police officer, Mr Sulaimanov.¹⁴⁵ They demanded that Mr Toktakunov and Ms Batykan stop defending Mr Askarov, since it was wrong for a Kyrgyz to defend an Uzbek. Ms Batykan states that she was physically attacked, but no action was taken by the authorities.¹⁴⁶ Mr Toktakunov also states that he was surrounded by an angry crowd, and threatened with reprisals for defending an Uzbek.¹⁴⁷
67. Following this incident, Mr Toktakunov was able to have a three-minute private meeting with Mr Askarov.¹⁴⁸ The meeting was interrupted by Ms Turazhanova, who herself started to interrogate Mr Askarov.¹⁴⁹ In the presence of Ms Turazhanova, Mr Askarov said that had no complaints about the actions of the officers but had been beaten by other inmates in police custody.¹⁵⁰ Mr Toktakunov was also granted access to the case materials but was not allowed to make copies of them.¹⁵¹

¹³⁷ Motion to the Prosecutor of Bazar-Korgon Region of 22 June 2010.

¹³⁸ *Ibid.*

¹³⁹ Application on initiation of the criminal case of 23 June 2010, addressed to the Prosecutor of Jalal-Abad Region Mr Turdumambetov K.J. from Mr Toktakunov N.A.

¹⁴⁰ *Ibid.*

¹⁴¹ Diary of Azimzhan Askarov, page 8.

¹⁴² *Ibid.*

¹⁴³ Application to the Prosecutor of Jalal-Abad Region Mr Turdumambetov K.J. from Mr Toktakunov N.A. on initiation of the criminal case of 23 June 2010.

¹⁴⁴ *Ibid.*

¹⁴⁵ Interview of the ICJ mission with Nurbek Toktakunov.

¹⁴⁶ The fact of the attack is mentioned (without some details) in the complaint to the Minister of Interior, Baibolov K. B. from Toktakunov, of 4 August 2010.

¹⁴⁷ Complaint to the Minister of Interior, Baibolov K.B. from Toktakunov N.A. of 4 August 2010.

¹⁴⁸ Appeal of 25 June 2010 in addition to the appeal of 23 June 2010, to the Prosecutor; Complaint to the decision of the prosecutor in order, provided by the art. 131 CPC to Jalal-Abad City Court from lawyer Toktakunov in the interest of Mr Azimzhan Askarov Kambarovich, detained in IVS of Bazar-Korgon ROVD, of 14 July 2010.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

68. On 24 June, Mr Askarov was transported to Jalal-Abad and was immediately taken to the Provincial Court. At the Court, Mr Askarov states that people threatened that if Mr Askarov were released, they would set the court building on fire. He also states that there were threats made to kill his relatives.¹⁵² The Court collegium on criminal cases and administrative offences of Jalal-Abad Provincial Court considered the complaint challenging the decision of the Bazar-Korgon District Court decision to detain Mr Askarov and denied the application.¹⁵³ Among other reasons the Court mentioned that Mr Askarov should be kept in detention as he might refuse to testify: "Given a possibility of prevention of conducting of a preliminary investigation by the accused, refusal to testify (sic), changing place of residence (sic) and the possibility that the accused may escape from the investigation if this security measure changes, the judicial board found no grounds for cancellation or change the resolution of Bazar-Korgon District Court and to meet application of lawyer of the accused—A. Abylakimov."¹⁵⁴ No details of why the court came to this conclusion or of how each of these criteria were in line with the Criminal Procedure Code requirements were given.
69. Possibly on the same day,¹⁵⁵ Mr Askarov was taken to the Prosecutor's Office where he had a meeting with the Province Prosecutor, who said, according to Mr Askarov, that he had talked to a high ranking official¹⁵⁶ and promised that his case would be separated and he would get away with a minor accusation and would be released.¹⁵⁷
70. On 25 June, defence lawyer Mr Toktakunov presented a complaint on violation of the rights of defence lawyers and restrictions on his ability to carry out his professional functions, as a result of the actions of Deputy Prosecutor Turazhanova.¹⁵⁸ He also raised the issue of denial of access to the case materials, necessary for the preparation of the defence.¹⁵⁹ In his application, which was submitted the same day, Mr Toktakunov asked to transfer Mr Askarov from police custody in Bazar-Korgon, where the slain police officer, Mr Sulaimanov, used to work, to Osh.¹⁶⁰ In particular it said: "My client Askarov A. has been detained in the IVS of the same ROVD, where Sulaimanov M. worked, in involvement of murder of whom he is accused. For obvious reasons, it poses a threat to his life and health and affects his testimony. Despite the fact that Askarov asserts that he was beaten by a detainee in the cell for temporary detention, I have every reason to believe that he was beaten by the staff of Bazar-Korgon ROVD. I request to transfer him to the detention centre of Osh city."¹⁶¹ This request was denied three days later (see below).¹⁶²
71. Around 28 June 2010, Mr Askarov was transferred from Jalal-Abad back to Bazar-Korgon.¹⁶³ Attempts of Mr Toktakunov to meet with Mr Askarov were to no avail, since each

¹⁵² Diary of Azimzhan Askarov, page 9.

¹⁵³ Resolution of the Judicial Collegium on Criminal Cases and Administrative Offences of Jalal-Abad Regional Court of 24 June 2010.

¹⁵⁴ *Ibid.*

¹⁵⁵ Askarov's account on this point contradicts the dates of the hearing thus the date of this meeting is not confirmed.

¹⁵⁶ The ICJ has the name of the official at its disposal.

¹⁵⁷ Diary of Azimzhan Askarov, page 9.

¹⁵⁸ Appeal of 25 June 2010 in addition to the appeal of 23 June 2010, to the Prosecutor; Complaint to the decision of the prosecutor in order, provided by the art. 131 CPC to Jalal-Abad City Court from lawyer Toktakunov in the interest of Mr Azimzhan Askarov Kambarovich, detained in IVS of Bazar-Korgon ROVD, of 14 July 2010.

¹⁵⁹ *Ibid.*

¹⁶⁰ Appeal of 25 June 2010 in addition to the appeal of 23 June 2010, to the Prosecutor; Complaint to the decision of the prosecutor in order, provided by the art. 131 CPC to Jalal-Abad City Court from lawyer Toktakunov in the interest of Mr Azimzhan Askarov Kambarovich, detained in IVS of Bazar-Korgon ROVD, of 14 July 2010; Addendum to the appeal complaint in court collegiums on criminal cases and administrative offences of Jalal-Abad Regional Court.

¹⁶¹ Appeal of 25 June 2010 in addition to the appeal of 24 June 2010 to the prosecutor of Jalal-Abad province, Mr Turdumambetov K.J.

¹⁶² Resolution of Refusal to Initiate a Criminal Case of 28 of June 2010, Jalal-Abad, Deputy Prosecutor of Jalal-Abad Region Berdibayev O.K.

¹⁶³ Diary of Mr Askarov, page 10.

time physical attacks or threats outside the place of detention prevented the meeting from happening.¹⁶⁴ On two occasions, he was subject to physical attacks.¹⁶⁵

72. On 28 June, the prosecutor's office of Jalal-Abad Province represented by Mr Berdibaev, refused to initiate a criminal case on the complaint that Mr Toktakunov had submitted on 23 June, regarding the injuries which Mr Askarov had sustained in custody.¹⁶⁶ In the resolution denying initiation of a criminal case, it was stated that the guilt of Mr Askarov (and Mr Mirzalimov) was proven by the statements of the police officers who were the victims (sic) and other persons, that according to the conclusion of medical forensic examination of 24 June 2010, it was established, "that in the area of arms and lower back Mr Askarov has bruises which are classified as injuries which did not cause temporary health disorder."¹⁶⁷ It further states that on 16 June, while held in the same cell as Mr Askarov, Mr Mahmudzhanov Mavlyanbek "repeatedly struck Mr Askarov with his hand in the area of head and other parts of the body."¹⁶⁸ The resolution states that Mr Askarov filed a petition requesting that Mr Mahmudzhanov not be charged "and also stated that none of the police officers ever beat him and that he categorically refuses to go through the medical forensic examination, referring to the fact that examination has already been conducted."¹⁶⁹ According to the resolution, since the crime under art. 112 of the Criminal Code, which was applicable to the actions of Mr Mavlyanov, are the cases of "private prosecution", there were no grounds for initiation of a criminal case, since Mr Askarov did not file a complaint.¹⁷⁰ Therefore, no criminal investigation for torture was initiated, since Mr Askarov himself had indicated that on 16 June he was beaten by another detainee.¹⁷¹
73. The resolution also indicated that in the actions of Ms Turazhanova there was no *corpus delicti* for preventing the activity of defence lawyers, and that transfer of Mr Askarov to the pre-detention facility of Osh was not possible, since "investigative actions are conducted with participation of the accused in Bazar-Korgon district of Jalal-Abad Province."¹⁷²
74. On 30 June 2010, the deputy prosecutor of Jalal-Abad province, Mr Berdibaev, responded to Mr Toktakunov's previous complaints concerning Mr Askarov's injuries. (In the response they are indicated as petitions of 24 and 25 June, although, most likely, they are intended to refer to those of 23 and 25 June). According to the Prosecutor, Mr Askarov acquired his injuries as a result of personal conflict with his cellmate Mr Mahmudzhanov and had no complaints about the latter and refused to file in complaint regarding the matter. In the opinion of the prosecutor's office, the facts of violation of the defence lawyers' rights had not been confirmed.¹⁷³ This document was similar to the one that had been presented two days previously.¹⁷⁴
75. On 1 July the Office of the Interim Government of the Kyrgyz Republic replied to an appeal of the Coalition for Democracy and Civil Society about arbitrary detention of Mr Askarov. The letter said that the request was forwarded to the Office of the Prosecutor General of the Kyrgyz Republic.¹⁷⁵

¹⁶⁴ Interview of the ICJ mission with Nurbek Toktakunov.

¹⁶⁵ *Ibid.*; Diary of Azimzhan Askarov, page 10.

¹⁶⁶ Resolution on Refusal to Initiate a Criminal Case of 28 June 2010, Jalal-Abad, Deputy Prosecutor of Jalal-Abad Region Berdibayev O.K.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*; Also, Complaint to the decision of the prosecutor in order, provided by the art. 131 CPC to Jalal-Abad City Court from lawyer Toktakunov in the interest of Mr Azimzhan Askarov Kambarovich, detained in IVS of Bazar-Korgon ROVD, of 14 July 2010.

¹⁷² Resolution on refusal to initiate criminal case of 28 June 2010.

¹⁷³ The letter of Deputy Prosecutor of Jalal-Abad Region, O.K. Berdibaev No. 8-от 11-10 of 30.06.2010.

¹⁷⁴ Letter (the document does not contain the name or letterhead) of Jalal-Abad province Prosecutor's Office from Berdibaev O.K. of 30 June 2010.

¹⁷⁵ Letter from the Office of the Interim Government of the Kyrgyz Republic D. Oshurakhunova to the Coalition for Democracy and Civil Society of 1 July 2010 [the actual document is probably mistakenly dated 1 June 2010].

76. On 2 July at approximately 11 a.m., Turdihan Askarova, daughter-in-law of younger brother of Mr Askarov, Hakimzhan Askarov, came to visit Mr Askarov to give him food, a radio set and a fan. However, she was attacked by the crowd outside the detention facility. According to Khakimdzhhan Askarov, Ms Askarova needed medical treatment following the attack.¹⁷⁶
77. According to Mr Askarov, Deputy Prosecutor Turazhanova was constantly in touch with the relatives of Mr Sulaimanov and informed the relatives that they should wait for defence lawyers next to the ROVD.¹⁷⁷ Mr Toktakunov reported that Ms Turazhanova on a regular basis would inform the crowd of his arrival and that, in the context of the threats, the police officers were afraid of the crowd themselves.¹⁷⁸ He states that, in any case, each time that family members or the defence lawyers visited or sought to visit Mr Askarov, the crowd outside the detention facility would include relatives and colleagues of Mr Sulaimanov, suggesting that there was deliberate notification of the visits.¹⁷⁹ Although Mr Askarov alleges that the family of Mr Sulaimanov were involved, the ICJ could not verify this information based on the materials at its disposal.
78. On 14 July, Mr Toktakunov lodged a complaint about the Prosecutor's Office's denial of access to his client, in Jalal-Abad municipal court.¹⁸⁰ Mr Toktakunov in particular alleged that the resolution of deputy prosecutor of Jalal-Abad Province was illegal and sought orders to require the prosecutor's office to end several alleged violations of the law, including: the denial of private conversation with his client; the limited number and length of meetings with the client; the prevention of the defence from copying case documents; and denial of initiation of a criminal case into allegations of torture.¹⁸¹
79. On 26 July, Jalal-Abad Court upheld the Prosecutor's Office's denial of an investigation into allegations of torture of Mr Askarov.¹⁸² The Court refused to initiate criminal proceedings on the use of torture for the following reasons:

"On the basis of the case materials and the circumstances of the case clarified at the hearing, it was found that during the criminal case against A. Askarov under the clauses 4, 6, 9, 10, 15, 16 of the Article 97 and Part 2 of article 233 of the Criminal Procedure Code of the Kyrgyz Republic and during investigations, his cellmate M. Makhmudov beat him on the grounds that 'he sold them'. The defendant A. Askarov said in his testimony that he was beaten by his cellmate M. Mahmudzhanov and that he was not beaten by law enforcement officials. The defendant A. Askarov also expressed refusal of filing an application and of the forensic medical examination on this fact. There is no reason not to trust the defendant. The fact of the use of force against A. Askarov by law enforcement officials is fully inspected by investigating authorities. The Court finds that under these circumstances there is no reason to initiate a criminal case on the fact of receiving injuries by A. Askarov and to conduct an inspection on this fact, as the investigating authorities fully inspected everything on this fact and issued an appropriate decision".¹⁸³

80. On 2 August, Mr Toktakunov met with the prosecutor of Jalal-Abad Province and reported his difficulties in obtaining access to his client and the threats allegedly made by Mr Su-

¹⁷⁶ Appeal to the Head of PA "Voice of freedom, Coordinator of Center of rehabilitation of victims of tortures Mr Bagyshbaev S.B. from Mr Hakimzhan Askarov and Ms Turdihan Askarova of 27 July 2010 , Complaint to the Minister of Interior, Mr Baibolov K.B. from Mr Toktakunov N.A of 4 August 2010.

¹⁷⁷ Human Rights Center "Citizens Against Corruption": Detailed description by Mr Askarov of arrest and court hearings, *op. cit.*, page 2.

¹⁷⁸ Interview of the ICJ mission with Nurbek Toktakunov.

¹⁷⁹ *Ibid.*

¹⁸⁰ Complaint to the decision of the prosecutor in order, provided by the art. 131 CPC to Jalal-Abad City Court from lawyer Toktakunov in the interest of Azimzhan Askarov Kambarovich, detained in the IVS of Bazar-Korgon ROVD, of 14 July 2010.

¹⁸¹ *Ibid.*

¹⁸² Resolution of Jalal-Abad City Court of 26 July 2010, CY-369/10 Д-4.

¹⁸³ *Ibid.*

laimanov's relatives. The prosecutor accompanied Mr Toktakunov to the ROVD, where he met with Mr Askarov privately.¹⁸⁴ After about 10 minutes Mr Askarov was taken back to his cell and it was explained that the relatives of Mr Sulaimanov were about to appear. Mr Toktakunov was able to call the prosecutor who had previously accompanied him.¹⁸⁵ When he went outside, Mr Toktakunov states that he found himself alone with no ROVD officers around in front of a group of people who attacked him, took his briefcase, tore his shirt, insulted and threatened to avenge his defence of an Uzbek.¹⁸⁶ The officers of Jalal-Abad provincial Prosecutor's Office arrived just in time and stopped the attack.¹⁸⁷ It is noteworthy that at least one of the police officers told the relatives that Mr Toktakunov was not in the building at that time.¹⁸⁸

81. On 4 August, Mr Toktakunov filed a complaint to the Minister of Interior about the 2 August attack, as well as the attack on Ms Turdihan Askarova, and the threats on 23 June.¹⁸⁹
82. On 11 August, the prosecutor of Jalal-Abad Province gave notice that the case would be transferred to Bazar-Korgon District Court.¹⁹⁰
83. On 16 August, the Chief of Police of Jalal-Abad Province ROVD, Mr T. Bazarbaev, responded by letter to Mr Toktakunov's complaint of 4 August 2010 addressed to the Minister of Interior. The response stated that a service inspection was implemented and upon its results a prophylactic work has been carried out on compliance with requirements of the order No. 710 of 24 August 2009.¹⁹¹ The brief document did not mention what this order was and what exactly the "prophylactic work" included.
84. On 23 August, Mr Toktakunov sent an appeal to Jalal-Abad Provincial Court with a request to conduct the court hearing in another district.¹⁹² In particular Mr Toktakunov wrote: "Consideration of this case in the Bazar-Korgon Court can lead to unpredictable consequences and poses a risk to lives and health of the defendants, their lawyers, as well as the judge hearing the case. These circumstances raise doubts as to the ability of the judge of Bazar-Korgon District Court to consider the case impartially."¹⁹³ The hearing nonetheless was held in Bazar-Korgon District Court in Nohoken.
85. Mr Askarov was thereafter transferred to Jalal-Abad and he was able to meet with defence lawyers and friends, who gave him medicine, and a doctor examined him.¹⁹⁴
86. In Bazar-Korgon ROVD Mr Askarov had experienced health problems because of constant beatings in the area of the kidneys, as a result of which he could not normally use the toilet, since the inmates were taken to the toilet only twice a day and they were allowed to use the toilet only for 10 minutes for everyone which meant they were given only about a minute each. Often some of them did not have time to use it at all. In such circumstances he could not normally relieve himself and started to eat and drink less and stopped using it. As a toilet, a bucket in the cell would be used.¹⁹⁵ The prison cell was some 2 to 3.5 meters for seven to twelve people which only had one bench to sleep on which is why they slept in turn. As it was the summer time it was very humid and hot inside. They were only given one bucket of water to drink for the whole day. They were given one loaf of local

¹⁸⁴ Interview of the ICJ mission with Nuberk Toktakunov.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ Complaint to the Minister of Interior, Mr Baibolov K.B. from Nurbek Toktakunov N.A. of 4 August 2010.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ Notification of Prosecutor's Office of Jalal-Abad Region of 11 August 2010.

¹⁹¹ Response of the Minister of Interior of 16 of August 2010, No. 4/4763.

¹⁹² Motion to the President of Jalal-Abad Regional Court on referring the case to another court of 23 August 2010 from Nurbek Toktakunov.

¹⁹³ *Ibid.*

¹⁹⁴ Interview of the ICJ mission with Azimzhan Askarov.

¹⁹⁵ *Ibid.*

bread and a plate of plain pasta (macaroni) to be eaten by all for the whole day. It was always rather dark in the cell as there was one dim lamp and was only one small window with bars so it was impossible to read anything. They were never allowed to walk apart from the toilet time. Mr Askarov would spend a lot of time standing and breathing near that small window. They even painted the walls themselves. Despite serious health problems, such as urinating with thick blood and pain in his kidneys, he was never provided with medical assistance until his transfer to the Jalal-Abad ROVD.

The first instance trial: Bazar-Korgon District Court, Nohoken Village

87. The first day of the trial took place on 2 *September in Nohoken*. The hearing took place in the absence of Mr Toktakunov, since he received a final reply that the hearing would not be postponed in the evening of 1 September and he had to travel to Nohoken from Bishkek, a journey of 10 hours.¹⁹⁶ In the absence of Mr Toktakunov, 16 prosecution witnesses were heard.¹⁹⁷
88. The hearing took place in the presence of large numbers of the victim's supporters and relatives. Observers at the trial gave accounts of attacks and threats on others seeking to attend the hearing. They report that the relatives of Mr Sulaimanov threw rocks and chased the persons supporting Mr Askarov's who were seeking to attend the hearing.¹⁹⁸
89. Defence lawyers found it necessary to be extremely cautious during the defence, due to fears for their own safety. They refrained from inviting witnesses due to their inability to provide for the witnesses' safety.¹⁹⁹ Defence lawyers state that they were filmed on cell phone cameras in the courtroom and threatened with death for defending "murderers".²⁰⁰ Mr Askarov recounts threats that for each defence lawyer, someone would be hired to kill him or her, and for Mr Toktakunov, a killer would be contracted from Bishkek.²⁰¹ Witnesses for the defence were also reportedly the objects of attacks, threats and insults.²⁰² The Mission heard allegations that threats were made by the police officers as well.
90. In this atmosphere of extreme tension and violence, the judges of the Court also appeared to be in an extremely vulnerable situation. The Court would at times assist the prosecution on its own initiative, for instance, suggesting what questions should be asked of the accused by the prosecution.²⁰³ Numerous motions of the defence lawyers were denied by the court.²⁰⁴
91. The defence, as well as observer NGOs present at the trial, report that the hearings took place in an atmosphere of fear, constant threats and insults by the victim's relatives and supporters.²⁰⁵ In one incident, one of the supporters of the victim threw a glass at the accused and this act was ignored by the court.²⁰⁶ Defence lawyers were constantly inter-

¹⁹⁶ Addition to the Appeal to the Verdict of Jalal-Abad province court of 15 September 2010.

¹⁹⁷ *Ibid.*

¹⁹⁸ Brief trial observation report on the hearing of the criminal case in Nohoken district court of 6 September 2010. (Second session), prepared by the International Foundation for the Protection of Human Rights Defenders Front-line Defenders and Human Rights Centre "Citizens against Corruption".

¹⁹⁹ Addition to the Appeal to the Verdict of Jalal-Abad province court of 15 September 2010, *op. cit.*

²⁰⁰ Interview of the ICJ mission with Azimzhan Askarov.

²⁰¹ Diary of Azimzhan Askarov, pages 11–12.

²⁰² Interview of the ICJ mission with Azimzhan Askarov.

²⁰³ Addition to the appeal complaint in Judicial Collegium on Criminal Cases and Administrative Offences of Jalal-Abad Regional Court of 25 October 2010.

²⁰⁴ Diary of Azimzhan Askarov, page 12.

²⁰⁵ Addition to the appeal complaint in Judicial Collegium on Criminal Cases and Administrative Offences of Jalal-Abad Regional Court of 25 October 2010, *op. cit.*

²⁰⁶ Amnesty International, Kyrgyzstan: Process on the case of prisoner of conscience Askarov Azimzhan is taking place with violation of just court, 3 of September, EUR 58/014/2010, <http://amnesty.org.ru/node/1522>.

rupted, insulted, and warned that Kyrgyz lawyers should not defend Uzbeks.²⁰⁷ The tentative objections of the defence lawyers about the absence of the relatives of the accused were dismissed by the court.²⁰⁸ The ICJ mission heard the following testimony about the atmosphere there: "There was totally wild pressure. There were assaults against lawyers. They would throw objects pending the hearings; they held big posters with the text 'death to sarts.'"²⁰⁹ Frontline defenders reported that the supporters of the prosecution shouted to Nurbek Toktakunov: "We will kill you. We will kill your family and will eat your children."²¹⁰

92. After the hearing, the cage where Mr Askarov sat was opened and police officers started to beat the defendants. One kick hit Mr Askarov's left eye, after which he fell unconscious.²¹¹
93. In addition, Mr Askarov reports that all eight defendants, including one woman, Minyura Mamadaliyeva, were severely beaten in the exercise yard of Nohoken district police custody facility by the police officers of Nohoken and Bazar-Korgon, while they were in handcuffs and could not cover themselves from blows.²¹² Mr Askarov said that around 20 police officers stood in the corridor, beating him and asking: "Do you remember me, writer?" These were police officers with whom he had had previous conflicts in connection with his human rights activity. The beatings continued for several hours. In the corridor of the Police Custody he was beaten again on his head with a plastic bottle filled with water. They appeared to purposely to avoid beating his face. After this he felt sick and was vomiting for several days.²¹³ Police officers then hit and kicked him while he went to the latrine.²¹⁴ On one day he was denied a chance to use the latrine. He states that the beatings continued for three days. He later learned that the screaming of those who were beaten was heard even outside the police custody facility. They demanded that the defendants remain silent during the Court or answer with "yes" or "no" answers.²¹⁵ Mr Askarov's notes were confiscated as "he had no right to have them" and the head of ROVD told Mr Askarov that he could not speak and only his lawyer was allowed to speak.²¹⁶
94. Mr Askarov states that after these proceedings he was thrown into a cell, along with another accused in the case, Mr Kochkarov Muhammadzakir, who was covered with blood. Mr Kochkarov then said that in Court he would make statements against Mr Askarov, saying that he was the leader of the uprising and killed the police officer. Later it appears that, after conversation with other prisoners, Mr Kochkarov learned that compliance with the demands of the police might have negative consequences during his serving of his prison sentence, and so refused to make statements against Mr Askarov. However, Mr Askarov indicates in his diary, that despite the fact that Mr Kochkarov never made statements against Mr Askarov, in the Court sentence it is stated that the former indicated that saw Mr Askarov participating in the killing of Mr Sulaimanov.²¹⁷ Mr Askarov learned that defendant Ms Munira Mamadaliyeva also agreed at that time to testify against Mr Askarov.²¹⁸
95. On 3–4 September, rumours circulated amongst detainees that, because of the complaints filed by Mr Askarov's defence lawyers, the Government Commission which was

²⁰⁷ Diary of Azimzhan Askarov, page 12.

²⁰⁸ Interview of the ICJ mission with Kyrgyzstan NGOs.

²⁰⁹ "Sart"—an offensive name they used for Uzbeks.

²¹⁰ Kyrgyzstan: Update—Unfair trial and fear of torture of human rights defender Mr Azimjan Askarov, <http://frontlinedefenders.org/node/13314>.

²¹¹ Medical Resolution of 12 October 2011, Facility No. 47, Bishkek.

²¹² Interview of the ICJ mission with Azimzhan Askarov.

²¹³ Medical Resolution of 12 October 2011, Facility No. 47, Bishkek.

²¹⁴ Interview of the ICJ mission with Azimzhan Askarov.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ Diary of Azimzhan Askarov, page 22.

²¹⁸ *Ibid.*, page 22.

established to review the complaints regarding Mr Askarov's case would visit the police custody facility. Mr Askarov recounts that, before the Commission's visit, which took place on 6–7 September, the police officers demanded that the senior prisoner persuade Mr Askarov not to complain to the members of the Commission. They threatened that otherwise all the inmates in police custody would be forced to walk goose-step. Since this would be quite painful, the senior prisoner demanded that he say nothing to the Commission. After the rumours of the Commission's visit started, the treatment improved. The chief of Police Department met and talked with Mr Askarov at around 2 a.m.²¹⁹ A police officer who had been beating Mr Askarov, came over and personally gave Mr Askarov cigarettes.²²⁰

96. During the Commission's visit Mr Askarov, regardless of the left eye injuries caused by the beatings, said that he fell down while returning to the Police Custody from the Court.²²¹ After the Commission's visit the treatment was drastically changed. On one occasion, the exact date of which is not certain, Mr Askarov was allowed to talk to his relatives over the phone and they were invited to visit him.²²²
97. On 5 September, Mr Toktakunov, Ms Tatyana Tomina and other defence lawyers, having learned about the beatings of their clients, called the prosecutor of Jalal-Abad Province and asked for permission to visit the defendants. The request was denied on grounds that it was Sunday.²²³
98. The second day of the hearing took place on 6 September. Observers and NGOs reported that since that morning there were posters at the entrance to the Court with threats towards defendants, including calls to murder containing anti-Uzbek expressions.²²⁴ The posters remained hanging during the entire day.²²⁵
99. The session started at 11:00 a.m. and was postponed to 1 p.m. since one of the defendants had no defence lawyers.²²⁶ The room was filled with supporters of the victim and the prosecution, including relatives of Mr Sulaimanov, and police officers, the majority of whom were in uniform.²²⁷ Trial observers report that at the opening of the session, supporters of the victim sought to attack the defendants and posed a real threat to their safety.²²⁸ Throughout the day, the movements and remarks of the defendants were accompanied by insults, obscene language, anti-Uzbek expressions and calls for killing of representatives of Uzbeks and threats of physical reprisals.²²⁹ It was reported that the defendants were on several occasions asked questions by members of the public in the audience, without formal permission of the Court. According to Mr Toktakunov, during the process defence lawyers faced threats and insults from persons representing the victims, and they hurled threats and insults at them.²³⁰ Speeches of defence lawyers were interrupted by nationalistic and insulting shouting from the audience. Threats were issued against the lawyers and their families. Some members of the public shouted at one lawyer, Ms Tomina, that she had no right to participate in the process, since she was of Russian

²¹⁹ Diary of Azimzhan Askarov, page 23.

²²⁰ *Ibid.*, page 21.

²²¹ *Ibid.*, page 23.

²²² *Ibid.*, page 26.

²²³ Interview of the ICJ mission with Azimzhan Askarov.

²²⁴ Brief trial observation report on the hearing of the criminal case in Nohoken district court of 6 September 2010, (Second session), prepared by the International Foundation for the Protection of Human Rights Defenders Front-line Defenders and Human Rights Centre "Citizens against Corruption".

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ Interview of the ICJ mission with Nurbek Toktakunov.

ethnicity.²³¹ Although the judge issued several warnings, he did not take any measures against those responsible.²³² In fact, in the hostile and aggressive atmosphere, lawyers reported that the judge had difficulty controlling the courtroom.²³³ The police also refrained from taking any action.²³⁴ As a result, some of the defence lawyers felt compelled to refuse active involvement in the case.²³⁵

100. During the hearing, Mr Toktakunov filed a motion for a medical examination²³⁶ and for a meeting with Mr Askarov.²³⁷ The Court left the issue of medical examination open.²³⁸ The Court did not investigate the circumstances of Mr Askarov's injuries, or the statements on this issue.²³⁹ The decision on medical examination was made at the end of the day, after their arrival to ROVD, when they mentioned the "everyday" nature of the injuries.²⁴⁰
101. The Court refused to postpone the session to the next day, since "it would be disrespectful towards the people, gathered at this point in the courtroom".²⁴¹ The Court and the prosecution agreed to a meeting of the defence lawyers with their clients at the end of the session.²⁴²
102. After the interrogation of everyone except for Mr Askarov and a reminder of Mr Toktakunov about the motion regarding the private meeting, the Court declined the request, referring to a bylaw, banning private communication of defence lawyers and clients that are kept in IVS at the stage of the court hearing.²⁴³
103. On 7 September, the third day of the trial, all the accused with traces of violence on their bodies were taken one at a time to the IVS of Nohoken ROVD for medical examination by Mr Sabirbaev.²⁴⁴ Mr Askarov refused to go through a medical examination, saying that he had no complaints against anyone.²⁴⁵ Later, he explained that as before he had no other option since a medical examination revealing signs of ill-treatment would have meant negative consequences for the other prisoners.²⁴⁶
104. At the beginning of the trial at noon Mr Sabirbaev was interviewed about the accused. He explained that he was sent to examine the defendants' injuries, but they refused to undergo the examination themselves. To the question of Mr Toktakunov about Mr Askarov he responded that Mr Askarov had bruises.²⁴⁷ Of eight defendants, four showed obvious signs of beatings on their faces.²⁴⁸

²³¹ Brief trial observation report on the hearing of the criminal case in Nohoken district court of 6 September 2010, *op. cit.*, page 3.

²³² Brief trial observation report on the hearing of the criminal case in Nohoken district court of 6 September 2010, *op. cit.*, Interview of the ICJ mission with Nurbek Toktakunov.

²³³ Interview of the ICJ mission with Nurbek Toktakunov; Interview of the ICJ mission with Kyrgyzstan NGOs.

²³⁴ Interview of the ICJ mission with lawyer Abdimalip Abylakimov.

²³⁵ Interview of the ICJ mission with Nurbek Toktakunov.

²³⁶ Motion to carry out a medical examination of 6 September 2010, to the judge of Bazar-Korgon district court, Alimkulov N. from lawyer Toktakunov in the interest of Mr Askarov A.

²³⁷ *Ibid.*

²³⁸ Addition to the Appeal to the Verdict of Jalal-Abad Regional Court of 15 September 2010.

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ Brief Trial Observation Report on the Hearing of the Criminal Case in Nohoken District Court of 6 September 2010; page 3.

²⁴² *Ibid.*

²⁴³ Addition to the Appeal to the Verdict of Jalal-Abad Regional Court of 15 September 2010.

²⁴⁴ Judicial System of the Kyrgyz Republic: Supreme Court of Kyrgyzstan Explains Why it Left Valid the Sentences of the First and Second Instance Courts in Relation to the Convict Azimzhan Askarov, 27 December 2011, http://www.sudsystem.kg/index.php?ELEMENT_ID=883.

²⁴⁵ Addition to the Appeal to the Verdict of Jalal-Abad Regional Court of 15 September 2010.

²⁴⁶ Interview of ICJ mission with Azimzhan Askarov; Human Rights Centre "Citizens Against Corruption": Detailed description by A. Askarov of arrest and court hearings, *op. cit.*

²⁴⁷ Interview of the ICJ mission with Nurbek Toktakunov.

²⁴⁸ Brief Trial Observation Report on the Hearing of the Criminal Case in Nohoken District Court of 6 September 2010, *op. cit.*, page 3.

105. As on the previous day of the trial, statements by defence lawyers were accompanied by insults and threats from supporters of the victim, including threats of murder and threats to their families, and the defence lawyer Ms Tomina was subjected to abuse because she was “Russian”.²⁴⁹
106. On 8 September, the fourth day of the trial, the prosecutor requested that Mr Askarov be sentenced to life imprisonment.²⁵⁰
107. On 15 September, Bazar-Korgon District Court delivered its verdict in the case. It found Mr Askarov guilty of all the crimes he was charged with and sentenced him to life imprisonment; revocation of rights to occupy a position in different institutions, including law-enforcement agencies, barrister’s agencies, notary office and prosecution agencies; and rights to be engaged in activity requiring legal education in non-governmental institutions and organisations for three years.
108. The charges against Mr Askarov, according to the articles of Criminal Code of the Kyrgyz Republic, were as follows:
- Art. 28, 30–227(2)(subparas. 1,3) (attempt of complicity in taking a hostage by a group of persons with prior agreement and with use of physical violence endangering life or health, or with the threat of murder);
 - Art. 241(1) (illegal acquisition, transfer, marketing, storage, transportation or carrying firearms, as well as ammunition, explosives or explosive devices);
 - Art. 299(2)(subparas. 1) (instigation of ethnic, racial, religious and inter-regional hostility, humiliation of national dignity, propaganda of exclusion, of superiority or of inferiority of citizens based on their attitude towards religion, national or racial identity, with application of violence or with the threat of its use);
 - 233(1,2,3) (Participation, organisation of mass disorders, accompanied by violence, massacre, arson, destruction of property, application of fire arms, explosives or explosive devices, and also by showing armed resistance to authorities, call for active insubordination to legitimate demands of authorities and calls for mass disorders as well as the calls for violence towards citizens);
 - 30–97(2) (subparas. 3, 4, 5, 6, 9, 10, 13, 14, 15) (complicity in murder of a person, who is obviously in a helpless state or juvenile, a person—or their relatives—who is performing a service or public duty, endangering life for many persons, with extreme cruelty, committed on the grounds of inter-ethnic or racial or religious hatred or hostility, out of hooliganism, in order to cover up another crime or mitigate its perpetration, committed by the group of persons by prior agreement);
 - 28,30–97 (2) (subparas. 1,4,5,6,9, 10, 13, 14, 15) (attempted complicity in the murder of two or more persons, a person—or their relatives—who is performing service or public duty, endangering life for many persons with extreme cruelty, committed with extreme cruelty, committed on the grounds of inter-ethnic or racial or religious hatred or hostility, out of hooliganism, in order to cover up another crime or to mitigate its perpetration, committed by the group of persons by prior agreement).
 - 30–340 (complicity in murder of law-enforcement officer).
109. It is noteworthy that out of 29–30 pages of the judgment, 15 deal with Mr Askarov’s case, including a description of his actions, witnesses’ statements against him and the body of

²⁴⁹ Brief Trial Observation Report on the Hearing of the Criminal Case in Nohoken District Court of 6 September 2010, *op. cit.*, page 4.

²⁵⁰ Interview of the ICJ mission with Nurbek Toktakunov.

the sentence, relating to Mr Askarov. The statement of Mr Askarov is given only one paragraph.²⁵¹ The judgment contains no mention of the allegations of ill-treatment made by Mr Askarov, his lawyer, or by other defendants or their lawyers.

110. It is notable that the judgment makes no reference to the circumstances in which the crimes with which the defendants were charged were alleged to take place. In no part of the decision is there any mention of the situation of widespread violence and fear in Southern Kyrgyzstan during the incident, including subsequent violence in Bazar-Korgon, which led to the killing of more than 20 persons, 50 wounded and 205 burned houses.²⁵² For example, barricading the road according to the Court was done “in order to incite inter-ethnic hostility”. The Court does not mention the witnesses’ statements indicating that the road was blocked in order to protect the village from an anticipated attack, which did in fact later take place.²⁵³
111. The judgment does, however, abound with references to the ethnicity of those involved in the events: terms used to indicate ethnic identity include “Uzbek people”, “Kyrgyz people”, “representatives of Uzbek ethnicity”, “representatives of Kyrgyz ethnicity”, “Kyrgyz nation”, “Uzbek population”, “Kyrgyz population”, “Uzbek Diaspora”, “persons of Uzbek ethnicity”, “citizens of Uzbek ethnicity”, “Uzbek ethnos”, “people of Uzbek ethnicity” used synonymously and interchangeably without any clear distinction in the meaning. There is an indicative fragment, describing the actions of Mr Askarov in the evening of 12 June: “Mr Askarov A., while proceeding with his criminal actions, on 12th of June 2010 approximately at 21.00, upon preliminary collusion with residents of Bazar-Korgon village <...> made a speech in front of the people <...> at the same time inciting inter-ethnic hostility between the Kyrgyz and Uzbek people, manifesting violence in relation to the representatives of Kyrgyz ethnicity, insulting them with different kinds of swearing like ‘Kyrgyz are dogs’, thus humiliating the national dignity of the Kyrgyz people, while propagandizing benefits of the Uzbek ethnos.”²⁵⁴
112. The Court concluded in its judgment that allegations that the investigation was conducted in a one-sided manner were “brought in order to avoid criminal responsibility.”²⁵⁵ However, the judgment does not describe the accused’s submissions on this issue, or give reasons for its findings.
113. Mr Askarov’s defence lawyer maintains that the conviction of Mr Askarov was based on the statements of police officers, who in this case act as victims and accordingly are not interested in an impartial description of circumstances of what had happened. He states that the Court did not examine exculpatory evidence, did not interview impartial witnesses and eyewitnesses as to what occurred. According to the defence lawyers, many of the eyewitnesses of the inter-ethnic conflict, seeing the situation around the trial of Mr Askarov, were simply afraid to make statements in court, since they had every reason to fear reprisals by the victims’ relatives and friends.²⁵⁶
114. Mr Askarov recounts that on 9 October a SWAT team came and that he and the other prisoners were put into the convoy truck, and taken to Suzak IVS as the appeal hearing was to take place at the Suzak village. There, despite the cold weather, they were made to take off their clothes down to their underwear after which, by Mr Askarov’s account, he

²⁵¹ Sentence of Bazar-Korgon District Court of 15 September 2010.

²⁵² Appeal to the Chairperson of Supreme Court of the Kyrgyz Republic of Bazar-Korgon Village residents.

²⁵³ *Ibid.*

²⁵⁴ Sentence of Bazar-Korgon District Court of 15 September 2010.

²⁵⁵ *Ibid.*

²⁵⁶ Interview of the ICJ mission with Nurbek Toktakunov; Also, e.g. the statements by lawyer Usmanov during the Supreme Court hearings: “counsel and potential witnesses were attacked and stoned”; Also interview with lawyer Abdimalip Abylakimov: “We found some neighbours who could serve as witnesses of his presence at home at the time the policeman was killed, but they didn’t dare to testify because of real threats by the police”; also Toktakunov during the Supreme Court hearings: “We have presented statements of 14 other witnesses that on June 13th he was not on that bridge but in his house. Six of them could have provided an alibi for Azimzhan Askarov but they were afraid; there was simply no guarantee for the safety of the witnesses”.

was hit twice in the back and in the chest.²⁵⁷ He was made to take off his shoes and struck with them over his head while he was facing the wall.²⁵⁸ The rest were severely beaten. After beatings by masked SWAT members, the beatings were continued by the ROVD officers.²⁵⁹ The prisoners were told that after they got to Osh they would live no more than ten days.²⁶⁰ The police officers said that all of them would make it only to the Court of Appeal, and then would be “finished off”. After this they were allowed to put their clothes on and were distributed throughout the cells. The next day beatings continued.²⁶¹ They were held there until 23 October. On 12 October, Mr Askarov was examined by an independent doctor from “Voice of freedom”.²⁶²

Detention in Tash Komyr

115. On 23 October, at approximately 11 a.m., according to Mr Askarov’s account, the SWAT team came again to Suzak ROVD. Mr Askarov and the other defendants were beaten. Each was put into the vehicle and taken to Tash Komyr. In this Police Department Mr Askarov was put in cell number 4 with someone who he considered to be mentally ill. This person was constantly talking except for when he slept.²⁶³ The Chief of Police Custody took all the medicine from Mr Askarov and said: “no one should ask for medicine and be sick”, and he was not allowed to receive medicine from relatives.²⁶⁴ He was not beaten there, but he could hear others being severely beaten. Besides they could not use toilet regularly. Mr Askarov in one of those days went on a 17-day hunger strike and only after that started to eat soup (See *infra* para. 132).²⁶⁵ Some officers from Bazar-Korgon came to “teach them a lesson”.²⁶⁶ A young man named Elmurad was beaten so hard that an ambulance had to be summoned.²⁶⁷
116. During the time he was held in this cell, Mr Askarov made at least two suicide attempts. He tore off a piece of firm fabric from his mattress, made a loop and tried to hang himself from the top of the bunk bed. But the string tore, and he fell and hit his head. On another occasion, he stood on his bed and deliberately let himself fall on the concrete floor, striking the back of his head. He lost consciousness for some time. The prison guards heard the noise and came over along with the other officers, and they decided that it was his cellmate’s fault and started beating him. At this moment Mr Askarov came to himself and said that he fell himself because he felt sick.²⁶⁸
117. Mr Askarov reports that detention conditions in Tash-Kumyr were poor. He slept on a bunk bed, covered with a mattress that was hollow on the inside since the padding had been taken out by prisoners to use it as toilet paper, but for three days he did not have any blanket or mattress. In the Police Custody of Tash-Kumyr he was not allowed to relieve himself in a normal way, but only to wash himself.

The Court of Appeal

118. The Court of Appeal hearing began on 25 October. The hearing took place in Tash-Kumyr village of Jalal-Abad Province in the building of Tash-Kumyr District Court. The case was

²⁵⁷ Interview of the ICJ mission with Azimzhan Askarov.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² Letter of Mr Askarov to Sardor Bashyshbekov of 12 October 2011.

²⁶³ Interview of the ICJ mission with Azimzhan Askarov.

²⁶⁴ Medical Resolution of 12 October 2011, Facility No. 47, Bishkek.

²⁶⁵ *Ibid.*; Also see, Appeal to the Head of Jalal-Abad PPD, Mr Bakirov S.N. from Lawyer Toktakunov N.A.

²⁶⁶ Interview of the ICJ mission with Azimzhan Askarov.

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

heard by a panel of three judges. At this hearing, reportedly, security measures were intensified. However the accused and defence lawyers were nevertheless exposed to pressure and threats, including death threats.²⁶⁹

119. During the three-day hearing only two witnesses for the defence were heard.²⁷⁰ The lawyer for one of the defendants, Ms Tatyana Tomina (defence lawyer of Ms Minura Mamadaliyeva) stated that she would call a witness. However, during the second half of the process she stated that her witness had had to flee from the court premises because of the threats and persecution by a relative of Mr Sulaimanov.²⁷¹ Mr Askarov's defence asked to call 10 witnesses, including relatives of Mr Askarov, who could testify that on 12–13 June he was at his home, as well as neighbours and other witnesses. They were not however invited as witnesses.²⁷²
120. By contrast, there were many prosecution witnesses. In the monitoring by "Citizens against Corruption" the following witnesses are listed: "relatives of the killed police officer Mr Sulaimanov, the victims themselves (15 officers, 1 police officer was in the Russian Federation), traffic police officers, State Security Service officers, investigator of district prosecutor's office, who was heading the investigation, and a local resident Mr Nurhojaev from Bazar-Korgon (local elder)".²⁷³
121. Trial observers reported that, during the process, the Court provided an opportunity for both parties to present their cases,²⁷⁴ and to question the opposing party.²⁷⁵ However, the room was filled with aggressive supporters of the victim.²⁷⁶ Defence lawyers reported that, in addition to threats to lawyers²⁷⁷ and witnesses, there were direct threats to the judges.²⁷⁸
122. Mr Askarov states that during the appeal hearing, the ill-treatment of the accused continued. In the morning and in the evening they were taken to the latrines running and later were forced to walk goose-step, accompanied with beatings.²⁷⁹
123. On the second day of the appeal hearing, on 3 November, defence lawyers explained to the Court that many defence witnesses were not involved in to the process because they were afraid of attacks in Court.²⁸⁰ At the end the Court announced that the next hearing would take place in Nohoken village.²⁸¹
124. During a break in the hearing on 3 November, Mr Askarov states that SWAT team members as well as supporters of the victim beat all the defendants, except Mr Askarov and the female defendant, Minyura Mamadaliyeva, with rubber clubs.²⁸²

²⁶⁹ Interview of the ICJ mission with Azimzhan Askarov.

²⁷⁰ Report Following the Monitoring of Court Hearings of Appeal, Jalal-Abad Regional Court, Human Rights Centre "Citizens Against Corruption", <http://news.fergananews.com/archive/2010/askfinal15112010.pdf>, page 17.

²⁷¹ Brief trial monitoring report on the case of Azimzhan Askarov and others of 25 October 2010, Human Rights Centre "Citizens Against Corruption".

²⁷² Trial monitoring on criminal case in relation to Askarov Azimzhan and 7 convicts of 5 November 2010, <http://anticorruption.kg/2012/01/15/monitoring-sudebnogo-processa-po-ugolovnomu-delu-v-otnoshenii-azimzhana-askarova-i-7-podsudimyx/>.

²⁷³ *Ibid.*

²⁷⁴ Report upon the monitoring of court hearings in jurisdiction of appeal, Jalal-Abad Regional Court, Human Rights Centre "Citizens against corruption", *op. cit.*, page 11.

²⁷⁵ Brief trial monitoring report on the case of Azimzhan Askarov and others of 25 October 2010, Human Rights Centre "Citizens against corruption", page 2.

²⁷⁶ Report Following the Monitoring of Court Hearings of Appeal, Jalal-Abad Regional Court, Human Rights Centre "Citizens Against Corruption", *op. cit.*, page 11.

²⁷⁷ Complaint on Sentences of Bazar-Korgon District Court of 15 September 2010 and Jalal-Abad Regional Court of 10 November 2010 to the Judicial Board on Criminal Cases and Administrative Offences of the Supreme Court of the Kyrgyz Republic from lawyer Abylakimov Abdimalip, 22 November 2010.

²⁷⁸ Interview of the ICJ mission with Nurbek Toktakunov.

²⁷⁹ Diary of Azimzhan Askarov, page 28.

²⁸⁰ Trial monitoring on criminal case in relation to Askarov Azimzhan and 7 convicts of 5 November 2010, *op. cit.*

²⁸¹ Interview of the ICJ mission with Azimzhan Askarov.

²⁸² *Ibid.*

125. The third day of the appeal hearing, on 4 November, took place in Nohoken. In the second half of the session, defence lawyer Ms Tomina raised concerns with the Court about attempts to attack defence lawyers as they entered the Court each day, despite the large numbers of police stationed outside the Court.²⁸³ Observers reported that on the third day of the hearing, supporters of the victim continued to interrupt the statements of defence witnesses, shouting, making offensive remarks, expressing threats.²⁸⁴
126. According to Mr Askarov, on completion of the hearing on the way out of the courtroom to the vehicle, there was severe beating of the accused initiated by the police escort.²⁸⁵ In the evening the accused were taken to IVS of Bazar-Korgon, where the police officers were expecting them and started to beat everyone except for Mr Askarov next to the vehicle and in the corridor of IVS.²⁸⁶
127. The last day of the Court of Appeal hearing took place on 10 November. The Court was filled with police officers, relatives of Mr Sulaimanov, journalists and observers. Mr Toktakunov and the other defence lawyers told the Court that their clients had been exposed to torture on numerous occasions, that basic fair trial standards had not been observed, and pointed to various procedural irregularities in the investigation.²⁸⁷
128. The Court delivered its judgment on 10 November, rejecting the appeal. The Court found that "criminal acts of the convict Mr Askarov are correctly classified by the Court of first jurisdiction", that the appeal complaint "should be left without satisfaction due to its groundlessness", and "the arguments about use of violence in relation to Mr Askarov and infliction of bodily injuries were given an appropriate assessment during the investigation. The complaint about incorrectness of investigatory actions was not filed in a timely manner to the prosecutor's office or the Court in accordance with the established legal procedure."²⁸⁸
129. On or around 11 November Mr Askarov and others were taken to Jalal-Abad ROVD in two vehicles.²⁸⁹ Mr Askarov heard the chief of Police Custody giving orders to his officers "to give them hard time as much as possible", after which Mr Askarov was stripped and beaten.²⁹⁰ Mr Toktakunov filed an application on conducting of a full medical examination of Mr Askarov and his hospitalisation.²⁹¹
130. On or around 12 November, Mr Askarov was transferred Jalal-Abad to Bishkek.²⁹² Upon the doctors' recommendations he was initially put in the passenger car, but along the way the police officers that were accompanying him became indignant that they had to travel alongside a prisoner and moved him to the prison truck in the compartment 60 by 60 centimetres. Since he had no sufficient clothing he became cold in the prison truck. Also, because of the bumpy ride in the truck, the slag in his rectum became crushed and started to come out.²⁹³
131. On the way to Bishkek they stopped at Police Custody of Toktogul ROVD.²⁹⁴ En route, Mr Askarov had no food or drinks.²⁹⁵ The cell was made of concrete. Mr Askarov had no warm

²⁸³ Trial monitoring on criminal case in relation to Mr Askarov Azimzhan and 7 convicts of 5 November 2010, *op. cit.*, page 3.

²⁸⁴ *Ibid.*, page 5.

²⁸⁵ Interview of the ICJ mission with Azimzhan Askarov.

²⁸⁶ *Ibid.*

²⁸⁷ *Ibid.*

²⁸⁸ Sentence of Judicial Collegiums on Criminal Cases and Administrative Offences of Jalal-Abad Regional Court of 10 November 2010, Masy Village.

²⁸⁹ Interview of the ICJ mission with Azimzhan Askarov.

²⁹⁰ Diary of Azimzhan Askarov, page 30.

²⁹¹ Appeal of 11 November 2010 to the Chief of Jalal-Abad ROVD, Bakirov S.N. from lawyer Toktakunov N.A.

²⁹² Interview of the ICJ mission with Azimzhan Askarov.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ Diary of Azimzhan Askarov, page 30.

clothing and had summer shoes on his feet and the officers asked him whether he would be able to spend a night in the cell, to which Mr Askarov responded that he is not sure whether he would be able to survive in such cold. He was given a blanket. Mr Askarov considered that this police custody cell had the worst detention conditions of any in which he had been held.²⁹⁶

132. On 13 November, Mr Askarov was taken to Correctional Facility number 47,²⁹⁷ and was hospitalised on the same day.²⁹⁸ Upon arrival, he received medical assistance.²⁹⁹ After a 17-day hunger strike, he started to eat soup (See *supra* para. 115).³⁰⁰ He was discharged from the hospital on 25 November.³⁰¹
133. On 22 November Mr Askarov's lawyer, Mr Abylakimov, appealed against the decision of the Appeals Court.³⁰²
134. On 3 December, the relatives of Mr Sulaimanov filed an appeal to the Court with a request to sentence Mr Askarov to the death penalty.³⁰³
135. Defence lawyers of Mr Askarov filed an appeal to the Supreme Court with attachment of 15 notarized witnesses' statements.³⁰⁴
136. On 20 December, Mr Toktakunov filed an application to the General Prosecutor's office on initiation of a criminal case in connection with use of torture (art. 3051 KR CC) against Mr Askarov, attaching an interview of Mr Askarov with the "Moscow Komsomolets-Asia" newspaper of 15 December 2010 with description of torture and photographs of his injuries.³⁰⁵
137. On 14 January 2011, Mr Toktakunov filed to the Prosecutor General's office an addendum to the application on initiation of criminal case on torture, with attachment of printout of the text of Mr Askarov's diary, describing the details of the ill-treatment.³⁰⁶
138. On 20 January, the Prosecutor General's office denied initiation of a criminal case with regard to torture of Mr Askarov, on the basis that his injuries had been caused by his cell-mate, Mr Mahmudzhanov.³⁰⁷ In the letter it was stated that Mr Askarov had filed a request not to prosecute Mr Mahmudzhanov and that "none of the police officers had ever beaten him and that he categorically refused medical forensic examination, referring to the fact that the examination has already been conducted".³⁰⁸ The prosecutor's office did not make an official decision but responded in the form of a letter.
139. On 27 January, Mr Toktakunov filed a complaint to the Supreme Court about the detention conditions, violating the right to humane treatment in Police Custody of Bazar-Korgon ROVD and Jalal-Abad CPD during five months of his detention.³⁰⁹

²⁹⁶ Interview of the ICJ mission with Azimzhan Askarov.

²⁹⁷ Diary of Azimzhan Askarov, page 30.

²⁹⁸ Report on Health Condition of Convict Azimzhan Askarov Kambarovich, to Lawyer Toktakunov [the date is not confirmed].

²⁹⁹ Interview of the ICJ mission with Azimzhan Askarov.

³⁰⁰ Medical Resolution of 12 October 2011, location Correctional Facility No. 47 Bishkek; Appeal to the Chief of Jalal-Abad PPD, Mr Bakirov S.N. from defence lawyer Mr Toktakunov N.A.

³⁰¹ Patient's History No. 745/0275, Central Clinic, Facility No. 47.

³⁰² Complaint to the Supreme Court by Abdimalip Abylakimov of 22 November 2010.

³⁰³ Complaint to the Chairperson of Supreme Court of the Kyrgyz Republic from father, mother and widow of the victim of 3 December 2010.

³⁰⁴ Appeal of Nurbek Toktakunov to Supreme Court with notarized witness statements attached [the date is not confirmed].

³⁰⁵ Appeal on initiation of criminal case from Nurbek Toktakunov to the Prosecutor General's office of 20 December 2010.

³⁰⁶ Addendum of 14 January 2011 on initiation of criminal case from Nurbek Toktakunov to the Prosecutor General's office of 20 December 2010.

³⁰⁷ Letter from the Head of the Main Department of Prosecutor General's Office K. Bohorsokov of 20 January 2011, No. 8/2-210-10.

³⁰⁸ *Ibid.*

³⁰⁹ Motion of 27 January 2011 to the Judicial Collegiums of Criminal Cases and Administrative Offences of Supreme Court of the Kyrgyz Republic.

140. On *15 March*, Mr Toktakunov filed a complaint to Pervomaysky District Court with a request to oblige the Prosecutor's Office to take an official decision upon the results of consideration of his statements about the use of torture, since Mr Askarov had only received a letter, which, according to the defence lawyers, was not an official procedural document.³¹⁰
141. On *22 March*, Mr Toktakunov filed in an application with a request not to transfer Mr Askarov, located in Correctional facility Number 47 to the facilities of general detention in connection with the threat to his life.³¹¹
142. On *30 March*, Pervomaysky District Court of Bishkek satisfied the complaint of Mr Toktakunov filed on 15 March obliging the prosecutor's office to make a formal decision rather than a letter.³¹²
143. On *8 April*, Mr Askarov's lawyers received a response from the State Service of Execution of Punishment about the fact that Mr Askarov was kept separately from the main mass of the convicts.³¹³
144. On *15 April*, Mr Toktakunov submitted a letter to the General Prosecutor's Office with a demand to implement the court decision dated 30 March 2011.³¹⁴

Supreme Court hearing

145. The Supreme Court appeal, which took place on 20 December 2011, was attended by ICJ trial observers (see Introduction). The following account relies on their observation of the hearing.
146. The court session in the Supreme Court was scheduled for 10:00 am on 20 December 2011. There was no disturbance or protest outside the Supreme Court building. Access to the Supreme Court building was through a checkpoint, equipped with a metal detector and guarded by several military personnel. The observers arrived in advance and asked the guards to let them in to the courtroom. The guards were admitting only those people who were named in the list of visitors, prepared in advance. The participants in the process, representatives of nongovernmental and international organisations, journalists, relatives of the victim and other persons were able to enter the building upon submission of their IDs. When the names of the observers were not found in the list, the guards initially refused their admission to the courtroom. But after the demand of the observers to report their arrival to the authorised officials of the Supreme Court's administration who were responsible for decisions about admission the guards got in touch with these officials. After some time the checkpoint was visited by the staff of administration, who said that the information about the observers had arrived late, therefore their names were not included into the list. As a result, the observers entered the building and informed the Court of their arrival and the purpose of the mission by providing the relevant documents (Ordre de Mission) to the Secretary of court session Ms Akysheva Bahtygul. The Secretary later on confirmed that the documents were handed to the Court.
147. The process began at 10:25 a.m. The courtroom was a large, rectangular room with a table located in the middle, a platform for the judges and rows of chairs for the audience. To the left of the platform there was a table of prosecutor, to the right the table of the secretary of the court session. On the rear wall there was the coat of arms of Kyrgyzstan. The defence lawyers sat in the front row seats of the public area, on the right hand side of the room. The representatives of the victim sat at the front on the left hand side. Ob-

³¹⁰ Complaint of 15 March 2011 to the Pervomaysky District of Bishkek by Nurbek Toktakunov.

³¹¹ Appeal to the Head of State Service of Execution of Punishment, Baizakov S.K., by Nurbek Toktakunov of 22 March 2011.

³¹² Resolution of Pervomaysky District Court of 30 March 2011, CY 95/11 БЗ.

³¹³ Letter from the State Service of Execution of Punishment of 8 March 2011, No. 10/2-T-5.

³¹⁴ Letter by Nurbek Toktakunov to the Prosecutor General Salyanova A.Zh. of 15 April 2011.

servers from a number of national and international NGOs and from international IGOs and embassies sat further back in the public space. The hall was equipped with sound-amplifying equipment. Whether audio recording took place is unknown. The collegium of judges in the Supreme Court was composed of Ms Abakirova, Mr Zhakypbaev and Ms Sutalinova, who entered through a separate entrance in to the courtroom after all the process' participants. The Chairperson, Ms Abakirova, announced the composition of the Court and asked whether the participants of the process trusted the composition of the Court and whether they had any statements and petitions. Most participants reported the absence of challenges and affirmed their trust as to the composition of the court.

148. Defence lawyer Mr Toktakunov pronounced a challenge to the entire composition of the Court, explaining his position that the Court was implementing its functions in violation of the Constitution of the Kyrgyz Republic. Mr Toktakunov's and Mr Abylakimov's positions are described briefly in the Supreme Court decision.
149. The Court asked for the views of the other participants in the process regarding the challenge. One of the defence lawyers agreed with the challenge, the rest either said they did not, or left the solution of this matter at the discretion of the Court. The prosecutor and the victims protested against the challenge.
150. The judges retired to consider the challenge. Upon their return from the decision room, the Court announced resolutions of denial of Mr Toktakunov's claim. According to the Court, since the activity of the Council on the selection of judges had been temporarily suspended, the current judges were authorised to consider cases until new judges were appointed in a manner prescribed by law.
151. The presiding judge next sought the views of the participants of the process on the motion of defence lawyer Mr Toktakunov, in which he asked to apply to the Constitutional Chamber in relation to the compliance with the Constitution of the main law of regulations of the Criminal Procedure Code about the possibility of consideration of the case in supervisory authority without mandatory participation of the defendant.
152. Some defence lawyers supported this solicitation. One left it to the discretion of the Court. Others, including the prosecution, spoke against it. The Court then once again retired to consider the motion. Upon returning, the Court announced a resolution denying the motion.
153. The Chairperson of the panel then announced the response of the Ministry of Interior of the Kyrgyz Republic to the appeal of defence lawyer Mr Toktakunov regarding the illegality of the convicts' detention conditions in police custody and the application of torture in relation to the detainees. The essence of the response was that, in the opinion of the Interior Ministry, such detention conditions do not violate human rights, since the Police Custody facilities are equipped with walking areas, showers, and sleeping areas. Thus, the detention conditions in Police Custody correspond to relevant standards. As to complaints about torture, the Ministry of the Interior stated that this allegation was not confirmed and that the convicts made statements that they have no complaints against the police officers in this matter.
154. After the announcement of the answer, the Chairperson of the panel for the case began to state the circumstances of the case, the crimes alleged, the trial and appeal instance and the essence of the procedural complaints raised by the participants. This statement took about one hour. After this, the Chairperson asked the other judges whether they had any questions about what had been stated. There were no questions. At 12:40 p.m. a break was announced until 2:30 p.m.
155. After the break, the Court began examination of the position of the defence party according to the merits of their appeals. Defence lawyer Mr Toktakunov and others made an application to attach additional witnesses' statements to the case. The Court asked for the parties' position on this request. The defence representatives agreed, but the prosecution objected. The Court upheld the application.

156. After this the parties to the case made their statements on the case. Due to difficulties in translation from the Kyrgyz language, the observers were unable to document in full the content of statements made in Kyrgyz. However, a brief description of these statements follows.
157. Defence lawyer Mr Toktakunov demanded that the conviction of Mr Askarov be overturned, since his guilt had not been proven, torture had been used, the true facts had never been established, and the real criminals had never been apprehended. He further stated that the Court's verdicts were made under emotional influence and that there was insufficient evidence for any sort of conviction. Mr Toktakunov also stated that procedural action reports were forged, that the allegations of insult toward the Kyrgyz people were not proven, and that the main witnesses were police officers. These were police with whom Mr Askarov had very bad relations, in particular following a case mentioned above where he had established the innocence of a woman accused of murder, who had been tortured in police custody.³¹⁵
158. The defence provided to the Court the statements of 14 witnesses, who stated that Mr Askarov on 10 June was at his house and not at the bridge. Defence lawyer Mr Toktakunov also indicated that in this case torture was used, but that none of the allegations of torture had been properly investigated. He stated that that the main reason of the mass disorder was the conflict between the Uzbek "shadow business" and the Kyrgyz political elite in the South of Kyrgyzstan. He alleged that the real authors of what had happened are not only secret leaders of "the Uzbek Diaspora", but also the officers of the public and law-enforcement agencies of Kyrgyzstan. At this point, the Court started to interrupt the speech of Mr Toktakunov, demanding that he speak on the "essence" of the case.
159. It should be noted that during the speech of Mr Toktakunov, the sister of the victim, Ms Gulnora Jusupova, repeatedly tried to interrupt the speech with emotional remarks alleging that the defence lawyer was delaying and confusing the case, and expressing threats to him including to murder him. Mr Toktakunov then asked the Court to take the relevant measures against her. The Chairperson of the panel reprimanded Ms Jusupova, and warned that she could be removed from the courtroom.
160. Defence lawyer Mr Abylakimov, speaking in defence of Ms Mamadalieva, pointed to the failure of prove the accusations against her, in relation to the blocking of the road. He stated that Ms Mamadalieva has three children, whom she is bringing up without a husband while taking care of her elderly father. He said that the actions of the accused and their role in incriminating violations imputed are not reliably established and there is no proof of their guilt available. His client wanted to block the road only in order to protect herself and her relatives from the thugs. The Court of first jurisdiction was not impartial, there was pressure applied against the judges and defence lawyers. During the process the defence lawyers had a glass thrown at them and were threatened. On the wall there were posters saying, "Death to Sarts". Prosecutors did not respond to any of these acts by initiating criminal investigations.
161. Defence lawyer Mr U. Usmanov stated that he had presented notarised witnesses' statements verifying that during the unrest, his client was in Uzbekistan in the refugee camp. Lawyer further stated that the physical evidence in the case had nothing to do with his defendant, that the investigation and court proceedings were not impartial, that conclusions regarding the convicts' guilt were based on assumptions and speculations, and that the defence witnesses were afraid to attend the proceedings since they were threatened and had rocks thrown at them. The defence attorney also noted that there was no preponderance of evidence, and that the investigation was one-sided. He pleaded that the Court avoid adopting what he called a stone age attitude and asked for an acquittal of his client inasmuch as there was an utter failure to prove his guilt.

³¹⁵ See *supra* para. 11 of this Report.

162. Defence lawyer Ms Tomina told the Court that it was not possible to enter the Police Custody of Bazar-Korgon to visit her client, but when after numerous demands they were allowed to see their client they were not allowed to have a private and confidential conversation, and all meetings took place in the presence of the chief of Police Custody. She affirmed that the accused were taken out of their cells and beaten every night.
163. At this moment the Court interrupted the speech of the defence lawyer and demanded that she speak on the point of the case. The defence lawyer Ms Tomina stated that Ms Mamadalieva never blocked the road and it was done by the residents themselves. She had asked to guard the road and to leave the police to block it, but the residents took back the trailer to the road, because on the other side a crowd of aggressive persons of Kyrgyz ethnicity gathered and several houses were set on fire by that time. Ms Tomina stated that Mr Rasulov Elmurat said that during the investigation he was severely beaten. The defence lawyer received an official response to her request to the authorities in Uzbekistan to clarify that on 13 June he was in Bakhtyabaz region of Uigur district of Uzbekistan. The defence lawyer drew attention to the fact that many prosecution witnesses could not confirm that Ms Mamadalieva and Mr Rasulov were at the place of the incident during the mass disorders. The defence lawyers and the investigator were pressured and the accused were beaten right after they provided truthful statements on the case. Ms Tomina said that defence lawyers were constantly complaining about threats toward them, and also stated that during the court session someone threw a glass at her.
164. The other defence lawyers supported the arguments of their complaints. Defence lawyer Mr Toktakunov asked the Court to acquit Mr Askarov, and also to make a particular decision about inadmissibility of keeping the defendants in Police Custody and the absence of a pre-detention facility in the South of Kyrgyzstan.
165. All the victims of the case were represented by one lawyer. In his speech he stated that the guilt of the convicts was proven, and that all necessary examinations on the case had taken place. The aforementioned persons were leaders of separatist movements taking advantage of the sudden weakness of the authorities. He further stated that they had been waiting for years for such weakness in order to achieve the separation from Kyrgyzstan of a part of its territory and to create an enclave. He considered that this verdict should have the effect of stopping separatism. If the sentence were mild, it would become a sort of permission for separatist activity in Kyrgyzstan to continue. He stated that the sentence is just, and asked that it be upheld. Victims supported the speech of the lawyer.
166. The sister of the victim, Ms Gulnora Jusupova categorically disagreed with the arguments of the defence lawyers, and said that Mr Askarov since 1996 has always stood for the Uzbeks and never defended the Kyrgyz people's rights. She demanded that the sentence be left intact, and in a very emotional way described the experiences of the family members in connection with the death of her brother and requested that the victim's son, who was present at the court session, stand up and show himself to the Court, which he did. The Court also asked her to speak to the point of the case.
167. The victim's widow also expressed her disagreement with arguments of defence lawyers and demanded that the sentence remain intact. She further appealed to the patriotism of the judges, saying that the outcome of the case should not be decided in connection with receiving financial support from Western countries. She also encouraged people not to look back at the OSCE and the other international observers, then ask what would happen to Kyrgyzstan.
168. The prosecutor briefly stated the essence of prosecution saying that the circumstances of the case had been fully established, the convicts' guilt had been proven and asked to leave the sentence intact.
169. The Chairperson of the panel asked whether the process participants have anything to add and whether the other judges have questions to the parties. No addendums or ques-

tions were expressed, after which the Court went to decision room to make decision on the merits of the case.

In approximately ninety minutes the judges returned from the room and announced the decision made. The verdict and sentence in relation to Mr Azimzhan Askarov was left unaltered by the Supreme Court of Kyrgyzstan.

III. LEGAL ANALYSIS: INTERNATIONAL HUMAN RIGHTS LAW AND THE LAW OF KYRGYZSTAN

170. This chapter examines the case of Azimzhan Askarov, as set out in the factual exposition in Chapter II, with a view to evaluating his treatment and the disposition of the case against him against Kyrgyzstan's international human rights law obligations, as well as the requirements of Kyrgyz law, in particular the Criminal Code and the Criminal Procedure Code of Kyrgyzstan. The assessments in this regard do not constitute a definitive or comprehensive identification of issues concerned, of finding of violations or compliances in the case. Rather, they form an analysis of the critical issues which the facts which should be confirmed by competent national or international bodies. The analysis is not comprehensive, and is limited by the factual information available to the ICJ. In particular, an analysis of possible violations in the cases of Mr Askarov's co-defendants was beyond the scope of this report, although some points are raised relevant to these cases. It is clear that credible allegations of *prima facie* human rights violations have been raised in relation to the cases of Mr Askarov and each of his co-defendants, that require a thorough and independent investigation by the Kyrgyz authorities.

Torture and ill-treatment

The prohibition on torture and ill-treatment and the responsibility of the State

171. This case raises a number of serious issues in regard to Kyrgyzstan's international law obligations to prohibit and protect against torture or cruel, inhuman or degrading treatment or punishment.³¹⁶ The prohibition of torture and cruel, inhuman or degrading treatment³¹⁷ is absolute and is non-derogable under both the ICCPR (Article 4) and regional human rights treaties.³¹⁸ The Convention Against Torture defines torture as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.³¹⁹ Conduct or treatment not amounting to torture, but which is cruel, inhuman or degrading, is similarly subject to an absolute prohibition.³²⁰ Thus treatment that causes severe pain or suffering, either physical or mental, is absolutely prohibited under international law.³²¹ Methods of psychological torture may include *inter alia* the threat of treatment amounting to torture, the threat of violence to relatives or friends and the threat of having to witness their ill-treatment.³²²

³¹⁶ Universal Declaration of Human Rights, art. 5 of the; International Covenant on Civil and Political Rights (ICCPR) (Kyrgyzstan acceded on 7 October 1994), art. 7.

³¹⁷ The European Court for Human Rights (ECtHR) has reiterated that art. 3 "enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment". See e.g. ECtHR, *Z. et al. v. UK*, No. 29392/95, 10 May 2001, para. 73; *Osman v. UK*, No. 23452/94, 28 October 1998, para. 116; *A. v. UK*, No. 25599/94, 23 September 1998, para. 22 and *Saadi v. Italy*, No. 37201/06, 28 February 2008. See also, e.g. African Court for Human and People's Rights (ACtHPR), *Huri-Laws v. Nigeria*, October/November 2000, para. 41.

³¹⁸ See American Convention on Human rights (ACHR), arts. 5(2), 27(2); African Charter on Human and People's Rights (ACHPR), art. 5 as interpreted by the African Commission; European Convention on Human Rights and Fundamental Freedoms (ECHR), arts. 3, 15(2).

³¹⁹ International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), art. 1 provides a definition of torture (Kyrgyzstan acceded on 5 September 1997).

³²⁰ CAT, art. 16; ICCPR, art. 7

³²¹ See, e.g., UN Human Rights Committee (HRC) General Comment 20: "The prohibition in art. 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim," para. 5. See also Inter-American Court for Human Rights (IACHR), *Maritza Urrutia v. Guatemala*, 27 November 2003, para. 89.

³²² HRC, *Miguel Angel Estrella v. Uruguay*, 74/1980, 29 March 1983; *Victor Domukovsky, Zaza Tsiklauri, Petre Gelbakhiani and Irakli Dokvadze v. Georgia*, 623, 624, 626 & 627/1995, 6 April 1998.

172. In addition to the international obligations of the Kyrgyz Republic prohibiting all forms of torture, the Kyrgyz Constitution and Criminal Code prohibit torture and other forms of ill-treatment, including during criminal proceedings and pre-trial detention. Torture and other forms of ill-treatment are contrary to the constitutional provisions that “[n]o one may be subject to torture as well as other inhuman, cruel and degrading forms of treatment or punishment”³²³ and that “[e]ach person deprived of liberty shall have the right to human treatment and respect of human dignity”.³²⁴ It should be noted that the Kyrgyz Constitution specifically states that the constitutional prohibition of torture and other cruel, inhuman, and degrading forms of treatment or punishment “shall not be subject to any limitations”.³²⁵
173. The Criminal Code of the Kyrgyz Republic also establishes the criminal offence of torture and other offences relevant to torture and ill-treatment. These include: (1) the crime of torture, which is punishable according to Article 305–1 of the Criminal Code of the Kyrgyz Republic by five years of imprisonment, and (2) coercion to give confession by use of violence, mockery and torture, which is punishable according to Article 325(2) of the Criminal Code by a maximum of eight years of imprisonment. Threats of violence, such as those allegedly made against Mr Askarov and members of his family, also amount to an offence, stipulated in Article 325(1) of the Criminal Code and punishable by maximum of two years of imprisonment.
174. Torture and ill-treatment of detained and accused persons is also in breach of a number of fundamental principles guaranteed by the Criminal Procedure Code of the Kyrgyz Republic: (1) “All state agencies and officials involved in criminal proceedings shall respect individuals and secure their rights, freedoms, and dignities”;³²⁶ (2) “Threats, violence and other illegal actions shall be prohibited in the cause of interrogation and other investigational and court proceedings”;³²⁷ (3) “No participant of criminal proceedings shall suffer violence or shall be treated in a cruel or humiliating way”.³²⁸
175. In this case, Mr Askarov gave a detailed description of various episodes of treatment, including during the period of unacknowledged detention. He described multiple occasions of severe and continuous beatings, including with a gun, punches and kicks, threat of death, threat to relatives, insults, and lack of basic necessities such as toilet facilities. The alleged treatment involved agents of the State and, on one occasion, of the juvenile son of one of the officers, in the yard of the police department. It further included the subsequent beatings and other ill-treatment by police and other officials, including, among other forms of ill-treatment: standing on Mr Askarov’s neck until he foamed at the mouth; trampling his hand; kicking him in the groin, beating him with a rifle butt on his torso, after which he could not lie down or move around without assistance; prolonged beatings in the kidneys area; beatings in the head and chest; threats to kill him; forcing him to sing the national anthem; beatings in the court room and further beatings in police departments.
176. Those alleged to have been involved in such ill-treatment during the first days and weeks of his detention included officials in the police and prosecution service, as well as several lower-ranking police officers. As to psychological torture, Mr Askarov alleges that when initially taken into custody he was threatened that if he did not provide the information asked for ‘a lot more would be happening to him’. The officers threatened to find his wife and daughter and rape them in front of him. It is alleged that subsequently, additional pressure was applied by his awareness that his brother was being beaten.³²⁹

³²³ The Constitution of the Kyrgyz Republic, art. 22(1).

³²⁴ *Ibid.*, art. 22(2).

³²⁵ *Ibid.*, art. 20(4)(1).

³²⁶ Criminal Procedure Code of the Kyrgyz Republic, art. 10(1).

³²⁷ *Ibid.*, art. 10(2).

³²⁸ *Ibid.*, art. 11(3).

³²⁹ In turn, his brother was exposed to the sounds of his torture, see *supra* para. 42.

177. These allegations are attested to by detailed and consistent accounts from Mr Askarov himself, his lawyers who raised these issues from the very beginning on various occasions before state bodies and courts, and are supported by photographs of his injuries, and by the deterioration in his health. Given this documentation and the more general credible reports of the widespread use of torture and ill-treatment by law enforcement forces in Kyrgyzstan,³³⁰ these allegations are prima facie highly credible and must be pursued by competent investigatory and judicial authorities. In this regard, it should be underscored that the European Court of Human Rights has recently noted that:

*"due regard must be had to the special difficulties in proving allegations of torture. Torture is uniquely evil both for its barbarity and its corrupting effect on the criminal process. It is practiced in secret, often by experienced interrogators who are skilled at ensuring that it leaves no visible signs on the victim. All too frequently, those who are charged with ensuring that torture does not occur—courts, prosecutors and medical personnel—are complicit in its concealment".*³³¹

178. *Moreover, in this case allegations of torture and ill-treatment have not been subject to any official investigation and the State has failed to confirm or disprove the credible allegations through investigation, despite the existence of an offence of torture in the Kyrgyz Criminal Code. The treatment alleged, if confirmed, amounts to repeated severe ill-treatment over a lengthy period during which Mr Askarov was detained in the sole power of the state authorities, often with no or very limited access to his lawyers or family. As such, the ICJ considers that it is likely to give rise to multiple violations of Kyrgyzstan's international obligations under the ICCPR (Article 7, Article 10) and CAT (Articles 1, 2 and 16) including torture and cruel, inhuman or degrading treatment. It is further contrary to principles enshrined in the Constitution of the Kyrgyz Republic, and to provisions of the Kyrgyz Criminal Procedure Code, as well as amounting to crimes under the Criminal Code. Such treatment also gives rise to non-compliance with a number of international and national legal obligations of prevention, investigation and remedy and reparation, which will be considered further below.*

Conditions of detention and of detention transfers

179. Persons deprived of their liberty are in a special situation of powerlessness vis-à-vis the authorities so that States have particular obligations towards them.³³² The State has obligations to take steps to protect their right to life and freedom from torture and other ill-treatment, amongst other things, by providing adequate medical care and by guaranteeing minimum conditions of detention compatible with their dignity.³³³ Under Articles 7 and 10 ICCPR,³³⁴ and Articles 1, 2 and 16 CAT,³³⁵ minimum standards for all detained persons must be respected with regard to hygiene, clothing, bedding, access to facilities, light,

³³⁰ See, *inter alia*, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/19/61/Add. 2, 21 February 2012; Human Rights Watch: Kyrgyzstan: Torture, Detentions Escalate Tensions International Police Force and International Inquiry Urgently Needed, 15 July 2010, <http://www.hrw.org/news/2010/07/13/kyrgyzstan-torture-detentions-escalate-tensions>; Human Rights Watch: Kyrgyzstan Distorted Justice Kyrgyzstan's Flawed Investigations and Trials of the June 2010 Violence, June 2011, <http://www.hrw.org/sites/default/files/reports/kyrgyzstan0611webwcover.pdf>; Amnesty International: Annual Report 2012, Kyrgyzstan, <http://www.amnesty.org/en/region/kyrgyzstan/report-2012#section-17-3>.

³³¹ ECtHR, *Othman (Abu Qatada) v. UK*, No. 8139/09, 17 January 2012, para. 276.

³³² ICCPR, art. 10; HRC, General Comment 21 on the Rights of Detainees; See also IACHR, "Instituto de Reeducción del Menor" (Paraguay), 2 September 2004, para. 152; See also UN Special Rapporteur on Torture, E/CN.4/2006/6, paras. 39, 40.

³³³ HRC, *Henry and Douglas v. Jamaica*, 571/1994, 25 July 1996; ECtHR, *Kalashnikov v. Russia*, No. 47095/99, 15 July 2002 and IACHR, "Instituto de Reeducción del Menor" (Paraguay), 2 September 2004.

³³⁴ See also, HRC, General Comment 21 on the right to humane treatment in detention (article 10), 10 April 1992.

³³⁵ See also e.g. Standard Minimum Rules for the Treatment of Prisoners (First UN Congress on the Prevention of Crime and the Treatment of Offenders, Geneva 1955; approved by the Economic and Social Council, resolutions 663 C (XXIV), 31 July 1957 and 2076 (LXII), 13 May 1977); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly res. 43/173, 9 December 1988).

temperature, and food.³³⁶ The UN Human Rights Committee has affirmed that denial of access to medical care during detention may violate both Article 7 and Art. 10(1) ICCPR,³³⁷ and the UN Standard Minimum Rules on the Treatment of Prisoners set out detailed standards for the provision of both physical and mental healthcare in all forms of detention.³³⁸ In addition, the right to adequate healthcare, protected under the International Covenant on Economic, Social and Cultural Rights (ICESCR), applies to all persons, including those in detention.³³⁹

180. No reasons may be invoked to limit, restrict, or derogate from obligations to ensure minimum conditions of detention as required by international treaties. Like the UN Standard Minimum Rules for the Treatment of Prisoners,³⁴⁰ Article 10 ICCPR sets out minimum standards, which must be safeguarded 'regardless of a State party's level of development'.³⁴¹ This means that in any circumstances 'lack of resources' cannot justify ill-treatment of people detained.³⁴² Furthermore, the cumulative effects of various kinds of poor conditions and ill-treatment in detention, as well as transfer conditions, and the length of the period during which a person has been detained in poor conditions,³⁴³ must be taken into account in assessing whether the treatment violates obligations to protect against ill-treatment.³⁴⁴
181. *In the case of Mr Askarov, the conditions of detention in which he was held call into question compliance with the State's obligations to prevent and desist from ill-treatment.* Several aspects of Mr Askarov's reports about the conditions of detention are of particular concern: not allowing use of the toilet for longer than one minute and only twice a day; having only a bucket to use as a toilet in the cell; sleeping in turn with other detainees due to lack of sleeping beds and space; providing only a bucket of water, a loaf of bread and a plate of macaroni for the whole day for all the inmates in the cell; and having one light bulb and a small window near which Mr Askarov had to spend much time due to lack of fresh air and other conditions of detention. At times hindering access to the latrines appears to have been used as a form of punishment, in violation of international standards. He did not obtain medical aid despite the fact that because of the beatings he could not go to the toilet and when he did he was bleeding.

³³⁶ HRC, *Paul Kelly v. Jamaica*, 253/1987, 8 April 1991; See also HRC, *Daniel Pinto v. Trinidad and Tobago*, 232/1987, 20 July 1990; ECtHR, *The Greek Case (first)*, 5 November 1969; See also, e.g., ECtHR, *Cyprus v. Turkey*, 10 July 1976; ECtHR, *Hurtado v. Switzerland*, 17549/90, 28 January 1994; See also UN Standard Minimum Rules for the Treatment of Prisoners, paras. 9–20.

³³⁷ For violations of arts 7 and 10(1) see e.g. HRC, *Ebenezer Derek Mbongo Akwanga v. Cameroon*, 1813/2008, 22 March 2011, para. 7.3; *Leehong v. Jamaica*, 613/1995, 13 July 1999, para. 3.1.1; *Kelly v. Jamaica*, 253/1987, 08 April 1991, para. 5.7; *Linton v. Jamaica*, 255/1987, 22 October 1992, paras. 2.7 and 8.5; *Bailey v. Jamaica*, 334/1988, 31 March 1993, para. 9.3 and *Maurice Thomas v. Jamaica*, 321/1988, 19 October 1993, paras. 9.2 and 11. For a finding of a violation of Art. 10(1) in the context of access to medical care see e.g. HRC, *Kalenga v. Zambia*, 326/1988, 27 July 1993, para. 6.

³³⁸ Standard Minimum Rules for the Treatment of Prisoners, *op. cit.*, paras.22–25

³³⁹ Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14, para. 34 "...in particular, States are under the obligation to respect the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees ... to preventive, curative and palliative health services."

³⁴⁰ Standard Minimum Rules for the Treatment of Prisoners, *op. cit.*; See also: Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, adopted by the General Assembly, 9 December 1988, Resolution 43/173; Principles of Medical Ethics relevant to the role of Health Personnel, particularly Physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment, Adopted by the General Assembly of the United Nations on 18 December 1982, resolution 37/194; Code of Conduct for Law Enforcement Officials, adopted by United Nations General Assembly resolution 34/169 of 17 December 1979.

³⁴¹ See, HRC, General Comment 21, *op. cit.*, para.4. The HRC also determined this in a case Cameroon, in which it also referred to the aforementioned Standard Minimum Rules for the Treatment of Prisoners: "It should be noted that these are minimum requirements which the Committee considers should always be observed, even if economic or budgetary conditions may make compliance with these obligations difficult", HRC, *Albert Womah Mukong v. Cameroon*, 458/1991, 8 July 1992, para. 9.3.

³⁴² The same applies to the conditions in which Mr Askarov was eventually transferred.

³⁴³ See e.g. ECtHR, *Alver v. Estonia*, No. 64812/01, 8 November 2005 and *Ciorap v. Moldova*, No. 12066/02, 19 June 2007, para. 64.

³⁴⁴ See e.g. ECtHR, *Dougoz v. Greece*, No. 40907/98, 6 March 2001, para. 46.

182. In addition, when Mr Askarov was finally transferred to Bishkek, his internal injuries appear to have been exacerbated by the manner of transport and by the bumpy road. The transfer took place under substandard conditions that further damaged his health. The transfer of Mr Askarov, in his precarious health condition as a result of the beatings and other treatment, took place in a jail vehicle not suitable given his health condition, from the South to Bishkek, with insufficient clothing and rubber slippers, when it was extremely cold. His physicians had called for a more suitable form of transport. Mr Askarov's health conditions appear to have been exacerbated by lack of medical care when it was urgently needed. Especially worrying is the report that even when doctors demanded that Mr Askarov be placed in hospital, this never happened. Whether by deliberate act or by omission, the lack of healthcare, and the disregard of Mr Askarov's state of health in his treatment in detention and in transfer, are contrary to the principle that a detained person should not be subjected to "distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance".³⁴⁵
183. Furthermore, it is a matter of concern that Mr Askarov's mental health deteriorated significantly during his time in detention, culminating in at least two suicide attempts (as described in Chapter 2). The ICJ was told that, at least until the time of the appeal hearing in the Supreme Court, Mr Askarov had received no access to mental healthcare, despite these obvious manifestations of extreme risk. *Failure of the State to take steps necessary to address the impact on Mr Askarov's mental well-being*³⁴⁶ raises issues of obligations to provide adequate healthcare under Articles 7 and 10 ICCPR, Article 12 ICESCR and Articles 2 and 16 CAT, as well as of obligations to protect the right to life under Article 6 ICCPR.
184. *The conditions of detention described by Mr Askarov were also incompatible with the requirements of the national law of Kyrgyzstan.* It appears that the Kyrgyz investigating and detention authorities in a number of respects violated the provisions of the Law of the Kyrgyz Republic "On the procedure and conditions of detention of persons detained on suspicion and charges of committing crimes". First, the law states that "suspects and defendants are provided with free meals, sufficient to maintain health and strength".³⁴⁷ In this case the food the authorities provided can hardly be considered as "sufficient to maintain health and strength". Secondly, the law also stipulates that conditions in the detention centres should "meet the requirements of hygiene, sanitation and fire safety".³⁴⁸ Obviously, the conditions in which Mr Askarov was held at several points during his detention did not meet such requirements. Thirdly, Mr Askarov was deprived of his right to have an individual bed and bed linen guaranteed by the law. Fourthly, it appears that the cell was overcrowded and therefore the detention authorities did not provide minimum space for detainees, including Mr Askarov, which is guaranteed by the law.³⁴⁹ Moreover, the detention authorities failed to provide medical assistance to Mr Askarov. The law requires the detention authorities to provide immediate medical assistance to injured detainees.³⁵⁰ Also in cases of serious medical condition the law requires the authorities to transfer the detainee to the medical centre.³⁵¹ *None of these requirements was satisfied in Mr Askarov's case, in violation of Kyrgyz law.*

³⁴⁵ ECtHR, *Kudla v. Poland*, No. 30210/96, 26 October 2000, para. 94; Also see HRC, *Deidrick v. Jamaica*, 619/1995, 9 April 1998, para. 9.3.

³⁴⁶ HRC, *C. v. Australia*, 832/1998, 28 October 2002, para. 8.4.

³⁴⁷ The Law of the Kyrgyz Republic "On the procedure and conditions of detention of persons detained on suspicion and charges of committing crimes", art. 21.

³⁴⁸ *Ibid.*, art. 22.

³⁴⁹ *Ibid.*, art. 22 guarantees at least 3.25 square meters per person.

³⁵⁰ *Ibid.*, art. 23.

³⁵¹ *Ibid.*

The positive obligation to prevent torture and ill treatment by State agents and by cell-mates

185. The international human rights law obligations of the State include positive obligations to prevent torture or other ill-treatment, in addition to the obligations to refrain from such treatment. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) obliges all state parties to take effective legislative, administrative, judicial or other measures to prevent acts of torture and cruel, inhuman or degrading treatment or punishment.³⁵² According to Article 2(1) CAT, “[e]ach State Party shall take effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under its jurisdiction”. Article 16 CAT requires that “[e]ach State Party shall undertake to prevent (...) other acts of cruel, inhuman or degrading treatment or punishment.” These obligations are also reflected under Article 7 ICCPR.³⁵³ In addition, the duty of the State extends to acts of persons acting “...in their official capacity, outside their official capacity or in a private capacity”.³⁵⁴ The same principle is applied by the European Court of Human Rights which has found violations of states’ obligations to protect the right to life and the freedom from inhuman or degrading treatment, in situations of detention where detainees suffered violence from other detainees, or where they committed suicide, where the authorities knew or ought to have known of the risk of such acts, and did not take sufficient steps to prevent their occurrence.³⁵⁵
186. In accordance with its obligations under the ICCPR and CAT, therefore, Kyrgyzstan is responsible not only for acts of state agents, but also, in certain instances, for omissions of the State in taking reasonable steps to protect from the acts of private persons.³⁵⁶ *If the person responsible for treatment amounting to torture or other ill-treatment has not been identified or is a private person, the State may still be responsible where there has been a lack of due diligence in preventing the treatment or in redressing it.* As the UN Human Rights Committee has affirmed in describing the general obligations of states under the ICCPR, including in regard to Articles 7 and 10, “the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities... The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. ...It is ... implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power.”³⁵⁷

³⁵² See in particular UN CAT arts. 2 and 16, but also arts. 10, 11 12 and 13.

³⁵³ HRC, General Comment No.20, para 8. In addition, the UN HRC has stated that “[a]rticle 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations” (see General Comment 31: The nature of the general legal obligation imposed on States Parties to the Covenant, para. 7). It further added that “[i]n general, the purposes of the Covenant would be defeated without an obligation integral to art. 2 to take measures to prevent a recurrence of a violation of the Covenant” (General Comment 31, para. 17).

³⁵⁴ HRC, General Comment 20, para. 2.

³⁵⁵ ECtHR, *Paul and Audrey Edwards v. the United Kingdom*, No. 46477/99, 14 March 2002, paras. 54–56; ECtHR, *Trubnikov v. Russia*, No. 49790/995, July 2005, paras. 67–70; ECtHR, *Keenan v. the United Kingdom*, No. 27229/95, 3 April 2001, paras. 90–93.

³⁵⁶ See IACHR, *Velásquez Rodríguez*, 29 July 1988, to which the ILC Commentary accompanying the Articles on State Responsibility refers as well; See further, ECtHR, *Osman v. UK*, 23452/9, 28 October 1998.

³⁵⁷ UN HRC, General Comment 31, para.8.

187. The Committee against Torture has found, for example, that when public officials knew what was occurring, and were in fact present, but 'did not take any appropriate steps' to protect the petitioners from acts of ill-treatment, this implied 'acquiescence' in such acts, in violation of Article 16 CAT.³⁵⁸
188. Furthermore, these international law obligations are reflected in national law. Kyrgyz law requires that in the event of threats to life and health of detainees or the threat of crime against them from other suspects or accused, detention authorities shall immediately take steps to ensure the personal safety of the detainees.³⁵⁹
189. In light of the heated situation in the South at the time of his arrest, and the fact that Mr Askarov was accused of the murder of a police officer attached to Bazar-Korgon police station, and had previously exposed human rights violations by officers there, it should have been clear to the authorities that his detention in the Bazar-Korgon police station placed him at particular risk, which required particular measures to protect against ill-treatment. Such measures could have included transfer to another police station outside the region, as well as rigorous supervision of the detention and interrogation regime. Furthermore even if, as has been claimed by the authorities, Mr Askarov's injuries, or some of them, were caused by his cell-mate, this factor only reinforces the need for the State to discharge its obligation to take steps to protect Mr Askarov from such acts. *Whatever the cause of Mr Askarov's injuries, there is no dispute that he suffered injuries in detention. This engages the responsibility of the State under CAT and the ICCPR to take reasonable steps to protect against treatment that amounts to torture or other cruel, inhuman or degrading treatment. In the view of the ICJ, this obligation was not met in Mr Askarov's case.*

The obligation to investigate torture allegations, prosecute and punish

190. Under CAT as well as the ICCPR, Kyrgyzstan is under obligations to institute effective official investigations into well-founded allegations of torture and other ill-treatment. Such obligations—as regards torture—are expressly set out in Article 12 CAT which stipulates that: "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction." The obligation also implicitly extends to ill-treatment not amounting to torture. As the Committee against Torture has noted, the "obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture."³⁶⁰ The Human Rights Committee has also identified a duty to investigate, extending to both torture and to other ill-treatment prohibited by Articles 7 and 10 ICCPR. In light of the right to an effective remedy under Article 2(3) ICCPR, it has found that these articles require the state to carry out an effective official investigation to identify the persons responsible for an act of torture or other ill-treatment and to bring them to justice.³⁶¹ The UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment also provide that "States shall ensure that complaints and reports of torture or ill-treatment are promptly and effectively investigated. Even in the absence of an express complaint, an investigation shall be undertaken if there are other indications that torture or ill-treatment might have occurred."³⁶²

³⁵⁸ UN CAT, *Dzemajl et al. v. Yugoslavia (Montenegro)*, 161/2000; ECtHR, *Moldovan and others v. Romania*, Nos. 41138/98 and 64320/01, 12 July 2005.

³⁵⁹ The Law of the Kyrgyz Republic "On the procedure and conditions of detention of persons detained on suspicion and charges of committing crimes", arts. 18 and 32.

³⁶⁰ CAT, General Comment 2 on Implementation of art. 2 by States Parties, CAT/C/GC/2, 24 January 2008, para. 3.

³⁶¹ HRC, *Rodriguez v. Uruguay*, 322/1988, 19 July 1994, paras.13–14; HRC, *Zelaya Blanco v. Nicaragua*, 328/1988, 20 July 1994, para. 10.6; HRC, General Comment 20, para.14; HRC, General Comment 31 on the Nature of Legal Obligations under the Covenant, paras. 15–18.

³⁶² UN General Assembly, Resolution 55/89 and Human Rights Commission Resolution 2000/43, para. 2.

191. Such investigations must be thorough and effective and not merely formal or cursory.³⁶³ Merely mentioning torture allegations in a court decision, but rejecting them 'with a blanket statement that the evidence in the case confirms the guilt of the accused' indicates a failure to adequately address torture allegations.³⁶⁴ It must be initiated promptly³⁶⁵ and at the initiative of the authorities.³⁶⁶ Investigations of human rights violations should be carried out with diligence, that is, using all legal means available and oriented toward determining the truth.³⁶⁷ The bodies which conduct investigation into the allegations of human rights violations must ensure an independent and credible procedure for the investigation especially when allegations are often found to be unfounded: the UN Human Rights Committee has found that in such circumstances it is particularly important that "investigation into complaints of abuse of authority by members of the Police Force must be, and must appear to be, fair and independent and therefore must be entrusted into an independent mechanism".³⁶⁸ States have the obligation to ensure that all necessary steps are taken to uncover the truth about what happened and to ensure that those responsible are brought to justice,³⁶⁹ whether they have been responsible for 'encouraging, ordering, tolerating or perpetrating prohibited acts'.³⁷⁰
192. Moreover, States are obliged "to proceed to an investigation ex officio, wherever there are reasonable grounds to believe that acts of torture or ill-treatment have been committed and whatever the origin of the suspicion".³⁷¹ It has been stressed that "once the situation has been brought to their attention, the national authorities cannot rely on the victim's attitude for their failure to take adequate measures which could prevent the likelihood of an aggressor carrying out his threats against the physical integrity of the victim".³⁷² The legislative framework should enable the prosecuting authorities to pursue criminal investigations despite the withdrawal of complaints by the victim when the violence committed is sufficiently serious to warrant prosecution and there is a constant threat to the victim's physical integrity.³⁷³
193. Despite the serious and well-substantiated claims of torture and ill-treatment which were brought to the attention of the police, prosecutor's office and courts, such investigations do not appear to have been conducted in this case. In fact, on 26 July, the Jalal-Abad Regional Court upheld the decision of the prosecutor's office not to investigate allegations that Mr Askarov had been tortured following his detention on 15 June. The Appeals Court

³⁶³ HRC, *Fuenzalida v. Ecuador*, 480/1991, 12 July 1996, para.9.4; HRC, *Freemantle v Jamaica*, 625/1995, 30 March 1998, para.7.2; HRC General Comment 31, para.15.

³⁶⁴ HRC, *Otabek Akhadov v. Kyrgyzstan*, 1503/2006, 25 March 2011, para. 7.3; See also, e.g. HRC, *Bradley McCallum v. South Africa*, 1818/2008, 25 October 2010, para. 6.4.

³⁶⁵ CAT, art. 12; HRC, General Comment 31 para.15

³⁶⁶ See: IACHR, *Velásquez-Rodríguez v. Honduras*, 29 July 1988, para.177; see also, e.g. IACHR, *Zambrano-Vélez et al. v. Ecuador*, 4 July 2007, para.120. ECtHR, *Tashin Acar v. Turkey*, No. 26307/95, 8 April 2004 [Grand Chamber], (referring to ECHR, *İlhan v. Turkey* [GC], no. 22277/93, 27 June 2000, para. 63, and ECHR, *Finucane v. the United Kingdom*, No. 29178/95, para. 67.

³⁶⁷ See IACHR, *García-Prieto et al. v. El Salvador*, 20 November 2007, para.101.

³⁶⁸ HRC, Concluding Observations, United Kingdom of Great Britain and Northern Ireland (Hong Kong), CCPR/C/79/Add. 57, 9 November 1995, para. 11.

³⁶⁹ See: IACHR, *Bulacio v. Argentina*, 18 September 2003, para. 114; the *Rochela Massacre v. Colombia*, 11 May 2007, para. 146 and the *Miguel Castro-Castro Prison v. Peru*, 25 November 2006, para. 382.

³⁷⁰ See e.g. HRC, General Comment 20 on art. 7 ICCPR, paras. 8 and 13–14. See also, e.g. Concluding Document of the OSCE Budapest Summit (1994): participating States "recognize the importance of national legislation aimed at eradicating torture. They commit themselves to inquire into all alleged cases of torture and to prosecute offenders", para. 20; In *Velásquez Rodríguez*, the IACHR recognized that as a consequence of this obligation, "the States must prevent, investigate and punish any violation of the rights recognized by the Convention" *Velásquez Rodríguez* case, Judgment of 29 July 1988, para. 166. In *Velásquez Rodríguez* the IACHR also pointed out that "if the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction". "The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention."

³⁷¹ CAT, *Blanco Abad v. Spain*, 59/96, 14 May 1998, para. 8.2.

³⁷² ECtHR, *Opuz v. Turkey*, No. 33401/02, 9 June 2009, paras.153, 167–168 (also referring to *Osman v. the United Kingdom*, para. 116).

³⁷³ *Ibid.*, paras. 167–168.

summarily dismissed the arguments about the use of ill-treatment against Mr Askarov by observing that these had been appropriately assessed during the investigation without indicating how and why this qualified as appropriate. The Court simply noted that 'a complaint on the incorrectness of the investigation was not submitted to the prosecutor or to the Court in the manner prescribed by law in a timely manner'.³⁷⁴ At the hearing before the Supreme Court, allegations of torture were once again raised by the defence, but were summarily dismissed. It is striking that (as described above in Chapter 2) a cursory letter enquiring about these allegations was sent to the relevant authorities, but once the police officers denied the allegations, no further steps were taken and a criminal investigation was never initiated. The State may not use procedure as a mere formality in order to avoid its obligations both under national and international law.

194. Furthermore, as noted above, torture and other forms of ill treatment by law enforcement officers are criminal offences in Kyrgyzstan. Failure to investigate and prosecute law enforcement officers who commit those crimes can itself constitute a criminal offence. In other words, prosecutors who refused to investigate allegations of torture of Mr Askarov may fall under article 323 of the Criminal Code for their refusal to institute a criminal case.³⁷⁵
195. *In the view of the ICJ, the failure to investigate torture allegations clearly breaches Kyrgyzstan's obligations under CAT and the ICCPR, as set out above. Mr Askarov has given detailed, repeated and consistent accounts of the place, in several instances the dates, the type of treatment and in some instances also an indication of the effects of the treatment.*³⁷⁶ *He did so with regard to acts perpetrated against him, and against co-defendants, as well as against his brother, and in some cases other detainees held alongside him. This information, together with physical and photographic evidence of at least some of this ill-treatment, clearly requires the authorities to initiate thorough and independent investigations into the ill-treatment in custody of Mr Askarov, his co-defendants, and his brother, and other detainees named by him as suffering ill-treatment.*
196. The authorities cannot avoid the responsibility to initiate such an investigation by maintaining that Mr Askarov withdrew his claim and said that all the various situations of beatings and other ill-treatment were committed by one cell mate, especially in light of the obligation to investigate the statement that he was pressured, e.g. through the cell-leaders. To the extent that one of the beatings may indeed have been by a cell-mate rather than by the authorities themselves, this would still incur the responsibility of the authorities, since it would indicate a failure of the authorities to protect him, contrary to Article 7 ICCPR as well as CAT. In any case, it is very clear that Mr Askarov maintained his claim of severe beatings and other acts of torture or other ill-treatment by various authorities, including in his interview with the ICJ representatives. However, it is not the place of the ICJ, nor of any other non-governmental authority, to undertake a full investigation of these very serious allegations. *It is the national authorities which are uniquely placed to undertake such an investigation, and it is the State which has an international legal responsibility to do so. In the view of the ICJ, the evidence of ill-treatment of Mr Askarov, his co-defendants and his brother now requires a thorough, independent, official investigation. Such an investigation is essential to a just resolution of this case.*

Rights related to arrest and investigation

Legal basis for detention

197. Article 9(1) ICCPR, which protects the right to liberty and security of the person, prohibits arbitrary deprivation of liberty, including detention which is not in accordance with

³⁷⁴ Judicial Board on Criminal Cases and Administrative Offenses of Jalal-Abad Regional Court, 10 November 2010.

³⁷⁵ Criminal Code of the Kyrgyz Republic, art. 323.

³⁷⁶ See *supra* Factual Circumstances of the Case.

grounds and procedures established by law.³⁷⁷ This includes circumstances where a detention has not been officially acknowledged or recorded. The Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment³⁷⁸ provide, in Principle 12.1, that “There shall be duly recorded (a) The reasons for the arrest; (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority; (c) The identity of the law enforcement officials concerned; (d) Precise information concerning the place of custody.” Principle 12.2 further provides that “[s]uch records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.”

198. There is good evidence that Mr Askarov was taken into custody on 15 June,³⁷⁹ however his arrest was registered only in the evening of the next day, 16 June. Such periods of unregistered arrests and detention before the official arrest appear to be a common practice in Kyrgyzstan. The UN Special Rapporteur on Torture has recently observed, in regard to Kyrgyzstan, on the basis of his interviews with detainees, that “Almost all detainees interviewed indicated that they had been subjected to mistreatment or beating since the time of apprehension and delivery to the temporary detention facility for the purpose of extracting a confession. During this unaccounted period of time, suspects may be held in unofficial detention settings (unregistered custody), such as in police vehicles or office rooms, where police officers have “conversations” with suspects or witnesses. This involves inviting a person to the police station without recording the time and purpose of the visit, and often holding a person incommunicado for an unlimited period of time. These individuals do not in effect enjoy the rights that are provided for by criminal procedure law to suspects or accused.”³⁸⁰
199. It appears that Mr Askarov’s apprehension on 15 June 2010, was never recorded as an arrest. His claim that his arrest was only recorded the day after he came under the control of the State authorities, has not been investigated properly. The State has not responded to these allegations by providing any explanation as to the circumstances around the date of his arrest. *During this initial period of detention, from 15–16 June, Mr Askarov was held without access to a lawyer or his family. In the view of the ICJ, the detention from 15 June until formal arrest on the evening of 16 June was arbitrary and without legal basis, contrary to Article 9(1) ICCPR.*
200. According to Article 95 of the CPC KR, the arresting authority should create a record of detention no later than three hours after the actual (factual) delivery of the suspect to the police station or other place of detention. This record or transcript should contain the grounds and reasons, place and the time of the arrest (with indication of hour and minute), the results of the personal search. The record should be read to the suspect, and the officer should warn the suspects and explain them their rights. The record of detention should be signed by the person who has written it and by the detainee. The investigator is obliged to inform the prosecutor in writing about the detention within twelve hours starting from the moment of writing the record of detention.³⁸¹ *In this case, Mr Askarov appears to have been detained by the authorities for more than 24 hours without a record and in violation of rules of criminal procedure of Kyrgyzstan.*
201. Moreover, the investigating and prosecuting authorities appear to have not followed the provision of the Criminal Procedure Code, which requires them to receive a judicial au-

³⁷⁷ See e.g. HRC, *Zhakhongir Maksudov, Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov v. Kyrgyzstan*, 1461/2006, 1462/2006, 1476/2006 and 1477/2006, 16 July 2008, para. 12.2.

³⁷⁸ Body of Principles For the Protection of all Persons Under Any Form of Detention or Imprisonment, adopted by GA Resolution 43/173 of 9 December 1988.

³⁷⁹ *Supra* para. 44.

³⁸⁰ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Mission to Kyrgyzstan, 21 February 2012, A/HRC/19/61/Add. 2, Mission of 5–13 December 2011, para. 45.

³⁸¹ Criminal Procedure Code of the Kyrgyz Republic, art. 95.

thorisation of detention pending trial within 48 hours after the person has been actually detained.³⁸² Therefore Mr Askarov was detained without a judicial warrant between 11:30am on June 15 until the evening of 17 June, or for more than 48 hours.

202. Following his formal arrest, Mr Askarov alleges that despite the fact that the record of arrest indicates that he was informed of his rights, he was neither informed of the reasons for detention, nor of his rights, as is required under Article 9(2) ICCPR.³⁸³
203. It further took the judge of the Bazar-Korgon District Court about five minutes to decide that Mr Askarov and the others charged under the criminal case had to be detained pending trial. Mr Askarov was not asked a single substantive question in that extremely brief hearing. The Court, in authorising detention of Mr Askarov, said that because of Mr Askarov's actions "...the Prosecutor's Office staff received injuries and the police captain Sulaimanov was killed.³⁸⁴ *The judge's statement suggests that the decision to detain was based on a presumption of guilt, and that the judicial oversight of detention was therefore ineffective.* Although the Kyrgyz law is not elaborate regarding the procedure of detention hearings it does, however, stipulate that after the prosecutor's speech other participants should be heard.³⁸⁵ It appears that the judge violated the rules of criminal procedure by not giving the accused an opportunity to challenge the lawfulness of detention.

Right of access to a lawyer and to communicate with a lawyer in private

204. The right of prompt, regular and confidential access to a lawyer in detention is a requirement of the right to fair trial³⁸⁶ as well as a protection against arbitrary detention and against torture or other ill-treatment in detention.³⁸⁷
205. Under Article 14(3)(b) ICCPR, the right to a fair trial imposes obligations on the State to provide an accused person with adequate time and facilities for the preparation of his defence and to communicate with counsel of his or her own choosing. As the Human Rights Committee has noted, this provision is an important element of the guarantee of a fair trial.³⁸⁸ The Committee has pointed out that the "right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications".³⁸⁹ In addition, according to the Standard Minimum Rules for the Treatment of Prisoners, '(f)or the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. (...) Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official".³⁹⁰ The Body of Principles for the Protection of all Persons Under Any Form of Detention or

³⁸² Criminal Procedure Code of the Kyrgyz Republic, arts. 39 and 110.

³⁸³ See also e.g. HRC, *Natalia Bondar on behalf of her husband Sandzhar Ismailov v. Uzbekistan*, 1769/2008, 25 March 2011, para. 7.2; and, HRC, 1348/2005, *Ashurov v. Tajikistan*, 20 March 2007, para. 6.4. See further e.g. HRC, General Comment 8 'Right to liberty and security of persons'; and *Kelly v. Jamaica*, 253/1987, 08 April 1991, para. 5.8.

³⁸⁴ Resolution of Bazar-Korgon Court of 17 June 2010.

³⁸⁵ Criminal Procedure Code of the Kyrgyz Republic, art.110(4).

³⁸⁶ HRC, General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (art. 14), CCPR/C/GC/32 (2007), para. 34, referring to *Khomidova v. Tajikistan*, para. 6.4; *Siragev v. Uzbekistan*, para. 6.3; and *Gridin v. Russian Federation* para. 8.5.

³⁸⁷ HRC, General Comment 20, *op. cit.*, para. 11; See also the Standard Minimum Rules for the Treatment of Prisoners; See Standard Minimum Rules for the Treatment of Prisoners, *op. cit.*, para. 93; See also, Body of Principles for the Protection of all persons under Any Form of Detention or Imprisonment, Principles 17 and 18 and UN Basic Principles on the Role of Lawyers, principles 7 and 8.

³⁸⁸ HRC, General Comment No. 32, para. 32

³⁸⁹ *Ibid.*, para. 34, referring to *Khomidova v. Tajikistan*, para. 6.4; *Siragev v. Uzbekistan*, para. 6.3; and *Gridin v. Russian Federation* para. 8.5.

³⁹⁰ See: Standard Minimum Rules for the Treatment of Prisoners, *op. cit.*, rule. 93. See also UN Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment, principles 15, 17.

Imprisonment specifies in Principle 18(2) that “a detained or imprisoned person shall be allowed adequate time and facilities for consultation with his counsel.” “Adequate facilities” for the preparation of the defence must include access to documents and other evidence; this access must include all materials³⁹¹ that the prosecution plans to offer in court against the accused or that are exculpatory. In cases of a claim that evidence was obtained in violation of Article 7 of the Covenant, information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such a claim.”³⁹²

206. Access to a lawyer may only be delayed in exceptional circumstances, in accordance with strict legal criteria, and in any event, should occur no later than 48 hours after the initial arrest.³⁹³ Article 18.3 of the Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment states that “the right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.” Furthermore, as the Human Rights Committee has emphasised, “lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter.”³⁹⁴ Under principle 16 of the Basic Principles on the Role of Lawyers, governments must ensure that lawyers “are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference” and “are able to consult with their clients freely...”³⁹⁵
207. Article 14(3)(d) ICCPR provides the right of all accused of a criminal charge to defend themselves in person or through legal counsel of their own choosing, or to have legal assistance assigned to them free of charge whenever the interests of justice so require. The Human Rights Committee has stressed that the counsel provided by the competent authorities on the basis of this provision must be effective in the representation of the accused, and that, in certain cases, the lawyer’s misbehaviour or incompetence may entail the responsibility of the State in this respect.³⁹⁶ Denial of access to a lawyer of choice until the trial stage may constitute a violation of article 14(3)(b) and (d).³⁹⁷
208. In Mr Askarov’s case, restrictions on his access to his lawyers and on the confidentiality of his communications with them, as well as the harassment and physical attacks to which his lawyers were subjected, appear to have severely affected the lawyers’ capacity to defend the rights of their client, and to protect him from ill-treatment in detention. On 16 June 2010, the day after he had been taken into detention (although his arrest was only formally registered on 16 June), a defense lawyer from Jalal-Abad was not allowed to see him. On the evening of 17 June, he was provided with a state-appointed lawyer, who Mr Askarov claimed supported the police’s positions and did not attempt to defend his client’s interests, denying him the effective assistance of lawyer. A new, independent lawyer, Mr Toktakunov, was then appointed and was able to visit him briefly on 22 June, but not in

³⁹¹ HRC, Concluding Observations, Canada, CCPR/C/CAN/CO/5 (2005), para. 13.

³⁹² HRC, General Comment 32, para. 33.

³⁹³ UN Basic Principles on the Role of Lawyers, Principle 7; HRC, Concluding Observations of the Human Rights Committee on Israel, CCPR/CO/78/ISR, para.13.

³⁹⁴ HRC, General Comment 32, para. 34.

³⁹⁵ UN Basic Principles on the Role of Lawyers, principle 16

³⁹⁶ HRC General Comment 32 paras. 37 and 38.

³⁹⁷ See e.g. General Comment 32: paras. 32, 37 and 38 and *Natalia Bondar on behalf of her husband Sandzhar Ismailov v. Uzbekistan*, 1769/2008, 25 March 2011, para. 7.4. The African Commission added that it is desirable for indigent defendants that they were represented “at state expense”, but “even in such cases, the accused should be able to choose from a list the preferred independent counsel ‘not acting under the instructions of government but responsible only to the accused’”. ACHPR *Civil Liberties Organisation et al. v. Nigeria*, April/May 2001, para. 29. The Commission referred to early case law of the HRC involving Uruguay and to its own Resolution on the Right to Recourse and Fair Trial (1992). See also ACHPR, *Malawi African Association et al. v. Mauritania*, May 2000, para. 96 (no access or restricted access to counsel and insufficient time to prepare for the defence in violation of Art. 7(1)(c)).

private. The lawyer reported that an officer was present throughout the meeting and that Mr Askarov said very little and appeared to be frightened. His lawyer was able to make photos of the bruises on his back where he had been hit on both kidneys. Instead of taking decisive action in response to the photos of his kidney bruises, no investigation into the allegations has been initiated. It was only in the first week of August that Mr Askarov was able to meet with his lawyer in private. On several occasions, Mr Askarov's lawyers were also prevented by private parties from gaining access to the detention facility to visit their client, were denied access to documents necessary for the preparation of the defence, and were subject to violent attack, which the law enforcement authorities were unable or unwilling to prevent.

209. It is of particular concern that during the initial days of his detention, on 15 and 16 June, during which time he suffered serious injuries, Mr Askarov had no access to a lawyer. When he was granted access to a state-appointed lawyer on 17 June, lawyer appeared to have been ineffective in affording him any legal support, and therefore insufficient to protect against torture or other ill-treatment, or to allow him to challenge his detention. Access to legal assistance, from a lawyer of his own choosing, was granted only seven days after his initial apprehension, and six days after his formal arrest. Such delay is contrary to international standards, and is likely to have contributed to violations of his human rights in detention.
210. *These restrictions on access to lawyers, as well as the failure to prevent private parties from attacking and preventing lawyers' visits, clearly hindered the lawyers' ability to take effective action against torture and ill-treatment and, in the view of the ICJ, are likely to have contributed to violations of the prohibition on such treatment, as well as to violations of the right to an effective defence, an element of the right to a fair trial. Furthermore, the physical attacks on defence lawyers, including Mr Toktakunov, the defence lawyer for Mr Askarov, raise issues in regard to the right to security of the person of the lawyers themselves (Article 9 ICCPR)³⁹⁸ and the state's duty to protect from such violent attacks, as well as to investigate their occurrence.*
211. The restrictions on access to a lawyer and on private lawyer-client communication also raise issues of compliance with national criminal procedure legislation and with the Law on Advocate Activity. *In particular, interrogations (allegedly accompanied with torture and ill-treatment, insults and threats) of Mr Askarov without a lawyer of his choosing during the first several days of his detention are incompatible with the requirements of the Criminal Procedure Code. These requirements include these elements: (1) the suspect has a right to have a lawyer from the moment of the first interrogation, and in case of detention — from the moment of actual arrival to the agency of preliminary investigation;³⁹⁹ (2) lawyer shall start his participation in the case from the moment of the first interrogation of suspect (accused), witness or actual detention of the suspect (accused);⁴⁰⁰ (3) a lawyer shall be invited by the suspect, accused, defendant, witness, their legal representatives, or by other persons if so requested by or at the consent of the suspect, accused, defendant, witness;⁴⁰¹ (4) if so requested by the suspect, a lawyer shall be assigned by the investigator or the court.⁴⁰²*
212. *By denying access of a lawyer from Jalal-Abad to Mr Askarov, the investigating authorities violated several provisions of the Law On Advocate Activity. These include (1) the right of the advocate to participate in a criminal case from the moment of the first interrogation of the suspect (accused), or in case of detention from a moment of actual delivery of the*

³⁹⁸ HRC, *Delgado Paéz v. Columbia*, 195/1985, 12 July 1990.

³⁹⁹ Criminal Procedure Code of the Kyrgyz Republic, art. 40(1)(4).

⁴⁰⁰ *Ibid.*, art. 44(3).

⁴⁰¹ *Ibid.*, art. 45(1).

⁴⁰² *Ibid.*, art. 45(2).

suspect to the place of investigating agency;⁴⁰³ (2) the right of a lawyer to represent the interests of his client does not depend on the discretion of the court, law enforcement agencies and officials, and other circumstances.⁴⁰⁴

213. *If, as Mr Askarov alleges, the first state appointed lawyer was not acting in the client's best interests, this violates the requirements of domestic laws on criminal procedure and on advocate activities.* Thus, according to Article 48(6) of CPC "the defence counsel cannot take any actions against the interests of the defendant".⁴⁰⁵ Moreover, by collaboration of the investigative and prosecuting authorities with the state-appointed lawyer undermined the principle of independence of the advocate stipulated in the Law On Advocate Activity: "advocates are independent in the exercise of their profession in the choice of means and ways to defend their clients' rights and are not dependent on opinions and estimates of any state bodies and officials."⁴⁰⁶
214. *Investigative and prosecuting authorities also violated the right of Mr Askarov and his new lawyer Mr Toktakunov to meet each other in private, which is guaranteed by Kyrgyz law.* The Kyrgyz CPC guarantees the right of the suspect or accused to communicate with his lawyer confidentially and without limitation of time and number of meetings.⁴⁰⁷ Another provision of the Code stipulates that from the moment of participation in the criminal case the lawyer is entitled to meet with the suspect, accused, or defendant in private, confidentially and without any limitations of time and number of such meetings.⁴⁰⁸ Similar provision can be found in the Law on Advocate Activity.⁴⁰⁹
215. The fact that access of Mr Askarov to his lawyer was delayed by six days cannot be justified by any provision of the criminal procedure law. On the contrary, it constitutes a criminal offence as stipulated in the Kyrgyz criminal law, namely, the obstruction of the professional activity of the lawyer. According to Article 318-1, "obstruction in any form of the fulfilment of rights and discharge of duties of a lawyer... by a person using his official position" is punishable by deprivation of liberty for a term of up to five years.⁴¹⁰

Right to an independent medical examination

216. As a procedural safeguard against torture, the HRC has emphasised the importance of prompt and regular access to doctors as well as to lawyers.⁴¹¹ International standards, including the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, require that "a proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge".⁴¹² The importance of an independent medical examination is acknowledged by international standards. For example, the CPT standards stipulate that the right of access to a doctor should include the right of a person in custody to be examined, if the person concerned

⁴⁰³ Law of the Kyrgyz Republic on Advocates Activity, art. 12.

⁴⁰⁴ *Ibid.*, art. 15.

⁴⁰⁵ Criminal Procedure Code of the Kyrgyz Republic, art. 48(6).

⁴⁰⁶ Law of the Kyrgyz Republic on Advocate Activity, art. 15.

⁴⁰⁷ Criminal Procedure Code of the Kyrgyz Republic, art. 42(1)(9).

⁴⁰⁸ *Ibid.*, art. 48(3)(6).

⁴⁰⁹ Law of the Kyrgyz Republic on Advocate Activity, art. 12.

⁴¹⁰ Criminal Code of the Kyrgyz Republic, art. 318-1.

⁴¹¹ HRC, General Comment 20, para. 11.

⁴¹² Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 24; Code of conduct for Law Enforcement Officials, art. 6; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, principle 5.c; According to the CPT there should be a complete custody record for each detainee which should record "all aspects of custody and action taken regarding them (when deprived of liberty and reasons for that measure; when told of rights; signs of injuries, mental illness, etc; when next of kin/consulate and lawyer contacted and when visited by them; when offered food; when interrogated; when transferred or released, etc). Further, the detainee's lawyers should have access to such a custody record", CPT/Inf/E (2002) 1, p. 7, para. 40.

so wishes, by a doctor of his/her own choice and that all such examinations should be conducted out of the hearing, and preferably out of the sight, of police officers.⁴¹³ Furthermore, the results of the medical examination should be formally recorded and access to such records, including by the detainee and his lawyer, should be ensured.⁴¹⁴

217. In the case of Mr Askarov, he did not receive any independent medical examination in the initial stages of his detention, despite applications by his lawyer for such an examination to be carried out, and despite the obviously very high risks of ill-treatment in his case. An initial medical examination shortly after he was taken into custody (16 or 17 June 2010) showed no injuries or evidence of torture or ill-treatment, while another examination on 24 June (after photographs had been taken showing injuries on his body) showed that he had not suffered even "temporary" health disorder. The prosecution authorities refused to provide Mr Askarov's lawyer with a copy of the medical report.
218. Official records show that medical examinations were refused on at least one occasion by Mr Askarov, who is alleged to have stated that he had no complaints and did not need such an examination. This is contradicted however by Mr Askarov's own description of events, and the suspicion must arise that any such rejection of a medical examination was made under pressure.
219. The law of the Kyrgyz Republic allows the suspect and lawyer to apply for medical examination by a doctor who is not affiliated with the detention centre.⁴¹⁵ Although the law does not require the investigative or detention authorities to grant such application in all cases, the refusal of a medical examination by an independent doctor raises concerns that the authorities might have wished to conceal evidence of ill-treatment.
220. *The failure to ensure prompt, independent and thorough medical examination of Mr Askarov following his arrest, and to communicate the results of any such examination to his lawyers, is likely to have contributed to violations of the prohibition on torture and other ill-treatment in this case.*

Access of relatives

221. The protection of the detainee from ill-treatment, as well as from arbitrary detention, also requires that prompt and regular communication with and access to family members.⁴¹⁶ The Standard Minimum Rules for the Treatment of Prisoners stipulate that "(a)n untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution".⁴¹⁷ The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment require the authorities to allow suspects a free telephone call with family members or relatives.
222. Kyrgyz law stipulates that suspects and accused detained in pre-trial detention centres may have meetings with their relatives: no more than two meetings per month of up to three hours each.⁴¹⁸ However, such meetings should be approved by the person who is in

⁴¹³ European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), 12th General Report of the CPT's activities, covering the period 1 January to 31 December 2001 [CPT/Inf (02)], para. 42.

⁴¹⁴ Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, principle 26; CPT 2nd General Report of the CPT's activities, covering the period 1 January to 31 December 1991 [CPT/Inf (1992) 3], para. 38.

⁴¹⁵ Law "On the procedure and conditions of detention of persons detained on suspicion and charges of committing crimes", art. 23.

⁴¹⁶ HRC, General Comment 20, para. 11.

⁴¹⁷ Standard Minimum Rules for the Treatment of Prisoners, rule 92; see also rule 37 for convicted prisoners.

⁴¹⁸ Law "On the procedure and conditions of detention of persons detained on suspicion and charges of committing crimes", art. 17.

charge of the criminal case, for example the investigator or the trial judge. This legislation, allowing for visits only at the discretion of such officials, as it was in the case of Mr Askarov's relatives, is incompatible with international human rights standards. Moreover, as the UN Special Rapporteur on Torture has recently noted following a visit to Kyrgyzstan, a general practice of delaying formal arrest exacerbates this omission and, by delaying access to family members increases the risk of torture and ill-treatment exactly in this period. The Special Rapporteur found that "[i]n temporary detention facilities, access to and the length of family visits are determined by investigating officers on a case-by-case basis, which is an incentive for bribery and arbitrariness'. He observed that 'most pretrial detainees in temporary detention facilities were either not aware of their right to receive visits from their families or thought that they were not entitled to it during pretrial detention'.⁴¹⁹

223. Mr Askarov appears to have been taken into custody on 15 June.⁴²⁰ His arrest was registered in the evening of the next day. Despite his requests to see his family, he was not allowed to do so until the trial. Access to family members appears to have been actively hindered on 21 July 2010, when a group of women threw stones at Mr Askarov's sister-in-law, inside the police detention centre where she tried to deliver a food parcel to him.⁴²¹
224. *The lack of access to family members in this case contributed to the isolation of Mr Askarov at the most vulnerable period in his detention, when there is good indication that he suffered serious ill-treatment. With regard to the security of Mr Askarov's family members, including his brother and his daughter-in-law, the authorities do not appear to have fulfilled the obligations under the freedom from cruel, inhuman and degrading treatment (Article 7 ICCPR) and the right to security of person (Article 9 ICCPR),⁴²² to protect against the violent acts of third parties. In any case, the alleged violence against Mr Askarov's family members has not been properly investigated. With regard to the allegation of torture of Mr Askarov's brother, a proper investigation does not appear to have been conducted into allegations of his torture or subjection to other ill-treatment in detention.*

Duty to investigate the killing and to establish accountability of the perpetrators

225. The charges against Mr Askarov and several of his co-defendants concerned a most serious charge, of murder, one of many crimes perpetrated during the ethnic violence of June 2010. As the International Commission of Inquiry and others have noted, these crimes have, for the most part, not yet been subject to thorough, independent and effective investigation.⁴²³ Kyrgyzstan's international human rights obligations entail duties to the family members of the victim of this killing, the police officer Mr Sulaimanov, that it be subject to independent and effective investigation. Under the ICCPR, failure to investigate allegations of human rights violations, such as violations of the right to life, or to bring the perpetrators to justice may in itself give rise to a separate breach of the relevant Covenant rights, including Article 6 ICCPR (the right to life).⁴²⁴ This may be the case where the alleged violation lies in the failure to protect against the acts of private parties, as well as in cases where the violation may have been directly perpetrated by state actors.⁴²⁵

⁴¹⁹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Mission to Kyrgyzstan, 21 February 2012, A/HRC/19/61/Add. 2, Mission of 5–13 December 2011, para. 62.

⁴²⁰ See *supra* paras. 39, 44, 45 of this Report.

⁴²¹ See *supra* para. 76 of this Report.

⁴²² HRC, *Delgado Paéz v. Columbia*, 195/1985, 12 July 1990.

⁴²³ The Report of the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan in June 2010.

⁴²⁴ See e.g. HRC, General Comment No. 31, "The nature of general legal obligation imposed on States parties to the Covenant", 29 March 2004, paras. 15 and 18; HRC, *Almeida de Quinteros v. Uruguay*, 107/1981, 21 July 1983, para. 138.

⁴²⁵ HRC, General Comment No. 31, *op. cit.*, para. 8.

226. Compliance with the obligation to investigate and to punish those responsible is closely linked to “the right of the next of kin of the alleged victims to know what happened and to know who was responsible for the respective events”.⁴²⁶ Investigations of allegations of human rights violations should be carried out promptly, thoroughly and effectively, through independent and impartial bodies, using all legal means available and oriented toward determining the truth.⁴²⁷ States have the obligation to ensure that all necessary steps are taken to uncover the truth about what happened and to ensure that those responsible are held accountable and punished.⁴²⁸
227. Given the many flaws in the investigation and trial of Mr Askarov described in this report, flaws which also apply for the most part to the investigation and trial of his co-defendants, it cannot be said that this obligation has been discharged by their conviction. It is certainly clear that the judiciary has not been open to this possibility thus far. During the Supreme Court hearings, when Mr Askarov’s lawyer said that it would not be possible to find the true perpetrators through the use of torture, he was interrupted by one of the judges. When he continued he said: ‘I am saying this way we will never find the real responsible.’ Then he was interrupted by the police officers and he was apparently ordered to discontinue. *In the view of the ICJ, the failure to fully investigate Mr Askarov’s and his co-defendant’s cases—the selective reliance on biased witnesses for example—may lead to impunity of the real perpetrators, and may therefore be said to violate the right to an effective investigation and to reparation of the victims.*

Trial and Appeal

Presumption of innocence

228. Everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law.⁴²⁹ The presumption of innocence is a fundamental and absolute principle of fair trial, deviation from which is prohibited at all times.⁴³⁰ This principle is ‘fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle’.⁴³¹ Not only judges but also all public authorities must not prejudge the outcome of the trial including “by abstaining from making public statements affirming the guilt of the accused.”⁴³² The principle means that whenever there are facts or circumstances giving rise to doubt about evidence, they should be interpreted in favour of the accused.⁴³³ If

⁴²⁶ See IACHR, *García-Prieto et al. v. El Salvador*, 20 November 2007, para. 102; and the “Las Dos Erres” *Masacre v. Guatemala*, 24 November 2009, para. 105. See also e.g. HRC, *Miango v. Zaire*, 194/1985, 27 October 1987, paras. 9 and 11; In general regarding victims’ rights see e.g. the United Nations General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985.

⁴²⁷ HRC, General Comment 29, paras. 8, 15, 18; HRC, *Bautista v. Colombia*, 563/1993, 27 October 1995, para. 82. See also IACHR, *García-Prieto et al. v. El Salvador*, 20 November 2007, para. 101; ECtHR, *McKerr v. UK*, No. 28883/95, 4 May 2001; ECHR, *Menson v. UK*, No. 47916/99, 6 May 2003; *Kaya v. Turkey*, No. 22729/93, 19 February 1998.

⁴²⁸ HRC, General Comment 29, *op. cit.*, para. 18; IACHR, *Bulacio v. Argentina*, 18 September 2003, para. 114; and *The Rochela Massacre v. Colombia*, 11 May 2007, para. 146 and *The Miguel Castro-Castro Prison v. Peru*, 25 November 2006, para. 382; ECtHR, *Nachova v. Bulgaria*, No. 43577/98, 6 July 2005.

⁴²⁹ ICCPR, art. 14 (2).

⁴³⁰ HRC, General Comment 32, para. 6, referring also to General Comment 29 (2001) on art. 4: Derogations during a state of emergency, para. 11.

⁴³¹ See HRC, *J.O. v. France*, 1620/2007, 23 March 2011, para. 9.6, referring to General Comment 32 on art. 14. In that Comment, see para. 30, referring to *Gridin v. Russian Federation*, paras. 3.5 and 8.3. See also e.g. *Irina Arutyuniantz on behalf of her son Vazgen Arutyuniantz v. Uzbekistan*, 971/2001, 30 March 2005, paras. 6.4–6.6 (from the material available to it, the Committee considers that Mr Arutyuniantz was not afforded the benefit of this doubt in the criminal proceedings against him).

⁴³² HRC, General Comment 32, para. 30, referring to *Gridin v. Russian Federation*, paras. 3.5 and 8.3. See also e.g. *Irina Arutyuniantz on behalf of her son Vazgen Arutyuniantz v. Uzbekistan*, 971/2001, 30 March 2005, paras. 6.4–6.6.

⁴³³ ECHR, *Barbera, Messegue and Jabardo v. Spain*, No. 10590/83, 6 December 1988, para 77.

the prosecutor, witnesses or experts make statements which indicate their bias, the Court must take a position against such statements.⁴³⁴ The HRC, for instance, has found a violation of Article 14(2) ICCPR because a petitioner's right to be presumed innocent had been violated due to the extensive and adverse pre-trial coverage by state-directed media.⁴³⁵

229. The presumption of innocence is one of the fundamental principles of criminal justice declared in the Kyrgyz Constitution and criminal procedure legislation. Article 26 of the Kyrgyz Constitution states: "Everyone shall be presumed innocent of committing a crime until found guilty in accordance with the law and his/her guilt was ascertained by a court verdict having entered into force." Similar provision is stipulated in the Criminal Procedure Code.⁴³⁶
230. In this case, Bazar-Korgon District Court when authorising detention of Mr Askarov said that because of Askarov's actions "the Prosecutor's Office staff received injuries and the police captain Sulaimanov was killed."⁴³⁷ This statement was made more than two months before the actual trial. According to the Kyrgyz law, the Court in authorising detention is not allowed to consider the issue of guilt of the accused. The only issue, which the Court should consider and decide, is whether the arrest was lawful and, if so, whether the person should remain in custody.⁴³⁸ The Court cannot establish facts, which aim to prove the guilt of the accused because it is the jurisdiction of the first instance court, and not the judge who presides at the detention hearing.⁴³⁹ By baldly asserting that the death of captain Sulaimanov and the injuries to prosecutor's staff had resulted from Mr Askarov's conduct, the Court was prejudging the case, in clear contravention of the principle of presumption of innocence.
231. Before the trial, the office of the prosecutor widely distributed a press release announcing that the guilt of Mr Askarov and of Mr Mirzalimov "has been fully proven by the materials of the criminal case, specifically by the direct testimony of the witnesses, both the officers of the police and also civilians, victims, confrontation". During the trial, multiple reports indicated that witnesses made nationalistic statements, including displaying posters with insults, insulting lawyers and defendants and that this behaviour was not prevented or remedied by the Court.
232. *These actions of judges and prosecutors involved in the case are indicative of the preconceived idea of the guilt of Mr Askarov or, regardless of his guilt, of his inevitable future imprisonment. They run contrary to the guarantee of the presumption of innocence, in violation of Article 14.2 ICCPR, as well as of the Constitution of the Kyrgyz Republic.*

Duty to ensure the security of judges and the right to an independent and impartial court

233. In order to ensure due process, it is essential for states to guarantee and protect the independence of the judiciary.⁴⁴⁰ According to the UN Basic Principles on the Independence of the Judiciary (1985), guaranteeing that judges are protected against external pressures means that they are able to rule on the matters they hear on the basis of the facts and in accordance with the law, without any restriction and without being subject to influences, inducements, pressures, threats, or improper interferences, be they direct or indirect, from whatever sector, or for

⁴³⁴ ECHR, *Austria v Italy (Pfunders Case)*, report of 31 March 1963, yearbook VI (1963), page 740.

⁴³⁵ HRC, *Gaibullodzhon Ilyasovich Saidov (submitted by his wife Barno Saidova) v. Tajikistan*, 964/2001, 8 July 2004.

⁴³⁶ Criminal Procedure Code of Kyrgyz Republic, art. 15.

⁴³⁷ Resolution of Bazar-Korgon Court of 17 June 2010.

⁴³⁸ Criminal Procedure Code of Kyrgyz Republic, art. 110(5).

⁴³⁹ See *supra* para. 54.

⁴⁴⁰ See e.g. United Nations Basic Principles on the Independence of the Judiciary, *op. cit.*; see also, e.g. ECtHR, *Campbell and Fell v. the United Kingdom*, Nos. 7819/77 and 7878/77, 28 June 1984, para. 78; ECtHR, *Langborger v. Sweden*, No. 11179/84, 22 January 1989, para. 32; IACHR, *Constitutional Court Case v. Peru*, 31 January 2001, para. 71 and *Reverón Trujillo v. Venezuela*, 30 June 2009, para. 67.

whatever reason.⁴⁴¹ The UN Human Rights Committee has stressed the importance of protecting judges against intimidation: "It is necessary to protect judges against conflicts of interest and intimidation. In order to safeguard their independence, the status of judges, including their (...) security, (...) shall be adequately secured by law."⁴⁴² The Bangalore Principles of Judicial Conduct (2002) also affirmed this principle. In its Commentary to these Principles, the Judicial Integrity Group has pointed out: "The judge's duty is to apply the law as he or she understands it, on the basis of his or her assessment of the facts, without fear or favour and without regard to whether the final decision is likely to be popular or not."⁴⁴³ In fact, "one of the principal purposes of the separation of public powers is to guarantee the independence of judges."⁴⁴⁴

234. The UN Special Rapporteur on the Independence of Judges and Lawyers has specifically stated that "it is the responsibility of each State to protect judicial actors from attacks, intimidation, threats, reprisals and retaliation actions. Additionally, adequate measures are needed to protect officers of the criminal justice system and their families, especially in highly sensitive cases, such as those involving terrorism, drug-trafficking, and organized crime offences".⁴⁴⁵ When an environment of fear and intimidation exists this often cripples the criminal justice system, resulting in lack of investigation and prosecution of crimes. In such a scenario, even though an adequate criminal justice system may be in place, it is not used because of fear of reprisals.⁴⁴⁶
235. *The ICJ considers that throughout the proceedings in the South, the authorities insufficiently protected the security of judges who, in the given volatile circumstances, were often unable to properly administer justice.* In fact it was the general perception among the NGOs present and among the lawyers with whom the ICJ met that the members of the mass crowd contrived to dictate the conduct of the judges. The right to a fair trial may be violated due to "the failure of the trial court to control the hostile atmosphere and pressure created by the public in the courtroom, which made it impossible for defence counsel to properly cross-examine the witnesses and present his defence".⁴⁴⁷ In this case, the judges may have been unable to act independently because of the immediacy of the threats, in the context of a highly volatile and hostile wider situation. The authorities did not use the opportunity, available under Kyrgyz law, to change of venue of a trial in cases where there are circumstances that may cast doubts on the judge's impartiality.⁴⁴⁸
236. *The ICJ considers that the state has failed to ensure the "absence of any direct or indirect influence, pressure or intimidation" of the judges in this case.*⁴⁴⁹ *This raises issues under Article 9(1) and Article 14(1) of the ICCPR.*

⁴⁴¹ Basic Principles on the Independence of the Judiciary, principle 2. The principle was confirmed later in the Bangalore Principles of Judicial Conduct, stating in 1.1 that judges shall exercise their judicial function "free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason." See The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25–26, 2002.

⁴⁴² HRC, General Comment 32, para. 19.

⁴⁴³ See Judicial Integrity Group, Commentary to the Bangalore Principles of Judicial Conduct, March 2007. By way of illustration it referred to *S v. Makwanyane*, Constitutional Court of South Africa, 1995 (3) S.A. 391, per President Chaskalson: "The question before us, however, is not what the majority of South Africans believe a proper sentence should be. It is whether the Constitution allows the sentence. Public opinion may have some relevance to the inquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication... The Court cannot allow itself to be diverted from its duty to act as the independent arbiter of the Constitution by making choices on the basis that they will find favour with the public."

⁴⁴⁴ IACHR, *Constitutional Court Case v. Peru*, 31 January 2001, para. 73; *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, 5 August 2008, para. 55. See also Inter-American Commission on Human Rights Democracy and Human Rights in Venezuela, 30 November 2009, para. 184.

⁴⁴⁵ See Interim report of the Special Rapporteur on the independence of judges and lawyers (Gabriela Knaut), A/65/274, 10 August 2010, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/480/55/PDF/N1048055.pdf?OpenElement>, para. 46, referring to A/HRC/14/26/Add.2.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ HRC, *Gridin v. Russia*, 770/1997, 20 July 2000, para. 8.2.

⁴⁴⁸ Criminal Procedure Code of the Kyrgyz Republic, art. 70(3) and 242(2).

⁴⁴⁹ HRC, General Comment 32, para. 25.

Security of the defence lawyers and the right to a defence

237. It is the duty of the State under Article 9 ICCPR to take adequate measures to ensure personal security.⁴⁵⁰ This applies equally to the security of lawyers who must be protected by the state from intimidation, hindrance, or harassment.⁴⁵¹ The authorities must take adequate measures when the security of lawyers is threatened as a result of discharging their functions.⁴⁵² This duty entails initiating a prompt, impartial and independent investigation into any case of attacks or harassment of lawyers⁴⁵³ by an impartial and independent body.⁴⁵⁴
238. According to the Human Rights Committee, discussing Article 14 ICCPR, "lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter".⁴⁵⁵ The UN Special Rapporteur on the Independence of Judges and Lawyers has noted that in the exercise of their duty to defend their clients and in the discharge of their professional activities, lawyers are too often identified, by both State and non-State actors, with the interests and activities of their clients.⁴⁵⁶ Safeguards should be put in place to protect lawyers from reprisals for conduct related to the discharge of their professional functions.⁴⁵⁷ In instances where there are reprisals, lawyers may cease to represent their clients.⁴⁵⁸ Indeed, when a state does not take measures to address threats against lawyers, this can be tantamount to violation of the right to a defence, protected under international law.⁴⁵⁹
239. In this case, throughout the criminal investigation and the trial stages there were incidents in which aggressive crowds, both inside and outside the courtroom, either physically attacked or otherwise intimidated lawyers through threats and insults. The situation of constant and imminent threat made it impossible for lawyers to effectively discharge their functions in a free manner and without fear in accordance with the wishes of their clients. The threats also resulted in the lawyers being fearful to act in court. It appears that during the trial and appeals proceedings the defendants and their lawyers did not have an equal opportunity to challenge the arguments put forward by the prosecutor because the lawyers were constantly threatened and harassed; and when they tried to speak, hissing would make their statements barely perceptible.
240. On 23 August, Mr Askarov's lawyer filed a request to move the hearing of the case to another court in order to ensure a fair trial. This request was not granted and the hearings took place in Bazar-Korgon District Court. It should be underscored that the UN High Commissioner for Human Rights has recommended specifically with regard to Kyrgyzstan, that "in case of retrials related to the June 2010 events, the hearings should

⁴⁵⁰ See e.g. *Tshishimbi v. Zaire*, 542/1993, 25 March 1996, where the HRC referred to its prior jurisprudence that art. 9(1) also included protection against 'threats made by persons in authority to the personal liberty and security of non-detained individuals within the State party's jurisdiction'; *Delgado Páez v. Colombia*, 195/1985, 12 July 1990; *Bahamonde v. Equatorial Guinea*, 468/1991, 20 October 1993; see also subsequent cases: *Dias v. Angola*, 711/1996, 20 March 2000; *Chongwe v. Zambia*, 821/1998, 2 October 2000; *Jayawardena v. Sri Lanka*, 916/2000, 22 July 2002.

⁴⁵¹ UN Basic Principles on the Role of Lawyers, principle 16.

⁴⁵² *Ibid.*, principle 17.

⁴⁵³ Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/64/181, 28 July 2009, para. 69.

⁴⁵⁴ *Ibid.*, para. 107(b).

⁴⁵⁵ HRC, General Comment 32, para. 34.

⁴⁵⁶ See Interim report of the Special Rapporteur on the independence of judges and lawyers (Gabriela Knaul), A/65/274, 10 August 2010, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/480/55/PDF/N1048055.pdf?OpenElement>, para. 34 and references therein.

⁴⁵⁷ *Ibid.*

⁴⁵⁸ See Report of the United Nations High Commissioner for Human Rights on technical assistance and cooperation on human rights for Kyrgyzstan, A/HRC/17/41, 1 April 2011, para. 78(c).

⁴⁵⁹ See Interim report of the Special Rapporteur on the independence of judges and lawyers (Gabriela Knaul), *op. cit.*, para. 34 and references therein.

not take place in courts in the south of the country in order to ensure impartiality of judges".⁴⁶⁰

241. During the hearing before the Supreme Court, it became apparent that the Supreme Court was not open to any arguments forwarded by the lawyers of the various defendants on the issue of threats. This is confirmed by its judgment, which simply summarily stated that "[s]tatements of lawyer Toktakunov that he could not effectively discharge his functions as there were threats and hindrance from the relatives during the investigation, are, groundless. ...According to the materials of the case the circumstances which impeded discharging functions of defence have not been identified".⁴⁶¹
242. *The ICJ considers that threats against the lawyers hindered the effective functioning of the lawyers of the various defendants, contrary to the defendants' rights under Articles 9(1) and 14(1) ICCPR.*⁴⁶² These threats hindered the preparation of the defence, as well as the conduct of the lawyers and the defendants in the courtroom.
243. The actions of the crowd, with instigation or omission to stop them by the authorities, undermined and violated the following principles and rights of the defendants, protected in Kyrgyz law: (1) an adversarial trial and equality of arms;⁴⁶³ (2) protection of rights and freedoms of individuals in the course of criminal proceedings;⁴⁶⁴ (3) equality of persons before the law and the court;⁴⁶⁵ (4) ensuring the suspect, accused and defendant the right to a defence.⁴⁶⁶ According to the Criminal Procedure Code, the Court must ensure "favourable conditions so that the parties could enjoy their procedural rights and perform their duties."⁴⁶⁷ Instead, the court allowed harassment of the lawyers during the trial. The Kyrgyz law prohibits the court from taking any party's side or express any interests other than the interests of law.⁴⁶⁸
244. According to the Criminal Procedure Code, courts, judges, prosecutors and investigators have a positive obligation to "protect rights and freedoms of persons involved in criminal proceedings".⁴⁶⁹ In particular, they must "create conditions favourable for such protection and should take timely actions to satisfy lawful claims of participants of criminal proceedings".⁴⁷⁰ *In this case, judges, prosecutors and investigators failed to protect the rights of the defence, as required by the Criminal Procedure Code.* Furthermore, some of the acts allegedly carried out by members of the crowd constitute criminal offences under Kyrgyz law. Some of the alleged actions can be qualified as threats or violent acts against lawyers in connection with the administration of justice.⁴⁷¹ Some other actions clearly constitute obstruction of professional activity of the lawyer. However, it appears that none of these offences were ever investigated. In fact, as noted above, Kyrgyz courts of all levels, including the Supreme Court, refused to duly acknowledge concerns of threats and harassment.

Right to call witnesses and rights of witnesses

245. The right to call, obtain attendance and examine witnesses under the same conditions as the prosecutor is an essential element of "equality of arms" and is specifically protected

⁴⁶⁰ The Report of the United Nations High Commissioner for Human Rights on technical assistance and cooperation on human rights for Kyrgyzstan, A/HRC/17/41, 1 April 2011, para. 78(b). She also recommended: "Judges should maintain their impartiality irrespective of the ethnicity of the victims, lawyers and defendants. To ensure such impartiality, provincial rotation mechanisms of judges and other participants in judicial processes should be adopted."

⁴⁶¹ Resolution of the Supreme Court of the Kyrgyz Republic of 20 December 2011.

⁴⁶² E.g. see *supra* paras. 80, 91 of this Report.

⁴⁶³ Criminal Procedure Code of the Kyrgyz Republic arts. 18 and 256.

⁴⁶⁴ *Ibid.*, art. 12.

⁴⁶⁵ *Ibid.*, art. 16.

⁴⁶⁶ *Ibid.*, art. 20.

⁴⁶⁷ *Ibid.*, art. 18.

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.*, art. 12(1).

⁴⁷⁰ *Ibid.*

⁴⁷¹ Criminal Code of the Kyrgyz Republic, art. 320(2).

by Article 14(3)(e) ICCPR. These elements are indispensable to the enjoyment of the right to a fair trial. This guarantee is important, including "for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution."⁴⁷² A key guarantee in this regard is attendance of witnesses.⁴⁷³ States must, among other requirements, guarantee that complainants, witnesses, investigators and their families are protected from violence, threats of violence or any other form of intimidation."⁴⁷⁴ In order to ensure that witnesses are protected, states should "ensure that victims and witnesses are not intimidated, subject to reprisals or dissuaded by other means from complaining or pursuing their complaints or participating in the proceedings. These measures may include particular means of investigation, protection and assistance before, during or after the investigation process, in order to guarantee the security and dignity of the persons concerned."⁴⁷⁵ In its General Comment on the right to a fair trial, the Human Rights Committee has stressed that: "[f]airness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. A hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the Court, thereby impinging on the right to defence, or is exposed to other manifestations of hostility with similar effects."⁴⁷⁶

246. In the cases concerned, the defendants had been unable to call witnesses either due to fear of personal retaliation or due to direct threats to witnesses who as a result were afraid to testify. The extremely volatile situation with threats and intimidation within and outside of the courtroom was evident and reported as such by observers. There were obviously no possibilities for the defence witnesses to attend the hearing and testify under the same conditions as prosecution witnesses.⁴⁷⁷ It has consistently been argued that defence witnesses were afraid to attend the proceedings because of threats and when they appeared in the Court they were expelled and chased with a real threat of physical violence. During the three-day hearing, only two witnesses for the defence were heard. One witness fled from the court premises and others never dared to testify in the first place. Lawyers also did not wish to pressure them, for fear of putting them in harm's way. In the case of Mr Askarov, this meant that more than 10 witnesses, including relatives of Mr Askarov as well as neighbours, who could testify that on 12–13 June he was at his home, did not testify in court.
247. The general situation of threats resulted in successfully discouraging potential witnesses for the defence from testifying on behalf of the defendants and/or in a legitimate fear by lawyers for the safety of potential witnesses, causing them not to press for their testimony. No serious efforts were made to protect potential witnesses in order to secure their attendance, in conformity with the principle of equality of arms. When lawyer Ms Tomina raised concerns with the Court about attempts to attack defence lawyers as they entered the Court each day, despite the large numbers of police stationed outside, such complaints were ignored by the Court.
248. By their threatening behaviour, the crowd present in the courtroom appears to have effectively prevented witnesses from testifying. This behaviour was not curtailed by the

⁴⁷² HRC, General Comment 32, art. 14, para. 39.

⁴⁷³ *Ibid.*

⁴⁷⁴ Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, principle 15.

⁴⁷⁵ Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, Adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies, para. 6.

⁴⁷⁶ HRC, General Comment 32, para. 25, referring to *Gridin v. Russian Federation*, para. 8.2.

⁴⁷⁷ See *infra* paras. 88-91.

judge or prosecutor during the trial and appeal phase. Indeed, the deputy prosecutor was repeatedly identified as having instead facilitated the threats. The threats also persisted around and during the appeals hearings.

249. In sum, the courtroom conditions were not conducive to securing equality of arms. The politically charged and volatile atmosphere made impossible the normal conduct of trial and appeals hearings. The State had an obligation to ensure respect for rights under Articles 14 and 9 ICCPR by the means at its disposal, including for example by securing the presence of a greater number of police or moving the hearings to other regions where those involved would not be under threat. Whatever the means chosen by the State, the duty to ensure a fair trial in which all the rights and freedoms are fully guaranteed had to be fulfilled.
250. *The ICJ considers that the lack of adequate and necessary measures did not allow for the defence to be prepared and the trial to be conducted in a manner required by Article 14 ICCPR. The general atmosphere of threats and the failure of the authorities to ensure the security of the judges, defence lawyers and (potential) witnesses irreparably tainted the fairness of the proceedings. In this situation, the right of the defendants to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against (Article 14 (3) (e) ICCPR) was disrespected.*
251. *The failure of the Court and law enforcement agencies to provide security and protection for the witnesses in this case is also contrary to fundamental principles of the Kyrgyz criminal procedure, in particular the principles of adversarial trial, equality of arms and the obligation of the Court to ensure favourable conditions so that the defence could enjoy its procedural right to call and examine witnesses for the defence.*⁴⁷⁸ Moreover, the Court also violated the principle of thorough, complete and objective examination of circumstances of the case prescribed by the Criminal Procedure Code. In particular, the law requires the judge to provide for the necessary conditions for the defence to fully realise its right to thorough investigation on the case.⁴⁷⁹ Under Article 255, the trial judge must also fulfil the obligation to take "all measures provided by the Code to ensure equality of rights of all parties, to whom the Court provides all conditions necessary for complete and detailed examination of the circumstances of the case."⁴⁸⁰

Treatment of evidence, dismissal of defence motions

252. One of the main functions and purposes of fair trial guarantees under international law is "to place the 'tribunal' under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision."⁴⁸¹ In order to achieve this, "each party must be afforded a reasonable opportunity to present his case—including evidence—under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."⁴⁸² This is the essence of the principle of equality of arms. It is generally for the national courts to assess and evaluate the facts of a case.⁴⁸³ Yet when the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation is manifestly arbitrary or amounted to a denial of justice, this raises concerns under Article 14 ICCPR.⁴⁸⁴ In this case, given the atmosphere of fear and threats of attacks inside and outside of the courtroom, the trial and appeal hearings could not take place in a fair manner. The judges ap-

⁴⁷⁸ Criminal Procedure Code of the Kyrgyz Republic, art. 18(6).

⁴⁷⁹ *Ibid.*, art. 19(2).

⁴⁸⁰ *Ibid.*, art. 255.

⁴⁸¹ ECtHR, *Kraska v. Switzerland*, 13942/88, 19 April 1993, para. 30.

⁴⁸² ECtHR, *Dombo Beheer B.V. v. The Netherlands*, No. 14448/88, 27 October 1993, para. 33.

⁴⁸³ HRC, *Romanov v. Ukraine*, 842/1998, 30 October 2003, para. 6.4.

⁴⁸⁴ HRC, *Arutyuniantz v. Uzbekistan*, 971/2001, 13 April 2005, para. 6.5.

peared to defer to the prosecution and relied heavily on the statements of the witnesses of the prosecution. It appears that most of the findings in relation to the events which took place on 13 June 2010 were based on the statements of the witnesses for the prosecution. The same approach was taken by the courts to establish the conduct and situation of the defendants. Thus the evidence based on which Mr Askarov and the other defendants were found guilty, was provided by the police officers who were colleagues and friends of the killed officer and may well have been prone to a pre-existing antipathy towards Mr Askarov and others. All the more so, the Court had an obligation to invite the witnesses of the defence in order to ensure equality of arms in the process with an equal treatment of the evidence obtained.

253. According to the civil society organisations and lawyers with whom the ICJ spoke and many of whom had attended the trial and appeals proceedings, the courts accepted in full the statements made by the prosecution, but the claims by the defendants of having been tortured or ill-treated were not taken into account. Moreover, the Appeals Court simply dismissed the arguments by the defendants that the investigators pressured them. The Supreme Court relied on a letter from the Ministry of Interior which stated that after a check "it was established that physical force had not been used with regard to Askarov and there was no moral pressure", it further stated that "no arguments had been submitted that could be used as a basis to find the proof invalid or refute them." Thus the Court considered a letter mentioning an internal check as proof that torture and ill-treatment had not been used, despite serious and consistent allegations to the contrary, supported by evidence including photos. Such an approach raises concerns of bias in violation of Articles 7 and 14(1) and 14(3)(g) ICCPR.

Obligations of the prosecution

254. International standards require that states guarantee that prosecutors are able to and do carry out their professional functions impartially and objectively. In particular, they must "ensure that prosecutors perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability."⁴⁸⁵ As affirmed in the UN Guidelines on the Role of Prosecutors, prosecutors must act in accordance with the law and "perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system."⁴⁸⁶ Prosecutors also have a duty with regard to the use evidence obtained through torture, in particular a duty to refuse to use evidence obtained through unlawful methods which constitute grave violations of human rights including torture against anyone except for torturers themselves.⁴⁸⁷ They must inform the Court about such evidence and must "take all necessary steps to ensure that those responsible for using such methods are brought to justice."⁴⁸⁸ A prosecutor commits a violation of his duty of impartiality in cases of failure to appeal against a decision where there is evidence of use of torture.⁴⁸⁹ In protecting public interests, prosecutors must also act with objectivity and "take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect."⁴⁹⁰
255. The situation in Mr Askarov's case, including the alleged involvement of the police and the deputy prosecutor in allegedly improper interrogations and ill-treatment, makes it highly unlikely that the prosecution paid attention to all relevant circumstances, irrespective of

⁴⁸⁵ UN Guidelines on the Role of Prosecutors, guideline 4.

⁴⁸⁶ *Ibid.*, guideline 12.

⁴⁸⁷ *Ibid.*, guideline 16.

⁴⁸⁸ *Ibid.*

⁴⁸⁹ CAT, *Khaled Ben M'Barek v. Tunisia*, 60/1996, 10 November 1999, para. 11.10.

⁴⁹⁰ UN Guidelines on the Role of Prosecutors, guideline 13(b).

whether they are to the advantage or disadvantage of the suspect. This omission contravenes an underlying requirement of the right to a fair trial, as specified in Guideline 13b of the Guidelines on the Role of Prosecutors. The lawyers for the defence do not appear to have been provided with exculpatory evidence only available to the police, as is required under international law. The potential defence witnesses were not even interviewed during the investigation. Lawyer should also have been provided with information on possible improprieties in the gathering of evidence. *The office of the Prosecutor in this case also appears to have failed in its duty under the Criminal Procedure Code "to supervise the legality of criminal investigation"*⁴⁹¹ since, despite allegations of torture and other forms of ill-treatment, prosecutors did not take action to prevent or address human rights violations of Mr Askarov and his co-defendants.

256. *The ICJ considers that the conduct of the prosecution during the investigation and trial failed to meet the standards of the Kyrgyz Criminal Procedure Code and was not conducive to ensuring a fair trial in the case. The prosecution lacked the requirements of objectivity and impartiality and contributed to a failure to guarantee rights under Articles 2, 7, 9, 10 and 14 of the ICCPR, and Articles 1 and 16 of the CAT. In this regard it must be stressed that prosecutors play a crucial role in ensuring the right to a fair trial by an independent and impartial tribunal, including equality before the law and the presumption of innocence.*⁴⁹²

Disregard of allegations of torture and ill-treatment as a relevant procedural issue

257. Under international human rights law, the trial is only fair in the "absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt."⁴⁹³ The UN Human Rights Council has urged States to respect and ensure respect for the critical role that judges, prosecutors and lawyers play in the prevention of torture and other cruel, inhuman or degrading treatment or punishment.⁴⁹⁴ The HRC has found that guaranteeing a fair trial under Article 14(3)(g) also implies the prohibition of torture and cruel treatment.⁴⁹⁵ Information, including statements or "confessions" obtained in violation of Article 7 of the Covenant must under law be excluded from the evidence, except for cases when they serve as evidence of ill-treatment.⁴⁹⁶ These standards reflect the specific prohibition on the admission of torture evidence in Article 15 CAT, which the Committee against Torture has found to apply in equal and absolute terms both to statements obtained under torture, and to statements obtained under other ill-treatment.⁴⁹⁷ The HRC has similarly found that the equivalent prohibition under Article 7 ICCPR applies to all forms of ill-treatment contrary to Article 7⁴⁹⁸ and that the exclusion of evidence required by Article 14(3)(g) ICCPR has the same scope.⁴⁹⁹ When there are allegations of use of torture or other ill-treatment, the burden is on the State to prove that statements made by the accused have been given of their own free will.⁵⁰⁰

⁴⁹¹ Criminal Code of the Kyrgyz Republic, art. 34.

⁴⁹² See e.g. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Basic Principles on the Independence of the Judiciary; Code of Conduct for Law Enforcement Officials.

⁴⁹³ HRC, General Comment 32, *op. cit.*, para. 41. See also, e.g. HRC, *Paul Kelly v. Jamaica*, 253/1987, 08 April 1991; *Glenford Campbell v. Jamaica*, 248/1987, 30 March 1992 and *Albert Berry v. Jamaica*, 330/1988, 7 April 1994; *Ruzmetov v. Uzbekistan*, 915/2000, 19 April 2006, para. 7.3; *Singarasa v. Sri Lanka*, 1033/2001, 21 July 2004, para. 7.4; *Deollall v. Guyana*, 912/2000, 11 November 2004, para. 5.1.

⁴⁹⁴ UN Human Rights Council Resolution, Torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers, GA A/HRC/RES/13/19, 15 April 2010.

⁴⁹⁵ See e.g. HRC, *Paul Kelly v. Jamaica*, 253/1987, 8 April 1991 and General Comment 32, paras. 6, 41 and 60; See also ACHPR, *Malawi African Association et al. v. Mauritania*, May 2000, para. 95 and *Civil Liberties Organisation et al. v. Nigeria*, April/May 2001, para. 40.

⁴⁹⁶ General Comment No. 32, *op. cit.*, para. 41.

⁴⁹⁷ CAT, General Comment 2, *op. cit.*, para. 6.

⁴⁹⁸ HRC, General Comment 20, *op. cit.*, para. 12.

⁴⁹⁹ HRC, General Comment 32, *op. cit.*, para. 41.

⁵⁰⁰ HRC, General Comment 32, *op. cit.*, para. 41.

258. The HRC has explained: "The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights."⁵⁰¹ Thus, for example, "as article 7 is also non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14 ICCPR, including during a state of emergency."⁵⁰² Subjecting an individual to torture or ill-treatment in order to pressure the person to become a witness against the defendant violates Article 7 ICCPR as well as the right to a fair trial of the defendant protected by Article 14.
259. The prohibition on the admission of information as evidence obtained by torture or other violation is also reflected in Kyrgyz law. According to Article 81(4)(3) of the CPC "any evidence obtained with a violation of rules" of the Code is inadmissible⁵⁰³ and cannot be relied upon when deciding the case.
260. In the case of Mr Askarov, despite allegedly being subject to torture and ill-treatment, he did not admit guilt and thus his self-incriminating evidence was not used as a basis for his conviction. However, there is little doubt that the testimony of at least Ms Mamadalieva who testified against Mr Askarov was obtained under duress. The ICJ heard accounts of the beatings, which continued throughout the trial stage and were done in a systematic manner when a squad would arrive to carry out this physical abuse. *These organised beatings, which appear to have been aimed at intimidating the defendants and preventing them from testifying in court, raise serious concerns and are contrary to Articles 7, 9, 10, 14 of the ICCPR and 1 and 16 CAT.* Article 14 is violated when any statement or information by anyone obtained in violation of Article 7 ICCPR is used as evidence, except against persons alleged to be responsible for these violations of Article 7.
261. In this case, claims of torture and ill-treatment were not properly investigated and their invocation in the context of the right to a fair trial was ignored up to the level of the Supreme Court, as the ICJ mission observed. The Supreme Court was unresponsive to the information about torture brought to its attention by various lawyers, apart from in fact interrupting/reprimanding two of the lawyers when they raised the issue.⁵⁰⁴ This reflects patterns identified in research by the OSCE in the Kyrgyz courts in 2005–2006, which found that when courts explored the allegations of torture and ill-treatment, they summoned investigators to testify as witnesses and always accepted their accounts that defendants had not been tortured during pre-trial proceedings.⁵⁰⁵ In April 2011, the UN High Commissioner for Human Rights recommended that the Government take immediate steps to address deficiencies in the protection of fair trial rights for detainees, including in relation to admissibility of evidence: "[T]he Supreme Court <...> should ensure that in those cases where inadmissible evidence might have been used, the verdicts rendered by lower courts are reversed and the criminal cases are dismissed or sent for retrial. The Supreme Court should further ensure full assessment of torture allegations and of the admissibility of evidence that might have been obtained under duress."⁵⁰⁶

The principle of nullum crimen sine lege

262. Article 15(1) ICCPR provides that "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national

⁵⁰¹ HRC, General Comment 32, *op. cit.*, para. 6.

⁵⁰² Except of course if a statement or confession obtained in violation of art. 7 is used as evidence that torture or other treatment prohibited by this provision occurred, see also CAT art. 15.

⁵⁰³ Criminal Procedure Code of the Kyrgyz Republic, art. 81(4)(3).

⁵⁰⁴ Due to a limited scope of the report this point was not discussed in Chapter II of the report. However it should be noted that the ICJ Mission observed that when Elmurad Rasulov's lawyer stated before the Supreme Court that her client tried to write information on a piece of paper and the police chief took it away from lawyer's hands. The lawyer stated that the defendants were tortured every night. At this point the judge interrupted her statement, apparently telling her not to further discuss this issue.

⁵⁰⁵ OSCE, Results of trial monitoring in the Kyrgyz Republic 2005–2006, <http://www.osce.org/odihr/29615>.

⁵⁰⁶ Report of the United Nations High Commissioner for Human Rights on technical assistance and cooperation on human rights for Kyrgyzstan, A/HRC/17/41, 1 April 2011, para. 78(a).

or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby." This expresses the well-established principle of *nullum crimen sine lege*, under which no one can be held responsible for an act or omission which at the time of commission did not constitute a criminal offence. This gives rise to a duty of the State "to define precisely by law all criminal offences in the interest of legal certainty and to preclude the application of criminal laws from being extended by analogy."⁵⁰⁷ In particular, the criminal law must satisfy the requirements of foreseeability.⁵⁰⁸ This means that "[a] norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."⁵⁰⁹

263. Although the ICJ has not fully analysed the process against and possible violation of the rights of Mr Askarov's co-defendants, it wishes to draw attention to the non-conformity of some of the charges against them, with the principle of *nullum crimen sine lege*. In particular, the actions of several of the defendants in blocking a road were apparently interpreted, from the very beginning, as incitement to hatred. This construction of the defendants' acts is not an obvious or foreseeable one. As was previously noted, the events were not considered by the courts in the context of the violence taking place in the South of Kyrgyzstan during those days. Villagers in several places tried to prevent their villages from being attacked by different means. The Courts however interpreted pulling a cart or other activities aimed to prevent attacks against the person and destruction and burning of houses and as incitement to hatred. *It is difficult to see how the defendants could have predicted that their actions erecting a protective roadblock when the State is failing to fulfil its duty to protect the citizens would be criminal. This raises difficulties of compliance with the principle of nullum crimen sine lege.*
264. The ICJ reiterates that in order to comply with the general principle of *nullum crimen sine lege*, statutory law must be unambiguous. According to this principle, a conviction can only be based on an offence that existed at the time the acts or omissions with which the accused is charged were committed, and which was sufficiently foreseeable and accessible.⁵¹⁰ In the context of Article 15 (1) ICCPR (freedom from *ex post facto* laws) it has been noted that "(if) a necessary element of the offence, as described in national (or international) law, cannot be properly proven to have existed, then it follows that a conviction of a person for the act or omission in question would violate the principle of *nullum crimen sine lege*, and the principle of legal certainty, provided by article 15, paragraph 1."⁵¹¹ It has been pointed out that "[i]f laws change with retroactive effect, the rule of law is undermined since individuals cannot know at any moment if their actions are legal. For a law-abiding citizen, this is a terrible uncertainty, regardless of the likelihood of eventual punishment."⁵¹²

⁵⁰⁷ M. Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary, 2nd revised edition, citing Frowein and Peukert 322, p. 360.

⁵⁰⁸ ECtHR, *G. v. France*, No. 15312/89, 27 September 1995, paras. 24–25.

⁵⁰⁹ ECtHR, *Müller and others v. Switzerland*, No. 10737/84, 24 May 1988, para. 29.

⁵¹⁰ See ICTY, *Prosecutor v. Krnojelac*, No. IT-97-25-A, App. Ch. 17 September 2003, para. 220.

⁵¹¹ HRC, *David Michael Nicholas v. Australia*, 1080/2002, 19 March 2004, para. 7.5; See also art. 11(2) Universal Declaration; art. 15 ICCPR; art. 7 ECHR; art. 9 ACHR; art. 7 African Charter on Human and Peoples' Rights; this freedom is non-derogable under art. 4(2) ICCPR (see e.g. *Luciano Weinberger Weisz on behalf of his brother Ismael Weinberger v. Uruguay*, 28/1978, 29 October 1980, para. 16, on a conviction for 'subversive association' for acts which were legal at the time); art. 27(2) ACHR and art. 15(2) ECHR. In addition the ICC-Statute refers to *nullum crimen sine lege* in art. 22 as a general principle of criminal law, pointing out that a person shall not be criminally responsible under the ICC Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. In this respect it notes that the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. It is included in the ICC Statute as a general principle of criminal law, but in addition Kyrgyzstan has also signed the Statute on 17 July 1998. See also, e.g. *ICTY Prosecution v. Galic*, No. IT-98-29-T, T.Ch. I, 5 December 2003, para. 93.

⁵¹² ACHPR, *Media Rights Agenda and Others v. Nigeria*, Nos. 105/93, 128/94, 130/94 and 152/96, 31 October 1998, paras. 58–59.

IV. CONCLUSIONS AND RECOMMENDATIONS

265. In the assessment of the ICJ, Mr Askarov, throughout his arrest, detention and trial, was subject to multiple violations of his internationally protected human rights, as well as violations of the Criminal Code and Code of Criminal Procedure of the Kyrgyz Republic. The process resulted in conviction for serious crimes, and a sentence of life imprisonment, which he is now serving. In the view of the ICJ, the many violations identified in this report, taken together, amount to a manifest violation of the right to a fair trial as protected by Article 14 ICCPR, and are likely to give rise to a denial of justice. In particular, not only have the consistent allegations of torture and ill-treatment during unofficial detention been investigated insufficiently or not at all, but torture and ill-treatment of the defendants allegedly continued up to and during the trial. These allegations have not been properly examined, despite multiple attempts and sufficient prima facie evidence to initiate criminal investigations into them. The courts failed to address properly the complaints by Mr Askarov and his co-defendants or their lawyers related to their ill-treatment by the police and others.
266. The court proceedings were conducted in an atmosphere of fear, intimidation, tolerance of hatred and nationalistic threats and attacks. Administration of justice is hardly possible in such a hostile environment when a real threat exists for the parties in the process, witnesses, the prosecution and the judges. The threats to lawyers, witnesses, judges and the constant use of torture against the defendants, seriously undermined the possibility of the proper administration of justice and the validity of the judgments by the trial and appeals courts. Prolonged severe ill-treatment, attacks against lawyers, fear of witnesses to testify, undermining of the presumption of innocence and failure to ensure equality of arms and the right to an effective defence in court, amongst other irregularities described in this report, raise serious concerns that the trial as a whole failed to provide a fair trial in accordance with Kyrgyzstan's international human rights obligations and may have resulted in a denial of justice, which the appeals instances, including the Supreme Court, failed to address.⁵¹³
267. Based on international and national law, the ICJ recommends:
- In this case, as in other cases, torture must be treated in law and in practice as a crime of the utmost gravity against an individual person as well as against the interests of society and the State and the wider international community. Kyrgyzstan's international human rights obligations require that there must be a thorough and independent investigation into the allegations of torture and other ill-treatment against Mr Askarov, his co-defendants and others involved in the case. Such investigations should be capable of leading, where there is sufficient evidence of crimes under Kyrgyz law, to the identification, prosecution and accountability of those responsible for these crimes as well as full remedy and reparation for the victims.
 - There should also be a prompt, thorough and independent investigation into allegations of violence and threats of violence, intimidation or harassment against lawyers and witnesses in the case. Such investigations should be capable of leading, where there is sufficient evidence of crimes under Kyrgyz law, to the identification, prosecution and accountability of those responsible for these crimes.

⁵¹³ See e.g. HRC, *Clifton Wright v. Jamaica*, 349/1989, 27 July 1992; HRC, *Carlton Reid v. Jamaica*, 250/1987, 20 July 1990 and *Irina Arutyuniantz on behalf of her son Vazgen Arutyuniantz v. Uzbekistan*, 971/2001, 30 March 2005, paras. 6.4–6.6 and *Miguel González del Río v. Peru*, 263/1987, 28 October 1992, para. 5.2. The HRC equally found violations of Art. 14(1) in cases against Guyana and Tajikistan; In *Lallman Mulai and Bharatraj Mulai (submitted by their sister Rookmin Mulai) v. Republic of Guyana*, 811/1998, 20 July 2004; *Abduali Ismatovich Kurbanov (submitted by his mother Safarmo Kurbanova) v. Tajikistan*, 1096/2002, 6 November 2003; *Gaibullodzhon Ilyasovich Saidov (submitted by his wife Barno Saidova) v. Tajikistan*, 964/2001, 8 July 2004; *Bakhrom Khomidov (submitted by his mother Saodat Khomidova) v. Tajikistan*, 1117/2002, 29 July 2004.

- The investigation into the killing of Mr Sulamainov should be re-opened, with a structure that permits the new investigation to act independently of those involved in the first investigation, and of local authorities and interests, and a scope that permits a thorough investigation into this and other killings at the bridge. If such an investigation comes to a conclusion that there is not enough evidence to proceed with accusation of Mr Askarov and/or any other accused in the case, they must immediately be released and further compensation should be paid. The family of Mr Sulaimanov must be granted access to the investigation materials and must be informed about the progress of the investigation and its results. Their rights as victims in the process under Kyrgyzstan law and under international law, including the right to know the truth, must be respected.
- In light of the numerous irregularities in the conduct of the investigation and trial, including multiple violations of the right to fair trial, as well as violations of the freedom from torture and ill-treatment and the right to liberty, which deprived the investigation and trial of credibility or reliability, the case against Mr Askarov and his co-defendants should be re-opened. If sufficient evidence is discovered in the course of an investigation against any of the defendants in the case there should be a retrial through a process which fully respects all the fair trial guarantees starting from the stage of investigation. In particular, the process should ensure equality of arms between the prosecution and defence, provide for equal rights to call and cross examine witnesses, ensure the security of lawyers and witnesses, and exclude evidence obtained by torture or other ill-treatment. The prosecution and the defence should have equal rights to present their case and challenge the other party. The overall purpose of the trial must be establishing the truth based solely on established facts and law. The trial should be conducted in a location and under conditions that enable security to be fully ensured within and outside the courtroom. To provide a fair trial, any retrial must take into account all allegations and established incidences of torture, ill-treatment and threats to participants in the process.
- All those who have been victims of violations of their human rights in the course of or related to this investigation and trial, including the defendants in the case, witnesses and lawyers, should be afforded adequate reparation, as required by international human rights law, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

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