

The Azimjan Askarov Case

Judicial Proceedings Based on the Decision
of the UN Human Rights Committee

A Legal Opinion

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List of Acronyms

CC	Criminal Code of the Kyrgyz Republic
CCP	Code of Criminal Procedure of the Kyrgyz Republic
HRC	UN Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
UDHR	Universal Declaration of Human Rights

I. EXECUTIVE SUMMARY

1. Azimjan¹ Askarov, a prominent human rights defender in the Kyrgyz Republic, was convicted on 15 September 2010 of complicity in the murder of a law enforcement officer, attempted complicity in hostage-taking, illegal possession of firearms, incitement of interethnic hatred, and organization of riots.²
2. The International Commission of Jurists (ICJ) has followed his case since the initial trial – and Askarov’s eventual conviction – and identified multiple violations of his human rights in detention, trial and conviction in 2010.
3. In 2016, the UN Human Rights Committee (HRC) adopted Views in which it found violations of Askarov’s rights under the International Covenant on Civil and Political Rights (ICCPR). The HRC decided that Kyrgyzstan was to make full reparation to Askarov; take appropriate steps to immediately release him; quash his conviction and, if necessary, conduct a new trial in due compliance with fair trial guarantees.
4. Following the HRC decision, the Supreme Court remanded the case for retrial to the Chuy Regional Court due to new circumstances. The retrial proceeded without quashing the defendant’s conviction but with “resumption” of the proceedings in the case.
5. The ICJ observed a number of hearings of the retrial and analyzed documents in the case to publish this report, which assesses the retrial in light of Kyrgyzstan’s domestic law as well as relevant international law and standards.
6. Among other things, the analysis concludes that despite the retrial and the evidence presented, the court failed to effectively examine the allegations of torture of Askarov in detention. Credible information including the decision of the HRC was not used to investigate allegations of torture and to bring those responsible to account.
7. Furthermore, the failure during the retrial to conduct new investigations, hear new witnesses or question elements on which the initial conviction was based, meant that the retrial did not respect the presumption of innocence or comply with the requirements of a fair trial. It was therefore insufficient to remedy the violations of human rights found by the HRC.
8. In light of these findings, the ICJ urges that Askarov’s conviction be quashed, that he be released, that an investigation into allegations of torture and other violations of his human rights should be launched; and that he be accorded full reparations.

¹ Alternative transliterations of Askarov’s first name include Azimzhan, Azimjon and Azimzhon.

² By the judgment of Bazar-Korgon District Court (Judge Mr. N. Alimkulov) of September 15, 2010, Azimjan Askarov was convicted and sentenced under the Criminal Code:

-Articles 28, 30, 227 Part 2 § 1, 3 “Attempted complicity in the seizure or retention of a person as a hostage in order to force the State, an international organization, entity or person to commit or abstain from committing an action as a condition of release of the hostage by a group of persons by prior conspiracy, use of physical violence dangerous to life and health or threat of death” to 9 years of imprisonment;

- Article 241 Part 1 “illegal acquisition, transfer, sale, storage, transportation or carrying of firearms and ammunition, explosives and explosive devices” to 1 year of imprisonment;

- Article 299, Part 2 § 1 “inciting national, racial, religious or inter-regional hatred, humiliation of national dignity, as well as propaganda of exclusivity, superiority or inferiority of citizens on the basis of their religion, nationality or race, if committed in public or through the media with the use of violence or threat of violence” to 5 years of imprisonment with deprivation of the right to occupy certain positions or engage in certain activities;

- Article 233 “Riots – organizing of mass disorders accompanied by violence, pogroms, arson, destruction of property, use of firearms, explosives or explosive devices, as well as armed resistance to the officials, participation in mass disorders, as well as calls to actively disobey the lawful demands of the authorities, participation in riots, as well as calls for violence against citizens”;

- Article 30, 340 “complicity in the murder of a law enforcement officer with the aim to obstruct the legitimate activities of these persons for the protection of public order and public security.”

II. CASE SUMMARY OF THE ORIGINAL CASE

a. Factual circumstances of the original case³

9. Azimjan Askarov is an ethnic Uzbek of Kyrgyzstan nationality and a prominent human rights defender in the Kyrgyz Republic. A native of Bazar Korgon in Southern Kyrgyzstan, he first became involved with human rights in 1996 and in 2002 founded the AIR civil society organization to investigate and document human rights violations by the police and corrections authorities in his home town and the wider Jalal-Abad region.⁴
10. The events that led up to Askarov's conviction included violent disturbances between ethnic Kyrgyz and ethnic Uzbeks in the South of Kyrgyzstan, which followed the overthrow of the government in 2010 and included ethnically-motivated killings, rape and other sexual violence, beatings, and assault by angry mobs.⁵ On 11 June 2010, there began a full-scale conflict involving hundreds of deaths and injuries, and destruction of property, resulting in the displacement of tens or even hundreds of thousands of people.⁶
11. On 15 June 2010 Azimjan Askarov was detained and charged with numerous crimes, including complicity in the murder of police officer Myktybek Sulaimanov on the morning of 13 June 2010.⁷ Askarov was placed in police custody at the same police station where the police officer in question had worked.⁸ His detention remained, as confirmed by the HRC, unregistered for almost 24 hours in violation of the Criminal Procedure Code (CPC)⁹ requirement to have police custody registered within three hours of detention.¹⁰
12. In his communication to the HRC, Askarov claimed that during his first four days of detention he was subjected to repeated instances of torture and other cruel, inhuman or degrading treatment (CIDT) by the police at the station where he was held in custody.¹¹ They included being hit over the head with a gun and being forced to clean up his own blood, as well as psychological torture such as threats to have the detainee's wife and daughter brought and raped in front of him.¹² Askarov says he was denied access to a lawyer and interrogated without a lawyer present at least eleven times while in police custody, during which police officials allegedly attempted to coerce him into testifying against the Uzbek community leaders in Kyrgyzstan.¹³ In his complaint Askarov said that the trial had been "flagrantly unfair and amounted to a denial of justice".¹⁴ Death threats against the defense team and widespread intimidation of defense witnesses were said to have contributed to a heavy prosecution bias.¹⁵ Askarov had maintained his innocence throughout the proceedings.¹⁶

³ This section refers exclusively to the first trial (before the UN Human Rights Committee Views issuance). The factual circumstances of the retrial following the issuance of the Views are given separately under 3. *The Retrial before Chuy Regional Court*.

⁴ *Azimjan Askarov v Kyrgyzstan*, Human Rights Committee, Communication No. 2231/2012, , U.N. Doc. CCPR/C/116/D/2231/2012, 21 April 2016, para 2.1. (Hereinafter: HRC Views, *Askarov*).

⁵ Kyrgyzstan Inquiry Commission: *Report of the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan in June 2010*, May 3 2011, available at:

https://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_490.pdf. (Accessed: ????)

⁶ International Commission of Jurists, *Report on the arrest, detention and trial of Azimzhan Askarov*, Geneva, September 2012, pp. 5 and 8. (Hereinafter: (ICJ Askarov Report) Available at <https://www.icj.org/wp-content/uploads/2012/09/Askarov-Report-2012-Eng-004.pdf> [Accessed 4 August 2018].

⁷ HRC Views, *Askarov*, op. cit., para 2.1.

⁸ Ibid.

⁹ CCP, Article 95.

¹⁰ HRC Views, *Askarov*, op.cit., paras 2.3 and 8.4.

¹¹ Ibid, para. 2.2.

¹² Ibid, para. 2.3.

¹³ Ibid, para. 2.2.

¹⁴ Ibid, para. 2.6; As the ICJ concluded, "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." ICJ Askarov Report, op. cit., p. 66.

¹⁵ See, ICJ Askarov Report, op. cit., p. 24 ("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. Numerous motions of the defence lawyers were denied by the court.").

¹⁶ HRC Views, *Askarov*, op. cit., para. 2.13.

13. On 15 September 2010, Askarov was found guilty of the charges¹⁷ and received a life sentence.¹⁸ All of his co-defendants were also convicted and sentenced to long terms of imprisonment.¹⁹
14. The defense team appealed the convictions to the Jalal Abad Regional Court and on 9 October 2010, Askarov and his co-defendants were transferred to Suzak police station in preparation for the appeal hearings.²⁰ On arrival at the station, they were reportedly subjected to ill-treatment, including beatings and forced removal of clothing by masked officers.²¹ The hearing venues were repeatedly changed (first to Tash-Kumyr and then to Nooken village), and the detainees were also subject to further ill-treatment at the new venues.²²
15. On 10 November 2010, the appeal court rejected the appeals and upheld the sentences of the trial court.²³ Askarov, by his defense team's account, endured more ill-treatment in the meantime and by 12 November, when he was finally transferred out of police custody to a prison in Bishkek, his health had severely deteriorated.²⁴
16. As the next step, Askarov's and his co-defendants' defense team took the case to the Supreme Court, finally succeeding in filing the witness statements that they had been prevented from filing before that, including 14 witness statements confirming Askarov's exonerating account of his whereabouts during the morning of the police officer's killing.²⁵ However, the witness statements did not sway the Supreme Court's judgment.²⁶ The defense arguments were summarily dismissed and the Supreme Court upheld the conviction and sentence of Askarov.²⁷
17. Despite Askarov's defense counsel repeatedly filing complaints of ill-treatment with the trial court, appeal court and Supreme Court and the prosecutor's office, at the trial stage no investigation into the torture allegations took place.²⁸ In justifying their consistent refusal to investigate, the authorities referred to the presumably coerced statements Askarov made while in police custody, whereby he confirmed that he had no complaints.²⁹

¹⁷ Under CC Articles 28, 30, 227 Part 2 § 1, 3 (Hostage taking) to 9 years of imprisonment; under CC Article 241 Part 1 (illegal possession of firearms) to 1 year of imprisonment; Under CC Article 299, Part 2 § 1 (inciting hatred) to 5 years of imprisonment with deprivation of the right to occupy certain positions or engage in certain activities; Under CC Article 233 (organisation of riots)": -under para 1 to 9 years of imprisonment; - under paras 2 to 4 years of imprisonment; -under para 3 to 3 years of imprisonment; Under CC Article 30, 340 (complicity in the murder of a law enforcement officer). Acquitted for lack of *corpus delicti* under Article 299-2 part 1 of the Criminal Code.[for full text of relevant Articles see footnote 2 above].

¹⁸ HRC Views, *Askarov*, op.cit., para. 2.9.

¹⁹ Ibid, para. 2.10.

²⁰ Ibid, para. 2.10.

²¹ Ibid, para. 2.10.

²² Ibid, para. 2.11.

²³ Ibid, para. 2.12.

²⁴ Ibid, para. 2.12.

²⁵ Ibid, para. 2.13.

²⁶ The Supreme Court judgment selectively refers to the testimonies by co-defendant Mamadalieva and Makhmudzhanov, and does not mention the evidence to the contrary ("At the court hearing on September 6, 2010 to the question of the lawyer Mr. Kalmanov: "Who led the people during the events on June 12 and 13, 2010?" Mamadalieva replied: "The people were led by Karabaev, Askarov, Akmatov." And to the question of the lawyer Mr. Abylakimov: "What actions did Mr. Askarov undertake on Saidullaeva str. of the Bazar – Korgon village on June 12, 2010?" Mamadalieva replied: "Everything was started by Mr. Askarov, Mr. Karabaev. Due to their improper agitation of these persons I am here among the accused!" [...]

When Ms. Mamadalieva was charged by the investigators, she said about the events in the Kyrgyz – Uzbek border in Chek village in Russian, "It is Mr. Askarov, Akmatov and Karabaev to blame for the people did not listen to the governor and did not return home. It was them who incited ethnic hatred and urged to kill and disobey the authorities," Thus, she confirmed the validity of her testimonies (Vol. 7, p. 207).

These statements coincide with testimonies of the witness Mahmudzhanov given during the investigation and the trial. The witness testified that on 12 June 2010 at about 19:00 there were about 400 – 500 Uzbeks on Saidullaeva str.; that he saw that they were led by Minura eje (Minura Mamadalieva), a physician Shurik (Mirzalimov Sh.) and Mr. Askarov Azimjan; that having seen that they blocked the road with his cart, he removed it; that the next day they again blocked the street with his cart. (Vol. 1, p. 116, 118.)" (Quoted as per the unofficial translation of the Supreme Court judgment). Supreme Court of the Kyrgyz Republic, judgment of 24 January 2017, Л. д. №А-ч-219-16 үд.

²⁷ HRC Views, *Askarov*, op.cit., para 2.13 and 2.14.

²⁸ Ibid, para. 2.14.

²⁹ Ibid, para. 2.17.

His medical records, including two evaluations made by an independent foreign medical expert, were consistently ignored.³⁰

18. Following the initial detention and trial of Azimjan Askarov in June 2010,³¹ the ICJ received a request³² from the Human Rights Council of Kyrgyzstan to observe the hearing at the Supreme Court of Kyrgyzstan of the case against Askarov and seven other co-defendants. In response to the request, ICJ dispatched a fact-finding and trial observation mission to collect and examine the facts related to the case and to provide a legal analysis to the case. The ICJ also observed the appeal hearing in the case before the Supreme Court of the Kyrgyz Republic on 20 December 2011. Based on the results of the mission as well as the documents of the case, in September 2012 the ICJ released a detailed report (see below section 3.2. "Summary of findings by the UN Human Rights Committee and the ICJ").³³
19. In particular, through the assessment of the facts and law related to the original case, the ICJ found evidence in support of the allegations of *prima facie* human rights violations in relation to the cases of Askarov and each of his co-defendants, including violations of the prohibition of torture or cruel, inhuman or degrading treatment (CIDT) and of the fair trial rights and due process safeguards such as the right of access to a lawyer and to communicate with a lawyer in private, the presumption of innocence, the right to an independent and impartial court, and equality of arms, among others.³⁴
20. In its report, the ICJ recommended that:
 - a) There be a thorough and independent investigation into the allegations of torture and other ill-treatment against Askarov;
 - b) There 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;
 - c) The police officer murder investigation be reopened;
 - d) The case against Askarov be reopened and, if sufficient evidence against any of the defendants is discovered, a retrial be held with full respect for due process guarantees;
 - e) All victims of human rights violations, including the defendants in the case, witnesses and lawyers, be afforded adequate reparation, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.³⁵

b. UN Human Rights Committee Views

21. Following the final decision of the Supreme Court of the Kyrgyz Republic, Askarov took the matter to the HRC, claiming use of torture and CIDT in violations of Article 7 (read separately and in conjunction with Article 2(3) (ensuring effective remedies)), arbitrary detention in violation of Article 9, inhuman conditions of detention contrary to Article 10, violation of his fair trial rights under Article 14 and violation of the right to freedom of expression guaranteed under Article 19 of the International Covenant on Civil and Political Rights (ICCPR).³⁶
22. In the communication, Askarov presented the following requests:
 - a) that the Kyrgyz Republic quash his conviction;
 - b) that the Kyrgyz Republic immediately release him;
 - c) that the Kyrgyz Republic provide a full medical examination and medical treatment and allow Askarov to travel abroad to obtain treatment for his injuries;
 - d) that the HRC urge the Kyrgyz Republic to create an independent commission of inquiry to investigate the circumstances of Askarov's detention and torture, as

³⁰ Ibid, para. 2.17.

³¹ KIC Report on the Events in Southern Kyrgyzstan in June 2010, op. cit..

³² Request received on 5 December 2011.

³³ ICJ Askarov Report, op. cit.

³⁴ Ibid. paras 265-267.

³⁵ Ibid, para. 267.

³⁶ HRC Views, *Askarov*, op.cit., para. 1.

well as an independent commission of inquiry to review all convictions related to the violence in southern Kyrgyzstan in June 2010 with full respect for fair trial guarantees, and to investigate all torture allegations;

- e) that the HRC urge the Kyrgyz Republic to pay just compensation;
 - f) that the HRC urge the Kyrgyz Republic to introduce safeguards to prevent similar violations from happening in the future.³⁷
23. On the basis of the complaint submitted to the HRC, the Kyrgyzstan authorities instructed a specially established group of five prosecutors to investigate Askarov's claims.³⁸
24. The State denied Askarov's claims in its response to the HRC,³⁹ maintaining that he had been afforded adequate due process guarantees.⁴⁰ The State also maintained that Askarov had never been subjected to treatment in violation of Article 7 ICCPR.⁴¹ It provided an explanation by the former head of the Bazar-Korgon detention centre to the special investigative group,⁴² citing evaluations made by local medical experts invited by the investigator and explaining Askarov's recorded injuries as assaults on Askarov by his cellmates⁴³.
25. On 21 April 2016, having reviewed the communication, the HRC determined that the Kyrgyz Republic had breached its ICCPR obligations and violated a number of the complainant's rights, considering "that, in the circumstances of the present case, and in particular in the light of the State party's inability to explain the visible signs of mistreatment that were witnessed on a number of occasions, due weight should be given to the author's allegations."⁴⁴
26. In particular, the HRC found that the available evidence did "not allow it to conclude that the investigation into the allegations of torture was carried out promptly or effectively or that any suspects were identified, despite a number of incriminatory witness accounts."⁴⁵ The HRC also noted "the State party's submission that it interviewed the author. However, it did not refer to the results of the interviews, nor did it provide a copy of the record."⁴⁶ Thus, the HRC concluded that the facts in the case disclosed a violation of the right to freedom from torture or other cruel, inhuman or degrading treatment or punishment under Article 7 of the ICCPR, as well as of the right to an effective remedy for violations of the Covenant rights under Article 2(3).⁴⁷ In this connection, the HRC considered that, "in the circumstances of the [Askarov] case, and in particular in the light of the State party's inability to explain the visible signs of mistreatment that were witnessed on a number of occasions, due weight should be given to the author's allegations"⁴⁸ of torture. With reference to the remedies, the HRC noted, in particular, criminal investigation and consequential prosecution as "necessary remedies for violations of human rights such as those protected by article 7 of the Covenant."⁴⁹
27. Furthermore, the HRC found a violation of the right to liberty⁵⁰ (Article 9(1) of the ICCPR), as Askarov's arrest had been registered only one day after his actual apprehension and

³⁷ *Askarov v. the Kyrgyz Republic*, Communication to the United Nations Human Rights Committee, <https://www.opensocietyfoundations.org/sites/default/files/askarov-hrc-11132012.pdf>, para 402.

³⁸ HRC Views, *Askarov*, op. cit., para. 4.1.

³⁹ Full account of Kyrgyzstan's observations on each of the violations alleged, is provided in the HRC Views, *Askarov*, op.cit., paras. 4.1 – 4.38, and 6.1. – 6.13

⁴⁰ Ibid, paras. 4.10, 4.18, 4.21 and 4.28.

⁴¹ Ibid, para. 4.9.

⁴² Ibid, para. 4.19.

⁴³ Ibid, paras. 4.11, 4.13 and 4.15.

⁴⁴ Ibid, para. 8.2.

⁴⁵ Ibid, para. 8.3.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid, para. 8.2.

⁴⁹ Ibid, para. 8.3.

⁵⁰ See, in particular, HRC Views, *Askarov*, op. cit, para 8.4

("The Committee further notes the author's claims under article 9 (1) that he was arbitrarily detained from 15 to 16 June 2010. The author also claims that this was done to enable the police officers to torture him. The State party contends that the author was first questioned only as a witness and formally arrested on 16 June. The Committee recalls its general comment No. 35 (2014) on liberty and security of person according to which arrest within the meaning of article 9 need not involve a formal arrest as defined under domestic law. Beyond the requirements of the Covenant that no one shall be deprived of liberty except on such grounds and in

detention, which according to Askarov allowed torture to take place.⁵¹ In addition, taking note of the inhuman conditions of Askarov's detention and lack of access to medical care, it concluded that Kyrgyzstan violated Askarov's rights to be treated with humanity and dignity in detention, under Article 10 (1) of the ICCPR.⁵²

28. In addition, the HRC found violations of the right to fair trial, in particular the right to have adequate time and facilities for the preparation of a defence (Articles 14(3)(b))⁵³ and the right to examine witnesses (Article 14 (3)(e)),⁵⁴ as the facts in the case suggested withholding by the prosecuting attorney of key evidence from Askarov's counsel, repeated attacks on the counsel that went unpunished, failure to notify the counsel of the hearing date and time, as well as Askarov's inability to call witnesses on his behalf.
29. In summary, the HRC concluded that "the facts before it disclose a violation of the author's rights under article 7, read separately and in conjunction with article 2(3), and articles 9(1), 10(1) and 14(3)(b) and (e) of the Covenant,"⁵⁵ finding that the State Party should
 - a. make full reparation to Askarov;
 - b. take appropriate steps to immediately release him;
 - c. quash his conviction and, if necessary, conduct a new trial in due compliance with fair trial guarantees.⁵⁶
30. The HRC also requested that the State Party was to provide it, within 180 days, with "information about the measures taken to give effect to the Committee's Views,"⁵⁷ which information was to be made public.⁵⁸
31. On 12 June 2016, in view of the HRC decision, the Supreme Court of Kyrgyzstan, "in the light of new circumstances and in accordance with the decision of the UN Human Right Committee of 21 April 2016 and in view of the statements of the [defendant's] lawyer Toktakunov"⁵⁹ vacated the original judgments – including the Supreme Court judgment in the appeal – and ordered a new review of the case by the trial court.⁶⁰

accordance with such procedure as are established by law, the State party categorically denies that it held the author during the night in question, despite numerous witness accounts to the contrary and the fact that his family members were unable to locate him. In the absence of any pertinent explanation from the State party regarding the author's whereabouts, the conditions of his detention and the record of arrest, the Committee considers that the author's rights under article 9 (1) of the Covenant were violated.").

⁵¹ HRC Views, *Askarov*, op. cit., para. 8.4.

⁵² Ibid, para. 8.5.

⁵³ Ibid, para. 8.7.

⁵⁴ Ibid, para. 8.6.

⁵⁵ Ibid, para. 9.

⁵⁶ Ibid, para. 10.

⁵⁷ Ibid, para. 11.

⁵⁸ Ibid.

⁵⁹ Decision of the Supreme Court of the Kyrgyz Republic No 4-0743/16UD [unofficial translation to English].

⁶⁰ Ibid.

III. THE RETRIAL BEFORE CHUY REGIONAL COURT

32. This chapter describes the retrial of Askarov before the Chuy Regional Court in 2016 and 2017, following the decision of the UN HRC. The description of facts below is based on the observation of hearings by the ICJ,⁶¹ analysis of the case materials, official court minutes, as well as media coverage of the case.

a. Context: Constitutional amendments on the status of treaty body decisions

33. The retrial achieved a high degree of public profile and extensive media coverage. One of main issues of interest was that of applicability of Kyrgyzstan's international law obligations in the domestic judicial context and the significance of Article 41(2) of the Constitution of Kyrgyzstan, requiring that redress be provided in accordance with decisions of international human rights bodies. Numerous opinion pieces published during the retrial suggested the need to amend the Constitution in force at the date of the start of the retrial especially in light of the decision of the HRC in the Askarov case.⁶²

34. On 28 July 2016, a constitutional reform initiative was launched by three parliamentary groups.⁶³ In December 2016, the referendum took place and the Constitution was amended.⁶⁴ The new amendments entered into force on 15 January 2017.

35. Prior to the constitutional reform of 2016, Article 41(2) of the Constitution contained a clause requiring Kyrgyzstan to provide a remedy in the event that the international human rights body has found a violation of Kyrgyzstan's international law obligations.⁶⁵ However, the constitutional referendum of 2016 led to amendments of this provision.⁶⁶ Article 41(2) of the amended Constitution guarantees "everyone the right, pursuant to international treaties, to petition international human rights bodies to seek relief from violations of rights and freedoms," but does not stipulate that a remedy should be provided within the national system, following a decision of such bodies.

36. The 2016 constitutional amendments also repealed Article 6(3), which made international human rights treaty provisions directly enforceable. It was replaced with a provision whereby "the procedure and terms of application of international treaties and customary

⁶¹ The ICJ observed several of the hearings of Askarov's retrial. Dr Dmitry Nurumov, ICJ Legal Consultant and Dr Stefan Stobl observed the trial as ICJ observers and reported directly to the ICJ about the findings. E.g see: Kyrgyz Republic: ICJ observes an appeal hearing of the case against Azimzhan Askarov, 11 October 2016, available at: <https://www.icj.org/kyrgyz-republic-icj-observes-an-appeal-hearing-of-the-case-against-azimzhan-askarov/> [Accessed 4 August 2018].

⁶² See, e.g., Experts Speaking: Constitution Must Be Brought in Line with Kyrgyzstan's National Interests, published on 6 May 2016, https://www.gezitter.org/politic/49920_govoryat_ekspertyi_konstitutsiyu_neobhodimo_privesti_v_sootvetstvie_natsionalnyim_interesam_kyrgyzstana/, http://akiwww.gezitter.org/politic/49920_govoryat_ekspertyi_konstitutsiyu_neobhodimo_privesti_v_sootvetstvie_natsionalnyim_interesam_kyrgyzstana/; Operation: "Askarov Gate": Will the Kyrgyz Constitution Continue to Serve Foreign Interests?, published on 11 July 2016, http://m.gezitter.org/politic/51758_operatsiya_askarov-geyt_konstitutsiya_kyrgyzstana_tak_i_budet_prodoljat_slujit_vneshnim_silam/; Proof That the Constitutional Amendments Were the Right Thing to Do, published on 10 January 2017, http://www.gezitter.org/konstitutsija_2016/56672_dokazyvaetsya_chno_izmenenie_konstitutsii_stalo_ochen_pravilnyim_shagom/.

⁶³ Vecherniy Bishkek, News agency: The Parliament suggests to hold a referendum to change the Constitution in the autumn, available at: https://www.vb.kg/doc/344168_parlament_predlagaet_provesti_osenu_referendym_po_izmeneniu_konstitucii.html (Accessed: 4 August 2018)

⁶⁴ The Central Election and Referendum Commission, available at: https://shailoo.gov.kg/ru/ReferendumReferendum/rezultaty_referenduma_vsenarodnogo_golosovaniya_Kyrgyzskoy_Respubliki_ot_11_dekabrya_2016_goda_/. (Accessed: 4 August 2018)

⁶⁵ Constitution of the Kyrgyz Republic, Article 41(2) before the amendment: "Everyone shall have the right to apply in accordance with international treaties to international human rights bodies seeking protection of violated rights and freedoms. In the event that these bodies confirm the violation of human rights and freedoms, the Kyrgyz Republic shall take measures to their restoration and/or compensation of damage."

⁶⁶ Article 41(2) as amended by the Law No 218 of 28 December 2016: "Everyone shall have the right, pursuant to international treaties, to petition international human rights bodies to seek relief from violations of rights and freedoms."

norms of international law shall be determined by law.”⁶⁷ This may be interpreted as requiring legislation to implement international legal obligations.

37. In connection with this constitutional reform, it should be mentioned that the Code of Criminal Procedure in force at the time of the retrial provided for “[a] finding by an international body, in accordance with international treaties to which the Kyrgyz Republic is a State Party, of a violation of human rights and freedoms in the course of the review of the criminal case in question by the court of the Kyrgyz Republic” as a ground for retrial.⁶⁸
38. Unlike the Constitution, the provision on the decisions of international human rights bodies as a ground for reconsideration of a judgment in force is retained in the new Code of Criminal Procedure, adopted in 2017 and due to come into effect in 2019.⁶⁹

b. Hearings at the Chuy Regional Court

39. Following the decision of the Supreme Court to initiate proceedings in the case, it was remanded for retrial to the Chuy Regional Court⁷⁰ on the grounds of “new circumstances,” though without quashing the defendant’s conviction but “resuming” the proceedings in the case in accordance with CCP Article 442.⁷¹ This decision meant that the investigation results from the initial case would remain as evidence and no new investigation into the case was ordered. Equally, the decision to remand Askarov in detention was renewed, presumably since the conviction had not been formally quashed but only remanded for retrial in light of the “new circumstances.”⁷²
40. The retrial took place from 4 October 2016 to 24 January 2017.⁷³
41. The first hearing on 4 October was held entirely in open court. During the hearing, the defense filed five motions, out of which two were granted (the prosecution objected to one of these motions) and three were dismissed; the prosecution filed no motions.⁷⁴ The defense attorney filed a motion to release Askarov and to return the case to the prosecutor for additional investigation,⁷⁵ arguing that:

⁶⁷ Article 6(3) before the amendments (“International treaties to which the Kyrgyz Republic is a State Party and that have entered into effect pursuant to the established legal procedure, as well as the customary principles and norms of international law, shall be the constituent part of the legal system of the Kyrgyz Republic. The provisions of international treaties on human rights shall have direct action and shall prevail over provisions of other international treaties.”) and Article 6(3) as amended by the Law No 218 of 28 December 2016 (“International treaties to which the Kyrgyz Republic is a State Party and that have entered into effect pursuant to the established legal procedure, as well as the customary principles and norms of international law, shall be the constituent part of the legal system of the Kyrgyz Republic. The procedure and terms of application of international treaties and customary norms of international law shall be determined by law.”) (Emphasis added).

⁶⁸ CCP, Article 384(2-1) (“The following shall be regarded as new circumstances:

[...]

3) finding by an international body, in accordance with international treaties to which the Kyrgyz Republic is a State Party, of a violation of human rights and freedoms in the course of the review of the criminal case in question by the court of the Kyrgyz Republic.”).

⁶⁹ New CCP, Article 442(4).

⁷⁰ The Chuy Regional Court is an appeals court.

⁷¹ CCP, Article 442 (“1. A convicting judgment, determination, resolution of the court that has entered into legal force may be repealed and the proceedings in the case resumed in light of new or newly discovered circumstances.”).

⁷² CCP, Article 442 (“1. A convicting judgment, determination, resolution of the court that has entered into legal force may be repealed and the proceedings in the case resumed in light of new or newly discovered circumstances. [...]

4. The following shall be regarded as new circumstances:

[...]

3) finding by an international body, in accordance with international treaties to which the Kyrgyz Republic is a State Party, of a violation of human rights and freedoms in the course of the review of the criminal case in question by the court of the Kyrgyz Republic.”).

⁷³ Criminal Case No A-ch 219-16, Court Hearing Minutes.

⁷⁴ The motion count was made based in the information contained in the Criminal Case No A-ch 219-16, Court Hearing Minutes.

⁷⁵ Criminal Case No A-ch 219-16, Court Hearing Minutes. Unofficial translation commissioned by the International Commission of Jurists.

“Paragraph 10 of the opinion of the UN Human Rights Committee points at the duty of the State to release A. Askarov, to revoke the conviction, and to conduct a new trial if necessary. The Supreme Court, however, has neglected this opinion, has not canceled the verdicts, has not released the defendant and has not sent the case for a new review. The Chui Oblast Court has the authority to put into effect the demands of the Human Rights Committee, to return the case to the prosecutor in order to fill the gaps of the investigation. The Constitution adopted in 2010, is still in force. Per the amendments made to Article 235 of the Criminal Procedure Code on November 18, 2014, the case must have a final indictment.” [...] The absence of an indictment in this case gives grounds to return the case to the prosecutor in order to fill the gaps of the investigation.”⁷⁶

This motion was dismissed by the court.⁷⁷

42. The widow of officer Sulaimanov testified at the hearing, stating, in particular, that she had never personally met Askarov before the proceedings, and that the allegations of Askarov’s presence on the bridge where Myktybek Sulaimanov was killed were communicated to her by other witnesses rather than as a result of personal observation.⁷⁸ In particular, she said that “someone [had] told [her] during the trial that it was him who killed [her husband],” although she could not remember who exactly told her that so this person could be questioned on the stand. She also testified that she “heard that it was [Askarov] who organized all that.”
43. A prosecution witness, when questioned by a defense attorney on the stand, remarked: “I don’t understand why you believe this guy who was sentenced to life, rather than us.”
44. A significant proportion of prosecution witnesses were reluctant to go into detail concerning the events of 13 June 2010 and gave testimonies that were vague at best. Three out of six prosecution witnesses – all of them former officers with the Bazar Korgon Police Department – testified that they did not remember if Askarov was at the bridge where the killing took place. The other three officers, who testified about seeing Askarov and hearing him call for violence, noted being positioned at varying distances from 30-150 meters from Askarov’s alleged spot in the crowd.
45. For example, former officer Mantybaev testified that he had stood some 100-150 meters away and heard Askarov call on the mob to “kill those Kyrgyz dogs.” When questioned by the defense team as to how the witness could make out Askarov’s words from such a distance, Mantybaev failed to provide an explanation.
46. District police commander Mamyrgan Mergentaev testified that the bridge was crowded and he did not remember seeing Askarov. He also maintained that no photo or video recording was made because of the “commotion and upheaval.” Former officer Kubanychbek Umurakhunov testified that he saw Askarov “in the crowd holding some papers,” but did not remember what Askarov was wearing. Notably, not a single witness out of all those who “remembered” seeing Askarov was able to describe what he was wearing on the day of 13 June.
47. At the 4 October hearing Askarov asked the prosecution witness, Mergentaev, to explain the apparent contradiction between the allegation of the murder being committed at the bridge and the fact that Officer Sulaimanov’s body was found in the reeds, specifically drawing the court’s attention to the failure to photograph the crime scene in contravention of the established police practice. It was at this point that Mergentaev cited “commotion and upheaval” as the reason why no recording had been made.
48. The ICJ notes that through the retrial, not only did the court fail to treat inconsistencies and conjectures in oral testimony as grounds for doubt, but it also did not duly consider gaps in documentary evidence. For example, throughout the retrial, numerous references were made to a video recording allegedly made by one Beknazarov, which allegedly shows Askarov standing on the bridge on the day of the murder. However, despite repeated requests by Askarov to produce the “incriminating” video if it existed, no such recording was produced. The defense’s efforts to draw the court’s attention to the glaring absence of

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

any photographic or video evidence did not sway the court's stance and the court did not appear to treat this issue as giving rise to doubt.

49. It is worth mentioning that rumors about such a video circulated during the first trial.⁷⁹ No such video was presented at that trial.
50. During the 11 October hearing, the defense filed seven motions, out of which three were granted (the prosecution did not object to any of the motions), four were dismissed, and one was granted in part (the prosecution did not object). The prosecution filed one motion, which was granted (the defense did not object). In particular, defense attorney Toktakunov filed a motion to remove handcuffs and leg chains from the defendant since:

"[t]he Ruling of the Supreme Court of July 12, 2016 cancelled the verdict of Jalal-Abad Oblast Court against A. Askarov and the Ruling of the Supreme Court. Only the verdict of the Bazar-Korgon Rayon Court remained; this sentence, however, did not come into force. And since the sentence of life imprisonment has not entered into force, it must not be enforced. However, A. Askarov is being treated as life imprisoned with his arms and legs enchained. He is being treated and kept as a person deprived of his liberty for life. The Supreme Court has not decided on the measure of restraint."⁸⁰

This motion was, however, dismissed. Also dismissed was a motion to lift the detention and to place Askarov under house arrest.⁸¹

51. Prosecution witnesses referred to the fact that Askarov was said to enjoy respect in the Uzbek community to support the allegation that it was Askarov who incited violence. For example, former mayor Artykov testified at the 11 October hearing that he "saw [Askarov] and assumed that he may be the instigator because the Uzbeks respect him."
52. Officer Joroyev testified that he did not remember seeing Askarov on the bridge, but was told by his colleagues that Askarov had been there. At the same hearing, former prosecutor Bakirov testified that he saw a mob of 300-400 Uzbeks. When asked by a defense counsel how he could be sure that everyone was an ethnic Uzbek, the prosecutor referred to "reports" he received from unnamed sources.
53. At the 11 October hearing defense attorney Vakhitov asked witness Bakirov (former prosecutor in Bazar Korgon) if a review of the torture allegations and the legality of detention had been conducted. Bakirov responded that "[the prosecutor's office has] not raised this issue," going on to say that "I know our guys never touched him." However, this statement, which may be interpreted as amounting to a voluntary admission that the torture allegations were ignored, was not followed up by the court in an effective manner.
54. In general, despite the defense consistently raising throughout the trial the issue of unlawful detention and torture suffered by the defendant,⁸² no enquiry into the allegations was ordered during the proceedings. Rather, any consideration of the issue was consistently postponed and never took place until the end of the trial.
55. The court left the issue of Askarov's "detention conditions" open. The judge promised to return to this issue in the course of the hearings to follow. However, the Court never in fact subsequently examined the question.
56. At the 20 October hearing, former officer Umurakhunov, who originally testified that he had been hit by a rock lobbed from the angry mob, declared having been hit by a stick. However, this did not raise any questions in respect of witness credibility.
57. The same witness, former officer Umurakhunov, was questioned by the defense team to clarify the discrepancy between his testimony at the retrial (where Umurakhunov testified about seeing Askarov) and his earlier testimony (where Umurakhunov was unable to confirm seeing Askarov in the crowd). Following the questioning, Umurakhunov admitted not seeing Askarov, but surmised that Askarov "may have given [protesters] directions over the phone."

⁷⁹ KIC report on the Events in Southern Kyrgyzstan in June 2010,, op cit, para. 55.

⁸⁰ Criminal Case No A-ch 219-16, Court Hearing Minutes.

⁸¹ Ibid.

⁸² At several hearings beginning 11 October (11 October, 25 October, 1 November, 8 November).

58. In this connection, Askarov alleged that at least some of the officer witnesses acted with malicious motive, since he, in his capacity as a human rights defender and investigative journalist, had earlier investigated them for alleged misconduct. No further inquiry into Askarov's allegations⁸³ was ordered.
59. During the 25 October hearing, the defense filed one motion, which was dismissed; the prosecution filed one motion, which was granted (the defense did not object). The motion to change the measure to secure Askarov's appearance in court and to lift the detention warrant was filed again and yet again dismissed.
60. During the 1 November hearing, the defense filed two motions, one of which was dismissed (with the court recalling that the same motion had been filed and dismissed earlier) and one was granted in part; the prosecution filed no motions. The motion that was dismissed concerned lifting Askarov's detention warrant.
61. At the hearing, the prosecution and the defense had a disagreement as to whether Askarov's wife Khadija and brother Khakimjon could have been called as witnesses.⁸⁴ When defense attorney Vakhitov asked why Khadija had never been called to testify, the prosecuting attorney retorted that "family members cannot be subpoenaed as per the law." The other defense attorney Toktakunov countered that while immediate family cannot be compelled to testify, there is nothing in the law that may be interpreted as an express ban on calling them as witnesses. Still, the prosecuting attorney continued to maintain his stance and the court refused to grant the motion to call family members as witnesses, while granting the motion to subpoena Askarov's neighbours.⁸⁵
62. During the 8 November hearing, the defense filed three motions, out of which two were granted (the prosecution objected to one of the motions and did not object to the other) and one was granted in part (over the prosecution's objections); the prosecution filed no motions. Askarov's neighbours were called as witnesses, testifying that they had not heard Askarov insult Kyrgyz people or otherwise incite inter-ethnic hate.
63. On that day, the Court continued reviewing the question of torture allegations. Public defender Tolekan Ismailova submitted a motion for the Court to introduce a "determination"⁸⁶ on whether the defendants in the original case, including Askarov, had been subjected to torture. In the event that the determination made a positive finding of torture, the Ministry of the Interior would be legally required to conduct an investigation. The Court, once again, postponed the resolution of this motion, never issuing a definitive ruling on the matter.
64. On 15 November, the judge asked the parties to communicate in Kyrgyz to facilitate the shorthand transcription of the proceedings. In response, Askarov requested that the Court allow him to testify in Russian due to his Uzbek accent in Kyrgyz, presumably because of the taint of prejudice, although this was not explicitly said. The judge allowed Russian-language testimony on the proviso that a suitably qualified Russian-Kyrgyz court interpreter be found. It should be noted that the Russian language is constitutionally recognized as an official one⁸⁷ and widely spoken throughout the nation.⁸⁸ The defense found an interpreter, however, the interpreter sat silent through the end of the proceedings because, as seemed obvious to the ICJ observer, those present understood Russian and there was no need for translation.
65. During the 6 December hearing, the defense filed two motions, out of which one was granted (the motion concerned a permission to take photographs at the hearing; the

⁸³ Perjury is criminalized by Article 345(1) of Kyrgyzstan's Criminal Code ("Knowingly false testimony by a witness, victim, or knowingly false opinion or testimony by an expert witness, or knowingly false testimony by a specialist, or else knowingly false translation in the course of civil or criminal trial or pretrial proceedings, in conjunction with felony or misdemeanor suspicion or charges, - shall be punished by Category IV correctional labor or Category V fine with or without ancillary ban on holding specified office or engaging in specified activities for up to two years.").

⁸⁴ Criminal Case No A-ch 219-16, Court Hearing Minutes, 1 November hearing.

⁸⁵ Ibid.

⁸⁶ A determination in the post-Soviet legal tradition is a type of court ruling.

⁸⁷ The Constitution of the Kyrgyz Republic, Article 10(2).

⁸⁸ National Statistical Committee of the Kyrgyz Republic, Population and Housing Census of the Kyrgyz Republic of 2009, Book I, Main social and demographic characteristics of population and number of housing units, para. 20, available at: <https://unstats.un.org/unsd/demographic-social/census/documents/Kyrgyzstan/A5-2PopulationAndHousingCensusOfTheKyrgyzRepublicOf2009.pdf>. (Accessed 4 August 2018)

prosecution did not object) and one dismissed (motion to adduce a media interview as evidence). The prosecution filed no motions.

66. During the 13 December hearing, the defense filed two motions, out of which one was granted (over the prosecution's objections) and one remained unresolved; the prosecution filed no motions. The motion that was granted concerned the adducement of evidence and specifically of some search records and UN HRC decisions establishing facts that supported the allegations of bias of certain prosecution witnesses.

67. During the 20 December hearing, the defense filed three motions, all of which were granted (the prosecution did not object to two of the motions and objected to one). The prosecution filed no motions. During the hearing, Askarov referred to the investigation conducted in respect of his case by Kyrgyzstan's Ombudsman Institute, stressing that the investigation confirmed his innocence. He also stressed that over ten additional witnesses could be called to testify in his defense, however, they had never been subpoenaed.

68. On 10 January 2017 hearing, the court heard the defense and prosecuting officer's closing arguments. In his presentation, defense attorney Nurbek Toktakunov called into question the prosecuting attorney's assertion that

"the UN decision had been executed, all the judicial procedures had been observed, and a scrupulous court session had been held,"⁸⁹ maintaining that "the procedures of court hearings were fulfilled, yet the UN decision was not. First of all, A. Askarov should have been acquitted and released in accordance with the UN decision."⁹⁰

Toktakunov noted that

"[t]he UN decision proved the use of torture against A. Askarov, there is no need to prove it at this court session. In the UN decision contains an idea of the need for further trials, which implies punishment of those responsible for torture."⁹¹

He went on to state that

"[p]ublic prosecutors said that A. Askarov did not submit any complaints about torture; that no forensic examination was done regarding torture. However, they rely on the fact that law enforcement officers should work in good faith. But if we believe that law enforcement officers work in good faith at all times, then not a single case of violence would ever be revealed. [...] Our legal system works the [...] way [that] – a person subjected to torture should prove the same, which is not right."⁹²

Prosecutor Kurmanbek Toktakunov, asserted that "the UN decision had been executed, all the judicial procedures had been observed, and a scrupulous court session had been held."⁹³ He stressed that the evidence in the case was comprehensive and assessed in its entirety, and denied the defense accusations of bias in the assessment of evidence. He also stressed the insignificance of the possibility of retaliation against Askarov, a prominent investigative journalist, by the local security services, mentioning that by the admission of both the head of the local State Security Committee department in Bazar Korgon and Askarov himself, they had known each other since 2008 and had never had any tensions.

69. On 24 January 2017 the Chuy Regional Court upheld the convicting judgment and the life sentence for Askarov.⁹⁴ His defense team announced that it planned to bring an appeal before the Supreme Court.⁹⁵

⁸⁹ Criminal Case No A-ch 219-16, Court Hearing Minutes.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ International Commission of Jurists, Kyrgyz Republic: ICJ condemns failure to remedy violations of the human rights of Azimzhan Askarov, posted on 25 January 2017, available at: <https://www.icj.org/kyrgyz-republic-icj-condemns-failure-to-remedy-violations-of-the-human-rights-of-azimzhan-askarov/> .

See also live feed of the court proceedings for 24 January 2017, <https://kloop.kg/blog/2017/01/24/live-oglashenie-prigovora-pravozashhitniku-askarovu/>.

⁹⁵ Ibid.

70. Below follows the motion count as per the court hearing minutes.⁹⁶

Total defense motions:

Granted: 13

Dismissed: 10

Granted in part: 3.

Total prosecution motions:

Granted: 2

Dismissed: 0

Granted in part: 0

71. Seven police officers who had witnessed Officer Sulaimanov's killing were granted victim status⁹⁷ in the case, rather than called as witnesses, the status that they had been afforded throughout the initial stages of the trial. Given the fact that these police officers were to testify as key witnesses and the fact their testimony was clearly critical to establishing the facts in the case, this decision remained unconvincing for the ICJ observers.

c. Judgment of the Chuy Regional Court

72. On 27 2017, the judgment of the Chuy Regional Court was officially rendered. The judgment summarized the essence of the case, including the substance of the indictment, the key evidence included in the case file, and the chronology of the original proceedings. The reasoning is obscure and difficult to ascertain, as the judgment tends to be primarily descriptive and essentially recounts the factual circumstances of the case. Importantly, the judgment refers not exclusively to the testimony given during the retrial, but also to the evidence obtained at the pretrial investigation stage. The Court concluded that "[a]s can be seen from the materials of the investigation, the first judicial authority having fully and correctly determined the circumstances of the criminal case, having comprehensively and deeply studied the facts collected during the investigation, finds the fully proven guilt of the defendant A. Askarov".⁹⁸

73. As follows from the HRC findings, at least some of the evidence obtained at the pre-trial investigation stage has been tainted by allegations of serious human rights violations. For instance, the judgment cites the pretrial testimony of Minura Mamadalieva, and relies on it to establish factual circumstances in the case. At the retrial she stated that she was forced to give testimony against Askarov during the initial investigation and trial.⁹⁹ In its Report on the first trial, the ICJ concluded regarding Ms Mamadalieva's treatment that there was "little doubt that the testimony of at least Ms Mamadalieva who testified against Mr Askarov was obtained under duress".¹⁰⁰ Relying on the evidence she gave during the investigation, during a period when she was allegedly tortured, the Court concludes in its judgment that the allegations of torture by Minura Mamadaliyeva were not credible:

"The judicial board notes that at the court hearing the arguments of M. Mamadalieva and A. Askarov about intimidation and beating by the police officers were not confirmed, because at the time they did not file complaints about torture to the relevant authorities; the judicial board comes to a conclusion that the arguments of M. Mamadalieva about the use of torture by the police were an attempt to save herself and A. Askarov from criminal liability.

The judicial board considers that during the trials the above facts were thoroughly studied, compared with other facts, they fully prove A. Askarov's guilt in committing the crime [..]. These facts correspond to the circumstances of the case,

⁹⁶ Criminal Case No A-ch 219-16, Court Hearing Minutes.

⁹⁷ See, e.g., Criminal Case 160-10-159, Volume 1, exhibits 32, 38, 46.

⁹⁸ Decision of the Chuy Court Л. д. №А-ч-219-16 уд, of 27 January 2017.

⁹⁹ Human Rights Watch, Kyrgyzstan: Travesty of Justice for Rights Defender, January 24 2018, <https://www.hrw.org/news/2017/01/24/kyrgyzstan-travesty-justice-rights-defender>.

¹⁰⁰ ICJ Askarov Report, op cit, para. 260.

complement each other and the judicial board finds no reason not to trust them.”¹⁰¹

74. On the torture allegations made by Askarov, the Chuy Regional Court found that “[t]he fact that A. Askarov was beaten and tortured by police officers and for this reason he turned to international human rights organizations is known only from the words of A. Askarov himself, his testimony is confirmed by nothing and no one.” The statement apparently did not take account of the finding by the UN HRC, that “the findings of the medical forensic examinations conducted by independent experts are consistent with other evidence suggesting that the author was subjected to acts of torture.”¹⁰²
75. Moreover, the Court refers to the original case file as well as the case file of the case as retried. The Chuy Court’s reliance on the materials of the investigation and their decisive impact on its judgment is vividly demonstrated for example by the judgment’s assessment of whether Askarov’s arrest took place on 15 or 16 June. For example, in its Views the HRC, arrived at the conclusion that article 9(1) was violated “[i]n the absence of any pertinent explanation from the State party regarding the author’s whereabouts, the conditions of his detention and the record of arrest”.¹⁰³ In its report, the ICJ concluded that Askarov was taken into custody on 15 June and his arrest was registered in the evening of the next day.¹⁰⁴ Despite the HRC views, the Chuy court said:

“... as can be seen from the case materials, according to Article 94 of the Criminal Procedure Code of the Kyrgyz Republic A. Askarov was detained as a suspect on 16 June 2010 in the presence of lawyer P. Myrzakulov /Attachment.1, crim. case, p. 124/. A. Askarov or his lawyer did not put down complaints or explanations in the same arrest protocol and filed a complaint about the placement in the temporary detention center on June 15, the judicial commission finds.

[...]

Therefore in the materials of the criminal case and in the materials of the case on the newly discovered circumstances, as well as at the appellate court hearing no evidence was presented on the detention and placement of A. Askarov to the temporary detention facility as a suspect on 15 June”.¹⁰⁵

76. Furthermore, the judgment goes on to state that “the above-mentioned facts fully establish A. Askarov’s guilt, since the noted case materials correspond to the offenses committed by the defendant, and these facts do not conflict with one another but rather complement one another.” Thus the evidence from the original trial was not dismissed, but used as evidence in the trial at issue.

¹⁰¹ Decision of the Chuy Court Л. д. №А-ч-219-16 уд, of 27 January 2017.

¹⁰² HRC Views, *Askarov*, op. cit., para. 8.2.

¹⁰³ HRC Views, *Askarov*, op. cit., para. 8.4.

¹⁰⁴ ICJ *Askarov* Report, op cit, para. 223.

¹⁰⁵ Decision of the Chuy Court Л. д. №А-ч-219-16 уд, of 27 January 2017.

IV. ANALYSIS

77. The ICJ, based on the description of the facts and observations as described above and using applicable international human rights law and standards, provides the following analysis of the issues which arise in regard to the implementation of the Views of the HRC, and Kyrgyzstan's compliance with its obligations under international human rights law.

a. Obligations under the ICCPR following the decision of the HRC

78. The ICJ recalls that the HRC in its Views adopted on 31 March 2016, stressed that pursuant to article 2(3) of the ICCPR, Kyrgyzstan had an obligation to provide Askarov with an effective remedy and full reparation, and to that end the authorities were required to:

- take appropriate steps to immediately release Askarov;
- quash Askarov's conviction;
- if necessary, to conduct a new trial, in accordance with the principles of a fair hearing, presumption of innocence and other procedural safeguards;
- provide Askarov with adequate compensation; and
- to take steps to prevent similar violations occurring in the future.¹⁰⁶

b. The nature of Kyrgyzstan's obligations under the ICCPR

79. Kyrgyzstan acceded to both the ICCPR and to its first Optional Protocol establishing a communication procedure in 1994. In so doing, it assumed legal obligations, which are binding on all agents of the State. Under international law, a State is responsible for any failure by any organ of the State, including the judiciary, to comply with its international obligations.¹⁰⁷ In respect of the ICCPR, the Human Rights Committee has made clear that:

"The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party."¹⁰⁸

80. It is well established that the Human Rights Committee, as the international supervisory body established under articles 28-45 of the ICCPR, is the preeminent authority on interpretation of the scope and nature of the obligations of States parties. This status is affirmed, by, among other authorities, the International Court of Justice, which has said with respect to the UN HRC, that it "should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty."¹⁰⁹

81. The HRC carries out its supervisory and interpretative functions by several means. For a conceptual interpretation of the nature and scope of obligations of particular ICCPR provisions, the Committee issues General Comments. In respect of general State compliance, it issues views following the examination of Periodic Reports. And, in respect of States like Kyrgyzstan that have accepted the individual communication procedure by becoming party to the first Optional Protocol to the ICCPR, it will make quasi-judicial rulings in individual cases.

82. In its General Comment 33, the Human Rights Committee described its authority in respect of individual communications under the Optional Protocol:

"While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the

¹⁰⁶ Ibid, para. 10.

¹⁰⁷ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Article 4.

¹⁰⁸ HRC, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, para. 4.

¹⁰⁹ *Ahmadou Sadio Diallo*, Merits, Judgement, I.C.J. Reports 2010(II), 639[66].

Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.

The term used in article 5, paragraph 4 of the Optional Protocol to describe the decisions of the Committee is "views". These decisions state the Committee's findings on the violations alleged by the author of a communication and, where a violation has been found, state a remedy for that violation.

The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.

...

The character of the views of the Committee is further determined by the obligation of States parties to act in good faith, both in their participation in the procedures under the Optional Protocol and in relation to the Covenant itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations.

...

(...) In any case, States parties must use whatever means lie within their power in order to give effect to the views issued by the Committee".¹¹⁰

83. In this respect, there is a clear legal obligation for States, including any concerned organs and agents such as prosecutors and judicial authorities, to at the very least take serious account of and accord substantial weight to all elements of the Committee's views in rendering their own decisions and taking their own actions. As two experts have put it, States, "violate their obligations under individual complaints procedures when they do not ensure that their national courts can pay heed to the outcome of these procedures in possible subsequent domestic proceedings."¹¹¹ They add that "[b]lanket refusals to implement particular Views, without considering them or attaching any weight to them, sit uneasily with the obligations flowing from or implied by the relevant conventions and protocols."¹¹²

84. Thus, a State party, which has voluntarily assumed a legal obligation to allow for complaints concerning ICCPR rights to be assessed by the Committee and has thereby recognized the interpretative function of the Committee, is not in a position to either ignore or provide an alternative assessment to that determined by the Committee, certainly without overwhelming and clear substantiation, in a particular case. In this regard, an authoritative international scholar has characterized the decision of the UN HRC as:

"... the end result of a quasi-judicial adversarial international body established and elected by the States parties for the purpose of interpreting the provisions...and monitoring compliance with them. This procedure would be undermined if a State did not accept the Committee's decision and replaced it with 'its own interpretation' after having 'voluntarily subject[ed] itself to such a procedure'."¹¹³

85. The HRC in the Askarov case reaffirmed the nature of Kyrgyzstan's obligations which it undertook by becoming a party to the ICCPR and the Optional Protocol. In particular, it

¹¹⁰ HRC, General Comment No. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, CCPR/C/GC/33.

¹¹¹ Rosanne van Alebeek and André Nollkaemper, *The legal status of decisions by human rights treaty bodies in national law*, In Helen Keller and Geir Ulfstein (Ed.), *UN Human Rights Treaty Bodies: law and legitimacy*, Cambridge University Press, United Kingdom, 2012, p 359.

¹¹² *Ibid*, pp. 386-387.

¹¹³ Christian Tomuschat, "Comment on the Massera case (Massera et al. v Uruguay, No.5/1977 under the Human Rights Committee)", in *Europäische GrundrechteZeitschrift (EuGRZ)*, Vol. 6, 1979, pp. 501-502.

"has recognized the competence of the Committee to determine whether there has been a violation of the Covenant" and that it "has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred."¹¹⁴

86. The Supreme Court of the Kyrgyz Republic seemed itself to acknowledge the authority of the HRC Views. Following the decision of the HRC in the Askarov case, the retrial was ordered by the Supreme Court: "in the light of new circumstances and in accordance with the decision of the UN Human Rights Committee of 21 April 2016 and in view of the application of lawyer Tokakunov N."¹¹⁵
87. The retrial took place between October 2016-January 2017, before the amendments to the Constitution concerning the consequences of decisions of international human rights bodies, had come into force. As mentioned above, the Code of Criminal Procedure in force at the time of the retrial provided for findings of international bodies of violation of human rights to be a ground for retrial.¹¹⁶ Indeed, the Supreme Court, giving due weight to the decision of the HRC, ordered a rehearing of the case based on the HRC decision and therefore decided "[t]o repeal the verdict of the Judicial Board on criminal cases and cases on administrative offenses of the Jalal-Abad regional court as of 10 November 2010 and the decision of the Supreme Court of the Kyrgyz Republic of 20 December 2011"¹¹⁷ and "[t]o refer the case to Chuy regional court for a new court review".¹¹⁸
88. At the Chuy Regional Court hearings, as demonstrated in paras 9, 34, 36 above the defence from the first day tried to raise the decision of the HRC to support their arguments concerning in particular the use of torture as established by the HRC. However, it appears that the only instance in which the Views of the Committee were taken due account of was in the initial decision of the Supreme Court, which ordered a reconsideration of the case. In no instance did the Chuy Court give the finding of the UN HRC the same weight as did the Supreme Court of the Kyrgyz Republic in ordering the re-trial. Nor did it make serious attempts to consider its findings or apply them to scrutinize the findings or procedure of the initial investigation or trial.
89. To the contrary, the Chuy Court continued to refer to the evidence obtained at the pretrial investigation stage of the original proceedings, even though the UN HRC findings unequivocally found that Askarov's rights under the Covenant, including rights under Article 7 of the ICCPR, which prohibits torture and cruel, inhuman or degrading treatment or punishment, the right to liberty under Article 9 of the Covenant as well as Article 14(3)(b) (the right to have adequate time and facilities for the preparation of defence) were violated in the course of that investigation. Furthermore, references to the pretrial testimony of one of Askarov's co-defendants at the original trial, Minura Mamadaliyeva,¹¹⁹ was problematic, since she had earlier complained of coercion that may have amounted to torture or other ill-treatment. At least in the absence of a thorough and impartial and effective investigation into these allegations, her original testimony should have been dismissed.
90. In addition, the Court in its judgment relied on the casefile from the first trial and the investigation conducted prior to that trial. This was despite the allegation by one witness and co-defendant who gave evidence at the first trial that she had been forced to give

¹¹⁴ HRC Views, *Askarov*, para. 11.

¹¹⁵ Decision of the Supreme Court of the Kyrgyz Republic, No. 4-0743/16УД of 12 June 2016.

¹¹⁶ CCP, Article 384(2-1) ("The following shall be regarded as new circumstances:

[...]

3) finding by an international body, in accordance with international treaties to which the Kyrgyz Republic is a State Party, of a violation of human rights and freedoms in the course of the review of the criminal case in question by the court of the Kyrgyz Republic.").

¹¹⁷ Decision of the Supreme Court of the Kyrgyz Republic, No. 4-0743/16УД of 12 June 2016.

¹¹⁸ Ibid.

¹¹⁹ See, ICJ Askarov report: "Mr Askarov reports that all eight defendants, including one woman, Minura 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 blow", para. 93; also paras 8, 124, 260.

testimony as a result of ill-treatment (see para. 73 above). Despite these allegations, as well as availability of independent reports such as that of the ICJ, the Chuy Court concluded that the allegations by the co-defendants “about the use of torture by the police were an attempt to save themselves and A. Askarov from criminal liability”. The judgment does not explain the reasons for these conclusions by the Court.¹²⁰

91. Finally, in its judgment the Court concluded that “A. Askarov confused international organizations to achieve his goal”. Bearing in mind the treaty obligations of Kyrgyzstan, as well as the decision of the Supreme Court to order a re-trial based on the Views of the HRC, this language, and the suggestion that the findings of the HRC are to be discounted, severely taints the judgment of the court. It fails to comply with the obligation of the Kyrgyz Republic to implement its international treaty obligations in good faith.
92. The ICJ regrets that unlike the Supreme Court, the Chuy Court did not take any meaningful steps to give due regard of the Views of the HRC, among other things, in order to remedy the violations of Askarov’s rights under the ICCPR, including an investigation of torture or ensuring a fair trial (see below). Rather, The ICJ concludes, **the Chuy Regional Court failed to give due regard to the Views of the UN HRC and so engages the responsibility of Kyrgyzstan for its failure to meet its international obligations under the ICCPR.**

c. Obligation to investigate the torture and ill-treatment

93. In its views, the UN HRC concluded that Askarov’s rights under Article 7 of the ICCPR were violated as due weight had to be given to his allegations of torture and other ill-treatment. The HRC concluded that an effective remedy must be provided (see paras. 26 and 29 above).
94. The prohibition of torture and cruel, inhuman or degrading treatment or punishment (ill-treatment) is absolute under the ICCPR, where it is not subject to derogation even in times of public emergency (article 4), the Convention against Torture (CAT), and under general international law.¹²¹ Where there are allegations of torture or other ill-treatment a State is under an obligation to provide an effective remedy and reparation under article 3(3) of the ICCPR and article 14 of the CAT, and as reflected in the Committee’s Views in the case of Askarov.¹²² Under the ICCPR, allegations of torture or other cruel, inhuman or degrading treatment prohibited by Article 7 ICCPR must be subject to a prompt, thorough and effective remedy by an independent and impartial body.¹²³ The purpose of such an investigation is both to ensure accountability for those responsible, as well as a remedy and reparation for the victims. Failure to conduct such an investigation has been held to lead to a violation of Article 7 ICCPR, in particular together with the right to an effective remedy under Article 2.3.¹²⁴ The HRC in multiple General Comments and individual communications makes clear that complaints against ill-treatment contrary to Article 7 “must be investigated promptly and impartially by competent authorities so as to make the

¹²⁰ See para. 73 above.

¹²¹ Case Concerning Ahmadou Diallo (Republic of Guinea v Democratic Republic of Congo), ICJ (Judgment of 10 November 2010) §87.

¹²² HRC Views, *Askarov*, op. cit., paras. 10 and 11.

¹²³ HRC, General Comment No. 20, *Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, para.14; HRC General Comment No. 31, op. cit., para.15; *Zohra Boudehane v. Algeria*, Human Rights Committee, Communication No. 1924/2010, U.N. Doc. CCPR/C/111/D/1924/2010, 24 July 2014, para. 8.12.; *Mamatkarim Ernazarov v. Kyrgyzstan*, Human Rights Committee, Communication No. 2054/2011, U.N. Doc. CCPR/C/113/D/2054/2011,, 11 March 2011, para.9.6.

See more, UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85., Article 12 (Hereinafter: CAT), The Kyrgyz Republic ratified the Convention against Torture in 1997; *Taoufik Elaiba v Tunisia*, Committee against Torture, Communication No. 55/2013, U.N. Doc. CAT/C/57/D/551/2013, 6 May 2016, para.7.6; *Déogratias Niyonzima v Burundi*, Committee against Torture, Communication No. 514/2012, U.N. Doc. CAT/C/53/D514/2012, 21 November 2014, para.8.4

¹²⁴ Among many other sources see: HRC Views, *Askarov*, para. 8.3.

remedy effective".¹²⁵ In addition, "A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant." (para.15) Similarly, a failure to carry out an investigation and bring to justice perpetrators of torture or ill treatment could in and of itself give rise to a separate breach of the Covenant (para.18).

95. These obligations are also reflected under the Convention Against Torture (UN CAT), which Kyrgyzstan acceded to in 1997. Article 12 of the UN CAT obliges "[e]ach State Party [to]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." Article 14 of the UN CAT obliges States parties to: "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation".¹²⁶ As the CAT Committee explained in its General Comment 3, in regard to States' procedural obligations that they must "... enact legislation and establish complaints mechanisms, investigation bodies and institutions, including independent judicial bodies, capable of determining the right to and awarding redress for a victim of torture and ill-treatment, and ensure that such mechanisms and bodies are effective and accessible to all victims."¹²⁷ The obligation of the State to investigate arises even without a formal complaint; an allegation of torture or other reasonable grounds to believe that torture has taken place are sufficient for the obligation to emerge.¹²⁸ 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."¹²⁹
96. Under the ICCPR and CAT, as well as other sources of international human rights law, an investigation of allegations of torture or other ill-treatment must meet certain essential criteria: it must be impartial; it must be prompt; it must be thorough and effective, carried out by appropriately qualified individuals who "seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person who might have been involved therein."¹³⁰ Where allegations concern torture or ill-treatment in custody, it is incumbent on the State authorities to produce evidence refuting these allegations, as the State is responsible for the security of any person under detention.¹³¹
97. The UN HRC in its General Comment 31 stressed the indispensable role of the judiciary in guaranteeing the enjoyment of human rights under the ICCPR. As the Committee puts it, the rights guaranteed "can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law."¹³² The UN Human Rights Council has urged States to respect and ensure

¹²⁵ HRC, General Comment No. 20, op. cit., para. 14; *Kalamiotis v Greece*, Human Rights Committee, U.N. Doc. CCPR/C/93/D/1486/2006, 5 August 2008, para. 7.2.

¹²⁶ CAT, Article 14(2).

¹²⁷ CAT, General Comment No. 3, Implementation of article 14 by States parties, CAT/C/GC/3 (2012), para. 5.

¹²⁸ CAT, General Comment No. 3, op. cit., para. 27; Concluding Observations: Peru, UN Doc. A/56/44 (2001) paras. 169. and 172.; See e.g., *Bouabdallah Ltaief v Tunisia*, Committee against Torture, Communication No. 189/2001, U.N. Doc. CAT/C/31/D/189/2001, 14 November 2003, paras. 10.6-10.8; *Blanco Abad v Spain*, Committee against Torture, Communication No. 59/1996, U.N. Doc. CAT/C/20/D/59/1996, 14 May 1998, paras. 8.2-8.8.

¹²⁹ Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Recommended by General Assembly resolution 55/89 of 4 December 2000, para. 2.

¹³⁰ *Hajrizi Dzemajl et al v Serbia and Montenegro*, Committee against Torture, Communication No. 161/2000, U.N. Doc. CAT/C/29/D/161/2000, 21 November 2002, para. 9.4.

¹³¹ *Womah Mukong v. Cameroon*, Human Rights Committee, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991, 10 August 1994, para. 9.1; *Ribitsch v Austria*, ECtHR, Application No.18896/91, Judgment of 4 December 1995, paras. 108-111.

¹³² HRC, General comment No. 31, op. cit, para. 15.

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.¹³³

98. The right to an effective remedy for gross human rights violations requires a judicial remedy, as affirmed by the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law, adopted by consensus of all States by the UN General Assembly in resolution 60/147 of 16 December 2005. Principle 12 affirms “[a] victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law.” The Human Rights Committee has affirmed that while non-judicial remedies might in some instances be appropriate for certain ICCPR violations, in respect of serious human rights violations such remedies are not adequate to discharge the obligation to provide an effective remedy.¹³⁴ Under the Convention against Torture, the Committee against Torture has made clear in respect of CAT violations that “[j]udicial remedies must always be available to victims, irrespective of what other remedies may be available.”¹³⁵
99. Where, as in the present case, a complaint about torture has been made during court proceedings, it is necessary that it is “elucidated by means of independent proceedings”, i.e. that a specific enquiry is initiated, which, in turn, depends on the national proceedings and the circumstances of the case.¹³⁶ The UN HRC has repeatedly found violations of Article 7 ICCPR read together with Article 2.3 ICCPR in cases where allegations of torture were raised in legal proceedings but the judge took no steps to inquire into them or to order an investigation.¹³⁷ This obligation is reinforced by the obligation under the CAT to “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”.¹³⁸ There is also an obligation to “ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.”¹³⁹
100. The investigation into allegations of article 7 violations must be effective and not merely formal or cursory.¹⁴⁰ 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 allegations of ill-treatment.¹⁴¹ Investigating, prosecuting and remedying torture and ill-treatment of any person is an absolute obligation irrespective of the alleged victims situation in criminal proceedings (the particular question about information obtained through torture or ill-treatment for use as evidence is discussed below). Investigations should be carried out with diligence,¹⁴² that is, using all legal means available and oriented toward determining the truth. States have the

¹³³ UN Human Rights Council, Resolution 13/19, Torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers, A/HRC/RES/13/19 (2010), para. 3.

¹³⁴ *Bautista de Arellana v. Colombia*, Human Rights Committee, Communication No. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993, 27 October 1995, para. 8.2; *Jose Vicente and Amado Villafane Chaparro et al v. Colombia*, Human Rights Committee, Communication No. 612/1995, U.N. Doc. CCPR/C/60/D/612/1995, 29 July 1997, paras. 8.2 and 5.3.

¹³⁵ CAT General Comment 3, op. cit., para. 30.

¹³⁶ *Henri Unai Parot v. Spain*, Committee Against Torture, Communication No. 6/1990, U.N. Doc. A/50/44 at 62 (1995), 2 May 1995, para. 10.6.

¹³⁷ *Zohra Boudehane v Algeria*, op. cit., paras. 4.4. and 8.5; *Ashirov v Kyrgyzstan*, Human Rights Committee, Communication No. 612/1995 2435/2014,, CCPR/C/120/D/2435/2014,, 28 July 2017, paras. 2.1. and 7.2; *Kipro v Tajikistan*, 26 May 2005, Human Rights Committee, Communication No. 1401/2005, CCPR/C/97/DR/1401/2005, paras. 2.4 and 6.2.; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CPT/Inf/E (2002) 1 - Rev. 2006, para. 45.

¹³⁸ CAT, op. cit., Article 12.

¹³⁹ *Ibid*, Article 13.

¹⁴⁰ *Assenov and others v. Bulgaria*, ECtHR, Judgment No. 90/1997/874/1086, Judgment of 28 October 1998, paras. 103-104.

¹⁴¹ *Andrei Khoroshenko v Russian Federation*, Human Rights Committee, Communication No. 1304/2004, U.N. Doc. CCPR/C/101/D/1304/2004, 29 April 2011, para. 9.5.

¹⁴² HRC, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/25/60 (2014), para. 33.

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, whether they have been responsible for 'encouraging, ordering, tolerating or perpetrating prohibited acts.¹⁴³

101. The burden of proof of the use of torture cannot rest on the accused. In *Singarasa v Sri Lanka*, the HRC elaborated on this point as follows:

"The Committee notes in this respect that the willingness of the courts at all stages to dismiss the complaints of torture and ill treatment on the basis of the inconclusiveness of the medical certificate (especially one obtained over a year after the interrogation and ensuing confession) suggests that [the alleged very low] threshold [of proof of torture] was not complied with. Further, insofar as the courts were prepared to infer that the author's allegations lacked credibility by virtue of his failing to complain of ill-treatment before its Magistrate, the Committee finds that inference to be manifestly unsustainable in the light of his expected return to police detention. Nor did this treatment of the complaint by its courts satisfactorily discharge the State party's obligation to investigate effectively complaints of violations of article 7".¹⁴⁴

Kyrgyzstan's Criminal Code expressly establishes torture as a criminal offense. In particular, Article 143 of the Criminal Code penalizes "[i]nfliction of physical or mental suffering on any person for the purpose of obtaining information or a confession." In addition, Article 11(3) of the Code of Criminal Procedure expressly prohibits violence or CIDT in respect of any participant in the proceedings.¹⁴⁵ Article 10(2) of the Code prohibits "threats, violence and other unlawful measures in the course of interrogations or else other investigative and judicial actions." Where there are grounds to believe that a crime occurred, Article 26(4) of the Code of Criminal Procedure, which categorizes torture as a public prosecution offense, makes prosecution mandatory.

102. Throughout the retrial Askarov and his lawyers made attempts, through a variety of procedural means, to draw the Court's attention to the fact that he had been subjected to torture and ill-treatment. For example, motions to inquire into allegations of torture that had not been addressed in the initial hearing were filed consistently on 11 October, 25 October, 1 November, 8 November (see relevant sections above). The Prosecutor's Office as a responsible authority in this regard should have initiated official proceedings in regard to the crime of torture, as required by international law and Kyrgyzstan's national Criminal Code, which categorizes torture as a public prosecution crime, making prosecution mandatory.

103. It is evident from the national law and international obligations of Kyrgyzstan that the Chuy Court was required to initiate formal proceedings to investigate the crime of torture, established by the UN HRC. However it eventually avoided initiation of proceedings to investigate torture by consistently "postponing" it only to arrive at a conclusion that no other evidence apart from Askarov's allegations existed.

104. The ICJ cannot but disagree with the Court's conclusion that "[t]he fact that A. Askarov was beaten and tortured by police officers and for this reason he turned to international human rights organizations is known only from the words of A. Askarov himself, his testimony is confirmed by nothing and no one". The HRC established that torture had taken place, but also decided that the State violated its positive obligation to investigate relevant allegations.¹⁴⁶ However, as the UN HRC has made clear, the burden of proof in establishing torture and ill-treatment does not rest with the individual applicant, since the individual and the State party do not always have equal access to relevant information about ill-treatment.¹⁴⁷ The European Court of Human Rights has well captured

¹⁴³ *Andrei Khoroshenko v Russian Federation*, op. cit., para. 9.5;

¹⁴⁴ *Singarasa v Sri Lanka*, Human Rights Committee, Communication No. 1033/2001,,U.N. Doc. CCPR/C/81/D/1033/2001, 19 June 2004,,para. 7.4;

¹⁴⁵ CCP, Article 11(3) ("None of the participants in the case may be subjected to violence or other cruel or humiliating treatment.").

¹⁴⁶ CAT, op. cit., Art. 12 ("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.").

¹⁴⁷ *Womah Mukong v. Cameroon*, op. cit., para. 9.2.

the rationale for this principle in their similar jurisprudence which, while not directly binding on Kyrgyzstan provides a useful explanation. In *Othman (Abu Qatada) v UK*, the Court held that the applicant should not be expected to establish more than a real risk that the evidence against him had been obtained by torture. It stressed 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 [....] in a criminal justice system which is complicit in the very practices which it exists to prevent, such a [high] standard of proof is wholly inappropriate.”¹⁴⁸

105. The ICJ recalls that the competence of the UN HRC to consider individual complaints under the Covenant is recognized by Kyrgyzstan by virtue of acceding to the Optional Protocol to the ICCPR as an international treaty of a legally binding nature.¹⁴⁹ Thus, the decision of the HRC, substantiated by the applicant’s submissions, can and must serve as credible evidence of torture that should be investigated by the Kyrgyzstan authorities, irrespective of whether those authorities consider that this evidence definitively establishes the use of torture. Furthermore, the ICJ conducted a thorough and comprehensive examination of the case. The report published as a result of this examination vividly demonstrated different violations and irregularities which took place during the investigation and the trial stages of the first case.¹⁵⁰ The Views of the HRC as well as other evidence at the disposal of the authorities, are therefore more than sufficient to constitute substantial evidence in an effective, thorough and impartial investigation on the part of the authorities themselves.

106. The multiple attempts of the defence to draw the Court’s attention to the obligation to initiate the proceedings presented sufficient opportunities for the necessary formal steps. The reasons for the Court’s failure to initiate the proceedings are unclear and in any event this lack of action is not in line with Kyrgyzstan’s obligations under the ICCPR to conduct an effective investigation into allegations of torture and ill-treatment pursuant to the duty to investigate. The Court failed to remedy the violation of human rights as required by Article 2.3 of the ICCPR, and this violation will remain unremedied until an investigation into the facts of torture as established by the HRC has been carried out. **Therefore, the Kyrgyz Republic remains under an obligation to conduct an effective investigation, with due accord being given to findings of the UN HRC that torture took place in the case of Askarov. The investigation must meet the required standards both under national Kyrgyzstan law and international human rights law. In particular, it must be prompt, thorough, effective, independent and impartial and capable of bringing to justice those responsible for the crime of torture, and should take the findings of the HRC into account.**

d. Use as evidence of information obtained in violation of human rights

107. The use as evidence of information obtained with the use of torture or other cruel, inhuman or degrading treatment is prohibited under international human rights law as part of a broader prohibition of such treatment.¹⁵¹ Kyrgyzstan is bound by the clear injunction

¹⁴⁸ *Othman (Abu Qatada) v UK*, ECtHR, Application No. 8139/09, Judgment of 17 June 2012, para. 276.

¹⁴⁹ The Kyrgyz Republic acceded to the Option Protocol on 7 October 1994: available at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=93&Lang=EN.

¹⁵⁰ ICJ Askarov Report, *op cit*.

¹⁵¹ HRC, General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32,

of article 15 that: “[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made”. It is also an essential component of discharging the obligation to ensure fair trials under article 14 of the ICCPR. General Comment 32 of the UN Human Rights Committee makes clear: “[d]omestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence, except if such material is used as evidence that torture or other treatment prohibited by this provision occurred, and that in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will.”¹⁵² Use of such torture or other coercion to procure confession evidence violates the right to fair trial under Article 14.3.g ICCPR (the right not to be compelled to testify against oneself or to confess guilt),¹⁵³ which applies even where information is not decisive for the outcome of the case.¹⁵⁴ This includes statements made by third parties, including witnesses.¹⁵⁵

108. It is the responsibility of the prosecution to ensure and demonstrate that the evidence against an accused person has been obtained by lawful means.¹⁵⁶ According to the UN Guidelines on the Role of Prosecutors: “[w]hen prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice”.¹⁵⁷

109. Furthermore, the right to fair trial, and in particular the right under Article 14.3.g not to be compelled to testify against oneself or to confess guilt, means that not only statements but any other evidence cannot be obtained through torture or ill-treatment. This is affirmed by General Comment 32 states that “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”.¹⁵⁸

110. Exclusion of evidence obtained through torture or other –ill treatment has a broader importance and value, as the ECtHR put it:

“More fundamentally, no legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself.”¹⁵⁹

paras. 6, 41, 60; *Judgment of 26 November 2010*, Inter-American Court of Human Rights, Cabrera-García and Montiel Flores v Mexico, para. 165; *Gäfgen v Germany*, ECtHR, Application No. 22978/05, Judgement of 1 of June 2010, paras. 165-168.

¹⁵² HRC, General Comment No. 32, op. cit., para. 41.

¹⁵³ *Ibid*, para.60

¹⁵⁴ *Harutyunyan v Armenia*, ECtHR, Application No. 36549/03, Judgment of 28 June 2007, paras. 63-66;

Levinta v Moldova, ECtHR, Application No. 17332/03, Judgment of 16 of December ,2008, para.100;

Stanimirovic v Serbia, ECtHR, Application No. 26088/06, Judgment of 18 of October, 2011, paras. 52. Please check what para do you refer to? There is no 694.

¹⁵⁵ See, HRC, General Comment No. 32, op. cit., para. 6; Cabrera-García and Montiel Flores v Mexico, op. cit., paras. 166-167.

¹⁵⁶ *Singarasa v Sri Lanka*, op. cit., para. 7.4 ; General Comment No. 32, op. cit., paras. 33 and 41.; *Idieva v Tajikistan*, Human Rights Committee, Communication No. 1276/2004, U.N. Doc. CCPR/C/95/D/1276/2004, 23 April 2009, paras. 9.3 and 9.6.

¹⁵⁷ Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, para. 16.

¹⁵⁸ HRC, General Comment 32 on the Right to Equality before Courts and Tribunals and to a Fair Trial, para.41; *Jalloh v Germany*, ECtHR [GC], Application no.54810/00, Judgment of 11 July 2006.

¹⁵⁹ *Othman v United Kingdom*, op. cit., para..264.

111. According to Kyrgyzstan's domestic law, information obtained in violation of the provisions of the Code of Criminal Procedure is inadmissible as evidence in court.¹⁶⁰ However, the Code does not include an express requirement to exclude evidence tainted by torture or ill-treatment. It should be noted that Article 82(4) of the new Code of Criminal Procedure, which will come into effect in 2019, already expressly requires the exclusion of testimony obtained through torture, as well as testimony obtained in the absence of the defense counsel, unless the defendant refuses to be represented by a counsel. Further, in the event the defense moves to have inadmissible evidence suppressed on the grounds of its having been obtained in violation of criminal procedure requirements, Article 276(4) of the new Code of Criminal Procedure places the burden of proof of admissibility on the prosecution.¹⁶¹
112. In the present case, the Court used the investigation results which were collected as a result of the initial investigation, which tainted the new proceedings and rendered them effectively worthless. In its report on the first trial of Askarov, having carefully examined the circumstances of the case, in regard to the investigation the ICJ concluded as follows:
- "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 ICJ arrived at the conclusion that
- "the many violations ..., 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."
113. In connection with the issue of evidence admissibility review, it is key to note that since, as noted above, Kyrgyzstan's CCP expressly and unequivocally requires courts to exclude as evidence any information obtained with the use of coercion without exception, this would, at a minimum, imply that torture allegations would be properly investigated and assessed for credibility, based on which the final decision on whether the evidence should be admitted or excluded would be made.
114. The general reluctance of the Court to look into the allegations of torture (see 4.1 Obligation to investigate allegations of torture), the procrastination by the judge and the continued evasion of the issue effectively rendered all information contained in the investigation materials admissible by the Court by default, regardless of it being obtained with the use of torture or ill-treatment. Throughout the trial not a single ruling was issued on the admissibility of the evidence. Despite the defense consistently raising the issue of unlawful detention and torture suffered by the defendant, and despite allegations of torture of a key witness and co-defendant in the first trial, Minura Mamadaliyeva, (see above para. 73) no information obtained as a result of the initial investigation was excluded as evidence – let alone a new independent and impartial investigation initiated as required by international law.
115. Since allegations of torture and CIDT were voiced not only by Askarov but by his co-defendants as well,¹⁶² the entire body of testimony was tainted by torture and other ill-treatment as well as violations of procedure, as established by the HRC and documented, *inter alia*, in the ICJ report on the trial. In these circumstances, in order to remedy the violations of fair trial rights, and provide effective remedies for other serious human rights violations, which had taken place during the initial proceedings, it was essential that the case be reinvestigated and that the multiple human rights violations of the previous investigation did not taint any of the proceedings which followed the UN HRC Views. **The ICJ concludes that the Court failed to exclude information obtained in violation of**

¹⁶⁰ Code of Criminal Procedure, Article 81(3) ("Information obtained with violation of the requirements of this Code is inadmissible as evidence, does not have evidentiary value and cannot be used in the decision in the case, nor used to prove any circumstances that Article 82 of this Code provides for.").

¹⁶¹ New CCP, Article 276(4) ("In considering a defense motion to dismiss evidence on the grounds of its having been obtained with violation of the requirements of this Code, the prosecution shall bear the burden of disproving the arguments of the defense.").

¹⁶² See Supreme Court Judgment No 4 – 0070/11.

Article 7 of the ICCPR and therefore the retrial did not meet the standard of fairness required by Article 14 of the ICCPR, and failed to comply with the prohibition on the use as evidence of information obtained by torture, under Article 15 CAT and Article 7 and 14 of ICCPR.

e. The right to a fair trial and the presumption of innocence

116. Article 14(1) ICCPR stipulates that “all persons shall be equal before the courts and tribunals” and that “in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. The Human Rights Committee explained 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,¹⁶³ or is exposed to other manifestations of hostility with similar effects.”¹⁶³

This guarantee is also reflected in the UN Basic Principles on the Independence of the Judiciary (1985), which affirms that judges must be 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 whatever reason.¹⁶⁴ 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 often not used because of fear of reprisals.¹⁶⁵

In *Gridin v Russia*, the HRC found a violation of Article 14(1) ICCPR where the Russian Supreme Court on appeal failed to address “the failure by the trial court to control the hostile atmosphere and pressure created by the public in the court room, which made it impossible for defence counsel to properly cross-examine the witnesses and present his defence”.¹⁶⁶

117. Also relevant to the consideration of the adequacy and fairness of the retrial is the right of the defence to call and examine witnesses under the same conditions as the prosecution, guaranteed by Article 14 (3)(e) ICCPR. This right is closely linked to, and a necessary condition for, protection of equality of arms and of the right to an effective defence.¹⁶⁷ [The right to call witnesses is not unlimited, but defendants have “a right to have witnesses admitted that are relevant to the defence, and to be given a proper opportunity to question and challenge witnesses against them at any stage in the proceedings”.¹⁶⁸

¹⁶³ General Comment 32, para. 25.

¹⁶⁴ 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.

¹⁶⁵ 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.

¹⁶⁶ *Gridin v Russia*, HRC, UN Doc. CCPR/C/69/D/770/1997 (2000), para. 8.2.

¹⁶⁷ HRC GC 32, article 14, para.39

¹⁶⁸ *Ibid.*, See also: *Fuenzalida v Ecuador*, HRC, UN Doc. CCPR/C/57/D/480/1991 (1996), para. 9.5.

118. A cornerstone of the right to a fair trial and a rule of law principle is the presumption of innocence, which is of particular relevance to an assessment of the retrial's compliance with the right to a fair trial. ICCPR Article 14(2) states that "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."¹⁶⁹ This means, among other things, that the court must not start with the preconceived idea that the accused has committed the offence with which he or she is charged.¹⁷⁰ As the HRC stated in its General Comment 32:

"The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle."¹⁷¹

The standard of beyond reasonable doubt "requires a finder of fact to be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused".¹⁷²

119. The presumption of innocence requires that whenever there are facts or circumstances giving rise to doubt about evidence, they should be interpreted in favour of the accused.¹⁷³ Speculation, even when it is not directly related to the establishment of the guilt but which contributes to the impression that the court has a preconceived view of the applicant's guilt, violates the principle of the presumption of innocence.¹⁷⁴ The presumption of innocence does not cease to apply solely because the first-instance proceedings resulted in a defendant's conviction when the proceedings are continuing on appeal.¹⁷⁵

120. Furthermore, 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." Article 15(1) of the Code of Criminal Procedure, which provides that "the defendant shall be deemed innocent of a crime recognized as guilty by a valid convicting judgment of a court,"¹⁷⁶ establishes the presumption of innocence as a fundamental principle of criminal procedure in Kyrgyzstan. The Code expressly provides for a prohibition against self-incrimination, places the burden of proof on the prosecution,¹⁷⁷ provides for the benefit of doubt,¹⁷⁸ and establishes a standard of proof roughly equivalent to that of beyond reasonable doubt by prohibiting "convicting judgment based on assumption."¹⁷⁹

121. As described in chapter II(b), the HRC found that the original trial of Askarov had violated the requirements of fairness under Article 14 ICCPR in numerous respects.

- The trial had been characterized by a number of serious irregularities, including disorder and violence caused by members of the public attending the trial. Such

¹⁶⁹ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Art. 14 (2).

¹⁷⁰ *Telfner v Austria*, ECtHR, Application No. 33501/96, Judgment of 20 March 2001, paras. 15. and 19-20.

¹⁷¹ HRC, General Comment No. 32, op. cit., para. 30.

¹⁷² *Appeal Chamber Judgment of 8 October 2008*, International Criminal Tribunal for the Former Yugoslavia, Case of the Prosecutor v Milan Martić, No. IT-95-11-A, paras. 55. and 61.

¹⁷³ *Barbera, Messegue and Jabardo v Spain*, ECtHR, Application No. 10590/83, Judgment of 13 June 1994, para. 77.

¹⁷⁴ *Telfner v Austria*, ECtHR, op. cit., para. 19.

¹⁷⁵ *Konstas v. Greece*, ECtHR, Application No. 53466/07, Judgment of 24 May 2011, para. 36.

¹⁷⁶ CCP, Article 15(1).

¹⁷⁷ *Ibid*, 15(2) ("The suspect and defendant shall be compelled to prove their innocence.").

¹⁷⁸ *Ibid*, Article 15(3) ("Any doubt concerning the proof of guilt that cannot be resolved pursuant to legal procedure as set forth by this Code, shall be interpreted to the defendant's benefit. Any doubt in respect of the application of the law shall also be resolved in his/her benefit.").

¹⁷⁹ *Ibid*, Article 315(1) ("A convicting judgment may only be issued in the event that the defendant's guilt has been established in the proceedings based on the totality of evidence, and shall not be based on assumption.").

violation was documented in the ICJ report¹⁸⁰ and affirmed in the decision of the HRC.¹⁸¹

- On several occasions relatives of the deceased police officer physically had attacked Askarov's lawyer on the premises of the police station and at the prosecutor's office, and the police and local prosecutors had failed to intervene, creating a general sense of fear that was incompatible with the proper execution of a defence lawyer's functions.¹⁸²
- Askarov's right to have adequate time and facilities for the preparation of his defence had been violated. The police and the prosecutor had refused to allow him to meet with his lawyer in private and had withheld information necessary to prepare for his defence.
- There was unrefuted evidence that on the first day of the trial, Askarov's lawyer was not present at the hearings because he had not been notified in time. In the absence of his lawyer, Askarov had not been able to cross-examine 16 prosecution witnesses.
- in breach of the requirement of equality of arms, Askarov had not been permitted to question any witnesses before the Supreme Court.¹⁸³

These violations of Article 14 were such that the HRC called for the immediate release of Askarov and the quashing of his conviction.¹⁸⁴ Should a new trial be ordered, the HRC observed that it had to be conducted in accordance with the principles of fair hearings, the presumption of innocence and other procedural safeguards.

122. However, the retrial of Askarov did not comply with these requirements. As is apparent from the conduct of the re-trial proceedings, as well as from the final judgment of the Chuy Regional Court, the Court relied heavily on the earlier proceedings showing a strong tendency to confirm the earlier findings without further examination. Much of the evidence relied on by the Court was that given in the earlier proceedings, without the recalling of the witnesses concerned. It also included evidence that had been given in the violent and hostile environment of the original trial, to which the HRC had drawn attention, as well as evidence that not been tested by cross-examination because of the absence of the applicant's counsel on the first day of the original trial. As is noted above, the Court accepted that evidence without questioning clear inconsistencies in the oral testimony of the witness and without taking into account gaps in the documentary evidence presented by prosecution witnesses.

123. Not only did the Court rely on the materials of the case which was compiled based on the investigation tainted by torture and other human rights violations, it did not go at all beyond the boundaries set by the initial, tainted investigation and trial, to consider other evidence. The Court did not invite any new witnesses in addition to those heard during the first trial and Askarov was not able to call and examine witnesses on an equal footing with the prosecution. In light of this, a fair re-trial would have required the hearing of witnesses additional to those heard during the first trial, in addition to the re-examination of witnesses from that trial. No new witness evidence was heard during the retrial, however. Furthermore, as described in chapter III, para. 61 above, the Court refused to grant a defence motion to allow two potentially significant witnesses, Askarov's wife and brother to be called as witnesses. Seven police officers, who were eye-witnesses of the events leading to the death of the police officer, were not called as witnesses, although they were granted victim status in the case.¹⁸⁵

124. On a number of occasions, documented in the present report, it failed to treat inconsistencies and conjectures in oral testimony of witnesses as grounds for doubt, or to consider gaps in documentary evidence presented by prosecution witnesses.¹⁸⁶ Moreover, as follows from the conduct of the proceedings as well as the final judgment, the Court on many occasions showed a tendency to confirm rather than to question the findings of the initial trial - in light of the findings of the UNHRC, - relying on the same documents and testimony in the evidentiary record.

¹⁸⁰ ICJ Askarov report, op cit, paras. 245-251.

¹⁸¹ Views of the HRC, op cit, para. 8.6.

¹⁸² ICJ Askarov report, op cit, paras. 246-248.

¹⁸³ Views of the HRC, op cit, para.8.6.

¹⁸⁴ Views of the HRC, op cit, para.8.6.

¹⁸⁵ See above, para.39.

¹⁸⁶ See above, paras 56- 58.

125. Concerns in regard to the fairness and thoroughness of the retrial, and its compliance with the right to a fair trial, including the presumption of innocence and the right to call and examine witnesses, are confirmed by an analysis of the judgment of the Chuy Regional Court. As noted above (para.40) the judgment contains obscure reasoning and does not show evidence of a thorough reconsideration of the case, that takes fully into account the violations of Article 14 ICCPR identified by the HRC in regard to the first trial. The judgment makes reference to evidence obtained at the pre-trial investigation for the first trial, as well as evidence heard at the retrial.
126. Furthermore, the judgment of the Court arrived at the patently unfounded conclusion that in alleging that he had been tortured, Askarov misled or confused UN HRC, an independent UN body whose competence to consider individual complaints Kyrgyzstan has recognized (see above). In arriving at this conclusion, the Court explicitly dismissed and disregarded the findings of the HRC. This finding, without any clear factual basis, raises concerns that the Court failed to re-consider the evidence in the case in light of the presumption of innocence, and did not interpret the doubts raised about the validity of such evidence in favour of the accused. To the contrary, the Court appears to have proceeded on the assumption that certain findings of the HRC that cast doubt on the original conviction were in error.
127. As is further noted above, the Chuy Regional Court repeatedly postponed consideration of the Askarov's claims of torture and ill-treatment, with the consequence that these claims were never examined at the re-trial. Nor did the Court examine the complaint of his co-defendant Minura Mamadalieva that she had been coerced into testifying against Askarov in the pre-trial investigation. Nevertheless, the Court rejected the claims of ill-treatment and coercion by the police on the grounds that they were not confirmed, since neither defendant had at the time filed complaints with the relevant authorities. In the case of Askarov himself, the Court, in finding that his testimony had been confirmed by nothing and by no one, not only ignored the medical evidence of ill-treatment but dismissed the clear findings of the HRC that Askarov had been the victim of torture, on the ground that the Committee had been confused and misled. This conclusion, reached without any foundation, of itself casts serious doubt on the fairness of the retrial proceedings and on the willingness of the Regional Court to reexamine the case against Askarov consistently with the requirements of Article 14, which were found by the HRC to have been violated.
128. **In the context of the present case, the requirements of a fair trial required that the re-trial of Askarov should be conducted disregarding the previous conviction of Askarov which the HRC had held should be quashed. It required also that fairness of the retrial should be untainted by evidence already found to have violated the requirements of a fair trial and that a full opportunity be given to the defendant to prepare his defence, to cross examine witnesses against him and to call his own witnesses. This conclusion and the failure to conduct new investigations, hear new witnesses or question elements on which the initial conviction was based, that have been thrown into question by the decision of the HRC, lead the ICJ to conclude that the retrial of Askarov did not respect the presumption of innocence or comply with the requirements of a fair trial sufficient to remedy the findings by the HRC of violations of Askarov's rights under Article 14 ICCPR. The re-trial was inadequate to provide a thorough and fair reconsideration of the case in accordance with the right to a fair trial, sufficient to remedy the multiple findings of violations of fair trial rights by the UN Human Rights Committee.**

V. CONCLUSIONS AND RECOMMENDATIONS:

129. Based on the analysis of the facts and international law and standards presented above the ICJ concludes that in reconsidering the case of Askarov following the UN HRC decision:

- the Chuy Regional Court failed to give due regard to the Views of the UN HRC and so engages the responsibility of Kyrgyzstan for its failure to meet its international obligations under the ICCPR.
- the Kyrgyz Republic remains under an obligation to conduct an effective investigation, with due accord being given to findings of the UN HRC that torture took place in the case of Askarov. The investigation must meet the required standards both under national Kyrgyzstan law and international human rights law. In particular, it must be prompt, thorough, effective, independent and impartial and capable of bringing to justice those responsible for the crime of torture, and should take the findings of the HRC into account.
- The ICJ concludes that the Court failed to exclude information obtained in violation of Article 7 of the ICCPR and therefore the retrial did not meet the standard of fairness required by Article 14 of the ICCPR, and failed to comply with the prohibition on the use as evidence of information obtained by torture, under Article 15 CAT and Article 7 and 14 of ICCPR.
- In the context of the present case, the requirements of a fair trial required that the re-trial of Askarov should be conducted disregarding the previous conviction of Askarov which the HRC had held should be quashed. It required also that fairness of the retrial should be untainted by evidence already found to have violated the requirements of a fair trial and that a full opportunity be given to the defendant to prepare his defence, to cross examine witnesses against him and to call his own witnesses. This conclusion and the failure to conduct new investigations, hear new witnesses or question elements on which the initial conviction was based, that have been thrown into question by the decision of the HRC, lead the ICJ to conclude that the retrial of Askarov did not respect the presumption of innocence or comply with the requirements of a fair trial sufficient to remedy the findings by the HRC of violations of Askarov's rights under Article 14 ICCPR. The re-trial was inadequate to provide a thorough and fair reconsideration of the case in accordance with the right to a fair trial, sufficient to remedy the multiple findings of violations of fair trial rights by the UN Human Rights Committee.

130. The ICJ therefore urges the relevant authorities of the Kyrgyz Republic that:

1. Askarov's conviction be quashed and Askarov be released, as his conviction was based on a manifestly unfair trial and to comply with the decision of the UN HRC;
2. An investigation into the allegations violations of human rights including the use of torture and cruel, inhuman or degrading treatment be launched and those responsible for acts contrary to Article 7 of the ICCPR be brought to justice;
3. Askarov be accorded full reparation in respect of the allegations of torture and ill-treatment he suffered, in line with the HRC decision, including providing Askarov with adequate compensation.
4. The decision of the HRC should be implemented in full;
5. If any new re-trial is conducted in the case, it should fully respect the right to a fair trial, including the presumption of innocence, in light of the findings of the HRC in its Views in the Askarov case.

This legal opinion is signed on behalf of the ICJ by three of its Commissioners from the African, European and Latin American continents: Justice Azhar Cachalia, Judge of the Supreme Court of Appeal of South Africa; Justice Nicolas Bratza, former President of the European Court of Human Rights, Professor Juan Mendez, former UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.

Sir Nicolas Bratza

Justice Azhar Cachalia



Juan Mendez



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