

COMMUNICATION TO:

UNITED NATIONS
WORKING GROUP ON ARBITRARY DETENTION

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SERVER RUSTEMOVYCH MUSTAFAYEV
Citizen of Ukraine

v.

THE GOVERNMENT OF THE RUSSIAN FEDERATION

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I. EXECUTIVE SUMMARY

1. Gibson, Dunn & Crutcher LLP and the Clooney Foundation for Justice (“**Petitioners**”) submit this communication on behalf of human rights defender Server Rustemovych Mustafayev to the United Nations Working Group on Arbitrary Detention (“**Working Group**”).¹
2. This communication concerns the arbitrary detention of Mr. Mustafayev by the Russian Federation (“**Russia**”). Mr. Mustafayev is a Crimean Tatar, practicing Muslim, and citizen of Ukraine. He previously served as the coordinator of Crimean Solidarity, a civil society organization that monitors and documents human rights violations committed by the Russian authorities in the Autonomous Republic of Crimea (“**Crimea**”), and in particular seeks to protect the rights of Crimean Tatars subject to trial in the Russian judicial system.²
3. Mr. Mustafayev was arrested in Crimea on 21 May 2018 by Russia’s Federal Security Service (the “**FSB**”).³ He was then detained for more than 15 months in Simferopol, Crimea.⁴ In September 2019, he was transferred from Crimea to the territory of Russia, where he remained in pre-trial detention until his trial began two months later.⁵
4. On 15 November 2019, Mr. Mustafayev was put on trial before the Southern District Military Court in Rostov-on-Don, Russia (the “**Military Court**” or the “**Court**”) for alleged membership in Hizb ut-Tahrir, an international Islamic organization that is banned in Russia but lawful in Ukraine.⁶ On 16 September 2020, following a 10-month trial, the Military Court convicted Mr. Mustafayev of two offenses under Russia’s Criminal Code—namely, “*prepar[ing] for a violent seizure of power or forcible retention of power*” and “*participating*” in the activities of a terrorist organization.⁷ The Military Court sentenced Mr. Mustafayev to 14 years imprisonment.
5. By the end of his trial, Mr. Mustafayev had been in detention for 28 months. He is now detained in SIZO-3 in Novocherkassk, a maximum-security prison in Russia, while awaiting consideration of his appeal.
6. This Working Group has previously expressed its concern about Mr. Mustafayev’s case on two occasions: in July 2018 in relation to his arrest,⁸ and in July 2020 in relation to his

¹ This communication has been prepared in consultation with Mr. Mustafayev’s defense counsel in Russia, Ms. Lilya Gemedzhi.

² See *infra* ¶ 12.

³ See *infra* ¶¶ 13-14.

⁴ See *infra* ¶ 16.

⁵ See *infra* ¶ 16.

⁶ See *infra* ¶¶ 17-18.

⁷ See *infra* ¶¶ 18-20.

⁸ See Letter from the UN Special Procedures to the Government of Russia, Ref: RUS 14/2018, 11 July 2018.

prolonged pre-trial detention, the legal and factual basis for the charges against him, and his conditions of detention.⁹ In addition, the UN General Assembly recently “*express[ed its] deep concern*” regarding the arbitrary detention and arrest of Mr. Mustafayev by Russia.¹⁰

7. Mr. Mustafayev’s detention was and continues to be arbitrary due to numerous severe violations of his fair trial rights, as protected by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (“**ICCPR**”). These include violations of his right to liberty, right to call and examine witnesses,¹¹ right to the presumption of innocence,¹² right to adequate time and facilities to prepare a defense,¹³ right to be tried in his presence,¹⁴ and right to appear before an independent and impartial tribunal.¹⁵
8. Mr. Mustafayev’s case thus meets the Working Group’s criteria for arbitrary detention under **Category III of the Working Group’s Methods of Work** in that the non-observance of fair-trial norms is of such gravity as to give his deprivation of liberty an arbitrary character.¹⁶
9. For the reasons that follow, Petitioners respectfully request that the Working Group urge Russia to release Mr. Mustafayev and provide him with appropriate reparations. Failing that, Petitioners request that the Working Group urge Russia to grant Mr. Mustafayev a new trial that complies with his fair trial and other human rights. In addition, Petitioners request that the Working Group address Russia’s application of its criminal law to occupied Crimea, which is in contravention of international humanitarian law.

⁹ See Letter from the UN Special Procedures to the Government of Russia, Ref: RUS 4/2020, 29 July 2020.

¹⁰ See UN General Assembly, Resolution No. 75/192, 28 December 2020, Preamble (“*expressing deep concern about the ongoing arbitrary detentions and arrests by the Russian Federation of Ukrainian citizens, including . . . Server Mustafayev and many others*”).

¹¹ See *infra* **Section VII.A.**

¹² See *infra* **Section VII.B.**

¹³ See *infra* **Section VII.C.**

¹⁴ See *infra* **Section VII.D.**

¹⁵ See *infra* **Section VII.E.**

¹⁶ See UN OHCHR, *Fact Sheet No. 26: The Working Group On Arbitrary Detention*, <https://www.ohchr.org/Documents/Publications/FactSheet26en.pdf>. While there are substantial grounds to believe that Mr. Mustafayev’s detention is a result of his exercise of protected rights, including the rights to freedom of expression and freedom of religion or belief, this Communication focuses on violations of Mr. Mustafayev’s fair trial rights. Further, Mr. Mustafayev’s transfer to Russia, and trial under Russian law, violated international humanitarian law. See HUMAN RIGHTS EMBASSY, “Crimea: Report on Proceedings in a Russian Military Court Against Server Mustafayev, a Human Rights Defender and Activist, and Seven Co-Defendants (‘the Second Bakhchisarai Group’),” 27 April 2021, <https://humanrightsembassy.org/attachments/article/365/Fairness%20report%20on%20the%20trial%20of%20Server%20Mustafayev%20and%20his%20seven%20co-defendants%20in%20Russian%20Federation.pdf>, pp. 4, 6-7 (hereinafter “**TrialWatch Report**”).

10. This communication is based in part on the monitoring of Mr. Mustafayev's trial by Human Rights Embassy as part of the Clooney Foundation for Justice's TrialWatch initiative.¹⁷ The communication has been structured to follow the format requested within the Working Group's model questionnaire.
11. Petitioners request that this communication be considered a formal request for an opinion of the Working Group pursuant to Resolution 1997/50 of the Commission on Human Rights, as reconfirmed by Resolutions 2000/36 and 2003/31, and Human Rights Council Resolutions 6/4, 15/18, 20/16, 24/7, 33/30, and 42/22.

II. IDENTITY OF COMPLAINANT

Family Name: Mustafayev

First Name: Server Rustemovych

Sex: Male

Date of Birth: 5 May 1986¹⁸

Nationality: Ukraine

(a) Identity Document: Passport

(b) Issued By: Ukraine

(c) Date Of Issue: 23 August 2008

(d) No.: ET143191

Profession And Activities: Mr. Mustafayev is a well-known human rights defender, civic journalist, and the former coordinator of Crimean Solidarity, a civil society organization.

Address Of Usual Residence: 32-b Stroitel'naya Street, Bakhchisaray, Crimea, Ukraine

III. SERVER MUSTAFAYEV'S ARREST

12. At the time of his arrest, Mr. Mustafayev was living in Bakhchisaray, Crimea, and served as the coordinator of the community group Crimean Solidarity. In this capacity, he led

¹⁷ See TrialWatch Report, p. 2. The TrialWatch initiative of the Clooney Foundation for Justice monitors trials of journalists, women, LGBTQ+ persons, minorities, and human rights defenders and advocates for those who are unjustly imprisoned. See TrialWatch, CLOONEY FOUNDATION FOR JUSTICE, <https://cfj.org/project/trialwatch/> (last visited Apr. 21, 2021).

¹⁸ Mr. Mustafayev was 32 years old at the time of his arrest in 2018.

several public meetings in February and April 2018, in which attendees discussed ongoing human rights violations committed by occupying Russian authorities in Crimea.¹⁹

13. On the morning of 21 May 2018, at 6:00 a.m., between four and five masked FSB officers entered Mr. Mustafayev's home, accompanied by an investigator from the FSB and two alleged witnesses whose identities remain unknown.²⁰ The FSB officers did not present any identification and did not wear badges. While the lead investigator showed Mr. Mustafayev a document purporting to relate to the search of Mr. Mustafayev's home, the document did not identify the premises the FSB had been authorized to search. During the raid, Mr. Mustafayev requested access to his lawyer but the FSB officers denied his request.²¹ The officers searched his home for approximately four and a half hours, seizing both electronics and documents.
14. After the search was completed, Mr. Mustafayev was arrested. **The FSB officers did not inform him of the charges against him.** Instead, he was taken to the FSB's Headquarters in Simferopol, Crimea, where he was interrogated. During this interrogation, he was permitted to have a lawyer and a Ukrainian interpreter present. He was asked questions about his alleged involvement in Hizb ut-Tahrir, as well as about the activities of other members of Crimean Solidarity. He was then taken to a temporary detention center and kept in custody overnight.

IV. SERVER MUSTAFAYEV'S DETENTION

15. On 22 May 2018, the day after his arrest, Mr. Mustafayev was taken to the Kievsky District Court in Simferopol, Crimea and informed during an in-camera hearing that he had been charged with violating Article 205.5(2) of Russia's Criminal Code based on his alleged involvement with Hizb ut-Tahrir.²² The charges were brought under Russia's Criminal Code, despite the fact that Mr. Mustafayev is a Ukrainian citizen who was living in occupied Crimea.²³ Moreover, while Hizb ut-Tahrir is a designated terrorist organization

¹⁹ See, e.g., Crimean Solidarity, *The Textual Broadcast Of Meeting Of The "Crimean Solidarity,"* 27 February 2018, https://www.facebook.com/permalink.php?story_fbid=1794324084204736&id=1653084724995340 (recording Mr. Mustafayev's role as a facilitator at a meeting held on 24 February 2018); Crimean Solidarity, *Another meeting of the public association 'Crimean Solidarity' has taken place today on Murch 31, 2018,* 1 April 2018, https://www.facebook.com/permalink.php?story_fbid=1807709256199552&id=1653084724995340 (recording Mr. Mustafayev's role as a facilitator at a meeting held on 31 March 2018).

²⁰ See Letter from the UN Special Procedures to the Government of Russia, Ref: RUS 14/2018, 11 July 2018.

²¹ In contemporaneous footage, numerous masked FSB officers can be seen standing guard outside Mr. Mustafayev, and a lawyer describes how he has been prevented from entering the premises. See *Обыски в Крыму: Без права на присутствие адвоката*, 21 May 2018, https://www.youtube.com/watch?v=qIyxh0uJbPg&ab_channel=%D0%9A%D1%80%D1%8B%D0%BC.%D0%A0%D0%B5%D0%B0%D0%BB%D0%B8%D0%B8.

²² See *infra* n. 24.

²³ Russia's application of its own criminal law to occupied territory is contrary to international humanitarian law. See *Convention relative to the Protection of Civilian Persons in Time of War*, Geneva Convention IV, 12 August 1949, Article 64 ("the penal laws of the occupied territory shall remain in force . . . [T]he tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.").

under Russian law, it is not considered a terrorist organization in Ukraine.²⁴ Hizb ut-Tahrir has been described as a religious political organization that espouses a philosophy of non-violence by Human Rights Watch.²⁵

16. During this hearing, Mr. Mustafayev was ordered to pre-trial detention. He was initially detained in Simferopol, Crimea. On 12 September 2019, he was transferred from Simferopol to Krasnodar, in Russian territory, where he was detained for two months.²⁶ Thereafter, on 3 November 2019, he was transferred to Rostov-on-Don pending trial.²⁷
17. On 15 November 2019, Mr. Mustafayev was put on trial before a panel of three judges of the Military Court: Rizvan Abdullaevich Zubairov (President), Roman Viktorovich Saprunov, and Maxim Mikhailovich Nikitin. Mr. Mustafayev was charged alongside seven co-defendants.²⁸ One of Mr. Mustafayev's co-defendants, Eden Smailov, was (like Mr. Mustafayev) arrested during a raid on his home on 21 May 2018, while the other six men were arrested in similar raids on 11 October 2017.
18. **Mr. Mustafayev was charged with two offenses: (i) attempting to forcibly or violently seize power contrary to Articles 30 and 278 of Russia's Criminal Code;²⁹ and (ii) participating in the activities of a terrorist organization under Article 205.5(2) of**

²⁴ Russia declared Hizb ut-Tahrir a banned terrorist organization in 2003. See Damelya Aitkhozhina, *Harsh Sentences for Alleged Hizb-ut-Tahrir Followers in Russia*, HUMAN RIGHTS WATCH, 1 October 2020, <https://www.hrw.org/news/2020/10/01/harsh-sentences-alleged-hizb-ut-tahrir-followers-russia>.

²⁵ See *Russia: Harsh Verdicts in Controversial Terrorism Cases*, HUMAN RIGHTS WATCH, 12 February 2020, <https://www.hrw.org/news/2020/02/12/russia-harsh-verdicts-controversial-terrorism-cases>. Hizb ut-Tahrir has further been described as a “transnational religious movement” which “pursues international Islamic solidarity in countries with a large Muslim populace,” and adopts a strong “commitment to nonviolence as a form of political protest.” Alisher Khamidov, *Counter the Call: The U.S., Hizb-ut-Tahrir, and Religious Extremism in Central Asia*, THE BROOKINGS INSTITUTION, July 2003, pp. IV, 1.

²⁶ See Letter from the UN Special Procedures to the Government of Russia, Ref: RUS 4/2020, 29 July 2020, p. 1. Russia's forcible transfer of Mr. Mustafayev from Crimea to Russian territory is contrary to international humanitarian law. See *Convention relative to the Protection of Civilian Persons in Time of War*, Geneva Convention IV, 12 August 1949, Article 49 (“Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive”).

²⁷ See Letter from the UN Special Procedures to the Government of Russia, Ref: RUS 4/2020, 29 July 2020, p. 1.

²⁸ Mr. Mustafayev's co-defendants are also Crimean Tatars: Ernes Ametov, Marlen Asanov, Memet Belyalov, Server Zekiryayev, Timur Ibragimov, Seyran Saliev, and Eden Smailov. In addition we understand from Ms. Gemedzhi that all, except for Server Zekiryayev, have a history of involvement in the advocacy activities of Crimean Solidarity.

²⁹ See Criminal Code of the Russian Federation, Articles 30(1) (“The looking for, manufacturing, or adapting by a person of means or instruments for committing a crime, the finding of accomplices for a crime, the conspiracy to commit a crime, or any other intentional creation of conditions to commit a crime shall be deemed preparations for a crime, unless the crime has been carried out owing to circumstances outside the control of this person.”), 278 (“Actions aimed at forcible seizure of power or forcible retention of power in violation of the Constitution of the Russian Federation, as well as aimed at forcibly changing the constitutional system of the Russian Federation”).

Russia’s Criminal Code.³⁰ Each offense carried a maximum sentence of up to 20 years of imprisonment. Mr. Mustafayev and his co-defendants pled not guilty to their respective charges, and alleged that the charges were brought against them in order to silence and punish them for their work as human rights defenders.³¹

19. As explained in further detail below, Mr. Mustafayev’s 10-month trial was marred by a number of procedural irregularities. This included the Military Court permitting the Prosecution to adduce “*anonymous*” witness testimony without procedural safeguards, limiting the ability of the defense to cross-examine witnesses, and removal of Mr. Mustafayev from the courtroom on multiple occasions.
20. On 16 September 2020, the Military Court convicted Mr. Mustafayev and all but one of his co-defendants.³² The judgment was inadequately reasoned and internally contradictory. Mr. Mustafayev was sentenced to a total of 14 years of imprisonment in a maximum security prison, with a further restriction on his freedom for one year afterwards.³³ Mr. Mustafayev is not expected to be released prior to September 2034.
21. **Since his arrest on 21 May 2018, Mr. Mustafayev has been held in continuous detention for almost three years.** This includes 17 months in pre-trial detention (from 21 May 2018 until 15 November 2019), 10 months of detention during the trial (from 15 November 2019 to 16 September 2020), and 7 months of detention serving his sentence while awaiting consideration of his appeal (from 16 September 2020 to the present).
22. In this three-year period, Mr. Mustafayev has been detained at the following detention centers: Penitentiary Unit #1 in Simferopol, SIZO-1 in Krasnodar, SIZO-1 and SIZO-5 in Rostov-on-Don, and SIZO-3 in Novocherkassk.

V. COUNTRY CONTEXT

23. Following Russia’s illegal occupation of Crimea in 2014,³⁴ Russian authorities have systematically targeted “[i]ndividuals opposed to the Russian Federation’s occupation of Crimea.”³⁵ In particular, Russia has targeted Crimean Tatars, a Muslim ethnic minority in

³⁰ See Criminal Code of the Russian Federation, Article 205.5(2) (“*Participation in the activities of an organization that, in accordance with the legislation of the Russian Federation, is recognized as terrorist*”).

³¹ See TrialWatch Report, p. 3.

³² See Judgment of the Southern District Military Court, 16 September 2020.

³³ In this final year of his sentence (after he is released from imprisonment in a maximum security prison), Mr. Mustafayev will be banned from traveling outside a pre-established area, prohibited from attending public events, and required to present himself to authorities twice a month.

³⁴ See, e.g., UN General Assembly, Resolution No. 75/192, 28 December 2020; UN General Assembly, Resolution No. 71/205, 19 December 2016; UN General Assembly, Resolution No. 72/190, 19 December 2017; UN General Assembly, Resolution No. 73/263, 22 December 2018; UN General Assembly, Resolution No. 74/168, 18 December 2019.

³⁵ UN OHCHR, *Human Rights in the Administration of Justice in Conflict-Related Criminal Cases in Ukraine*, 27 August 2020, UN Doc. No. A/HRC/45/CRP.9, ¶ 24.

Crimea.³⁶ Between May 2018 and August 2018—a period covering the date on which Russia arrested Mr. Mustafayev—the UN Office of the High Commissioner for Human Rights (“OHCHR”) documented 14 house raids by the FSB, 13 of which targeted properties owned by Crimean Tatars.³⁷ OHCHR explained that “*these actions were usually carried out with the justification of searching for weapons, drugs or literature with ‘extremist’ content forbidden under Russian Federation law.*”³⁸

24. Moreover, the UN General Assembly has “[c]ondemn[ed Russia’s] *continuous widespread misuse of counter-terrorism and anti-extremism laws to suppress dissent*”³⁹ and observed “*that the law enforcement system of [Russia] . . . disproportionately affect[s] Crimean Tatars.*”⁴⁰ In particular, Russian authorities have repeatedly pursued terrorism charges against Crimean Tatars who oppose the Russian occupation based on allegations that they are involved with Hizb ut-Tahrir.⁴¹ This crackdown has continued to intensify since the occupation of Crimea began in 2014.⁴² The civil society organization Crimean Human Rights Group has reported that as of December 2020, at least 69 Crimean Tatars were in pre-trial or post-trial detention for their alleged involvement in Hizb ut-Tahrir.⁴³ Human Rights Watch further notes that approximately “*300 people are serving harsh prison sentences in Russia and Russia-occupied Crimea on [Hizb ut-Tahrir]-related convictions, absent any link to violence.*”⁴⁴

³⁶ See UN General Assembly, Resolution No. 75/192, 28 December 2020, Preamble (“*Deeply concerned about continued reports that the law enforcement system of the Russian Federation conducts searches and raids of private homes, businesses and meeting places in Crimea, which disproportionately affect Crimean Tatars*”).

³⁷ See UN OHCHR, *Report on the human rights situation in Ukraine 16 May to 15 August 2018*, 19 September 2018, https://www.ohchr.org/documents/countries/ua/reportukrainemay-august2018_en.pdf, ¶ 114.

³⁸ See UN OHCHR, *Report on the human rights situation in Ukraine 16 May to 15 August 2018*, 19 September 2018, https://www.ohchr.org/documents/countries/ua/reportukrainemay-august2018_en.pdf, ¶ 114.

³⁹ UN General Assembly, Resolution No. 75/192, 28 December 2020, Preamble.

⁴⁰ UN General Assembly, Resolution No. 75/192, 28 December 2020, Preamble.

⁴¹ UN OHCHR, *Report on the human rights situation in Ukraine 16 May to 15 August 2018*, 19 September 2018, https://www.ohchr.org/documents/countries/ua/reportukrainemay-august2018_en.pdf, ¶ 111.

⁴² See UN OHCHR, *Report on the human rights situation in Ukraine 16 May to 15 August 2019*, 19 September 2019, https://www.ohchr.org/Documents/Countries/UA/ReportUkraine16May-15Aug2019_EN.pdf, ¶¶ 106-108 (noting that 53 of the 67 FSB raids documented by the OHCHR in the first six months of 2019 impacted Crimean Tatars).

⁴³ See CRIMEAN HUMAN RIGHTS GROUP, *Crimean Human Rights Situation Review*, December 2020, https://crimeahrg.org/wp-content/uploads/2021/01/crimean-human-rights-group_dec_2020_en.pdf, p. 3. Once an individual is accused of being involved in a terrorist organization by Russian authorities, conviction is near guaranteed. For example, in February 2020, 11 defendants in two separate military trials received prison sentences ranging from 11 to 23 years for their alleged involvement in a “terrorist” organization. Similarly, in September 2020, the Supreme Court of Russia upheld sentences ranging from 10 to 24 years for 19 men accused of involvement in Hizb ut-Tahrir. See Damelya Aitkhozhina, *Harsh Sentences for Alleged Hizb-ut-Tahrir Followers in Russia*, HUMAN RIGHTS WATCH, 1 October 2020, <https://www.hrw.org/news/2020/10/01/harsh-sentences-alleged-hizb-ut-tahrir-followers-russia>.

⁴⁴ Damelya Aitkhozhina, *Harsh Sentences for Alleged Hizb-ut-Tahrir Followers in Russia*, HUMAN RIGHTS WATCH, 1 October 2020, <https://www.hrw.org/news/2020/10/01/harsh-sentences-alleged-hizb-ut-tahrir-followers-russia>.

VI. SERVER MUSTAFAYEV'S PRE-TRIAL DETENTION WAS ARBITRARY

25. Article 9(3) of the ICCPR creates a presumption against pre-trial detention: “*It shall not be the general rule that persons awaiting trial shall be detained in custody.*” Interpreting this provision, the UN Human Rights Committee has held that “[d]etention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.”⁴⁵ The Working Group has applied this principle to find detention arbitrary where the relevant authorities have failed to conduct an individualized assessment to determine whether it is “*reasonable and necessary*” to keep an individual in pre-trial detention.⁴⁶ In addition, the reasoning must be substantiated. The Working Group has found that reliance on “*vague and expansive standards such as ‘public security’*”⁴⁷ is insufficient to justify pre-trial detention and instead a “*present, direct and imperative threat*” to national security must be shown.⁴⁸
26. In this case, Russia kept Mr. Mustafayev in pre-trial detention for approximately 17 months. Mr. Mustafayev challenged his pre-trial detention at least eight times without success. At no point did the Russian authorities provide individualized, substantiated reasons for this detention. Instead, the Military Court stated that pre-trial detention was justified because of “*the gravity of the charge, the circumstances of the joint criminal activity, the presence of citizenship to another state, and the presence of witnesses who were not examined.*”⁴⁹ However, the Prosecutor did not provide, nor did the Military Court request, any evidence that Mr. Mustafayev would attempt to flee, commit additional crimes, or intimidate witnesses. Instead, the Military Court improperly relied on “*vague and expansive standards such as ‘public security.’*”⁵⁰ Due to a lack of individualized, substantiated reasons for Mr. Mustafayev’s pre-trial detention, his detention violated Article 9(3) of the ICCPR.

⁴⁵ UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, UN Doc. No. CCPR/C/GC/35, 16 December 2014, ¶ 38.

⁴⁶ See, e.g., *Akhmedov v. Kazakhstan*, WGAD Opinion No. 62/2017, 5 August 2017, ¶¶ 45-46; *Suthijitseranee v. Thailand*, WGAD Opinion No. 56/2017, 24 August 2017, ¶¶ 67-68.

⁴⁷ *Suthijitseranee v. Thailand*, WGAD Opinion No. 56/2017, 24 August 2017, ¶ 9.

⁴⁸ *Jaradat v. Israel*, WGAD Opinion No. 23/2001, 29 November 2001, ¶ 29.

⁴⁹ Trial Monitor Notes, 6 February 2020. See also Transcript of Proceedings Before the Southern District Military Court, p. 438 (noting only that on 6 February 2020 “[t]he presiding judge announce[d] the ruling on the extension of the term of detention of the defendants” without recording the reasons for the ruling). Russia has confirmed the nonspecific basis for Mr. Mustafayev’s detention in its statements to the Working Group: “*the Court noted that it had taken into account information on the detainee such as family status, presence of minor children and positive characteristics, but had proceeded from the assumption that the detainee, as a suspect in the commission of a particularly serious crime, might hide from the investigating authorities or the Court, continue his criminal activity or obstruct the criminal proceedings.*” Information from the Russian Federation in relation to the joint request from the special procedures of the Human Rights Council concerning Mr. S.R. Mustafayev and Mr. E.-U.K. Kuku, Ref: RUS 4/2020, UN Doc. No. HRC/NONE/2020/SP/56, 25 September 2020, p. 3.

⁵⁰ *Suthijitseranee v. Thailand*, WGAD Opinion No. 56/2017, 24 August 2017, ¶ 9.

VII. SERVER MUSTAFAYEV'S ONGOING DETENTION IS ARBITRARY DUE TO VIOLATIONS OF HIS FAIR TRIAL RIGHTS

VII.A. Mr. Mustafayev's Right to Call and Examine Witnesses Was Violated (Article 14(3)(e))

27. Article 14(3)(e) of the ICCPR guarantees accused persons the right “[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”
28. At trial, the Prosecution relied on the evidence of three key witnesses: Nikolai Artykbaev (the FSB Officer who investigated the defendants) and two individuals identified by the aliases “Bekirov” and “Ismailov” who were permitted to testify anonymously and who allegedly participated in secret Hizb ut-Tahrir meetings alongside the defendants.
29. As explained in further detail below, the Military Court violated Mr. Mustafayev’s right to call and examine witnesses pursuant to Article 14(3)(e) by: (i) permitting anonymous witnesses to testify against him without legitimate bases or sufficient safeguards; and (ii) striking defense counsel’s questions and allowing the Prosecution witnesses to refuse to answer.

VII.A.i. *Use of Anonymous Witnesses*

30. The Working Group has acknowledged the “*problematic*” nature of anonymous witnesses, barring “*exceptional circumstances.*”⁵¹ The Working Group has explained that “*such a practice poses a grave danger to the principle of the equality of arms, as the defence has to evaluate or challenge the credibility of the witness with little information.*”⁵² This is echoed by the European Court of Human Rights (“ECtHR”), which has made clear that there must be sufficient counterbalancing measures to protect a defendant’s rights prior to approval of anonymous witnesses.⁵³ Applying this principle, the Working Group has found a violation of Article 14(3) when the State did not “*provide information regarding the legitimacy of [using anonymous witnesses] and the applicable safeguards involved in its possible implementation.*”⁵⁴ Similarly, the UN Human Rights Committee found a violation of Article 14(3)(e) when a defendant was not “*provide[d] in a timely manner relevant information that would allow adequate cross-examination of the prosecution’s*

⁵¹ *Abdullah v. Maldives*, WGAD Opinion No. 91/2017, 22 January 2018, ¶ 90.

⁵² *Abdullah v. Maldives*, WGAD Opinion No. 91/2017, 22 January 2018, ¶ 90.

⁵³ In similar circumstances, where a defendant is convicted on the basis of statements made by anonymous witnesses, the ECtHR has repeatedly held that the defendant’s fair trial rights have been violated absent a particularized reason for the witnesses’ anonymity because the defendant was unfairly precluded from challenging the anonymous witnesses’ credibility and reliability. See *Balta and Demir v. Turkey*, ECtHR Application No. 48628/12, Chamber Judgment, 23 June 2015, ¶¶ 61-62; *Krasniki v. Czech Republic*, ECtHR Application No. 51277/99, Judgment (Merits and Just Satisfaction), 28 February 2006, ¶¶ 76-81; *Van Mechelen and Others v. The Netherlands*, ECtHR Application Nos. 21363/93 et al., Judgment (Merits), 23 April 1997, ¶¶ 59-60.

⁵⁴ *Porrás v. Panama*, WGAD Opinion No. 25/2019, 4 July 2019, ¶ 64.

[anonymous] witnesses.”⁵⁵ Finally, the use of anonymous witnesses can pose practical hurdles that may impact a defendant’s rights under Article 14(3)(e). For example, the Working Group has held that the right of defense will be affected where, due to bad sound quality, a defendant cannot clearly hear what a witness is saying.⁵⁶

31. In this case, first, there were no “*exceptional circumstances*” justifying the use of anonymous witnesses.⁵⁷ Neither the Prosecutor nor the Military Court offered a clear justification for anonymity, and instead cited vague, undefined security concerns and unsubstantiated fears for personal safety.⁵⁸
32. Second, the Military Court obstructed defendants’ cross-examination. Instead of “*counterbalancing*” the prejudicial impact of the anonymous witness statements, the Military Court further disadvantaged the defendants. In particular, the Military Court cut off cross-examination that sought to understand the witnesses’ motives for testifying.⁵⁹ Bekirov, for example, conceded he was an active member of Hizb ut-Tahrir and had financed the organization.⁶⁰ As a clear consequence, he was presumably vulnerable to being prosecuted himself, and therefore could have been pressured by the FSB to testify. Yet, the Military Court struck any questions that sought to explore this on the spurious basis that it would lead to exposure of the anonymous witness’ identity.⁶¹
33. Third, the use of anonymous witnesses posed the kind of practical hurdles the Working Group has previously identified as unacceptable. Both anonymous witnesses testified from another room, with video and audio transmitted into the courtroom. However, their voices were distorted so heavily that the defendants and their lawyers repeatedly explained to the Military Court that they were having trouble understanding what the witnesses were saying.⁶² Further, the defense expressed credible concerns that the witnesses were being coached or reading from papers—which of course they were unable to verify because the

⁵⁵ *Khaleel v. Maldives*, HRC Communication No. 2785/2016, 27 July 2018, ¶ 9.5.

⁵⁶ *See Bokayev and Ayanov v. Kazakhstan*, WGAD Opinion 16/2017, 27 June 2017, ¶¶ 58-59.

⁵⁷ The improper use of anonymous witnesses is common in respect of cases against Crimean Tartars. Within Crimea, OHCHR has documented a number of similar cases where “*convictions were based primarily on the testimony of anonymous witnesses,*” finding that “[i]n none of these cases did judges verify that the interests of the witnesses in remaining anonymous could justify limiting the rights of the defence to fully cross-examine witnesses.” UN OHCHR, *Human Rights in the Administration of Justice in Conflict-Related Criminal Cases in Ukraine*, 27 August 2020, UN Doc. No. A/HRC/45/CRP.9, ¶ 154.

⁵⁸ *See* TrialWatch Report, pp. 28-29 (“*In rejecting the defense’s motion to lift anonymization of Ismailov, the court responded vaguely that ‘[t]he reason for classifying the witness is because the witness is afraid of mental and physical injury.’ Later, when the defendants were unable to understand the testimony of Bekirov due to the extreme distortion of his voice and connection problems, Judge Zubairov rejected another appeal to lift the witness’s protective measures, saying only ‘the witness reported about danger to his life’ and providing no further justification.*”).

⁵⁹ *See* TrialWatch Report, pp. 29-30.

⁶⁰ *See* TrialWatch Report, p. 30.

⁶¹ *See* TrialWatch Report, p. 30.

⁶² *See* TrialWatch Report, pp. 28-29.

witnesses were in a different room.⁶³ For example, on many occasions, a question from the defense would be followed by a long pause.⁶⁴

34. Therefore, Mr. Mustafayev’s trial violated Article 14(3)(e) of the ICCPR. Not only did the Military Court not offer a valid justification for the use of anonymous witnesses, but the anonymization obstructed Mr. Mustafayev’s ability to mount a defense. Moreover, the Court made no effort mitigate these issues. These violations were particularly egregious because Bekirov and Ismailov were the only Prosecution sources who claimed to have direct knowledge of the defendants’ membership in Hizb ut-Tahrir, which formed the basis of the charges against Mr. Mustafayev.⁶⁵

VII.A.ii. Obstruction of Cross-Examination of Prosecution Witnesses

35. Defendants are entitled to “*be given a proper opportunity to question and challenge witnesses against them.*”⁶⁶ The UN Human Rights Committee has found that “*repeatedly cut[ting] short*” the cross-examination of witnesses “*to avoid the possibility of harm to the witness[es]*” amounts to a violation of Article 14(3)(e).⁶⁷ This violation is particularly serious when the defendant is precluded from having “*a proper opportunity*” to confront a “*witness whose statement played a decisive role in securing his conviction.*”⁶⁸
36. Here, the President of the Military Court prevented Mr. Mustafayev and the other defendants from asking the Prosecution witnesses hundreds of relevant questions on cross-examination.
37. For instance, in addition to curtailing the cross-examination of Bekirov and Ismailov as to their motives,⁶⁹ the Military Court limited the cross-examination of key witness Artykbaev (the FSB investigator). The defense argued that the FSB’s investigations of the defendants were carried out in violation of Russia’s Criminal Procedure Code, which would have rendered the evidence obtained inadmissible.⁷⁰ It was therefore critical for the defense to be able to question Artykbaev regarding the FSB’s compliance with the Criminal Procedure Code. However, the Military Court barred the defendants from effectively doing

⁶³ See TrialWatch Report, pp. 29-30.

⁶⁴ See TrialWatch Report, pp. 29-30.

⁶⁵ See TrialWatch Report, pp. 28-29.

⁶⁶ UN Human Rights Committee, *General Comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial)*, UN Doc. No. CCPR/C/GC/32, 23 August 2007, ¶ 39.

⁶⁷ *Larranaga v. The Philippines*, HRC Communication No. 1421/2005, 24 July 2006, ¶ 7.7.

⁶⁸ *Turgunov v. Uzbekistan*, WGAD Opinion No. 53/2011, 20 June 2012, ¶ 44. See also *Al-Salman v. Bahrain*, WGAD Opinion No. 23/2015, 17 November 2015, ¶¶ 21, 37.

⁶⁹ See *supra* ¶ 32.

⁷⁰ Article 50(2) of the Constitution of the Russian Federation prohibits the use of illegally obtained evidence in court, and Article 75(1) of the Criminal Procedure Code of the Russian Federation provides that evidence obtained in violation of the Criminal Procedure Code is inadmissible.

so by striking any questions related to the FSB's investigation methods.⁷¹ In contrast, the Prosecution was permitted to ask repetitive questions and badger defense witnesses.⁷²

38. Moreover, all three Prosecution witnesses made vague, unsubstantiated allegations against the defendants (often amounting to hearsay), which the Military Court permitted to remain on the record. In fact, as discussed below, this evidence formed the basis for the Military Court's decision.⁷³ When asked by the defense to provide further details or to describe the basis of their alleged knowledge, the witnesses responded hundreds of times that they did not know, could not recall, or made general references to the information being in the case file (which was often untrue).⁷⁴ For example, both Bekirov and Ismailov, when asked to provide additional details of their alleged participation in Hizb ut-Tahrir meetings with the defendants, testified over and over "*I do not remember.*" Yet the Military Court stopped the defense from inquiring as to the reason the witnesses were unable to recall relevant information, overruling questions that challenged the witnesses' memory and highlighted contradictions in their testimony.⁷⁵
39. For the above reasons, the Military Court's actions violated Article 14(3)(e) of the ICCPR.

VII.B. Mr. Mustafayev's Right to Be Presumed Innocent Was Violated (Article 14(2))

40. Article 14(2) of the ICCPR guarantees accused persons "*the right to be presumed innocent until proved guilty according to law.*"
41. As explained in further detail below, the Military Court denied Mr. Mustafayev the presumption of innocence in violation of Article 14(2) by: (i) its sequestration of Mr. Mustafayev in a glass cage in the courtroom; and (ii) conviction of Mr. Mustafayev by means of an arbitrary verdict.

VII.B.i. Sequestration in Courtroom

42. The UN Human Rights Committee has repeatedly held that "*defendants should not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals.*"⁷⁶
43. For the duration of the trial, Mr. Mustafayev and the co-defendants were forced to sit in a glass enclosure to the side of the courtroom (see **Figure 1** below). Placing Mr. Mustafayev

⁷¹ See TrialWatch Report, pp. 23-24.

⁷² See TrialWatch Report, p. 26.

⁷³ See *infra* ¶¶ 46-49, 51.

⁷⁴ See TrialWatch Report, pp. 12-13.

⁷⁵ See TrialWatch Report, pp. 29-30.

⁷⁶ *Formonov v. Uzbekistan*, HRC Communication No. 2577/2015, 4 June 2018, ¶ 9.4. See also UN Human Rights Committee, *General Comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial)*, UN Doc. No. CCPR/C/GC/32, 23 August 2007, ¶ 30; *Sannikov v. Belarus*, HRC Communication No. 2212/2012, 6 April 2018, ¶ 6.8.

and his co-defendants in a cage throughout the hearings was a clear violation of Article 14(2) of the ICCPR.



Figure 1: Photo taken on 6 September 2020 of Mr. Mustafayev (third from the left) and his co-defendants at trial.

VII.B.ii. Inadequately Reasoned Verdict

44. The presumption of innocence also “guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt.”⁷⁷ As the UN Human Rights Committee has held, “it is generally for the relevant domestic courts to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice.”⁷⁸
45. The Military Court’s evaluation of the facts and evidence was clearly arbitrary. Barely a week after closing the 10-month trial, the Military Court issued its 40-page judgment convicting Mr. Mustafayev and all but one of his co-defendants. The judgment reflects serious deficiencies in reasoning confirming that the trial “amounted to a denial of justice.” These include the following: (i) reliance on unreliable witness testimony; (ii) reliance on irrelevant expert evidence; (iii) failure to consider the absence of physical evidence; (iv) application of a standard of proof lower than “beyond a reasonable doubt”; and (v) further indicia that the Court pre-judged the defense’s case.
46. **Unreliable Witness Evidence.** The judgment relies heavily on the testimony of anonymous witnesses Bekirov and Ismailov. In the judgment, the Military Court characterizes both Bekirov and Ismailov as having given testimony that was “mutually

⁷⁷ UN Human Rights Committee, *General Comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial)*, UN Doc. No. CCPR/C/GC/32, 23 August 2007, ¶ 30.

⁷⁸ *Pustovoit v. Ukraine*, HRC Communication No. 1405/2005, 20 March 2014, ¶ 8.11. See also *Ashurov v. Tajikistan*, HRC Communication No. 1348/2005, 2 April 2007, ¶ 6.7; *Arutyuniantz v. Uzbekistan*, HRC Communication No. 971/2001, 30 March 2005, ¶¶ 6.4-6.5; *Koreba v. Belarus*, HRC Communication No. 1390/2005, 25 October 2010, ¶¶ 7.2-7.5; *Larranaga v. Philippines*, HRC Communication No. 1421/2005, 24 July 2006, ¶ 7.4.

consistent,” “*consistent, logical and clear*”⁷⁹ and explained that it did not give any weight to “[s]pecific inaccuracies” and allegedly “*negligible*” gaps in knowledge.⁸⁰

47. To reach this conclusion, the Court ignored a critical contradiction between Bekirov and Ismailov’s testimony. Bekirov testified that the defendants participated in secret meetings called “*khalakats*” at homes, in which participants were open about their affiliation with Hizb ut-Tahrir. These were complemented by meetings called “*sukhbets*” at local mosques, open to the public, during which the ideology of Hizb ut-Tahrir was discussed in veiled form, but it was forbidden to mention the name of the organization.⁸¹ In direct contradiction to Bekirov’s testimony, Ismailov testified that “*sukhbets*” were held at the mosque using Hizb ut-Tahrir literature, and members of the public were prohibited from attending.⁸² This is a critical inconsistency and demonstrated that the Prosecution was unable to sufficiently identify the location and means through which the alleged terrorist activity took place.
48. Further, the Military Court ignored the fact that although both Bekirov and Ismailov claimed to have been active members of Hizb ut-Tahrir along with the defendants, neither could answer basic questions regarding the time period during which they frequented the alleged meetings, the location of the alleged meetings, and the organization’s ideology. The witnesses even put in doubt whether they had ever met the defendants, struggling at times to name the defendants and showing themselves unable to describe the defendants’ basic physical features.⁸³
49. The Military Court also placed significant weight on the investigator Artykbaev’s testimony,⁸⁴ despite evidence that put into question his credibility. Not only were the defendants precluded from testing Artykbaev’s credibility on cross-examination,⁸⁵ but Artykbaev’s credibility was undermined by his own assertion that he listened to and transcribed audio recordings that “*proved*” the defendants’ membership in Hizb ut-Tahrir—**despite the fact that most of the audio recordings were in Crimean Tatar and Arabic and Artykbaev spoke neither language.**⁸⁶
50. **Irrelevant Expert Evidence.** The Military Court gave significant probative weight to an expert report produced by the Center for Linguistic Expertise and Editing at the Bashkir State Pedagogical University (the “**CLEE Report**”). The 250-page CLEE Report purported to conduct a “*comprehensive linguistic and theological examination*” and concluded that the audio recordings obtained by Artykbaev demonstrated the defendants’

⁷⁹ Judgment of the Southern District Military Court, 16 September 2020, pp. 18-19.

⁸⁰ Judgment of the Southern District Military Court, 16 September 2020, pp. 18-19.

⁸¹ See Judgment of the Southern District Military Court, 16 September 2020, p. 7.

⁸² See Judgment of the Southern District Military Court, 16 September 2020, pp. 8-9.

⁸³ See TrialWatch Report, p. 13.

⁸⁴ See Judgment of the Southern District Military Court, 16 September 2020, p. 5.

⁸⁵ See *supra* ¶ 37.

⁸⁶ See TrialWatch Report, p. 25.

membership in Hizb ut-Tahrir, and evidenced a “*hostile attitude*” towards non-Muslims. Yet, these alleged experts had no theological expertise in Islam generally, or Hizb ut-Tahrir specifically. For example, the experts relied on a reference to “*dawaat*,” a basic concept of Islamic missionary work,⁸⁷ as evidence of recruitment into Hizb ut-Tahrir. Nevertheless, the Military Court held that the CLEE Report presented a “*scientifically substantiated*” opinion and it therefore had “*no doubt as to the veracity*” of the CLEE Report.⁸⁸

51. **Absence of Physical Evidence.** The Prosecution and Bekirov alleged that Mr. Mustafayev and the other defendants used specialized mobile phones to communicate as part of their ostensible “*terrorist conspiracy*.” They alleged that these phones did not connect to a network but allowed transfer of banned Hizb ut-Tahrir literature via Bluetooth.⁸⁹ But no such phones were ever found in searches of the defendants’ homes, nor in the shop where Bekirov alleged one of the defendants sold the devices to other Hizb ut-Tahrir members.⁹⁰ The Military Court nevertheless held that Mr. Mustafayev and the other defendants possessed these special devices, and used them for secretive Hizb ut-Tahrir meetings.⁹¹
52. **“Aggregate” Standard of Proof.** The Military Court held that the “*aggregate of evidence*” supported a finding that Mr. Mustafayev was guilty of the charged conduct.⁹² The Military Court’s reliance on an “*aggregate of evidence*” standard falls significantly below the “*beyond reasonable doubt*” standard of proof required under Article 14(2) of the ICCPR.⁹³
53. **Pre-emptive Judgment During Trial.** The Military Court’s behavior during the trial indicates that it had pre-emptively reached a judgment on the defendants’ guilt. In particular, the Court arbitrarily prevented the defendants from calling additional witnesses on the basis that “*the testimonies of the previously questioned witnesses were sufficient*.”⁹⁴ In justifying this decision, the Court stated that the additional witnesses were

⁸⁷ “*Dawaat*” or “*dawah*” is “*the practice or policy of conveying the message of Islam to non-Muslims.*” COLLINS DICTIONARY, Definition of “*dawah*,” <https://www.collinsdictionary.com/us/dictionary/english/dawah> (last accessed 19 April 2021).

⁸⁸ Judgment of the Southern District Military Court, 16 September 2020, p. 13.

⁸⁹ See TrialWatch Report, pp. 16-17.

⁹⁰ See TrialWatch Report, pp. 16-17.

⁹¹ See Judgment of the Southern District Military Court, 16 September 2020, pp. 6, 8. Likewise, the Military Court accepted the Prosecution’s assertion that Hizb ut-Tahrir literature, banned in Russia, was found in Mr. Mustafayev’s home and was further proof of his membership in the organization. This was despite clear evidence presented by the defense that there were significant procedural flaws in the search during which the evidence was allegedly found—arguments the Court summarily dismissed. In addition, the Prosecution did not prove that the documents in question were in fact Hizb-ut Tahrir literature.

⁹² Judgment of the Southern District Military Court, 16 September 2020, pp. 5, 19, 21, 23.

⁹³ See UN Human Rights Committee, *General Comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial)*, UN Doc. No. CCPR/C/GC/32, 23 August 2007, ¶ 30 (“*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.*”).

⁹⁴ TrialWatch Report, p. 26.

“characterizing and redundant” because they did not “know about the *unlawful activities of the defendants*.”⁹⁵ In other words, the Court declined to allow further defense witnesses on the sole basis that they could not provide evidence to support the Prosecutor’s case.⁹⁶

54. Taken separately, and together, the Court’s evaluation of the evidence and conduct during trial makes clear that Mr. Mustafayev’s right to the presumption of innocence pursuant to Article 14(2) of the ICCPR was violated.

VII.C. Mr. Mustafayev’s Rights to Adequate Time and Facilities to Prepare a Defense and Communicate with Counsel Were Violated (Article 14(3)(b))

55. Article 14(3)(b) of the ICCPR guarantees both the right to “adequate time and facilities for the preparation of [a] defence” and the right to “communicate with counsel of [one’s] own choosing.” The UN Human Rights Committee has opined that “adequate facilities” requires access to “all materials that the prosecution plans to offer in court against the accused or that are exculpatory.”⁹⁷ In addition, lawyers “should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.”⁹⁸ Accordingly, the Working Group has found breaches of Article 14(3)(b) where defendants are not given full access to the evidence relied upon by the prosecution,⁹⁹ and defendants are unable to meet with their lawyers in private.¹⁰⁰
56. In this case, according to one of the defense counsel, the defense did not receive portions of the case file from the Prosecution until July 2019, over a year after Mr. Mustafayev’s arrest. Moreover, Mr. Mustafayev’s lawyers struggled to meet with him during his pre-trial detention in Simferopol because the detention center only permitted entry of a total of six attorneys per day for all detainees. Mr. Mustafayev was also regularly unable to confer with his lawyer confidentially due to the presence of FSB guards and other detainees.
57. Moreover, while the trial was lengthy, the hearing schedule ordered by the Military Court did not allow adequate time between hearing days for Mr. Mustafayev to consult with his attorneys and effectively prepare his defense.¹⁰¹ Over the defendants’ objections, the Court

⁹⁵ TrialWatch Report, p. 27 (emphasis added).

⁹⁶ Moreover, the Prosecution had more than 50 days to make its case, but the eight defendants were only given 18 days to present their defense in violation of the right to equality of arms guaranteed by Article 14(1) of the ICCPR.

⁹⁷ UN Human Rights Committee, *General Comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial)*, UN Doc. No. CCPR/C/GC/32, 23 August 2007, ¶ 33.

⁹⁸ UN Human Rights Committee, *General Comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial)*, UN Doc. No. CCPR/C/GC/32, 23 August 2007, ¶ 34.

⁹⁹ See *Nasheed v. Maldives*, WGAD Opinion No. 33/2015, 10 November 2015, ¶ 90 (finding a breach of Article 14 where there was “limited provision of evidence to the defence team, including CDs and video evidence”).

¹⁰⁰ See *Sannikov v. Belarus*, WGAD Opinion No. 14/2012, 12 July 2012, ¶ 38; *Al-Labouani v. Syria*, WGAD Opinion No. 24/2008, 4 June 2007, ¶ 27.

¹⁰¹ See TrialWatch Report, p. 21.

scheduled back-to-back hearing days from 10:00 a.m. until 8:00 p.m. or 9:00 p.m.¹⁰² Mr. Mustafayev was thereafter transported back to the detention center and forced to go to sleep at 10:00 p.m.¹⁰³ During hearing days, Mr. Mustafayev was constantly accompanied by an “escort” assigned by the Military Court and was unable to meet with his attorneys confidentially. The “escort” also read any document passed between Mr. Mustafayev and his lawyers. Furthermore, on non-hearing days, Mr. Mustafayev was unable to meet with his attorneys confidentially at the detention center without the presence of a guard. The Military Court denied Mr. Mustafayev’s request for confidential meetings, relying arbitrarily on an entirely unrelated shooting incident at the FSB’s Moscow Headquarters as a reason to deny his request.¹⁰⁴

58. Further, as described above, Mr. Mustafayev and his co-defendants were placed in a glass cage during hearings.¹⁰⁵ This inhibited their ability to participate in the trial. They were often unable to hear the proceedings (including witness testimony and audio recordings), and could not freely confer with their lawyers at the bar table. When the defendants requested that the Court allow them to sit elsewhere in order to enable their meaningful participation in the proceedings, the President rebuffed the request stating, “[t]he court is listening and we hear it quite well. The court is of the opinion that everyone can hear it also. Stop complaining. Let’s continue.”¹⁰⁶ The Court also rejected requests from the defense for short breaks in the proceedings to allow the defendants to consult with their attorneys.¹⁰⁷
59. These actions described above violate Article 14(3)(b) of the ICCPR.

VII.D. Mr. Mustafayev’s Right to Be Tried in His Presence Was Violated (Article 14(3)(d))

60. Article 14(3)(d) of the ICCPR guarantees accused persons the right to “to be tried in [their] presence.” The UN Human Rights Committee has held that courts must take “all reasonable measures to ensure the [defendants’] continued presence at the trial, despite their alleged disruptive behaviour.”¹⁰⁸ Even in circumstances where defendants have grabbed guards’ weapons, whistled, and turned their backs to the court, the Committee has held that they are entitled to continued presence in the hearing.¹⁰⁹

¹⁰² See TrialWatch Report, p. 21.

¹⁰³ See TrialWatch Report, p. 21.

¹⁰⁴ See TrialWatch Report, p. 21.

¹⁰⁵ See *supra* Section VII.B.i.

¹⁰⁶ See TrialWatch Report, pp. 19-20.

¹⁰⁷ See TrialWatch Report, p. 20.

¹⁰⁸ *Domukovsky, et al. v. Georgia*, HRC Communication No. 623/1995, 6 April 1998, ¶ 18.9.

¹⁰⁹ See *Domukovsky, et al. v. Georgia*, HRC Communication No. 623/1995, 6 April 1998, ¶¶ 10.11, 18.9.

61. In this case, after Mr. Mustafayev objected to a court ruling on 10 August 2020, the President of the Court ordered that Mr. Mustafayev be removed from the courtroom **for the remainder of the trial**.¹¹⁰ Mr. Mustafayev was not permitted to return until 31 August 2020. The trial proceeded in his absence on 11 August, 12 August, 17 August, 18 August, 20 August, and 24 August 2020.
62. Previously, Mr. Mustafayev had been excluded from the court on three other occasions: 24 December 2019, 20 May 2020, and 16 June 2020.¹¹¹ The effect of these exclusions was further compounded by the Military Court’s refusal to permit Mr. Mustafayev to review the written transcript of each day that he missed. While the Court suggested Mr. Mustafayev could be sent an audio recording of the proceedings, the detention center where Mr. Mustafayev was being held did not permit audio discs to be brought on the premises, so this did not occur.¹¹² To date, Mr. Mustafayev has been unable to access an audio recording of the proceedings due to limitations on what can be brought into the detention facility where he is being held.
63. In communications to UN Special Procedures, Russia has since justified Mr. Mustafayev’s removals from court on the basis that “*after repeated warnings about disturbances of the proceedings and the exclusion of discourteous statements made about the Court, the justice system and the State structure of the Russian Federation in general, Mr. Mustafayev was removed from the courtroom before the end of the hearing.*”¹¹³ However, trial monitoring reports and official records of the proceedings do not support this contention. Instead, they show that Mr. Mustafayev was raising valid concerns regarding trial procedure and the apparent partiality of the Military Court.¹¹⁴
64. For these reasons, Mr. Mustafayev’s frequent removal from courtroom violated Article 14(3)(d) of the ICCPR.

VII.E. Mr. Mustafayev’s Right to Be Tried by a Competent, Independent, and Impartial Tribunal Was Violated (Article 14(1))

65. Article 14(1) of the ICCPR guarantees Mr. Mustafayev the right to “*a fair and public hearing by a competent, independent and impartial tribunal established by law.*” The concept of “*impartiality*” in this context requires that judges “*not harbour preconceptions*

¹¹⁰ See TrialWatch Report, p. 20. After the Court announced this decision and a short recess on 11 August 2020, two of Mr. Mustafayev’s defense attorneys remained in the courtroom to consult with him before he was removed. In response, the Court threatened the attorneys with administrative charges.

¹¹¹ See TrialWatch Report, p. 20.

¹¹² See TrialWatch Report, p. 20.

¹¹³ Information from the Russian Federation in relation to the joint request from the special procedures of the Human Rights Council concerning Mr. S.R. Mustafayev and Mr. E.-U.K. Kuku, Ref: RUS 4/2020, UN Doc. No. HRC/NONE/2020/SP/56, 25 September 2020, p. 3.

¹¹⁴ For example, Mr. Mustafayev argued that the President’s prompting of witnesses, interruption of defense cross-examination, and failure to treat the defense and Prosecutor equally were grounds for concern. See also *infra* Section VII.E.

*about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.”*¹¹⁵

66. As the UN Human Rights Committee has previously observed “*trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned*” and “*should be exceptional*” such that resort to a military court is “*necessary and justified by objective and serious reasons.*”¹¹⁶ The Working Group has further held that “*procedures of military or special jurisdiction are often irregular*” and “*common irregularities include restrictions on access to communicate with a lawyer, on the preparation of defense, summoning and examining of witnesses.*”¹¹⁷
67. Mr. Mustafayev is a civilian activist who was tried by a military court, without adequate legal basis or justification.¹¹⁸ Beyond these institutional concerns, the Military Court exhibited actual bias,¹¹⁹ consistent with the OHCHR’s finding that there is a “*special link between many judges of military courts [including the Rostov-on-Don Military Court] and the State, they tend to favor the prosecution.*”¹²⁰ Indeed, in addition to the bias displayed with respect to the procedural conduct of the trial,¹²¹ and the poorly reasoned judgment,¹²² on a number of occasions the Court displayed personal animus towards Mr. Mustafayev, mocking him and smirking during his submissions.¹²³ On one occasion, for instance, the President of the Military Court interrupted Mr. Mustafayev’s submissions to say, “*Are you done speaking? How much longer? . . . You don’t need to continue. You can go back to the*

¹¹⁵ *Karttunen v. Finland*, HRC Communication No. 387/1989, ¶ 7.2.

¹¹⁶ UN Human Rights Committee, *General Comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial)*, UN Doc. No. CCPR/C/GC/32, 23 August 2007, ¶ 22.

¹¹⁷ *Samad v. Egypt*, WGAD Opinion No. 50/2011, 2 September 2011, ¶ 16.

¹¹⁸ See UN General Assembly, *Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine: Report of the Secretary General*, UN Doc. No. A/75/334, 1 September 2020, ¶¶ 9-10 (“[C]ases involving allegations of membership of civilians in banned religious groups, espionage and subversive activities in Crimea are typically assigned to military courts located in the Russian Federation. Contrary to international human rights standards, such trials are held without justification of the necessity of trying this category of civilians in military courts.”) The ECtHR has in other circumstances where civilians were tried by military court found breaches of the right to a fair trial where the applicant “*could legitimately fear that the [Military Court] might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case.*” *Gerger v. Turkey*, ECtHR App No. 24919/94, Grand Chamber Judgment, 8 July 1999, ¶ 61; *Incal v. Turkey*, ECtHR App No. 22678/93, Grand Chamber Judgment, 9 June 1998, ¶ 72. Moreover, in any event, Russia’s application of its own criminal law to Mr. Mustafayev—a Ukrainian citizen who was living in occupied Crimea—is problematic. See *supra* n. 23.

¹¹⁹ See *supra* ¶¶ 26, 29, 31-32, 36-38, 45-54, 58, 61-62.

¹²⁰ UN OHCHR, *Human Rights in the Administration of Justice in Conflict-Related Criminal Cases in Ukraine*, 27 August 2020, <https://www.ohchr.org/Documents/Countries/UA/Ukraine-admin-justice-conflict-related-cases-en.pdf>, ¶ 149.

¹²¹ See *supra* ¶¶ 26, 29, 31-32, 36-38, 45-54, 58, 61-62.

¹²² See *supra* ¶¶ 45-54.

¹²³ See Trial Monitor Notes, 27 May 2020.

detention center later.”¹²⁴ The Court further chastised and declared “*inadmissible*” Mr. Mustafayev’s references to the “*annexation*” of Crimea, and cautioned him against using such “*violent adjectives.*”¹²⁵ The Court also ignored Mr. Mustafayev’s complaints regarding the inadequacy of food being given to the defendants.¹²⁶

68. The Military Court’s actions described above violated Article 14(1) of the ICCPR.

VIII. INTERNAL STEPS AND DOMESTIC REMEDIES

69. Mr. Mustafayev’s case is currently pending appeal before the Military Appeal Court in Vlasikha, Moscow. A hearing date has not yet been set.

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¹²⁴ See Trial Monitor Notes, 19 February 2020. See also Transcript of Proceedings Before the Southern District Military Court, p. 482 (noting that on 19 February 2020 “[t]he presiding judge stops the defendant Mustafayev” from continuing with his submissions and adjourns the hearing).

¹²⁵ See Trial Monitor Notes, 27 January 2020. See also Transcript of Proceedings Before the Southern District Military Court, p. 392 (noting that on 27 January 2020 “[t]he presiding judge stops the defendant Mustafayev S.R. and reiterates the inadmissibility of his use of provocative language, especially not related to the subject of the trial”).

¹²⁶ For instance, on a number of occasions the defendants were served food that had expired, was covered in mold, and/or pork even though Mr. Mustafayev does not eat pork for religious reasons. See Trial Monitor Notes, 27 November 2019, 4 December 2019, 16 December 2019, 24 December 2019, 6 February 2020, 10 February 2020, 25 February 2020, 16 March 2020, 5 June 2020, 15 June 2020, 4 August 2020, and 5 August 2020.